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Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights

THADDEUS METZ

In this article I spell out a conception of dignity grounded in African moral thinking that provides a plausible philosophical foundation for human rights, focusing on the particular human right not to be executed by the state. I first demonstrate that the South African Constitutional Court's sub-Saharan explanations of why the death penalty is degrading all counterintuitively entail that using deadly force against aggressors is degrading as well. Then, I draw on one major strand of Afro-communitarian thought to develop a novel conception of dignity as the view that what is special and inviolable about human nature is our capacity for harmonious relationships. I argue that a principle of respect for the dignity of such a capacity entails that the death penalty is an indignity but that deadly force in self- or other-defense need not be, and I contend that this African-inspired principle promises to do no worse than the more Western, Kantian principle of respect for autonomy at accounting for a broad range of human rights.

Introduction: Three Conceptions of Human Dignity

From an African, i.e., sub-Saharan, moral perspective, why should one think that capital punishment is an impermissible violation of human dignity? The typical answer one would receive is that it is degrading to intentionally kill human beings because their lives have a spiritual nature that has come from God (Cobbah 1987; Wiredu 1996: 157–171; Bujo 1997: 15–28, 143–156; Kasenene 1998: 20–55; Ramose 1999: 49–64, 138–145, 163–195; Ilesanmi 2001; Deng 2004; Bhengu 2006: 29–87¹). Such an account of why the death penalty is degrading is problematic in at least three respects. First, many of us are much more confident that the death penalty is degrading than we are that human life is an offshoot of a divine realm, meaning that we should seek a secular explanation of its degradingness. Second, even for those of us who are confident that God exists, many believe that there should be a public appraisal of legal coercion that is independent of supernatural views, again pointing us toward a secular rationale for abolishing the death penalty on grounds of disrespect. Third, we should want an account of why capital punishment is degrading that coheres with plausible thinking about the human rights we have more generally, but

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respect for the dignity of our ensouled life cannot straightforwardly ground rights to a fair trial, freedom from torture, freedom of expression and association, choice of employment, and other liberties that do not necessarily involve life and death matters.

Now, the standard Western idea that the death penalty is degrading of our capacity for autonomous decision making neatly avoids these three problems. This liberal principle, philosophically grounded in the ideas of Immanuel Kant (1785/2002, 1797/1991), is often thought to underwrite the judgment that capital punishment is degrading, and it is both secular and intuitively entails and explains a wide array of human rights.²

However, my aim in this article is to see whether one can plausibly judge the death penalty to be degrading for African reasons other than a principle of respect for a soul and different from a more Western principle of respect for autonomy. Drawing on ideas common in sub-Saharan moral thinking, I develop a third conception of dignity as, roughly, the view that what is special and inviolable about human nature is our capacity for communal relationship of a certain kind. I demonstrate that a principle of respect for the dignity of such a capacity is grounded in widespread African beliefs about ethics, entails that the death penalty is undignified, and on the face of it does no worse than the Kantian theory at both avoiding a religious foundation and accounting for a broad range of human rights.

Being a moral, political, and legal philosopher and not a social scientist, I make no claim as to whether many sub-Saharan Africans have in fact held the dignity-based rationale against the death penalty that I articulate. Indeed, the death penalty is legal in more than 30 countries on the African continent (Smit 2004: 2),³ and, in those countries where it is not, often much of the population wishes that it were. Instead, the claim I make for the “African” status of my abolitionist argument is that it coheres with fundamental views about morality that are common among indigenous communities and contemporary intellectuals in a wide array of countries below the Sahara desert. Another title for this article could be “How to Be an African Abolitionist”; *supposing* that one wanted to conceive of the death penalty as degrading in light of some sub-Saharan moral-philosophical ideas, I aim to demonstrate a way to do that with a principle that promises to ground human rights generally.⁴

I begin by spelling out some of the essentials of the African ethic of “*ubuntu*,” the Nguni word for humanness in South Africa that has cognate terms across the sub-Saharan region (e.g., “*Botho*” in Sotho-Tswana, “*Hunhu*” in Shona, and “*Utu*” in Swahili). Africans widely take *ubuntu* to be the concept at the heart of moral thought, and they typically think it entails communitarian norms of a certain kind. Using the techniques of analytic philosophy and avoiding appeals to the supernatural, I provide a philosophical interpretation of *ubuntu* that unifies many ideas associated with it in the form of a foundational principle of morally right action. In the following section, in order to tease out a plausible explanation of why an *ubuntu* ethic might entail that capital punishment is an indignity, I critically examine the South African Constitutional Court’s several reasons for thinking so, using them as a foil. In a 1995 case, *The State versus T. Makwanyane and M. Mchunu*, this Court unanimously ruled that the death penalty is unconstitutional, at least for crimes other than treason (Constitutional Court of the Republic of South Africa 1995⁵), with one central rationale being that it is inconsistent with the value of *ubuntu* that was mentioned in the interim Constitution binding at the time.⁶ I distinguish eight reasons the Court presents for thinking that an ethic of *ubuntu* forbids the death penalty as undignified and show that none of them is plausible. Specifically, I demonstrate that each of the Court’s *ubuntu*-based rationales against capital punishment “proves too much” in that it entails that the use of deadly force is wrong in cases of self- and other-defense where it appears not to be wrong. In the next section, I work out a new, more promising reason for thinking that *ubuntu* prohibits capital punishment for being degrading. I show that this secular but characteristically

African rationale for the indignity of the death penalty permits the use of deadly force against aggressors when intuitively permissible and also appears able to account well for several other human rights besides the right not to be executed. In the concluding section of the article, I indicate some topics for future research, namely, those related to choosing between the more Western, Kantian conception of dignity and the African one that I articulate here.

The African Ethic of *Ubuntu*: Prizing Communal Relationships

A good starting point for understanding sub-Saharan morality, or the major strain of it that I explore, is the widespread maxim that is usually translated in English as “A person is a person through other persons” or “I am because we are.” The Kenyan John Mbiti, in his classic, postwar survey of African worldviews, takes the maxim to be a “cardinal point in the African view of man” (1969: 108–109), and a large majority of scholars agree with him on this score.

To most non-African readers, the above phrases will indicate nothing normative and instead will bring to mind merely some empirical banalities about the causal dependence of a child on her parents or society. However, such statements express a moral claim (as is made clear in, e.g., Wiredu 1992; Menkiti 2004). Personhood, selfhood, and humanness in characteristic sub-Saharan worldviews are value-laden concepts. That is, an individual can be more or less of a person, self, or human being, where the more one is, the better. The ultimate goal of a person, self, or human in the biological sense should be to become a *full* person, a *real* self, or a *genuine* human being, i.e., to exhibit virtue in a way that not everyone ends up doing. The phrases say that achieving the state of being a *mensch* is entirely constituted by relating to others in a certain manner. In the way that “an unjust law is no law at all” (as per St. Augustine), or just as we might say that a jalopy is “not a *real* car” (Gaie 2007: 33, emphasis original), so Africans would characterize an individual who does not relate positively to others as lacking *ubuntu*, lacking humanness. Indeed, those who fail to relate properly are sometimes described as animals.

Exactly which sort of relationship is key to having *ubuntu* and acting rightly?⁷ The uncontroversial answer is, roughly, a communal one, as can be seen from this brief survey of the views of some prominent African intellectuals. First off, note the following summary of the moral aspects of Mbiti’s analysis of African worldviews: “What is right is what connects people together; what separates people is wrong” (Verhoef and Michel 1997: 397). Next, consider these remarks from black consciousness leader Steve Biko in an essay that explores facets of culture that Africans widely share: “We regard our living together . . . as a deliberate act of God to make us a community of brothers and sisters jointly involved in the quest for a composite answer to the varied problems of life. Hence . . . our action is usually joint community oriented action rather than the individualism which is the hallmark of the capitalist approach” (1971: 46). Finally, here is a summary of African ethical thinking from Desmond Tutu, winner of the Nobel Peace Prize and renowned chair of South Africa’s Truth and Reconciliation Commission:

When we want to give high praise to someone we say, “*Yu, u nobuntu*”; “Hey, so-and-so has *ubuntu*.” Then you are generous, you are hospitable, you are friendly and caring and compassionate. You share what you have. . . . Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum*—the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague. Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good. (1999: 31, 35)

Note that apparently for Mbiti, Biko, Tutu, and several others who have reflected on African morality,⁸ harmonious or communal relationships are valued for their own sake, not merely as a means to some other basic value such as pleasure. Hence, in light of these points, one could rework the vague statement that “a person is a person through other persons” to say something more precise such as “A human being lives a genuinely human way of life insofar as she values harmony with other human beings” or “A person becomes a real person through communal relationships.”

Now, these remarks about the moral fundamentality of harmony and community are suggestive but imprecise, from a philosophical perspective. What is the most attractive sense of “harmony” and “community,” and exactly how must one engage with these relationships in order to act rightly? I answer these questions by proffering the following basic and comprehensive principle of right action:

U: An act is right just insofar as it is a way of living harmoniously or prizing communal relationships, ones in which people identify with each other and exhibit solidarity with one another; otherwise, an act is wrong.

To identify with each other is largely for people to think of themselves as members of the same group—that is, to conceive of themselves as a “we,” as well as for them to engage in joint projects, coordinating their behavior to realize shared ends. For people to fail to identify with each other could involve outright division between them, i.e., people not only thinking of themselves as an “I” in opposition to a “you” or a “they” but also aiming to undermine one another’s ends. To exhibit solidarity with one another is for people to engage in mutual aid, to act in ways that are expected to benefit each other (ideally, repeatedly over time). Solidarity is also a matter of people’s attitudes such as emotions and motives being positively oriented toward others, say, by sympathizing with them and helping them for their sake. For people to fail to exhibit solidarity would be for them either to be indifferent to each other’s flourishing or to exhibit ill will in the form of hostility and cruelty.

An equivalent way of phrasing my theoretic interpretation of the African ethic of *ubuntu* is to say that an action is wrong insofar as it fails to honor relationships in which people share a way of life and care for one another’s quality of life, and especially to the extent that it esteems division and ill will. Note that the combination of sharing a way of life and caring for others’ quality of life, or, what is the same, of identifying with and exhibiting solidarity toward others, is basically a relationship that English speakers call “friendship” or a broad sense of “love.” So, it also follows that the present moral theory can be understood to instruct an agent to respect friendly relationships, and especially to avoid prizing ones of enmity.

Such a principle is fairly specific about the kind of relationship that gives one full personhood, viz., *ubuntu*, in an African ethic, and it does a reasonable job of philosophically explaining what makes an action wrong. Breaking promises, stealing, deceiving, cheating, abusing, and the like are well characterized as being *unfriendly*, or, more carefully, as failing to respect the value of friendship. They involve discord in at least one of the following senses: the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness; the actor is subordinating the other, as opposed to coordinating behavior with him; the actor is failing to act for the good of the other, but rather for his own or someone else’s interest; or the actor lacks pro-attitudes toward the other’s well-being and is instead unconcerned or malevolent.

This is a secular moral philosophy that is independent of the claim that people’s lives warrant respect in light of having their source in God. It is also a communitarian

perspective that differs from dominant Western moral theories, particularly in virtue of deeming relationships of a certain kind to have basic moral worth. For instance, neither the Kantian, who advocates respect for autonomy, nor the utilitarian, who directs one to maximize the general welfare, nor the contractualist, who prescribes acting in ways that no one could reasonably reject, ultimately values for its own sake a relationship in which people identify with one another.

Construing morally sound practices in terms of honoring relationships of identity and solidarity on the face of it well captures several common (not universal) facets of behavior and thought below the Sahara. For example, sub-Saharanans often think that society should be akin to family; they tend to believe in the importance of greetings, even to strangers; they typically refer to people outside the nuclear family with titles such as “uncle” and “mama”; they recurrently believe it important to acknowledge ancestors throughout the course of one’s life; they frequently believe that ritual and tradition have a certain degree of moral significance; they tend to think that there is some obligation to wed and procreate; they usually do not believe that retribution is a proper aim of criminal justice, inclining toward reconciliation; they commonly think that there is a strong duty for the rich to aid the poor; and they often value consensus in decision making, seeking unanimous agreement and not resting content with majority rule. I have the space merely to suggest that these salient (not invariant) practices are plausibly entailed and well explained by the prescription to respect relationships in which people both share a way of life and care for one another’s quality of life. I am not contending that this principle has been believed by even a majority of Africans; my point is rather that it promises to capture in a theory several salient aspects of a communal way of life and ideas associated with talk of “*ubuntu*” that have been widespread below the Sahara, and hence that it qualifies as “African.”⁹ If one wanted a moral theory that is grounded in the mores of many sub-Saharan peoples and is comparable in form to the Western principles of Kantianism, utilitarianism, and contractualism, the injunction to prize harmony would be one plausible instance.

Now, it is not clear whether a moral philosophy informed by *ubuntu* entails that the death penalty is an objectionable violation of human dignity. I have so far made no mention of “dignity” in articulating the basics of an African ethic, and it is not obvious from what I have said how the idea of dignity might figure into it. Many Africans do speak of the importance of human dignity, however, and, as I explain below, some conception of human dignity appears essential if one is going to account theoretically for human rights. Therefore, in the rest of this article, I search for the best way to integrate a notion of human dignity into the moral theory developed in this section, one that would plausibly account for the judgment that the death penalty is degrading. In the next section, I critically explore the reasons the South African Constitutional Court has given for thinking that a proper understanding of an *ubuntu* morality entails that capital punishment is an indignity. Although I agree with the Court that an attractive interpretation of *ubuntu* rules out the death penalty as incompatible with human dignity, my claim is that the Court has presented the right conclusion for the wrong reasons.

The South African Constitutional Court on Why *Ubuntu* Entails the Indignity of Capital Punishment

Here I consider and reject eight different explanations the South African Constitutional Court has given in *The State versus T. Makwanyane and M. Mchunu* for thinking that an *ubuntu* ethic entails that the death penalty is an unconstitutional violation of human dignity. I demonstrate that all eight rationales suffer from the same problem in that each entails

that the use of deadly force in other-defense against aggressors is wrong in cases where it is right (or seems to be right, for all one can tell).¹⁰ I proceed in roughly the order of the court's discussion.

Unequal Treatment

According to one justice, it follows from an *ubuntu* ethic that capital punishment is degrading since it involves one person treating himself as more valuable than another person, hardly a mark of a desirable kind of harmony or friendship.

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. (CCRSA 1995: para. 225)

Capital punishment appears not to respect the fact that people are of equal value, since those doing the executing lord themselves over those being executed.

The most straightforward explanation of why those doing the executing are treating themselves as superior is that they are intentionally killing others. However, that rationale counterintuitively rules out as degrading the killing of aggressors for the sake of other-defense. Consider the following hypothetical case, ETHNIC CLEANSING, which is designed to show that intentional killing is not inherently degrading.

You are a peacekeeper who sees four men chasing an innocent, elderly woman with machetes, trying to kill her merely because she has a different ethnicity. You have a machine gun. After firing a warning shot to deter the men, they are not scared off and continue after the woman. You shoot the four aggressors, reasonably judging it to be necessary and sufficient to protect the one innocent. They die, and she lives.

I submit that the use of deadly force in ETHNIC CLEANSING is morally justified. But if intentionally killing another person in itself were impermissibly degrading, then ETHNIC CLEANSING would be unjustified. I conclude, therefore, that *ubuntu* is not best interpreted as forbidding the death penalty as degrading merely because it involves the intentional killing of another and, for that reason, unequal treatment. I therefore seek some other reason for thinking that the death penalty is invariably degrading on grounds of *ubuntu*, while using deadly force in other-defense need not be.

Denying a Second Chance

The proper valuation of community is standardly understood among Africans to rule out vengeance and even retribution as good reasons for punishment. Instead, most friends of an *ubuntu* ethic believe that, in order for punishment to be justified, it must be at least likely to bring about some desirable result such as making people's lives go better. Specifically, one value commonly held by adherents to an African ethic is reconciliation between the offender, his victim, and the broader community (see, e.g., Tutu 1999; Bell 2002: 59–107). Perhaps force should be used only when it is likely to morally reform the offender so that he mends broken ties and more generally properly values communal relationships, something the death penalty does not effect.

[T]he death penalty rejects the possibility of rehabilitation. . . . One must then ask whether such rejection of rehabilitation as a possibility accords with the

concept of *ubuntu*. One of the relative theories of punishment (the so-called purposive theories) is the reformatory theory, which considers punishment to be a means to an end, and not an end in itself—that end being the reformation of the criminal as a person, so that the person may, at a certain stage, become a normal law-abiding and useful member of the community once again. . . . This, in my view, accords fully with the concept of *ubuntu*. (CCRSA 1995: para. 241–243)

In short, since the death penalty treats the person as incapable of reform, as unable to live harmoniously with others, perhaps it is impermissibly degrading.

Let us reflect on these remarks in light of ETHNIC CLEANSING. If one must always leave open the opportunity for rehabilitation, then one should never intentionally kill anyone, for such an action would always be a “rejection of rehabilitation as a possibility.” But would it be impermissibly degrading to shoot the aggressors for the reason that it would treat them as beyond redemption and prevent them from having any more harmonious relationships? No. Hence, it cannot be that executing offenders is impermissibly degrading simply because it denies them a second chance.¹¹

Psychological Torment

Perhaps it is not the bare fact of intentional killing that is degrading by virtue of unequal treatment (“Unequal Treatment”) or foreclosing the possibility of reform (“Denying a Second Chance”), but rather the process leading up to and including that act. There is little need to rehearse the large literature revealing the mental anguish that death row prisoners suffer prior to execution. It might be thought that knowingly inflicting such torment on them is degrading of them, as the Court maintains here:

Convicted persons in death row. . . . are subjected to a fate of ever increasing fear and distress. They know not what their future is and whether their efforts will come to nought. . . . “The measure of a country’s greatness is its ability to retain compassion in time of crisis.” This, in my view, also accords with *ubuntu*—and calls for a balancing of the interest of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading the individual. (CCRSA 1995: para. 247, 249–250; see also para. 356)

There is no doubt that *ubuntu*, as an ethic that prescribes living in a harmonious way with others, usually forbids doing something that one foresees will cause someone severe anxiety, fear, and other negative emotions and feelings. The question is whether it is always impermissibly degrading to do so.

I do not think so. Consider now a case different from ETHNIC CLEANSING, in which no psychological torment was imagined to be present among the aggressors before being killed. Here instead is IGLOO, another thought experiment designed to test the claim that it is necessarily wrong, because degrading, to knowingly cause another mental anguish:

You live in a very cold and isolated area in an igloo with your spouse and child. You have only one neighbor, who has his own igloo. You see that his igloo is deteriorating and urge him to fix it up. He elects not to do so, spending his time ice fishing instead. One day it becomes clear to both you and your neighbor that a major storm is headed your way. Your neighbor’s igloo now defunct, he

enters yours. However, there is not enough room in your igloo for your neighbor plus you and your family. When he is asleep, you remove him, installing you and your family. However, when you and your family sleep, he removes you and yours, forcibly retaking your igloo. The storm approaching, you eject him again, this time binding his legs and arms (and carrying him far away where you will not hear his screams), having reasonably judged such action to be necessary and sufficient to protect you and your family. Your neighbor suffers extreme mental agony, not knowing whether he will survive the storm, but reasonably suspecting not. He dies, and you and your family live.

Your actions in IGLOO are permissible, I submit, despite the fact of imposing great mental anguish upon your neighbor prior to his being killed. It therefore cannot be the bare presence of foreseen psychological torment leading up to intentional killing that makes an action impermissibly degrading by an attractive interpretation of an *ubuntu* morality.

Premeditation

At another point, the Court says that the ethic of *ubuntu* entails that the death penalty is degrading because it involves a planned and calculated killing, not merely an intentional one preceded by psychological torment. Consider these remarks:

[U]buntu expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity. . . . It is against this historical background and ethos that the constitutionality of capital punishment must be determined. The death penalty sanctions the deliberate annihilation of life. . . . This “planned and calculated termination of life itself” was permitted in the past. . . . Is it *now* permissible? (CCRSA 1995: para. 263–265; see also para. 314, 316, 357)

Of course, the question posed at the end is rhetorical, the implied answer being “no.”

The case of IGLOO serves as a forceful counterexample to this rationale against the death penalty. If premeditated killing (perhaps along with the imposition of psychological torment) were enough to render an action degrading and hence wrong to perform, then it would be wrong to kill your neighbor in IGLOO. But it is not wrong to do so. Therefore, premeditated killing cannot be what about the death penalty that the friend of *ubuntu* should find degrading.

Inalienable Right to Life

A different explanation of why capital punishment might be degrading in light of an African morality is that it violates a right to life that everyone has and no one can lose, simply because they are human beings in the biological sense (not in the sense of having *ubuntu*, which, of course, varies widely among people). Consider these remarks from the Court:

[There is a need to] recognise the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings, so that South Africans may also appreciate that even the vilest criminal remains a human being (*Furman v Georgia, supra*). In my view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both. (CCRSA 1995: para. 311; see also para. 313, 229 as well as Gbadegesin 1985)

According to this reasoning, the bare fact that a killer is a member of the human family, a potential part of a communal relationship, means that he has a right to life that would be violated by the intentional killing of him inherent to execution, even if doing so would (hypothetically) deter others and save more lives.

However, if, by the ethic of *ubuntu*, those who *have killed* retain an inviolable right to life simply by virtue of being human, then so do those who are merely *attempting to kill*. Aggressors, no less than offenders, are of course human beings. And so this rationale counterintuitively implies that all cases of killing aggressors when necessary and sufficient for other-defense are impermissible. If “inherent in all human beings” is a right to life that may not be violated by intentional killing, then it would be impermissible to kill the aggressors in ETHNIC CLEANSING and IGLOO. But it is, in fact, permissible. Hence, this purportedly *ubuntu*-based account of why the death penalty is degrading is implausible.

End-Seeking

Often the death penalty is imposed because it is expected to have certain consequences, perhaps in the thought that it would protect society from the offender, cost less than life in prison, or make the victim’s family obtain “closure.” Regardless of whether capital punishment would in fact benefit society in these ways,¹² it might be thought that it would be degrading to impose the death penalty as a means to any end.

[E]ven if the end was desirable, that would not justify the means. The death penalty violates the essential content of the right to life embodied in Section 9, in that it extinguishes life itself. It instrumentalizes the offender for the objectives of state policy. (CCRSA 1995: para. 313)

This rationale seems to leave open the possibility that the death penalty could be justified as an “end in itself,” apart from any of its results. However, it is unlikely that an ethic of *ubuntu* could entail such a retributive claim, for, as noted above, most believe that properly valuing harmonious relationships means rejecting retribution and instead maintaining that justified punishment must be expected to have some good consequence such as repairing broken relationships or protecting society. But if the Court is correct that *ubuntu* rules out sacrificing life for the sake of any benefits doing so might produce, then there is nothing left by which to justify the death penalty.

However, this rationale runs afoul of both ETHNIC CLEANSING and IGLOO. In both cases, life itself is being extinguished for the sake of realizing good outcomes of saving innocent lives. Since it appears to be perfectly permissible to “instrumentalize” an aggressor’s life so as to benefit the innocent, it cannot be end-seeking as such that entails that the death penalty is degrading, from the standpoint of *ubuntu*.

Deterrence

It might be thought that it is not the pursuit of just any end that would make the death penalty objectionable but the particular end of deterrence. If one executes someone in order to cause others to fear a penalty and thereby desist from crime, it might seem as though one is treating him merely as a means, something *ubuntu* would likely forbid as unfriendly or discordant behavior.

The state is the representative of its people and in many ways sets the standard for moral values within society. If it sanctions by law punishment for killing

by killing, it sanctions vengeance by law. If it does so with a view to deterring others, it dehumanises the person and objectifies him or her as a tool for crime control. (CCRSA 1995: para. 316)

Of course, a state might adopt the death penalty for a reason other than deterrence, in which case this rationale would not apply. However, one of the two most common rationales for capital punishment is deterrence, the other being retribution. If it were true that *ubuntu* ruled out retribution, and if it were also true that it forbade deterrence, then it would seem that *ubuntu* would be inconsistent with the major rationales proffered for the death penalty, again leaving little, if anything, left to justify it.

Neither ETHNIC CLEANSING nor IGLOO concerns deterrence, and so, in order to test the current rationale, I need to construct a case that does. Think about ETHNIC CLEANSING¹:

You are a peacekeeper who sees four men chasing an innocent, elderly woman with machetes, trying to kill her merely because she has a different ethnicity. You have a machine gun. After firing a warning shot to deter the men, they are not scared off and continue after the woman. You shoot one of the aggressors, reasonably judging it to be necessary and sufficient to scare off the other three and thereby protect the innocent. The aggressor you have shot dies, the other three run away out of fear for their lives, and the woman lives.

In this modified version of ETHNIC CLEANSING, you are using “a person as a tool for crime control,” in particular, as a deterrent, but it does not look impermissible to do so. Even if the person is being used as a tool, he is not being used *merely* as a tool, which would indicate indignity.

Total Control After the Offense

This is the Court’s last rationale for thinking that it follows from an *ubuntu* ethic that the death penalty is a violation of human dignity. The basic idea is that it would be degrading to bind and kill someone who is not presently committing any crime.

Force used by the State in cases of self-defence or dealing with hostage-takers or mutineers, must be proportionate to the danger apprehended; the issue arises because two or more persons compete for the right to life; for the one to live, the other must die. The imminence of danger is fundamental; to kill an assailant or hostage-taker or prisoner of war after he or she has been disarmed is regarded as murder. Executing a trussed human being, long after the violence has ended, totally lacks proportionality in relation to the use of force, and does not fall within the principles of self-defence. (CCRSA 1995: para. 355–356)

Note that no mention is made of *ubuntu* here. The Court does not explicitly ground this reasoning in African morality, but it is widely held that African thinking about the use of force permits it in cases of self- and other-defense (see note 10). And so it is natural to see whether the death penalty coheres with the norms governing the employment of deadly force for purposes of defense from aggressors. The Court maintains not and hence implies that the death penalty is degrading, since it is beyond the realm of other-defense to kill someone who has aggressed but who no longer poses a threat.

As will be clear below, this rationale points in the direction of the one that I shall claim is successful. However, as the Court expresses itself, the rationale is vulnerable to objection. Consider a new hypothetical case, SHARK, in which it appears permissible to kill someone who has aggressed and is no longer a threat himself, if doing so is essential for preventing a threat for which he is nonetheless responsible.

You and your brother are innocent, but nonetheless have a common enemy. Your enemy kidnaps your brother and throws him in shark-infested waters. You reasonably judge that binding your enemy and tossing him into the water would be necessary and sufficient to redirect the sharks' attention and thereby save your brother. Your enemy dies, and your brother lives.¹³

The case suggests that it can be permissible to kill a "disarmed" and "trussed" human being who no longer poses the threat of death or comparable harm. One might object that in SHARK it is not true that the killing is done "long after the violence has ended." In one sense that is true, for the sharks are still a threat. However, the thrust of the Court's reasoning is that capital punishment is degrading because the "killing by the state takes place long after the crime was committed" (CCRSA 1995: para. 138). SHARK is a counterexample to that claim.

That completes my critical discussion of the reasoning that the South African Constitutional Court provides for thinking that African morality entails the indignity of capital punishment. I have distinguished eight *ubuntu*-based explanations that the Court gives for the degradingness of the death penalty, and I have argued that all of them face a common problem; each entails that certain killings in other-defense are impermissible that in fact appear permissible, at least to those who do not hold pacifism, a line of thought far from dominant in African thinking about violence. In the following section, I aim to present an account of why an *ubuntu* morality forbids the death penalty as degrading that is both more African and more plausible for permitting deadly force against aggressors.

A New Interpretation of Human Dignity in Light of *Ubuntu*

An attractive *ubuntu*-based understanding of dignity would provide reason to think that capital punishment is invariably degrading but that killing in other-defense is often not. As I have shown above, executing offenders and killing aggressors can share many of the same features; they both could involve intentional, even premeditated, killing of a subdued assailant who suffers psychological torment beforehand, which killing is done for the sake of good outcomes such as protection of the innocent, perhaps by means of deterrence. In light of all the potential similarities between the death penalty and deadly force, what might be the moral difference between them?

I submit that a salient difference concerns the identity of the individuals who could be saved by killing the assailant. In the case of an aggressor, killing him is most clearly permissible when doing so is necessary and sufficient to prevent the killing of (or other, comparable harm to) those threatened because of wrongful choices he has made. That is a common feature in ETHNIC CLEANSING, ETHNIC CLEANSING¹, IGLOO, and SHARK; in all four cases, killing an aggressor is essential to save those whom he is responsible for threatening with death. In contrast, the death penalty never serves that function.¹⁴ Even if killing an offender turned out to deter other killings, those saved by the killing of the offender would not be those *he* has put in a situation of facing the prospect of death (or similar injury). If there is a principled¹⁵ difference to be found between imposing

death on an offender as a way to punish (and perhaps to prevent further murder) and using deadly force against an aggressor as a way to protect innocent lives, this must be it.

The question now is whether there are resources within an African ethic of *ubuntu* to underwrite the moral significance of this difference. I submit that there are. Recall that *ubuntu* urges us to live in a harmonious way and to eschew discord. I pointed out that an attractive understanding of harmony is in terms of the combination of identity and solidarity, or, roughly, friendship, where discord is naturally construed as enmity. This secular strand of African thinking instructs us to prize friendly relationships, and it will therefore be of use to reflect on the normativity of friendship.

Imagine a situation in which you are being unfriendly to an existing friend; in the terms developed here, you have thought of yourself as an “I” separate from her (not as a “we”), you have undermined her goals (rather than shared them), you have sought to harm her in some way (instead of having acted to benefit her), and you have failed to emotionally care about her and be moved to act for her sake (and have instead been callous and self-interested). Suppose, now, that you can do one of two things. On the one hand, you could end the unfriendliness and seek to make amends with your friend. On the other hand, you could make two new friends. Reflection on the proper way to value friendship suggests that, if you must choose, you should do the former action. Generally speaking, ending unfriendliness takes priority over promoting friendliness.

Suppose, now, that you refuse to end your unfriendliness and continue to mistreat your friend (whom we presume does not warrant it by virtue of having been unfriendly herself). If a third party were in a position to force you to stop, even if it cost you two prospective new friends, he would be justified in doing so. For instance, if he were able to get you to stop being mean by threatening to withdraw some privilege or to tell others of your behavior, he would not be dishonoring the value of friendship in doing so—just the opposite. He would be failing to respect friendship, however, if he threatened to cut off your arm to get you to stop being mean or if, after you had stopped being mean and had apologized, he threatened you in public so as to make others fearful of the consequences of being mean.

What do these thought experiments have to do with the difference between the death penalty and deadly force? This: the adherent to an ethic of respect for friendly relationships can sensibly reject the execution of offenders while accepting the killing of aggressors because only aggressors are, *by virtue of being killed, being forced to correct their own proportionately unfriendly relationships*. Even if capital punishment were to prevent substantial enmity, viz., killings, elsewhere in society by means of deterrence, it would not be essential to protect anyone threatened by the *offender's* own proportionate discordance.

To capture this point in a clear way, I submit that this principle follows from U, the abstract *ubuntuist* prescription to live harmoniously or to honor communal relationships:

U1: An act is wrong if it involves substantial discord [A]—unless the discord is directed to a discordant agent and is reasonably foreseen as necessary and sufficient to protect those threatened by a proportionate degree of his discordance [B].

This principle forbids the death penalty but permits deadly force. The [A] clause rules out using a very unfriendly means, such as killing, for the sake of anything, even the promotion of friendliness or the prevention of other unfriendliness. But then the [B] clause makes an exception to A's blanket prohibition against coercion. One may treat another in a very unfriendly way when and only when doing so is directed against a person whose actions

have been, are or will be unfriendly, is no greater than his unfriendliness, and is expected to protect those on the receiving end of his unfriendliness.

U1 is not vulnerable to purported counterexamples that one might be initially tempted to suggest. For instance, although capital punishment might serve the function of deterrence and hence prevent discord proportionate to what the offender has done, it would not be necessary to end any proportionate discordance that the *offender* is engaging in or responsible for. The person on death row is no longer torturing, mutilating, or killing, and so the death penalty would not help those threatened by *his* proportionate discordance. Furthermore, even if execution were to (m)end discordant relationships that the offender still has, e.g., with the victim's family, this discordance would not be *proportionate* to the discordant action of execution.

However, there do turn out to be conceivable situations in which U1 would not entail that the death penalty is wrong. First, it follows from the principle that the death penalty would be justified if it somehow brought a killer's victims back to life. My intuition suggests that, in that merely possible world, the death penalty would in fact be justified, and so I do not take this implication to be a problem for U1.

For another, somewhat more realistic exception, U1 would not forbid capital punishment if it were necessary and sufficient to prevent others from carrying out nefarious plans for which the offender is responsible. Imagine the offender has been culpable for directing crimes against humanity. He has inspired people to commit genocide, provided them weapons, coordinated their attacks, rewarded them for their misdeeds, etc. Suppose, for the sake of argument, that executing him would be the only way to successfully prevent his underlings from carrying out more atrocities that he has authorized. Then execution would be of a person who has been discordant, would be proportionate to the degree of his discordance, and would be necessary and sufficient to protect those threatened by his discordance. Again, my intuition suggests that execution would be justified in this extraordinarily rare case. For my part, I see no relevant difference between execution in such a case and killing in the above other-defense cases, particularly SHARK.

I conclude that U1 is grounded in the normativity of friendship, which an appealing, secular African ethic directs one to prize, and that it adequately differentiates between the death penalty and deadly force. However, U1 makes no mention of human dignity, and part of my task in this article is to propose a new, African-inspired conception of dignity that not only would explain why executing offenders is (nearly always) degrading and why killing aggressors need not be, but also would promise to ground human rights more generally. The general idea of human dignity is that of a superlative final value that (nearly) every human being in the biological sense has so long as she remains alive. Philosophically, the most plausible way to account for universally binding duties not to seriously interfere in people's lives for the greater good, i.e., for *human rights*, is to appeal to the idea that individuals have a dignity that demands respect. So, if offenders have a human right not to be executed, and if aggressors lack a human right not to be killed (when doing so would alone save the lives of their potential victims), which conception of human dignity explains these judgments? And which conception of human dignity also promises to underwrite a variety of additional firm judgments about human rights, such as the claim that potential victims have a human right against political institutions to protection from aggressors?

I suggest that it is the idea that a human being has a dignity *in virtue of her capacity for communal relationships*, i.e., for relations of identity and solidarity. On this view, what makes us more special than the animal, vegetable, and mineral kingdoms is that we can love others in a way that no other entity can.¹⁶ Of course, some people with this capacity do not actualize it and instead misuse it, but, by the present view, they retain a dignity

nonetheless that demands respect. Note that a person could have the ability to engage in loving or friendly relationships if she were a purely physical creature, and so this view is independent of any spiritual notion that a person's dignity is a function of God. In addition, although a person does need the Kantian ability to make voluntary decisions in order to engage in communal relationships, they are not one and the same thing; for one could make deliberative choices that have nothing to do with one's identity and solidarity with others.

The idea that people's dignity is constituted by their capacity to identify with others and to help them for their sake explains the appeal of U1 well. Killing in other-defense need not degrade the aggressor's capacity for such friendship, because (and when) only such an action ends the proportionately unfriendly relationship between him and the people threatened by it. However, capital punishment invariably¹⁷ degrades the offender's capacity for friendship, since execution would not be essential to end the proportionately unfriendly relationship between him and his victims. Hence, the African-inspired and dignity-based moral principle that would forbid the death penalty as degrading but permit killing in other-defense is this:

U2: An act is wrong (at least in part) because it degrades the individual's dignity that she has in virtue of her capacity to engage in harmonious relationships.

While I conceive U2 as entailing and explaining U1, I am as yet unsure of how U2 and U precisely relate to one another, specifically, of whether they are ultimately equivalent, whether U2 is more fundamental than U, or whether they need to be combined in some way. That deep and tricky issue in moral philosophy need not be settled in order to recognize a promising new theoretical basis for human rights; reflection on U's injunction to prize harmonious relationships has led me to posit U2 as a plausible dignity-based explanation of the human right of an offender not to be executed and of an aggressor's lack of a human right not to be killed.

U2 also provides a *prima facie* attractive account of a wide array of other human rights claims. The basic idea is that violations of human rights may be philosophically conceived in terms of substantially *unfriendly behavior*. More carefully, according to this perspective, a human rights violation just is a serious degradation of people's capacity for friendly relationships, which failure takes the form of a significant degree of unfriendly behavior that is not a proportionate, counteractive response to another's unfriendliness. What genocide, slavery, systematic rape, human trafficking, apartheid, and totalitarianism arguably have in common is, roughly, that those who engage in these practices treat people who are not being unfriendly in an extraordinarily unfriendly way, viz., by thinking of others as separate and inferior, seriously undermining others' ability to pursue their own goals, seeking to grossly impair their quality of life, and exhibiting emotions such as *Schadenfreude* as well as motives such as self-interest.

In addition, U2, as a principle of respect for superlative value of our capacity for communal relationship, entails a human right against those with the relevant means to use deadly force and criminal procedure as needed to prevent the above kinds of human rights violations. That is, people have not merely the negative right not to have their capacity for community interfered with (when they have not misused that capacity) but also the positive right to protection from such interference. In addition, this principle probably entails that the poor have positive human rights against those with the relevant means to provide socioeconomic goods such as food, shelter, education, healthcare, culture, and other resources needed to develop their capacity for identity and solidarity.

Before concluding this article, I address two criticisms of U2 that readers are likely to have. One major strategy for replying to both is to show that U2 is no worse off than its strongest competitor, namely, the Kantian view that humans have a dignity insofar as they are capable of autonomous deliberation. In some cases, U2 can use argumentative resources available to the Kantian to avoid objections, while, in other cases, the objections might be unavoidable, but then they are, too, for the Kantian.

First, then, one might suggest that U2 does not entail U1. It might seem that killing an aggressor when necessary and sufficient to protect his potential victims from being killed by him, which U1 permits, is in fact to degrade the aggressor's capacity for harmonious relationships, which U2 forbids. After all, he is being killed, meaning that this special capacity of his is being obliterated.

However, the logic of respect for dignity implies that it is possible to impair or even to destroy the capacity that grounds it without such behavior constituting an impermissible indignity. To see this, consider the Kantian conception of respect for the dignity of persons. What has a superlative inherent worth for the Kantian is our capacity to make voluntary decisions. However, almost no Kantians are pacifists; they nearly all believe that the use of police and military force can be justified. How is that possible, if coercion stunts the actualization of the capacity to make a free choice? The answer is roughly that respecting the capacity to make a voluntary choice means responding proportionately to the way a person has elected to employ that capacity (e.g., Metz 2006). If a person has chosen to act wrongly, e.g., in a way that attacks another, most Kantians believe it would not be degrading to use force in response to this wrongful choice, at least if doing so were essential to protect others' capacity to choose for themselves. The friend of U2 can say parallel things; it need not be degrading of an aggressor's capacity to engage in friendly relationships if one must use force to prevent him from engaging in extremely unfriendly ones.

A second objection one might make to U2 is to point out that its conception of dignity limits the scope of those who have human rights. There are some human beings who are incapable of engaging in friendly relationships, e.g., the severely retarded. U2 entails that any such beings lack dignity and hence lack human rights, which might seem counterintuitive.

In reply, the friend of U2 can point out that the Kantian conception of dignity equally entails that severely retarded individuals lack dignity, meaning that the present objection provides no reason to reject U2 in favor of its most powerful, Kantian rival. Furthermore, the defender of the Kantian conception often provides reasons for not mistreating severely retarded individuals in spite of their not having a dignity (see, e.g., Kant 1781/1981: 239–241), reasons that can be invoked on behalf of U2. For example, if we generally mistreated severely retarded individuals, then we would dull our moral sensitivities and be more likely to mistreat persons. In addition, severely retarded individuals are similar to normal adult human beings, so that when one mistreats the former, one is expressing disrespect for the latter.¹⁸ Lastly, since persons often care about severely retarded humans, mistreating them constitutes a lack of respect for persons.

Conclusion: Harmony Versus Autonomy

I do not have the space to defend this African-inspired conception of dignity systematically. My aim in this article has instead been to articulate a new analysis of dignity grounded in a secular, Afro-communitarian moral perspective and to demonstrate that it: explains why the death penalty is a degrading violation of an offender's human right, explains why deadly force need not violate any human right of an aggressor, and promises to account for many

other intuitive claims about human rights. I hope to have shown that a principle of respect for our capacity to love is an underdeveloped view inspired by sub-Saharan moral thinking that is worth taking seriously as a philosophical ground of human rights. I conclude by posing questions that should be answered elsewhere, supposing that I have accomplished my aim here. There are two major projects I suggest should be undertaken in future work.

First, it would be revealing to consider how well U2 accounts for other cases of “forced life and death choices” besides killing aggressors in defense of others. For instance, how might U2 handle cases of “innocent threats,” i.e., situations in which a choice must be made between killing an innocent person who is a threat to oneself and letting oneself be killed? How would it deal with “redirected threats,” that is, so-called “trolley cases” in which a impersonal threat such as a runaway train will kill a greater number of innocents unless a third-party steers it away toward a smaller number whom it will kill? U1, as it stands, forbids killing in cases of innocent and redirected threats, but further reflection on U2 might lead us to add onto it.

Second, U2 needs to be systematically compared with its strongest rival, which, as I have said, I take to be the Kantian conception of dignity. Precisely how could conceiving of dignity as grounded on autonomous agency forbid the death penalty but permit killing in other-defense? How might a Kantian theory deal with innocent and redirected threats? How do the Kantian theory and U2 compare when it comes to grounding human rights, say, to a fair trial or not to be tortured?

I like to think that the discussion in this article indicates one major respect in which African ideas about morality should be addressed by analytic ethicists, philosophers of law, and human rights theorists. Although it is extremely likely that human rights are philosophically grounded on a conception of human dignity, I submit that it is not clear which conception is the most attractive. I have suggested that they are unlikely to rest on a conception of human dignity *qua* spiritual essence. However, at this point, it is an open question whether they are grounded on the more Western notion of dignity as the capacity for autonomy or the more African construal of dignity in terms of the capacity for harmonious or communal relationships. I hope the reader will agree that there is some important and fascinating cross-cultural normative philosophical work to be done.

Notes

1. Although few of these texts mention the death penalty, it is clear that if their authors were to address it, they would appraise it in light of the inherent value of spiritual life.
2. Kant himself was a notoriously staunch defender of the death penalty, but contemporary Kantians inspired by his work tend to believe that Kant misapplied his own fundamental moral principle.
3. Chenwi (2007) presents a comprehensive analysis of the legal aspects of the death penalty in Africa.
4. For nondignity-based explanations of why the death penalty is objectionable on African grounds or for African societies, see Owoade (1988); Òkè (2007).
5. Future references to this court case will use the abbreviation “CCRSA” and will refer to relevant paragraphs, not pages. Maduna (1996) provides a summary of the case, in which all 11 justices wrote separate opinions for the same conclusion.
6. The final South African Constitution that was adopted in 1996 does not use the word “*ubuntu*,” although the South African Constitutional Court as well as lower ones still appeal to it on occasion as a fundamental value when interpreting legal documents.
7. Much of the rest of this section is drawn from Metz 2007, 2009a, 2009b.
8. For yet another, representative comment, consider these remarks about the practices of the G/wi people of Botswana: “[T]here was another value being pursued, namely the establishing

- and maintaining of harmonious relationships. Again and again in discussion and in general conversation this stood out as a desired and enjoyed end in itself, often as the ultimate rationale for action” (Silberbauer 1991: 20).
9. This conception of what makes something African implies that there could be accounts of morality beside the one I propose that are also worthy of the title. Furthermore, this conception implies that some idea could count as “African” without being unique to the African continent. I am therefore not saying that there is anything utterly geographically distinctive about the moral theory I articulate; though it does differ in striking ways from Kantianism, utilitarianism, and contractualism, which dominate Western normative theoretical analysis of human rights.
 10. This argumentative strategy is not an alien imposition on an African ethic, for it is common cause among those who have addressed the use of force in sub-Saharan moral thinking to note that it may be used in self- and other-defense. Consider representative claims from the literature such as these: “In African ethical thinking, violence in self-defence is justifiable” (Kasenene 1998: 41), and “The authority of law rests in the first place upon its recognition of self-defence as an inalienable individual or collective right. . . . This is the basis of *ubuntu* constitutional law” (Ramose 1999: 120). See also the reflections of the Christian independence leader of Zambia in Kaunda (1980).
 11. There are additional problems with a rehabilitationist rationale against the death penalty. For one, there might be cases in which capital punishment would in fact be necessary to reform an offender; perhaps no other penalty would lead an offender to know what it was like for his victim and to feel remorse as a result, or perhaps only impending death would prompt an offender to mend personal relationships broken long ago. For another, rehabilitationism rules out even life imprisonment without parole, for that, too, would be a “rejection of rehabilitation as a possibility,” supposing capital punishment were.
 12. Which is normally unlikely—recidivism rates are extraordinarily low for murder, and it costs more to execute than to imprison because of the appeals process.
 13. For a case that makes the same point but is even more hypothetical or “unrealistic,” see McMahan (2004: 721).
 14. Well, almost never. See the two idiosyncratic counterexamples I come up with below.
 15. There could be other, empirical differences. For example, one might suggest that the death penalty does not in fact deter and hence will not save any lives, whereas killing in other-defense might well serve the function of protecting the innocent. However, even if, *per argumentum*, the death penalty did deter, I and many readers would still have the intuition that it would be degrading.
 16. I set aside the empirical issue of whether higher animals such as chimpanzees, dolphins, and elephants are capable of communal relationships in the relevant sense.
 17. Aside from the unusual, hypothetical exceptions mentioned above.
 18. Consider why burning an effigy is disrespectful: damaging a mere likeness of a person can express disrespect of that person. Similarly, damaging something like beings capable of friendly relationships might be disrespectful of those beings.

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