

James J. White*

Frank Allen had all of the wonderful talents that Ted St. Antoine and Rick Lempert ascribe to him. He was exceptionally smart and thoughtful (no one gets to give those fancy lectures who is not). He was a wise man (he led the faculty through the tough times at the end of the Vietnam War). And he was compassionate but tough as nails (he favored affirmative action, but was willing to close down the BAM affirmative action disruption with police if necessary—Frank’s statement of his intention to call the police after the law school classes were disrupted forced the timorous Central administration to take action).

Grand as these talents are, they are not what made Frank Allen unique. Frank was the most articulate man I have ever known. The respect for his facility in using particularly the spoken word, but also the written word, is shown by the frequently murmured acknowledgement among envious faculty members that Frank seemed to “talk in paragraphs.” When he spoke in conversation, to the faculty, or in a prepared address, I had to resist the temptation to take out my pen and steal some of his phrases.

In the hope that I might lead a lawyer or a student to dip into Frank Allen’s writings for the purpose of improving his own writing (and with the incidental benefit of exposing himself to some of Frank Allen’s ideas), I devote a couple of pages to the words that Frank used in the Russell Lecture. The lecture, *The Law as a Path to the World*, was published in the *Michigan Law Review* in 1978.¹

Frank began his paper by quoting Mr. Justice Oliver Wendell Holmes “the law is a small subject (though . . . it leads to all things).”² Drawing particularly on the criminal law, his specialty, Frank shows how the law reflects the wishes, hopes, and uncertainties of society. In the paper he shows the law’s uncertainty between the use of the criminal law as a means, on the one hand, merely to punish or, on the other, as a means to rehabilitate the criminal and to punish him little or not at all. He asserts that this confusion in the law arises from society’s uncertainty both about what is right and what is possible.

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1. 77 MICH. L. REV. 157 (1978).

2. *Id.* at 157.

FOUR REASONS

It is one thing to understand that Frank Allen was the most articulate person on the faculty, but it is something else to explain exactly what he did to earn that title. Of course, he thought clearly and clear thought is surely a condition to clear speech, but I pass that, for clear thought, while necessary, is not sufficient. Many clear thinkers are not felicitous speakers or writers.

In the Russell lecture I will point to four things that set Frank apart as a speaker and as a writer.

First are Frank's words. Whether by instinct or consciously Frank always picked the right word. He was not afraid to use large words that would have been missing from the common vernacular but he never chose words that were pretentious or unnecessarily obscure. Neither "Normative," nor "Heuristics" would have earned a place in Frank Allen's writing, and "conflate" would never take the place of "confuse." But we do find words like "malleability," "stigmatic," and many other words such as "blameworthiness" that are familiar to lawyers and to the well educated but might be less well-known by laymen. So the first characteristic of Frank's writing and speech is his choice of the right word for the audience and for the idea and his avoidance of obscure and pretentious words.

Second are Frank's metaphors, perfect metaphors. They are never mixed and they always add meaning to the text that precedes or follows them. Often they are set against one another. In succeeding clauses he describes the confusion of the criminal law as it assumes first the "mantle of the moral philosopher" and, "a moment later, the posture of the behaviorist."³ Do you see how these fit? The behaviorist assumes a "posture," he does not earn a formal, traditional "mantle" but it would be wrong for the moral philosopher merely to "assume a posture;" on him the "mantle" fits.

A third strength of Frank's writing is repetition. Unaffected by the generations of law review editors who abhorred repetition, Frank understood the virtue of and need for repetition to make heavy ideas comprehensible. The repetition and alternative expression of an idea that has already been presented occurs not only in his metaphors but also by his following the general with the specific. This redundancy lets the reader or listener get the meaning of the general statement if he understands the specific and vice versa. Of course, Frank's repetition of a thought comes with such a light touch that we do not appreciate the repetition unless we look for it.

3. *Id.* at 159.

Consider the following sentence, “Justification of resort to punishment can be said to rest on utilitarian calculation—the deterrence or incapacitation of offenders, their rehabilitation, the security and survival of the state.”⁴ Now a reader of that sentence will understand what Frank is saying even if he has no idea about the meaning of “utilitarian.” The phrase after the hyphen explains what society seeks from punishment and so tells the meaning of the sentence even if the reader has never heard of a “utilitarian calculation.”

A fourth characteristic of Frank’s writing is his frequent invocation of prominent intellectual or historical figures and his citation to literary characters. As a shorthand way of conveying ideas that are important but too peripheral or too complex to earn extended coverage, Frank often refers to the work of others or to well-known literary characters. We find Oliver Wendell Holmes at the beginning of the piece, Doris Lessing and one of the Karamazovs in the middle, and Aristotle toward the end.⁵ Today these references might seem ostentatious, but they never seemed so from Frank’s mouth or pen. Some might even say that these references are a claim of superiority; I would argue, on the contrary, that they show Frank’s respect for the reader and listener—one who should know Karamazovs and should understand the lessons of Aristotle.

Doubtless I have failed to note many of the subtleties that make Frank’s work so clear and bright but that is the best a novice can do. To test my claims (and to test your ability to do better than I) I quote two passages at length and give my evaluation. See how you can improve on mine.

EXAMPLES

The following paragraph is in the middle of the article where Frank discusses the law’s persistent use of blameworthiness:

Perhaps the most basic reason for the persistence and survival of the blameworthiness principle is that in many instances it expresses what might be called the popular understanding of criminality. In widely differing societies rulers have encountered stubborn communal insistence that only

4. *Id.* at 160.

5. *Id.* at 157, 159, 159, 169. This piece of only 13 pages also invokes Hitler, Mozart, Eric Sevareid, B.F. Skinner, Immanuel Kant, Jimmy Carter, the Old and New Testaments, Greek Drama, an anonymous behavioral scientist correspondent, and a judge of five centuries ago.

those persons who *deserve* such treatment should be subjected to the severe and stigmatic penalties of the criminal law. Deserved punishment, in turn, appears to imply an offender possessed of meaningful powers to choose his own acts and one who has used those powers to pursue a course offensive to decency and propriety. That moral conviction and outrage fuel the system of criminal justice requires little demonstration. Patently such motivations significantly influence what kinds of behavior will be defined as criminal; what acts will be selected for criminal prosecution; and what penalties will be imposed once offenders are convicted. A law-giver who has misjudged the community's sense of propriety and proportion by condemning acts that are widely approved or authorizing penalties too extreme, may encounter the phenomenon of nullification: Prosecutors may refuse to prosecute; juries may disregard the evidence and acquit, and judges may in myriad ways frustrate the enforcement of the law. The Prohibition Experiment provided many instances of such responses, but examples may be drawn from other historical periods, including the present.⁶

In only twenty-three lines Frank summarizes and explains an idea that might take weeks of discussion in a criminal law class. Look at how he does it. He emphasizes the power of the "community"; in his words, the people exert a "stubborn communal insistence." He carefully outlines the risk of the lawgiver and beautifully illustrates the idea of nullification by referring to Prohibition.

A few pages farther on, Frank presents the counter claim: if blameworthiness is so important, why do we have any doubt about applying our moral rules to the criminal law and to criminal behavior? He describes the law and society's uncertainty as follows:

Why not a morally based criminal law? It is in attempting to respond to these and similar questions that one uncovers the clearest evidences of the kinship of the criminal law with the times in which it functions. For in the effort to predicate criminal liability on moral culpability and to proportion penalties to moral default one instantly becomes enmeshed in a gamut of characteristic modern issues. Here one tastes the flavor of the twentieth century and learns of ambiguity, contradiction, conflict of social purpose, compromise, and

6. *Id.* at 161.

incoherence. When he was a candidate for the presidency, Mr. Carter called for a morally based politics and a morally based foreign policy. One suspects that the success of efforts to achieve a morally based criminal law will prove as tentative and incomplete as that in other areas, and for many of the same reasons.⁷

Note the metaphor in the middle of the paragraph: “tastes the flavor of the twentieth century.” The remainder of the sentence explains the “flavor” for the reader who might be uncertain of its taste; it is “ambiguity, contradiction, conflict of social purpose” and the like. The paragraph reveals another aspect of Frank’s writing; he is a kind man and his words are not needlessly hostile or critical. In the last two sentences of the paragraph he gently chides our former president for his naïveté about politics and foreign policy.

In the next paragraph he acknowledges the uncertainty that many have felt in confronting this ambiguity, contradiction, and incoherence: “Some serious students have found themselves in positions like those of liberal clergyman whose faith in the assumptions of the traditional theology are shaken but who are unwilling to separate themselves completely from the tradition they have come to doubt.”⁸

What a wonderful image. How possibly can a smart and reflective clergyman avoid doubt about the literal accuracy and the traditional understanding of the teachings of Christianity?

He continues by raising the question what morality and whose morality should be invoked to measure blame. He illustrates these difficulties with a reference to the abortion debate: “Nor can these challenges always be set to rest through the processes of democratic lawmaking—by judicial edict or legislative enactment—as the continuing abortion controversy abundantly illustrates.”⁹

The parenthetical phrase that is set off by hyphens emphasizes and makes clear what he means by “lawmaking.” His reference to the “abortion controversy” directs every reader’s mind to the bitter disputes that have riled federal, state, and local politics continuously for more than twenty years.

I conclude with two sentences in which Frank summarizes the work of the legislatures, courts, and scholars in their attempt to find a place for blameworthiness without excluding behaviorism from the criminal law universe (and vice versa): “It would surely be

7. *Id.* at 163.

8. *Id.* at 163.

9. *Id.* at 165.

erroneous to conclude that all is waste and confusion in these legal areas. Yet it is difficult to deny that the impression gained from their scrutiny is more likely to be that of dissonance and cacophony than of Mozartean structure."¹⁰

CONCLUSION

So we have dissonance and cacophony, not Mozartean structure. One imagines that if Frank Allen were the law giver, there would be more Mozart and less dissonance. The next time you are lucky enough to read something by Frank Allen, take out your pen and steal some of his phrases and metaphors; he is gone now but I am sure that his spirit will be pleased to share.

10. *Id.* at 165.