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## Francis A. Allen--Architect of Modern Criminal Procedure Scholarship

Yale Kamisar

*University of Michigan Law School, ykaminsar@umich.edu*

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## FRANCIS A. ALLEN—ARCHITECT OF MODERN CRIMINAL PROCEDURE SCHOLARSHIP

Francis A. Allen, who spent the last eight years of his distinguished teaching career at the University of Florida, Fredric G. Levin College of Law, died at the age of eighty-seven. He was a leading figure in law teaching, and the legal profession generally, for more than four decades.

After graduating from Northwestern University School of Law (where he served as editor-in-chief of the law review), and clerking for Chief Justice Fred Vinson,<sup>1</sup> Frank Allen became a tenured professor at five major law schools: Northwestern (1948-53); Harvard (1953-56); the University of Chicago (1956-62 and 1963-66); the University of Michigan (1962-63 and 1966-86); and the University of Florida (1986-94). I once asked him why he left his tenured position at the Harvard Law School in 1956. He told me that at the time too many of his colleagues had great difficulty understanding why, given a choice in the matter, any first-rate person would want to teach criminal law.<sup>2</sup> In no small measure because of the work and dedication of Frank Allen and other criminal law professors of his day, that attitude no longer prevails—at Harvard or anywhere else.

Some evidence of Allen's renown as a scholar and his prowess as a speaker is the remarkable fact that, starting in the late 1950s and continuing into the 90s, he delivered the premier endowed lectures at fourteen law schools. They include the University of Georgia (Sibley Lecturer), Harvard (Holmes Lectures), the University of Illinois (Baum Lectures), the University of Michigan (Cooley Lectures), Northwestern (Rosenthal Lectures), College of William and Mary (the Wyte Lecture), and Yale (Storrs Lectures).<sup>3</sup>

Further evidence of the high regard in which Allen was held is that he was President of both the Association of American Law Schools and the National Order of the Coif. He was also dean of the University of Michigan Law School from 1965-71, a time of extraordinary student unrest—and a time when Allen needed all of his abundant supply of civility, patience, wisdom, and sense of fairness.

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1. At the age of eighty-five, Allen and his son co-authored a biography of Vinson. See FRANCIS A. ALLEN & NEIL WALSH ALLEN, *A SKETCH OF CHIEF JUSTICE FRED M. VINSON* (2005).

2. Cf. Francis A. Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 816 (1977) (recalling the days when “the basic criminal law course was routinely assigned to the youngest and most vulnerable member of the faculty or to that colleague suspected of mild brain damage and hence incompetent to deal with courses that really matter”).

3. Allen gave the lectures at Harvard, Michigan, and Northwestern when he was no longer teaching at those schools. A number of his lectures were revised, expanded, and published as books or monographs.

Frank Allen's experience as a dean during adventurous times was undoubtedly one of the reasons he cared deeply about liberal and professional education.<sup>4</sup> According to him, "the greatest challenge facing American law schools" is "[t]he preservation and extension of an intellectually based and humanistically motivated legal education."<sup>5</sup> He feared "a narrowing of minds and concerns"—a "lower[ing] [of] aspirations for intellectual quality and service to the larger society."<sup>6</sup>

Allen himself was a product of the kind of "intellectually based and humanistically motivated legal education" he sought to preserve and to extend. He was that exceptional person who "possess[ed] both culture and expert knowledge in some special direction" and is thus able to explore the problems within his area of expertise with both intensity and in breadth.<sup>7</sup>

Allen had expert knowledge in a number of "special directions" (juvenile justice, criminology, criminal corrections, legal education, and various aspects of substantive criminal law, constitutional law, and family law).<sup>8</sup> In this brief tribute, I shall dwell on only one of his areas of expertise—the one I know best—constitutional-criminal procedure.

When I started writing about this subject in 1959, I benefitted greatly from the work of an impressive group of professors who had immediately preceded me (and who continued to do important work in the years ahead). I considered the most notable ones to be Allen, Ed Barrett, Caleb Foote, Bernard Meltzer, Monrad Paulsen, and Frank Remington.

These individuals ignited interest in constitutional-criminal procedure, contributed mightily to the Warren Court's so-called revolution in this area, and established the foundation for modern criminal procedure scholarship. I viewed all of them as "pioneers" in a newly emerging field (or at least a greatly revitalized one). But I could not help thinking that Frank Allen led all the rest.

Everywhere I turned, whether it was the right to counsel, search and seizure, or police interrogation and confessions, Frank Allen had been there before. He said more things that I wished I had said first than anyone else. (Of course, it was easy to wish I had said it first *after* reading what Allen had said and thinking about it some more.)

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4. Many of his thoughts on the subject are collected in FRANCIS A. ALLEN, *LAW, INTELLECT AND EDUCATION* (1979).

5. Francis A. Allen, *The New Anti-Intellectualism in American Legal Education*, in *LAW, INTELLECT AND EDUCATION*, *supra* note 4, at 59, 75.

6. *Id.*

7. *Cf.* ALFRED NORTH WHITEHEAD, *THE AIMS OF EDUCATION* 13 (Mentor ed. 1949).

8. *See, e.g.*, FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); FRANCIS A. ALLEN, *THE CRIMES OF POLITICS* (1974); FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

Frank Allen wrote many important books, monographs, and law review articles. But perhaps his most important writing—and his most insightful and powerful writing to boot—is to be found elsewhere. It is the “Allen Report” (as it has come to be called), the report Frank wrote as chair of a blue-ribbon committee appointed by Attorney General Robert Kennedy to study the impact of poverty on the administration of criminal justice.<sup>9</sup>

All eleven editions of the criminal procedure casebook my co-authors and I have produced have one feature in common. The chapter on “the right to counsel”—and “equality and the adversary system” generally—always starts out with a long extract from the Allen Report.<sup>10</sup> This reflects our view that the report is an extraordinarily thoughtful and illuminating commentary on the obligations of “equal justice” in the administration of the criminal law.

The Allen Report and its accompanying draft of proposed legislation led to the much-needed Criminal Justice Act of 1964 and the Bail Reform Act of 1966. Moreover, and more importantly, the Report significantly affected our way of thinking about the obligations of “equal justice” and the problems faced by criminal defendants of limited means. The Report underscored that minimizing the influence of poverty in the administration of criminal justice “involves more than an expression of humanitarian sentiment or the extension of public charity.”<sup>11</sup> I doubt that anyone has ever said it better:

The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. . . . When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused’s liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.

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The essence of the adversary system is challenge. The

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9. REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963) [hereinafter ALLEN REPORT].

10. See, e.g., YALE KAMISAR, WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, MODERN CRIMINAL PROCEDURE 77-79 (11th ed. 2005).

11. ALLEN REPORT, *supra* note 9, at 8.

survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. We believe that the system is imperiled by the large numbers of accused persons unable to employ counsel or to meet even modest bail requirements and by the large, but indeterminate, numbers of persons, able to pay some part of the costs of defense, but unable to finance a full and proper defense.<sup>12</sup>

Although portions of the Allen Report were quoted with approval in *Escobedo v. Illinois*<sup>13</sup> and *Miranda v. Arizona*,<sup>14</sup> the Report appeared too late to be mentioned in *Gideon v. Wainwright*.<sup>15</sup> However, the *Gideon* Court did cite an earlier work by Allen, one that sharply criticized the pre-*Gideon* cases governing the appointment of counsel as “distinguished neither by the consistency of their results nor by the cogency of their argument.”<sup>16</sup>

Allen’s greatest contribution to the criminal procedure law review literature was probably his work on search and seizure. As fate would have it, the Court decided the famous case of *Wolf v. Colorado*<sup>17</sup> in Allen’s very first year of law teaching. But he was ready. He went right to work. A year later, he published a devastating critique of the *Wolf* case.<sup>18</sup>

Although the *Wolf* majority recognized that the Fourth Amendment protection against unreasonable search and seizure was “basic to a free

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12. *Id.* at 9-10. The Report of the Attorney General’s Committee was hardly Allen’s only contribution to the improvement of justice. He was Drafting Chair of the Illinois Criminal Code of 1961. He was a member of the Advisory Committee to the National Institute on Law Enforcement and Criminal Justice (1974-78) and a consultant to the President’s Commission on Law Enforcement and the Administration of Justice (1965-66). He was also a member of the Council of the American Law Institute (ALI) and an advisor to two of the Institute’s most important projects: the Model Penal Code and the Model Code of Pre-Arrestment Procedure.

13. 378 U.S. 478, 490 n.13 (1964).

14. 384 U.S. 436, 472-73 n.41 (1966).

15. 372 U.S. 335 (1963).

16. Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 230 (1949), cited in *Gideon*, 372 U.S. at 338 n.2; see also Francis A. Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 197 (1958) (attacking the distinction the pre-*Gideon* Court had drawn between capital cases and noncapital felony cases as “lack[ing] integrity”).

17. 338 U.S. 25 (1949).

18. Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 11-12 (1950).

society” and thus “enforceable against the States through the Due Process Clause,”<sup>19</sup> it declined to require state courts to exclude the evidence the police obtained in violation of that right. As Justice Frankfurter, author of the majority opinion, expressed it:

When we find that in fact most of the English-speaking world does not regard as vital to [the protection against arbitrary intrusion by the police] the exclusion of evidence thus obtained, we must hesitate to treat [the remedy of exclusion] as an essential ingredient of the right.

. . . . We cannot, therefore, regard it as a departure from basic standards to remand [victims of illegal searches], together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford.<sup>20</sup>

Young Frank Allen was not persuaded:

This deference to local authority . . . stands in marked contrast to the position of the Court in other cases arising within the last decade involving rights “basic to a free society.” It seems safe to assert that in no other area of civil liberties litigation is there evidence that the Court has construed the obligations of federalism to require so high a degree of judicial self-abnegation. . . . [I]t is clear that unless one is content to view the rights of privacy under the Fourteenth Amendment as merely Platonic abstractions, the reality and content of such rights are determined by the aggregate of available remedies and enforcement devices through which the interest of the individual and the community in the preservation of the rights of privacy may be asserted. The effect, therefore, of leaving to the states virtual freedom in framing devices for the enforcement of the federal prohibition against unreasonable searches and seizures is to leave to the states the power to give (or withhold) content and reality to the federal right.<sup>21</sup>

In commenting, a decade later, on *Mapp v. Ohio*,<sup>22</sup> the case that overruled *Wolf*—and, as it turned out, fired the first shot in the Warren

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19. *Wolf*, 338 U.S. at 27-28.

20. *Id.* at 29-31.

21. Allen, *supra* note 18, at 11-12.

22. 367 U.S. 643 (1961).

Court's criminal procedure revolution<sup>23</sup>—Frank Allen showed no elation. Indeed, his response to the overruling of *Wolf* was quite restrained:

That the Court's action will be extravagantly praised and extravagantly condemned seems entirely predictable. Both reactions are entitled to be met with some skepticism. The *Mapp* holding will force a period of painful adjustment and accommodation in many states. There is no reason to believe, however, that the accommodation cannot be made or that, in making it, state and local law enforcement will be rendered incapable of performing its essential functions. On the other hand, one may doubt that the holding makes as substantial a contribution to the protection of individual rights as the majority of the Court appears to assume. This is true, in part, because the exclusionary rule is based on a theory of the causes of police misconduct that is partial and unsatisfactory. The fact remains that the administration of criminal justice is primarily a function of local government. The causes for abuses of the function must be sought in the pathologies of local government, and elimination of these ills must be accomplished primarily at the local level.<sup>24</sup>

Six years before *Mapp* overruled *Wolf*, the California Supreme Court surprised many. In *People v. Cahan*,<sup>25</sup> it overturned its own precedents and adopted the search and seizure exclusionary rule as a matter of state law. In doing so the California court relied heavily on Frank Allen's writings.<sup>26</sup> This did not prevent Frank from criticizing the *Mapp* Court, years later, for exaggerating the significance of California's "conversion."

He pointed out that "evidence of reluctance on the part of the states to accept the exclusionary rule . . . is still strong" and that the conversion of California is "balanced" by "the obduracy of New York."<sup>27</sup> Moreover, added Allen, if, as the *Mapp* Court claimed, California's conversion was part of a distinct trend among the states toward the exclusionary rule,<sup>28</sup> "it is far from clear which way the argument cuts."<sup>29</sup>

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23. See generally Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court's Criminal Procedure "Revolution,"* in CRIMINAL PROCEDURE STORIES 45 (Carol Steiker ed. 2006).

24. Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 47-48.

25. 282 P.2d 905 (1955).

26. In the course of his opinion, Justice Roger Traynor referred to Allen's 1950 article on the *Wolf* case five times. He also referred to another Allen article, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U. L. REV. 16 (1953).

27. Allen, *supra* note 24, at 28.

28. See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

29. Allen, *supra* note 24, at 28.

Assuming that general acceptance of the exclusionary rule is the consummation to be desired, might not the trend have been permitted to continue? . . . Indeed, the point can fairly be made that the clearest achievements of the Court in raising the standards of state criminal procedures . . . have occurred precisely in those situations in which the supervision of the Court has induced such constructive local response.<sup>30</sup>

The fair-mindedness and intellectual rigor that Allen demonstrated in his studies of the *Wolf* and *Mapp* cases are evidenced more generally by his views on the Warren and Burger Courts—and by his reaction to other commentators’ appraisals of those Courts. Although he had no affection for the Burger Court, Allen was even less fond of those critics of that Court whose work had “angry and apocalyptic tones.”<sup>31</sup>

What our recent experience does again demonstrate is the danger of relying so heavily as we have in the past upon the Supreme Court as the instrumentality to achieve efficiency and decency in the administration of American criminal justice. Many of those most appalled by . . . the Burger Court have shirked the battle in the political and legislative arena. However difficult the conflict may prove to be, it is there that a large share of the effort must be expended in the years immediately ahead. In the meantime . . . [o]ne hopes that the criticism [of the Burger Court] will be both rational and reasonably temperate, for extravagance of language can threaten the long-term vitality of the institution. This would be unfortunate, for we may need the Court again some day.<sup>32</sup>

Although Allen welcomed the Warren Court’s revolution in American criminal procedure, noting that that Court had sought to reshape American criminal justice “in the interest of a larger realization of the constitutional ideal of liberty under the law”<sup>33</sup> he did not “canonize” the Court nor “regard its works as sacrosanct.”<sup>34</sup> Indeed, he thought it important not to do so.<sup>35</sup> For the Warren Court “frequently failed to articulate its decisions adequately and sometimes appeared to doubt the importance of adequate

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30. *Id.* at 28-29.

31. Francis A. Allen, *Foreword—Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & CRIMINOLOGY 391, 396 (1975).

32. *Id.* at 399; see also Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810 (1970).

33. Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 525.

34. *Id.* at 539.

35. *Id.*

articulation”;<sup>36</sup> “was frequently self-righteous and intolerant of competing considerations”;<sup>37</sup> and “often, having embarked upon a problem . . . did not go far enough.”<sup>38</sup>

Nevertheless, Allen was confident that whatever its shortcomings and whatever the retreat from its precedents by future Courts, the influence of the Warren Court would long endure:

By reason of what the Warren Court said and did, we now perceive as problems what too often were not seen as problems before. This is the dynamic of change, and that fact may well be more significant than many of the solutions proposed by the Warren Court. The critique of American criminal justice implicit in the opinions of the Warren era was essentially ethical. Barring cataclysmic upheavals in American life even more devastating than those we anticipate, one expects this ethical insight to persist and to provide guidance in the years ahead.<sup>39</sup>

Let us hope Allen turns out to be right. However, it is less clear today that he will<sup>40</sup> than it was when he made those comments, some thirty years ago.

In the fall of 1993, when Frank had started his last year of teaching at the University of Florida, Fredric G. Levin College of Law, the University of Chicago awarded him the honorary degree of Doctor of Laws. If one had to sum up Frank’s career in one sentence, it would be hard to top the University of Chicago’s “citation statement”:

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36. *Id.*

37. *Id.*

38. *Id.*

This was true not only in *Miranda*. The Warren Court failed to realize its opportunity to place the law of entrapment on a more satisfactory footing . . . [h]aving struggled its way to a new and more useful approach to [what constitutes a search within the meaning of the Fourth Amendment] . . . it failed to pursue the implications of its insight. Sometimes its conflicting motivations appeared paradoxical. In the same period that it was pursuing innovations in the area of pretrial interrogation that many warned were threatening the effectiveness of law enforcement, it stubbornly defended in the name of law enforcement the use of undercover agents and resisted efforts to restrict and regulate their activities.

*Id.* at 539-40.

39. *Id.* at 539.

40. See, e.g., David A. Moran, *The End of the Exclusionary Rule Among Other Things: The Roberts Court Takes on the Fourth Amendment*, in *CATO SUPREME COURT REVIEW*, 2005-2006 (Mark K. Moller ed., 2006) (discussing *Hudson v. Michigan*, 126 S. Ct. 2159 (2006)).

Preeminent scholar of the criminal law who has profoundly influenced its theory and practice throughout the common law world, whose efforts have brought important elements of principle and fairness to the administration of criminal justice, and whose scholarship has set the standard for all who work towards the improvement of our criminal law system.

—*Yale Kamisar*\*

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\* Distinguished professor of Law, University of San Diego; Clarence Darrow Distinguished University Professor Emeritus of Law, University of Michigan. Professor Kamisar and Professor Allen were colleagues at the University of Michigan Law School from 1966 until 1986.