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Francis A. Allen--An Appreciation

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Francis Allen and I overlapped as members of the Michigan Law faculty in the 1962-63 academic year. It was much too short a colleagueship. But Frank hadn't gotten Chicago out of his system at that time, and I, a year after his departure, decided to follow the sun. (It took Frank a bit longer, apparently.) At all events, that year together at Michigan was the start of a friendship which has survived the separation of the intervening years. I became and remain a total and enthusiastic admirer of Frank Allen as a person and as a scholar, and of all that he stands for. To the shameless partisanship I bring to the task of penning these comments I offer these two pleas in abatement: one, that such is the inevitable fate of those who come to know him, and two, what I say here about him and his work has the redeeming virtue of being demonstrably true.

I will not try to say all that deserves to be said about Professor Allen's many achievements. I rely on others to speak from firsthand experience to such facets of his excellence as his talents as a teacher, his contributions as dean of the Michigan Law School during some trying years, his success in leading a revision of the Illinois Penal Code. I will confine my observations to what I know firsthand — his contributions to legal scholarship.

Frank Allen is a towering figure in criminal law scholarship. The bulk and range of his bibliography and the close attention paid his work by those who labor in these fields are sure indicators of his power and influence. Precisely because of his stature some comment is called for on the style of his work and the qualities of mind and heart which it reveals; on the nature of his intellectual contributions and how they came to have the impact they did.

Allen is a master of the essay form. He has done some work in the classic law review article mode, in chronicling the Supreme Court's development of the constitutional law of criminal procedure.[1] But the

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1. Two of his best-known articles in this area deal with Wolf v. Colorado, 338 U.S. 25 (1949) (*The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950)), and the case that overruled it, Mapp v. Ohio, 367 U.S. 643 (1961) (*Federalism and the Fourth Amendment: A Requiem for Wolf,* 1961 SUP. CT. REV. 1). These and other of Allen's articles in the field of criminal procedure are discussed elsewhere in this issue. *See* Kamisar,

bulk of his writing, and indeed his most significant work, is not in that style at all. His métier has been the essay.

In saying this I don't mean to imply anything unkind about the law review article. It's a form and it has its uses. There are great examples of it and also indifferent ones. That's true of any style of writing. All I mean to say is that those features that are typical of modern law review articles are not typical of Allen's work. The standard law review article is long, it seeks to be comprehensive, it is heavily footnoted, it collects all material that bears on the subject, it assumes that the reader knows nothing about the subject and explains everything, it offers itself as a reference tool as well as (or more than) an argument. It is, in a word, a short monograph for the uninitiated. Allen's medium, by contrast, is the essay — short, pithy, graceful, epigrammatic, speculative commentary. Where one reads the law review article as a matter of duty, one turns to an essay for the pleasure of reading it, as well as for the wisdom it provides. At least this is true of the best examples of the essay form, and Allen's pieces are certainly that.

We owe this output of essays to Allen's great popularity on the circuit of invited lectureships. They provided him with a medium perfectly suited to his special gifts; indeed in his hands they became a high art. When it is observed that a large part of his opus is the product of these lectures we have cause to be grateful to the sensible people who invited him.

Allen's essays focused principally on two great subjects — the criminal law and the university. The first he addressed from the perspective of scholarly observer; the second from that of embattled participant.

His writing in criminal law was pioneering. There was a long tradition of abstention by criminal law scholars from the subjects of punishing and treating offenders and the functioning of the agencies of criminal justice. These subjects had been yielded to the field of criminology, along with that of the nature and causes of criminal behavior. The landmark study of Michael and Adler in 1933, *Crime, Law and Social Science,* in demonstrating the jejune quality of much research in these areas, stamped a second-class label on the whole field that warned off a generation of criminal law scholars. That left little for law professors to do, since writing on the other significant issue of the criminal law, the choice and definition of conduct to be made criminal,

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Francis A. Allen: "Confront[ing] the Most Explosive Problems" and "Plumbing All Issues to Their Full Depth Without Fear or Prejudice," 85 MICH. L. REV. 406 (1986).

had long suffered a tradition of neglect and trivialization. The doldrums were broken by two scholars. Herbert Wechsler brought respectability to the substantive criminal law. Frank Allen did the same for the issues of the punishment of offenders and the workings of the agencies of criminal justice.

Allen's work in these areas is framed by two books of essays, *The Borderland of Criminal Justice: Essays in Law and Criminology,* published in 1964, and *The Decline of the Rehabilitative Ideal,* constituting the Storrs Lectures at Yale in 1979. The first comprises lectures delivered between 1954 and 1963. The subjects do not seem remarkable today — "The Borderland of Criminal Law: Problems of 'Socializing' Criminal Justice"; "Legal Values and the Rehabilitative Ideal"; "The Juvenile Court and the Limits of Juvenile Justice" — but at the time virtually no other legal scholar was writing in these fields. While they later emerged as central problems for criminal law scholarship, it was Allen who did more than any other person to make this happen.

The importance of Allen's work was not limited to establishing a new agenda for legal research; the ideas he brought to these issues had a shaping influence on the thinking of a generation of legal scholars. Consider some of the themes of his writing: the pervasive overuse of the criminal law; the self-defeating consequences of using the criminal law to perform social services, including its tendency to corrupt the agencies of criminal justice; the injustices committed by juvenile court processes by cloaking punitive responses in the wrappings of child welfare; the neglect of standards of decency and dignity that should apply whenever the law brings coercive measures to bear upon the individual; the preoccupation with reform of the offender, which he labeled the "rehabilitative ideal," the questionable assumptions behind it, and the inevitable debasement of that ideal that results from imposing it on the system of criminal justice. It is remarkable the extent to which these ideas became the central themes in criminal law scholarship in the years that followed.

More than that. Those ideas proved also to have had a significant influence on law and policy. The reach of the criminal law has been limited, at least to some extent; juvenile court processes have been reformed by the extension of constitutional and statutory rights to the juvenile; most significantly, the rehabilitative ideal has been substantially undermined and even wholly replaced in some jurisdictions by the elimination of parole and the use of determinate sentencing with an exclusively punitive rationale. This last development is hardly one to which Allen would want to claim paternity, since it represents just that indiscriminate careening to excess that has so blighted penal pol-

icy in this country. But it provided him with an opportunity in his 1979 Storrs lectures to reflect on the development of penal policy over the previous two decades, a development in which he was a significant participant. Here, as reflective observer, Allen has made a contribution that rivals his contribution as participant, for I know of no contemporary work which considers with more insight and subtlety "the relations of law and opinion . . . [and] the impact of changes in cultural and political attitudes on penal policy."[2]

No account of Allen's work in penology would be adequate without mention of the profound moral vision and large-minded wisdom of his contributions. I cannot exhibit this quality better than by letting him speak for himself. Commenting on the growing distrust of authority and discretion that drove the demise of the rehabilitative ideal, he makes the following plea for a renewal of social purpose which that distrust betokened:

> Much in modern attitudes toward authority reflects less a staunch individualism standing against the coercions and manipulations of the state than a decline of confidence in public purposes. . . . Sooner or later, however, this society must come to terms with social authority. Although the notion of there being an identity of social and individual interests is a chimera, there are social purposes which, if realized, contribute to a fuller humanity and are indeed the conditions for the achievement of human potentialities. Thus protection of persons and property from unwarranted aggressions by other members of the community must be accomplished at some level of adequacy, as must the relief of poverty and the care and protection of children, the mentally disadvantaged, and other members of the large and varied group of those unable to care for themselves. Theories of rights which, if implemented, prevent or seriously obstruct the achievement of such social purposes are not likely to survive and contain the danger of breeding revulsions that strip public support from proper efforts to protect individuals from tyrannical governmental interventions. If a theory of rights prevents the achievement of social purposes, there is something amiss either in the theory of rights or in the conception of public purposes. Penal policy is concerned with achieving social purposes in a fashion that nevertheless protects the essential humanity of those who, for reasons of social defense, are placed in positions of extreme dependency. But in this era we all exist in a state of dependency, and how well we meet the problems of penal justice may foretell the degree of our success in dealing with matters of wider social concern.[3]

Allen's lectures on the university and related issues of the life of the mind emerged from his leadership role in legal education, as dean of the University of Michigan Law School and President of the Associ-

2. THE DECLINE OF THE REHABILITATIVE IDEAL 1 (1981).

3. *Id.* at 88-89.

ation of American Law Schools, during the sixties and seventies.[4] Happily now only a dark memory, this was a period of revolt from the Left against the university and the intellectual values for which it stood, rivaled in recent times only by the revolt from the Right associated with Joe McCarthy in the fifties. Allen perceived early that the most serious threat was not to law and order on the campuses, "but the possible triumph of attitudes and values which, in some instances, seek to convert the universities into political pressure groups to achieve social objectives that are essentially nonintellectual or even anti-intellectual in character," for "[i]f such objectives prevail in their more virulent forms, they will incapacitate the universities from performing the functions that are uniquely theirs in the years ahead."[5] Allen's was one of the more eloquent voices of the time reminding all of us what those functions were and how far the quality of our society would be diminished by their loss. He spoke of the civilizing values a university exemplifies — "rationality and the skills of reasoned articulation,"[6] disciplined intelligence, the moral dimension of intellectual endeavor[7] and its indispensability to achieving justice between men, humanistic values, tolerance for the thought of others. We needed leaders in that era to take on the anti-intellectualism and moral fanaticism that possessed so many otherwise well-meaning students (and faculty) of those days. In the law school world no one did so with greater eloquence and effect.

Allen's romance with the university is epitomized in a comment he recently made to an interviewer: "It has always seemed to me that the university life comes about as close to being the good life as one is likely to get on this earth."[8] Certainly as Frank Allen has been leading it, he's unquestionably right.

4. These essays are collected in LAW, INTELLECT, AND EDUCATION (1979). The other significant books of lectures that grew out of Allen's engagement with the parlous sixties are CIVIL DISOBEDIENCE AND THE LEGAL ORDER (1967) and THE CRIMES OF POLITICS: POLITICAL DIMENSIONS OF CRIMINAL JUSTICE (1974). I pass them without comment only in deference to the constraints of brevity appropriate to the occasion. For my views on the latter, see Kadish, Book Review, 88 HARV. L. REV. 840 (1975).

5. LAW, INTELLECT, AND EDUCATION 24 (1979).

6. *Id.* at 26.

7. *Id.* at 29.

8. Miller, *Never Leaving Law School,* STUDENT LAW., Jan. 1986, at 14, 17.