BOOK REVIEW

Review of Matthew C. Altman, A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State (London: Routledge, 2021), pp. 310, $273

Matthew Altman's *A Theory of Legal Punishments* sets forth a thorough, systematic account of punishment that relies on both a consequentialist and a retributivist justification of punishment. Preferring the term ''two-tiered model'' to ''mixed theory,'' Altman argues that the legislature should employ consequentialist aims while the judiciary should operate with a retributivist purpose. The legislature should define classes of criminal acts and set out ranges of punishment for each class of crime based on the punishment's ability to maintain public order. In contrast, after determining guilt, the judiciary should assign an individual punishment within the legislatively determined range based on the goal of expressing appropriate resentment. Far from an abstract theory, the two-tiered model laudably aims at being action guiding for policymakers. Altman ends the book by explaining why his model calls for death penalty abolition and supports exploratory implementation of restorative justice practices within existing punishment institutions.

Altman sets out the core of his theory in Part II of the book. There he defends a particular sort of consequentialism and retributivism, and he explains how these apparently contradictory approaches to punishment can be resolved through his two-tiered model.

I. CONSEQUENTIALISM AND PROMOTING PUBLIC ORDER

Altman's argument for consequentialism is that a state cannot function without taking some care to preserve public order. He argues that, in a retributivist utopia where the state gives every criminal what they deserve but does not attend to maintaining public order, the state has failed to do its most basic job. If given a choice between a state devoted only to retributivist punishment or only to consequentialist punishment, Altman argues that people would in

fact prefer a society in which public order is maintained even if not every criminal gets the punishment they deserve. This shows that the primary purpose of punishment for the state is to maintain public order through deterrence, broadly construed to include any prevention of future crime, including specific and general deterrence, incapacitation, or rehabilitation.

Of course, in a just state, the goal is not to preserve order at all costs. Altman argues that the consequentialist goal of public order should be understood in the context of a just state, which he calls a requirement of 'reasonability' as opposed to pure rationality. "State sponsored punishment is legally [rationally] justified only if the punishment helps to maintain the state and enforce its laws, or can be reasonably expected to do so." (57). "State-sponsored punishment is morally [reasonably] justified if and only if (a) the state itself is justified, its laws promote a just arrangement, and (b) there is no less harmful alternative that would as effectively maintain the state." (62). A punishment system is only justified if it is both rational and reasonable.

II. RETRIBUTIVISM AND EXPRESSING RESENTMENT

Having argued that consequentialism is the proper goal of the state, Altman then makes what seems to be the contrary argument: that retributivism based on the expression of resentment is the proper goal of the state. He argues for a resentment-based retributivism because resentment is an attitude or emotion with the kind of content that can be either unjustified or justified. As a reactionary attitude, it is only warranted when in fact someone has done a blameworthy act. It is thus better than anger or vengefulness as a reaction to a crime. Having established resentment as the proper response to crime from victims and the community, Altman explains why *the state* in particular is justified in expressing resentment on behalf of the victim. He gives several reasons. First, the state is in a good position to do so because "criminal acts threaten the social order, so the offender should be subjected to a public, state-sponsored process." (78). This allows for the expression of proper resentment without the concern that victims will over-punish based on anger or vengefulness. Even if the victim fails to have appropriate feelings of resentment, the state's response to the criminal can help

the victim clarify their emotions and come to have proper feelings of resentment. "The public feels resentment on their behalf and the punishment of the abuser is part of an attempt to correct the false belief resulting from a distorted moral education, that love can be expressed through violence." (79).

Although Altman purports to advocate for a *retributivist* expressivism, his reasons for the state expressing the victim's resentment—to preserve public order, to morally educate, to avoid vigilantism—at least appear to be consequentialist.

III. RESOLVING THE ANTINOMY OF PUNISHMENT

Having argued that both consequentialism and retributivism are warranted goals of the state, Alman seeks to resolve this apparent tension. He draws on the analogy that other philosophers have suggested between Kant's antinomies of reason and the conflict between retributivism and consequentialism, "the antinomy of punishment." For those who are not familiar with the antinomies, in the most famous antinomy of reason, Kant argues that it seems like both determinism and libertarianism (belief in human freedom) must be true, but they are rationally in conflict. Kant resolves this contradiction by arguing that in the phenomenal realm, everything is determined, but in the noumenal realm, human freedom is possible. Alman makes a similar move. Assuming one is convinced by the foregoing defenses of consequentialism and retributivism, one is stuck in an antinomy because they are directly in conflict (like determinism and freedom). This antinomy can be resolved by saying that these contradictory purposes operate on different levels. This is the primary argument for the two-tiered model: both purposes can operate on their own levels without contradiction. Consequentialism is the correct purpose and justification for punishment at the legislative level, while at the judicial level, punishment is justified by and aims toward retributivism.

IV. CONSEQUENTIALIST LEGISLATURE

On the two-tiered model, the legislature determines which acts should be criminal, what elements must be proven for each crime,

and how much punishment is warranted based on the goal of
maintaining a public order that is also reasonable and just. In a liberal
society, this will mean that criminal laws and punishments are not so
strict so as to undermine liberty rights, so they should not aim at
preventing every harm. The legislature ought to set a range of
punishments for each class of crimes. The severity of the range
should be motivated by the best social science data available about
what is actually effective at deterring, keeping in mind costs of
punishment (not simply monetary costs, but social ones as well) and
marginal utility.

In a well-researched chapter, Altman defends the use of crimi-
nology in sentencing, arguing against the retributivists of the 1970s
who overreacted to the limitations of social science data at the time.
''It seems quite strange that a group of philosophers working in this
field would give up on consequentialism and become retributivists in
large part because criminology has not yet perfected its methods.
Apparently, because we do not know how to best use punishment to
maintain the social order, punishment does not need to maintain the
social order'' (171). For Altman, not only will empirical evidence
help legislatures give the least severe punishments that still deter, but
also this evidence might point to other responses to crime beyond
hard treatment. For example, empirical evidence shows that drug
treatment programs are much more effective than incarceration in
deterring drug crime, and legislatures should rely on evidence like
this when designing all kinds of responses to crime.

V. RETRIBUTIVIST JUDICIARY

The judiciary's role is to make sure that these punishments are only
given out to those who are actually guilty of committing crimes.
Judges also must assign a sentence within the range set by the leg-
islature that expresses the right amount of resentment based on the
particularities of the criminal act and the person who committed it.
At first blush, this may resemble John Rawls' argument for a sort of
mixed theory of punishment where the practice of punishment is
justified by consequentialist aims of protecting individuals from
harm, but judges must assign blame only to the guilty because that
makes for the best punishment practice. Altman argues that his
model is different because it actually takes the retributivist practice of

expressing resentment as good in itself, not just as a rule that is instrumentally good for the practice of punishment.

VI. PROBLEMS WITH PROPORTIONALITY

The legislature determines which wrongs should be criminal and how much to punish based on the goal of maintaining order. Given that it is impossible and imprudent to try to deter every single crime, Altman argues that the lower threshold of punishment for a given crime class should be set by determining how much of a deterrent is necessary to keep that class of crimes within an "acceptable level." (96). The upper limit of the severity should be that at which there is no more deterrent effect by increasing the punishment. As Altman notes, this is oversimplified, as severity of punishment is only part of deterrence, along with certainty and celerity. States should also consider costs of punishments and the system as a whole, including the fact that resources spent on criminal punishment are taken away from other programs and other types of costs like the harms to families of those incarcerated. Still, the main focus in setting the range of punishments is effectively keeping the crime rate of each class of crime at an acceptable level, and legislatures should not consider the expression of resentment when setting these ranges.

Within this range, judges presumably give the more severe sentences to those who are more blameworthy, thus expressing an appropriate level of resentment. Judges have no control over the ranges themselves.

Here is where Altman's theory runs into a complication. The severity of a punishment range for a class of crime will be determined by effective deterrence. Judges merely set individual punishments based on those ranges. On this model, a cold blooded, calculating tax evader will get the harsh end of the tax evasion range, whereas someone who evading taxes in a last-minute act of desperation would get the lower end. Ordinal proportionality within crime classes is secured, but there is no reason to think that the ranges set for different classes of crimes will express resentment in anything that resembles proportionality. Imagine, for example, that severity matters little to those who commit murder (as plenty of evidence suggests). In a given country, an eight-year sentence will

keep murder at an acceptable rate, but anything above a ten-year sentence adds no further deterrent effect. The range the legislature should set is eight to ten years. But imagine tax evasion is just very difficult to deter in this country because most evaders do not get caught, so it is rational for potential evaders to take bigger risks. To keep tax evasion at an acceptable rate, those who are caught must get 10 years in prison, and each year of prison is more effective at deterring, up to 20 years. Thus, the range the legislature should set is ten to twenty years. This would mean the worst murderer would be punished with the same amount of expressed resentment as the least blameworthy tax evader. Altman argues that this is not going to happen simply because, the more serious the crime, the smaller the 'acceptable rate' of that crime will be. He thus presumes this will avoid the kind of problem above. But there is nothing inherent in crimes or in human behavior that ensures this calculation will not produce at least facially disproportionate expressions of resentment. Altman stakes his retributivist argument on the need for the state to express resentment on behalf of victims, but if punishments fail to align with the loosest conceptions of proportionality, the idea that punishments express justified resentment will start to fall apart. Instead, it might turn out that we only end up with the value of negative retributivism, which is much less than the two-tiered model promises.

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