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# TROUBLING QUESTIONS: A REVIEW OF *THE DECLINE OF THE REHABILITATIVE IDEAL*

*Sheldon L. Messinger\**

THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE. By *Francis A. Allen*. New Haven and London: Yale University Press. 1981. Pp. xii, 132. \$15.

## I

At the height of its dominance over recommendations for research on penal treatment, Francis A. Allen made three bold assertions about the rehabilitative ideal.<sup>1</sup> First, the ideal had functioned to narrow criminological scholarship. Beguiled by whether penal treatment had achieved the ideal, scholars had neglected to ask other, more important questions, questions with respect to the exercise of state power to criminalize conduct, and questions about the achievement of other criminal justice aims, like deterrence. Second, the ideal had served to mask hypocrisy and oppression. Hard treatment was renamed "therapy" and few noticed; treatment that could not be justified as punishment was warranted as "therapeutic." Finally, attitudes encouraged by the ideal sometimes supported penal measures that threatened liberty and personhood. Under the dazzling lights of the rehabilitative vision and experts' claims to know how to realize that vision, laws were enacted and practices countenanced that imperiled basic political values.

A considerable indictment, Allen's essay has since served to disturb and enlighten successive generations of students of criminal law and justice — and, hopefully, a few law makers and practitioners as well. Its message was loud and clear: the rehabilitative claims of penal authorities are not to be taken at face value. The announcement of benevolence, however often repeated, may cover harshness, neglect, even malevolence. Crime and criminal justice are political matters of greatest import. Be wary: the rehabilitative claims of officials had justified their exercise of considerable unstructured, unchecked discretion, and the discretion of state officials may be, and on the evidence often is, misused.

In *The Decline of the Rehabilitative Ideal*, Allen returns to survey the territory twenty years later. Now, criminological scholarship has become less narrow if, in some respects, no sounder. Hypocrisy and oppression have been decried, even if not fully routed. The rehabilitative vision had

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1. See *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 226 (1959).

been blurred by 1979, when the lectures on which these essays are based were given. Experts' claims, if no less plentiful, are viewed now with considerable skepticism. Liberty and personhood remain threatened, but by other forces and ideals — or by the absence of commanding ideals. How to assure personal liberty and a decent respect for the autonomy of persons remains a central concern for Allen. But the most salient threats now appear to be escalating dissension and a loss of faith in the capacity of our social institutions to accomplish public purposes. The deterioration of the rehabilitative ideal of criminal justice is both a sign and a part of this dissension and disillusionment. And a significant risk is that, reacting to such deterioration and loss of faith, we shall deny sufficient discretion to state officials to permit fashioning new purposes or moving toward their accomplishment.

## II

Allen's volume contains three essays and a brief epilogue. First he undertakes to account for the decline of the rehabilitative ideal in terms that point to broader changes in the United States, cultural shifts of wider import. He next canvasses current criticism of the ideal with a view to grasping "the assumptions on which contemporary efforts to recast criminal justice are based" (p. 32). Then he speculates about the direction that criminal justice policy might take in the future and, particularly, the role that the rehabilitative ideal might play in influencing a new policy. Finally, Allen identifies a central risk engendered by current efforts to redirect criminal justice policy.

First, then, why the weakening of the grip of the rehabilitative ideal? Allen reasons that to answer this question requires understanding the conditions facilitating the rise and dominance of the ideal in criminal justice. What are these? He offers two broad propositions. First, the ideal is likely to arise and persist in societies that strongly believe in the malleability of human character and behavior. Because this seems almost tautological (the ideal itself posits such change as possible), he offers a supplementary proposition: what counts is confidence in the capacity of social institutions to effect desired changes in character and behavior. A second cultural requisite is a working consensus about what it means to be rehabilitated, sufficient consensus "on the distinction between the malady and the cure" (p. 11). Societies whose cultures meet these conditions will experience the rise and persistence of the rehabilitative ideal. When these conditions are no longer met, the ideal will decline.

Allen illustrates these propositions in two ways. First, he examines the pre-Civil War United States and contemporary China as examples of societies in which the conditions are met, and the rehabilitative ideal rises and persists. Both societies, he says, exhibit considerable faith in human malleability, the capacity of social institutions positively to affect it, and sufficient consensus on the aims of treatment. Broader cultural differences between the pre-Civil War United States and modern China doubtless make a difference in the actual content of the rehabilitative ideal and its practical realizations, although there are, he notes, striking similarities. Still, in Allen's judgment, the propositions seem to hold — and to be enlightening. All of

this and more is said in a very few pages, too few to make more than a suggestive case.

At greater length, Allen describes our own society as an example of how loss of confidence in social institutions, and diminishing consensus about the appropriate treatment of criminals, leads to a decline of the rehabilitative ideal. But it is well to note that Allen is not arguing that skepticism about the rehabilitative ideal is unique to the modern United States. He recognizes a point made forcefully by Michel Foucault: that criticism of the rehabilitative ideal was born with the ideal itself.<sup>2</sup> What is distinctive about the contemporary situation, according to Allen, is the consensus now to be found, particularly among intellectuals, about the disutility, and even injustice, of pursuing the rehabilitative ideal in penal policy — or, at least, of making the ideal dominant. Radical criminologists, individual rights philosophers, egalitarians, supporters of more stringent regulation of government, and law-and-order devotees have all had nasty things to say about this pursuit. Even empirically oriented social scientists have made their contribution. But as Allen points out, such criticism is part of the phenomenon to be explained, not part of the explanation for the decline of the ideal.<sup>3</sup>

So what explains it? In Allen's view, the cultural supports for the ideal have collapsed, eroded by a confluence of events including the Vietnam War, the civil rights movement, and Watergate. We no longer believe that our central socializing institutions work or can be trusted. We cannot agree on what they should work to accomplish. Thus, there has been a loss of faith in the family as an authoritative site for the shaping of character and behavior in socially productive ways. Schools are seen as failing institutions. Even belief in therapy has crumbled, or evolved to support the pursuit of personal satisfactions, not public purposes. Part and parcel of the same shift of attitudes, penal treatment has come to be seen as both ineffective and politically suspect. There is no longer agreement on the proper aims of treatment. Considerable disagreement has surfaced about the criminalization of certain forms of behavior — homosexuality, abortion. Even violence is defended by some groups. The criminal justice system has been deeply affected by cultural changes beyond its ken or control. Crime has increased since World War II, particularly crime by nonwhite males. The reformers and the reformed are increasingly alienated from each other, leading both to question the wisdom and possibility of pursuing a rehabilitative ideal of penal treatment.

In his second essay, Allen reviews contemporary criticism of the rehabilitative ideal. If it doesn't account for the ideal's decline, it is still worth examining to discover assumptions that may affect the future direction of criminal justice. What are these criticisms and assumptions?

First and most important, the rehabilitative ideal can pose a threat to fundamental political values. It can serve to mask repression, blunting justified protests and encouraging procedural laxity. Allen, of course, was

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2. M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 264-68 (A. Sheridan trans. 1977).

3. See the remarkable review of early criticism of the inhumanity of total institutions in A. SCULL, *DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT — A RADICAL VIEW* 95-119 (1973).

among the first to voice this criticism. Now he thinks criticism may have gone too far and become too strident and crude, too ideological. It is important nonetheless to see, he concludes, that such criticism points to a tension between the rehabilitative ideal and liberal political values. The former calls for increased state discretion, the latter for checks on state power. The crucial issue now is how these can be reconciled.

Second, critics have exposed the vulnerability of the rehabilitative ideal to "debasement," to being used to justify activities not truly aimed at rehabilitation. Again, a criticism made earlier and well by Allen. Now, he suggests, the task is to appreciate the inherent vulnerability of the ideal to debasement and, presumably, to stay on guard. The ends proposed by the ideal are vague, the means to its realization uncertain; both may be permanent features of the ideal. Given these facts, administrators, pressed to realize other ends, will be sorely tempted to co-opt "rehabilitative" programs, and find it relatively easy to do so. Rehabilitative devotees, intent on proving their worth, may be tempted to promise too much and corrupt their programs in an effort to seem to deliver. The problems are plentiful and enduring. Allen's message is that they are no reason for complete abandonment of rehabilitative efforts.

Finally, it may be that we simply do not have the knowledge requisite for successful rehabilitation. Allen clearly believes that this has been the case most of the time. Again, however, the lesson he draws is one of moderation: this is not a reason for complete abandonment of rehabilitative efforts. Above all, it is not a reason to stop studying the problem of rehabilitation and tools for achieving it.

What, then, about the future? What are the options among the contenders for the dominant penal ideal, now that rehabilitation is no longer viable? This is the topic of Allen's third essay. There is, of course, the war-on-crime theory, which always presses to increase repression. Allen finds the theory morally bankrupt, and impractical as well. It is unlikely, in his judgment, to achieve general acceptance. In the meantime, as always, it will limit positive accomplishments of all sorts. Then there is the radical theory, but this seems less a theory of penal reform to Allen than a wish for revolution.<sup>4</sup> A liberal theory also exists, but it, like the radical theory, contains few prescriptions for penal reform; it calls, instead, for broader reforms that will prevent crime. This leaves older ideas competing for dominance: just deserts (retribution), deterrence, incapacitation. What are their chances of becoming the dominant ideal?

First, just deserts. Allen begins by considering why retributive theory is currently so popular, having long been a kind of whipping boy for intellectuals. Just deserts, he suggests, serves to "reaffirm the reality of moral values at a time when much in contemporary thought appears to challenge the concept of moral as well as legal responsibility" (p. 67). It counsels restricting the discretion of officials just when government authority is being questioned. It comports well with philosophies stressing individual rights and the importance of human volition, philosophies gaining popularity just

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4. Allen insightfully notes that it is unclear that radical criminologists oppose the rehabilitative ideal even in its more coercive actualizations. It is "rather that the wrong values are imposed" by the rehabilitative efforts of the states they are criticizing. P. 452 n.3.

when the viability of the first and reality of the second are in serious doubt. And it expresses, in some of its forms, a strong aspiration for equality dear to much of the population — dearer yet, perhaps, because of the apparent slowness of its coming.

The popularity of just deserts theory, briefly, is in important part a response to the forces accounting for the decline of the rehabilitative ideal — loss of faith in authority, loss of consensus about guiding values. When these troubles diminish, so will the popularity of just deserts theory. Still, it will survive, influencing any emergent criminal justice policy because it expresses now, as in the past, a basic moral intuition: no punishment unless merited. At the same time, it will not dominate a new penal policy. There are too many competing questions and values. Are individuals autonomous and should they always be treated as if they were? Can justice be realized in a society like ours — is a just theory, full-blown, justifiable in such a society? Will such a theory satisfy demands for community protection? And: what *is* blameworthy?

Just deserts theory, then, will survive and contribute to any emerging policy, but it will not dominate. The idea of “commensurate penalties,” central to the theory, is at least as vague as the idea of “rehabilitation,” which is one reason why enlightened persons might oppose its domination. It can, however, point to the need to put limits on punishment, and to the wisdom of ordering punishments according to the culpability of offenders. Thus it can help contain state power, at least by pointing up the need for and the justice of containment. But other values — deterrence, incapacitation, even parsimony — will compete for influence over decisions within the limits that just deserts theory will help to establish.

A modern synthesis, according to Allen, will be eclectic. This view seems to be in part a prediction, in light of the lack of consensus Allen has traced, and in part a recommendation. A modern synthesis should honor just deserts as a principle for containing state power. Equality of treatment should be respected, by requiring “affirmative showings of substantial social advantage” (p. 76) if it is to be violated — and such violations should take place only within the boundaries of deserved punishment. Discretion should be controlled and not eliminated. Guidelines for decision-makers should be provided, and provisions made to review their decisions.

Deterrence and incapacitation are scarcely mentioned as contenders for the dominant principle. They are not “sufficient . . . to determine all aspects of modern penal policy . . . and each . . . must at some point be countered by other principles” (p. 76).

What of the rehabilitative ideal? It should continue to play a role in any new policy. There are two reasons to think it will. Rehabilitative programs will be seen as needed for some who cannot easily be treated as autonomous. Further, and less happily, politicians will continue to legislate “rehabilitative” programs when they do not know what else to do. It should continue to influence penal policy, in any case, to combat prisonization (prisons will continue to be used) and as a component of community corrections programs. Whatever the effectiveness of rehabilitative programs, they should be furnished as a moral necessity, part of the state’s obligation to facilitate prisoners’ aspirations for knowledge and growth.

Finally, in his epilogue, Allen turns to a major concern, one that has influenced his thinking on the many problems discussed in this volume. An important source of the modern withdrawal from the rehabilitative ideal is suspicion of authority. As a practical matter this means opposition to official discretion — moves, as in various “determinate” sentencing laws, to structure and limit discretionary decision-making. Allen wants to warn against overzealousness in the attempt to tie officials’ hands. Discretion cannot be abolished in the governance of human affairs. But it can be transferred and it can be hidden. One risk is that the recipients of transferred discretion may be even less competent than its original holders. Another is that checking the results of the exercise of discretion will become even more difficult. Discretion will always be with us; the task is to tame it. To attempt to restrict it too severely is to risk being unable to accomplish any public purposes at all.

### III

In sum: the rehabilitative ideal has dominated thinking and discourse about penal treatment, especially among intellectuals, in the United States since shortly after the birth of the Republic. In the 1960s and 1970s it suffered a precipitous decline. This decline reflects the deterioration of the cultural assumptions which sustained it: belief that human character and conduct can be shaped by social institutions in ways that serve public purposes, and agreement about those purposes. Criticism of the rehabilitative ideal is widespread. Such criticism suggests some ideas that might usefully inform any new penal policy. Claims that penal treatment is rehabilitative should be viewed with skepticism: such claims may mask repressive action; they may leave penal programs particularly vulnerable to being put to other, less acceptable uses; they may be unfounded. Still, those who shape policy must be careful not to go too far, not to abandon completely and for all types of offenders the effort to rehabilitate, not to stop inquiring into means for rehabilitation and their efficacy. A new penal policy will not emerge easily, given extant distrust and dissension. Law-and-order advocates, radicals, even liberals have little to offer. The new policy will doubtless — and rightly — reflect older aspirations for justice, equality, and community protection, and even fiscal restraint will have a place. Ways must be found — perhaps this is the main lesson — to guide and check the discretion of those who mete out criminal justice. But these ways must not so bind officials’ hands that no coherent public purposes can emerge in this field or be effectively pursued.

### IV

The decline of the rehabilitative ideal, like other political upheavals of the 1960s, caught most scholars unawares. Allen’s is one of the first efforts to make sense of what appears to many to be the beginning of a major change in thinking about penal treatment and in recommendations for its reform. Whether the change will prove as important as many, including Allen, believe, remains to be seen. So, too, does the exact character of the change, including, particularly, its consequences for penal treatment, as opposed to discourse about it.

Will the change be as thoroughgoing as that which overtook penal treatment in the United States and elsewhere at about the turn of the nineteenth century, when prisons, ostensibly devoted to reforming their captive populations, first came into widespread use for punishment?<sup>5</sup> The social sources and meaning of that change currently are the subjects of intensive scholarly debate, triggered, perhaps, by a sense that the results of the change are themselves about to pass from the societal stage. It is that lengthy era during which the rehabilitative ideal dominated the recommendations of reformers and, later, the research agendas of social scientists. It is that era, too, about which many now conclude that rehabilitation was as much, if not more, an ideological screen for hard treatment especially directed to minorities as it was a genuine aspiration closely linked to humanitarian impulses. Allen was among the first to point this out.

In this volume, he is more concerned to point out the risks associated with the new ideals that may replace that of rehabilitation. He contends, in essence, that we are in danger that new ideals may function as ideologies, limiting vision and deflecting criticism. If too exclusively or zealously pursued they may cause neglect of other important aims of criminal justice, eventually engendering a reaction that may itself cause needless damage to important social goals. We must attend carefully to all the functions we would have penal treatment achieve. We should not permit a single goal to dominate our vision of proper penal policy as some have in the past. We should learn a lesson from our experience with the dominance of the rehabilitative ideal.

As noted above, Allen examines only one competing alternative to the rehabilitative ideal at all carefully: retribution or just deserts. He is correct, I think, in pointing to the sources of the current popularity of just deserts theory. It provides a promise of redress for many of the losses we feel we are suffering; it is in part an effort to stem a felt tide of deterioration of public purpose and morality.<sup>6</sup> This is not all that is involved, and Allen remarks on this as well. His cautions about the risks of exclusive pursuit of a retributive penal policy are also well-taken.

I wish that he had as carefully analyzed the other contenders for dominant ideal — particularly incapacitation. At least two recent treatises have recommended it.<sup>7</sup> One has suggested how it might contribute not only to

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5. Four of the best recent studies of the emergence of prisons and the change in penal philosophy accompanying the rise are M. FOUCAULT, *supra* note 2 (discussing French penal system); M. IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION 1750-1850* (1978) (discussing English penal system); D. MELOSSI & M. PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* (1981) (Italian and American penal systems); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971) (origins of American penal system).

6. Allen's interpretation is reminiscent of Joseph R. Gusfield's discussion of the meaning of the prohibition movement. *See* J. GUSFIELD, *SYMBOLIC CRUSADE* (1963). Prohibition was a "symbolic crusade" to preserve a set of values felt to be threatened by another set and style of life, associated with persons of other (urban, immigrant) origins. The values represented by the prohibition movement have themselves declined, after a brief, perhaps final flare. Is something similar in the offing for "just deserts"? Allen doesn't think so, although he doubts that retributive values will dominate future penal policy.

7. *See* P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982); M. SHERMAN & G. HAWKINS, *IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE* (1981).

reducing crime, but also to reducing the prison population.<sup>8</sup> This combination is certain to be immensely attractive to legislators, confronted with demands to raise taxes to relieve prison congestion, and at the same time to "reduce" crime. Allen's observation that "at some point" an incapacitative policy (like deterrent policy) must "be countered by other principles" (p. 76), although probably true, could be true only in the long run — about which Keynes said all that needs saying. And the "point" in time might be very far away if the dominance of the rehabilitative ideal be any example.

I think there are good reasons to be especially concerned about incapacitation. There is no convincing sign that we are about to give up imprisonment, notwithstanding much current talk about "corrections in the community." If we retain it as the central instrument for control of "dangerous" criminals, the need will be — is — to construct a new rationale, given the current, and perhaps continuing, disaffection from the rehabilitative ideal. What better rationale is available, particularly what rationale that does not require what Allen argues we have lost — namely, a belief in the capacity of our institutions to affect character and behavior? None, I think, and particularly none that is ironically so closely connected to the rehabilitative ideal itself, which, if weakened, is arguably not exhausted. "Rehabilitation" and "incapacitation" are, in some respects, the obverse sides of a single coin, as Allen recognizes but fails, to my taste, sufficiently to explore. The connection has been made clearer during the course of the dominance of the rehabilitative ideal. All of the major changes in adult penal treatment that were introduced with much fanfare in the first part of the twentieth century — probation, the indeterminate sentence, parole — provide means for investigating the "character" of those convicted of crimes with a view to determining their recidivist potential, or for taking account of it.<sup>9</sup> They were intended, perhaps, to facilitate trial of the rehabilitative arts; but they were also intended, and functioned (however ineffectively), to permit incapacitation, prolonged incapacitation, or re-incapacitation of those thought unlikely to profit from such rehabilitative trials, or who failed them.<sup>10</sup>

We have been pursuing a partially incapacitative "ideal" for a very long time under the banner of "rehabilitation." The current move in some places to make sentences more "determinate" may serve less to counteract this policy than to provide a vehicle for making it more systematic, while at the same time taking some account of pressures for limits (in the absence of

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8. See P. GREENWOOD & A. ABRAHAMSE, *supra* note 7.

9. This view is particularly that of Foucault in *DISCIPLINE AND PUNISH*, *supra* note 2, at 16-24, although he does not give special attention to early twentieth century developments. David Rothman does, and partially shares this view. See D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1970). See also Foucault, *About the Concept of the "Dangerous Individual" in 19th-Century Legal Psychiatry*, 1 *INTL. J.L. & PSYCH.* 1 (1978).

10. For years observers of modern prisons have commented on the seeming senselessness of elaborate diagnostic and classification procedures, in the absence of meaningful rehabilitative programs. Consider that their main use for long may have been to identify "accidental" offenders who didn't need to be incapacitated and "born" offenders who did. We have, of course, developed a more sophisticated set of labels in recent years. See, e.g., the vocabulary developed in P. GREENWOOD & A. ABRAHAMSE, *supra* note 7.

strong sentiment for continued incarceration in most cases) and more equality. Put differently, what is currently emerging could be a refinement of the "rehabilitative ideal" as it has been understood by many, and applied (again, however ineffectively) in many, even most, places. This is an ominous refinement insofar as it implies, as I think it does, the readiness of many to "come to terms" with our "lack of knowledge" about how to rehabilitate—that is, how to facilitate voluntary conformance. Is such knowledge really lacking? Or do we know, instead, that rehabilitation is bound, for many, to be a chimera without major changes in the wider society, the accomplishment of which seems too remote to disturb our whole lives over — which is what is required for major social change. In this mood, further to salve our troubled consciences, we may be ready to deny the capacity to change — and thus the liberty and personhood — of some members of the population (and they can be identified), while at the same time we are, more or less knowingly, letting stand the social conditions which make them incapable of changing.

Allen's essays raise these kinds of thoughts in me. They raise difficult, troubling questions, questions that need answers. I think that other readers will have a similar experience. That is very much for a scholar to have done.