Rediscovering Retribution: Understanding Punishment Theory after Blakely

Blakely will surely transform our sentencing policies in both large and small ways. But before the courts should further interpret and apply Blakely, a fuller understanding of the underlying punishment theory is necessary. Accordingly, this article attempts to paint a brief picture of the past and future of sentencing theory. The core of Blakely relies on an unarticulated theory of community-based retribution, one that needs to inform our understanding of criminal punishment as we go forward.

Over the past thirty years, the theory underlying criminal punishment and sentencing has been in flux. Although sentencing rules and proceedings have been changing, no coherent belief structure has supported the new system, which has led to inequity and inconsistency. The Supreme Court’s reasoning in Blakely and its prior sentencing opinions, however, suggest a new jurisprudential underpinning to sentencing, one that is based on the Court’s reliance and renewed attention to the rights of the jury to determine all facts affecting punishment.

Before we explore the new jurisprudence underlying the reasoning in Blakely and its predecessors, though, it is important to understand what sentencing theory we are leaving behind. The utilitarian theories driving criminal sentencing in the late nineteenth and twentieth centuries were deeply problematic. As Albert Alschuler has contended, optimistic reformers led penal philosophy to rehabilitation as a basis for sentencing.1 Beginning in the 1970s, however, disillusioned reformers rejected rehabilitative sentencing theories for those of deterrence and incapacitation. In 2003, prior to Blakely but following Jones, Apprendi, and Ring, Alschuler presciently argued that “retribution, a seemingly archaic, backwards-looking goal dismissed by the champions of rehabilitation at one end of the twentieth century and by the champions of ‘crime control’ at the other, merits recognition as the central purpose of criminal punishment.”

As sentencing scholars have noted, penal theory and punishment philosophy can be either dependent or independent variables—they may cause changes in the world or result from them. Consequently, we can better understand the origins of punishment ideas, policies, and practices if we become more aware about why and when particular ideas and beliefs become popular. Thus, exploring the Blakely Court’s “rediscovery” of the Sixth Amendment jury right in sentencing proceedings becomes critical to help us understand why a retributive theory of sentencing makes best sense of the Court’s most recent sentencing decisions.

Retributive theory is often misunderstood and mischaracterized. Although a retributivist must believe that imposition of deserved punishment is an intrinsic good, that is the only proposition to which she commits; she needn’t believe it is the only intrinsic good. Instead, a retributivist can accept the goal of imposing the community’s sanctions as an intrinsic good that expresses social disapproval, shapes norms, and creates moral education.

Many retributivists believe in a balancing of burdens as part of society’s role in criminal punishment. As scholars have noted, this consequential argument for retributivism turns on “how a society perceives desert rather than on desert itself.” As this line of thought contends, when there are conflicting perceptions of desert, democratic processes are most likely to give the best concept of desert for a polity. Concepts of desert that emerge from democratic processes will generally be widely shared or respected. Finally, “recognizing that criminal punishment is not simply an instrumental good discourages unweighted procedural tradeoffs of the sort that have characterized the new penology.”

As H.L.A. Hart argued, “we attach importance to the restrictive principle that only offenders may be punished.” The Supreme Court’s new sentencing jurisprudence attempts to bolster that statement by ensuring that punishment only goes to those offenders who have been found guilty by a jury of any and every offense with which they have been charged. The critical aspect of the jury’s role in sentencing reflects the importance the Court has placed on the community’s role, and their liberal democratic decision making, in sentencing procedures.

Moral judgments still justify criminal punishment and sentencing, as “[t]he relative gravity of punishments is to reflect moral gravity of offences[ sic].” Accordingly, the level of punishment in retributive theory is roughly equal to the seriousness of the wrong and the blameworthiness of the offender in committing it.
Historically, the jury has made these moral judgments, or determinations of blameworthiness. The Court’s ringing endorsement of the right to a jury decision is equally an endorsement of the jury’s determination of who, in society, is blameworthy. Thus, the ideal of retributive justice, as applied to sentencing, can be found in the Court’s rediscovery and reaffirmation of the right of the jury—that is, the polity—to set out all criminal punishment, no matter what form it may take. This ideal is neither vengeful nor desirous of suffering, but instead allows the community to set out blame for crimes that specifically affect them. We impose community standards of punishment with sadness, not “rettributive hatred.”

Retribution is not only concerned with the offender’s past wrongdoing, of course. Retributivists urge on offenders the idea that they must take responsibility for the reasonably foreseeable results of their actions. Specifically, as one scholar has argued, when we punish an offender who knows or should have known his actions were illegal, “we tell him his actions matter to this community constituted by shared law.” This belief ties into the Court’s repeated arguments, in its recent sentencing decisions, that the jury must make the decisions on almost all facts that affect punishment because only a decision made by a fair cross section of the community imposes the responsibility of taking moral blame for her crime onto the offender.

When doling the moral blame of punishment falls solely, or primarily, to the judge, instead of the jury, offenders may not have as much feeling of responsibility for their actions, because the kind and type of punishment—the sentence—is far attenuated from their community. When the judge determines the facts creating a sentence, the offender may very well attribute his punishment to the State and shrug off the desired feelings of responsibility or awareness of his wrongdoing. In contrast, when the jury determines the facts for a sentence, it is harder for the wrongdoer to duck the burden of responsibility for his crime, because his fellow citizens, his community, and his peers have pronounced his blameworthiness—as signified by the weight and heft of his sentence.

Finally, a form of retributive theory helps support the Court’s new sentencing jurisprudence because every time the offender commits a crime, she undermines the sovereign will of the people by challenging their decision-making structure. As criminal laws in liberal democracies reflect a democratic pedigree, crimes are expressions of superiority to the state and the community. By involving the will of the people within the sentencing punishment phase, via the incorporation of the jury, the Court helps offset the unfairness the criminal offender created against the community.

The imbalance and attack against the will of the people is punished, in the Court’s new allegiance to the Sixth Amendment right in sentencing, by the requirement that the jury—another branch of the will of the people—find all elements of any crime alleged. If retributivism communicates directly to offenders, as has been argued, then it is a communication from the community to the wrongdoer.

Even preceding Blakely, some scholars argued that in the absence of wide consensus on sentencing goals, it was best to leave the sentencing decision with a deliberative democratic institution—the jury. These scholars contended that the role of the jury was so important because the use of the jury allowed for a greater communal voice in sentencing. Jury involvement in sentencing increases the legitimacy of sentencing punishment, because the punishment for each offense is linked directly to the will of the community.

Post-Blakely, the Court’s interest in, and dedication to, the jury’s right to decide all facts that increase the sentence for an offender is, in some senses, an expressive approach to the rights and needs of the community, because it relies on the “citizenry’s moral representative”—that is, the jury—to express the community’s condemnation of the act and vindicate the victim’s unfairly reduced value.

Ultimately, a retributive theory of law encompasses both the historical antecedents of the Sixth Amendment jury right and modern ideals of punishment. As one scholar notes, revisiting retributive theory with an open eye to its contours can “show that it is bound up with our best understanding of how individuals and communities live well together.” Despite the argument of critics over the years, retributive theory has a liberal democratic nature. As such, it is best suited to explain, on a more philosophical level, the Court’s recent sentencing decisions. Any further sentencing jurisprudence of the Court should explicitly take the underlying retributive philosophy into account.

Notes
2 Id.
4 Id. at 1234.
5 Alschuler, supra note 1, at 15.
6 I borrow these ideals from utilitarian theory, as articulated in Paul H. Robinson & John M. Darley, The Utility of Desert: A Retrospective on the Past Century and Some Thoughts About the Next, 70 U. Chi. L. Rev. 453 (1997), but believe they can equally apply to retributive jurisprudence. As Hart noted well over forty years ago, “most contemporary forms of retributive theory recognize that any theory of punishment purporting to be relevant to a modern system of criminal law must allot an important place to the Utilitarian conception as to be justified as a method of preventing harmful crime.” H.L.A. Hart, Responsibility and Retribution, in PUNISHMENT AND RESPONSIBILITY 235–36 (1968).
7 See Herbert Morris, On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology 34 (1976). Morris argues, among other things, that people’s “disposition to comply voluntarily will diminish as they learn that others are with impunity renouncing burdens they are assuming.”
8 Alschuler, supra note 1, at 19.

Hart, *Responsibility and Retribution*, supra note 6, at 234.


Id. at 1449. See also JEFFRIE G. MURPHY & JULES L. COLEMAN, *Philosophy of Law* 124 (1990).

Markel, supra note 13, at 1453.

Id. at 1465.


Id. at 316 (celebrating the “democratic virtues” of jury involvement in sentencing).


Markel, supra note 13, at 1430.

Id. at 1431.