

# Reconciliation as the Aim of a Criminal Trial: *Ubuntu's* Implications for Sentencing

THADDEUS METZ

**ABSTRACT:** In this article, I seek to answer the following questions: What would a characteristically African, and specifically relational, conception of a criminal trial's final end look like? What would the Afro-relational approach prescribe for sentencing? Would its implications for this matter forcefully rival the kinds of penalties that judges in South Africa and similar jurisdictions typically mete out? After pointing out how the southern African ethic of *ubuntu* is well understood as a relational ethic, I draw out of it a conception of reconciliation that I advance as a strong candidate for being the proper final end of a criminal trial. I argue that, far from requiring forgiveness, seeking reconciliation can provide strong reason to punish offenders. Specifically, a reconciliatory sentence is one that roughly has offenders reform their characters and compensate their victims in ways the offenders find burdensome, thereby disavowing the crime and tending to foster cooperation and mutual aid. I argue that this novel account of punishment is a *prima facie* attractive alternative to more familiar retributive and deterrence rationales, and that it entails that widespread practices such as imprisonment and mandatory minimum sentences are unjust.

**KEYWORDS:** African jurisprudence, communal relationship, criminal justice, imprisonment, punishment, reconciliation, sentencing, sub-saharan morality, *ubuntu*

**AUTHOR:** Distinguished Professor, University of Johannesburg.  
Email: [tmetz@uj.ac.za](mailto:tmetz@uj.ac.za)

**ACKNOWLEDGEMENTS:** This article has been improved as a result of oral feedback received from participants at the *Constitutional Court Review IX* Conference and written feedback from Lucy Allias, Stephen Kershner, Stu Woolman and two anonymous reviewers.

## I INTRODUCTION

It might seem obvious what the point of a criminal trial is: to ascertain whether there is legal guilt and to impose a penalty in response to it. However, from a philosophical perspective, it is fair to ask why judges should impose a penalty in response to a crime, not to mention which penalties are appropriate. It is not enough to respond that judges should impose certain penalties because the common law or a legislative or constitutional provision instructs them to, for that begs the question of why there should be law requiring judges to respond to crimes in those ways.

Salient accounts of what judges should ultimately be trying to achieve when responding to crime in contemporary English-speaking jurisprudence include protecting rights, giving people what they deserve and other views that are Western and individualist (in senses spelled out below). These conceptions of the proper final end of a trial have important ramifications for which penalties, if any, a judge ought to impose.

In this article, I seek to answer the following cluster of questions: What would a characteristically African, and specifically relational, conception of a criminal trial's final end look like? What would the Afro-relational approach prescribe for sentencing? Would its implications forcefully rival the kinds of penalties that judges in South Africa and similar jurisdictions typically mete out?

In what follows I answer these questions about respects in which a judge should sentence offenders in the light of *ubuntu*, the Nguni term meaning humanness that is widely used in South Africa and more broadly on the continent to capture indigenous sub-Saharan ideas about morality. After pointing out how *ubuntu* is well understood as a relational ethic, I draw out of it a certain conception of reconciliation that I advance as a strong candidate for being the proper final end of a criminal trial and as having prima facie attractive implications for how to punish offenders. Although a reconciliatory approach to sentencing is *from* (South) Africa, it is not meant to be only *for* (South) Africa; those working in other traditions should be able to find something of prima facie interest in it.

Of course, others are known for having argued that *ubuntu* and related traditional African values prescribe reconciliation, social cohesion or restorative justice.<sup>1</sup> However, when such an approach has been applied to contemporary, large-scale societies, it has usually been viewed as an alternative dispute resolution mechanism, that is, as something to be sought only in the cases of adolescents,<sup>2</sup> or less serious offences,<sup>3</sup> or transitional societies,<sup>4</sup> or customary law matters.<sup>5</sup> In contrast, I am interested in how *ubuntu* might ground a mainstream approach to the way judges in 'modern' societies punitively respond to violations of criminal law, which has yet to be considered.

---

<sup>1</sup> J Murungi 'The Question of an African Jurisprudence' in K Wiredu (ed) *A Companion to African Philosophy* (2004) 522–523; W Idowu 'African Jurisprudence and the Reconciliation Theory of Law' (2006) 37 *Cambrian Law Review* 1; D Louw 'The African Concept of *Ubuntu* and Restorative Justice' in D Sullivan and L Tiffit (eds) *Handbook of Restorative Justice* (2006) 161; and A Krog 'This Thing Called Reconciliation: Forgiveness as Part of an Interconnectedness-towards-Wholeness' (2008) 27 *South African Journal of Philosophy* 353.

<sup>2</sup> *Dikoko v Mokhatla* [2006] ZACC 10 at para 115 (Sachs J points out disapprovingly). (*Dikoko*)

<sup>3</sup> South African Law Commission *Sentencing: A New Sentencing Framework* (2000) xviii.

<sup>4</sup> D Tutu *No Future without Forgiveness* (1999).

<sup>5</sup> F Mnyongani 'Duties of a Lawyer in a Multicultural Society: A Customary Law Perspective?' (2012) 23 *Stellenbosch Law Review* 352.

In addition, others have contended that reconciliation essentially requires forgiveness of offenders or otherwise demands a non-punitive response to them if at all possible.<sup>6</sup> However, I argue that an *ubuntu*-based conception of reconciliation between disputants as the point of a criminal trial grounds a novel account of when and how judges should punish offenders, one that is a real competitor to dominant approaches to sentencing. In a nutshell, instead of seeking to give offenders what they deserve or to instil fear in prospective offenders so as to prevent rights violations, reconciliation would have offenders reform their characters and compensate their victims in ways the offenders find burdensome, thereby disavowing the crime while tending to foster cooperation and mutual aid.

In order to illustrate the differences between these approaches to punishment, I address the recent South African Constitutional Court case of *Ndlovu v The State*.<sup>7</sup> The case was about precisely which mandatory minimum prison sentence to impose on Brendan Solly Ndlovu, who was morally guilty of having both committed rape and inflicted serious bodily harm, but had been charged with only the former. Ndlovu naturally preferred a lighter sentence than what the state sought. I, however, provide reason to doubt both sides of the dispute, maintaining that no mandatory minimum prison sentence would have been ideal, even given Ndlovu's serious crimes. Although mandatory minimums could make sense by appeal to retribution or deterrence, I argue that they are largely out of place in a reconciliatory scheme, by which judges would routinely need to attend to the specifics of the offender, his victim and the broader social context. Furthermore, I contend that while punishing with imprisonment could well be prescribed by considerations of retribution or deterrence, doing so is normally proscribed by a reconciliatory perspective.

In the next section of this article, I begin by reminding readers of the most influential conceptions of the point of a criminal trial, noting how it entails certain conceptions of just punishment, and indicating why these conceptions count as Western and individualist (section II). Then, I sketch a moral-philosophical interpretation of the African ethic of *ubuntu* and draw from it a certain conception of reconciliation (section III). In the next section, I suppose that the point of a criminal trial is to bring about such reconciliation and spell out what this would mean for how to punish (section IV). Along the way, I contrast reconciliatory sentencing with the more Western/individualist theories of punishment as well as indicate how reconciliatory sentencing prescribes changes to some current practices that these theories support using *Ndlovu* as a foil. I conclude by noting some further research that it would make sense to undertake. This includes how to obtain evidence of guilt in a criminal trial and what to criminalise in the first place, supposing this article has advanced a plausible, Afro-centric and reconciliatory alternative to dominant models of criminal justice (section V).

## II DOMINANT PHILOSOPHIES OF CRIMINAL JUSTICE

In this section I briefly recount the philosophies of criminal justice that have been particularly prominent in English-speaking jurisprudence and have influenced practice in South Africa and similar jurisdictions in both Africa and the West the most. I also explain why I label

<sup>6</sup> J de Gruchy *Reconciliation: Restoring Justice* (2002) 170, 178–179; Krog (note 1 above); D Tutu 'Foreword' in C Villa-Vicencio (ed) *Walk with Us and Listen: Political Reconciliation in Africa* (2009) ix; F de Klerk 'The Need for Forgiveness and Reconciliation' in F du Toit & E Doxtader (eds) *In the Balance: South Africans Debate Reconciliation* (2010) 27.

<sup>7</sup> *Ndlovu v The State* [2017] ZACC 19, 2017 (10) BCLR 1286 (CC)(*Ndlovu*).

them ‘Western’ and ‘individualist’, in contrast to the more ‘African’ and ‘relational’ approach articulated in the following section.

By ‘criminal justice’ I mean the contested issue of how the political community should respond morally to legal transgressions, where one potential response is the infliction of punishment. State punishment, in turn, is essentially a matter of trying to burden or deprive someone in response to a legal transgression that has been committed (or represented as such).<sup>8</sup> So defined, a criminal justice system that includes state punishment differs from civil justice, defensive force and quarantine, which do not necessarily include aiming to burden someone because of a legal transgression.

Retributivism, or the ‘pay back’ theory, is one influential account of why there should be a criminal trial and of how state punishment should be inflicted to achieve its final end. I use the term ‘retributivism’ broadly to signify the view that the aim of a trial should be to determine whether someone is guilty of having broken a just law and to impose a penalty that is proportionate to the crime he committed in the past. In the South African context, this approach is often alluded to with the suggestion that sentencing ought to fit ‘the nature of the crime’ or ‘the seriousness of the offence’ and that there is a presumption against ‘disturbing disparities’ or a ‘striking difference’ between two sentences for the same crime. Someone guilty of rape, such as Ndlovu, should invariably receive a harsh penalty, much harsher than someone guilty of stealing a candy bar, and just because of what they have respectively done.

Within the genus of retributivism, philosophers of law have articulated various species. For instance, there is desert theory, the view that the aim of a criminal trial should be to give offenders what they deserve for having culpably done wrong.<sup>9</sup> Just as one can positively deserve a job, a raise or a reward of a sort that is proportionate to having done well, so one can negatively deserve a penalty that is fitting in respect of having acted poorly.

Another instance of retributivism is fairness theory, the view that the point of a criminal trial is to ascertain which, if any, crime occurred and to impose a penalty that will remove the unfair advantage the criminal thereby took of other law-abiding residents.<sup>10</sup> In order for there to be rule of law, everyone must restrict their liberty by obeying it, such that when someone breaks the law, she is getting the benefit of the rule of law without undergoing the burden needed to produce it. Punishment is thought to remove the unfairness by imposing a burden similar in degree to that which the offender failed to carry.

Retributivism is a ‘backward-looking’ view,<sup>11</sup> directing a judge to consider the past in order to ascertain what to do in the present. When imposing a sentence, a judge has to consider whether a defendant is guilty of a crime and, if so, how grave a crime it was, and from that determine which penalty is proportionate to the severity of the crime. The only consideration about the future a retributivist might routinely consider is whether by imposing a penalty on an offender the court would foreseeably bring undeserved harm to

---

<sup>8</sup> H Bedau & E Kelly ‘Punishment’ in E Zalta (ed) *Stanford Encyclopedia of Philosophy* (2015) section 2, available at <https://plato.stanford.edu/entries/punishment>.

<sup>9</sup> A von Hirsch *Past or Future Crimes* (1987); M Moore *Placing Blame* (1997); and S Kershner ‘A Defense of Retributivism’ (2000) 14 *International Journal of Applied Philosophy* 97.

<sup>10</sup> J Murphy *Retribution, Justice, and Therapy* (1979); M Davis *To Make the Punishment Fit the Crime* (1992); and R Dagger ‘Playing Fair with Punishment’ (1993) 103 *Ethics* 473.

<sup>11</sup> The distinction between backward-looking and forward-looking theories of punishment comes from T Metz ‘Censure Theory and Intuitions about Punishment’ (2000) 19 *Law and Philosophy* 491 and ‘Legal Punishment’ in D Moellendorf & C Roederer (eds) *Jurisprudence* (2004) 555.

some other innocent parties such as his children. Otherwise, a retributivist does not believe that the point of a sentence is to prevent either the offender or others in society from committing crime down the road.

In contrast, the other familiar class of accounts of criminal justice are resolutely 'forward-looking', requiring the prevention of crime or similarly desirable outcomes in order for state punishment to be justified. Utilitarianism is one instance of this general category. According to this approach, the time, labour and other costs of a criminal trial are justified insofar as it would do some long-term good for society. In particular, a trial ought to put a judge in a position to ascertain whether imposing a penalty would reduce other, greater harms (bads) such as crimes, or produce compensating benefits (goods), for people more than any non-punitive response.<sup>12</sup>

However, utilitarianism is not the only forward-looking view, with many of those who believe in fundamental rights also maintaining that punishment must have some desirable effect in order to be just. Consider, for instance, the idea that by having committed a crime, a criminal forfeits his right not to be punished, and that he may justly be punished if and only if doing so would protect society from similar crimes in the future.<sup>13</sup> By this approach, punishment is justified in more or less the way force used in self- and other defence is, with the point of a trial being to ascertain whether someone has aggressed against others and thereby forfeited his rights and, if so, whether a penalty of some kind (no greater than the rights forfeited) would prevent future aggression either by him or others.

For both utilitarian and defensive force approaches, incapacitation and deterrence are central (even if not exhaustive) mechanisms by which punishment is thought to be desirable for controlling crime. Adherents to these influential forward-looking views welcome the prospect of potential (re-)offenders either being rendered unable to break the law or being afraid of what would happen if they exercised their ability to do so. Putting the likes of a rapist in prison for a long time could well serve both functions.

Although these are not the only accounts of why a punishment system should be established and maintained, they have been the most influential ones over the past two hundred or so years in English-speaking philosophy. They have grown out of the moral-philosophical soil that has been prominent in the West, including the duty-based principle of respect for persons articulated by Immanuel Kant; the natural rights ethic often ascribed to John Locke; and the utilitarian morality of Jeremy Bentham. It is in this sense that I call these theories of criminal justice 'Western'; they have been salient in the philosophical thought, and also juristic practice, of North America, the United Kingdom and Europe. These accounts have been prominent in

<sup>12</sup> J Smart 'Utilitarianism and Punishment' (1991) 25 *Israel Law Review* 360; R Brandt 'A Utilitarian Theory of Punishment' in J Sterba (ed) *Morality in Practice* (5th Ed, 1997) 512; and J Braithwaite and P Pettit *Not Just Deserts* (1990).

<sup>13</sup> D Farrell 'The Justification of Deterrent Violence' (1990) 100 *Ethics* 301; J Murphy 'Retributivism, Moral Education, and the Liberal State' and 'Why Have Criminal Law at All?' in J Murphy *Retribution Reconsidered* (1992); and P Montague *Punishment as Societal-Defense* (1995).

many Western cultures for a long time in ways they have not in others, such as the East Asian, Indian, Middle Eastern and African.<sup>14</sup>

Despite the important distinction between the backward- and forward-looking rationales for a criminal trial that have been prominent in the West, both share a common feature, namely, individualism. The accounts sketched above are all grounded on the idea that what gives people a moral status are features internal to them. For the Kantian it is our capacity to reason; for the Lockean it is that we own ourselves and what we work on; and for the Benthamite it is that we can feel pleasure or otherwise be satisfied. Crimes are typically viewed as degrading to an individual's ability to make a choice for herself, or as violating her rights to control her mind, body and what she has put herself into, or as causing unnecessary pain, with penalties being justified as ways of respecting an individual's choice, protecting individual rights to life, liberty and property, or preventing pain from coming to individuals (even if treated as a sum).

In the next section, I spell out an ethic that, in contrast, is characteristic of African cultures and is relational. From this perspective, what gives people dignity is roughly that they could interact cohesively, which grounds an approach to criminal justice according to which its aim should be to fix broken relationships, often by employing punishment.

### III UBUNTU AS A RELATIONAL MORAL PHILOSOPHY<sup>15</sup>

According to one large swathe of southern, and more generally sub-Saharan, African thought about morality, one's basic goal in life should be to become a real person or develop human excellence, that is, to exhibit *ubuntu*, with the central (if not sole) way to do so being roughly to commune or harmonise with others. After spelling out one plausible interpretation of what communion or harmony involves, I suggest that reconciliation is well understood as partial communion, a stepping-stone towards a fuller sort that would be ideal.

#### A An Afro-communal ethic

As Desmond Tutu, the influential South African Nobel Peace Prize winner and Chairperson of the Truth and Reconciliation Commission, has remarked of characteristically African approaches to morality –

[w]e say, 'a person is a person through other people'. It is not 'I think therefore I am'. It says rather: 'I am human because I belong,' I participate, I share ... Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* – the greatest good.<sup>16</sup>

---

<sup>14</sup> In using the geographical label 'Western' in this way, I am not implying that considerations of desert, fairness, utility and defensive force have decidedly influenced thought about criminal justice either everywhere in that location or only in it. Of course there have been some Western philosophers who have rejected all these accounts, and there have been some non-Western ones who have accepted some of them. The label is meant to designate what has been particularly recurrent (not universal) in much of a locale for a long while, relative to many (not all) other spaces and times. Hence, it is quite possible that a person who lives in Africa in the twenty-first century might not hold values that are below described as 'African'. That is, they may not subscribe to an ethos that possessed moral salience over much of the continent for several hundred years. For some defence of this way of using geographical labels, see T Metz 'How the West Was One: The Western as Individualist, the African as Communitarian' (2015) 47 *Educational Philosophy and Theory* 1175.

<sup>15</sup> This section relies on ideas previously articulated in T Metz 'South Africa's Truth and Reconciliation Commission in the Light of *Ubuntu*' in M Swart & K van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years on* (2017) 221.

<sup>16</sup> Tutu (note 4 above) 35.

As for what a harmonious or communal relationship involves in some more detail, consider the following statements from a variety of additional South African thinkers.

Former South African Constitutional Court Justice Yvonne Mokgoro remarks in an essay on *ubuntu* and the law, 'Harmony is achieved through close and sympathetic social relations within the group – thus the notion *umuntu ngumuntu ngabantu/motho ke motho ka batho ba bangwe* (a person is a person through other persons—ed.)'.<sup>17</sup> Gessler Muxe Nkondo, who has had positions of leadership on South Africa's National Heritage Council, says that '*ubuntu* advocates ... express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community'.<sup>18</sup> Nhlanhla Mkhize, an academic psychologist and Dean at the University of KwaZulu-Natal, remarks that 'personhood is defined in relation to the community ... A sense of community exists if people are mutually responsive to one another's needs ... [O]ne attains the complements associated with full or mature selfhood through participation in a community of similarly constituted selves ... To be is to belong and to participate'.<sup>19</sup> For a final example, two South African theologians, Mluleki Mnyaka and Mokgethi Motlhabi, understand *ubuntu* as follows:

Individuals consider themselves integral parts of the whole community. A person is socialised to think of himself, or herself, as inextricably bound to others ... *Ubuntu* ethics can be termed anti-egoistic as it (sic) discourages people from seeking their own good without regard for, or to the detriment of, others and the community.<sup>20</sup>

This characterization of *ubuntu* and other construals of communing or living harmoniously with others embrace two recurrent themes.<sup>21</sup> On the one hand, part of so relating is what I call 'identifying with others' or 'sharing a way of life', a matter of participating, being close, experiencing life as bound up with others, belonging and considering oneself a part of the whole. On the other hand, one finds references to sharing, being sympathetic, being committed to others, responding to others' needs and acting for others' good, which I call 'exhibiting solidarity' or 'caring'.

More carefully, it is revealing to understand identifying with another (or being close, belonging, etc) to be the combination of exhibiting certain psychological attitudes of we-ness and cooperative behaviour. The psychological attitudes include a tendency to think of oneself as a member of a group with the other and to refer to oneself as a 'we' (rather than an 'I'), a disposition to feel pride or shame in what the other or one's group does, and, at a higher level of intensity, an emotional appreciation of the other's nature and value. The cooperative behaviours include being transparent about the terms of interaction, allowing others to make voluntary choices, acting on the basis of trust, engaging in joint projects, and, at the extreme end, choosing for the reason that 'this is who we are'.

The other part of communing or harmonising, namely, exhibiting solidarity with another (or acting for others' good, etc), is also usefully construed as the combination of exhibiting

<sup>17</sup> Y Mokgoro 'Ubuntu and the Law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 17.

<sup>18</sup> G Nkondo 'Ubuntu as a Public Policy in South Africa' (2007) 2 *International Journal of African Renaissance Studies* 91.

<sup>19</sup> N Mkhize 'Ubuntu and Harmony' in R Nicolson (ed) *Persons in Community: African Ethics in a Global Culture* (2008) 39, 40.

<sup>20</sup> M Mnyaka & M Mokgethi 'Ubuntu and Its Socio-moral Significance' in M Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 69.

<sup>21</sup> T Metz 'Toward an African Moral Theory' (2007) 15 *Journal of Political Philosophy* 321.

certain psychological attitudes and engaging in certain kinds of behaviour. Here, the attitudes are ones positively oriented towards the other’s quality of life, and they include a belief that the other merits aid for her own sake, an empathetic awareness of the other’s condition, and a sympathetic emotional reaction to this awareness. The actions are not merely those likely to be beneficial, that is, to make the other better off in welfarist terms, but also, in the ideal case, are ones done for that reason and for the sake of making the other a better person or for the sake of communal relationship itself.

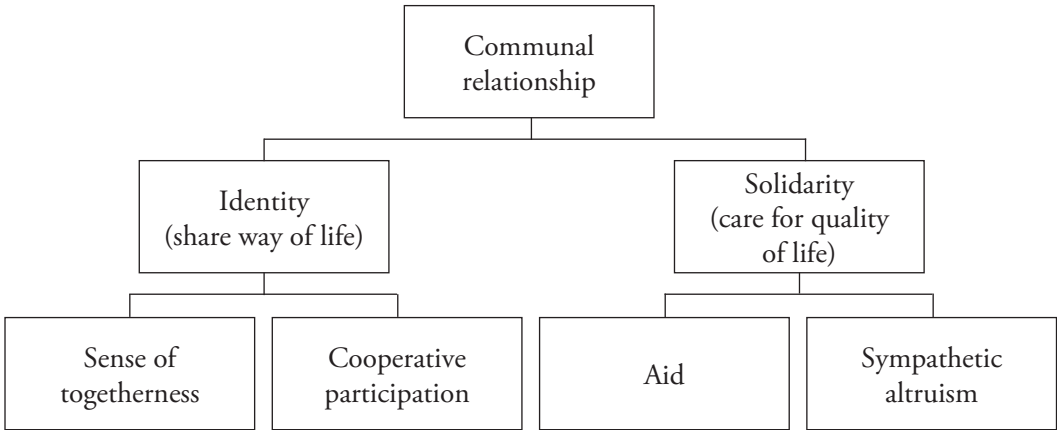


Figure 1: Schematic representation of communion

In sum, what I take to be the attractive moral core of *ubuntu* is the proposition that one ought to develop human excellence, which one can do by sharing a way of life with others and caring for them, or, more carefully, by treating people as having a dignity in virtue of their capacity to be party to these communal or harmonious relationships. This analysis of *ubuntu* is a moral-philosophical reconstruction, a secular one that does not rely on highly contested metaphysical claims about the existence of imperceptible agents such as ancestors and forces such as witchcraft, and one that should be prima facie appealing to readers from a wide array of cultures.

By this approach to ethics, any given agent should, roughly, seek to create, maintain and enrich relationships of sharing and caring. Conversely, one would act wrongly if one either failed to do so (at least with other innocent parties), or, worse, prized the opposite, anti-social relationships. On the face of it, actions that intuitively count as crimes are ones in which people act out of an ‘us versus them’ attitude, subordinate others, harm them and do so out of indifference to their good or even cruelty. In terms of *ubuntu*, it is relating discordantly in these ways that calls for a reconciliatory response.

One can see how an interest in reconciliation consequent to crime would follow from an ethic of treating people with respect insofar as they are capable of identity and solidarity. If what is of utmost importance is relating communally or harmoniously, then one who acts in a discordant manner should be treated in ways that are likely to counteract his discordance and to foster harmony between him and others. The focus on rebuilding relationships differs from an individualist focus on, say, giving people what they deserve or preventing pain from coming to them, with further contrasts drawn below.



## B Reconciliation as a function of communion<sup>22</sup>

In this section, I appeal to elements of the African ideal of communion to articulate the essentials of a desirable kind of reconciliation. It is only in the following section that I draw from it a certain punitive approach to responding to violations of criminal law.

In general, reconciliation is something that occurs after a period of conflict, ranging from a fight between spouses to systematic human rights violations between groups. In addition, while reconciliation is probably good for its own sake to some degree, few think of it as an ideal, with reconciliation instead usually being understood as something that lays a path towards an ideal. At a social level, reconciliation is not necessarily full-blown distributive justice, and at the interpersonal level it is not essentially real love.<sup>23</sup>

There are a variety of ways of conceiving of a desirable, but less than ideal, form of social interaction consequent to conflict. The one I propose is grounded on the *ubuntu* ethic sketched above. Suppose, with *ubuntu*, that a state's moral duty (or that of its officials, if one is sceptical that a state as such is a collective agent that has moral duties) is to treat residents as special in virtue of their capacity for communal/harmonious relationships. One clear way of doing so would be for a state to foster such relationships between people in its territory, that is, to actualise the special capacity. Now, if one proper final end of the state were to engender communal relationships, and if reconciliation were a stepping stone towards such a condition, then it would be sensible to think of reconciliation as constituted by *some* of the elements of communion.

Specifically, a promising conception of reconciliation is based mainly on what I labelled the behavioural facets of a characteristically African conception of communion/harmony, and not as much on the attitudinal ones. As a first approximation, consider the view that to reconcile is for two parties to engage in cooperative behaviour oriented towards mutual aid. Such need not involve mental states such as thinking of oneself as a 'we', taking pride in others' accomplishments, exhibiting sympathy towards others or acting for their sake.<sup>24</sup> Of course, people's hearts and minds would need to change to *some* degree in order to move from serious discord, roughly substantial subordination and harm, to a way of relating with the core, behavioural components of identity and solidarity as above. However, they would need to do so to a much lesser degree than they would in order, say, to be motivated by altruism or compassion, or to enjoy a sense of togetherness. Supposing, then, that communion is central to ethics and that reconciliation contributes towards full-blown communion, it is plausible to

<sup>22</sup> This subsection draws on two prior works: T Metz 'Limiting the Reach of Amnesty for Political Crimes: Which Extra-Legal Burdens on the Guilty Does National Reconciliation Permit?' (2011) 3 *Constitutional Court Review* 243; T Metz 'A Theory of National Reconciliation' in C Corradetti, N Eiskovits & J Rotondi (eds) *Theorizing Transitional Justice* (2015) 119.

<sup>23</sup> Metz 'A Theory of National Reconciliation' (note 22 above) 120–121.

<sup>24</sup> Were we to require inclusion of these psychological responses, we would be expecting 'too much' from the concept of reconciliation, and demanding that it conform too closely to a specific and rather demanding social ideal. After a period of serious conflict between people, one cannot expect their beliefs and emotions to change quickly, whereas their behaviour might. Consider that although after World War II many West Germans reportedly continued to favour Hitler's policies, they nonetheless conformed to a constitutional order that sought to repair some of the damage done to the Jewish and other oppressed populations. Whatever (desirable) changes to the collective mindset that (ostensibly) occurred, they came much later. What goes for two populations might plausibly be said to hold for two people.

think of reconciliation as consisting mainly of the behavioural facets of it, and not requiring all the emotional and motivational ones.

Note that, unlike some conceptions of reconciliation offered by South African thinkers, particularly those in the Christian tradition,<sup>25</sup> forgiveness, understood as including the dissipation of negative emotions, is not essential to the conception I propose. Neither is empathy,<sup>26</sup> nor is 'a spiritual sense of belonging and community that draws people towards a fullness of humanity through others'.<sup>27</sup> Forgiveness, empathy and a spiritual sense of belonging would be elements of a complete communion (or perhaps the very best form of reconciliation), but are too demanding for reconciliation as such, which is less than ideal.

One way to honour the final value of people's capacity for communion is to realise it as an end, that is, to actualise communal relationships; however, that is not the only way to express certain positive attitudes towards this special capacity. Specifically, an attractive notion of reconciliation, as a way of respecting people's capacity to commune, is one that also includes the disavowal of disrespectful treatments of this superlative value that were undertaken in the past. That would involve those associated with victims, such as family members and wrongdoers, as well as the political community in certain kinds of cases, expressing disapproval of the wrongdoing (ie, roughly the prizing of discord) that took place.

Sometimes people who have been party to a conflict that includes wrongdoing are able to come together and repair the relationship without thinking in those terms, perhaps electing to forget without any moral reflection on what transpired. However, my suggestion is that usually such so-called 'reconciliation' is not particularly desirable. To honour the value of communion means acknowledging when it has been seriously undermined in impermissible ways (when it comes to victims); and to treat people as special by virtue of their capacity to commune also means responding to offenders in the light of the way they have misused this capacity. In the best case scenario, this would involve offenders hearing victims out, apologising to them and expressing remorse by striving both to make up for wrongful harm done and to avoid repeating the wrong. However, at least where offenders are unwilling to do these things, a political community that has taken responsibility for upholding residents' dignity should hear victims out, acknowledge aspects in which they were mistreated, express disapproval of how they were mistreated and do so by effecting reparations for wrongful harm they suffered and making it clear that it will protect them from further mistreatment.

Putting things together, here is an *ubuntu*-based account of an attractive conception of reconciliation: a condition consequent to interpersonal conflict in which those directly affected by it interact on a largely voluntary, transparent and trustworthy basis for the sake of compossible ends largely oriented towards doing what is expected to be good for one another and in which those associated with victims disavow wrongdoing that was part of the conflict. Notice the two basic parts here: the realisation of (behavioural) harmony and the disavowal of prior discord. Mere disavowal of a wrong would not be sufficient for something to count as reconciliation at all, while mere (behavioural) harmony consequent to a wrong would be sufficient for reconciliation, but not a particularly welcome form of it. If, by *ubuntu*, we must

---

<sup>25</sup> Several authors cited near the beginning of this article (note 6 above) offer good examples of this mindset.

<sup>26</sup> Cf P Lenta 'In Defence of AZAPO and Restorative Justice' in W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid* (2007) 162, 172.

<sup>27</sup> C Villa-Vicencio 'Reconciliation: A Thing that Won't Go Away' in F du Toit & E Doxtader (eds) *In the Balance: South Africans Debate Reconciliation* (2010) 165.

treat people as special by virtue of their capacity for harmonious relationships, then both facets are plausibly essential for a desirable kind of reconciliation.

#### IV RECONCILIATORY SENTENCING

In this section, I spell out what it would mean for a criminal trial to seek out reconciliation as an end, focusing in particular on the implications of reconciliation for laying down penalties. I contrast reconciliatory prescriptions for sentencing both with Western-individualist theories of punishment and with some predominant ways that people are punished in South Africa and similar jurisdictions, including imprisonment and mandatory minimum sentences. Although I do not aim to convince the reader that a reconciliatory approach to sentencing is justified, I do try to show that it should not be dismissed as a rival to more familiar models and practices.

##### A Reconciliation as fact-finding

If reconciliation between at least offenders and victims<sup>28</sup> were a central point of a criminal trial, then an important task for a judge would be to obtain the truth about what had transpired. For one, the notion of reconciliation from the previous section requires disavowing wrongful discord, which, in turn, means that there is a clear fact-finding role for a court: it must discover who acted wrongfully and in what respects. A court must sort between the innocent and the guilty, and ascertain how much guilt there is and for what, so as to be in a position to express disapproval of wrongdoing.

Furthermore, even the advancement of behavioural communion, in the form of cooperation, prescribes truth about the past. Two parties genuinely *share* a way of life when they are clear about how they have interacted in serious ways that potentially include wrongdoing, or at least when they are aware of what the other thinks about that. And those associated with these two parties, such as family members and co-workers, also need the truth about the past in order to share a way of life with them, as opposed to being isolated by virtue of ignorance.

It is an empirical question of whether an adversarial system or an inquisitorial one (or a mix, or something else) would do a satisfactory job of revealing the truth about past wrongdoing. Legal scholars who draw on traditional African culture have invariably eschewed adversarialism, since its competitive or combative nature appears incompatible with duties to do what is best for society<sup>29</sup> or to foster reconciliation amongst disputants.<sup>30</sup> However, if reconciliation includes moving forward together in the light of an accurate awareness of what transpired in the past, and if it happened to be the case that an adversarial system is necessary to facilitate that adequately or did so to a much greater degree, then there would be a strong, under-appreciated case for adversarialism on grounds of reconciliation. Any plausible African ethic will make space for competitive fora such as sports and markets (which does not necessarily mean capitalism) roughly because they can facilitate a greater harmony on balance for society, and it could be that a competitive courtroom is analogously justified.<sup>31</sup>

<sup>28</sup> In the conclusion I raise the issue of whether reconciliation should be sought amongst more than just victims and offenders.

<sup>29</sup> J Murungi *An Introduction to African Legal Philosophy* (2013) 124–126, 149.

<sup>30</sup> Idowu (note 1 above) 13, 15.

<sup>31</sup> In any event, how to obtain evidence of guilt is an issue to address in detail elsewhere. The focus of this article is how to punish persons once one has obtained evidence of their guilt.

## B Reconciliation as punishment

Upon having ascertained that there was a crime and who committed it, a judge must decide how the state should respond to the criminal. As noted in the previous section, the sort of reconciliation that *ubuntu* (as understood here) prescribes does not require forgiveness. Letting go of resentment and related negative attitudes towards an offender could sometimes be instrumentally useful for enabling reconciliation, but reconciliation, as the combination of the realisation of (behavioural) harmony and the disavowal of prior discord, does not essentially consist of that or otherwise require it.

In addition, I now seek to rebut the widespread presumption that reconciliation or restorative justice is incompatible with punishment. Justice Sachs' discussion in *Dikoko* suggests such a view. According to him, *ubuntu* prescribes restorative justice, where 'the key elements of restorative justice have been identified as encounter, reparation, reintegration and participation'<sup>32</sup> and where reparation 'focuses on repairing the harm that has been done rather than on doling out punishment'.<sup>33</sup> Although it is doubtful that Sachs would eschew punishment altogether in a criminal justice system given what he says about the need for deterrence,<sup>34</sup> the thrust of his remarks suggest that restoring relationships, including by compensating victims for harm they have undergone, is an alternative to punishment. In what follows I argue that an *ubuntu*-based reconciliation often prescribes punishment, indeed as a way to compensate victims.

One tempting strategy by which to show that reconciliation can prescribe punishment is to note that there are situations in which reconciliation between victims and offenders would be possible only after victims were satisfied that offenders had been punished in retributive fashion. This approach has been suggested by the social scientist Brandon Hamber, informed by his engagements with victims of apartheid-era political crimes. He and various co-investigators found that 'there remains a strong feeling amongst victims/survivors that justice should be done and that this is necessary if we are to create a new society'.<sup>35</sup> Similarly, Hamber and others remark, 'The door to reconciliation and forgiveness will be opened all that wider if the desire for revenge is legitimised and understood, if it is respected and contained, and if it is given both public and private space for its expression'.<sup>36</sup> Basically the idea is that only upon seeing offenders receive their just deserts would victims be likely to accept their reintegration into society.

---

<sup>32</sup> *Dikoko* (note 2 above) at para 114.

<sup>33</sup> *Dikoko* (note 2 above) at para 114. Elsewhere in this judgment, Justice Sachs remarks: 'The principal goal should be repair rather than punishment. To achieve this objective requires making greater allowance in defamation proceedings for acknowledging the constitutional values of *ubuntu – botho*'. Ibid at para 112.

<sup>34</sup> *Dikoko* (note 2 above) at para 120.

<sup>35</sup> B Hamber, T Maepa, T Mofokeng & H van der Merwe 'Submission to the Truth and Reconciliation Commission: Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report' (1998) Recommendation 10, available at <http://www.csvr.org.za/publications/1705-submission-to-the-truth-and-reconciliation-commission-survivors-perceptions-of-the-truth-and-reconciliation-commission-and-suggestions-for-the-final-report>.

<sup>36</sup> B Hamber, D Nageng & G O'Malley "'Telling It Like It Is....'" Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' (2000) 26 *Psychology in Society* 30–32, 37–38, 39. See also B Hamber and R Wilson 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 *Journal of Human Rights* 48.

However, this is not my preferred approach, since the connection between what is called 'reconciliation' and punishment is not strong enough. By the above rationale, punishment would be unjustified if it were unnecessary for victims and offenders to 'reconcile' afterwards. However, many readers will share the intuition that punishment for many kinds of crimes would be justified even if victims were to forgive offenders and absolve them of deserved punishment. Similar offences should receive comparable penalties, in terms of the degree of burden involved.

In contrast, my main strategy is to contend that the preferred understanding of 'reconciliation' routinely includes punishment as partially constitutive of it. Instead of deeming punishment to *cause* reconciliation on occasion, my suggestion is that punishment (nearly) always helps to *constitute* reconciliation. Roughly speaking, the *ubuntu*-based account of reconciliation typically carries a certain kind of punitive justice within it that differs from Western retributivism.

There are two reasons for thinking so, grounded on each of the two major facets of reconciliation, viz, promotion of behavioural communion in the future and disavowal of its having been flouted in the past. First, consider reconciliation insofar as it includes behavioural communion in the form of cooperation and aid. That can prescribe compensation; making reparations to a victim would be one way for an offender to cooperate with and aid her, and often it would be a burden to do so. However, if an offender were wealthy, then making reparations would not be burdensome, making this rationale unable to ground punishment to the degree that is intuitively warranted. Similarly, if a victim were poor, an offender might be able to pay minimal compensation that would aid the victim in a way that would be welcome relative to her means, but fail to track the degree of the offence.

Relatedly, behavioural communion in the future could be advanced by preventing recidivism on the part of the offender. An offender has a duty to reform himself to avoid committing crime again, and the state has an obligation to take steps to prevent a wrongdoer from doing wrong again. That is especially true if the wrongdoer is not doing so himself or is unable to do so on his own. The Court made this connection between *ubuntu* and rehabilitation in *S v Makwanyane*:

[T]he reformatory theory ... 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*.<sup>37</sup>

However, the same concern about this reasoning arises, namely, that reform and consequent cooperation and mutual aid could conceivably occur without hard treatment of the offender being involved; consider a spontaneous 'come to Jesus' moment on his part.

Therefore, essential to grounding a reconciliation-based justification of punishment is its other facet, the disavowal of wrongful discord. It is this under-appreciated, squarely expressive dimension of reconciliation that, I argue, reliably brings accountability in the form of deprivation in its wake. 'Actions speak louder than words.' 'Put your money where your mouth is.' 'Talk is cheap.' In addition to these maxims, a fortune cookie once told me, 'A person of words and not of deeds is like a garden full of weeds.' I maintain that, in cases of serious crime, reconciliation prescribes *burdensome compensation and burdensome rehabilitation as ways of expressing disapproval on the part of the political community, and also, in the best case,*

<sup>37</sup> *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 at paras 240–243 (Madala J speaking).

*remorse on the part of the offender.*<sup>38</sup> For an offender merely to apologise or for a court merely to wag a disapproving finger at him would be inadequate forms of disavowal; in a word, there must also be some hardship for the disavowal of a serious crime to be meaningfully expressed, whether by the offender or the court.<sup>39</sup>

The degree of hardship imposed should *track* the degree of wrongdoing, in the sense that the worse the wrong, the greater the hardship, although retributive *proportionality* is not required. For example, to express disavowal of torture adequately, a court must impose a weighty burden indeed on the torturer, but it need not sentence him to be tortured or to a fate strictly proportionate to the wrongful harm of that crime. So long as all torturers were to receive comparably stiff sentences, even if they were not a matter of torture or its exact equivalent, there would be consistency in sentencing.<sup>40</sup>

Although compensation merely for the sake of moving forward together need not involve hard treatment of an offender, compensation in order to disavow a crime plausibly must. If an offender were truly sorry and wanted to demonstrate his guilt, he would be willing to place hardship on himself as a way to display those emotions, where the greater his wrongdoing and the stronger his apt emotional reactions to it, the heavier the hardship. Hence, if the offender were rich, he would do more than just cut a cheque to the victim. And if a court were truly disapproving of a crime, it would compel the offender to make restitution in a way that involved real labour or some other burden. Where making financial compensation would mean a change in lifestyle for an offender, it could well be a sentence that adequately disavows the offence.

There are, however, ways that compensation could place a weighty burden on an offender that are not financial. Perhaps someone who cheats on his taxes should be made to perform some dull tasks for the state revenue service. Maybe a person who has robbed a household should wear a uniform and serve as a neighbourhood-watch guard for a time. Possibly someone who has unjustifiably taken the life of a breadwinner should farm with his hands, providing sustenance to the victim's family.

Of course, victims might not want to be in contact with offenders.<sup>41</sup> *Ubuntu* likely places some form of moral obligation upon victims to try to reconcile with offenders -- say, by accepting their offers of restitution. It does not follow that a court should force victims to do so. In such a case, victims might indicate a preferred way in which offenders should direct their efforts. After consultation with a woman who had been physically abused, for instance, a

---

<sup>38</sup> In the following, I assume that the degree to which an offender should express remorse and the degree to which a political community should express disapproval align, although I recognise that this assumption may be questioned and might deserve an extended defence elsewhere.

<sup>39</sup> Retributive expressivists have adopted this position for some time. See J Hampton 'The Retributive Idea' in J Hampton & J Murphy *Forgiveness and Mercy* (1988) 111; and T Metz 'Realism and the Censure Theory of Punishment' in P Smith & P Comanducci (eds) *Legal Philosophy: General Aspects* (2002) 117 (Articulates, but no longer reflects, a position I once held.)

<sup>40</sup> There are, therefore, resolutely 'objective' dimensions to reconciliatory sentencing: (1) facts about how bad a crime was; (2) how severe a penalty is; and (3) which penalties would track a given crime. Ultimately, a proponent of reconciliatory sentencing must provide accounts of them, but some headway can be made for now without them.

<sup>41</sup> Although there are fascinating occasions where offenders and victims have been able to reconcile by labouring together. For an example in Canada, see 'Convicts, Victims Work to Heal Old Wounds on B.C. Farm' available at <https://www.cbc.ca/news/canada/convicts-victims-work-to-heal-old-wounds-on-b-c-farm-1.3819003> (2016).

court might order her offender to undertake labour for a battered women's shelter by delivering needed items or helping to repair the building.

Beyond disavowing wrongful discord by ordering compensatory labour from offenders, a court would also do so by ordering labour from offenders likely to foster moral reform.<sup>42</sup> If offenders are genuinely remorseful, then they of their own accord would not merely take steps, but also climb stairs, to show that they would not perform the relevant acts again. In addition, courts would express disapproval of the wrongful behaviour by making them do so. Such penalties would often mean mandatory therapy to get to the root of what caused the mistreatment of others, something that would be time-consuming and psychologically difficult. Consider as well penalties meant to instil empathy and an awareness of the consequences of actions, such as a judge sentencing drunk drivers to work in a morgue.<sup>43</sup> Finally, there are the points that the hardship of punishment can often itself be a way for offenders to appreciate how they have mistreated their victims, as well as that the guilt consequent to moral reform would also be a foreseeable burden that offenders should undergo.

Even if an offender had a spontaneous appreciation of what he had done wrong and were unlikely to commit similar actions again because of that, penalties would usually be apt as ways of aiming to cultivate his moral personality while disavowing what he had done. Imagine that you were the offender and had had a change of heart right after committing a crime. You would want to go out of your way to show that to the victim, her family and others who reasonably feel threatened by what you did – they could not just take your word for it. And so you would willingly submit to burdens to express remorse, including forms of rehabilitation that would provide all the more grounds to think that you will avoid reoffence in the future. If you were not willing to do that, it would be right for a court to make you anyway, so as to stand up for the victim and to censure your behaviour, all with the aim of improving relationships in the future.

This necessity for hardship is one large difference between reconciliatory sentencing and more familiar reformatory theories of punishment.<sup>44</sup> The latter prescribe doing something good for the offender, helping him to become a better person, where the hardship of punishment is conceived as the key learning tool, so that if learning were to occur without the hardship, the logic of these theories entails that the hardship would be unjustified. In contrast, by reconciliatory sentencing, the hardship of punishment, which is welcomed as a potential learning tool, is inflicted additionally in order to express remorse for and disapproval of discord (and thereby express respect for our relational nature). By this account, expressive considerations mean that a court would usually be right to penalise offenders by ordering

<sup>42</sup> For a useful overview of contemporary psychological and criminological research on rehabilitation, see B Huebner 'Rehabilitation' *Oxford Bibliographies Online* (2014), available at <http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0046.xml>.

<sup>43</sup> 'Thailand Drunk Drivers Face Morgue Work as Punishment' *BBC News* (2016), available at <http://www.bbc.com/news/world-asia-36025937>.

<sup>44</sup> H Morris 'A Paternalistic Theory of Punishment' (1981) 18 *American Philosophical Quarterly* 263; J Hampton 'The Moral Education Theory of Punishment' (1984) 13 *Philosophy and Public Affairs* 208. See also more recent work in therapeutic jurisprudence, such as D Wexler 'Therapeutic Jurisprudence' (2004) 20 *Touro Law Review* 353; and E Erez, M Kilchling & J Wemmers (eds) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (2011).

therapeutic interventions, and offenders should submit to such an order, even if doing so were not in fact necessary to prevent recidivism.<sup>45</sup>

The expressive dimension of reconciliatory sentencing also enables it to make sense of why punishment would be justified in situations where improved relationships are clearly not forthcoming. For example, consider the case in which the victim has been killed and she had had no family or friends; then, no reconciliation with her or even her intimates would be possible, so that it might seem as though reconciliatory punishment would have no point. However, part of an attractive reconciliation, I have contended, is disavowing the unjust discord that took place, where offenders express remorse for what they have done and the political community expresses disapproval of it. Even if a criminal trial sometimes cannot serve the function of advancing relationships of participative cooperation and mutual aid, it could always disavow respects in which people had been wronged by the opposite, discordant ways of relating, again accounting for the intuition that consistency in sentencing must be upheld.

### C Some contrasts with Western theories

In order to illustrate and motivate reconciliatory sentencing, I contrast it with the Western, individualist accounts discussed above. Although the following points are not ‘knock-down’ arguments against the latter, they provide reason to take the former seriously.

First off, it is of course a strike against a theory of punishment if it cannot explain why it is only the guilty who should be punished. Utilitarianism notoriously has difficulty restricting state punishment to those who have broken just laws, as there can be situations in which punishing people known to be innocent would (be expected to) have the best results for society. In contrast, a reconciliatory approach forbids punishment of innocent parties, since they have not done anything to undermine communal relationship. Those who have not been discordant warrant neither burdensome compensation, for there are no victims, nor burdensome rehabilitation, for no wrong has been done.

Reconciliatory sentencing avoids another famous problem for utilitarianism, namely, the imposition of disproportionately harsh penalties. In principle, severe sentences placed on a few for having committed intuitively trivial crimes could be justified if many would benefit in the long run from doing so. For example, if people risked receiving 25 years in jail for actions such as speeding, failing to indicate when changing lanes, and rolling slowly through stop signs, it could be that traffic deaths would be reduced, making the benefits to society worth the costs of occasionally ‘making an example’ out of a few offenders. However, most punishment theorists believe such penalties would be wrong, regardless of how much good they would do. Reconciliatory sentencing can account for that intuition, insofar as the degree to which the court expresses disapproval, via the imposition of burdens, should be no be greater than the

---

<sup>45</sup> This account conflicts with the principle that violence, punishment and related kinds of significant discord are justified if, and only if, they are both necessary and expected to counteract greater discord on the part of the one responsible for it. I have advanced this purely defensive account of force in previous work. T Metz ‘Human Dignity, Capital Punishment, and an African Moral Theory’ (2010) 9 *Journal of Human Rights* 81. In contrast, reconciliatory sentencing prescribes penalizing offenders in burdensome compensatory and reformatory ways to disavow injustice, even if the burdens are unnecessary for compensation or reform. For a powerful reason to think that not all permissible uses of force are defensive, consider the case of ‘Morty’ in S Kershnar *For Torture: A Rights-Based Defense* (2011) 53.



wrongful nature of the crime (including the extent to which the criminal was responsible for it), lest the court treat the crime as more wrongful than it was.

A third advantage of reconciliatory sentencing relative to not just utilitarianism, but also other prominent forward-looking theories, is that it abjures general deterrence as a mechanism by which to control crime. Although some African theorists have appealed to general deterrence as a legitimate way to protect communal relationships,<sup>46</sup> I maintain that respect for people's capacity to commune probably forbids such an approach. If a thief wrongfully enters my house and the only way to get him to leave and without taking my things is to use a certain degree of force, I may do so. However, it would intuitively be wrongful (not merely illegal in all jurisdictions I am familiar with in North America, Europe and South Africa) to haul him out into the street and give him an additional beating intended to scare off other, potential thieves. A plausible rationale for *why* it would be wrong to inflict harm, such as punishment, on the guilty for the sake of general deterrence is that one is not liable for the actual or potential misdeeds of others. There is no disrespect in using substantial force, such as punishment, if necessary to get a wrongdoer to stop his discordant behaviour, to compensate his victims for it or to get him to reform so that he will not reoffend. However, there is probably a kind of disrespectful treatment when substantial force is used against a wrongdoer for some purpose other than getting him to 'clean up his own mess'.

Turning now to the Western backward-looking theories, reconciliatory sentencing differs from them, and in some *prima facie* attractive ways. One of the most prominent objections to retributive accounts of punishment is that they fail to make sense of why a criminal justice system is worth the price.<sup>47</sup> It takes a lot of time, effort, money and other resources to arrest apparent lawbreakers, to conduct a trial, to punish those who have been found guilty and to monitor their progress in a correctional setting, where merely giving people what they deserve or correcting unfairness do not seem weighty enough to justify the costs. It seems to many that a major public institution should promise to do *some* kind of good for society, and not merely increase the overall amount of suffering or other harm in the world in the manner of an eye for an eye. According to a reconciliatory approach, a major point of setting up and maintaining a criminal justice system includes reforming offenders so that they do not reoffend, getting them to compensate their victims and more generally healing broken relationships.

Another weakness of standard retributive theories is that they cannot easily account for intuitions that an offender's moral reform can call for a lesser penalty. For example, it is common for judges in South Africa and elsewhere to sentence in part based on whether or not an offender has expressed remorse for having committed the crime. That should be completely irrelevant on a desert or fairness model, which directs a judge nearly exclusively to the nature of the crime committed, regardless of what has happened since. However, by a reconciliatory approach, a genuine expression of remorse could be reason to reduce a penalty, even if some kind of burden that broadly tracks the nature of the crime is essential, both to express remorse and to express disapproval. Similar remarks apply to the practice of parole, that is, early release for good behaviour. Concrete evidence of rehabilitation gives a reason to reduce a penalty in terms of a reconciliatory approach, if only marginally, but it is no reason

<sup>46</sup> E Aja 'Crime and Punishment: An Indigenous African Experience' (1997) 31 *Journal of Value Inquiry* 353 at 360 and O Balogun 'A Philosophical Defence of Punishment in Traditional African Legal Culture' (2009) 3 *The Journal of Pan African Studies* 43 at 52.

<sup>47</sup> D Husak 'Why Punish the Deserving?' (1992) 26 *Nous* 447.

to reduce one according to a retributive approach, supposing the initial penalty was indeed strictly proportionate to the crime committed.

A final advantage for reconciliatory sentencing relative to Western retributivism concerns penalties that might be deserved or fair, but that are intuitively wrong to impose nonetheless. I am thinking of torture, rape and death. Torturers, rapists and murderers might well have these respective penalties coming to them, as proportionate to what they have done, but they would be intuitively unjust for a court to authorise. By an *ubuntu*-based reconciliation, part of the explanation of why these penalties are unjust is that they are not merely unnecessary, but also unlikely, to produce meaningful compensation for victims and moral reform on the part of offenders. In addition, these kinds of penalties are not necessary in order for offenders to express their guilt and for a court to express disapproval of their guilty behaviour, with quite weighty but less than strictly proportionate burdens being sufficient. Although these considerations probably do not constitute the entire explanation of why certain kinds of severe penalties are unjust, they are more than is available to the desert or fairness theorist.

#### D Some contrasts with current practices

If reconciliation were made the final end of a criminal trial, then some sentencing practices common in South Africa and in many other jurisdictions would need to be substantially revised. In particular, reconciliation would probably mean that mandatory sentences and imprisonment, the focus of *Ndlovu v The State*, would not be used as frequently as they are.

Brendan Solly Ndlovu was convicted of a particularly brutal rape and sentenced to life imprisonment. The Constitutional Court needed to decide whether the sentence was appropriate, given that Ndlovu had been charged with rape, not with the infliction of grievous bodily harm, but had been sentenced on the basis of both. The mandatory minimum sentence for a first offence of rape is 10 years in prison, with a maximum of 15, while the minimum (and, equally, maximum) for the infliction of grievous bodily harm is imprisonment for life (although parole is possible after having served 25 years). The Court ruled that the sentence of life in prison was unconstitutional, since Ndlovu had been charged only with rape. The Court instead imposed the maximum of 15 years, in accordance with the statute governing the crime for which Ndlovu had in fact been charged. Although the Court deemed criminal justice on the whole to be best served by reducing Ndlovu's sentence, it lamented its inability to impose a much longer sentence of imprisonment on him.

Although this case concerns mandatory minimum sentences of imprisonment, these two issues are logically distinct; one could have mandatory minimums when it comes to, say fines instead of jailtime, and, then, one could imprison without a legislature having indicated which amount of time served is essential. I first argue that mandatory minimum sentences, whether of prison or some other kind of penalty, are usually unjustified and next that prison is rarely an appropriate kind of sentence.

Mandatory minimum sentences are straightforwardly justified by the Western backward-looking and forward-looking theories. If the sentences are proportionate to the nature of the crime, making allowances for mitigating and aggravating factors, then they can be deserved for having committed a certain kind of crime or be what would remove an unfair advantage obtained by having done so. And if the sentences would incapacitate or deter potential offenders to an extent that crime would be reduced to a noticeable degree, then utilitarianism and self-defence theory would also prescribe them.

In contrast, a practice of reconciliatory sentencing demands flexibility in response to the particular circumstances of offenders and victims. Above I argued that reconciliatory sentencing includes a maximum, permitting disavowal of a strength no greater than the crime, and also that it includes a minimum, in the sense of normally requiring some kind of burden to be placed on offenders so as to disavow the crime, even on those able to compensate victims and change their motivations without a burden. However, in between there would be a range of possible severities that a judge would be best placed to pick amongst, a legislature of course being uninformed about the specifics of a given case. When determining how victims should be compensated, a judge needs to know what particular ways they were harmed, what would help make up for those harms, what offenders are realistically capable of doing and what form of compensation would place appropriate burdens on offenders. Similarly, when determining how offenders should be reformed, a judge needs to know why they were motivated to offend, what would be likely to change their motivations and what would be appropriately burdensome with regard to expressive considerations. Reconciliatory sentencing requires *judgement*.

Somewhat similar considerations apply to imprisonment, by which I mean the predominant form where offenders are simply locked up, at best given time to think and offered some optional rehabilitative and recreational activities. Backward-looking approaches to punishment easily justify prison, since they do not require any good to come from a type of penalty. If prison is of a severity proportionate to the nature of the crime, where the severity is deserved or would correct unfairness, it is justified. And then the forward-looking theories naturally justify prison as well. Recall that, for them, incapacitation and deterrence are proper mechanisms by which punishment should be used to reduce crime, where prison renders someone unable to commit crime and tends to make prospective criminals fearful of getting caught.

Prison should not be the default mode of punishment, however, if the aim of criminal justice is reconciliation, understood as the combination of the disavowal of the wrongful discord done in the past and the improved chance of harmonious relationship in the future. Although prison can express disavowal of a crime, it does not serve the additional function of making repair of the broken relationship more likely. Merely locking someone up does not reliably foster either compensation to victims or reform of offenders.

What, then, should have been done with Ndlovu? His case is amongst the most difficult for a reconciliatory approach, given how heinous his behaviour was. Detainment would have been appropriate, but that is not necessarily the same thing as jail as we know it. Ndlovu should have been made to undertake truly burdensome reparations for his victim and to undergo difficult procedures likely to change his inclination to reoffend, both of which could have been ways of expressing remorse on his part, but at least would have been vehicles by which to express disapproval on the part of the political community.

For a start, Ndlovu of course should have apologised to his victim, a way of showing that she matters. In addition, he should have been given a way to earn money that could have been directed to her, or otherwise afforded a way to labour in ways that would have benefited her. Perhaps because of the crime she has been unable to work, and so has found it difficult to afford school fees for her children; Ndlovu could have been required to pay for them. If she did not want to be reminded of him, the court could have ordered him to help a charity of her choice or a state clinic that would offer her therapy.

Furthermore, Ndlovu should have been mandated to undergo counselling of an intense sort. With respect to his beliefs, he should have been forced to reconsider his views of the standing

of women. Perhaps he considers them to be his property or second-class citizens, and hence as something to be used as a mere means to his ends. His emotions, too, should have been explored and probably adjusted. Did he commit the brutal rape because he feels impotent and needed a sense of power? Does he hate women because of how he was reared? One hopes that, in time, his personhood would develop, so that he would feel the appropriate sort of guilt and be haunted by what he has done. And then Ndlovu also should have done what would have changed his desires. Perhaps he lacks a second-order desire to avoid desiring to rape and to inflict pain, or, if he has such a second-order desire, it might be ineffective at changing his first-order ones. Court-ordered self-exploration would have been apt, as would have been the mentoring of others less reformed, supposing there were improvement on Ndlovu's part.

## E Replies to objections

Some readers will find these penalties to be intuitively insufficient, with the prospect of compensation, reform and improved relationships not being important enough to forgo a harsher penalty such as imprisonment or even corporal punishment of some kind. However, if *ubuntu* is our touchstone, then we have to let go of vengeful or retributive reactions.<sup>48</sup>

Conversely, others will find the therapeutic interventions overly intrusive or otherwise illiberal in some way. However, the claim is not that either brainwashing or brain surgery is permissible; the methods of reform must be consistent with respect for a person's capacity for communal relationship. Plus, a focus on the offender's character is arguably justified, given an *ubuntu* ethic's concern for personhood and supposing the development of personhood would be a particularly reliable way to prevent recidivism.

However, what is to be done if an offender refuses to undertake the burdens of compensation and reform? In that case, it might be that threats and penalties designed to prompt conformity would be appropriate, where these might involve imprisonment. Such a 'back-up' approach is reminiscent of that taken by South Africa's Truth and Reconciliation Commission, where a normal trial could proceed if offenders did not fully disclose the political crimes they had committed during the apartheid era. Although not all penalties would be reconciliatory in such a scheme, it would still constitute a radical departure from the current approaches in most jurisdictions in Africa and the West.

For another objection, what if an offender is simply too dangerous to participate in compensatory or reformatory procedures? In that case, confinement, in contrast to imprisonment, would be appropriate. Putting in prison, I am supposing, would involve, if not the aim to harm, at least an intervention that is likely to harm the one imprisoned. In contrast, confinement need not involve such an intention or expectation. It could be a matter of sequestering an out of control offender in a comfortable manner, similar to a quarantine. In that case, it would not count as punishment, since no hard treatment would essentially be involved and since it would not be a response to a crime that had already occurred. Preventive detention of this sort would be outside the reconciliatory approach to punishment that I have advanced here, even if it does have a small but proper role to play in a criminal justice system.

---

<sup>48</sup> Interestingly, one interlocutor has suggested to me that reconciliatory sentencing, given its expressive focus, might be apt for the very worst deeds, such as crimes against humanity, but not for crimes such as theft in which symbolic considerations seem irrelevant. However, reconciliatory sentencing is apt as a way to respond to any crime in which people's capacity to relate communally is treated disrespectfully. The disrespect in theft also calls for an expressive response in part.

Finally, one might reasonably be concerned about how realistic reconciliatory sentencing is, at least in jurisdictions in which there are many crimes but few defence attorneys, prosecutors and judges with expertise. Treating reconciliation as the end of a criminal trial would mean spending vast amounts of resources to establish guilt during the trial, to ascertain an apt sentence if guilt is established and then to carry out the sentence. In contrast, a system of plea bargaining, as standardly combined with fines or imprisonment, would be much more efficient, and could well be essential for any criminal justice system with substantial numbers of cases.

I accept the point about needing to make compromises in situations of scarce human and other resources. However, doing so is consistent with maintaining that reconciliatory sentencing is an ideal for which to strive. Reconciliatory sentencing plausibly explains not only why plea bargaining would be an unjust way of dealing with crimes in situations where there is no resource scarcity, but also how plea bargaining sacrifices moral weight even when it is, all things considered, justified. Plea bargaining streamlines criminal justice at the cost of failure to ascertain guilt with care, to hear victims out and to sentence in ways likely to compensate victims, reform offenders and adequately disavow previous wrongdoing. By my favoured account of sentencing, we should want as much of those things as we can realistically get in the present circumstances, striving for progressive realisation of more over time.

## V CONCLUSION

My aim in this article has been to sketch some respects in which a judge should sentence in a criminal trial, assuming its central aim to foster an *ubuntu*-based conception of reconciliation. Specifically, I have advanced the view that, instead of requiring forgiveness or otherwise forbidding punishment, an attractive notion of reconciliation includes the disavowal of crime, which, in turn, typically prescribes punishment. A genuine expression of remorse on the part of offenders or disapproval on the part of the political community means placing burdens on them, in particular ones oriented towards the rehabilitation of offenders and the compensation of victims. Although this account of just punishment has grown out of characteristically African views of personhood, communion and reconciliation, it is meant to capture some intuitions that are widely shared, even by those who currently endorse more Western theories.

Supposing that reconciliatory sentencing indeed merits consideration, a number of other theoretical projects would naturally follow. For one, it is worth considering whether the evidentiary procedures of a criminal trial need to be revised so as to foster reconciliation. I have contended that they need to reveal guilt and the degree of it, but might there be a way of doing so that would be more likely, say, to prompt an apology on the part of offenders?<sup>49</sup> What does reconciliation entail for the adversarial versus inquisitorial distinction about how to ascertain legal guilt?

For another, in this article I have set aside the question of precisely whom a crime characteristically wrongs, having focused on an individual victim, but not also her (extended) family or the broader society. However, it is well known that indigenous sub-Saharan peoples often considered legal transgressions to have a community dimension, or at least for many others beyond the 'immediate' or 'direct' perpetrator and victim to have a stake in

---

<sup>49</sup> Cf Sachs J (note 2 above) para 117.

reconciliatory processes.<sup>50</sup> How might a judge overseeing a criminal trial in a ‘modern’ state plausibly incorporate these facets of African criminal justice?

Beyond the responsibilities of a judge in a criminal trial, it is also worth thinking about how reconciliation might bear on those of other actors. For example, I have not systematically addressed the matter of what should be criminalised. However, viewing reconciliation to be the final end of a criminal trial probably has implications for what a legislature should count as a crime. Might it rule out, for instance, victimless activities as meriting a response from a criminal justice system? Should legislators decriminalise activities such as physician-assisted suicide and drug-taking, where these are not inherently discordant in respect of other parties, or should they instead criminalise such behaviour out of concern for citizens’ personhood?

Finally, for now, the account of sentencing given here, which includes compensation to victims as an inherent feature, raises the question of whether the distinction between criminal and civil trials should be abandoned. Normally, the sort of harm that a civil trial seeks to repair is what was caused wrongfully, suggesting that the kind of criminal trial advocated in this article would render a civil trial unnecessary. However, this inference might be too quick. Suppose, for example, that a way of compensating that would be appropriately burdensome on the offender would not provide as much repair of the harm done to the victim as some other way. Would a civil trial be apt in that situation? Or are there harms that were not wrongfully caused by a certain agent but which this agent should be forced to compensate, say, because he is best placed to do so? I submit that these and related questions merit consideration.

---

<sup>50</sup> J Alie ‘Reconciliation and Traditional Justice: Tradition-based Practices in the Kpaa Mende of the Sierra Leone’ in L Huyse & M Salter (eds) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 136–137; E Masitera ‘Ubuntu Justice and the Power to Transform the Modern Zimbabwean Rehabilitation Justice System’ in E Masitera & F Sibanda (eds) *Power in Contemporary Zimbabwe* (2018), 114–116.