

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

<https://www.e-ir.info/2020/07/06/the-crime-he-committed-was-to-steal-a-cow-moral-luck-and-gacaca/>

MAXFIELD HANCOCK, JUL 6 2020

In certain respects, Rwanda's post-genocide *Gacaca* court system was not unlike the mid to late 20th and early 21st centuries' multiple other high-profile experiments in transitional justice. As in the case of the Nuremberg trials, the International Criminal Tribunal for the former Yugoslavia, and South Africa's Truth and Reconciliation Commission, the individuals who went before Rwanda's *Gacaca* courts were implicated in unimaginable wrongdoing. *Gacaca*'s administrators were forced to make profound decisions concerning justice, reconciliation, agency, and individual responsibility. In other respects, the *Gacaca* courts were radically unlike their contemporary and historical counterparts. *Gacaca* emphasized penitence and reconstruction (as opposed to justice for survivors). Trials were held outdoors and presided over by community leaders. Lawyers were barred from participating. Presented with a familiar array of ethical and political challenges, the post-genocide government of Rwanda generated a wholly original response.

In so doing, the Rwandan government privileged certain philosophical positions. Specifically, the *Gacaca* court system favored a lenient view of individual moral responsibility. In this paper, I articulate how Rwanda's *Gacaca* courts did and did not assign responsibility to individuals accused of genocide crimes with reference to moral luck, a concept first formulated by philosopher Thomas Nagel. Nagel observes that one's natural moral judgement of a person is dependent largely on that person's good or bad fortune – what he calls that person's "moral luck." Nagel wrote in the 1970s, but his work reflects back and responds to the ethical and political disarray that followed World War II. Now, as then, the capacity of individuals to participate in programmatic evil boggles the mind and confuses judgement. Shedding light on the ethical system that emerged from Rwanda's *Gacaca* courts will advance perennially relevant debates over evil, responsibility, transitional justice, and the individual.

Literature Review

Gacaca

There is an abundance of literature available on the *Gacaca* courts of post-genocide Rwanda. The court system polarized commentators and attracted a great deal of scholarly attention. Generally speaking, *Gacaca* was poorly received. The court system's detractors cite its power imbalances, community setting, and disregard for due process as well as its potential to deepen ethnic divides and thereby facilitate revenge. Advocates counter that *Gacaca*'s capacity to secure local justice and advance reconciliation redeems the process.

Susan Thomson is one vocal critic of the *Gacaca* court system, who characterizes *Gacaca* as a "state-run legal system that produces a particular version of justice and reconciliation that reinforces the power of the post-genocide government at the expense of individual processes of reconciliation" (Thomson 2011, 374). Thomson analyzes the power dynamics that uphold *Gacaca* and that *Gacaca*, in turn, reproduces. Her findings implicate President Kagame's administration in the oversight and operation of a court system that consolidates Rwandan government control and fails to respond properly to the demands of Rwandan citizens. Anuradha Chakravarty adopts a similar line of inquiry in her 2016 book, *Investing in Authoritarian Rule: Punishment and Patronage in Rwanda's Gacaca Courts for Genocide Crimes*. Her analysis brings out the roles played by patronage and certain targeted incentives in

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

cementing the Rwandan Patriotic Front's authoritarian rule over post-genocide Rwanda (Chakravarty 2016).

Other critics choose to focus on *Gacaca's* truth telling component. Bert Ingelaere, for instance, identifies a conflict between *Gacaca's* ostensible interest in promoting truth and reconciliation and its actual role as a state-sanctioned, prosecutorial institution (Ingelaere 2009). He is careful to distinguish problematic (his view), post-genocide *Gacaca* from traditional *Gacaca*, which by his assessment is the modern court system's more effective predecessor. Karen Brounéus adds to Ingelaere's findings and demonstrates the deleterious impact that *Gacaca* has had on the psychological wellbeing of Rwandan citizens, Hutu and Tutsi alike (Brounéus 2010). Her empirical study of Rwandan mental health, alongside Ingelaere's critical analysis of *Gacaca's* purported aims, challenge the relativist position that *Gacaca's* value lies in its emphasis on truth telling.

Susanne Buckley-Zistel is also skeptical of claims that truth will lead to justice and justice to reconciliation. In an influential 2005 paper, she observed that "Factual truth established in *Gacaca* jurisdictions is an outcome of power relations and often incorrect. The narratives re-affirm the dichotomy of the ethnic identities of Hutu and Tutsi, and, rather than mediating memory, they perpetuated exclusive notions of self and other" (Buckley-Zistel 2005, 126). David Scheffer voiced similar concerns in a 2004 article that appeared in *Foreign Policy*. He noted that crimes committed after 1994 fall outside of *Gacaca's* jurisdiction. Tutsis who committed violent revenge attacks against Hutus were left effectively immune to criminal prosecution (Scheffer 2004, 85). Des Forges and Roth, who also felt that *Gacaca* would intensify ethnic hatred in Rwanda, accused the court system's administrators of favoring "therapy" over justice (Des Forges and Roth 2002).

The final criticism brought forward against *Gacaca* concerns the court system's failure to comply with international legal norms. Reports from leading human rights organizations (Amnesty International 2002, Human Rights Watch 2011) allege that the courts failed to secure defendants' rights to due process and that the court system's emphasis on community participation weakened the court system's claims to rigor and impartiality. Plenty of scholars have taken up this same position (Tully 2003, Corey and Joireman 2004, Sarkin 2001) and alleged, furthermore, that Rwanda's *Gacaca* courts simply lacked the capacity to meet popular demand for justice and reconciliation.

Gacaca is not without its proponents. From its outset, *Gacaca's* supporters applauded the design of the court system, which they felt represented a welcome departure from punitive, procedural Western justice. Drumbl, for instance, writing in 2000, noted that *Gacaca's* restorative component might successfully lead to what he calls "reintegrative shaming" and predicted that Rwandan communities would be better served by *Gacaca* than by more retaliatory approaches (Drumbl 2000). Cobban, also, writing two years later, stressed how valuable a model of transitional justice that prioritizes reconstruction over retribution might be for Rwanda. On this point, she cites the particular challenge posed by the enormous scope of participation in the Rwandan genocide (Cobban 2002).

The ranks of the *Gacaca* optimists grew over the course of the decade. Uvin and Mironko, for instance, formulated a defense of the courts that distinguished between Western, hegemonic understandings of justice and culturally appropriate, local value systems (Uvin and Mironko 2003). Longman (2006) and Meyerstein (2007) share this belief and advance a postcolonial critique of the legalist case against *Gacaca*. Phil Clark, in his 2010 book, *Justice without Lawyers: Peace, Justice, and Reconciliation in Rwanda*, articulates a slightly different defense. Clark writes that *Gacaca's* value lies in its explicit focus on community participation, which he argues has successfully facilitated a certain degree of reconstruction (Clark 2010).

The positions outlined above define the contours of a fierce and ongoing debate over *Gacaca's* success, a debate which dominates existing literature on *Gacaca*. That is to say, scholars in recent years have paid a great deal of attention to the legal-administrative structure of the court system and to its impact, broadly speaking, on Rwandan society. In-depth, descriptive studies of *Gacaca* trial proceedings are relatively few (Ingelaere 2018, Brehm, Uggen, and Gasanobo 2014). Fewer still are analyses that address the unique system of courtroom ethics and procedures that emerged from *Gacaca* and their implications for the study of transitional justice. My analysis will begin to fill this gap in the literature. My analysis will, furthermore, articulate a position implicit in the performance and design of *Gacaca* with respect to moral luck and individual responsibility, advancing an under-researched area of study within the field of ethics and transitional justice.

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

Moral Luck

The problem of moral luck was first formulated by moral philosopher Thomas Nagel in a 1979 article. Briefly, Nagel posits that our deeply held moral judgements of a person are contingent, to an unsettling degree, on chance. He lists four different categories of "moral luck" which might impact moral assessment: constitutive luck, luck in how one is determined by antecedent circumstances, luck in how one's actions turn out, and luck in one's circumstances (circumstantial luck) (Nagel 1979). They are all opposed, Nagel writes, "by the idea that one cannot be more culpable or estimable for anything than one is for the fraction of it which is under one's control" (Nagel 1979, 324).

Constitutive luck concerns a person's temperament, inclinations, and personal traits to the extent that those character traits are beyond the person's control (Nagel 1979, 324). Luck in antecedent circumstances concerns luck in the antecedents of a person's actions that are similarly beyond the person's control (Nagel 1979, 326). What Nagel calls luck in how one's actions turns out refers to cases wherein individuals are judged not for their decisions but for the results of their actions (Nagel 1979, 324). To illustrate the latter, Nagel asks the reader to consider the case of a drunk driver who swerves onto the sidewalk. If the driver does not hit anyone, then she might be cited for driving under the influence but can consider herself morally lucky. If another driver, equally inebriated, does the same and there happen to be pedestrians in the path of that driver's car, then that driver might be tried and convicted of manslaughter. The two drivers behaved in an equally reckless fashion, but one received harsher sanctions than the other.

The final category of moral luck, and that with which this paper is concerned, is luck in one's circumstances. "The things we are called upon to do," Nagel explains, "the moral tests we face, are importantly determined by circumstances beyond our control" (Nagel 1979, 326). A man whose existence might otherwise have been perfectly harmless, to give one common example, might find himself tried for genocide crimes as a result of his (purely by chance) having been born in Germany in the early 20th century. By that same token, a person with the capacity to participate enthusiastically in the German Nazi Party who by good fortune happened to leave Germany in the 1920s might lead a peaceful life, beyond reproach, in Argentina.

Bernard Williams's 1980 response to Nagel refined the concept of moral luck further, in particular luck in how one's actions turn out (or consequential luck) (Williams 1980). Nagel's paper and Williams's response laid the foundation for the philosophical study of moral luck. Essentially, Nagel and Williams argue that the system of values that flows from strict adherence to the condition of control (the principle that one ought to be morally assessed *only* for that which is under one's control) is unnatural and, furthermore, wholly unrecognizable. "The intuitively plausible conditions for moral judgement threaten to undermine it all," Nagel explains (Nagel 1979, 328). Nagel and Williams were not the first to challenge the role of luck in moral assessment. Feinberg (1962), for instance, observed that factors beyond a given agent's control do bear on one's natural moral assessments of that agent. Nagel and Williams, however, pioneered the concept and sparked decades of vigorous philosophical debate.

Margaret Urban Coyne (1985) identifies three different positions on the topic of moral luck that emerged in the years following the publication of Williams's response to Nagel. The positions she distinguished in 1985 continue to shape debate on the subject. The first is "moral luck is real and constitutes a paradox in morality." The second is "moral luck is illusory." The third and final is "moral luck is real and not paradoxical" (Coyne 1985, 236).

The first is the position that Williams and Nagel themselves advance. The second position is held by moral luck skeptics including Jensen (1984), Richards (1986), Thomson (1989), Zimmerman (1987), Rescher (1993), and Pritchard (2006). Scholars representing the latter tendency argue that Nagel's paradox is no paradox at all but rather a case of epistemic confusion. Misfortune might change a bystander's *knowledge* of a person's desert, by this argument, but cannot change the *content* of that person's desert. Put differently, moral bad luck might reveal the substance of a person's character, and in so doing expose that person to sanctions, but cannot affect that person's authentic moral standing. The third position that Coyne distinguishes is advocated by Coyne (1985) herself, who offers that contingency does bear substantively on moral assessment but that it is by this intrusion of chance that human virtue is rendered meaningful. "Courage, integrity, compassion, humility, dignity, and grace," she elaborates, "could not mean all that they do for us in a morally hazard-free world" (Coyne 1985, 324). Card (1996), and

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

Athanassoulis (2005) articulate similar positions.

Philosophers of moral luck do address issues of criminal justice. Scholarly debate over the significance of consequential luck to criminal sentencing practices has been a mainstay of the field for decades. Bebhinn Donnelly writes that thought on the issue falls into two different categories: Theories of equivalence and theories of non-equivalence (Donnelly 2007, 393). Equivalence theorists argue that blameworthiness ought to be a reflection not of the consequences of a person's actions but of her actions and intentions in and of themselves (Donnelly 2007, 393). By this view, a person accused of attempted murder and a person accused of completed murder ought to be administered equivalent sentences. Leading equivalence theorists include Ashworth (1993), Becker (2005), and H.L.A. Hart (Summers 1962). Non-equivalence theorists, including Levy (2005), Andre (1983) and legal theorist Antony Duff (Jacobs 1999) hold that morally culpable actions that do *not* result in death are not equivalent to those that do (Donnelly 2007, 393). For this reason, non-equivalence theorists propose that the crime of attempted murder merits less serious sanctions than the crime of completed murder. It is important to note that my paper addresses circumstantial, not consequential, luck. The equivalence debate is key to understanding most contemporary discussions of moral luck and criminal justice but does not appear in my research.

Theory Development

I employ purely descriptive methods of analysis. The aim of this paper is *not* to advance a position on the normative value of the *Gacaca* court system nor any particular theory of moral luck. Furthermore, my analysis takes Rwanda as a *sui generis* case and neither adopts nor endorses a particular theory of transitional justice. My research does, however, engage a web of theoretical assumptions.

Moral luck is troubling because it draws attention to the function of chance in moral assessment. It subverts the widely held belief that neither good luck nor bad luck should affect one person's judgement of another person's moral standing (what moral philosophers would call the desert of the person being judged). Adam Smith struck on this belief in *The Theory of Moral Sentiments*. He proposes in the introduction to the text that the morally essential content of a person's actions lies in that person's inner will, and that motivation and intention are the proper subjects of moral assessment (Smith 1759). Decades later, Kant theorized in his *Foundations of the Metaphysics of Morals* that:

The good will is not good because of what it affects or accomplishes or because of its adequacy to achieve some proposed end; it is good only because of its willing, i.e., it is good of itself... Even if it should happen that, by a particularly unfortunate fate... this will should be wholly lacking in power to accomplish its purpose, and if there remained only the good will then it would sparkle like a jewel in its own right, as something that had its full worth in itself (Kant 1785).

From Kant's ethics flows the Control Principle: "We are morally assessable only to the extent that what we are assessed for depends on factors under our control" (Nagel 1979). Inquiry into moral luck presumes faith in the Control Principle because it casts doubt upon whether moral decision makers *do in fact* adhere to the Control Principle and whether they *ought* to adhere to the Control Principle.

This paper also questions the possibility of accusing individuals for collective action. Theory addressing individual responsibility for instances of collective action is divided between individualists and collectivists. Hardline individualists propose that all responsibility can be accounted for at the level of the individual, whereas collectivists argue that responsibility is in some cases irreducible from the level of the collective. Debate between individualists and collectivists in certain ways mirrors debate among moral philosophers over the issue of moral luck, and by taking as its focus the trials of individual *genocidaires*, my paper does favor a certain viewpoint. Namely, although my task is largely descriptive, I do not challenge the proposition that individuals can and should be held responsible for actions that they carry out as a part of a collective. This sets my paper at odds with collectivist theory. I do not, however, presume that *total* responsibility can be accounted for at the level of the individual – it is not the case that collectives cannot hold responsibility.

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

Methodology

"Thick description" is a methodology first described by Thomas Ryle (Ryle 1968). The methodology was pioneered, however, by anthropologist Clifford Geertz, who used the term to describe his approach to ethnography (Geertz 1973). His development of thick description was Geertz's primary contribution to the social sciences. It allowed Geertz, in his research, to thoroughly describe human behavior by "sorting out the structures of signification" within which behavior occurs (Geertz 1973, 318). Thick description, as Geertz theorized it and as it has come to be employed by analysts representing a variety of disciplines, is a normative, interpretive research methodology that accounts for symbolic context and historical, cultural depth.

Thick description suits my analysis well for two reasons. First, my research is interpretive and relies on the analysis of texts and oral histories. Empirical research methods would not have been appropriate, given the dearth of publicly available sanctions data and the normative character of my research question. Second, my research draws principally from firsthand accounts of individual trials. The cases below are, to use Geertz's language, "microscopic" (Geertz 1973, 318). Thick description is well-adapted to research on this scale.

This category of cultural analysis (that which begins with local truths and ends in general visions of nation and society) is fraught. It is tempting but misguided to hunt for the essence of grand systems of law and morality in the minutia of individual *gacaca* trials. Equally inappropriate is a methodological approach that conceives of local cases as controlled environments or natural laboratories that generate scientific, unassailable results. A strength of thick description is that avoids these pitfalls. Thick description makes possible an informed and profound understanding of the local case (in this case, the proceedings of individual *gacaca* court cases) and adds depth to one's understanding of more general structures and themes (in this case, ethics and transitional justice).

Research Design

This analysis is divided into three subsections. The first, 'Participation and Intention,' includes transcripts from two different *Gacaca* trials. Both transcripts were gathered by Anuradha Chakravarty and are included in her book, *Investing in Authoritarian Rule*. The two cases chosen negotiate the distinction between participating in a squad and intending to kill. Together, they move my analysis closer to a distinct notion of moral culpability. The second subsection, 'Penitence,' introduces forgiveness – that administered by *Gacaca* officials and that practiced by genocide survivors. The centrality of penitence and forgiveness to *Gacaca*, in its design and in its practice, is integral to my research. The third subsection, 'Just Following Orders,' analyzes the ethical content of "superior orders" and considers *Gacaca*'s place alongside past transitional justice mechanisms.

Analysis

From the *Gacaca* court system's emphasis on reconciliation and community participation emerged a code of trial ethics radically unfamiliar to Western observers. Appeals to poor circumstantial luck were A) common and B) led to more lenient sanctions.

I. Participation and Intention

Organic Law No. 16/2004 of 19/6/2004 establishing the organization, competence, and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 (the Gacaca Law) divides Category 2 individuals into three subcategories. They are, from most sanctionable to least sanctionable, as follows:

1. The person whose criminal acts or criminal participation place among killers or who commit acts of serious attacks against others, causing death, together with his or her accomplices;
2. The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices;

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

3. The person who committed or aided to commit other offences persons, without the intention to kill them, together with his or her accomplices (Gacaca Law 2004).

Below are two cases, taken from Professor Anuradha Chakravarty's text, *Investing in Authoritarian Rule: Punishment and Patronage in Rwanda's Gacaca Courts for Genocide Crimes*. The trials are remarkable for the role that luck in one's circumstances plays in each. In both cases, the accused confesses to some degree of participation in a death squad. In both cases, furthermore, the accuser's confession and the court's opinion that the accused had participated only peripherally in the death squads lead the courts to administer more lenient sanctions than they might have otherwise. Moral luck enters into the equation at the moment the accused argues that he or she was swept up in the moment, or only "following along" as opposed to taking a leadership role. The argument relies on a certain conception of individual responsibility for collective wrongdoing (one to which the judges in the cases described below apparently adhere) whereby one's actions, no matter how heinous, might be excused by appeal to "everyone else was doing it, given the context my actions *were not* extraordinary." The implication is that the accused is an ordinary person, who makes decisions as anyone might, who happened to find him or herself in extreme circumstances.

Case #1 (Chakravarty 2016, 154 -159):

The defendant, John, (pseudonyms are Chakravarty's) *had already confessed* to participating in five separate incidents, including two murders. The trial was nearly complete when a survivor, Marianne, stood and asked to speak. She alleged that John's testimony was incomplete. John had confessed to participating in a death squad, which had threatened Marianne's life and extorted a cow from her husband. Marianne accused him of *leading* the death squad to her house. According to Marianne, John instigated the attack by sharing her location with the death squad, sharing with them that she was an *icyitso* (RPF collaborator), and then leading the attackers to her home. Participation in a death squad is looked upon as less heinous an offense than leading a death squad. If Marianne's charges held, then John could become ineligible for a reduced sentence. Marianne's allegation prolonged John's case, but the case was ultimately decided in his favor. The judges could not prove that he was responsible for tipping the attackers off to Marianne's location and *icyitso* status.

Relevant Statement:

0. President of the Concerned Cell Court: "The crime he [John] committed was to steal a cow. He has accepted that and paid for it. So, the matter has been finished."

Implications:

The President's comments indicate that, in her eyes, John's crime was stealing the cow. John, by his own admission, was a member (if peripheral) of a death squad. The President's remarks reflect a dismissive attitude toward participation in death squads, which she appears to rank as less criminal than the theft of livestock. Here she endorses the view that when evil becomes ordinary, individuals cannot be held responsible for certain, reprehensible actions. During the genocide, participation in a death squad, though certainly more grave a crime than stealing livestock, became less *extraordinary* a crime than stealing livestock and therefore less sanctionable.

The importance of the distinction between participating in a death squad and leading a death squad to someone's home is remarkable as well. Involvement with death squads, to a certain extent, is apparently not criminal. Involvement becomes criminal the moment that an individual within the death squad sets him or herself apart by taking on a leadership role. Most importantly, the President's statement indicates that moral responsibility for a killing begins not with participation but with initiative. She tacitly supports the position that normal behavior, even in cases where "normal behavior" can be extended to include attempted murder, can be forgiven on the basis of its being normal. Luck in one's circumstances, she believes, excuses participation to a certain degree.

Case #2 (Chakravarty 2016, 159-162):

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

The defendant, AC, (Chakravarty's pseudonym) stood charged of being an accomplice to a killing. AC confessed to the charges. At trial, however, new accusations arose. A witness claimed that AC (who had confessed only to having been an unarmed and peripheral member of the death squad that carried out the killing) had in fact carried a machete. This accusation prolonged AC's trial. As the trial continued, more accusers came forward. One claimed that AC had used his machete to beat a captive Tutsi man, another alleged that AC had masterminded the killing with which he had originally been charged with only peripheral involvement. AC was forced to upgrade his confession. Eventually, the court decided on a relatively lenient verdict – he was classified as an individual who had confessed to crimes perpetrated with the intention to kill. Chakravarty reports that AC was exceedingly penitent, and that he wept openly in front of the court on more than one occasion. She speculates that this might have been partly responsible for the judges' decision not to pursue more serious charges.

Relevant Statement:

- AC: "I did not behave well. I have a role in his death."

Implications:

As seen in John's case, AC's verdict depends not on whether he participated in a death squad (he confessed that he did) but whether he carried a machete – a detail which opens him up to charges of perpetrating crimes with an intention to kill. On its own, participation in a death squad *does not* constitute "intention to kill."

AC's penitence, furthermore, to the extent that it might warp the court's perception of his responsibility for the killing, also bears mentioning. Begging forgiveness and showing remorse is not the same as appealing to luck in one's circumstances. A court's decision to soften its verdict on the basis of such a display, however, would indicate that the jurors themselves carry with them a particular conception of moral luck. The question is, why exactly was AC's court receptive to his penitence? This question will return later in my analysis.

In both cases, involvement with a death squad could be forgiven so long as the accused could have been shown to have merely *participated* in, and not to have led or organized, the death squad. This distinction does not appear the Gacaca Law. The law does draw a crucial distinction between those who did and did not "intend to kill," a distinction that becomes important in AC's case. AC's judges contemplated charging him with intention to kill but decided that his participation in a death squad alone was not sufficient evidence. Here, as in John's case, luck in one's circumstances emerges as a part of the *Gacaca* judge's calculations. The decisions reached in cases 1 and 2 indicate that the *Gacaca* court system looked favorably upon extraordinary circumstances pleas, and that taking part in a death squad was construed as non-criminal and not evidence of murderous intent.

II. Penitence

Concurrent with their official aims of truth-telling and national reconciliation, the *Gacaca* courts emphasized the importance of forgiveness. Forgiveness in the wake of a genocide might strike one as impossible or undesirable. Nevertheless, interviews with survivors suggest that forgiveness is not only possible, but central to their experiences of the *Gacaca* court system. One survivor testified that "He [a genocide perpetrator] acknowledged what he did with more regrets, and I felt in my heart that I deserve to offer him forgiveness. Today, genocide perpetrators and victims of the genocide live together, side by side and peacefully. I think Rwanda is, today, the only country where the victims of such hideous crimes live side by side with their perpetrators" (National Commission for the Fight Against Genocide 2017, 74). Another, a survivor from the town of Mwirire, shared, "Our house was completely destroyed during the genocide after the murder of my husband and my four children. Yes, the one who killed them pleaded guilty and asked for forgiveness, and I forgave him" (National Commission for the Fight Against Genocide 2017, 61).

Not everyone is as optimistic. One survivor remarked that "During the *Gacaca* court trials, genocide perpetrators were encouraged to seek forgiveness from the victim's family, and those who confessed and pleaded guilty were given shorter sentences in exchange" (National Commission for the Fight Against Genocide 2017, 75). This is no accident – Rwandan law incentivized confession, which in many cases led *genocidaires* to beg strategically for

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

forgiveness. This behavior can be seen in the case of AC described above. Another survivor added that "They [the accused] are afraid of living out their lives in prison if they don't ask for forgiveness... Once they've asked for forgiveness in front of the *Gacaca* they think it's all over" (Penal Reform International 2010, 50).

The Gacaca Law states that the court system is designed "not only with the aim of providing punishment, but also reconstituting the Rwandan Society that had been destroyed by bad leaders" (Gacaca Law 2004). The centrality of restoration to the *Gacaca* court system is evidenced by the above testimonies. *Gacaca*'s administrators, it is clear, deliberately implemented a reconciliation-oriented model of transitional justice. The court system has been largely successful, too, in its stated aim of reconstructing a fractured Rwanda, which is remarkable given the extent of participation in the genocide. Might reconciliation, however, have come at an expense?

Professor Sam Rugege, Deputy Chief Justice of the Supreme Court of Rwanda, in a 2010 interview with *Gacaca* scholar Phil Clark, remarked, "And justice must precede reconciliation. It's part of the process – in many ways, we have to get it out of the way so that reconciliation can become viable" (Clark 2010, 240). By justice, it seems that Professor Rugege is referring to a narrowly punitive legal framework. The justice Rugege describes might more appropriately be termed strict accountability – a legal ethos which places retribution at its fore and disregards the possibility of mitigating circumstances. Rugege does believe that justice, as he defines it, is central to *Gacaca*. Even he, however, acknowledges that the ends of justice might be at odds with those of reconciliation.

Clark also spoke with Rwandan Minister of Justice Tharcisse Karugarama about the importance of reconciliation. Karugarama was pleased with the performance of the *Gacaca* court system:

Justice isn't about laws. It's about fairness and restoring human dignity. I've been a prosecutor and a judge, and I know you shouldn't confuse justice and legal dogma. *Gacaca* hasn't always been acceptable to the legal fraternity but that's just dogma. *Gacaca* has delivered a justice that restores people's dignity and gives them a way to live together (Clark 2010, 241).

Karugarama, who speaks on behalf of the Rwandan *Gacaca* administration, is of the opinion that the pursuit of what he calls legal dogma and Rugege calls justice must cede priority to the pursuit of reconciliation. At every level of their operation, it appears, Rwanda's *Gacaca* courts advanced restoration at the expense of accountability.

Longman, a *Gacaca* optimist, suggests that this outlook reflects *utabera* – a particular understanding of justice shared by hundreds of Rwandan civilians that he interviewed in 2010 (Longman 2010, 49).

While justice in the West is commonly understood to involve individual accountability and punishment for infractions of public law, *utabera* is understood in more collective terms. In Rwanda, crime is seen as disturbing the equilibrium of society, and the primary goal of judicial processes is to re-establish society's balance rather than establishing accountability through the punishment of wrongdoers (Longman 2010, 49).

It should come as no surprise, according to Longman, that *Gacaca* might resemble state-sanctioned *utabera*.

Ozannio Ojielo, a scholar of Africa's Great Lakes region who specializes in the study of comparative transitional justice, poses a normative challenge to *utabera*'s priorities. Ojielo writes that societies in transition must respond to the demands of justice and accountability first and foremost so that they might "fully demarcate the past from the future" (Ojielo 2013, 126). Such arrangements are necessary, according to Ojielo, because new codes of governance and behavior are necessary following a collapse on the order of the Rwandan genocide. Wrongdoing must be brought to light, challenged, and punished (Ojielo 2013, 127).

Ojielo's justice and Karugarama's are both carried out in the service of national reconstruction. There is a gulf, however, between transitional justice as Ojielo theorizes it and that that was administered by *Gacaca* court officials. Karugarama, for instance, would likely dismiss Ojielo's principle of accountability as overly dogmatic. The most substantial difference between the two visions of justice is the treatment within each of individual moral responsibility. For the purposes of restoring dignity and providing Rwandans with, to quote Karugarama, "a way to live together,"

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

Gacaca officials made forgiveness state policy. The result was a national court system that looked favorably upon the convicted genocide criminal's classic appeal to pity: Recourse to moral luck.

III. Just Following Orders

Professor Chakravarty conducted interviews in two different Kigali prisons with individuals who had confessed to genocide crimes. Among those that she interviewed one encounters a tendency to shift blame for genocide crimes onto Hutu elites. Below are six of the most telling statements that she gathered (Chakravarty 2016, 194-195).

1: "The RPF knows we are not responsible. It came from the leaders, not the peasants."

2: "The [Hutu] leaders are the ones who led us into these killings."

3: "No one could have dared to kill if had not been passed by that government as a law. People killed because they felt they were obeying."

4: "We did what [Hutu] politicians asked us to do."

5: "The implementers were ignorant people organized by their [Hutu] leaders. Ordinary people were not greedy for property."

6: "*Interahamwe* [Hutu militia groups] implemented what they were ordered to do by the government."

Nagel uses the example of Nazi Germany to illustrate the problem of circumstantial luck. He addresses the Nuremberg defense ("I was just following orders," also "anyone might have behaved the same") specifically. He writes:

Ordinary citizens of Nazi Germany had an opportunity to behave heroically by opposing the regime. They also had an opportunity to behave badly, and most of them are culpable for having failed this test. But it is a test to which the citizens of other countries were not subjected, with the result that even if they, or some of them, would have behaved as badly as the Germans in like circumstances, they simply did not and therefore are not similarly morally culpable. Here again one is morally at the mercy of fate... we judge people for they actually do or fail to do, not what they would have done had circumstances been different (Nagel 1979, 326).

In the case of the Rwandan genocide, Nagel's observation that ordinary citizens of extraordinary regimes are granted an opportunity to behave heroically and an opportunity to behave badly rings true. So too does his observation that those citizens find themselves "morally at the mercy of fate."

Therein lies the unsettling power of statements such as "No one could have dared to kill if it had not been passed by that government as law." The "mercy of fate" is anathema to modern jurisprudence, to which the establishment of malicious intent is a central tenet. The latter principle reflects Kant's conception, introduced earlier in this report, of a blameworthy will. Where intent is difficult to pinpoint, as in the cases of the *genocidaires* interviewed above, criminal wrongdoing is difficult to articulate. American constitutional lawyer Yosel Rogat addressed this difficulty in his study of the trial of Nazi war criminal Adolf Eichmann. Rogat proposes that "a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore, that a wronged collectivity owes a duty to the moral order to punish the criminal" (Rogat 1961, 22).

Hanna Arendt cites Rogat in her own study of the Eichmann trial. In the epilogue to her report, Arendt upholds the decision of Eichmann's judges to administer the death penalty but criticizes the court's rationale. She pens her own, dissenting opinion on the basis of the principle that "justice must not only be done but must be seen to be done." Arendt steps into the role of Eichmann's judges and addresses the man directly:

No matter through what accidents of exterior or interior circumstances you were pushed onto the road of becoming a

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

criminal, there is an abyss between the actuality of what you did, and the potentiality of what others might have done... You told your story in terms of a hard-luck story, and, knowing the circumstances, we are, up to a point, willing to grant you that under more favorable circumstances it is highly unlikely that you would ever have come before us or before any other criminal court. Let us assume, for the sake of argument, that it was nothing more than misfortune that made you a willing instrument in the organization of mass murder... Just as you supported and carried out a policy of not wanting to share the earth with the Jewish people... we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang (Arendt 2006, 278-279).

I hesitate to draw parallels between the holocaust and the Rwandan genocide for a variety of reasons. The purpose of this analysis, of course, is not to compare the two genocides. The purpose is to draw from and amplify the contributions made by scholars of denazification to the much broader field of ethics and transitional justice. Rogat and Arendt propose a solution to Nagel's paradox by way of an appeal to a higher moral order. Regardless what role misfortune may have played in the appearance of a *genocidaire* before a court of law, they posit, the fact remains that the guilty party participated in a class of crime so grave that retribution becomes non-negotiable.

Conclusion

Implicit in the performance and administration of the *Gacaca* courts of post-genocide Rwanda is a different solution. The case analyses in the 'Participation and Intention' subsection of my report reveal that certain *Gacaca* judges believed that individual defendants could not be held responsible for a wide range of collective actions, including (but not limited to) participation in death squads. This attitude must be attributed to the judges themselves – their positions with respect to establishing intention to kill could not have been deduced from the text of the *Gacaca* Law alone. The *Gacaca* Law was written and administered, however, by officials who shared the judges' outlook on individual responsibility. The statements discussed in the second subsection of my report reflect an official policy of forgiveness and indicate that the aforementioned policy was largely successful. Finally, the defense introduced in the subsection titled 'Just Following Orders' affirms that confessed *genocidaires* themselves, as one might expect, were quick to plead superior orders or appeal to extraordinary circumstances. I find that, at every level of the *Gacaca* court system, appeals to moral luck were common, encouraged, and well-received.

In short, a particularly lenient conception of individual responsibility and circumstantial luck held together the assemblage of survivors, genocide criminals, judges, and administrators that made up Rwanda's post-genocide court system. In the interest of national reconciliation, the Rwandan government instituted and administered a transitional justice program that rewarded confession and promoted reintegration. *Gacaca*, as a result, came to be characterized by a permissive attitude toward issues involving luck and moral responsibility.

Unfortunately, my access to court proceedings and *Gacaca* transcripts was limited. A researcher with full access to the Rwandan government's *Gacaca* archives could have undertaken a far more comprehensive analysis. Furthermore, although the published work of *Gacaca* scholars proved invaluable to my research, my paper could have been more thorough had I been able to conduct my own interviews and document research in Rwanda. Hopefully my work will inspire others to tackle the issue of moral luck in the context of transitional justice and expand on my findings.

As it stands, scholarship addressing the ethics of Rwanda's *Gacaca* courts is scarce and scholarship addressing the courts' approach to luck in one's circumstances is nonexistent. My research begins to fill this gap in the *Gacaca* literature but leaves important questions unresolved. For instance, did *Gacaca*'s implicit position on the issue of moral luck evolve as time passed and the courts became more punitive and more corrupt? What can researchers learn about the diffusion of international justice norms from Western, legalistic criticisms of *Gacaca*'s trial procedures? Finally, a comparative survey of contemporary transitional justice mechanisms might yield important results. For all the ink that has been spilled on the topic in recent decades, *Gacaca* continues to fascinate and provoke. I hope that my paper moves the fields of ethics and transitional justice forward toward a more nuanced understanding of truth, international justice, and reconciliation.

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

Bibliography

- Amnesty International. 2002. *Gacaca: A question of justice*. London, England: Amnesty International Publications.
- Andre, Judith. 1983. "Nagel, Williams, and Moral Luck." *Analysis* 43(4): 202–207.
- Arendt, Hannah. 1963. *Eichmann in Jerusalem: A Report on the Banality of Evil*. London: Penguin
- Ashworth, Andrew. 1993. "Some Doubts about Retributive Justice." *Crim. Law Forum* 4: 277.
- Athanassoulis, Nafsika. 2005. "Common-Sense Virtue Ethics and Moral Luck." *Ethical Theory and Moral Practice* 8(3): 265–276.
- Becker, Lawrence C. 2005. "Reciprocity, Justice, and Disability." *Ethics* 116(1): 9–39.
- Buckley-Zistel, Susanne. 2005. "'The Truth Heals?' Gacaca Jurisdictions and the Consolidation of Peace in Rwanda." *Die Friedens-Warte* 80(1/2): 113–129.
- Brounéus, Karen. 2010. "The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health." *The Journal of Conflict Resolution* 54(3): 408–437.
- Brehm, H. N., Uggen, C., & Gasanabo, J.-D. 2014. "Genocide, Justice, and Rwanda's Gacaca Courts." *Journal of Contemporary Criminal Justice* 30(3): 333–352.
- Card, Claudia. 1996. "The Unnatural Lottery: character and moral luck."
- Chakravarty, Anuradha. 2016. *Investing in authoritarian rule: Punishment and patronage in Rwanda's Gacaca courts for genocide crimes*. Cambridge: Cambridge University press.
- Clark, Phil. 2010. *Justice without Lawyers: Peace, justice and reconciliation in Rwanda*. Cambridge: Cambridge University Press.
- Cobban, Helena. 2002. "The Legacies of Collective Violence." *Boston Review*. <http://bostonreview.net/archives/BR27.2/cobban.html> (September 7, 2018).
- Corey, Allison, and Sandra F. Joireman. 2004. "Retributive Justice: The Gacaca Courts in Rwanda." *African Affairs* 103(410): 73–89.
- Coyne, Margaret Urban. 1985. "Moral luck?" *Journal of Value Inquiry* 19(4):319-325.
- Donnelly, Bebhinn. 2007. "Sentencing and Consequences: A Divergence between Blameworthiness and Liability to Punishment." *New Criminal Law Review: An International and Interdisciplinary Journal* 10(3): 392–414.
- Des Forges, Alison, and Kenneth Roth. 2002. "Justice or Therapy?" *Boston Review*. http://bostonreview.net/archives/BR27.3/roth_desforges.php (September 7, 2018).
- Drumbl, Mark. 2000. "Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda." *NYU Law Review* 75(5): 1221–1326.
- Feinberg, Joel. 1962. "Problematic Responsibility in Law and Morals." *The Philosophical Review* 71(3): 340–351.
- Geertz, Clifford (1973). Thick Description: Towards an Interpretive Theory of Culture. In *The Interpretation of Cultures*. Basic Books, New York City.

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

- Human Rights Watch. (2011). *Justice compromised: The legacy of Rwanda's community based Gacaca courts*. New York, New York: Human Rights Watch Publications.
- Ingelaere, Bert. 2009. "Does the Truth Pass across the Fire without Burning?' Locating the Short Circuit in Rwanda's Gacaca Courts." *The Journal of Modern African Studies* 47(4): 507-528.
- Ingelaere, Bert. 2018. *Inside Rwanda's Gacaca Courts*. Madison: University of Wisconsin Press.
- Jacobs, Jonathan. 1999. "Luck and Retribution." *Philosophy* 74(290): 535-555.
- Jensen, Henning 1984. Morality and Luck. *Philosophy* 59(229):323 - 330.
- Kant, Immanuel. 1785. *Foundation for the Metaphysics of Morals*.
- Levy, Ken. 2005. "The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action That Causes It." *Law and Philosophy* 24(3): 263-303.
- Longman, Timothy. 2006. 'Justice at the grassroots? Gacaca trials in Rwanda' in N. Roht-Arriza and J. Mariezurrena (eds), *Transitional Justice in the Twenty-First Century: beyond truth versus justice*. New York NY: Cambridge University Press.
- Meyerstein, A. 2007. "Between law and culture: Rwanda's gacaca and postcolonial legality." *Law and Social Inquiry* 32(2): 467-50.
- Nagel, Thomas. 1979. "Moral Luck." 4(1): 73-80.
- Ojielo, Ozonnia. 2013. "Justice versus Reconciliation: The Dilemmas of Transitional Justice in Kenya." *Conflict and Peacebuilding in the African Great Lakes Region*, edited by Kenneth Omeje and Tricia Redeker Hepner, Indiana University Press: 122-140.
- Pritchard, D. 2006. "Moral and Epistemic Luck." *Metaphilosophy* 37: 1-25.
- Rescher, Nicholas. 1993. "Moral luck." In Daniel Statman (ed.), *Moral Luck*. Suny Press: 141-66.
- Penal Reform International (2010). *Eight Years On: A Record of Gacaca Monitoring in Rwanda*. Bell and Bain: London.
- Richards, Norvin. 1986. "Luck and Desert." *Mind* 95(378):198-209.
- Rogat, Yosal. 1961. *The Eichmann trial and the rule of law*. Santa Barbara, Calif.: Center for the Study of Democratic Institutions.
- Ryle, Gilbert. 1968. Thinking and Reflecting. In *The Human Agent*. Royal Institute of Philosophy Lectures. Palgrave Macmillan: London.
- Sarkin, Jeremy. 2001. "The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide." *Journal of African Law* 45(2): 143-172.
- Scheffer, David. 2004. "It Takes a Rwandan Village." *Foreign Policy* 143(2004): 84-85.
- Smith, Adam. 1759. *The Theory of Moral Sentiments*.
- Summers, Robert S. 1962. "H.L.A. Hart on Justice," *Cornell Law Faculty Publications*. Paper 1263.

"The Crime He Committed Was to Steal a Cow": Moral Luck and Gacaca

Written by Maxfield Hancock

Testimonies and Needs of Genocide Survivors. Kigali: National Commission for the Fight Against Genocide, 2017.

Thomson, Judith Jarvis. 1989 "Morality and Bad Luck." *Metaphilosophy* 20(3/4): 203–221.

Thomson, Susan. 2011. "The darker side of transitional justice: The power dynamics behind Rwanda's Gacaca courts." *Africa: Journal of the International African Institute* 81(3): 373–390.

Tully, L.D. 2003. *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. Int'l & Comp. L. Rev: 385.

Uvin, Peter, and Charles Mironko. 2003. "Western and Local Approaches to Justice in Rwanda." *Global Governance* 9(2).

Venter, C. M. 2007. "Eliminating fear through recreating community in Rwanda: the role of the gacaca courts." *Texas Wesleyan Law Review* 13(2): 577-97.

Williams, Bernard. 1980. "Moral Luck: Philosophical Papers 1973 – 1980."

Zimmerman, Michael J. 1987. "Luck and Moral Responsibility." *Ethics* 97(2): 374–386.

Written at: Hendrix College

Written for: Dr. Daniel Whelan

Date written: February 2019