Equality, "Anisonomy," and Justice: A Review of *Madness and the Criminal Law*

Andrew von Hirsch
*Rutgers University, Newark*

Follow this and additional works at: [https://repository.law.umich.edu/mlr](https://repository.law.umich.edu/mlr)

Part of the Criminal Law Commons, Health Law and Policy Commons, and the Law and Psychology Commons

**Recommended Citation**
Available at: [https://repository.law.umich.edu/mlr/vol82/iss4/58](https://repository.law.umich.edu/mlr/vol82/iss4/58)
EQUALITY, "ANISONOMY," AND JUSTICE: A REVIEW OF MADNESS AND THE CRIMINAL LAW†

Andrew von Hirsch*


Norval Morris's latest book, Madness and the Criminal Law, is not exclusively addressed to that topic; much of its subject matter is sentencing theory. Morris defends, and elaborates upon, the conception of criminal sentencing that he first espoused in his influential book of a decade ago, The Future of Imprisonment.1 He then attempts to apply that theory not to the mad defendant but to the half-mad: to the defendant who is not crazy enough to satisfy the legal test for exculpation on grounds of insanity, but who nonetheless has committed his crime in part because of mental or emotional disturbance (pp. 129-76). He also deals with exculpation itself — with the insanity defense (pp. 29-87) — but there his views seem to me less forcefully defended than they are in the remainder of this thoughtful volume. In the course of discussing these various topics, Morris also tries his hand at fiction. Two of the chapters2 are reports of imaginary incidents of violence involving bizarre mental states, which purport to have been written by the late Eric Blair (George Orwell) while he was a police officer and magistrate in Burma in the late twenties. These alone make superb reading.

Morris's book is an argumentative book in the best sense: he really argues his positions, giving reasons in their support and addressing seriously the criticisms that they have received. There is none of what one sees all too often in penological debate: the attempt to defend a view by merely reasserting it and by caricaturing the objections raised by others. It is because the book has the virtue of being

† This review originated in an invitation in March 1983 by Michael H. Tonry to address a group of his students at the University of Maryland Law School on the subject of "treating like cases alike" in criminal law, and the ideas herein grew out of that stimulating exchange. I am also indebted to Professor Tonry's own helpful comments, and those of Professor Nils Jareborg of Uppsala University, Sweden.

* Professor, School of Criminal Justice, Rutgers University, Newark, New Jersey. A.B., LL.B, Harvard. Professor von Hirsch is the author of DOING JUSTICE (1976) and (with Kathleen Hanrahan) THE QUESTION OF PAROLE (1979). — Ed.

good argument that I shall succumb to the temptation of arguing back: my disagreement herein with some of Morris's contentions is my own attempt to carry the debate a step further. Let me begin, then, with Morris's central thesis concerning the rationale of criminal sentencing and then proceed to his thoughts on half-madness and (more briefly) on madness.

I

The debate over sentencing theory in the last decade has focused in large part on the respective roles that should be given to utilitarian considerations and to desert in deciding quanta of punishments. The positions have varied from those giving crime-preventive concerns exclusive emphasis, to those giving preeminence to notions of proportionality and desert. The debate is by no means a purely abstract one: on it turns the choice of factors that a rulemaking body such as a sentencing commission should use in fashioning its rules or guidelines on the choice of sentence. On a desert-oriented rationale, the sentence must be based upon the seriousness of the defendant's criminal conduct. The more one moves away from desert and toward utilitarian models, the greater the entitlement to use factors that are unrelated to the blameworthiness of the conduct and that concern instead the likelihood of the defendant’s recidivating or the effect of the penalty in deterring others.

In this debate, Professor Morris has been the primary exponent of what he calls “limiting retributivism” (p. 161)—namely, a mixed model somewhere between pure utilitarianism and the more thoroughgoing desert outlook which some of my colleagues and I have been advocating. In Madness and the Criminal Law, he attempts to defend his view against the criticisms of those who advocate more reliance on desert.

Before exploring the differences between Morris and the desert advocates, it is important to take note of important similarities. Morris, like the modern retributivists, insists that desert is to be taken seriously as a constraint on utilitarian pursuits. Throughout his book, there is a clearly visible thread of argument that desert is a separate, retrospectively-oriented conception based on the blame-

worthiness of the offender's conduct; that desert and prospectively-oriented utilitarian notions have to be kept distinct and are in potential conflict; and that the problem of sentencing theory is not to try to obliterate that crucial distinction but to find the just and proper balance of emphasis between retributive and utilitarian notions (pp. 179-209). I could not agree with all this more strongly.

Let us turn, then, to the areas where Morris and the modern desert advocates disagree. I shall spend more space on these issues because they are the ones on which Morris concentrates his own arguments in this book.

Morris's basic position in sentencing is that desert supplies the upper and lower bounds within which a penalty may justly be levied; but that within those bounds, utilitarian concerns — e.g., the amount of punishment needed to achieve a socially acceptable level of deterrence — should be decisive. He is attempting to defend this view here against those, such as myself, who have been urging that desert be given a more central role in deciding punishments. Morris insists that we are mistaken: desert, he says, should properly serve only as a limiting principle that sets bounds on permissible punishments. It should not be used as a determining (he uses the less apt word "defining") principle — one purporting to guide decisions on actual quanta of punishments. In Morris's words:

Desert is not a defining principle; it is a limiting principle. The concept of "just desert" sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine-tuning to the appropriate sentence than that. The fine-tuning is to be done on utilitarian principles. [P. 199].

The reason desert can only be limiting, Morris goes on to argue, is that none of us has any idea of precisely how much punishment is deserved for any given category of offense; we can grasp only what would be manifestly disproportionate in lenience or severity. As Morris puts it:

When we say a punishment is deserved, we rarely mean that it is precisely appropriate in the sense that a deterrent punishment could in principle be. Rather we mean that it is not undeserved; that it is neither too lenient nor too severe; that it neither sentimentally understates the wickedness or harmfulness of the crime nor inflicts excessive

---

7. Morris thus implicitly rejects the views of those, such as Ernest van den Haag, who assert that the idea of proportionate punishments can be explained purely in terms of a deterrence calculus or other crime-prevention notions. See van den Haag, Punishment as a Device for Controlling the Crime Rate, 33 Rutgers L. Rev. 706 (1981). Contra, Goldman, Beyond Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate," 33 Rutgers L. Rev. 721 (1981).

8. This position is set forth in chapter 5 of the book, where Morris presents his general sentencing theory, pp. 179-209.

pain or deprivation on the criminal in relation to the wickedness or harmfulness of his crime. It is not part of a utilitarian calculus. . . .

The concept of desert defines relationships between crimes and punishments on a continuum between the unduly lenient and the excessively punitive within which the just sentence may be determined on other grounds. [P. 198].

Since desert is only a limiting principle, Morris goes on to assert, the sentencer is not obligated to impose equal sentences on equally deserving (or rather, undeserving) criminals: cases that are like in respect to the blameworthiness of the defendant's conduct may be treated unlike where necessary for utilitarian ends (pp. 187-96). In fact, Morris entitles his main chapter on sentencing theory as "Anisonomy, or Treating Like Cases Unlike."

When one asks whether desert is limiting or determining, however, it is essential to specify: determining or limiting for what purpose? One must distinguish between ordinal and cardinal magnitudes of punishment: That is, between (1) the question of how defendants should be punished relative to each other, and (2) the question of what absolute severity levels should be chosen to anchor the penalty scale.10 To view desert as a determinative principle in deciding how crimes should be punished relative to each other does not commit one to the claim that it is determinative for deciding their cardinal magnitude.

For modern desert theory, this distinction is critical. Advocates of desert-oriented sentencing such as myself do not assert that desert is determinative for all purposes. Rather, our claim is a more restricted one, to wit: desert is a determinative principle in deciding ordinal magnitudes, but only a limiting principle in deciding cardinal magnitudes.11 To see what this means in practice, consider the crime of burglary. The issues of ordinal magnitude deal with how a particular burglary should be penalized compared to other burglaries and to other more or less serious crimes. When desert theorists assert that desert is a determining principle here, they mean that the ordering of penalties must meet the following two requirements. The first is the requirement of parity: criminal conduct of equal seriousness should be punished equally, with deviations from such equality permitted only where special circumstances alter the harm or culpability — that is, the degree of blameworthiness — of the defendant's conduct.12 The other is that of rank ordering: penalties should be ranked and spaced to reflect the ranking and spacing in degree of

11. Id. at 212-14, 219-26.
12. Id. at 212-13, 226-27.
seriousness among crimes. What desert theorists object to is deciding these questions of comparative punishments on grounds other than the blameworthiness of the defendant’s conduct: for example, to punish a particular burglar more severely than other burglars not because his particular crime is any worse but because he is a worse risk or because giving him a higher-than-usual punishment would make him an example to others.

To espouse this view does not, however, require one to hold that desert is determinative in deciding cardinal magnitudes. Here, rather, most modern desert theorists — certainly I — would admit that desert is a limiting principle only. I do not claim to know precisely how much punishment an intermediate-level crime such as burglary deserves, only that punishments beyond a certain level of harshness or leniency are undeserved. But to make that concession about cardinal magnitude does not in logic compel one to abandon desert as the principle for deciding relative severities.

This distinction between ordinal and cardinal magnitudes may seem elementary, but Morris sometimes ignores it in his book. He seems to hold that desert must either be limiting for all purposes or determinative for all purposes. He quotes for example, a passage of mine where I am speaking of how a sentencing commission in writing its guidelines might draw the dividing line on a sentencing grid between crimes serious enough to warrant imprisonment and those warranting lesser sanctions (p. 204). I state that cardinal proportionality requires severe punishment such as imprisonment for the most serious crimes and lesser punishments for the least serious; but that the notion of a reasonable proportion between crimes and punishments may not be precise enough to determine exactly where to draw the dividing line through intermediate-level crimes; and hence that the rulemaker might properly invoke various nondesert considerations in deciding this latter issue. Morris seizes upon this statement of mine as suggesting some kind of inconsistency with a desert orientation. In his words:

Professor von Hirsch would thus allow utilitarian considerations within desert constraints to guide a sentencing commission but would deny them to a judge. I don’t see why, except to protect the elegance of his thesis or the robe of the judge. [Pp. 204-205].

In fact, my point has nothing to do with theoretical or sartorial

13. Id. at 213-14, 221-30.
14. Id. at 237-44.
15. Id. at 219-26, 230-32.
16. Id.
18. Id. at 787-789.
elegance. It has to do with the difference between ordinality and cardinality. A sentencing commission, within broad limits of cardinal proportionality, might anchor the penalty scale by deciding to locate the "in-out" (i.e., prison vs. non-prison) dividing line a little higher or lower on the sentencing grid, so that intermediate-level crimes such as burglary either receive a short period of imprisonment or a jail or probation sentence instead. But once the scale has been so anchored, the rulemaker is required to observe parity among convicted burglars — and to rank higher or lower on the penalty scale crimes which are, respectively, more or less serious than burglaries. The fact that I may have no precise quantum in mind as the precise deserved penalty for burglary does not mean I am precluded from insisting that the punishment for burglaries should be ranked vis-à-vis the punishment for other crimes so as to reflect the relative gravity of those acts.

If one does bear in mind the distinction between cardinal and ordinal magnitudes, what is Morris's thesis? Morris is saying that desert is a significant limiting principle in deciding cardinal magnitudes. A penalty system, he is saying, ought not be so inflated or deflated that penalties cease to bear any reasonable relationship to the degree of reprehensibleness of crimes. Here, Morris's view does not seem so different from that of desert theorists. The difference comes when one deals with ordinal magnitudes. There, Morris is saying that one need not observe parity in punishment among equally serious criminal acts, if there are utilitarian reasons for imposing different punishments. And he seems also to take the rank-ordering principle less seriously than desert theorists would: one may, for deterrent or incapacitative purposes, punish a few burglars more severely than most convicted robbers — so long as one is not being so very harsh as to breach the cardinal limits on the punishment of burglary.

II

Professor Morris's thesis, in my view, faces two main difficulties. One, internal to his own statement of his thesis, concerns the width of the desert limits. The other problem concerns the condemnatory implications of punishment. Let me take each of these issues in turn.

Width of the Desert Limits

If desert is to be treated as only a "limiting" principle, as Morris suggests, the question that immediately comes to mind is the breadth

20. Id. at 225-26.
21. Id.
of those limits. Is desert to be a significant constraint on utilitarian punishments, or only some kind of wide outer limit, that merely bars outrageous disproportion in lenience or severity?

The tendency of theorists who speak of desert as being only a "limiting" principle is to adopt the latter interpretation.\textsuperscript{22} Sentences are to be decided ordinarily on utilitarian grounds alone, and desert comes in only as a constraint against extremes: it should be little more than a protection against, say, inflicting very long prison sentences on car thieves or burglars, or giving probation to those convicted of the most violent offenses. This is the interpretation proposed by the American Bar Association's Task Force on criminal sentencing in its 1979 report.\textsuperscript{23} I have criticized the Task Force's report at some length elsewhere;\textsuperscript{24} suffice to say here that this view is scarcely an advance over traditional positivism of two decades ago: the Model Penal Code already had rules against \textit{grossly} disproportionate sanctions.\textsuperscript{25}

Morris, to his credit, firmly rejects the ABA Task Force's view of desert as a mere "side constraint" (pp. 202-04).\textsuperscript{26} This, he recognizes, would be inconsistent with his own basic insistence on taking desert seriously. Desert, he argues, must be treated as a significant restraint on utilitarian punishments, not merely as a rule against unlikely extremes in punishment that defy common sense and the common morality. His words are worth quoting:

There is clearly a difference of emphasis here [between the ABA Task Force's view and my own] which is not unimportant. My case for inequality is for mercy and clemency within an ordered system of justly deserved punishments; it aims at avoiding the severity amounting to tyranny that rigidly insists on equality and seeks to exercise discretion and mercy from sentencing. It accepts the long tradition of justice as equality but seeks to moderate it by acceptance of the uncertainties attending our utilitarian purposes in the distribution of punishment and to allow for a slippage of inequality to achieve parsimony in punishment. The ABA Report seems to go further than this and, insofar as it does, von Hirsch's strictures seem to me well founded. [Pp. 203-04].


\textsuperscript{23} AMERICAN BAR ASSOCIATION, TASK FORCE ON SENTENCING ALTERNATIVES AND PROCEDURES, SENTENCING ALTERNATIVES AND PROCEDURES (1979).

\textsuperscript{24} von Hirsch, \textit{supra} note 17.

\textsuperscript{25} The Code prescribed statutory maxima based on the felony-category of the offense, and also prescribed that sentences were not to be so low as to "depreciate the seriousness of the defendant's crime." MODEL PENAL CODE §§ 6.06, 7.01(1)(c) (Proposed Official Draft 1962). For fuller discussion, see von Hirsch, Book Review, \textit{supra} note 22.

\textsuperscript{26} The term "side constraint" is used in AMERICAN BAR ASSOCIATION, \textit{supra} note 23, at 19.
There are a variety of claims here that we shall need to take up later: that Morris's modified utilitarianism has something to do with "parsimony," "mercy" and suchlike virtues. But it is plain here that Morris wants desert to play a significant role in the structure of penalties — that it should be more than merely an outer "side constraint."

So far, so good. The next question, however, is how significant desert's role should be: how wide or narrow should the desert-based limits be, within which utilitarian concerns are permitted to operate? Fairly wide limits — say, a few months' to five years' confinement for the serious offense of armed robbery — would mean that utilitarian considerations would still play the primary role in determining the choice of penalty. Narrower limits — say, a range of two years to three for a first offense of armed robbery — would mean that desert would carry a greater, perhaps the primary weight in the choice of penalties. Which does Morris prefer, the narrower or the wider desert limits? He does not say.

I am not speaking here of a mathematical formula. Rather, the problem is that Morris does not even suggest any principles that would guide one in deciding the latitude of the desert limits. When he refers to the use of utilitarian considerations for "fine tuning" (p. 199), this would suggest rather narrow limits. Some of his examples, however, suggest otherwise — a broad scope for utilitarian concerns. Without any specification of the nature of the desert limits or of how those limits might be derived from his theory, one does not know what one is dealing with: a substantially desert-oriented system, a primarily utilitarian one, or

27. See text at notes 43-53 infra.

28. The nature of these limits might conceivably be affected by how broadly or narrowly the prohibited conduct is defined: the desert limits on punishing armed robbery, for example, might have to be wider the more comprehensively robbery is defined to embrace forcible takings of varying types and shadings of gravity. But supposing one were operating with offense definitions of a given degree of breadth or specificity, it still needs to be explained how wide or narrow the desert limits should be for such offenses under Morris's theory.

29. He admits he does not specify the width of the limits. In his words:
I am well aware that I have not defined the proper range fixed for all crimes and for criminals by the upper and lower limits of undeserved severity and excessive leniency which exaggerate or depreciate the gravity of the crime. My view is merely that such ranges exist, that they should be defined as punishment categories in some form such as that set forth by the Minnesota Sentencing Commission ....

P. 205. I doubt, however, that endorsement of the Minnesota Commission's guideline format would really be consistent with Morris's view. The Commission's guidelines come close to adopting the desert parity that Morris wishes to reject: there is a recommended presumptive prison sentence for each cell in the Commission's sentencing grid for which imprisonment is prescribed, surrounded by a quite narrow range of permissible variation. For a fuller analysis of the Minnesota Guidelines, see von Hirsch, supra note 5, at 180-91, 193-207, 208-10.

30. It is also unclear precisely how that utilitarian "fine tuning" might be accomplished, given the imprecision of our efforts to gauge the crime-preventive (for example, deterrent or incapacitative) effects of sentences.

31. See his proposal for the treatment of the crime of purse-snatching, at pp. 194-96, where he would have a range of probation to six-months incarceration.
something in between. As a result, Morris's formula for "limiting retributivism" seems less of a theory than something akin to a party platform: a broad formula attractive because it accommodates what are in fact substantially different positions.

Is the more thoroughgoing desert model I have been advocating less ambiguous than Morris's scheme? Here, we must resort again to the cardinal/ordinal distinction. Desert theorists, at least as yet, have hardly done better than Morris in specifying the precise extent of the limits which desert imposes on the cardinal magnitudes of punishment. 32 But our model calls for considerably more specificity in dealing with ordinal magnitudes: to meet the requirements of parity and rank-ordering, crimes will have to be graded according to their seriousness; normally recommended penalties will have to be assigned to those gradations; and deviations from those penalties permitted only in special circumstances related to the harm or culpability of the offender's conduct. 33 This will not, in pure theory, provide for a unique set of solutions, since (given the open-endedness of the cardinal requirements) the penalty scale as a whole could be inflated or deflated to a considerable extent while the relative proportions among punishments were held constant. But in practice, such a theory will provide substantially more guidance to the rulemakers. A sentencing commission does not in fact have all that much leeway in inflating or deflating overall severity levels, without encountering limits on the availability of prison resources on the one hand and political constraints on reducing severities on the other. 34 Where the commission's power resides, and where it needs guidance, is in deciding questions of relative severity and in determining how much to emphasize the gravity of the criminal conduct versus other factors in deciding who is to be confined and for how long. It is precisely on this issue of distribution that the desert-oriented view, with its strong ordinal requirements, provides definite guidance as to which defendants should be punished more severely, and which less, and as to what aspects of the crime and the criminal's history should be relied upon in the guidelines. 35 And it is on that crucial issue that Morris leaves his model so little specified, because he downgrades the ordinal desert requirements and looks only to the much less clear cardinal requirements of desert.

33. Id. at 214-19, 237-44.
34. For a discussion of these practical constraints, see id. at 225.
35. In Minnesota, for example, reliance on the ordinal requirements of desert were critical in helping the Commission decide questions of relative severity of punishments. See von Hirsch, supra note 5, at 180-91.
The Blaming Implications of Punishment

The case for the ordinal requirements — that is, for equal treatment of the equally undeserving and for ranking punishments according to the seriousness of crimes — rests on the condemmatory implications of punishment. The reason, according to desert theorists, why the ordinal proportionality requirements must be observed is that to do otherwise means blaming equally reprehensible conduct unequally, or blaming less reprehensible conduct more than worse conduct.  

How does Morris deal with this issue of the reprobative overtones of punishment? He ignores it. To desert advocates who object to his model as permitting unequal punishment of the equally blameworthy, his answer is that such arguments are merely circular: “[T]hey seem to me rather to restate the conflict than to resolve it against my view” (p. 202).

But the argument is not circular. It can be stated in general terms as follows:

1. Suppose X is an institution having strong praising or blaming implications, such that the quantum of X distributed to any recipient connotes how much he is to be praised or blamed for his or her conduct.

2. It follows that X should as a matter of fairness be distributed among recipients so as to comport with the degree of praiseworthiness or blameworthiness of the recipient's conduct in the relevant respect.

3. Therefore if one does not wish to distribute X according to recipients' deserts, one must make one of these two moves:
   a. Deny the premise; that is, show that institution X has no such praising or blaming implications, as customarily understood; or else
   b. Reform institution X so that its praising or blaming implications are eliminated or diminished so far as possible.

Let me give a modest illustration. Each year, the School of Criminal Justice at Rutgers University awards a certain number of fellowships and assistantships to graduate students. The fellowships are explicitly designated as awards, and carry a stipend but no added work. The assistantships are not so designated, and involve working with a faculty member. Because of the different character of the two institutions, our faculty uses different criteria to distribute them. The fellowships, in virtue of their character as awards, are distributed according to desert: that is, according to the quality of the student's past academic performance. The assistantships, however, are distributed according to more utilitarian criteria: since they are viewed

36. See A. Von Hirsch, supra note 4, at 71-72; see also von Hirsch, supra note 17, at 784-89.
as jobs, the student's usefulness for and experience in a faculty member's area of research are considered, along with academic grades. Were a faculty member to propose distributing fellowships similarly, he would need to argue for changing their character to make them less of an award and more a form of employment.

Applying the point to punishment, the logic runs similarly. Desert theorists' crucial claim is that punishment is, and ought to be, a blaming institution — and hence that penalties should be distributed according to the degree of blameworthiness of criminal conduct. In order to do that, one must observe the ordinal requirements of desert: to punish equally blameworthy criminal conduct equally, and to grade severities of penalties so as to comport with the rank-ordering of seriousness of crimes. To resist these conclusions, one needs to deny the premise; that is, to assert that punishment either (1) is not, or (2) should not be essentially a blaming institution.

Assertion (1), denying that punishment connotes blame, seems to me pretty implausible. The only perceptible difference between a tax and a fine, for example, resides in the condemnatory character of the fine; not in the material deprivation, which in both cases is a taking of money. I doubt Professor Morris would wish to deny the blaming character of punishment.

Assertion (2) is not quite so implausible: one conceivably could say that the blaming element of punishment is an historical relic; and that one should seek to reform the criminal sanction so as to make it only a material disincentive against undesirable conduct, with little or no moralizing overtones. One could argue, further, that disregarding ordinal-proportionality requirements would be a step toward thus reforming the sanction, to be taken along with other symbolic changes (such as, if one wished to go far enough, even eliminating morally-laden terms such as "innocence" or "guilt"). This is not merely hypothetical: juvenile-justice reformers in the United States tried for years to recast the juvenile system so as to eliminate all traces of moral stigma.

But I wonder if this route would have much attraction for Professor Morris. It might, in the first place, carry utilitarian costs he would not like: were the criminal sanction to involve only material deprivation and not much moral obloquy, much higher levels of material deprivation might conceivably have to be resorted to in order to achieve even a minimal level of crime prevention.

37. See note 36 supra.


more seriously, eliminating or downgrading the blame element in punishment might eliminate desert requirements too well. Not only might it dispense with the need for parity and rank-ordering in punishments, but it might also dispense with the desert requirement Morris does wish to keep: to wit, the cardinal-proportionality principle barring absolute disproportion in punishment. After all, the civil commitment law has had no similar principle, precisely because no moral stigma has been seen as involved in its sanctions, as Morris himself has noted (p. 30). No, I doubt that he is any more willing than 140 to excise the blaming element in punishment. But if that element is retained, I find it hard to understand how ordinal desert requirements can justly be disregarded.

III

In support of his sentencing conception, Morris offers some pragmatic arguments concerning existing sentencing practice and the notion of "parsimony." He also mentions the idea of mercy. Let me consider these issues briefly.

Existing Sentencing Practice: Exemplary Punishments

Judges sometimes impose extra punishment on selected offenders for deterrent effect. Morris cites the instance of the exemplary sentence imposed on nine white hoodlums convicted of racial assaults on blacks in the Notting Hill district of London in 1958 (pp. 187-88). Such a practice, he points out, does not comport with the parity requirements of desert:

It needs no refined analysis to demonstrate that these nine offenders were selected for unequal treatment before the law. Please do not misunderstand me; I am not opposing such sentences, quite the contrary. Rather, I am arguing that if the increased penalty is within the legislatively prescribed range, then any supposed principle of equality does not prevent such a sentence from being in the appropriate case a just punishment. [P. 188, emphasis in original].

The difficulty with this argument should be apparent: citing the existence of a sentencing practice does not demonstrate the justice of that practice. Yes, judges, when left to their discretion, sometimes impose exemplary deterrent sentences; they also often impose extra punishments on the basis of predictions of debatable accuracy.41 They may also engage in a variety of other practices that are not necessarily defensible. Such facts, however, no more establish that

40. My own arguments for why the sanction against criminal behavior should involve blame are set forth in id. at 63-69.

exemplary sentences are appropriate than they show that predictive sentencing is desirable. Some jurisdictions, moreover, have reformed their sentencing systems so as to sharply restrict judges' powers to impose exemplary or predictive sentences. The Minnesota and Washington sentencing guidelines are examples of this.42 (Surely, Morris would not permit me to argue that the fact of Minnesota's or Washington's insistence on desert-parity is, alone, reason for concluding that parity ought to be observed as a matter of justice.)

The Parsimony Argument

Elaborating on his earlier writings,43 Morris asserts that it is "parsimonious" to impose unequal punishments — that is, to ignore or downgrade the requirements of desert-parity. Suppose, he says, that a sentencing commission is deciding what is to be the normally applicable penalty for second-time purse-snatchers. If parity is not required, one can give most such purse-snatchers probation and achieve such deterrence as is necessary by giving a few six months in jail. He thus would recommend that the commission adopt a probation-to-six-months range as the standard penalty. If equally culpable purse-snatchers must be punished equally, however, then the commission may, as a realistic matter, have to require that all of them be sent to jail for a short period — a less parsimonious result in Morris's view (pp. 194-96).

The most natural and straightforward response of the desert theorist would be to hold his ground. If blame is and should be so central to the idea of punishment, then it simply is unjust to impose unequal punishments on those found guilty of equally reprehensible crimes; and that inequality remains unjust even when urged in the name of parsimony. But Morris's argument strikes me as questionable even within his framework of "limiting retributivism." Is it really so obvious that abandoning desert-parity will produce more "parsimonious" results?

Morris has made his conclusion sound plausible through his choice of example. People tend to be only moderately exercised about how purse-snatchers are punished. If we change the example to a substantially more fear-instilling crime, things may work differently.

Consider the crime of armed robbery. In devising the penalty for armed robbery and other crimes, the Minnesota sentencing commission did adopt a strong parity requirement.44 This meant that when

43. Morris, Punishment, Desert and Rehabilitation, in SENTENCING, supra note 3, at 256-71.
44. See von Hirsch, supra note 5, at 208-10.
limited prison resources were taken into account, terms for armed robbery had to be in the two-to-three year range (depending on the offender's criminal record), with longer terms reserved for the minority of defendants having quite long criminal records.\footnote{See id. at 176, 192-93.} Suppose the commission had instead rejected parity. This could have meant that some armed robbers (say, those deemed favorable risks) would get shorter terms than Minnesota's two-to-three years. But it would also have meant that other robbers would get longer terms, and a few could be visited with extremely long terms. To prevent excessive severity, Morris might apply his retributive ceiling by, for example, limiting the prison terms of robbers (other than those with the worst records) to no more than, say, five years. But if we are speaking of a commission's realistic choices, as Morris claims he is (pp. 192-93), how easy would it be to defend such a limit? Once a commission abandons parity in the treatment of robbery, how effectively can it defend a maximum of five years when it is practically feasible to imprison some robbers for ten, fifteen, or twenty years, and when that may appear to be the more effective exemplary deterrent? The more one downgrades parity and permits selectivity among those convicted of a crime of a given degree of gravity, the harder it will be in practice to prevent the extraordinarily severe treatment of a selected few. As the crime becomes more serious and demands for a tough response increase, this problem will become all the worse.

The problem of harsher punishment for the unlucky few raises the question of parsimony for whom? Suppose the penalty for Crime A has been set at \( x \) years confinement and that there are 100 defendants per year convicted of the crime. Suppose that, by abandoning the parity requirement, one will reduce the penalty for fifty defendants by one-half; keep the penalty the same for another twenty-five; and double the penalty for the remaining twenty-five. Has one produced a more parsimonious result? That depends on how one defines parsimony. If one counts only the number of defendants, a larger number get lower punishment than before. Were one to use the more sophisticated utilitarian criterion of aggregate cost — by factoring in the amount of penalty-change per person as well as the number of persons involved — there would be no change in net severity. Were one to adopt the nonutilitarian criterion of considering the position of potentially the worst-off persons\footnote{See generally J. Rawls, A Theory of Justice (1971).} — a criterion that Morris has not hesitated to use in other contexts\footnote{See N. Morris, supra note 1, at 80-84.} — then the change does not seem parsimonious at all: instead of facing a punishment of \( x \) years, the potentially disadvantaged defendant faces double that amount. And his extra suffering — as a separate person with only
his own life to lead — is scarcely made good by the benefit accruing to other defendants.

One could continue arguing the parsimony issue, but my last point can be stated more generally as follows. If one is debating the relative merits of a more versus a less utilitarian conception of punishment, any claim about parsimony can carry persuasive weight only if it does not beg the question by adopting utilitarian assumptions itself. The ABA Task Force Report, in one passage, flagrantly ignored this point by explicitly defining parsimony in crime-control terms.\textsuperscript{48} Morris is careful to avoid that obvious pitfall (p. 157), but his arguments about parsimony still seem to come dangerously close to assuming the utilitarian notions he is setting out to prove.

\textit{The Mercy Argument}

Throughout his book, Morris keeps asserting that his scheme is more "merciful" than a more thoroughgoing desert approach.\textsuperscript{49} The claim is not easily responded to, because penologists (including myself) have hardly touched upon the concept of mercy.

In the philosophical literature, however, there has been some discussion. One useful analysis is entitled "On Mercy," written a decade ago by Claudia Card.\textsuperscript{50} Mercy, Dr. Card suggests, is not a utilitarian concept at all. If a judge reduces an offender's penalty below the norm for that offense because he or she finds the offender is not dangerous or would better respond to correctional treatment in the community, or because the offender is a noted scientist who needs to be at liberty in order to discover a new cancer cure, these are prudential reasons for being more lenient but not for acts of mercy in the commonly understood sense. Mercy, Card contends, is a conception that is tied to the idea of desert. It involves reducing the penalty on grounds that go beyond the normal reasons of diminished culpability, but Nevertheless are concerned with the suitability and commensurability of punishment for someone who has been visited by much collateral suffering.\textsuperscript{51}

If Card is right — and I think she is at least on the right track — then desert advocates should think more seriously than they have about the issue of mercy. Perhaps there exist a variety of circumstances where one should be permitted to go below the normally applicable penalty on grounds related to mercy. A beginning would be to consider the appropriateness of reducing the punishment in cases where the act has visited the offender himself with sufficiently injuri-

\begin{footnotes}
\footnote{48. See von Hirsch, supra note 17, at 776-79.}
\footnote{49. See, e.g., pp. 203, 206.}
\footnote{50. Card, \textit{On Mercy}, 81 PHIL. REV. 182 (1972).}
\footnote{51. Id. at 184-87, 201.}
\end{footnotes}
ous consequences. (The German Penal Code, in the context of a law with considerable retributivist traditions,\textsuperscript{52} has an analogous provision.\textsuperscript{53})

I find it difficult to understand, however, how the idea of mercy fits into Morris's scheme. If it is an act of prudence rather than mercy to fix penalties for utilitarian ends, then how has Morris made his system more merciful by limiting the scope of desert considerations and expanding the scope of utilitarian ones in deciding the appropriate sentence? Morris has not explained what he means by mercy, or how mercy is to be distinguished from other concepts that he uses (such as parsimony). Without such an explanation, his talk of mercy strikes me as more rhetorical than illuminating.

IV

While gallons (nay, barrels) of ink have been spent on the insanity defense, the issue of the half-mad has scarcely been touched. Professor Morris, to his great credit, opens the issue to debate.\textsuperscript{54} However one chooses to define legal insanity, there will be a good number of defendants who do not satisfy the test of exculpation; who will thus have to be sentenced; and yet who were suffering from some degree of mental disturbance when they committed the act. Such cases of partial disability are apt to be much more frequently encountered than the very small number of insanity acquittals. What should be done with such persons? Morris's proposal is, essentially, to scale down the punishment for such offenders on grounds of their reduced culpability. In his words, "[p]unishment will be reduced by reason of mental illness to the degree to which those imposing that punishment regard the offender's moral culpability as lessened by his mental illness" (p. 152). I thoroughly agree that this is the proper conclusion, but question its consistency with Morris's general sentencing theory. Let me explain why.

1. It is true that partial mental disability reduces a person's culpability. The person is less to blame because his mental troubles reduce his capacity to exercise judgment and self-control. For that reason, the half-mad defendant, even if he does not satisfy the test for legal insanity, deserves less punishment.

2. On a desert-oriented rationale for sentencing, there is no conceptual difficulty in accommodating the half-mad. Desert theory (notwithstanding Morris's occasional assertions to the contrary) does not require mechanical equality in punishment for all convicted

\textsuperscript{52} Weigend, \textit{Sentencing in West Germany}, 42 Mo. L. REV. 37, 39 (1983).

\textsuperscript{53} STGB 60. This calls for remission of the entire punishment when the adverse consequences of the act to the actor are sufficiently great.

\textsuperscript{54} His discussion of sentencing the half-mad is set forth in chapter 4 of the book, pp. 129-76.
of a given offense. The parity requirements of desert calls for equal
treatment of equally blameworthy defendants and diminished culpability means less blameworthiness. This is not a matter of mercy
either, as Morris asserts (pp. 155-59); the less culpable defendant deserves and is entitled to reduced punishment. In desert-based
guideline systems, this can be achieved through the presumptive sentence device: while a set quantum of punishment is assigned to each
gradation of severity, the judge retains authority to deviate below that sentence for mitigating circumstances related to desert. One
such ground for mitigation is partial mental disability. The Minnesota guidelines (which Morris himself quotes on this point (p. 173)),
include the following in the list of mitigating factors warranting departures below the prescribed grid ranges: "The offender, because of
physical or mental impairment, lacked substantial capacity for judgment when the offense was committed."57

3. On Morris’s "limiting retributivism" rationale, however, it is
difficult to explain why punishments should be reduced for the half-mad. If desert sets only the upper and lower boundaries of permissi-
ble punishment, and if the sentence is to be fixed within those bounds on utilitarian grounds, what room is there for considering
the reduced culpability of the partially mentally disabled? Whether someone gets a sentence near the top or the bottom of the prescribed
penalty range would, on this theory, depend only on utilitarian fac-
tors of incapacitation or deterrence (pp. 196-202). The fact that the
half-mad defendant is less culpable would be irrelevant, since desert
would set only the boundaries of the range, and we are speaking of a
punishment within the range to be decided on crime-preventive
grounds. The half-mad defendant would get a sentence in the lower
portion of the range only if he was a good risk, and was not conspic-
uous enough to be used as an example to others; and he would get no
less a punishment than a wholly sane defendant who was equally
nondangerous and equally inconspicuous.

4. How, then, does Morris explain his treatment of the half-mad?
His suggestion is that the partially disabled defendant should, in
view of his reduced culpability, receive a sentence in the lower por-
tion of the range — unless there is a strong basis (in the sense of a

55. von Hirsch, supra note 10, at 244-45.
58. I am speaking here of the general sentencing theory that Morris sets forth in Chapter 5 of his present book and in his earlier book The Future of Imprisonment, N. Morris, supra note 1, and which was discussed in Parts I-III of this review.
59. See text at notes 8-9 supra.
high base-expectancy rate) for believing that he is a poor risk (pp. 146-72). The suggestion is interesting, surely, but hard to square with his general theory. As just explained, the theory calls for desert considerations to set only the boundaries of the ranges. And the theory does not ordinarily require such strong evidence of utilitarian effects when locating the sentence within the range: Morris, for instance, is quite unembarrassed to accept exemplary deterrence on much flimsier evidence (pp. 187-88).

What Morris's proposals on the half-mad imply, then, is a different general theory of punishment. His suggested treatment of the half-mad would be consistent with a sentencing theory having the following features: (1) desert would set the upper and lower limits of the range. (2) within those limits, desert would have another critical role: the punishment would vary (in an approximate, nonquantitative fashion) with the offender's degree of culpability. (3) the punishment may be increased within the range on utilitarian grounds only when there are strong empirical grounds for expecting significant preventive effects. The reduced punishment to which half-mad defendants would normally be entitled would then be explainable in terms of their reduced culpability — since degree of blameworthiness would ordinarily be decisive in deciding the sentence within the range. The insistence on a high base rate expectancy before increasing the sentence on predictive grounds would also become explicable because of the stricter standard this theory imposes for using preventive considerations. (I do not know whether Morris accepts this embryo of a theory — a subsequent lecture by him suggests not.60). What is apparent, however, is that this is a very different conception than a limiting retributivism that relegates desert to defining the range boundaries; and that this theory, by making culpability so important for decisions within the range and by restricting the use of utilitarian considerations, would give considerably more weight to the concept of desert.

V

Let us turn, finally, to the fully mad and to Professor Morris's views on the insanity defense. His position is simply stated. A defendant's insanity should be considered, like any other relevant evidence, in determining whether he had the requisite degree of mens rea — for example, in determining whether he had the intent to commit the act that the law requires in most felonies (pp. 53-76).

However, there should be no separate insanity defense. In the course of developing this abolitionist position, Morris provides a valuable overview of the current debate over the insanity defense, and furnishes telling criticisms of sillier recent schemes, such as the “guilty but insane” plea (pp. 83-87).

Should the insanity defense be abolished? Morris rightly reminds us that the debate is not about the principle that punishment should presuppose blameworthiness. Abolitionists support this principle as do preservationists — they argue only over whether it can adequately be taken into account through the law’s mens rea requirements. In Morris’s words:

One is left, therefore, with the feeling that the special defense [of insanity] is a genuflection to a deep-seated moral sense that the mentally ill lack freedom of choice to guide and govern their conduct and that therefore blame should not be imputed to them for their otherwise criminal acts nor should punishment be imposed. [However] . . . it is important not to assume that those who advocate the abolition of the special defense of insanity are recommending the wholesale punishment of the sick. They are urging rather that mental illness be given the same exculpatory effect as other adversities that bear upon criminal guilt. [P. 59].

What the abolition debate is about, however, is the criteria for judging the blameworthiness of the mentally ill. To support abolition is to say that the idea of criminal intent suffices to express the notion of the blameworthiness that should be required of any defendant, even a mentally troubled one. To support retention is to say that, where mad defendants are concerned, having an intent to commit the act should not be a sufficient condition for culpability; the defendant’s capacity to understand the wrongfulness of his act, or his capacity for controlling his actions, also matter.

Who is right? An answer would require deeper exploration of our conceptions of personal fault. Is the defendant who acts with apparent purpose but for wholly crazy reasons properly to be held accountable? Can one make sense of the idea of someone being incapable of exercising self-control, as opposed simply to his failure to

61. Morris notes that abolition of the special defense of insanity would inculpate mad defendants charged with crimes of negligence, since the applicable definitions of criminal negligence do not presuppose personal fault. But if this seems unfair, he suggests, the reason lies in the inadequacy of those definitions of criminal liability: punishing without requiring personal fault is unfair not merely to the mentally disturbed defendant but to any defendant. Pp. 70-72. Morris’s solution would be to eliminate negligence liability in the criminal law altogether. Pp. 70-72. Mine would be to retain it but require that the defendant was capable of comprehending the risk in the circumstances even if he did not in fact consider the risk.


exercise it? Despite all the debate over insanity these conceptual issues remain to be illuminated adequately.

Morris, unfortunately, does not explore such questions. He contents himself with stating his preference for abolition in general terms; with emphasizing that the insanity defense is not important as a practical matter (because it is almost never used for defendants charged with everyday felonies); and with asserting that the culpability of mentally disturbed defendants is a matter of degree (pp. 61-62). In an otherwise thoroughly philosophical book, Morris never really reaches the issue of principle: of deciding what it is — the presence of or absence of intent, the reasons for an act, or whatever — that might render an insane defendant free from fault. As a result, I do not think he has made a convincing case for abolition of the insanity defense.

It should be emphasized, however, that Morris's main thoughts about sentencing do not depend on his conclusions about the insanity defense. The abolitionist, just as much as the preservationist, is free to prefer either a more or less utilitarian conception of how much to punish those whom the law decides are suitable candidates for punishment.

VI

I have described Morris's book as argumentative in the best sense, and have herein been rather argumentative myself. Our points of disagreement should not, however, obscure the important points of agreement that I mentioned earlier: on the need to take desert seriously as a principle of punishment; and on the need to face honestly the tension between retributive and utilitarian concerns in sentencing. Nor should they obscure the sense I have of the merit of this book: it is among the most stimulating works on criminal jurisprudence to have appeared in years.