

BOOK REVIEW

ALLEN, FRANCIS A. *The Borderland of Criminal Justice: Essays in Law and Criminology*, University of Chicago Press, Chicago, Illinois, 1964. ix + 139 pp. \$3.95

This book brings up the whole problem of psychiatric influence within the legal system and within the entire society as well. The stated theme is how to "domesticate" the social and behavioral sciences in the service of our legal values and social needs. The psychiatrist, of course, is a key figure in this domestication process. He is the individual most responsible for applying these sciences to the social problems of the day, whether he acts as an expert witness in court, a pretrial examiner, a consultant to juvenile court or the parole boards, or as a physician who treats people in mental hospitals. Therefore this collection of essays about behavioral science and the law inevitably evolves into a study of psychiatry and the law, with implications far beyond these institutions.

Many individuals look upon the marriage of psychiatry and the law with unguarded enthusiasm, and this book may prove a surprise to them, if not a disappointment. Professor Allen raps us on the head again and again with insights into the dilemma of the psychiatrist and the criminologist (and perhaps modern man himself)—whether he will be a force *for* freedom or *against* it. The author, a professor of law at Chicago University, has many reservations about "treatment" or "rehabilitation" as guiding ideals in the criminal law and the judiciary. He is not against *helping* criminals and other unfortunates, but he is against confusing punitive measures with therapy. He documents how this confusion threatens both the liberties of the individual and the very help which he is deemed to need. Some readers may respond to this unexpected thumping with a new clear-headedness, some with a nagging headache.

Either way, the experience is intense, for the book is short and pithy.

The insights of the author seemed to have sprung *de novo* from his legal orientation, with no reference whatsoever to corroborating opinions from such "extra-legal" critics as Thomas Szasz (psychiatry), Ernest Becker (anthropology) and Erving Goffman (sociology). This may explain why he is more thoroughly critical toward the legal system than toward psychiatry and behavioral sciences. He sees the problems caused by forcing therapeutic ideals upon people through the criminal procedure, but at times he neglects the even greater problems caused by forcing these ideals upon patients in mental hospitals. This defect is relatively small, for he is most critical where he is most sure, and he is by no means *uncritical* outside his field. This reviewer is a psychiatrist and his attention will naturally turn to drawing out lessons appropriate to psychiatry. This also seems a necessity in reviewing the book, since it fails to pursue a number of difficulties to their roots within psychiatry itself.

The themes of the book surround the basic conflict between measures directed toward the social good and toward the individual good. This is presented in a number of different ways, as punishment *vs.* therapy, control *vs.* freedom, penal measures *vs.* welfare measures. He especially attacks the grand assumption so often made in psychiatry that these dichotomies all fall under the rubric "treatment" and need not conflict. Early in the book, in his chapter entitled "The Borderland of the Criminal Law: Problems in 'Socializing' Criminal Justice," he says: "Lawyers and social workers, for example, may well be reminded that the distinction between penal treatment and the administration of welfare services is one that has sometimes been far from clear, even in theory." The lack of clarity

is nowhere better illustrated than in typical state mental hygiene laws. The penal aspect is apparent, for the laws are written to protect society from the individual, and they do this more powerfully than the criminal law itself. For example, "dangerous" persons may be put away without having committed any crime which might bring them into jeopardy under the criminal code. At the same time, the mental hygiene laws were written to serve the needs of the individual for treatment, although this intention was not implemented for many years.

Professor Allen details some of the problems encountered in these laws of mixed intention: "Whenever penal sanctions are employed to deal with problems of social service, two things are almost always certain to happen. . . . First, the social services will not be effectively rendered. Second, the diversion of personnel, resources and energy required in the effort will adversely affect the ability of the system to fulfill those functions that it can best perform." He gives the illustration of unwed mothers who are charged criminally and put into penal institutions because the local communities had no other means to provide maternity and prenatal care. Not only do the services themselves suffer, but the individual is stigmatized with the label "criminal."

Professor Allen claims that an "issue of justice" is at stake, for the use of penal institutions for social services is bound to mean that the poor and helpless of the community will be punished while being given treatment. In contrast, those who are better off escape the punishment but lose out in treatment. This criticism goes right to the heart of the state hospital system. The state hospital dispenses justice when it incarcerates people against their will and stigmatizes them as "mentally ill"; and at the same time it dispenses social services to individuals in need. At its worst, this combination of penal and social service

functions punishes the underprivileged and provides them inferior services.

The failure of justice when combined with therapy is further illustrated in the juvenile court. He recognizes with what good intent these courts were founded, to do things *for* the child instead of *to* him. The trouble, he says, is that doing something for someone always involves doing something to him when the setting is coercive. Furthermore, in their haste to help the child, the courts may not bother to ascertain if the child is guilty of the alleged crimes which brought him to the court's attention. Hearsay social service reports may substitute for a fair trial. The child, he says, may be embittered by this lack of justice.

The author mentions that these problems are only obscured by redefining criminal proceedings as "civil commitment," as is done through the mental hygiene acts. Despite this recognition, he does not elaborate upon the theme of what Szasz calls "psychiatric justice." Since neglect of this issue leads him into some knotty situations later in the book, let me illustrate what I mean by the failure of justice in the mental hospital setting. Typically, a psychiatric patient is hospitalized at the urging of his relatives. Often the patient seems to come voluntarily, but he may do this knowing full well that his family or a doctor will force him if he refuses. As family therapy often discloses, this person is often a "scapegoat" for the overall family problem. I like to compare him to a fuse that blows out when the wiring of the house as a whole is faulty. The incarcerated patient is likely to be the most impotent or helpless member of the family: the family is most able to manipulate him and the psychiatrist is most likely to see him as in need of help. On the other hand, from the point of view of *justice* or *fairness*, he may not be the most morally reprehensible of the group. Yet he is the one who is "jailed" and he is the one who is then pressured to change

by means of drugs, electroshock or social restraint. The mental hygiene law thereby works to victimize the weak, rather than to protect them from the strong. From the penal point of view, the "guilty one" is not the one who is punished; from the social service point of view, the causes of the problem are not treated. From the patient's point of view, his distrust of those around him is reinforced.

Professor Allen makes some more general comments about coercive implementation of the therapeutic ideal. He says that we have all seen enough of the twentieth century world "to render untenable any assumption of the inevitable benevolence of state power." More specifically, "the exercise of arbitrary and undisciplined power in the juvenile courts has retarded rather than advanced attainment of the objectives of the juvenile court movement." Certainly the power of psychiatry through civil commitment and medical certification far outstrips the "undisciplined power" of the courts, both in the case of imprisonment and in the indeterminacy of sentencing. He also states that the basic legal definitions of delinquency are so "amorphous and all-inclusive that little practical guidance is actually provided." Again, the definitions of mental illness are even more amorphous and all-inclusive, and are left to the discretion of examining physicians with even less legal acumen or concern.

Not only does justice waver when penal intentions are mixed with therapeutic ones, but the treatment itself is likely to be futile. Professor Allen documents this in regard to alcoholism, which he describes as the greatest single burden upon the courts, the police and the jails. He seems to share the hope that psychiatry might somehow help, while footnoting that thus far psychiatry has not dented the problem. He then places the problem in its political and ethical context—troublesome dilemmas always arise when the state interferes in the lives of individuals, if these individuals are willing

victims of their own "private vices," such as alcoholism and addiction.

He does not take the more hazardous plunge into the issue of state interference in such "private vices" as grossly psychotic behavior, if and when this behavior causes no direct harm to anyone but the victim himself. He continues to criticize the abuse of the therapeutic ideal in criminology, without getting the core of the ideal as it is implemented in psychiatry. Nonetheless, his general observations might be repeated for all to hear. Speaking of rash applications of science to the manipulation of human behavior, he says "Arrogance is far too expensive a luxury to be tolerated, for the most of human values are at stake: human liberty and human dignity." He then concludes this impressive chapter with the sentiment that "Above all, we cannot afford to be lured into the belief that good intentions are a sufficient substitute for procedural fairness. Indeed, it may be almost true that the naive man of good intentions is more dangerous in this area than the knave..." The good man, convinced of his benevolence, may be less inhibited by feelings of guilt.

The second chapter is entitled "Legal Values and the Rehabilitative Ideal," and is closely tied to the central themes of the book. Early he asks "By what scale of values do we determine the ends of therapy?" Having asked the crucial question, he passes on in preference for more practical problems. I believe he would have proceeded with more clarity and force had he addressed himself to this question. It goes to the heart of his book, the conflict between different sets of ideals represented in the penal and the therapeutic attitudes. Throughout the book he refers to human liberty as one of the highest human values. I would put it as *the highest*, and I gather the author would also place it somewhere near the top or at the top. If it is the highest human value, then the goal of therapy must be that same human liberty. This

makes more obvious the inevitability of conflict, frustration and confusion within institutions which attempt to foster the ideal of freedom by taking away human liberty.

Previously I have stated the themes of the book as punishment *vs.* therapy, penal measures *vs.* welfare measures, control *vs.* freedom. The issue of the book can now be stated more clearly in its moral context: how to enhance human freedom (the therapeutic ideal) when working within any system whose major function is to restrict human freedom (the penal ideal). The answer may be that it is not possible to mix the two, and that only complete separation of penal and therapeutic institutions will preserve the function of each and protect the individual from punishment under the guise of treatment. Instead, the prison system and the hospital system combine functions in a most confusing fashion. Punishment is called treatment and treatment is given out like punishment.

Meanwhile, Professor Allen's less frontal attack on the therapeutic ideal continues to disclose more and more problems in its coercive implementation. He shows how criminologists and others have been so ensnared by psychiatric and sociologic aspects of crime that they have failed to ask the question, "What constitutes a crime?" Psychiatrists are even less likely to ask this question, but they are often called upon to deal with crimes of one kind or another. A typical case that appears with increasing frequency is that of the "troublesome old lady." She is an elderly paranoid woman who lives alone and unattended because she has no family or other resources or does not wish to avail herself of them. When she is brought to the hospital, it is frequently because of a specific crime: she has been a nuisance to her neighbors, clinic doctors or various welfare agencies. Her neighbors may be afraid of her and the police may be tired of receiving calls about her, although she is

likely to be harmless. Once in the hospital, the social service department will receive various hearsay complaints about her, and may actively seek out other "witnesses," often by phone. If sufficient complaints are registered, the punishment for her crime may be life imprisonment in one of the larger state hospitals. Put in such bold terms, one wonders about psychiatric justice which metes out life imprisonment to a community nuisance. That the medical "judges" are "good men" does not undo the fact that the patient has been tried by a kangaroo court (a staff conference) without procedural safeguards of any kind. Nor is the therapeutic intent of these men sufficient protection, for as Professor Allen says, "The language of therapy is frequently employed, wittingly or unwittingly, to disguise the true state of affairs in our custodial institutions...".

Professor Allen's broader perspective comes over unmistakably in his closing remarks of this chapter. For want of space, I present them in abbreviated patchwork fashion: "The most fundamental problems in these areas are not those of psychiatry, sociology, social case work or social psychology. On the contrary, the most fundamental problems are those of political philosophy and political science... the perennial issue of political authority: Under what circumstances is the state justified in bringing its force to bear on the individual human being?"

He then criticizes psychiatrists more directly when he states that "the values of individual liberty may be imperiled by claims to knowledge and therapeutic technique that we, in fact, do not possess and by our failure to concede candidly what we do not know." While I wholeheartedly agree with his intention, I believe it is dangerous to justify limits on psychiatric power on the basis of its ineffectiveness or unjustified claims. A time may come when psychiatry will have more powerful tools, and this time may come upon us before

we are ready to deal with it. Let us suppose that the current resurgence of lobotomies in some foreign countries should lead to "improved" methods for controlling people. Or more close to home, suppose we should develop drugs that control behavior and emotion in the way we sometimes wish they would? Should we then use these treatments, or should we retreat aghast at what we have done? I am afraid of arguments to limit psychiatry power because of its ineffectiveness; such arguments may only encourage the development of more potent means of controlling human beings.

The insidiousness of psychiatric power is demonstrated by Professor Allen's own surprisingly sanguine attitude toward it: "The laws providing for commitment of persons displaying classic symptoms of psychosis and advanced mental disorder have proved a seductive analogy for other proposals." He does not seem to know that these laws in practice are used to coerce a much wider range of individuals than psychotics. Our hospitals are filled with people hospitalized against their will for a plethora of reasons, from "passive-dependency" to "neurotic depression," or "acting out," or simply "no place else to go." Nor does he realize that the *threat* of commitment indirectly controls many individuals who are by no means psychotic. For example, he discusses the case of a committed patient who could not be released because the psychiatrist could not be certain he was no longer a danger to others. The psychiatrist admitted, however, that he couldn't really be certain about *anyone* in this world. This same criterion, dangerousness, is often used before permitting *anyone* to leave a mental hospital, whether that patient is voluntary or involuntary. If the patient is voluntary and considered dangerous, the threat of commitment may then be brought to his attention if he requests to leave.

The growth of the therapeutic ideal has already placed tremendous power in the

hands of the psychiatrist, and no reversal of this trend is on the horizon. In New York State, for example, a new set of laws effective September 1965 will make *all* involuntary hospitalization a medical matter. Commitment by judges will be abolished in favor of certification by one or two physicians. Similarly, informal and voluntary patients, once in the hospital, will more easily be subject to certification by physicians without the necessity of judicial commitment. That judicial *review* is more openly encouraged by the laws does not mitigate the growing trend toward incarceration as "medical therapy."

There is cogent evidence that physicians, as anyone else, will readily avail themselves of their burgeoning power. This is illustrated by the fate of many state mental hygiene acts which were originally intended for "emergency hospitalization." In a state such as Massachusetts, these "emergency statutes" have become the *routine* and even the *perferred* method of hospitalization. Power over individuals is always convenient to use from the family's point of view and from the physician's. And it is easily rationalized as in the patient's best interest.

A third chapter, on juvenile courts, details many of the points made earlier and introduces a few new ones. Two comments are worth repeating here, and worth repeating again and again when the opportunity arises. First, in our zeal for *new* treatment methods we may overlook the more immediate and practical humanitarian steps before us. Thus, acute treatment centers and smaller state hospitals are built for new patients, while long-term patients continue to languish in rather deprived conditions in more gargantuan institutions. In a true liberal spirit, we might clean up our own back yards to start with, providing relief to those unfortunates already in our custodial care. Second, our zeal for the rehabilitation of individuals may lull us into forgetting that poverty,

unemployment, discrimination, disintegration of family ties and religious ties, etc., are better dealt with through social reform than through individual reform.

I shall skip over the next two chapters because they have less relevance to psychiatry and to the main themes of the book. One is an analysis of the nineteenth century criminologist, Garofalo, in the light of modern problems. The other is essentially a book review of Koestler's *Reflections on Hanging*. There is a relevant theme in both, however—that we know very little about the effect of our individual treatments and punishments on the society as a whole, so let us be wary of doing things to individuals in order to further this elusive social good.

His chapter on criminal responsibility and the criminal code is the one in which he most obviously fails to confront the problem "What is mental illness?" and "What do psychiatrists do?" The issue of criminal responsibility brings the psychiatrist directly into the criminal procedure in the guise of an "expert" on "mental illness." Instead of examining the validity of this expertise, Professor Allen leaves it up to the psychiatrists. He supports the Model Penal Code which epitomizes the extension and amplification of the therapeutic ideal within criminal law by providing for broad psychiatric interpretation of mental illness and responsibility. Although his own observations seem to prove the point, he does not see that the concept *mental illness* is nothing more than the embodiment in its most confused form of all the contradictions inherent in the penal-therapeutic complex. That is, mental illness is the label which we give to individuals when we wish to feel justified in treating them *against their will* for their alleged benefit. Professor Allen criticizes criminologists for permitting justice to be stolen away under the guise of therapy, but then he opens the back door to the real thief, the psychiatrist himself. Thomas Szasz has made this point well in

several books and it is too bad that Professor Allen has not drawn upon his work. The Professor exemplifies how even the most insightful social critics can hold out a vain hope that psychiatry will somehow provide them the answers to the age-old moral problems of man in relation to man. Such a hope is unrealistic, and hence bad for psychiatry and bad for everyone else as well.

While Professor Allen does not offer formal solutions, he does urge a general approach, summed up in the last words of his book, "Be not too bold." Although from an entirely different professional slant, he comes to much the same conclusion as Thomas Szasz in *Law, Liberty and Psychiatry*. The warning is especially directed at the do-gooder, and it warns him not to be too bold in doing *anything* to other people against their will, even for their own good. Szasz would specifically limit intervention as much as possible to those instances in which the individual is a threat to *other* people. Two other groups might then be treated involuntarily. Stuporous, mute patients might be handled as medical emergencies under the existing laws pertaining to medical emergencies. Dangerously paranoid people might be treated under criminal laws and incarcerated in prison-hospitals. Suicidal patients would not be hospitalized involuntarily under Szasz's system. But even if suicide is maintained as a criterion for involuntary hospitalization (with due process), we would still greatly curtail the current scope of psychiatric power over the individual.

Such criticisms of involuntary treatment and psychiatric power are frequently met with cries of "callousness" or "indifference to suffering." Professor Allen's approach is humane and humanistic, yet the accusations may still be made. The urge to alleviate emotional suffering or psychological suffering is a strong one, and like most strong impulses it may give rise both to the highest virtues and to the lowest vices. A mother may be tempted to kill a screaming

infant, as well as to succour it. I emphasize "psychological suffering," because we tolerate physical suffering and physical death much more easily. The extremity which this position takes in psychiatry is illustrated by a comparison to medicine. While we recognize a man's right to refuse life-saving blood, we insist he accept that much thinner stuff, chlorpromazine; while we recognize the right to refuse definitive and life-saving surgery, we insist on acceptance of that much less certain treatment, electroshock.

It is difficult to give men freedom to suffer; it stirs suffering in us. Here then is the human conflict, whether to risk freedom for the sake of other human aspirations. This is the same question as "What is the ultimate goal of therapy?" Should we solve human problems through involuntary hos-

pitalization, drugs and electroshock or should we choose freedom and the chance of unresolved human misery? And if we choose to risk or even forfeit freedom in our moment of need, should we then enforce laws to make *others* choose the same ethical path? These are the questions that I glean from this book, and the questions which the legal profession and the society so eagerly thrust into the lap of the psychiatrist. As for the psychiatrist himself, he complains mightily about the burden, but he seldom refuses any new responsibility or power. Instead he denies the moral meaning of his responsibility and power. He denies he has the choice of being *for* or *against* freedom, although the choice sits in his lap as large as life itself.

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