



Justice as Failure

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Abstract

In this reflection, I take up the contradiction of calling for justice to be delivered from the same institutions that, under contemporary conditions of settler-colonial and white supremacist hetero-patriarchy, are often themselves the sources of injustice. I argue for an orientation toward justice that grounds itself on its condition of failure, drawing on Beauvoir's existentialist ethics and queer theory's embrace of failure as a resource for critical analysis and liberation. From an abolitionist perspective, I thus call for thinking about justice as failure in order to better hear the voices and respond to the demands of those most marginalized by carceral logics and practices.

Keywords

justice, failure, Beauvoir, police violence, existentialism, #blacklivesmatter, queer theory, abolition

I. “What We Cannot Not Want”¹

It took 16 hours for a jury to acquit George Zimmerman of responsibility for the death of 17-year-old Trayvon Martin. The speed with which the verdict was reached stands in sharp relief to the six long weeks it took the Sanford, FL police department to initially arrest and arraign Zimmerman the previous year. As protests in response to the verdict swept across the country, I found myself at a rally in Oscar Grant Plaza in Oakland, CA where a disappointed, vocal, and angry crowd held signs aloft that read: “The Whole System Is Guilty,” “No Justice, No Peace,” and “Jail Zimmerman.”

Even as someone dedicated to prison and police abolition, I recognized in myself this desire to have Zimmerman arrested, tried, and ultimately punished for his actions. And

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1. Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999), p. 110.

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the acquittal felt simultaneously like an indictment of the legal standards of criminal responsibility in Florida, a clear failure of the justice system, and above all, a powerful admission of what was only previously implied by the Sanford police department's death investigation: the willful killing of a person is not a crime when that person's very being is considered criminal or is always already presumed to be criminal.

But as a scholar of punishment, race, and political membership in the United States, it is likewise clear to me that Zimmerman's arrest, trial, conviction, and punishment would have been entirely unable to produce something that could rightly be termed a "just" outcome. To even call the criminal "justice" system in the United States "broken" arguably ignores the ways in which it in fact operates quite successfully as an instrument of white supremacy in this country, creating far more harm than it repairs.² The nature of this dilemma was put eloquently by Nicholas Mitchell: "[I]n appealing to the power of the police to arrest, and to the power of the courts to sentence Zimmerman, we also make heard a message that we might otherwise hesitate to send: namely, that we believe that these institutions – the police, the courts, the law – are institutions capable of delivering the justice we want."³

My own desire to see "justice" done in the case of Martin's murder is arguably an instance of what Spivak identifies as one of those things that "we cannot not want." My desire to see justice done according to the radically insufficient terms available under the law cannot possibly be satisfied. And yet I continue to find myself, with alarming regularity, in the familiar position of desiring indictments, prosecutions, and punishment in case after case: Michael Brown in Ferguson, MO (killed by Officer Darren Wilson, but whom a grand jury refused to indict); Rekia Boyd in Chicago, IL (shot in the head by Officer Dante Servin, and whose charges of reckless discharge of a firearm were dismissed by a Chicago judge); Eric Garner in New York City (choked to death by Officer Daniel Pantaleo, but whom a grand jury refused to indict despite Garner's death being officially ruled a homicide); Freddie Grey in Baltimore, MD (whose spine was severed while being transported to a police station by six officers, eventually charged with his death); Laquan McDonald in Chicago, IL (shot 16 times by Officer Jason Van Dyke, and charged with first degree murder); Ezell Ford in Los Angeles, CA (shot in the back by Officers Charlton Wampler and Antonio Villegas while Ford was pinned to the ground); John Crawford III in Beavercreek, OH (shot by Officer Sean Williams in a Walmart without warning while carrying a toy gun and talking with his mother on the phone); Sandra Bland in Prairie View, TX (violently arrested during a traffic stop by Officer

2. Angela Davis, "Race and Criminalization: Black Americans and the Punishment Industry," in *The House That Race Built*, ed. Wahneema Lubiano (New York: Pantheon, 1997); Angela Davis, "From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System," in *The Angela Y. Davis Reader*, ed. Joy James (Malden, MA: Blackwell Publishing, 1998); Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, MA: Harvard University Press, 2010); Ryan Conrad, ed., *Prisons Will Not Protect You* (Lewiston, ME: Against Equality Publishing Collective, 2012).

3. Nicholas Mitchell, 2012, "Justice for Trayvon ... but how?" *Low End Theory*, March 20, 2012. <http://www.lowendtheory.org/post/19640906873/justice-for-trayvon-but-how>.

Brian Encinia and subsequently found dead in her jail cell); or 12-year-old Tamir Rice in Cleveland, OH (who was shot by Officer Timothy Loehman two seconds after Loehman arrived on the scene and subsequently left Rice to die while his partner, Officer Frank Garmback, tackled and handcuffed Rice's 14-year-old sister).

Again and again we find ourselves calling for justice from a system which, if it *succeeds*, would likely result in dangerous long-term incarceration in overcrowded and deplorable conditions primarily reserved for members of marginalized communities. And this success would further validate our criminal punishment system's ability to provide a "just" outcome. Such a success would also be a failure, I contend: an *injustice* that reproduces conceptions of responsibility predicated on questions of narrow liability, a reinforcement of practices of policing and hyper-incarceration that target marginalized communities with concentrated harm, and a validation of the same prosecutorial practices that sent Marissa Alexander and CeCe McDonald to prison.⁴ Zimmerman's conviction, for example, would not have simply left these injustices in place, it would have *reinforced* them by shoring up popular support (especially from the political left) for practices that are integral parts of how white supremacy, hetero-patriarchy, and settler colonialism function in the United States as a political system, distributing rights and obligations along multiple hierarchies of difference. This is a problem not just for prison and police abolitionists, but for anyone whose *desire* to see Zimmerman punished marks a preference for the former injustice over the latter in such cases (i.e. preferring the injustice of hyper-incarceration over the injustice of acquittal). And each success/failure along these lines further blocks attempts to dismantle, disrupt, and bring about what W.E.B. Du Bois termed "abolition-democracy" into being.⁵

It is this concern – that the kind of criminal justice available to us offers a Faustian bargain at best – that motivates my line of thinking here. The problem we face is not

4. "Mass" or "Hyper" incarceration is characterized by two interlocking features: first, the sheer scale of incarceration, at present more than 1 percent of the U.S. population; and second, its concentrated social effects, i.e. this 1 percent is not drawn randomly or evenly from the population. See David Garland, ed., *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001); "One in 100: Behind Bars in America 2008" (Washington, DC: The Pew Center on the States, 2008). Marissa Alexander was convicted of aggravated assault for firing a single warning shot at her husband, who had threatened to kill her in Jacksonville, FL in the summer of 2010. She was originally sentenced to 20 years in prison, a sentence later overturned before a plea agreement was struck requiring Alexander to plead guilty to three counts of aggravated assault in exchange for time served and an additional two-year house arrest sentence. The prosecutor in the case, Angela Corey, was the same prosecutor who failed to convict Zimmerman. CeCe McDonald was convicted of second-degree manslaughter for defending herself against a racist and transphobic attack that occurred in Minneapolis during the summer of 2012. McDonald was sentenced to serve her imprisonment in a men's prison, despite her gender identification as a woman. Her incarceration galvanized supporters who organized for her release in 2014 (through a plea agreement).

5. See W.E.B. Du Bois, *Black Reconstruction in America*, ed. David L. Lewis (New York: Simon & Schuster, 1995); Joel Olson, *The Abolition of White Democracy* (Minneapolis, MN: University of Minnesota Press, 2004); Angela Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (New York: Seven Stories Press, 2005).

simply a *failure of justice* or a *failure to be just*, but rather that we live in a world where the possibilities for legal justice are too narrowly circumscribed in terms that measure justice through procedural, distributive, or retributive “success.” We fail to have justice because we do not take seriously how justice is constituted and conditioned by failure. This is not to say that we ought to merely temper our expectations and not demand justice, but rather to heed the call of justice requires the abolition of these existing institutions along with ways of thinking about justice as something static, final, or which has (either along retributivist and distributivist conceptions of justice) a “correct” outcome.⁶ Instead, we ought to think about justice as failure and as a practice of freedom conditioned upon such failure.

II. The Facticity of Failure and Queer Negativity

By marking *failure* as the condition and orientation of justice I am self-consciously drawing on Simone de Beauvoir’s existentialist ethics as a point of departure and inspiration. In *The Ethics of Ambiguity* she writes, “[T]he most optimistic ethics have all begun by emphasizing the element of failure involved in the condition of man; without failure, no ethics; for a being who, from the very start, would be an exact co-incidence with himself, in a perfect plenitude, the notion of having-to-be would have no meaning.”⁷ Failure is the condition of ethics in that it is part of the contingent facticity of the world. The disclosure of subjects as free subjects – as free creators – requires acknowledgment of a world that they did not create. The free disclosure of the subject occurs “only through the resistance which the world opposes to him. The will is defined only by raising obstacles, and by the contingency of facticity certain obstacles let themselves be conquered, and others do not.”⁸ As such, not just the possibility, but the *certainty* of failure conditions existence.

Rather than face “the risk of coming to grief against the obstacle,” Beauvoir argues that we have created ingenious ways of avoiding our ambiguous condition as, on the one hand, “sovereign and unique subject[s]” and on the other, as determined objects.⁹ “As long as there have been men and they have lived,” she writes, “they have felt this tragic ambiguity of their condition, but as long as there have been philosophers and they have thought, most of them have tried to mask it.”¹⁰ The history of philosophical and practical ethics

6. See Bonnie Honig, “Rawls on Politics and Punishment,” *Political Research Quarterly* 46(1) (1993).

7. Simone de Beauvoir, *The Ethics of Ambiguity*, trans. Bernard Frechtman (Secaucus, NJ: Citadel Press, 1948), p. 10. English translations of Beauvoir typically render “*l’homme*” as “man” even when referring to “human” as a universal. In the introduction to *The Second Sex* she notes the gendered nature of this and the epistemology it implies. I do not alter the translation in quotations, but note that Beauvoir (unlike most of her contemporaries, as well as our own) is arguably using “man” to refer to “human.” This is not an unproblematic usage, it should be noted.

8. *Ibid.*, p. 28.

9. *Ibid.*, pp. 28, 27.

10. *Ibid.*, p. 7.

has worked to “eliminat[e] the ambiguity by making oneself pure inwardness or pure externality, by escaping from the sensible world or by being engulfed in it, by yielding to eternity or enclosing oneself in the pure moment.”¹¹ Ethics, as it has been expressed and practiced, turns out to be a paradigmatic instance of “bad faith,” of refusing either the possibility of transcendence, or the givenness of the world and its facticity. If ethical theory refuses to acknowledge the ambiguity of existence and the condition of failure that underwrites that existence, then it condemns others to static positions of failure and unfreedom, denying the possibility of the creation of meaning. Perhaps not surprisingly, Beauvoir points to punishment as an ultimate method for the denial of this creation: “There is no more obnoxious way to punish a man than to force him to perform acts which make no sense to him ... Life imprisonment is the most horrible of punishments because it preserves existence in its pure facticity but forbids it all legitimation.”¹²

The facticity of failure is not something to be embraced *per se*, but neither can it be rejected, displaced, or disavowed. Instead of refusing to acknowledge the “fundamental ambiguity” of existence, Beauvoir insists that it is *possible* to “want this tension with the failure which it involves” and to approach failure as “assumed” for the sake of “conversion” rather than as something to be “surpassed” in a Hegelian sense.¹³ Failure is itself the existential grounds of freedom, and insofar as one wills freedom necessarily in concert with others¹⁴ one must will it *through* failure. The difficulty of acknowledging failure as a condition of human existence is that it appears that the acknowledgment of this condition forecloses action. Yet ethical freedom, on Beauvoir’s terms is a *practice* that points toward future action not despite, *but because of* the facticity of failure. “One does not exist without doing something,” she writes, “[I]t is a matter of reconquering freedom on the contingent facticity of existence, that is, of taking the given, which at the start *is there* without reason, as something willed by man.”¹⁵ Such an ethics, therefore, is eminently *political*, eschewing accepted divisions between politics and ethics that have largely characterized Western thought, in which ethics refers to one’s relation to others, while politics (at best) attempts to generalize or formalize ethical principles into institutional arrangements, constitutions, and laws.

The key implication of this reading of freedom and ethics in relation to failure is that it orients practice to both the past (in terms of responsibility) and the future (in terms of action). Ethical action in the face of persistent failure – and by my implication, practices of justice – changes the goal: we do not (because we cannot) seek resolution or closure, but openness toward futures of wide possibilities. “Salvation,” Beauvoir writes, “is only possible if, despite obstacles and failures, a man preserves the disposal of his future, if the situation opens up more possibilities to him.”¹⁶ Rather than leading toward resignation, acknowledgment of failure grounds a demand for further action in concert with others; that the world be otherwise than it is: “It is because there are real dangers, real

11. *Ibid.*, p. 8.

12. *Ibid.*, pp. 31–2.

13. *Ibid.*, p. 13.

14. *Ibid.*, p. 73.

15. *Ibid.*, p. 156.

16. *Ibid.*, p. 30.

failures and real earthly damnation that words like victory, wisdom, or joy have meaning. Nothing is decided in advance, and it is because man has something to lose and because he can lose that he can also win.”¹⁷ Moreover, this means that any “reconquering of freedom” is “never finished; the contingency remains, and, so that he may assert his will, man is obliged to stir up in the world the outrage he does not want.”¹⁸

Reconceiving justice as a practice of freedom, conditioned by failure and directed toward a more open future, must not reaffirm the necessity for “success” on the currently available terms, however. Rather, following queer theorists who have turned to failure as something more than a condition of existence, we might embrace it as a *strategy* to challenge that current state of existence. As José Muñoz and Jack Halberstam have argued, because “success” is defined under the terms of capitalist heteronormativity, success is precisely the problem.¹⁹ Halberstam goes further than a reappraisal of the terms, however, and argues that “under certain circumstances failing, losing, forgetting, unmaking, undoing, unbecoming, not knowing may in fact offer more creative, more cooperative, more surprising ways of being in the world.”²⁰

Failure on this account is a practice to be pursued for the sake of both critique and resistance. Despite its “host of negative affects, such as disappointment, disillusionment, and despair, it also provides the opportunity to use these negative affects to poke holes in the toxic positivity of contemporary life.”²¹ Focusing on failure, and in particular the practices and ways of knowing of those who have been relegated to the positions of failure, those for whom justice has been “fugitive,” allows for a politics not focused on winning the game as it is played, but on changing (or refusing to play) the game itself. Once one reorients toward failure and its negative affects as resources, “the negative thinker can use the experience of failure to confront the gross inequality of everyday life in the United States.”²²

This allows for a reappraisal of utopian thinking in a queer form that eschews both overly abstract forms and concrete arrangements (as heteronormative and liberal utopias tend to) in favor of “horizons.” As Muñoz puts it, “To see queerness as horizon is to perceive it as a modality of ecstatic time in which the temporal stranglehold ... [of] straight time is interrupted or stepped out of.”²³ For Muñoz, such an interruption or disidentification with the current state of affairs is aided (if not made possible) by failure. It is here that queer theory’s affinity with Beauvoir’s ethics is clearest: if failure orients us toward a future that could be otherwise, it does so by interrupting the bad faith

17. *Ibid.*, p. 34.

18. *Ibid.*, pp. 156–7.

19. Jack Halberstam, *The Queer Art of Failure* (Durham, NC: Duke University Press, 2011), p. 2.

20. *Ibid.*, pp. 2–3.

21. *Ibid.*, p. 3.

22. *Ibid.*, p. 4.

23. José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York: New York University Press, 2009), p. 32. This view of a queer future stands in contrast to Edelman’s insistence that future is *always* heteronormative, c.f. Lee Edelman, *No Future: Queer Theory and the Death Drive* (Durham, NC: Duke University Press, 2004).

reading of the present that presumes that things *had* to be the way that they are. This means that refusals, rejections, and failures of the current state of affairs are not idle wishful thinking, but may be radical attempts to remake the world in a way that *requires* constant ethical practices of freedom. “Utopia can never be prescriptive,” Muñoz writes, “and is always destined to fail.”²⁴

III. Hearing Failure, Resisting Closure

The mode of justice offered by the white supremacist and hetero-patriarchal state is focused on verdicts, outcomes, states of affairs, and distributions as its measures of success. Even those theories of justice that focus on procedure and processes, especially in criminal proceedings, nevertheless point to stable outcomes as benchmarks of evaluation, and in doing so, insist that justice is something that can be “served.” Yet both moves are readable as “bad faith” on Beauvoir’s terms. When faced with an odious outcome (like the Zimmerman verdict, the dismissal of charges against Officer Servin, or the non-indictments of Officers Pantaleo and Wilson), our tendency is either to refuse that some other outcome was possible given the existing rules, laws, and procedures, or to blame the outcome on the bad acts of those charged interpreting and enforcing those laws. In either case, more pressing critiques of law and justice are blocked. Yet even more dangerous is the possibility that these outcomes do not in fact call for more radical refusals or resistances. Such justice preys upon and exploits the desire for that which we cannot not want, using that desire as fodder for its own maintenance.

To conceive of justice as failure and as an ongoing practice of freedom conditioned by that failure, however, would force us to follow different lines of thought and flight. First, conceiving of justice as failure implies that justice must work *against* forms of finality and the desire for closure by recognizing the impossibility of such things. Any kind of justice that forecloses rather than opens possibilities for action – especially for those who have been relegated to nonbeing, abjection, and dismissal – both refuses to acknowledge the conditions of living in the world and re-creates the world in that image: foreclosed, static, and in deadly bad faith.

Second, justice as failure requires that we acknowledge the failures that are constitutive of “successes.” If the conviction and punishment of Zimmerman would have fed into and supported the current system of criminal punishment in the United States, partially (if not fully) vindicating the Sanford police department and the same prosecutorial system that typically targets marginalized persons, then that success must be measured against the injustices that constitute it. The indictment of officers for the death of Freddie Grey, or the charging of Jason Van Dyke in the death of Laquan McDonald are surely “successes” (even if delayed, partial, and precarious), but they are also predicated on absolving the broader police forces and prosecutors’ offices of responsibility for the actions of a few “bad apples.” Insofar as justice is always already a failure, it escapes and disappoints. But such disappointment should spurn us to act in ways that are not already prescribed by systems or institutions, to move beyond and outside “judicial models of

24. Muñoz, *Cruising Utopia: The Then and There of Queer Futurity*, p. 173.

redress [that] often require that claims fit a legal paradigm of individual rights.”²⁵ Justice as failure means that heeding the call to justice must be conditioned on an explicit and unflinching statement of what must come next – of the horizon – *at precisely* the moment when we might otherwise claim that justice has been achieved.²⁶ This way of thinking about justice and about politics requires that we embrace the ambiguity and impurity of a “both/and” approach.

Third, to recognize justice as failure would be to refigure it as an ongoing *practice of freedom* always in relation to others and always in relation to the material conditions that shape concepts. Following Beauvoir, to will justice thus would be to necessarily will it for others. But because both freedom and justice are situated contingently, they are tied socially and politically as impossible *debts* to others. A complete repayment is not simply difficult but impossible. Justice, on this reading, is something with inexhaustible terms that *require* a lack of perfection or “success” and that are part of the production of a self in relation to others that starts from those debts and those contingencies and which must reorient us to a radical openness to claims of injustice from *within* practices of justice. This in turn requires a radical listening to others in the mode described by Iris Young as a “respectful stance of wonder.” Such a stance, she writes:

... is one of openness across, awaiting new insight about their needs, interests, perceptions, or values. Wonder also means being able to see one’s own position, assumptions, perspectives as strange, because it has been put in relation to others. . . . I cannot assume that because last week I understood her standpoint, I can do so today. Respectful listening thus involves attentive and interested questioning. But answers are always gifts. The transcendence of the other person always means that she can remain silent, or tell only part of her story, for her own reasons.²⁷

Wonder for Young is not a matter of aesthetic practices and archives, but a prioritization of marginalized voices. If we are concerned with criminal justice, then the voices to which we should listen belong to the incarcerated, to those who are relegated to the non-being of solitary confinement, and to those whose political voice has been stripped under conditions of political and social disenfranchisement.

Lastly, because the material institutions of justice to which we have become accustomed (those which we cannot not want yet which promise us only successful failures) are now recognizable as institutionalized bad faith, it is precisely those institutions which must be abolished. We must not fall prey to the desire to perfect the jury, the judge, or the jail, but rather refuse their promises. Or, as CeCe McDonald puts it more eloquently

25. Stephen Best and Saidiya Hartman, “Fugitive Justice,” *Representations* 92(1) (2005), 1–15, 8.

26. This arguably means that justice as failure has a dialectical character in which negation, negativity, and despair are engines of movement. This is not to say that one ought not take pleasure in “successes” or “wins,” but rather that one need not see critique or negativity as blocks to action. See Robyn Marasco, *The Highway of Despair: Critical Theory After Hegel* (New York: Columbia University Press, 2015).

27. Iris Marion Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought,” *Constellations* 3(3) (1997), 358.

(responding to a question about how her case has been used to spotlight the conditions of transwomen incarcerated in men's facilities):

I just want to say that all prisons are fucked up. It wouldn't matter if I went to a women's prison ... you know, they're talking about building a new trans prison in California? It's like, no prison is safe for no one. You want to capitalize off of me through a fucked up system? And I'm not having it. ... I would rather die than go to any prison. ... There is no way that you can convince me that being in a men's prison or being in a women's prison, or being in a trans prison, being in a fucking unicorn prison, I don't care. It's not beneficial to anyone. It's not beneficial to me, it's not beneficial to you, it's not beneficial to our community.²⁸

McDonald calls us to refuse the closure and finality of the prison and its promises of safety and justice through unfreedom, and redirect ourselves to a passionate and dedicated resistance to those very promises of absolute assurance that are caught up in the logic of, and the desire for, success.

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28. CeCe McDonald, "The Struggle for Trans Liberation: A Conversation with CeCe McDonald," YouTube video, 58:01, from a public lecture at the Socialism 2014 Conference in Chicago, IL, posted by "WeAreManyMedia," August 21, 2014, <https://youtu.be/emx5iHwbPOg>.