

## Review Articles

Charles H. Whitebread, *Criminal Procedure: An Analysis of Constitutional Cases and Concepts*. Mineola, N.Y.: Foundation Press, 1980. Pp. 622. \$18.50.

Reviewed by Sara Sun Beale

Anyone who has taught a criminal procedure course in recent years is aware of the formidable volume of material to be covered. The United States Supreme Court has continued to devote a large portion of its docket to criminal cases in recent years,<sup>1</sup> and state courts have interpreted state constitutions as the source of individual rights that in many instances now exceed analogous federal rights.<sup>2</sup> One measure of the volume of material to be covered is the extraordinary size of one of the most popular casebooks, the fifth edition of Kamisar, LaFave, and Israel's *Modern Criminal Procedure*. This encyclopedic volume now exceeds 1600 pages, not including its statutory appendices and accompanying supplement.

It is not surprising that many students feel the need for some guidance in digesting this great mass of material, and accordingly there is a natural demand for some short and relatively straightforward statement of the law to complement the traditional casebook.<sup>3</sup> Professor Whitebread has attempted to meet this demand. He has written a one-volume treatise that describes the major constitutional decisions on virtually all aspects of criminal procedure. Although the treatise was published in 1980, a supplement containing cases decided before July 1, 1982, is scheduled for release in August of 1982.

In seeking to distill all of constitutional criminal procedure into roughly 600 pages, Professor Whitebread has necessarily had to leave something

Sara Sun Beale is Associate Professor of Law, Duke University.

1. Stephen A. Saltzburg, Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 *Geo. L. J.* 151, 154 n. 20 (1980).
2. See generally William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 *Harv. L. Rev.* 489 (1977).
3. Indeed each of the authors of *Modern Criminal Procedure* has recognized this need. Professors Israel and LaFave are the authors of *Criminal Procedure in a Nutshell: Constitutional Limitations*, 3d ed. (St. Paul, Minn.: West Publishing Co., 1980). Professor Kamisar has joined forces with Joseph Grano and James Haddad to produce *The Sum and Substance of Criminal Procedure* (Inglewood, Calif.: Josephson Center for Creative Educational Services, 1977). Whitebread's scope is more comprehensive than either of these works. *Sum and Substance* includes only limitations on the investigation of suspected criminal conduct (i.e., search and seizure, confessions, entrapment, electronic surveillance, etc.). Israel and LaFave's *Nutshell* is largely devoted to the right to counsel plus Fourth and Fifth Amendment issues, although it does include a summary discussion of pretrial proceedings and the trial itself.

out. Much of the text is simply a straightforward description of the cases.<sup>4</sup> The facts, holding, and rationale are described, and in many instances Whitebread is content to leave it at that, without offering any critical evaluation or independent analysis. This deficiency is more apparent in some portions of the book than in others. Whitebread's coverage of Fourth Amendment issues is the most complete; it accounts for approximately 250 of the book's 600 pages. Whitebread seems most at home with the Fourth Amendment materials, and his discussion frequently does go beyond a simple description of the cases to a critical evaluation of the particular problems and the Court's resolution of them. Other subjects receive only cursory treatment. Despite the fact that in many jurisdictions 90 percent or more of all cases are resolved by plea bargaining, a total of only seventy-five pages is allotted to plea bargaining, plus bail, pretrial hearings, and the grand jury. Twenty pages at the end of the book are devoted to the scope of federal *habeas corpus* review of state decisions. A few subjects have been omitted entirely. There is no discussion of the right to compulsory process<sup>5</sup> or of the confrontation clause.<sup>6</sup> Although there is a discussion of the prosecutor's duty to disclose exculpatory evidence, there is no general discussion of pretrial discovery by the prosecution and the defense.<sup>7</sup>

Since a brief description of any lengthy case must omit a good deal, reading Professor Whitebread's description can supplement but cannot substitute for reading *at least* excerpts from the opinions themselves. As might be expected, the gap between the information contained in Professor Whitebread's descriptions and that which can be gleaned from the opinions themselves is narrowest in the sections on Fourth Amendment cases and widest in the sections dealing with subjects in a more summary fashion. For example, Whitebread's twenty-page chapter on the grand jury

4. Professor Whitebread does include an introductory chapter to provide perspective by comparing the two models of the criminal process—the crime control model and the due process model—described by Herbert Packer in *The Limits of the Criminal Sanction* (Stanford, Calif.: Stanford Univ. Press, 1968).

Although his principal focus is on the decisions interpreting the United States Constitution, in several sections Professor Whitebread does include discussion of relevant statutory provisions. For example, his discussion of the right to a speedy trial (pp. 474–81) includes not only the cases construing the Sixth Amendment but also a description of the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 et seq. Almost ten pages (pp. 244–53) are devoted to a description of the limitations imposed on electronic surveillance by the adoption of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90–351, 82 Stat. 211, codified as 18 U.S.C. §§ 2510–20.

5. See, e.g., *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14 (1967).

6. See, e.g., *Ohio v. Roberts*, 448 U.S. 56 (1980); *California v. Green*, 399 U.S. 149 (1970); and *Pointer v. Texas*, 380 U.S. 400 (1965).

7. Perhaps a general discussion of discovery is beyond Whitebread's scope, since the defendant's right to discovery is largely a matter of statutory rather than constitutional entitlement. But constitutional issues are clearly raised by the discovery rules in force in particular jurisdictions, such as rules that provide for a right of government discovery or reciprocal government discovery if the defendant elects to exercise his statutory discovery rights. See *Wardius v. Oregon*, 412 U.S. 470 (1973).

includes the following discussion of *United States v. Dionisio*, 410 U.S. 1 (1973) (p. 381, citations omitted):

In the case of *United States v. Dionisio* the Supreme Court seemed to indicate that a grand jury subpoena may not be attacked as violative of one's Fourth Amendment rights. The Court stated:

It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome.

This description of the result in *Dionisio* and the quotation are accurate as far as they go, but that is not very far. The Court's rationale is not fully explored; indeed there is no explanation given for the caveat implicit in the author's statement that the Court "seemed to indicate . . . ." Although some discussion of other aspects of the opinion in *Dionisio* and a brief statement of the facts are included in other chapters, no cross reference to that discussion is provided. And nowhere is the reader given the sense of why there are no Fourth Amendment constraints on the prosecutor's authority to summon a witness to come before the grand jury. The following excerpt from the Court's opinion in *Dionisio* provides some sense of what the reader is missing (410 U.S. at 9-10, citations omitted):

Last Term we again acknowledged . . . that "[c]itizens generally are not constitutionally immune from grand jury subpoenas. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 682. . . .

These are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281. . . .

The compulsion exerted by grand jury subpoena differs from the seizure effected by an arrest, or even an investigative 'stop' in more civic obligation. . . .

The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

The Court thus rested principally on the historic role of the grand jury. Contemporary critics have charged that the grand jury no longer serves its historic role, that it has become nothing more than a rubber stamp for the prosecutor. If it could be established that the grand jury's independence has been undermined and its traditional role subverted, then the rationale for *Dionisio* would be largely undercut. The Court's reliance in *Dionisio* on the distinction between the grand jury subpoena and the abrupt and demeaning stop or arrest is also significant, and it sets the stage for questioning the status of a "forthwith" grand jury subpoena.<sup>8</sup>

8. Cf. *In re Nwamu*, 421 F. Supp. 1361 (S.D.N.Y. 1976).

Of course this book's usefulness will depend upon the reader's expectations. Although I have suggested concerns about the cursory treatment of many subjects and the omission of some others, students' principal concern may be that 600 pages is too much analysis and detail, not too little. Students will be pleased to see that the book is organized so as to permit ready reference to particular topics, and that each chapter ends with a *brief* section of numbered conclusions. Reading *Whitebread* for review purposes would undoubtedly benefit some students. Indeed reading *Whitebread* *before* doing assigned readings on a subject—such as double jeopardy—where the Court's opinions are particularly confused might not be a bad idea.

*Whitebread* can also serve as a useful source for the student, practitioner, or academic who is beginning research on an unfamiliar criminal procedure topic. The most useful feature of the book for this purpose is its inclusion of a carefully selected bibliography on each chapter. Up to twenty-five law-review articles are cited for each chapter, and of course the reader also has the citations for all of the major cases and *Whitebread's* description of them.

In short, this book can make a useful contribution if the reader does not ask too much of it.

---

Thomas L. Shaffer, *On Being a Christian and a Lawyer*. Provo, Utah: Brigham Young University Press, 1981. Pp. 271. \$12.95.

Reviewed by Harry W. Jones

*On Being a Christian and a Lawyer* is a remarkable book, rich in its literary and other cultural references, clean and lively in style, and boldly original in its insights and point of view. It is an intensely personal book; there is nothing quite like it in recent legal literature. Professor Shaffer writes unguardedly and holds nothing back; he is not fearful or shy, as the rest of us are, about speaking "prophetically" (p. 179) to the profession from which he thinks great things may some day come. In his provocative chapter entitled "Moral Moments in Law School," Professor Shaffer says, of a law student who has exposed himself to classroom ridicule by expressing a deeply held moral position, that the student is, "in speaking out, laying himself on the line." This is precisely what Shaffer is doing in this book: laying himself on the line. Yet, despite its high seriousness, this is not a dour or solemn book. Professor Shaffer writes good humoredly and with engaging intellectual and moral humility. His book's prevailing tone is best illustrated by something he says at page 175: "I often think that the only way to be both a Christian and a lawyer is to ask, every day, 'Is

Harry W. Jones is Cardozo Professor Emeritus of Jurisprudence, Columbia University.

it possible to be both a Christian and a lawyer?' and to be open, every day, to the thought that it is *not* possible."

A good many potential readers who would greatly like *On Being a Christian and a Lawyer* may be put off by its title. Let them be assured straightaway that there is no trace of prayer-breakfast piety in this book, that Professor Shaffer's religious conviction is entirely free of the self-righteousness and narrow certainties many of us associate with the likes of the Moral Majority, and that the word "Christian" in his title includes, somewhat confusingly, believing Jews as well as Roman Catholic and Protestant believers. The ethical tradition Shaffer tries to bring to bear on lawyers and their work is of religious origin but is in no way denominational, as witness such of his references as those to "Jewish and Christian theology" (p. 9) and to the "Jewish and Christian idea [of justice]" (p. 137). It is evident, too, that Shaffer's views, particularly about interpersonal relations, are as much influenced by the writings of the Jewish theologian Martin Buber as by Barth, Tillich, or even Thomas Aquinas. Except where some specific context forbids, we can, without changing Professor Shaffer's thought in any serious way, read "Christian" as meaning "Judeo-Christian" in just about all his references to Christian ethics or a Christian view of things. *On Being a Christian and a Lawyer* speaks equally to Jews, Catholics, and Protestants, even—as I shall suggest later—to lawyers whose moral aspirations are not based on religious belief.

The book takes up, as its first subject, the moral dimensions of counseling, particularly in civil matters. In a brisk and frequently sparkling discussion extending over four chapters, Professor Shaffer considers and rejects both "the ethics of role"—the conventional view within the profession that lawyers are not to be charged with moral responsibility for their clients' unworthy practices—and "the ethics of isolation," in which lawyers are seen as ethically obligated to appraise the moral propriety, as well as the bare legality, of what they help their clients do. Shaffer, with his religion-influenced conception of the lawyer's calling as a "ministry," sees quite different issues than the rest of us have seen in such current debates as those over the proposed Model Rules of Professional Conduct; for Shaffer, counseling is, or at its best can be, an occasion for "moral conversation" with the client. What is called for is nothing less than a "theology of the client," pursuant to which moral discourse is conducted with him in a true "I-You" relation (Buber) and according to what Shaffer characterizes as "the ethics of care." The discussion then moves, for the next five chapters, to lawyer-client relations in criminal law matters. The central idea running through these chapters, essentially an application of "the ethics of care," is a conception of the practice of criminal law as a "ministry to the guilty," as Jesus' largely was, and Paul's. The tensions in this are manifest: one who would minister to the guilty must somehow

“be a counselor and companion without being a collaborator” in the client’s evil purpose. “The client who proposes to commit perjury is in need of more talk with his lawyer, not less.” Trollope’s *Orley Farm* is drawn on as the problem case for analysis and criticism; three barristers with very different notions about professional ethics advised and represented the guilty Lady Mary Mason, but no one of them measured up to the moral imperatives of this “ironic” (p. 75) ministry.

In Part Two of his book, Shaffer advances a general theory of “advocacy” that extends far beyond courtroom representation. Advocacy, in Shaffer’s broad and unusual sense of the term, is “reconciliation in an institutional focus,” or, to put it a bit more simply, moral discourse with the decision makers of the state or other institution. The prophet Nathan was thus an “advocate” (before and in discourse with King David) as were Gandhi and Martin Luther King. And advocacy, thought of as moral discourse, will give primacy less to formal principles than to “the human person before the court”; moral discourse is “an interpersonal thing—a thing grounded in the person of the client.” Does this imply that justice, too, respects persons more than principles? I am not entirely sure how Professor Shaffer would answer this question. “Justice,” to him, is not something administered or even administrable by courts; it is “interpersonal debt” (p. 139). “The question is not what you are entitled to demand from me, but how are we to live together.” This distinctively “Jewish idea of justice” (p. 140) is, through the life of Jesus, a central ingredient of the Judeo-Christian religious tradition. If we lawyers are hopelessly committed to using the term “justice” with a narrower and more adversary meaning, we “need to find a different word to express the hopeful idea we have about community in our country” (p. 141).

The world of law, Shaffer tells us in his later chapters, is a subculture in need of a philosophy or, as he would put it, a “theology.” He is hard on lawyers, likening their legality-bound world view to that of the scribes and Pharisees, hardest of all perhaps on those of us who exercise our professional vocation as members of university law faculties. Law teachers are uniquely well placed to “speak to the profession prophetically but from within the tradition the profession claims,” but we rarely do, tending instead “to sanctify ideas of exclusive fraternity that are at worst wrong and at best tragic” (p. 182). Shaffer’s chapter on “Moral Moments in Law School” is a scathing but not, I think, overstated account of how students learn in the law-school classroom that morals are without “intellectual importance.” Moral assertions by students, even when not dismissed as naive as they often are, are practically never “explored,” that is, practically never subjected to intensive and intellectually rigorous analysis. Does the message come through from Doctor to Student that moral considerations “have nothing to do with the [legal] enterprise”? If so, how might law teachers who want to correct this false impression go about the task?

Shaffer's affirmative prescriptions include two that I wish I had tried in my own largely unsuccessful struggle with the problem: (1) genuine moral discourse in the law-school classroom requires explicit recognition of the tragic fact that in law, as elsewhere in life, the difficult "moral choices are not those between good and evil but those between good and good" (p. 174), and (2) that *lawyer stories* (Shaffer's italics) are incomparably more instructive than ethical abstractions in giving students some notion of the morality of being a lawyer. Shaffer's Chapter Fourteen is just such a lawyer story: Judge Edwin Horton's anguished granting of the motion for a new trial after the jury verdict of guilty against Haywood Patterson in the fifth of the Scottsboro trials.

"Stories" are also central in the three chapters towards the end of *On Being a Christian and a Lawyer* in which Professor Shaffer addresses himself to the great jurisprudential—and theological—problem of individual conscience *versus* state power. Two of these chapters, written by Shaffer in collaboration with the theologian Stanley Hauerwas, deal chiefly with the tragedy of Thomas More. More's is a lawyer story, in a sense, because More was a very great lawyer and faced his life's crisis with inspired "skill"; but even this vast skill was insufficient, and More's final steadfastness was, in the authors' terms, an expression of Christian "hope." These two chapters are, for me at least, the most difficult in the book, probably because I am not as much at home in the universe of theology as I might be. Theology, like law, has its specialized vocabulary, and this can raise problems for the mere lawyer-reader: e.g., the statement at page 197 that "More's character is fashioned with habits of skill as hope and hope as skill." I think I now understand the author's meaning, but it has taken four close readings of the chapter.

But there is nothing hard to grasp about the following chapter, also a "story," which considers the humble but indomitable Christian witness of Franz Jaggerstatter, an Austrian farmer and church sexton beheaded by the Nazis in 1943 for refusing to participate, even as a noncombatant, in what his conscience told him was a profoundly unjust war. Jaggerstatter was neither lawyer nor theologian; it was simply that for him, as for Thomas More, there had to be "that little area in which I must rule myself." In this "little area," imperatives of obligation higher than those of the state's positive law may command civil disobedience, at whatever penalty. Higher-law theories, including but not limited to those that proceed from religious conviction, thus proclaim that there are outer limits on the power of the state—or any other social institution—over the conscience of the individual. For Professor Shaffer, as his eloquent concluding chapter makes plain, this is a matter of keeping the faith: "The primary witness a believer has to give in the world of power is a witness of limitation. . . . We witness real power as we witness the limitations of the power that, however powerful, is not real." And he adds, almost as an

aside but a deeply felt one, that a “biblical community,” if one ever comes into being, will have its principal ministry “among the poor.”

*On Being a Christian and a Lawyer* was, the author tells us, “five years in the writing.” Will it have widespread and continuing influence in future discussions of the ethics of legal practice, or will it be disregarded as a counsel of perfectionism? Is Professor Shaffer’s “prophetic” way of looking at moral problems one that has meaning for the generality of the legal profession, even and particularly for lawyers, judges, and legal scholars who do not share his religious belief and commitment? Let me put the question in a less sweeping and more personal way: why will I, who am without religious assurance in my notions about right and wrong, most certainly assign this book as a required text if I ever again teach a course on Legal Ethics or Professional Responsibility?

One answer, and a sufficient one, is that Professor Shaffer brings his moral discourse to bear on conventional standards of professional morality in a strikingly original and uninhibited way. He sees problems in our old Canons, present Code, and probable future Model Rules that no one else has ever quite seen there, and he asks searching questions about the lawyer’s moral role that have gone too long unasked. The first nine chapters of *On Being a Lawyer and a Christian*, even if they were all there were, provide a perspective on the Model Rules of Professional Conduct and its predecessors, a sense of proportion about such exercises in the codification of moral principles, that cannot be found anywhere else. But Shaffer’s vision—as he would call it, his “hope”—of what humaneness and true righteousness might be in the practice of law goes far beyond any ethics that could ever be embodied in a code of permissible professional behavior.

Professor Shaffer’s book stands or falls, as I am sure he would have it stand or fall, on the validity and social relevance of his Christian “hope.” We are not used to this kind of risk taking in legal literature. How can such “unrealistic” and unabashed idealism as Shaffer’s illuminate the trying moral occasions of a lawyer’s life? Reinhold Niebuhr addresses just such a question in his great essay on “The Relevance of an Impossible Ethical Idea”:

While the final heights of the love ideal condemn as well as fulfill the moral canons of common sense, the ideal is involved in every moral aspiration and achievement. It is the genius and the task of prophetic religion to insist on the organic relation between historic human existence and that which is both the ground and the fulfillment of this existence, the transcendent.

Professor Shaffer’s book insists on just this “organic relation” between the day-to-day experience of lawyers in courts and law offices and the transcendent ideals reflected in his deliberate use of terms like “witness,” “ministry,” and “the ethics of care.” There is nothing otherworldly in this.



What Professor Shaffer is saying, if I read his book rightly, is that the moral decisions all lawyers have to make in their professional lives are most deeply understood—and perhaps most bravely faced up to—when viewed in the timeless perspective of the Judeo-Christian tradition. One can agree wholeheartedly with Professor Shaffer, as I do, even without the support of religious faith. How could a lawyer who is a believing and seriously committed Christian or Jew be of a different mind?

---

W. Todd Furniss, *Reshaping Faculty Careers*. Washington, D.C.: American Council of Education, 1981. Pp. xi + 171. \$15.00.

Reviewed by Richard C. Maxwell

As any fairly constant newspaper reader knows, the American academic establishment has financial problems which translate in human terms to career dislocation for existing and potential members of college and university faculties. This is a book about pre-career changes, mid-career changes, phased retirement, early retirement, and retirement. There is little joy in it. It is a mark of the good fortune of law faculties in the last decade that there is also not much in it of current pressing concern to them. There certainly is talk in the national university community of distributing the burden of falling enrollments and depleted sources of tuition and taxes throughout the disciplines. Thus far, however, external market forces have served to protect law schools to a great extent from the general depression in academic life and careers.

The continued vitality of these forces is viewed with wonder by many. If they lessen precipitously in the latter years of this decade, a quick reading of this volume will be of some use to the law-school people who will have to work with the career crises that will afflict some of their colleagues. Even if such conditions were just beyond the horizon for some law schools, many of the suggestions in this study, particularly those for pre-career and mid-career problems, would have minimal relevance for law professors.

The extremely serious job shortage in academic fields for young Ph.D.s in the arts and humanities does not have an analog in the law-school world. Although the job market is far from being at its peak for the would-be academic lawyer, a person with the qualifications which make it reasonable for him to expect such an appointment is almost certain to be fully employed in the practice of law or in a law-related job. If it takes several years for such an individual to find an appropriate academic post, his career may in the long run be enhanced by the additional experience

gained. If scholarly ambition does not survive the delay and the economic disparity that may then exist for the candidate in the distinct markets for practice and teaching, the loss to scholarship may be small.

Since most academic lawyers are self-trained on the job, the person denied such a career because of job availability suffers few of the heavy costs of career redirection that is the lot of the person with the impressive but academically unmarketable knowledge and skills of the humanities Ph.D. Such a person may be helped, this book suggests, by programs providing information about suitable jobs "outside higher education"<sup>1</sup> and an "introduction to such areas as accounting, finance, management information systems, marketing, organizational management, and policy and social responsibility."<sup>2</sup> For those who have completed work for the Ph.D. because they were obsessed by their particular specialty, this would be bitter medicine indeed and probably ineffective in small doses. If an individual has the energy and enthusiasm for a career change of this magnitude, total immersion in an M.B.A. program would seem to offer more chance for a permanent cure if the subject can somehow handle the additional educational investment.

The materials presented on changes in occupation for the "professor in mid-career"<sup>3</sup> may have more personal interest for law-school people. The problem dealt with is that of the academic career gone flat in middle age with a move to other employment likely to benefit both the professor and the institution. A suggested solution is institutional encouragement for trying off-campus jobs in the hope that a part-time attachment to other work will become permanent. The object of this suggestion seems to be the faculty member whose professional competence is not at a level that would attract consulting work in his field: the outside work is rather an opportunity for such "faculty members to dip their toes in other waters."<sup>4</sup> A person with these characteristics on a law faculty is not likely to be stirring "other waters"<sup>5</sup> but to be doing routine part-time work in some rather shallow legal pool. The activity may not be entirely detrimental to the person's institution since the routine professional competence gained may improve course offerings for students with a yen for "how to do it" information: further, the possibility that the time spent in outside employment would have been used for effective intellectual work in law is probably long since extinct in such cases in any event.

I doubt very much that institutional encouragement to engage in outside work will cause such an outside worker to leave. He will keep

1. Furniss at 89.
2. *Id.* at 92.
3. *Id.* at 99.
4. *Id.* at 104.
5. *Id.*

enough of his professional anatomy on his tenured seat to ride it out to retirement. Of course, much outside work done by members of law faculties does not fit in the mold described. The work is often high-level professional activity performed by stronger faculty members which contributes to the performers' professional competence as teachers and scholars and enhances the reputation of their schools. Such individuals are more likely to be wholly lost to the law faculty by absorption in outside interests<sup>7</sup> than are the sad cases to which the mid-career material in *Reshaping Faculty Careers* relates.

The chapter on retirement entitled, I hope with irony, "The Last of Life for Which the First was Made,"<sup>6</sup> is a useful introduction for those who have not previously thought seriously about the matter to the problems of planning for retirement in an economic system that has any substantial level of inflation. The materials make clear that one's career should have been spent in a job which includes a retirement system not dependent on employer and employee contributions for its pension levels which are fully indexed to consumer prices and guaranteed by the taxing powers of the federal government. Since for many people this is no longer possible, one could be led by reading these materials to look at the realities of one's own pension system to discover that the wild cards of inflation and life expectancy make anything like reasoned, fairly exact bidding on the future impossible. This book handles that problem as it does many others: when its prose leads to despair, it turns to poetry. In this instance we are exhorted, in the words of Dylan Thomas, that we "not go gentle into that good night."<sup>7</sup> That is, try to keep working. Here, too, law faculty members may be better off, at least in the present state of things, than their colleagues in the less commercial disciplines.

---

Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*. New Haven: Yale University Press, 1981. Pp. xii + 132. \$15.00.

Reviewed by Frank J. Remington

In his always thoughtful style, Frank Allen discusses a trend that has taken place during the past decade or so, a trend that has had a tremendously important impact on the government's response to deviant behavior. This trend has been one of rapidly decreasing confidence in the ability of government to treat deviancy in ways that will increase an indi-

6. *Id.* at 112.

7. *Id.* at 128.

vidual's capacity to engage in conforming behavior. The decline of the rehabilitative ideal has had a great effect on the way government responds to the criminal and the mentally ill in our society. A short time ago, both the criminal justice and the mental health systems had as their major goal the effective treatment of the criminal offender and the mentally ill patient. Today, talk of rehabilitation has largely disappeared from the criminal justice system, and declining institutional populations of the mentally ill bear witness to the skepticism about our ability to treat mental illness successfully, at least in an institutional setting.

Frank Allen's book enables one to understand better the extent of the decline of the rehabilitative ideal; to know some of the reasons why this decline has occurred (reasons found largely in changing attitudes in society as a whole); to look at the decline in the context of changing attitudes toward the treatment of deviancy in the period from pre-Civil War to the present; and, most important, to avoid simplistic explanations of a complicated phenomenon and to avoid naive expectations as to the value of newfound assumptions that have come to replace belief in the rehabilitative ideal.

Allen explains the declining faith in rehabilitation in terms of the lack of a current consensus on what desirable behavior is (thus, an uncertainty about the objectives of rehabilitation); increasing doubt as to whether people can change for the better; and, even if people can change, doubt that government has the ability to bring about desirable change. These characteristics of current society have significance beyond the criminal justice and mental health systems and give rise to fundamental questions about the role of government generally and particularly with respect to long-standing government functions such as public education.

The decline in the belief that people can be changed for the better and that government can play a useful role in bringing about desirable change has resulted in increased restraints on the exercise of governmental power. The "due-process" revolution is in large part a reflection of this phenomenon. Added to increasingly detailed procedural requirements are moves to eliminate discretion or, where discretion exists, to control its exercise by objective and quantifiable criteria that must be applied with mathematical precision.

Understanding all of this is obviously essential for those of us who study and teach in fields such as criminal justice and mental health. And Allen's book helps greatly to illuminate what has happened in the past, what is happening at the present time, and why the changes are taking place and taking place so rapidly. These developments present an important challenge to legal education: students will not be equipped to serve the needs of their clients or the needs of the larger society effectively unless they are sensitive to the extent and implications of these changing attitudes and assumptions. Although we have been criticized recently for

our failure to teach practice skills adequately, our graduates are in fact a great deal more adept at practice than they are at understanding how best to use their skills to their clients' advantage in the face of these kinds of change. How often do we see lawyers give advice, based on their assumption that the criminal justice or mental health system has the capacity—to rehabilitate, for example—when in fact that capacity may no longer exist, if it ever did? This kind of assistance can have a devastating effect on the client—as is apparent to anyone who has dealt closely with those confined in correctional and mental health institutions, individuals whose sentences or commitments were requested by their lawyers in the expectation of treatment that does not exist. One can also observe law graduates at the legislative level supporting simplistic changes in programs of criminal justice and mental health, without paying any attention to whether the “new” program has been tried before (as most, in fact, have), thus losing any benefit from past experience.

Allen's book impresses one with the need to understand what is occurring now as well as the need to understand these developments in the context of history, in the context of more general social changes—i.e., to develop a sophistication toward changes that significantly affect governmental programs, particularly our systems of criminal justice and mental health. One who has read *The Decline of the Rehabilitative Ideal* will be less likely to accept proposed changes without asking whether they have been tried before and with what success. *The Decline of the Rehabilitative Ideal* would be well worth reading if this were the extent of its contribution. But the value of Allen's book for me is even greater.

*The Decline of the Rehabilitative Ideal* makes clear the fact that the recent changes in criminal justice and mental health systems have resulted largely from other, external changes, particularly the lack of consensus about values, the lack of belief in the ability of individuals to change, and the lack of confidence in government. The criminal justice and mental health systems have changed, not because of careful and critical evaluation in light of experience, but as a result of the impact of larger societal forces.

Similar, almost identical, changes have occurred in legal education. A couple of decades ago all of the voices in legal education were raised in behalf of the feasibility and desirability of rehabilitative treatment as an objective of both the criminal justice and mental health systems. Today, one hears few voices lamenting the decline of the rehabilitative ideal. Instead there is broad belief in the desirability of a system of “just deserts,” procedural due process, and the elimination—or at least the minimization—of the exercise of discretion in criminal justice and mental health programs.

If Allen is right (as I believe he is) in concluding that changing attitudes toward criminal justice and mental health programs are mere reflections

of more general societal changes in attitudes toward human behavior and the proper role of government, then must one conclude that the changed position of the law-teaching profession is no more than a reflection of these same forces, uninfluenced by the lessons of experience? Has research during the past few decades made no contribution of independent significance? Or, to the extent that empirical research has made a contribution, has the conclusion that rehabilitation does not work as well as we once thought resulted in the replacement of rehabilitation by "just deserts," the effectiveness of which also is without empirical support? Candor requires one to say that we seem to have been more willing to espouse ideas, popular at the time, than we have been to subject those ideas to the lessons of history and to careful empirical evaluation to try to determine whether the newest proposal does in fact have the merits claimed in its behalf. Allen implies that we can expect research to make a larger and more significant contribution; but that will require a better understanding of history than most of us have had. *The Decline of the Rehabilitative Ideal* cautions against a thoughtless "turning back of the clock." Ideas tried and abandoned in the past perhaps can be recycled and work when tried again, but they ought not to be accepted without careful consideration of the lessons of the past.

Greater recognition is needed of the fact that the criminal justice and mental health systems do not exist in isolation; rather, they are very much affected by changing attitudes in the general society with respect to social values, the ability of individuals to change for the better, and the competence of government to develop programs which can assist individuals to change in desirable ways. But such a recognition does not make it inevitable or desirable that we accept proposed changes in the criminal justice and mental health systems merely because those changes accord with popular attitudes. The contribution of legal scholarship ought to represent more.

We need to ask more critical questions about proposals for change; to resist popular proposals that have been tried in the past and have failed; to develop ways of evaluating criminal justice and mental health programs so that there is an empirically adequate basis for deciding their worth rather than relying solely on the popular acceptance of those programs.

It is difficult to know whether current responses to crime and mental illness are "workable" or to know whether proposed changes will be more "workable." In the context of the criminal justice and mental health systems, workable should mean, at least, that people are dealt with in a humane way. Allen points out that discarding the rehabilitative ideal may in fact mean abandoning our principal force for humane treatment and may result in less humane treatment of persons confined in correctional institutions. Current indications are that this is the case. We have had ample opportunity to observe the inhumane treatment of the mentally ill

who have been "dumped" back into the community, largely because of the unpopularity of institutional treatment.

In a larger sense, workable should mean that persons who come into the criminal justice and mental health systems, particularly into prisons and mental hospitals, can leave, go back into the community, and avoid further involvement with the criminal justice or mental health system. Whether this can best be achieved by some form of rehabilitative treatment, by vocational training, or by punishment or threat of punishment poses additional questions that are not easily answered. It is unlikely that one answer will fit all situations. Certainly we have long since abandoned the notion that there is any single response to medical illness. It is even less likely that there is any single response to behavior that is physically dangerous or viewed by society as intolerable for other reasons.

The complexity of the task faced by the criminal justice and mental health systems makes it all the more important that naive, simplistic approaches be rejected and that we pay particular attention to the lessons of history, lessons that warn against placing confidence in any single solution to what are obviously complicated social and behavioral problems. I believe that this is what Frank Allen is trying to tell us in *The Decline of the Rehabilitative Ideal*. It is an important message which, if we heed it, can make a difference in the way we respond to suggestions for change and in the quality of the contribution we make to a society that needs more than popularity as a basis for deciding how best to treat people who engage in seriously deviant behavior.

---

**INTENTIONAL BLANK**



