

Retributarianism: A New Individualization of Punishment

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Abstract This article seeks to reveal, conceptualize, and analyze a trend in the development of the retributive theory of punishment since the beginning of the 21st century. We term this trend “retributarianism.” It is reflected in the emergence of retributive approaches that through expanding the concepts of censure and culpability extend the relevant time-frame for assessing the deserved punishment beyond the sentencing moment. These retributarian approaches are characterized by the individualization of retributivism. On one hand, retributarianism shares with classic retributivism the rhetoric of justice, a focus on the moral evaluation of the severity of the offense, and the primary importance ascribed to maintaining proportionality. On the other hand, it shares with utilitarianism the possibility of taking into account, in addition to the severity of the offense, the offender’s personal circumstances, with a future-oriented perspective that also considers developments subsequent to the commission of the offense. This article analyzes the emergence of retributarianism, suggests possible explanations for its development, and assesses its possible implications for penal theory and policy.

Keywords Philosophy of punishment · Punishment theories · Retributarianism · Retribution · Utilitarianism · Just desert · Penal theory

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1 Introduction

Individualization of punishment has traditionally been identified with utilitarian punishment theories. Utilitarian punishment is not necessarily related to the seriousness of the past offense. Rather, it seeks to tailor the sentence according to the offender's criminogenic needs. Rehabilitation and incapacitation provide judges with wide discretion to assess the degree of risk posed by the offender, diagnose the specific causes of that risk, and consider whether those causes can effectively and safely be treated (Garland 2001a; Matravers 2011; Tonry 2016).

In contrast, the retributive concept, which in its classical formulation consists of the theory of just desert and similar theories, is relatively strict (we call it henceforth, "strict retributivism") (Moore 1997; von Hirsch 2017). Strict retributivism has been recognizing the legitimacy of using individual discretion in sentencing, but this recognition has been limited to assessing the *severity* of the offense, given its particular circumstances, such as the offender's *mens rea* or other elements that affect culpability or harm at the time of the offense. However, the offender's individual characteristics, which are unrelated directly to the severity of the offense, such as the offender's post-offense conduct, are traditionally perceived as irrelevant for retributivists (von Hirsch and Hanrahan 1979; Roberts and Maslen 2015; von Hirsch 2017).

In this article, we address a new individualization of punishment that has emerged in recent years in penal theory. This emerging penal trend expands the limits of retributivism. It allows considering, as part of assessing the *proportionate* punishment, the offender's post-offense changes and perceiving them as elements that may affect the deserved punishment. We propose the term "retributarianism" to describe this development.

The rise of retributarianism is reflected in the emergence of flexible and more individual-oriented retributive concepts of censure and culpability. As we will explain, two main theories—the communicative theory and character retributivism—represent the retributarian trend. These theories offer more flexible concepts of censure and culpability as well as adopting a wider time-frame for assessing the deserved punishment. On one hand, retributarian theories share with strict retributivism the use of the rhetoric of justice, a focus on the moral assessment of the crime, and ascribing primary importance to proportionality. On the other hand, retributarian as well as utilitarian approaches share the possibility of taking into account the offender's post-offense circumstances. Retributarianism, we suggest, is also reflected in the perception of mechanisms that are originally utilitarian, such as probation, parole, and restorative justice, as justified for retributive reasons.

The goal in this paper is to analyze retributarianism, suggest potential explanations for its emergence, and assess its possible implications for penal theory and practice. We seek to provide theorists and policy makers with a basis for a deeper understanding of the contemporary penal discourse in a system that (still) emphasizes the principle of proportionality.

The article contains five parts. In Part 2, we discuss the rise of strict retributivism and describe its meaning. In Part 3, we describe retributarianism and its

theoretical importance. In Part 4, we assess the trend and its implications, and suggest a socio-historical explanation to its emergence. Finally, in Part 5, we look into some future implications and challenges that retributarianism poses.

2 Strict Retributivism: Just Desert and Similar Theories

The renaissance of retributivism in the late 20th century and its causes have been extensively analyzed in legal and philosophical scholarship (von Hirsch 1976, 2017; Whitman 2003, 2014). In short, since the late 19th century until the 1960s, punishment focused on personal and social factors that underlie delinquency, while determining the sentence mainly based on considerations of rehabilitation. In the 1970s, utilitarian punishment and its lack of success in reducing crime became the subject of severe criticism based on utilitarian and retributive grounds (Martinson 1974; Simon 2014). Retributivists argued that risk and rehabilitation have led to unjust and disproportionate punishments. In this spirit, retributive theories have emphasized fairness, proportionality, and desert (Matravers 2011; von Hirsch 2017).

In the past three decades, preventive considerations have replaced retribution in the so-called “new penology,” which emphasizes risk management and the use of actuarial predictors to monitor the populations of offenders (Feeley and Simon 1992; Garland 2001a). Concurrently, American law has resorted to severe sentences against recidivist offenders, usually based on incapacitation and deterrence (Simon 2014). In most Western jurisdictions, however, the principle still guiding sentencing for most offenders is retributive-based proportionality (Matravers 2011; von Hirsch 2017), widely considered by legal scholars and philosophers to be the dominant sentencing theory (Yankah 2015).¹

The question of what meanings the term “retributivism” embraces is not a simple one. As Antony Duff sharply put it, “retributivism needs saving not only from its plentiful enemies, but from some of its would-be friends” (Duff 2011: 3). Because there are many versions of theories calling themselves “retributivist,” one may wonder whether they all belong to a single stream of thought (Cottingham 1979; Duff 2011).² Nevertheless, it can be said that “retributivism” is a collective term for a set of theories that justify punishment on the basis of the common ground that the offenders “deserve” the punishment for their offense, independent of any contingent future benefits that may follow from it (Moore 1997; von Hirsch 2017).³

¹ The centrality of retribution (usually as part of the limiting retributivism account) is prominent in many common law jurisdictions such as United States, England and Wales, Israel, Finland, and Sweden (von Hirsch 2017). A different question involves the gap between the academic “dominant retributivist impulse” and laypersons’ moral intuitions (Yankah 2015: 458).

² See, for instance, Husak’s view of “retributivism” as a collective term that refers to any theory of punishment that affords a central place to desert in the justification of punishment (Husak, unpublished paper). According to his view, even if retributivists identify desert by reference to an offender’s past offense, they need not be construed to insist that persons should always be given, all-things-considered, what they deserve.

³ Moore (1997: 153), for example, argued that “Retributivism is the view that we ought to punish offenders because and only because they deserve to be punished. Punishment is justified, for a retributivist, solely by the fact that those receiving it deserve it.”

According to just desert theory, the severity of the punishment must be proportionate to the severity of the offense, measured in harm and culpability.⁴ Just desert ignores the personal characteristics of the offender, as long as they are unrelated directly to the assessment of the severity of the past offense.⁵ Individual elements that are related to the assessment of culpability or harm, such as *mens rea* or specific defenses, are considered as relevant because they determine the severity of the offense itself. However, consideration of the offender's post-offense personal characteristics is perceived as harming fairness and equality, and as conveying an erroneous social message about the real severity of the offense (von Hirsch 1976; von Hirsch and Ashworth 2005). Furthermore, because the severity of the offense is usually fully known at the time of sentencing, similar punishments should be imposed for those who committed offenses of identical severity under identical circumstances, without the need to reevaluate the punishment over time. As von Hirsch and Hanrahan (1979: 29) put it, "Judgments about seriousness are judgments about past events ... By waiting longer *one learns nothing new*" (emphasis added). In this approach, questions that are important for rehabilitative and preventive sentencing, such as the effect of the punishment on the offenders with respect of their recidivism, are irrelevant to the assessment of the deserved sentence. In other words, strict retributivism assumes that "what's done cannot be undone, as it were" (Roberts and Maslen 2015: 89). No matter how much the offender may regret or try to undo the act, he cannot affect his culpability at the time of the commission of the offense.

In addition to just desert, a common approach in many jurisdictions is limiting retributivism. This mixed theory suggests that proportionality should set upper and lower limits so that any punishment within those limits is not disproportionate (Morris 1974; Frase 2013). Within that range, considerations of prevention, rehabilitation, deterrence, and parsimony are weighed to determine the exact punishment for the offender. Limiting retributivists usually view punishment as "imposed largely on the basis of consequences, with only a very loose outer limit imposed by community notions of what is fitting in the circumstances" (Thorburn and Manson 2007: 287; see also Tonry 1994). However, recent versions of limiting retributivism provide a central role for proportionality and only fairly narrow deviations from proportionality in pursuit of instrumental end (Thorburn and Manson 2007; Frase 2004, 2013). Limiting retributivism, regardless of the room it gives for utilitarian considerations, does not allow consideration of the offender's post-offense conduct based on retributive considerations (Reitz 2004).

3 Conceptualizing Retributarianism

"Retributarianism" is the term we use to describe a trend of individualizing and expanding the retributive concept while blurring the practical implications of the

⁴ Tonry (1994) called von Hirsch and Ashworth's approach "strong proportionality," as opposed to limiting retributivism.

⁵ Some retributivists argued that prior convictions are irrelevant to the offender's culpability and therefore should not be considered in sentencing, while others accept that prior convictions may increase an offender's culpability. For a discussion, see Roberts (2010).

traditional distinction between retributivism and utilitarianism, although differences in other respects are still preserved. Retributarian theories adopt a dynamic and broader time-framework either for assessing the offender's deserved *censure* or the appropriate *culpability* for the past crime. Retributarianism shares with strict retributivism the retributive rationale as a sole justification for punishment, the requirement of proportionality, and the past-looking focus on the severity of the offense. At the same time, retributarianism shares with utilitarianism the possibility of also taking into account post-offense conduct as part of assessing the *proportionate* punishment, rather than due to utilitarian considerations.

To sum up, retributarian theories share one central but neglected feature: an increasing focus on the post-offense characteristics of the offender for assessing the offender's culpability or his deserved censure for the offense. In these approaches, as in strict retributivism, great importance is ascribed to maintaining the proportionality between the severity of the offense and the severity of the punishment. To achieve such proportionality, however, it is necessary to take into account, in addition to the individual elements that affect directly the severity of the offense, also the individual post-offense developments, which are unrelated directly to the past offense. Accordingly, a retributarian principle of proportionality should be formulated as follows: the severity of the penal censure should be a function of the seriousness of the offense, measured by harm and culpability, *as inferred also from post-offense factors*. Since the offender's culpability and the censure might be mitigated after the commission of the offense, the full severity of the sentencing might no longer be deserved and therefore there might be a need to reevaluate the sentence in the future.

To illustrate the shift towards retributarianism, we briefly present the theoretical basis for expanding the concepts of censure and culpability in penal theory since the end of the 20th century.

3.1 Expanding the Concept of Penal Censure

The communicative theory of punishment (Duff 2001, 2004) and its recent developments (Maslen 2015; Roberts and Maslen 2015; Bottoms 2017) constitute a central basis for the retributarianist trend.⁶ The communicative theory shares with the rest of the retributive theories the position that the punishment is justified as a response to an offense. The punishment conveys a message of condemnation, proportionate to the severity of the offense, to the offender, the community, and the victim (Duff 2001). The punishment constitutes a type of secular penance by which the accused can process the wrongfulness inherent in the offense and try to undergo

⁶ Although some doubt the characterization of the communicative approach as a retributive theory, the accepted view identifies this approach at least as a non-utilitarian theory—one that reflects retributive values in a broad sense (Roberts and Maslen 2015). Duff (2001: 21) has described his theory as a “species of retributivism” because it justifies punishment as an intrinsic response to committing offenses. At the same time, Duff (2004: 87) admitted that the communicative theory combines both retributive and future-oriented goals, and therefore it is not purely retributive, or, as he put it, “a ‘third way’ between retributivism and consequentialism.” Zaibert (2002) has described it as similar to a mixed theory.

moral correction. The penal “hard treatment” assists the offender in the process of atonement toward society by focusing his attention on the offense. Duff (2001, 2004) described the penal process as a rational and reciprocal dialogue between the community and the offender: the punishment is addressed to the offender and calls on him to correct his ways in response to the penal message.⁷ Duff stresses, however, that the offender is not *forced* to undergo a moral change. The justification for punishment is not dependent on the chances of success of the condemning message to cause the offender to correct his ways, and certainly not on its practical success. The offender must be able, however, to listen to the penal message, although he needs not be persuaded by it. Therefore, regardless of the conduct of the offender during the period of serving the sentence, at the end of this period, he is considered to have properly completed the dialogue (Duff 2001, 2004).

An additional step towards retributarianism was taken by the theory of responsive censure (Maslen 2015). The responsive censure account emphasizes the need for the punitive authority to reexamine its steps following the offender’s response to the punishment as part of the penal dialogue. In this approach, the term penal “dialogue” is reactive: the offender’s response to the message expressed in the punishment may change the original message conveyed by the punishment. The punitive condemnation is a product of three stages. In the first stage, the imposed sentence constitutes an initial reaction to the offense. In the second stage, the offender responds by his behavior to the condemning message of the punishment. The third stage includes an internal process that takes place within the penal authority itself; according to the offender’s response, the state adjusts the intensity of the original condemnation (Maslen 2015; see Smith 2016).

The theoretical shift from desert to responsive censure expands the relevant time-framework for assessing the deserved punishment (Roberts and Dagan 2018). The focus on the condemnation as a continuous and developing concept, which maintains a feedback relationship with the offender’s response to punishment, allows room for maneuvering when calibrating the punishment, even after the sentencing hearing, according to the offender’s response to the sentence. If the censure imposed by the state is aimed at encouraging a moral transformation of the offender, the censoring agent must be sensitive to signs of moral awakening from the offender since the communication gains a greater legitimacy when it is tailored to the recipient (Roberts and Maslen 2015).

Others have argued that the responsive censure account can be applied in reviewing sentences in cases of responsive offenders who mitigate the original censure of their past offenses. For example, if a prisoner mitigates the seriousness of the offense (say, by making amends for the crime or showing sincere remorse or apology)—he directly minimizes the harm inflicted and therefore the state should consider him as responsive and deserving some censure mitigation. Indifference by the sentencing authority towards the offender’s efforts disrespects the offender’s agency and moral standing, which should be of central concern to retributive punishment. The censoring authority does not “abandon” the prisoner following sentencing. At a

⁷ For an argument that prison violates the communicative principles, see Cochrane (2017).

later point, there is a need to reevaluate whether the degree of censure expressed at the sentencing moment remains proportionate along the punishment period (Smith 2016; Bottoms 2017; Roberts and Dagan 2018).

3.2 Expanding the Concept of Culpability

According to theory of character retributivism, just desert is a function not merely of wrongful conduct but of the quality of the offender's underlying moral character (Murphy 2003, 2007; cf. Yankah 2015).⁸ Whereas according to strict retributivism, the concept of culpability is static and past-looking, character retributivism proposes not to settle for the "moment of weakness" of the commission of the offense, but rather to examine the entirety of the offender's moral personality to determine the proportionate punishment (Gardner 1976). In other words, the punishment should be proportionate to the offender's "inner weakness" (Tasiolas 2007: 503).

We suggest distinguishing between two versions of character theories. According to one version, punishment should take into account the character that the offender comes to have over time, namely positive post-offense changes in the offender's personality. Post-offense remorse and penance "are important emotional and normative mechanisms through which desert is either exhausted or bartered away and through which wrongdoers *alter their central character*" (Robbins 2001: 1118; emphasis added). According to this view, by enduring the emotional suffering of guilt and remorse and by taking responsibility for his wrongdoing "the repentant defendant actually transforms himself into a meaningfully different person, one who deserves less punishment" (Simons 2004: 331). Such an approach indeed expands the relevant time-frame for assessing the deserve punishment, as Smith (2016: 348) explains:

Character retributivism ... makes a broader judgment about the totality of—or at least a wider swathe of—the offender's moral being. The character retributivist calibrates punishment according to the desert of the person, considered holistically, rather than merely her singular criminal act. From this perspective, a categorically apologetic offender rather obviously demonstrates a transformation that indicates an improvement in character from the time of offense.⁹

According to the second version, punishment should be proportionate only to the seriousness of the offense, which is in part a function of the offender's real character. The offender's post-offense conduct might be relevant only insofar as it shows that his character was not actually as bad, at the time of the crime, as the crime itself suggested. A propensity for change is relevant to the assessment of a proportionate punishment if it could be taken as evidence of a less "hardened" character at the

⁸ For other culpability-based arguments for post-offense mitigation, see Smith (2016) and Roberts and Maslen (2015).

⁹ Smith (2016) also argues that considering post-offense conduct, such as apology, can make retributivism fairer and more consistent in the same way that considering pre-offense conduct, such as premeditation, provides a more holistic and accurate view of the wrongness of the past offense (see also Roberts and Maslen 2015).

time of the offense (Bierschbach 2012). As Murphy (2007: 443) explains “[s]tates of character, if truly present, will be viewed as revealing an inner character that is much less vicious than the character present in the unrepentant criminal.” While the second version might be interpreted as consistent with strict retributivism, the first version represents retributarianism.

Despite the substantive theoretical differences between communicative theories of punishment and character retributivism—each one supported by a significant body of literature—they share an important characteristic that warrants their inclusion within the framework of retributarianism: the need to focus on developments regarding the offender *after* the commission of the past offense. The importance of the offender’s response to punishment as part of the penal dialogue and of the changes that reveal the offender’s overall moral character is considered relevant for the retributive analysis and is part of the pursuit of a proportionate punishment, regardless of any utilitarian purposes. These approaches therefore deviate from the traditional focus of strict retributivism on a past-oriented assessment that takes into account only the severity of the offense. The novelty of this account of individualization of the punishment derives from the *rationale* for considering the offender’s personal characteristics, which is proportionality-based retributivism. This is in contrast to utilitarian theory, which also recognizes the individualization of punishment, but for different reasons having to do with the reduction of crime.

One interesting application of the retributarianism trend is manifested in retributive interpretation of originally utilitarian penal mechanisms. While retributivists traditionally reject utilitarian-based mechanisms, scholars have recently suggested *justifying* such mechanisms on retributive grounds, thus enabling retributivists to become supporters.

One example is probation, which is traditionally perceived as rehabilitative punishment and even as an alternative to punishment. It was argued that probation can be justified as a communicative means by which the probationer responds to the probation conditions and conveys a message of repentance through the response (Duff 2001; Weaver 2009). Others suggest justifying indeterminate sentences, usually considered the ultimate utilitarian punishment (Tonry 2016), by a communicative rationale for disciplinary offenses in prison that expresses a rejection of the punitive message and justifies increased severity of punishment (O’Hear 2011a). It was also argued that parole supervision is part of a system of normative, communicative messages between the released prisoner and the community (Dagan and Segev 2015).

The effect of the rise of retributarianism is also reflected in the interpretation of alternative or complementary procedures to the traditional criminal process, which have been developed in recent decades. Restorative justice processes, which are integrated into criminal proceedings, may be an instructive example of the attempt to explain essentially utilitarian ways of punishment in retributive terms. The restorative approach perceives the act of the offense as a personal injury to the parties concerned and to the relationship between them (Zehr 1990). To repair the harm caused by the offense, it seeks to address the needs of the victim, the community, and the offender (Braithwaite 1999). The literature often emphasizes the underlying utilitarian rationale of restorative justice, aimed at repairing the harm and empowering the members of the community in which the offense was committed. Some have

suggested, however, viewing restorative justice processes as fulfilling objectives of communicative punishment, as they involve the condemnation of the offender, leading to penance and making amends (Daly 1999).

Drug courts, a variation of problem-solving courts, might be construed as another example. Drug courts serve to create an individualized response for each offender, in accordance with the offender's characteristics and problems, aimed at addressing the root causes of the offense committed. Some scholars have suggested that measures imposed on offenders constitute a communicative punishment intended to focus the offenders' attention on the wrongdoing of their behavior and on what is required of them to correct their actions, and to achieve secular penance, repentance, and reconciliation (O'Hear 2011b; cf. Husak 2011). This tendency of framing utilitarian mechanisms as part of a retributive approach might be construed as part of the retributarianism trend.

4 Evaluating Retributarianism and Its Significance

How can retributarianism be explained, and what are its implications? Below, we suggest that the rise of retributarianism is the product of complex socio-historical processes that have occurred, and some of which are still occurring, in common law jurisdictions. We do not presume to exhaust here the discussion of all possible causes of this trend, and therefore we admit to a possible bias toward complexity in explanation. Rather, we consider our proposed hypothesis as *one* plausible explanation.

We suggest that the growth of retributarianism comes in the wake of the vacuum created by the decline of strict retributivism, on one hand, and of the recognition of the shortcomings of utilitarian theory, on the other. The resulting approach provides the justification for a new type of penal theory that accommodates both the benefits of the retributive rhetoric and those of utilitarian practice. Thus, retributarianism may enjoy the best of all worlds, while offering an attractive alternative theory of punishment that enables to expand the legitimacy of the penal decision. Table 1 summarizes, according to several parameters, the differences between retributarianism and the main traditional penal theories discussed above: just desert, utilitarianism, and limiting retributivism.

4.1 Retributarianism Versus Just Desert

According to our hypothesis, the rise of retributarianism occurred against the backdrop of the relative decline of the just desert theory. This development came in the wake of the harsh consequences of excessive punishment, which were inspired by the just desert theory, but mainly because of the abuse of just desert rhetoric, which resulted in disproportionate punishments.¹⁰ The hypothesis that the just desert theory has inspired the intensification of punishment may be puzzling, as just desert

¹⁰ As Ashworth (2017: 486) noted: "... proportionality theory did not fail to produce penal moderation, because it was not implemented as intended."

Table 1 Comparison between punishment theories

	Just desert	Utilitarianism	Limiting retributivism	Retributarianism
Penal goals	Retributive-based (proportionality)	Utilitarian-based (rehabilitation, incapacitation, deterrence)	Retributive-based (proportionality) as a primary goal + utilitarian-based (rehabilitation, incapacitation, deterrence, parsimony)	Retributive-based (proportionality)
Considering individual post-offense factors	Not allowed	Allowed	Allowed within the deserved sentencing range	Allowed
The reasons for individualization	–	Crime reduction	Crime reduction (within the deserved sentencing range)	Proportionality (deserved censure and culpability)
The scope of mitigation for post-offense conduct	–	No strict limits	Only within the deserved sentencing range (depends on how much the deserved range limits are broad)	No strict limits, but the focus is mainly on the severity of the past offense
Main factors in determining the sentence	Severity of the offense (harm and culpability)	Recidivism-related factors	Severity of the offense (harm and culpability) + recidivism-related factors (within the deserved sentencing range)	Severity of the offense (harm and culpability); remorse; apology; compensation for victims; responsibility for the past offense
The relevant time-frame for determining the sentence	During sentencing only	During sentencing, with the option of making changes while serving the sentence	Usually during sentencing only	During sentencing, with the option of making changes while serving the sentence

theorists often emphasize that the theory demands careful adherence to the principle of proportionality, and as such it serves as a *restraint* against excessive punishment. Andreas von Hirsch (2017) stresses that the excessiveness of punishment that took place in the US in the 1970s does not represent the principle of proportionality (see also Duff 2001; Zaibert 2016). However, the claim that retributivism made a positive contribution to the increased severity of punishment is not new. It has been argued that the abandonment of rehabilitation during the 1970s and the support of desert as the primary goal of punishment, together with liberal advocacy of determinate sentences, left liberals without any forceful rationale for opposing the call for more and longer punishments: “liberal resistance to harsh penalty structures degenerates into disagreement over numbers ... hardly a solid ideological base from which to counteract conservative pressure to ‘get tough’ on crime” (Cullen and Gilbert 2013: 141). Scholars have also found a connection between the harsh American penal policy and retributivism (Zaibert 2016). For example, Dolinko (1991: 537) argues that retributivism was the official basis for “penal policy in the nation’s most populous state,” being responsible for the “dramatic change” in the American criminal justice system.¹¹ Whitman (2003: 94) also argues that “to the extent retributivist philosophers are heard at all, they are heard in ways tantamount to pouring gasoline on the fires of American punishment.” It is therefore no coincidence that retributivism went hand-in-hand with the increased severity of punishment in the US since the 1970s. Retributivism deals, by nature, with culpability and harm, and allows the expression of emotional social reaction to it. Many retributivists regard punishment as positive in itself, even as a right of offenders to be punished, for reasons of equality and respect for their autonomy (Flanders 2010). Others argue that just desert is far removed from the harsh practical consequences of punishment. Lacey and Pickard (2015) suggest that, because of the empirical difficulty in determining the basis for a cardinal proportionality scale, the ability of the proportionality principle to offer a meaningful criterion for scaling punishments is limited, and in practice it has the potential to impose harsh punishments. Chiao (2017) also argues that deontological theory cannot explain what is unjust about mass incarceration, although mass incarceration is widely considered—including by proponents of deontological theories—to be unjust. Finally, O’Hear (2011a: 1286) argues that the retributivists’ failure to bring restraint to penal practices may be related to “their orientation toward ‘front end’ aspects of the criminal justice system,” since retributivists have devoted far less energy to the “back end” sentencing mechanisms, particularly to the implementation of sentences of imprisonment.

It would be more prudent, however, to say that the retributive *rhetoric* has been used to increase the severity of punishment without meticulous adherence to the requirements of the theory. Murphy (2012) states that it is easy to move from just desert theory, which is focused on proportionality, to its harsh implementation through revengeful retributivism. Yankah (2015: 459) explains that retributivism

¹¹ Zaibert (2016: 108), however, argued that there is no sufficient evidence to show that Americans have been influenced by philosophers and legal scholars, as what “ordinary people, or politicians understand by ‘retributivism’ is often different from retributivism as a philosophical doctrine.”

artificially abstracts “the criminal offender from his social context in ways that make it difficult to understand powerful intuitions and causing our suppressed interest in character to manifest itself in many of our ugliest criminal law practices.” The strengthening of neo-liberal trends in the US since the 1960s, at the expense of a policy of penal-welfarism, has reinforced perceptions that regard crime as a product of the offender’s responsibility rather than of a complex social system. These perceptions were followed by a retributive rhetoric call for increased severity in punishment, which translated into mass incarceration. Scholars have linked the increasingly harsh punitive policy in the US with political changes taking place in the 1960s and 1970s, including (a) the decline of the welfare state (Garland 2001a; Simon 2014), (b) the rise of identity politics, which focuses on consensual issues, such as the need to take a hard line against delinquency, using the rhetoric of harsh justice (Caplow and Simon 1999), and (c) the increase in the status of crime victims (Pratt 2007). These and other factors have popularized the retributive rhetoric, in its sense of severe punishment focused on strong expressive condemnation of the offense.

The connection between severe punishment and retributive rhetoric is not surprising; the advantages of retributive rhetoric in this respect are clear. Retributive theories have used widely the concept of “justice,” a loaded and ambiguous term whose practical meaning is controversial (Ristroph 2006). In a postmodern and multicultural world, rife with social disparities between different groups in the population, the attitude toward justice is elusive. In this reality, concepts such as “justice” and “just desert” enjoy a symbolic advantage, being powerful rhetorical tools of political consequences and internal persuasion, aimed at the general public. These concepts, on one hand, require no proof of practical results, and, on the other, allow for various interpretations, and more important, various implementations. Although retributivists justify punishment according to what the offender deserves, the public perceives it simplistically as a moral affirmation of hatred for offenders and as a justification for severe punishments (Pratt 2007). Retributive theorists naturally insist that this is a misinterpretation of their intention (Zaibert 2016; von Hirsch 2017). However, as some scholars have pointed out, the absence of a clear agreed-upon definition of specific solutions resulting from the retributive approach may leave the abstract concepts of justice, desert, and proportionality open to interpretation in a manner appropriate to the harsh public climate (Whitman 2003; Flanders 2010). Furthermore, retributive punishment, by nature, does not depend on the consequences of crime reduction, which makes it possible to adopt it without any commitment to a proven practical outcome (Pratt 2007). Retribution is perceived as based on a common sense that reflects the wisdom of the masses, in contrast to distant academic discourse, which is perceived as failing to reflect the real feelings of the public (Garland 2001a). Thus, retributive discourse allows legislators to openly express a sense of punishment without being perceived as irrational, at the same time donning a neo-liberal mantle. Braithwaite and Pettit (1990) argue that the retributive discourse is the political field of “tough on crime” policies. When retribution is perceived as the justification of punishment, the liberal retributivists’ vision fades, while public opinion tends to swing toward severe punishment (see Ashworth 2017). Kleinfeld (2016: 1028) points out that after a mid-century crime wave, American moralists adopted a pattern of thought according to which some criminals are evil and “[i]

t is of the first importance to recognize evil for what it is, condemn it in the way it deserves, and not pretend that such people are likely ever to change or to stop unless they are controlled.” This pattern of thought supported justifying harsh punishments.

The question of why and how strict retributivism has lost its predominance still remains. What led to the decline of strict retributive rhetoric and the growth of retributarianism? An important turning point appears to have occurred in recent years with the increasing recognition of the destructive consequences of severe penal policies. This understanding produced cracks in the persuasiveness of this rhetoric, and consequently in the attractiveness of the retributive theory itself. Mass incarceration in the US has caused a serious legitimacy crisis in the criminal justice system (Garland 2001b). Many criticisms have been voiced about the ills of the system. Much knowledge has accumulated about the discriminatory and racist character of the prison system as well as about poor conditions in detention facilities that violate prisoners’ human dignity (Simon 2014). These eroded the power of traditional retributive justifications, which are (rightly or wrongly) identified with aggravated punishment.

It might be that precisely because they are vague, the concepts of “justice,” “culpability,” “censure,” and “retribution” have begun to receive broader interpretations that take into account also post-offense aspects that enable post-offense mitigation. In recent years, there has been a growing understanding that focusing on the offender is what realizes the concept of justice more fully, as opposed to focusing on the severity of the offense alone (Whitman 2014). This view is also reflected in studies showing that a punishment is perceived as fair when it takes into account not only the severity of the offense and the need for condemnation, but also data related to the offender’s past, remorse, shame, mercy, the consequences of the conviction for the offender’s family, and more. Empirical study has found, for example, that “(t)here is more to their sense of justice than strict proportionality... the public’s view of culpability is much broader too. The offending is relevant, but they also rely on factors which proportionality would see as indirectly related ... to the seriousness of the offending” (Lovegrove 2010: 344).¹² The rise of retributarianism can be seen more clearly against this background. Such an intermediate approach allows retention of the concept of retribution and of the justice-based rhetoric, together with a softening of the severe consequences associated with the adoption of strict retributivism

4.2 Retributarianism Versus Utilitarianism

Retributarianism also makes it possible to overcome various shortcomings of utilitarianism. Although the two theories are focused on the individual post-offense characteristics of the offender, and expand the relevant time-frame for determining the punishment, there are significant differences between them. Retributarianism

¹² Empirical studies of public opinion show that, although people tend to support retribution in principle, and to justify strict punishment based on it, they frame the actual punishment according to utilitarian considerations in the case at hand (see Ristroph 2006: 1310).

focuses, based on a retributive rationale, on developments concerning the offender that occurred after the offense. The main determinants of punishment are not related to the chances of rehabilitation or the reduction of recidivism, which require empirical validation, but rather to their ability to inform about moral and personality changes or the internalization of the condemning message while serving the sentence. Whereas retributarianism-based mitigation is relatively limited because harm and culpability remain the main focus, in the utilitarian approach, subject to constitutional limitations, any data indicating a chance of reduced recidivism may be considered.

How therefore can we explain the rise in retributarianism relative to utilitarian punishment? There has been growing reliance in recent years on the use of empirical measures to formulate evidence-based policies in criminal law, which appears to dovetail with utilitarian punishment focused on attaining a measurable objective. In a multicultural, global, and individualistic society, the ability to convey normative messages through punishment is questionable. It turns out, however, that even pure utilitarian rhetoric was not found to be convincing by itself. Philosophers, legislators, judges, jurors, and the public tend, perhaps instinctively, to seek the unique, idiosyncratic element of criminal punishment—that same characteristic that distinguishes the institution of criminal punishment from non-criminal sanctions. Although non-criminal sanctions are also aimed at achieving deterrence, what distinguishes the criminal sanction is the just desert it is intended to achieve, in addition to other utilitarian goals (Ashworth and Horder 2013). As a result, it is necessary to justify institutions that are utilitarian by nature in both retributivist and justice terms, to preserve the unique criminal aspect of utilitarian mechanisms.

Pursuit of the embodiment of penal justice is also consistent with the surge of constitutional discourse, beginning with the 1990s. This discourse emphasizes the intrinsic importance of values and rights, such as human dignity, freedom, and equality, apart from considerations of efficiency. It is manifest, for example, in the decision of the US Supreme Court to order a large-scale early release from prison for reasons of overcrowding in California, arguing that it violates the constitutional prohibition against cruel and unusual punishment.¹³ In the context of sentencing, Antje du Bois-Pedain (2017) argues that a proper constitutional approach, which can be found in Canadian and Irish law, regards considerations of human dignity, including the effect of punishment on the offender, as an integral part of the requirement for proportionality. This constitutional proportionality emphasizes the responsibility of the punisher toward the punished, and takes into account the welfare of the punished, in order to express his dignity as a member of the community.

The rise in retributarianism may also be explained against the background of practical difficulties raised by utilitarian sentencing. In the utilitarian approach, it is difficult to assess whether the objectives of the punishment have been achieved at the time of sentencing. This can only be measured retrospectively, usually at the end of the punishment period and thereafter. By contrast, retributive punishment, generally, is a one-time act that does not require ongoing evaluation. Its quality is measured

¹³ Brown v. Plata, 563 U.S. 493 (2011).

by its ability to accurately reflect a moral judgment that “captures” the harm caused at the moment of the offense (Bierschbach 2012). The benefits of retributarianism stand out against this background. On one hand, and similarly to utilitarianism, retributarianism ascribes weight to the considerations that concern the offender’s post-offense individual factors, as part of the exercise of broad discretion. On the other hand, the rationale for individualization in the retributarianism approach is retributive—the desire to achieve proportionate punishment. It follows that retributarianism is not focused on the consequences of the punishment itself: the offender’s return to crime is not identified with the failure of the punishment, because its goal is to achieve justice in its broad sense, not necessarily to reduce crime.

4.3 Retributarianism Versus Limiting Retributivism

A challenging question that remains to be answered concerns the advantages of retributarianism in relation to limiting retributivism, given that the latter, as a mixed theory, already allows combining retributive and utilitarian elements. Despite the practical similarity, however, there is a fundamental difference between retributarianism and mixed theories, having to do with the justification for considering the offender’s post-offense conduct and characteristics. Whereas retributarianism allows consideration of the offender’s post-offense circumstances for reasons of proportionality, based on a retributive rationale, mixed theories allow it for utilitarian and public policy reasons. Limiting retributivism allows taking into account the offender’s post-offense characteristics within the proportionate sentencing range, when there are utilitarian-based justifications for such consideration. These are contingent upon the existence of empirical evidence, recognizing that, although this is inconsistent with adherence to considerations of equality and fairness, there is still room within the deserved sentencing range for differences between offenders who committed similar offenses, for utilitarian reasons. Retributarianism does not recognize consideration of the offender’s post-offense characteristics based on utilitarian reasons, but it allows taking into account the offender’s post-offense individual factors based on the rationale of proportionality. This difference has practical implications. Consider the case of an offender who expressed remorse or agreed to pay compensation to the victim. The expression of remorse or the payment of compensation may play a key role in determining the punishment according to retributarianism because it may affect the assessment of the offender’s proportionate punishment. This is the case even if such factors do not necessarily predict lower recidivism. The difference allows retributarianism relatively extensive flexibility, without empirical evidence concerning the connection between the offender’s characteristics and the reduction of future crime, while granting wide discretion in the sentence for reasons of proportionality. Retributarianism also allows consideration of the offender’s characteristics, in appropriate cases, without being limited to a predetermined sentencing range. Although such consideration is limited relative to that possible in utilitarian punishment, it is broader than in limiting retributivism. These differences also amount to a more general distinction: whereas in the case of retributarianism the period during which the sentence is served is an important stage in determining the proportionate

punishment, in the case of limiting retributivism, the determination of the punishment remains part of the sentencing stage only.

However, it may be argued that retributarianism suffers from the shortcomings of both strict retributivism and utilitarianism. First, retributarianism is characterized by chronological flexibility, in the absence of clear limitations on determining the severity of the sentence. Second, retributarianism also creates great variation in punishment between offenders who committed similar offenses, merely because of personality or subjective differences. At the same time, and in contrast to utilitarian punishment, retributarianism does not necessarily seek to reduce future crime, and thus it does not produce evidence-based results. We do not seek therefore to persuade that the theory of retributarianism is optimal at a normative level. Our aim is to present the change caused by the trend of retributarianism, fully recognizing its strengths and weaknesses.

5 Conclusion and a Look into the Future

The intriguing change taking place at the beginning of the 21st century in penal theory raises questions about the future development of retributivism in general, and of the trend of retributarianism in particular. The questions are many: is the emergence of retributarianism a local phenomenon, relevant for a relatively short period of time, or is it likely to gain momentum in the future? Are additional manifestations of it expected? Will the considerations of retributarianism be assimilated into positive law and consolidated, or will retributarianism remain a primarily theoretical trend? Will there be a deepening of the theoretical discussion concerning the basis for the distinction between retributarianism and traditional punishment theories? What are the practical implications of the rise of retributarianism? How, if at all, will case law apply the variants of retributarianism?

Without venturing any guesses, we can only formulate a few likely hypotheses. As we have shown, strict retributivism, which was originally intended to be true to proportionality, was in practice exploited and harnessed rhetorically to support increased severity of punishment. The reduction in the levels of punishment in the US following the legitimacy crisis of mass incarceration may inhibit the expansion of retributarianism. The need to find a substitute for strict retributivism will no longer be necessary when punishment returns to reasonable and proportional dimensions. At the same time, essentially utilitarian mechanisms, which have become part of sentencing, have been gaining momentum in many countries worldwide in the past two decades, and have yielded positive results (such as cost savings and a reduction in recidivism). In this situation, it is unclear whether these mechanisms will require in the future also a justification based on the rhetoric of justice, to the extent that utilitarian punishment is proven to be effective. Nevertheless, in an age in which the reduction of punishment during sentencing intersects with the expansion of mechanisms, such as restorative justice and problem-solving courts, the need to preserve the idiosyncratic element that characterizes criminal law is increasing. This need is likely to breathe new life into retributarianism, as a theory that enables

furnishing utilitarian mechanisms with the unique retributive dimension of criminal law.

Without making a normative decision as to whether and under what circumstances retributarianism is preferable to traditional theories, it is clear that the growth of retributarianism has expanded the judicial toolbox used today in sentencing. Recognition of the rise of retributarianism has theoretical, philosophical, sociological, and historical importance, but beyond that, it may have practical significance in the way in which it affects future penal policy and its underlying theoretical foundation. Retributarianism adds new considerations to the existing ones, which the judge can take into account during sentencing, increasing variety and flexibility when considering the punishment. Indeed, retributarianism has many advantages that make it possible to overcome the shortcomings of both strict retributivism and utilitarianism. As we have seen, however, it also has its drawbacks. It is important therefore in future studies, to integrate considerations of retributarianism into a framework of a penal policy that demands systematic methodology, fairness, and equality in sentencing.

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