

Thirteen

AN UBUNTU ETHIC OF PUNISHMENT

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1. Introduction

Philosophers have come belatedly to the prison or penal debate, a matter of a concern for reform-minded United States citizens, policy makers, criminologists, and certainly the millions of people mired in the carceral complex. It was only when it hit a crisis point with mass incarceration in the last twenty years that a few started to pay closer attention. The profession's silence is quite odd given that our first philosopher, Socrates, was jailed before taking the poisonous drink. Plato's *Apology* presages famous and controversial modern defenses in the courtroom (from Fidel Castro, to Nelson Mandela, Steve Biko, and John Africa). Socrates dared the jury to give him a pension rather than punishment for being a gadfly in the market place.

Philosophers today have taken stock of theories of punishment, (that is, retribution, deterrence, and incapacitation, Honderich, 1970) as well as of the repressive prison apparatus (Foucault, 1977). However, how successful have we, as public intellectuals, been in addressing our concerns to a general public? In this chapter, I link *political* analysis with questions about human values by engaging with contemporary *ethical* theories. I focus on Ubuntu, a Southern African ethic (cf. Metz, 2007) and compare it with an ethic of care (Gilligan, 1982).

Engaged Quakers and criminologists have used a pragmatist approach rather than thinking through an ethical paradigm. I don't know of any sustained *philosophical* analyses of restorative or transformative penalty—with the exception perhaps of Plato. Taking my cue from Angela Y. Davis's concept of abolitionism, I argue for a transformative model of justice rather than a restorative model. In her critique of the prison industrial complex, Davis engages in "tarrying with the negative," rather than providing a non-ideal account of "abolition democracy."

I turn to an Ubuntu inspired penal ethic to see if it can give us guidance for a novel justice paradigm the world over. Ubuntu is a Southern African concept that refers to shared humanity as in the Nguni saying: *umuntu ngumuntu ngabantu* ("one is only human through other humans").

2. Ubuntu Principles

In his insightful article “Toward an African Moral Theory,” Thaddeus Metz proposes a bold secular theory of right action shared by “most friends of *Ubuntu*” (2007, p. 323), meaning Africans. This theory should also have overlapping consensus with Westerners, who are wedded to normative ideals based in justice principles. He outlines six violations such as killing innocent people, rape, deceit, theft, breaking promises, racial discrimination as being universally accepted as egregious, or, using Kant’s language “vices” (*Laster*) which have to be countered by perfect duties (for example, dignity, reverence for life, and telling the truth).

Here of course, it is important to note that Kant was not beyond racist sentiments himself (see Eze, 2001; Bernasconi, 2002). On the other hand, sub-Saharan societies would find these six behaviors abhorrent: majoritarian rule; retribution; possessive individualism; greed; nonconformity, failure to marry and procreate, and, especially, disrespecting tradition. These beliefs, attitudes and practices are of course ingrained in much of Western tradition that is wedded to a public patriarchal, capitalist ideology, and a moral code based on individualist rights. Virtues such as generosity, unanimity, cooperation, and sharing that are prized according to an African ethic would be at best imperfect duties according to Kant. Metz then proceeds to lay out six different postulates of an Ubuntu (U) ethic, with the intent to derive a “right action.” I mention here the final step: “*U6: An action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community*” (p. 334, his italics). According to Metz, an African moral theory based on right action would be founded in good-will and shared identity to produce harmony. Furthermore, he thinks with his revised and enriched version he would be able to bridge the ethical gap between ego-centric Western and communitarian African thought:

An action is right just insofar as it promotes shared identity among people grounded on good-will; an act is wrong to the extent that it fails to do so and tends to encourage the opposites of division and ill-will (p. 338).

This statement seems to enrich a (Western) utilitarian account, yet he admits it is not robust enough to account for deontological restrictions (ibid.).

I do wonder if it makes sense to *excise* the spiritual component of Ubuntu in the way Metz presented it, to make African moral theory more compatible with Western secular tradition. It is of course a worthy goal to go beyond the enduring racialized questions—whether Africa has a philosophy, or in Hegel’s terms, whether it actually has a history—and Metz presents a convincing case that an Ubuntu ethic has great promise in helping to construct a “competitive African moral theory” (p. 341).

What then is “African” about this ethic? Metz focuses on imperfect duties such as generosity, communal fervor, promoting harmony, all of which

are tenets of an ethic of care, and a Muslim ethic, amongst others. Certainly, discovering one's humanity through other persons seems to be germane to all indigenous pre-colonial value systems. What may be uniquely "African" about the idea that my humanity is inextricably linked with yours, as Desmond Tutu would put it, is that Ubuntu has been (1) characterized as a "manly" virtue (Gade, 2011); and (2) it tends to be limited to humans, separated from their spiritual connections to the crawling ones, the stone people, the wind, the fire, the water, and importantly the earth—to put it in the language of indigenous American peoples. Dirk Louw espouses that African humanism is imbued with deeply religious/spiritual meaning:

For the Westerner, the maxim "A person is a person through other persons" has no obvious religious connotations. He/she will probably interpret it as nothing but a general appeal to treat others with respect and decency. However, in African tradition this maxim has a deeply religious meaning. The person one is to become 'through other persons' is, ultimately, an ancestor. And, by the same token, these "other persons" include ancestors. Ancestors are extended family. Dying is an ultimate homecoming. Not only the living must therefore share with and care for each other, but the living and the dead depend on each other. (Van Niekerk, 1994, p. 2; Ndaba, 1994, pp. 13–14 cited in Louw, 1998).

Thus, a Westerner may now appreciate the deeper meaning of the famous burial court case of S. M. Otieno, whose body was eventually buried at his ancestral land among the Luos (Western Kenya), even though his widow, a Gikuyu, fought to have his body buried in Nairobi (central Kenya). According to custom and belief, Luos need to be buried among their people so that they will not haunt the living relatives (cf. Onyango, 2002). The Kenyan Court eventually ruled in favor of customary law and ordered the return of Otieno's body to the Luos.

Louw then adds a political element to the African "spirit" of Ubuntu:

However, although compassion, warmth, understanding, caring, sharing, humanness et cetera are underscored by all the major world views, ideologies and religions of the world, I would nevertheless like to suggest that Ubuntu serves as a distinctly African rationale for these ways of relating to others. The concept of Ubuntu gives a distinctly African meaning to, and a reason or motivation for, a decolonizing attitude towards the other, including and especially the religious other. As such, it adds a crucial African appeal to the call for the decolonization of the religious other—an appeal without which this call might well go unheeded by many Africans (cf. also Mphahlele, 1974:36; Ndaba, 1994:18-19). In this, and only in this peculiar sense, Ubuntu is of Africans, by Africans and for Africans. (Ibid., emphasis Louw's)

In a way, Thaddeus Metz's version of Ubuntu principles might better represent the cosmopolitan version of an ethic of strangers proposed by Kwame Anthony Appiah than a genuine indigenous African viewpoint. This is particularly true since Metz explores the idea of harmony at a global level (2010, p. 341). Appiah's version of cosmopolitanism seems to be, *prima facie*, a compatible theory because it explores tensions between an obligation relationship to strangers beyond walls and borders, (that is, a universal concern, and respect for different expressions of living, a particular concern (cf. Appiah, 2006, p. xv).

Our ethical imagination is stretched when we are asked to reflect on the humanity of prisoners, whether they are *génocidaires* of Rwanda housed in a Malian prison, or political prisoners housed on death row in a Pennsylvania state facility. What is it that they deserve? Is it natal alienation, civil death, or a certain modicum of human rights that simply limits their freedom of movement? Our toleration of the other's way of expression gets tested when judging those who are disappeared behind tall walls.

Appiah does not offer assistance about adjudication of where worldviews collide, or punishment has to be meted out. In his early writings (1993), he openly objects to the ideology of Afrocentrism. Even though he was raised in Ghana, he seems more at home with the Western classical liberal tradition than African postcolonial philosophers. In that vein, his praise of universalism writ large then seems indebted to EuroAmerican values, which tend to favor individual human rights over community or cultural particularities; put in another way: rights language trumps cultural difference. Appiah's (2006) reflections on ethical comportment toward strangers also seem to overlap with (Western) feminist care ethic concerns, namely partiality toward one's kin over having responsibility for distant starving children, say, in Africa.

3. Ubuntu and Feminist Considerations

Ubuntu has already been referred to as a "manly" virtue. One of the most fervent criticisms of Ubuntuism comes from feminist scholar Fainos Mangena (2009). He calls attention to a masculinist ethos in Ubuntu, which he finds particularly worrisome in the age of HIV/AIDS, which has had a devastating impact on many African countries. African women are told by community elders to take care of husbands who have HIV/AIDS by extolling the spirit of Ubuntu (or Hunhu, in Shona).

If Ubuntu is not the answer and salvation for "the" African woman, what about an ethic of care that has captured Western feminist's imagination ever since Carol Gilligan (1977) popularized it with her study of differences between girls' and boys' different sense of morality?

The ethic of care developed out of a need to differentiate girls' experiences in their moral socialization from that of boys. Gilligan suggests that boys are tasked to follow an ethic dominated by (public) sphere concerns of impartiality and justice, which is made most plainly in the deontological ver-

sion of the categorical imperative. Girls on the other hand have a (private) sphere concern for partiality and they may justify theft of a necessary medication to keep a sick family member alive. Clearly, their justification doesn't meet the basic demands of the categorical imperative (that is, that theft can never be considered a universalizable maxim). One of the criticisms Gilligan incurred was that her study was one of white middle class women. Mangena notes that her ethic of care may be fitting for a Western (white) possessive individualist ethical framework, but it carries very little weight in a society where the community comes first and the needs and the desires of the individual are quite secondary—and especially frowned upon when uttered by a (married) woman. “So, for the Western woman, it is a question of saying: What form should a care-giving ethic take? While for the African woman the question is: What am I expected to do by my culture” (Mangena, 2009, p. 24).

However, following Gilligan, other feminists, notably Nancy Chodorow (1978), have articulated a relational theory of the self that girls are enculturated, if not pressured, to adopt, whereas boys are steered toward an autonomous sense of self. So, women, especially qua mothers and daughters of elderly parents, are summoned to be compassionate in order to meet society's approval in the West.

Such patriarchal expectations seem mirrored in the African concept of Ubuntu where hospitality toward strangers, compassion, magnanimity, and certainly care for the other is part and parcel of expressing of one's humanity. On the other hand, African men's sense of irresponsibility as painted by Fainos Mangena (for example, engaging in risky behavior) mirrors any patriarchal society's *Anspruch* (in the global North as well as South) to individual freedom and autonomous expressions. (I leave aside some of the disturbing conclusions of the author, including a eugenic sounding wish for the disappearance of African patriarchal men due to AIDS, p. 27.)

My criticism of Mangena's ethic mirrors my concern about Metz's version: Mangena's description of an African feminist ethic is clearly based upon the liberal Anglo-American human rights agenda (for example, by suggesting that women should have a public voice and influence policy decisions, whether and under what circumstances they want to be caregivers to men living with HIV/AIDS). Thus, I am unsure what else (maybe virtues? another set of principles?) he brings to a normative discourse. His critical intervention on Ubuntu is however useful to get us to look into the challenge of avoiding a romantic perspective on Ubuntu. Is it descriptive or normative, that is, of aspirational value? The following quote suggests something of both:

It has been suggested that the transformation of an apartheid South Africa into a democracy is a rediscovery of ubuntu (Maphisa, cited in Loew, 2003). Ubuntu is a given and a task in African societies. It is part and parcel of Africa's cultural heritage. However, it clearly needs to be revitalized in the hearts and minds of some Africans (Koka, 1997; Shutte,

1993; Teffo, 1994). The actions suggested in the literature are part of this renaissance (Outwater, 2005; emphasis added).

A non-charitable interpretation of the Nguni saying of “a human is only human through other humans” (*umuntu ngumuntu ngabantu*), which encapsulates the Ubuntu spirit, might indicate that it is brotherhood that is celebrated not gender liberationist humanity. After all, as Gade’s (2011) catalogue of Ubuntu genealogy shows, one of the early explanations of Ubuntu refers to “manly virtue.” Historically, many pre-colonial African societies were not only patrilocal and patrilineal, but their customs certainly had and continue to have patriarchal tendencies with precarious consequences.

Female Genital Circumcision (FGC) is one the most infamous practices mentioned at international forums, because young girls are not able to give consent to such procedures. An engaging African pro-feminist critique of FGC is portrayed in Ousman Sembène’s film *Moolaadé* (2004), wherein the protagonist who offers magical protection (*moolaadé*) to uncircumcised girls is punished by her own husband for doing so, being whipped so severely that she could have been killed. Then in a turn of fortune, she returns to the village center quite victoriously with a band of women who defy patriarchal elders and accuse them of a misreading of the Qu’ran—which does not condone FGC.

Can Ubuntu be redeemed for a feminist ethic? One way it certainly can is to postulate that “manly virtue” is a deliberate or unconscious biased misapplication of the concept that seems so foundational to what counts as African philosophy (cf. Ramose, 2003). It may be problematic to venture into ideal theory, yet if one attends to roots of a concept, it seems to me important to provide a corrective to an ideologically convenient retrieval of a concept that demands submission of women to a masculinist ethos. Of course, it is disconcerting that African women philosophers’ voices are missing in this debate (cf. Presbey, 1997).

4. Ubuntu and Punishment Theories

This section deals with the engaging ways an Ubuntu ethic could assist in thinking about punishment. I maintain that the most promising aspect of Ubuntu is that it can serve as a powerful antidote to traditional Western punishment theories. Metz outlines that Africans tend to resort to forward-looking rationales for punishment, for spiritual and practical reasons (2007, p. 325). An Ubuntu ethic of punishment favors restitution over revenge. This is what Desmond Tutu strategically deployed in the Truth and Reconciliation Commission (TRC), when he admonished victims and survivors of apartheid violence to forgive as well as excoriated offenders to deliver genuine, credible apologies for their deeds of atrocity and crimes against humanity. It is worth quoting Archbishop Tutu’s explanation of Ubuntu in toto, because it shows how he Christianizes the concept to speak to a global audience that may not

understand ancestor reverence (as explained in Louw, 1998). He makes the connection with Christian morality by appealing to agape, reciprocity, and shared suffering:

[Ubuntu] is the essence of being human. It speaks of the fact that my humanity is caught up and is inextricably bound up in yours. I am human because I belong. It speaks about wholeness, it speaks about compassion. A person with *ubuntu* is welcoming, hospitable, warm and generous, willing to share. Such people are open and available to others, willing to be vulnerable, affirming of others, do not feel threatened that others are able and good, for they have a proper self-assurance that comes from knowing that they belong in a greater whole. They know that they are diminished when others are humiliated, diminished when others are oppressed, diminished when others are treated as if they were less than who they are. The quality of *ubuntu* gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanise them. (1999, pp.34–35)

If it is the case that my humanity is connected to another person (for example, an offender), then I have a bit of cruelty, sadism, lack of love in me as well, and, as such, I can relate to the action of the offender/oppressor. Radically put, I (as a victim) am also responsible for the ghastly deed of the oppressor. However, such heightened level of responsibility sits uneasily with a Western philosophical audience, steeped in notions of individual culpability. John Braithwaite claims that asking victims to forgive, or offenders to apologize, is wrong, if not cruel. Forgiveness and apology “are gifts that have no power as gifts when they are demanded” and they only play a role in restorative justice as “emerging values” that might arise out of the process (2011, p. 349). Tutu’s overreach then may consist in making these values into “constraining values” that have to be part of any successful restorative process, (that is, ground rules of conduct). Braithwaite, on the other hand, claims that constraining values deal with respectful listening, non-domination, empowerment, equal concern for all stakeholders, and freedom from racist and sexist oppression, appealability, and accountability (*ibid.*, p. 348). Tutu would, in all likelihood agree to these ground rules, and the TRC Commission mixed indigenous principles with Western rule of law, since the TRC referred those who didn’t win amnesty to criminal court. The TRC was the first commission of its kind for letting victims, victims’ families and offenders speak, as well as offering psychological counseling to those who were deeply traumatized by recounting past events. However, many critics of the TRC note that it was a “Truth” commission, rather than one of reconciliation, since, despite Tutu’s strenuous efforts, victims often did not sense that justice was served and that offenders apologized in a lighthearted way in order to receive the coveted amnesty. Furthermore, as Tutu (1999) acknowledges, the whole process was

undermined by the government's delay of reparations to bona fide victims and victims' families.

Some critics of the TRC proceedings would probably agree with critics of restorative justice, who hold that a fanatical focus on the restorative "process" may actually yield injustice (for the victim and/or her community). In order for restorative processes to work in consort with "doing justice," certain sentencing guidelines have to be met that are shared by the larger community, (that is, the rule of law and codification of criminal offenses, Robinson, 2011). "Doing justice" then amounts to "just punishment" of the offender, even if it goes contrary to the wishes of the victim. Hence, the principle of appealability comes to play here, since any consensual agreements arrived at by both parties in a, say, sentencing circle, which includes community members of both offender and victim, can then be appealed by a state actor, for example a district attorney, to the conventional criminal court system. A much-quoted case study from New Zealand illuminates the trouble of interweaving mediation or community justice with criminal courts.

In this case, the victim, Patrick Dale Clotworthy, survived a violent assault, leaving him with a scar that needed cosmetic surgery repair, which the offender was willing to pay for in addition to community service. The Court of Appeal reduced the payment, which then made surgery impossible, and instead argued from the principle of deterrence, interning the defendant for four years. Subsequently, Clotworthy committed suicide, "for reasons unknown" (cf. Braithwaite, 2011, p. 347).

I argue that appealing community justice or sentencing circles' decisions to an adversarial criminal justice system fundamentally violates the ethic of Ubuntu, as the trust between the parties is broken and dissent is the final outcome. The underlying principle of appealability is based on abstract rights, individualism, and retribution that goes against the ideas of compassion (Tutu, 1999), power sharing (Louw, 2002) and interconnectedness with those who are living-dead (the ancestors) and the yet-to-be-born (Ramose, 2003). In pre-colonial times, African jurisprudence focused on restoring (divine) order in the human community after a crime was committed and a decision had to be made to appease both the living and spiritual realm beings (cf. Achebe, 1958). In some African cultures, it may have involved gift-giving and apologies by both parties (the offending and the aggrieved) with the outcome that future generations of their families could be intermarried and live harmoniously. Such practices of Ubuntu are still used across the South of the Sahel (cf. Nagel, 2007; Murithi, 2005).

The Western rule of law in democratic theory takes a keen interest in human rights, in the abstract rights of the individual. Ubuntu also allows for individuality in balance with concern for the community. This is of particular interest to citizens in the New South Africa, as the following makes clear:

The Ubuntu respect for the *particularities* of the beliefs and practices of others (cf. also Wiredu, 1995), is especially emphasized by a striking, yet (to my mind) lesser-known translation of *umuntu ngumuntu ngabantu*: "A human

being is a human being through (*the otherness of*) other human beings” (Van der Merwe, 1996:1, italics added). For post-apartheid South Africans of all colors, creeds, and cultures, Ubuntu dictates that, to be human, we need to recognize the genuine otherness of our fellow citizens (Louw, 1998).

How do we recognize the individual in her particularity? Louw offers playfully this (African) solution:

This is all somewhat boggling for the Cartesian mind, whose conception of individuality now has to move from solitary to solidarity, from independence to interdependence, from individuality *vis-à-vis* community to individuality *à la* community. (Ibid.)

In other words, individualism cannot trump communalism, and lest there would be a celebration of communal dictate over individual rights and ontology, Ubuntu holds in balance both as co-equal and as such giving rise to a full expression of the diversity of humaneness. So, it may not be the solipsistic Cartesian or Kantian ego that we find reflected in Ubuntu metaphysics, but rather a version of Hegelian intersubjectivity.

Here I will make note of the controversial, yet exciting, findings of Susan Buck-Morss (2000) in her essay, “Hegel and Haiti.” The trope of the master-slave dialectic is indebted to Georg Wilhelm Friedrich Hegel’s reflections on the Haitian revolution (1791–1804), which was a unique world event in that it freed Haiti both from slavery and colonialism at once. I mention her discovery, since it’s well known that Hegel disparaged Africa for being devoid of history and human ingenuity and agency; yet he was sufficiently inspired by the Haitian revolution to make light of it (by erasing the historical event) in the deadly dance of recognition between “master” and “slave” in his masterwork of the *Phenomenology of Spirit*, which he completed in 1806 (see Hegel, 1977).

Given what we know of the normative tenets of an Ubuntu ethic, what would be the ramifications for a postcolonial theory of such an ethic, in particular *vis-à-vis* the concept of punishment? Is it an ideal theory that is disconnected from social context, much as a Rawlsian theory of justice has been described by feminist theorists (cf. Jaggar, 2009)? The answer is complicated. On the one hand, Desmond Tutu’s prophetic fervor and zeal is seductively simple and appealing to the kernel of love in each of us. On the other hand feminists contest such sentiment by noting that men have excused male chauvinist behavior under the cover of Ubuntu in order to pressure women to respond compassionately. Thus, a non-ideal theory of an Ubuntu ethic of punishment would have to stay clear of romanticism and wishful disappearance of racist, ethnocentric, sexist, and homophobic realities in the postcolonial polity. And perhaps we have to say with Braithwaite that some values are aspirational, or emerge out of the restorative justice process. However, here I question, also, the concept of “restorative justice.”

In a non-ideal world, the status quo ante is not simply harmonious; the violence of poverty, racism, and sexism all impact our lives, albeit in differentiated ways within the matrix of domination. Abolitionist penal theory tends to frame the “justice project” in terms of transformational considerations (Davis, 2005). How does this work with respect to Ubuntu?

When a personal crime is committed, the community gets together along with the offender (also a troubled term according to transformative justice analysis) and the victim and, of course, the ancestors. The process may involve ritual ceremonies and prayers, and the focus will be on an outcome that will be arrived at through consensual, respectful listening and speaking. Space does not allow for an extensive discussion of comparing Ubuntu ethic with Plato’s moral theory of punishment (cf. Mackenzie, 1981). However, let me briefly note that there are interesting similarities that derive from an organic worldview that focuses on the harmony of the polis/community, and even though Plato does not articulate it as such, except through the tri-partite structure of the soul, if one person breaks a law, the entire group/polis will be seen as lawbreakers, and all have to commit to solve the conflict to restore cosmos/order (Murithi, 2006).

Ubuntu-based justice that follows the transformational paradigm (cf. also Davis, 2003) advocates for broader goals of justice, other than adjudicating conflicts, which would include demands for dismantling power structures that favor the elite one percent over the bottom ninety-nine percent in all aspects of society. This indeed might be an ideal worth striving for (peacefully) and would spell the end of punishment.

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