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Book Essay

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MADNESS AND THE CRIMINAL LAW. By *Norval Morris*. Chicago and London: University of Chicago Press. 1982. Pp. ix, 235. $20.00.

Reviewed by Professor John H. Robinson *

In *Madness and the Criminal Law*[1] Norval Morris[2] advocates the abolition of the insanity defense and proposes ways in which judges might take account of mental infirmity in the sentencing process. The same perspective on the criminal justice system which leads Morris to reject the insanity defense also leads him to reject the plea of incompetency to stand trial, and in fact to oppose any blending of the criminal law and mental health powers of the state. Morris complements the arguments he makes for these proposals with two fictional narratives set in the Burma of British colonial days. The purpose of these narratives is to give some human substance to the cold abstraction "mental disease or defect" that lawmakers, courts, and critics bandy about so freely, and to convey some sense of how difficult it is for any system to acknowledge societal demands for the punishment of malefactors while doing justice to the retarded or deranged individual. While I did not find either narrative to be partic-

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1 N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982). For another review of this book, see Herman, Book Review, 51 GEO. WASH. L. REV. 329 (1983).

2 Norval Morris is the Julius Kreeger Professor of Law and Criminology at the University of Chicago. In all of his work he is animated by the desire to bring the modicum of scientific insight which criminologists possess to bear on the deeply held prejudices that, in his estimation, make the tasks of law enforcement so much more difficult than they need to be. What is more, Morris tries to do this *via* texts that are intelligible to the judge, legislator, and legal layman. To this end he coauthored with Gordon Hawkins *The Honest Politician's Guide to Crime Control* in 1970, an iconoclastic proposal for the reform of law enforcement in America. In that book, and in the subsequent *Letter to the President on Crime Control* (1977), Morris and Hawkins proposed strict gun control, community-based treatment of all but the most sociopathic offenders, a vast reduction in the reach of the juvenile courts, the decriminalization of drug use, the legalization of private sexual practices involving consenting adults, the abolition of the death penalty, and the demythologizing of the Mafia.

As this summary of Morris's proposed reforms of the criminal justice system suggests, he believes that much of the crime problem can be solved without any change in public behavior or any increase in the amount spent on the problem. In his opinion, much of the problem is the result not of miscreant behavior or inadequate funding, but of our seeing a problem where there is none (*e.g.*, the Mafia), of creating a crime where there need not be one (*e.g.*, drugs, sex), or of creating a solution that solves nothing while complicating many things (*e.g.*, the death penalty). Morris brings this same tendency of seeing the wounds from which the system bleeds as self-inflicted to his consideration of insanity.

ularly effective, I will not criticize them further in this review, confining myself instead to a recapitulation and critique of the arguments that Morris gives for his proposals.

I. *Madness and the Criminal Law*

At the outset Morris announces that the "overarching theme" of the book is that "injustice and inefficiency invariably flow from any blending of the criminal-law and mental health powers of the state" (p. 31). He would prevent this blending by abolishing both the plea of incompetency to stand trial and the insanity defense, and he would restructure the principles that determine the punishment meted out to those mentally ill persons who are convicted of crime. Since his discussion of sentencing is quite different in its philosophic underpinnings from his discussion of insanity as a bar to trial or conviction, I will discuss the two topics separately.

A. *Abolishing the Incompetency and Insanity Plea*

Of the two pleas, the incompetency plea is successfully invoked far more often than is the insanity defense—at a ratio of about 100 to 1 (p. 37)—but knowledge of its existence and debate over its propriety are confined to a handful of professionals, while nearly everyone knows about the insanity defense and has an opinion about its desirability. The incompetency plea is used to prevent any criminal trial of the accused from taking place. It is predicated upon the accused's inability either to understand the proceedings against him or to aid in the presentation of his own defense. No one would deny that there is something seriously wrong when someone is tried for an offense without his having any understanding of the charge, the evidence, or the verdict. If there is a dignitarian component to the due process clause—if being treated as persons implies having some say in what is done to us[3]—then surely we ought to bring to trial only those who can, if they choose, meaningfully participate in the proceedings which so markedly determine their future.

All of this Morris concedes, but it is what happens to the accused once the incompetency plea is invoked that leads him to reject it. Until 1972, it was possible that one found unfit to stand trial for even a minor offense could remain in a state institution for the rest of his life. This could be true even if the accused would not have been subject to civil commitment at the time of his arrest or of the entry of

3 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-03 (1978).

his incompetency plea. All that was necessary for this result to occur was that the disabilities that rendered the accused incompetent to stand trial go unremedied during the course of his "pre-trial" detention. *Jackson v. Indiana*[4] changed all that, and now the government must either civilly commit the accused, release him, or so treat him during his pre-trial detention that he makes progress toward the goal of being competent to stand trial. In Morris's opinion, however, *Jackson* did not, and could not, solve all the problems attendant upon the incompetency plea, as the celebrated case of Donald Lang makes clear.[5] Since those problems are serious and intractable, Morris believes that in place of the incompetency plea the states should rely on simple continuances for a period ordinarily of no more than six months, and then conduct either a civil commitment hearing or a criminal trial, or both consecutively in a proper case, as a way of dealing with the unrestorable incompetent (pp. 46-47). In the event that a criminal trial takes place, special rules intended to minimize the handicap that the accused's disabilities impose on him should be implemented. Morris does not go into detail on what the content of these special rules should be.

This proposal manifestly allows for the occasional criminal trial of one who is strictly incompetent to stand trial, but Morris believes that both society and the accused benefit from a criminal trial even in the case of the unrestorable incompetent. Society benefits because the strict and manifold formalities of the criminal trial make its outcome more reliable than do the laxer requirements of the civil pro-

4 406 U.S. 715 (1972).

5 In 1965 Donald Lang, a young illiterate deaf-mute, was arrested on a murder charge. Because of his deafness and his ignorance of sign language, he was found incompetent to stand trial and confined at a state school until he should become proficient enough at sign language to participate meaningfully in his trial. Efforts to teach Lang sign language failed, and in 1970 his lawyer obtained an appellate court order requiring a trial, lest his "pre-trial" confinement last indefinitely. *See* People *ex rel.* Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970). When the state's principal witness against Lang died, the case against him was dismissed, and he was released. Within six months Lang was again arrested for a murder distressingly similar to the 1965 killing. This time Lang was tried and convicted, but the conviction was reversed because of Lang's inability to communicate. *See* People v. Lang, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975). The inability to communicate which renders Lang physically incompetent to stand trial would not appear to constitute the sort of mental disorder that, when combined with dangerousness, warrants civil commitment. But in a bizarre reading of the relevant legislation, the Illinois Supreme Court justified Lang's continued confinement on the grounds that: (1) his failure to win an acquittal in the concededly unconstitutional trial that he was given in the second murder case established his dangerousness, and (2) his inability to communicate constitutes, in this instance, mental illness. *See* People v. Lang, 76 Ill. 2d 311, 391 N.E.2d 350 (1979). Part of Lang's saga was presented in a television drama entitled "Dummy." *See also* Morris, *supra* note 1, at 40-42.

cess, and society does need to know if in fact the accused engaged in the conduct in question (p. 46). The accused benefits from a criminal trial, even when he cannot intelligently participate in it, both because he has maximal protection against the state[6] in that process and because, if he is convicted, there are stricter limits on how long the state can deprive him of his liberty than exist in the case of civil commitment.[7] Morris insists that the criminal trial of an unrestorable incompetent will be a rare event since in the vast majority of cases such a person will also be civilly committable. But since this will not always be true, he believes that the system ought to acknowledge the right of both the accused and the state to a timely criminal trial.

Morris also wants to abolish the insanity defense. If abolition should prove politically unattractive, he favors the substitution of a

6 One who risks conviction for a criminal offense is protected by a vast array of constitutional rights that have as their effect that the state, using highly delimited kinds of evidence, has just one chance to convince a collection of the defendant's peers beyond a reasonable doubt that at some specified time the defendant engaged in conduct that the law antecedently had proscribed. In all of this the defendant normally has access to legal assistance (at state expense if the defendant is indigent), cannot be forced to participate in his own undoing, and is protected against excessive or barbarous punishment. This panoply of protections makes it clear beyond doubt that we take conviction for a criminal offense very seriously. The criminal trial is ideally a solemn ceremony in which we vindicate our commitment to the value of the individual while we conduct the necessary business of maintaining our collective security. The protections also make it clear how utterly without illusions we try to be. We do not see the state as a benign surrogate for God or Mom, entitled to an occasional error as it benevolently seeks the social good. We see it instead as a necessary but dangerous power that we must protect ourselves against lest it crush us for reasons having nothing to do with the common good. When, however, we turn to the procedural aspects of commitment of the mentally ill, all that is solid melts into air. The Constitution is silent on the question and we have no shared sense of how the courts do or should handle the mentally ill. Efforts to pattern the civil commitment procedure after the criminal process were rejected a few years ago when the Supreme Court held in Addington v. Texas, 441 U.S. 418 (1979), that a state need not prove the future dangerousness of a person beyond a reasonable doubt before he or she can be committed. The Court so held not because it denied that civil commitment involves an enormous loss of liberty and risks the incurring of a serious social stigma, but because it saw the state's intent in such proceedings as fundamentally benign. 441 U.S. at 428 & n.4. A commitment decision, furthermore, rests on a prediction of future dangerousness, so that a person's conduct during institutionalization can falsify that prediction. *Id.* at 429. A conviction, on the other hand, rests on a factual determination about a person's role in events that took place at some time in the past, and there is virtually nothing one can do while in prison to prove that the determination was mistaken. *Id.*

7 *Compare* Salem v. Helm, 103 S. Ct. 3001 (1983) (life imprisonment without possibility of parole for repeat offender's bad check conviction constitutes cruel and unusual punishment), *with* Jones v. United States, 103 S. Ct. 3043 (1983) (one committed to a mental hospital after "successful" insanity plea may be required to establish sanity or nondangerousness by a preponderance of the evidence before being released, regardless of how long a sentence the person could have received had the insanity defense failed).

diminished capacity defense, reducing murder to manslaughter (pp. 53-54). In Morris's opinion law and psychiatry are in radical and ineluctable conflict: their presuppositions, their language, their methods, and their goals differ too much for there ever to be a final reconciliation of the two (p. 54). It would, however, be possible for the legal system to avail itself of such insight as psychiatric expertise can deliver both in determining the guilt *vel non* of the accused and in framing a proper sentence for the accused if he is found guilty. What keeps this from happening, according to Morris, is that the law went wrong in the celebrated *McNaughtan*[8] case of 1843 and has kept on going wrong every time it has attempted to improve on *McNaughtan*. Before *McNaughtan*, evidence of mental illness was admissible at a criminal trial only insofar as it tended to negate the state of mind, ordinarily "intent," relevant to a particular offense, and, if the accused was found guilty, to affect his sentence. *McNaughtan* and its progeny changed all that, and for the worse according to Morris. What the *McNaughtan* rules and their variants do is to create an insanity defense independent of the *mens rea* element, one that can be invoked only after *mens rea* has been established. Morris believes that in doing this *McNaughtan* invited the sort of psychiatric testimony in which the expert is asked "philosophically impossible questions" (p. 56), by which Morris must mean questions to which it is impossible, for philosophical reasons, to give a nonmisleading answer. Those philosophical reasons relate to the radical conflict between the *Weltanschauung* of the law and that of psychiatry mentioned above. It is not clear from Morris's account how a return to pre-*McNaughtan* practice would avoid these "philosophically impossible questions."

As Morris sees it, the sole creditable rationale for the insanity defense is that "it is unjust and unfair to stigmatize the mentally ill as criminals and to punish them for their crimes" (p. 61). But this rationale, in his mind, "sinks into the sands of reality" (p. 61). The reality to which Morris refers is multiplex, but it can safely be reduced to three main facts. The first is that to be "insane" is only to be at some point on a continuum between being wholly determined by mental aberration and being wholly rational in what one does. The second is that the insanity defense in all of its forms fails, and must fail, to single out for favorable consideration that subset of the otherwise criminal population that most deserves to escape judgment

8 Daniel M'Naughten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). On the correct spelling of the poor man's name, see Peer, Book Review, 10 J. PSYCH. & LAW 385 (1982).

because of mental defect. The third, which Morris movingly invokes, is that for every person who successfully pleads insanity there is a legion of defendants whose exogenous poverty defense is at least as meritorious as is the psychotic's endogenous insanity defense, but who suffer judgment and punishment because the law, "giving excessive weight to the psychological over the social" (p. 64), inconsistently recognizes the one defense but not the other. The damning reality, then, reveals a vast prison population, whose just claim to reduced liability for their conduct goes unheard, set against a tiny pool of successful insanity claimants, whose clinically unsound claim to total irresponsibility for their conduct is respected (p. 64).

The solution to this injustice, Morris says, is not to recognize the poverty defense, but to abolish the insanity defense. At first glance this appears to be a very peculiar and unconvincing form of argument, as if we should stop treating justly one class (the insane) because we continue to treat unjustly another class (the poor). Morris, however, expects the reader to take his poverty defense argument as a *reductio ad absurdum*. From the fact that we don't scruple over filling our prisons with the poor, we should infer that our scruples over trying the somewhat insane are misplaced; they are evidence of our hypocrisy, of our tenacious clinging to the way things have been done, of our individualistic ideology, or of our purblind ignorance of what happens daily in our courts and prisons. Instead, according to Morris, our sense of the role poverty should play in the criminal process should guide us in our reconsideration of insanity: psychological adversity, like social adversity, should not lead to acquittal, but "should be taken into account in sentencing" (p. 64).

B. *Sentencing the Mentally Ill*

Morris's theory of punishment is a hybrid of the two conflicting theories that have vied for ascendancy in the West for the past two centuries. Kantians have argued that desert considerations should determine the amount of punishment any offender ought to receive,[9] and Benthamites have argued that deterrence considerations should control.[10] These two different approaches can lead to very different results in particular cases: Kantians might favor continued punishment even when it achieved no further deterrence, and Benthamites

9 *See* I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 99-107 (J. Ladd trans. 1965) (originally published 1797).

10 *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165-74 (J. Burns and H. Hart eds. 1970) (originally published 1789).

might favor early release just because all the deterrent efficacy had been extracted from a case.[11] Morris's hybrid gives both desert and deterrence significant but distinct roles in the sentencing process, and, if he is correct, the hybrid obviates any conflict between them.

Morris would give desert a limiting function in the determination of sentence (p. 161). That means that what a particular offender, given his prior record, deserves for a particular offense sets the upper and perhaps the lower bounds within which the actual punishment must fall. Within the bounds thus set, any punishment is just in the sense that it is "not undeserved," but desert can do no more than set those bounds. In particular, according to Morris, desert cannot *define* the sentence that any particular offender should receive (p. 183). To think that it can creates serious and needless problems for a sentencing system, as will be discussed under the rubric of "anisonomy" below.

Acceptance of the limiting, non-defining function of desert in sentencing legitimizes the appearance in the sentence-determining process of nondesert-related considerations, such as deterrence and parsimony. Suppose it has been decided that, relative to how this state treats other offenses and to how other states treat this offense, any sentence of between one and four years would be not undeserved. The judge is then free to fix the sentence near the upper bound (four years) if, for example, there is good reason to believe that as a result more potential perpetrators of similar crimes will be deterred than would be deterred by a lighter sentence. In the absence of this or other "aggravating" reasons, the judge, following the Benthamite principle of parsimony, ought to fix the sentence near the lower bound (one year) of the desert scale.

As applied to the mentally ill, Morris's sentencing approach would work as follows: because mental illness reduces culpability, the judge should sentence the mentally ill offender toward the lower bound of the desert scale except when the offender's mental illness gives the judge good reason to believe that, upon release, the offender is likely to pose a danger to others (p. 172). In that case, the sentence should be set nearer the upper bound of the desert scale. But in no event, according to Morris, should the offender's future dangerousness be seen as justifying a sentence that goes beyond the upper

11 A Benthamite could also punish *more* harshly than a Kantian would allow. *See* J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152-54 (R. White ed. 1967) (originally published 1873). *See also* Richards, *Rights Utility, and Crime*, 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 247, 285 (1981).

bound of the desert scale. To increase the offender's confinement beyond the time set by that upper bound, the state would have to resort to a civil commitment proceeding, one that would take place, presumably, at the end of the offender's prison sentence. This approach to sentencing would produce a pattern of sentences that might, on one account, appear to be unjust. Morris addresses that apparent injustice in his book's final chapter on anisonomy.

C. *Anisonomy*

If we accept Morris's claim that desert can only set the upper and lower limits on a punishment scale, we are likely to find ourselves endorsing as just the dissimilar treatment of similarly situated criminals, in contravention of what appears to be a fundamental component of justice—equal treatment. To see how this could occur, we need only consider a highly deterrable population and a non-impulsive crime. Doctors, Morris suggests, might be such a population and income tax evasion such a crime (pp. 190-92). It could well be the case that we get substantial deterrence from sentencing a single doctor to a prison term that approaches the upper limit on the desert scale, but minimal incremental deterrence from each additional imprisonment. It would be consistent with Morris's approach to punishment to give one doctor the stiff sentence (in order to reap the deterrence gains) while giving other similarly situated doctors lighter sentences out of respect for the principle of parsimony. The one unfortunate doctor selected for the stiff sentence could correctly argue that she was not being treated *isonomically*, that is, equally in comparison with other offenders similar to her in all relevant respects. But, if Morris is correct, such anisonomy does not by itself prove that the sentence in question is unjust.

In defending anisonomy, Morris is really attacking a somewhat limited target; *viz.*, the belief that isonomic considerations ought to have priority over other sorts of considerations in the selection of precisely what punishment several similarly situated culprits should receive. Morris assumes that his readers believe not only that like cases should be treated alike, but that this hoary maxim has some sort of priority over any other factor that might guide the conduct of a sentencing judge. It is this priority that Morris wants us to reconsider. In doing this Morris is engaging in the paradigmatically philosophical task, best illustrated by Plato's early dialogues, of examining the presuppositions we bring to our ethical life. How he would have us undertake this examination is not entirely clear, in large part, I be-

lieve, because Morris is far from sure himself how it should be undertaken. He does, however, suggest three different lines of inquiry, all of which lead to the same conclusion: isonomy is a weaker constraint on the sentencing judge than it at first appears to be.

The first and weakest of these lines involves calling to mind how often we do in fact tolerate, or even applaud, anisonomic outcomes, as, for example, when the courts "crack down" on drunk drivers just before a traditionally bibulous holiday season (p. 188), or when a pardon or amnesty is declared (p. 189). What makes this line of inquiry a weak one is that an isonomist might well acknowledge the existence of these practices, but criticize them just for their anisonomic results.

A second, more promising line of inquiry takes us to the parables of Jesus and, *mirabile dictu*, to the encyclicals of the current Pope. Morris sees the elder son in the parable of the Prodigal Son (Luke 15:11-32) as a proponent of isonomy; similarly, he sees the workmen hired at dawn in the parable of the Laborers in the Vineyard (Matt. 20:1-16) as isonomists (pp. 205-06). Morris invokes the encyclical "Rich in Mercy" of John Paul II in support of his claim that these parables impliedly rebuke our tendency to give isonomic considerations pride of place in our attempts to determine appropriate punishment. I am no more adept at interpreting parables than Morris is, and I rejoice at his inclusion of such material in his reassessment of isonomy. I am not at all sure, however, of the extent to which these parables were meant as guides to human conduct. I had always read them more as attempts at conveying what might anthropomorphically be described as God's way of dealing with the world. The extent to which human judges ought to conform their behavior to that of the Divine Judge is, of course, a further question, one that Morris wisely does not explore here.

Morris's third line of inquiry involves comparing the case for isonomy with the case for competing principles, for example, parsimony. Morris does not carry out the comparison in any detail; he merely urges us to carry it out. He is convinced that when we do this we will discover that, within the bounds set by desert, the Benthamite argument for parsimony is correct, and that parsimony ought to prevail over isonomy whenever the two collide. That being the case, isonomy is demoted from the overriding place it once occupied among the principles of punishment to the status of a merely guiding, easily overridden principle.

Morris's real target in his defense of anisonomy is the current

trend in scholarship and legislation toward the use of desert as a defining, as opposed to limiting, principle of punishment.[12] He fears that legislatures, reacting to the public perception of judges as soft on crime and accepting uncritically an isonomic conception of justice in sentencing, will follow California's "mischievous" (p. 145) lead and vastly reduce the sentencing judge's discretion. A sentencing scheme that leaves little room for anisonomic dispositions will, given the current national mood, be much harsher than any present scheme is, and needlessly so. Even if, in a different political climate, we could expect an isonomic legislature to produce a lenient desert-defined sentencing scheme, Morris would still want to leave room in the scheme for sentencing discretion and its attendant anisonomic outcomes. He seems to believe that there is something fundamentally wrong with an inflexible, bloodless, principle-ridden approach to justice. His attempted vindication of anisonomy appears to be a vehicle for the critique of that approach. It is as such that it ought to be assessed.

II. Evaluation

Even someone sympathetic with Morris's desire to make our criminal justice system more humane must take exception to the arguments developed in *Madness and the Criminal Law*. For all of Morris's good intentions, the book is simply deficient in three areas.

First of all, it is deficient in its treatment of constitutional issues. Crucial to Morris's advocacy of the trial of the unrestorable incompetent is some delineation of the procedures that would keep such a trial from becoming a moral and constitutional farce. But nowhere in the book do we get any clear idea what those procedures would be. All we are told is that under some conditions members of this class should be put on trial "under special rules of court dealing with pretrial disclosure, onus and burden of proof, corroboration, jury directions, and new trials appropriate to their particular circumstances" (p. 43). We are not told what these "special rules" might be, and we are not even told that we could learn more about these rules in an article co-authored by Morris and cited seven pages earlier (p. 36, n.6). Nowhere does Morris make clear how the rules developed in

12 Morris's principal adversary here is Andrew von Hirsch. *See supra* note 1, at 202. *See* von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 RUTGERS L. REV. 772 (1981), and von Hirsch, *Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale*, 74 J. CRIM. L. & CRIMINOLOGY 209 (1983).

that earlier article would obviate either the moral or the constitutional problems posed by such a trial. What little Morris has to say on the constitutional issue fails to make reference to a major precedential barrier to his proposal; *viz.*, *Drope v. Missouri*,[13] in which the Court unanimously reversed the conviction of a man of dubious competence, resting its reversal on the premise that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial."[14] As to the case that Morris does discuss—*Pate v. Robinson*[15]—that discussion is more a study in the holding-dictum game than it is a serious attempt to come to grips with the due process issues posed by a trial of an incompetent defendant (pp. 48-49).

Second, *Madness and the Criminal Law* is deficient in its argumentation. Crucial to Morris's attack on the insanity defense is some account of how a return to a pre-*McNaughtan* insanity rule would let the jury avail itself of whatever insights psychiatrists have into relevant issues without letting the psychiatrists take over the determination of guilt or innocence. No such account is provided. Furthermore, Morris's attempted *reductio*, in which the nonexistence of a poverty defense is used to argue against the need for the insanity defense, is as weak now as it was when Morris first used it fifteen years ago,[16] and its weakness epitomizes the weakness of the entire book. The *reductio* fails rhetorically and heuristically simply because Morris himself fails to take the endogenous/exogenous issue seriously.[17] Instead he indulges in unenlightening confession, [18] then switches to equally unenlightening motive analysis,[19] without ever undertaking a sustained consideration of the differential impact on culpability that endogenous and exogenous factors have. Morris suggests that, since (in his opinion) exogenous pressures are demonstrably more criminogenic

13 420 U.S. 162 (1975).

14 *Id.* at 171.

15 383 U.S. 375 (1966).

16 *See* Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968).

17 For a serious discussion of this issue, see the now famous pair of articles, Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976), and Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976). *See also* Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 896 (1975).

18 "For many years I have struggled with [the opinion that the insanity defense is crucial to the presentation of the "moral infrastructure of the criminal law"] . . . yet I remain unpersuaded." Morris, *supra* note 1, at 63.

19 "Operationally the defense of insanity is a tribute, it seems to me, to our hypocrisy rather than to our morality." Morris, *supra* note 1, at 64.

than endogenous pressures, a jurisprudence free of the individualistic bias that characterizes ours would perceive poor malefactors as even less culpable than the demented, and would mitigate punishment accordingly. A thesis as powerful as this needs more than mere assertion if it is to be accepted by the as yet unconvinced. It needs elaboration, but that is precisely what Morris fails to provide.

Third, Morris's consideration of the insanity defense rests on a fundamentally mistaken notion of the source of the difficulty which the disturbed offender presents to a criminal justice system committed to punishing only the culpable. Morris traces the difficulty to the conflict between psychiatric and legal models of the human personality. The deterministic model implicit in much psychiatric thinking may actually be in flat contradiction to the free will model implicit in legal thinking. At the very least there is potential for substantial conflict between them, and Morris is entirely justified in the concern he expresses about this conflict, if not in the radical approach he takes to avoiding it. Where he goes wrong, however, is in thinking that once the conflict between these two models is minimized, our conceptual problems with the insane will be solved. What Morris fails to acknowledge is that within the confines of the free will model itself the disturbed offender emerges as a special case. Morris therefore fails to see that the disturbed offender calls the free will model into question in ways that are both immensely troubling and potentially beneficial. The remainder of this review will establish both of these claims and demonstrate their relevance to the debate over the insanity defense.

Ordinarily we attribute conduct to agent in a straightforward and morally dispositive fashion.[20] In the absence of evidence to the contrary, we presume that a person intended to do what he did, and we praise or blame the person accordingly. In some cases, however, our attribution of conduct to agent is weak, rendering it impossible or difficult for us to praise or blame the agent on the basis of that conduct. Under some circumstances, for example, duress is wholly exculpatory: when we learn that a person stole a car only because he reasonably believed his child would be killed if he did not steal it, we do not attribute the theft to him legally or morally, and we do not attribute it to him legally *because* we do not attribute it to him morally.[21] With the dubious exception of some regulatory offenses, we

20 On attribution see G. FLETCHER, RETHINKING CRIMINAL LAW § 6.6 (1978).

21 On duress see W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 49 (1972).

consider eligible for criminal conviction and punishment only those to whom the conduct for which they are punished can be directly attributed in some morally relevant sense, and then only to the extent that it can be so attributed.[22] Thus, what ordinarily makes doing something negligently merit less punishment than doing the same thing intentionally is the fact that the negligent act is less fully attributable to the agent than is the corresponding intentional act. In labeling some people "criminally insane" we are saying that their conduct ought not to be attributed to them in the way that a normal person's conduct is. One consequence of this weak attribution of conduct to agent is that we hold the agent less blameworthy than would ordinarily be the case, making us less inclined to censure and punish the agent than we ordinarily would be.

Insofar as being found mentally ill reduces society's judgment against the person, it in some sense redounds to the benefit of those so found—they escape with less censure and less punishment than they would otherwise receive. But the same perception that leads us to be less censorious and less punitive also leads us to be more fearful of those we call criminally insane than of those we simply call criminal. Correctly or not—and the legal system is premised on the correctness of the perception[23]—we perceive those we call criminal as somehow in control of the conduct on the basis of which they are so labeled; we see them as able not to have done what they did, as having in some sense freely chosen to do as they did. It is in virtue of that perception of free choice that they are, in our judgment, blameworthy. In saying that those we call insane are less blameworthy than they would otherwise be, we are implying that they were less free relative to the conduct in question, less in control of that conduct, and it is the lack of control that frightens us.

On the basis of intuition more than of experience, we see most offenders as corrigible either by way of the conversion experience that it was once hoped incarceration would facilitate or by way of the aversion to repeated punishment that it is thought to engender in the mind of the rational agent.[24] Because we do not fully attribute conduct to agent in the case of the criminally insane, we are less sanguine about the possibility of reform in that case. We have lost, in

22 On the dubiety of criminal statutes that dispense with *mens rea*, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 342-51 (2d ed. 1960).

23 See G. FLETCHER, *supra* note 20, at § 10.3.1 for a good elaboration of this point. *See also* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74 (1968).

24 On the history of prisons in the United States, see D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

the case of the criminally insane, the reasons that ordinarily lead us to believe that measures addressed to the agent will somehow discourage a recurrence of the offensive conduct. So the very factor (*viz.*, weak attribution of conduct to agent) that renders a person less blameworthy makes us less hopeful that anything we do will lead the person away from such conduct in the future.

If this sketch of how we distinguish between "normal" and disturbed offenders is at all correct, it reveals that the difficulty which the latter present to our criminal justice system is more radical than Morris takes it to be. If, as I believe, the difficulty lies not in the conflict between a deterministic and a free will model of the person, but in the way in which the free will model leads us to perceive the disturbed in the first place, then the mere reallocation of the role psychiatric testimony should play in the trial of disturbed offenders would do very little to solve the problems such offenders pose. Even if psychiatric testimony could be entirely excluded from criminal trials,[25] careful juries would still be troubled by the presence of offenders to whom they could not in good conscience fully attribute the offense in question. What is more, the presence of the disturbed offender brings into the foreground of consciousness the free will model that in the standard case constitutes the conceptual backdrop of punishment or reward. Once we become conscious of the model, we become aware both of its centrality in our lives and of its fragility. Without it, we could not rationally live as we now do, but our hold on it is more tenacious than reasoned. The presence of a disturbed offender before the jury brings to mind the possibility that the free will model is radically mistaken, and with it the possible folly of so many of our social and political institutions. The conscientious jury is driven by the disturbed offender's presence to reconsider that model.

I would not seek means by which juries could avoid this reconsideration. I believe that the free will model ought endlessly to be put under scrutiny and there reaffirmed, rejected, or revised as the evidence might require. The jury should, on this account, hear the psychiatric explanation of human behavior, not in the confined manner that Morris vaguely proposes, but as a special defense. In that way insanity will appear to be just what it is. As an exception it calls attention to the standard case, thereby inviting reconsideration of it. The most likely outcome of this reconsideration will be a qualified

25 On why we might not want to exclude psychiatric testimony, see Barefoot v. Estelle, 103 S. Ct. 3383, 3396-99 (1983).

reaffirmation of the free will model, with the qualifications effecting over time substantial revisions of the model, and those revisions in turn producing reform in the law. In this way we will be doing justice to the jury, inviting it to address the basic issues raised by the insanity defense and thereby increasing the probability that the jury will deal justly with the defendant standing before it. In this way also we will make it more likely that our collective commitment to a free will model of the person will become no less tenacious, but more reasoned, nuanced, and defensible.

I would like to be able to end this review positively, endorsing at least Morris's defense of anisonomy. Surely there is much to be said for his approach to the matter: it is engagingly tentative; it assigns a central role in ethical reflection to imaginative literature; and it emphasizes the capacity of even the most elaborate sentencing formula to work needless injury. I am, however, not convinced that Morris's attempted vindication of anisonomy would solve any problem currently plaguing our criminal justice systems. In those systems indefensible anisonomic outcomes are common, as when a black person receives a harsher sentence than another simply because he is black, or when one person receives a harsher sentence than another simply because of the sentencing judges' different temperaments or philosophies.[26] In such cases isonomy would be an achievement, and it may well be that the elimination of indefensible inequalities in punishment can be achieved only by the adoption of isonomy-based procedures. If this is the case, and even if such procedures lead to an occasional isonomic outcome that is less just than the alternative anisonomic one, that seems to be a reasonable price to pay for the gains realized thereby. Theoretically we may not be forced to choose between isonomic and anisonomic injustices, but practically this may be just the choice we have to make. Morris may have established that isonomic considerations alone don't determine the justice of sentences, and the academic community is in debt to him for having raised the matter so cogently. Morris has not, however, shown that our system of criminal justice, or any system for that matter, ought to embrace anisonomy before it has achieved *de facto* isonomy.

26 *See* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).