Michigan Law Review

Volume 17 | Issue 8

1919

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Clarence A. Lightner

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Recommended Citation

Clarence A. Lightner, *Administering Justice the Medical Prepossession*, 17 MICH. L. REV. 666 (1919).
Available at: https://repository.law.umich.edu/mlr/vol17/iss8/3

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ADMINISTERING JUSTICE—THE MEDICAL PREPOSSESSION.

"The State, in conjunction with the other guilds, will deal with it by a just and righteous judgment."

THIS quotation is from a recent document coming from conservative and intelligent sources, recommending as a cure for economic and commercial unrest, and other evils, the creation of a League of National Guilds.

Underlying the whole scheme is the question whether it will work. Assuming the truth of the above quoted sentence, the outcome would be hopeful. This is, however, by no means an exceptional illustration of the child-like faith of the layman in his ability to create a tribunal which will administer "just and righteous judgment."

Justice is the most important matter in human existence, and there is nothing which will help the world, especially at present, as much as justice.

Any scheme, including that of the proposed League of National Guilds, must be administered ultimately by human agents, and the frailty of human nature is the principal reason why justice does not always prevail. This has always been true.

No people in ancient times had a higher ethical sense, and certainly no people had leaders who appreciated the need of "righteous judgment" better than the Hebrews. Among them justice was administered by the magistrate, usually sitting and holding his court at the gate of the city. Questions involved must have been simple, but justice did not always result, and largely because bribery was a habit, although it was frequently cloaked under the expression of free will gifts. One needs only to read how Samuel (perhaps the most righteous man produced by the Jewish people) prided himself upon his integrity as a judge,[1] while his two sons inducted by him into the judicial office became notorious bride takers,[2] to understand why the Jewish prophets continually preached "judgment," "justice" and "righteousness." No judge, in this country at least, would think it appropriate to call attention to the fact that he had administered his office honestly, because, with few exceptions, judges are now honest. However, conditions are different, and though

[1] See 1 Samuel, Chap. 12, verses 3 to 6.
[2] See 1 Samuel, Chap. 8, verses 1 to 3.

bribery may be unusual, administering justice, either in the courts or elsewhere, is, in the vast complexity of modern life, a difficult matter in many respects, because of the same frailty of human nature.

Directing our attention especially to the administration of criminal justice, the best tribunal will be one which has at its disposal, in an uncommon degree, such ordinary qualities as patience, common sense and human sympathy. It would be better if such a tribunal should know nothing of the controversy in question, and especially not the facts from which the prosecution arises.

Roman jurisprudence, in its Golden Age, developed these merits. In fact, under the Roman practice the trial judge was not supposed even to know the law. He certainly was not selected because of his knowledge of science. He heard the evidence submitted to him, and if a decision of the matter in controversy called for knowledge, on his part, of any scientific matter, he secured advice thereon from men who were versed in that particular science. To answer his doubt as to the law of the case he inquired of the *juris-consulti.* The trial judge usually had the common qualities above commended, which enabled him, if opinions varied, to choose the better advice. Not only did this method result in the most remarkable system of laws which the world has ever produced, but it worked remarkably well in practice, until the evils incident to the Empire, and resulting largely from conquest and prosperity, had undermined it. It was when justice failed to be fairly administered that the Roman Empire declined and fell. Human frailty was the underlying cause thereof.

The English method of administering criminal justice is not the result of a theory, and certainly not (as in the case of the proposed National Guilds) of a scheme prepared for the future. It is the outcome of experience. It is the fruit of centuries of agony endured by the English people. Our jury system is the principal result of this historical experience. We have, therefore, also in America at the present time, in the administration of criminal justice, a judge, who is supposed to know the law, and a jury, which is the final arbiter as to the disputed facts involved in the litigation. To this tribunal, namely, judge and jury, the facts are submitted by witnesses who know matters pertinent to the controversy. When a question of scientific knowledge arises, expert witnesses, *i. e.*,— persons who, in the particular branch of scientific knowledge, are learned and experienced, are called to advise the tribunal upon these matters. If all witnesses were honest, and if all experts un-

derstood matters upon which they were called to testify, and assuming that the judge and jury were capable and honest men, the administration of justice, even under the present complicated conditions of life, would be as nearly perfect as one could desire.

While the jury, as a factor in the machinery of justice, has received most severe criticism, one who understands English history will agree that it is, perhaps, the most beneficial element therein. With all of its weaknesses, it has worked. The value of the jury (its province being to determine disputed questions of fact) has so thoroughly approved itself that there is no civilized nation which has not tried to incorporate the idea of the English jury into its system of administering justice in criminal cases. With us, as well as in England, the jury has, by constant habit, been made tolerable, if not admirable, but elsewhere the success of the jury has varied, just as the ability to use a new tool depends largely upon the skill of the hands in which it is placed.

Erskine's words are as true now as they were in the year 1799:

> "Indeed, if I were to be asked what it is which peculiarly distinguishes this nation from the other nations of the world, I should say that it is in HER COURTS she sits above them: That it is to her judicial system she owes the stability of all her other institutions."[3]

The foregoing has been suggested upon reading a medico-legal book written by Dr. George W. Jacoby.[4] The author is well vouched for as one learned in medicine, and especially in his particular branch thereof. The book itself fully meets any expectation which the author's name might create in one reading the book. Upon the medical aspects of the subject, it seems to us that Dr. Jacoby has herewith presented to the profession a valuable contribution on the subject. The last half of the book, wherein is considered, under

[3] The quotation is from the early part of Lord Erskine's speech in defense of the Earl of Thanet, and is quoted from page 407 of Volume II of the edition of Erskine's Speeches, published by Reeves and Turner, of London, in 1870.

[4] The title page is reproduced in this note:

"The Unsound Mind and the Law",
A Presentation of Forensic Psychiatry, by George W. Jacoby, M.D.,
Author of "Child Training as an Exact Science"
Fellow of the New York Academy of Medicine, Member of the American Medical Association, American Neurological Association, and New York Neurological Society,
Consulting Neurologist to the Hospital for Nervous Diseases, The German Hospital, The Beth Israel Hospital, The Red Cross Hospital, and the Infirmary for Women and Children in the City of New York etc.
Funk & Wagnalls Company Publishers, 1918.

Part Second, "Psychiatric Expertism," and under Part Third thereof, "Special Anomalies" is above criticism, at least by one who is not qualified to speak learnedly on this branch of knowledge. As compared with previous literature on this general subject, the author's work shows a marked advance in the method of treatment and arrangement, as well as in the views upon the matters therein expressed. The Chapter on the "Examination of the Insane" (being Chapter VI. of Part First) is also of substantial value. I believe that there is little to be criticised in these portions of the book. Certainly, I refrain from undertaking any such criticism.

Dr. Jacoby does not profess to be a lawyer, nor to have had any education or experience in the administration of justice, except as he may have come in touch with the courts as an expert witness. I wish he had refrained from the expression of his views regarding the law. However, he is not the only medical scientist who feels that the law is a totally different proposition from medicine. The assumption is that medicine is a learned science, which only a man like Dr. Jacoby, who has studied it, and who has practised it during his lifetime, can talk about as an expert, while, on the contrary, any layman is quite competent to discuss the administration of justice, and correct the evils therein, and for this purpose one learned in medicine is as capable as the ordinary layman. It is this attitude, and the expression thereof in this book, which calls for careful and painstaking consideration. I think the author errs as much in what he says in his discussion of the law as he is, doubtless, right in his comments upon medicine.[5]

It has always seemed to me that, to produce a valuable book, dealing seriously with two learned professions, collaboration is advisable. The most valuable general book on Medical Jurisprudence is that of Wharton & Stillé, published in 1885. No extravagant statements upon either law or medicine appear therein, because each of the two authors attended especially to his own branch of knowledge.[6]

[5] Justice Brooke expressed clearly, and in simple language, the qualifications for judicial duties, in his eulogy upon the late Justice McAlvay of the Michigan Supreme Court. The proceedings had in the Supreme Court on this occasion on April 4, 1916, are found in the Preface to Vol. 191 of the Michigan Reports. I quote from Justice Brooke's remarks, in support of my comments in the text, the following from page XXXVI: "Few outside the profession have more than a vague notion of the law, or any intelligent comprehension either of its excellencies or its defects."

[6] To aid the reader who may not have Dr. Jacoby's book at hand, these few excerpts from "The Unsound Mind and the Law" are given herewith:

"Why is it that psychiatry which could and should be of so great aid to the jurist, is as yet inadequately appreciated by judges and lawyers?

"The answer to these questions is that all laymen—and jurists are laymen in this

The author of "The Unsound Mind and the Law" believes that judges should learn psychiatry and other branches of medicine. Differing absolutely with Dr. Jacoby, I think that a study of medicine by our judges would be a mistake. I have seen it in practice that a judge who professes to understand medicine is less qualified thereby as a judicial officer. He cannot know all medicine, not even all psychiatry, and a study of the subject will tend to make of him that most dangerous man in the administration of justice, namely, a dilletante. It is the province of the medical expert to advise the court and jury regarding scientific facts, when they come into question.

The author likewise complains that the law is "archaic," "conservative" and "stagnant," and he suggests that when a difference arises the law should yield to the science of medicine because "medical facts alone are stable." The error contained in this statement, which finds more or less acceptance outside of the legal profession, is a principal cause of the unsatisfactory administration of criminal justice at the present time.

Confining my attention to psychiatry, the constant changes in medical scientific knowledge will surprise one who has not directed his attention to the matter.

The meaning of the word "insanity" (which of course the law accepted from medicine) is a simple illustration of this change, or

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regard—notwithstanding all efforts to enlighten them, still remain entirely ignorant concerning mental disease and are prejudiced against occupying themselves in any way with the questions it involves." (Introduction, p. 7).

"The object of the physician who testifies in court should be no different, and it is this common purpose that imposes upon the physician the duty of acquiring adequate juristic knowledge, and upon the jurist the obligation to instruct himself in regard to such facts in medicine and the natural sciences as are of importance in the field we are now considering." (Introduction, p. 4).

"The extent to which the subject-matter must consequently suffer becomes particularly manifest when the more recent advances in psychiatric medicine are contrasted with the conservatism, or let us rather say stagnation, that exists in English and American laws in the same field." (Preface, p. v).

"Wherever the existing law and modern medicine disagree, there is a tendency to give the former a more plausible recognition than it actually deserves, or to assume that the latter, notwithstanding its scientific basis, is at least problematic, and therefore to attempt to fashion it to accord with the juristic mold." (Preface, p. v).

"I laid stress upon the possibility that a person who had committed a criminal act while under the bane of a morbid impulse of the will might be legally convicted, because the law, while it accorded an exculpatory value to abnormal intellectual activity, dealt otherwise with disorders that implicated the activity of the will." (Introduction, p. 3).

"But it distinguishes only two possibilities, responsibility and irresponsibility, a distinction which in many instances seems to be too abrupt and which represents a practical hardship." (P. 81).

"It is for the latter group of cases that the adoption of the notion of restricted responsibility would be in accord with all scientific facts, as well as being a great practical help alike to the judges and the medical expert." (P. 82).

development, in medicine, and of the serious injury resulting thereby to the law and its administration. The word "insanity," until of recent date, has included defective development as well as lesion of the mental faculties.[7] The law, in its legislative and judicial branches adopted this definition of insanity from medicine. Legislation and judicial decisions used the word in this broad sense, and the word connoted, substantially, mental deficiency from any source.[8]

During comparatively recently years, however, the medical profession has (and I have no doubt with good reason) come to regard mental deficiency, at least from the medical point of view, as a radically different disease from other forms of insanity. At all events the medical profession has made a distinction between mental deficiency (that is, amentia) on the one hand, and insanity (that is, dementia) on the other.

The valuable work by A. F. Tredgold, of London, entitled "Mental Deficiency" (amentia) first published in 1908, and especially the second edition, bearing date 1915, treats in a most satisfactory manner of the feeble-minded (aments), to the exclusion of the insane (dements). The discussion in Dr. Tredgold's book of the English Mental Deficiency Act of 1913, and the investigation which preceded the enactment of that statute, are illuminative of this whole subject.

Dr. Henry Herbert Goddard, Director of the Department of Research of Vineland Training School, New Jersey, has spent his life in the study of the feeble-minded, and he is recognized, not only in this country, but also abroad, as a leading authority upon the subject.[9]

His narrative of the case of Gianini, included in the book on "The Criminal Imbecile," published by him in 1915, impresses me with the marvellously accurate results which one learned in the

[7] The small book of Marshall D. Ewell, first published in 1887, contains on pages 337 to 341, the classifications of insanity by four of the learned alienists, including Dr. Ray. Mental deficiency is included in most, if not all, of these classifications, under the general term insanity.

[8] In Michigan legislation the words "insane" or "insanity" were used in the comprehensive sense, and the words "feeble-minded" or "imbecile" did not appear until in recent years. In 1873 was adopted an act providing for the barring of a woman's right of dower in the lands of her husband when she remained incompetent for two years or more. The words "imbecile" and "idiotic" are used in this statute in addition to the word "insane." This is exceptional, however, in earlier Michigan legislation.

[9] Dr. Goddard's larger work is doubtless well-known to the medical profession, entitled "Feeble-mindedness, its Causes and Consequences." "The Kallikak Family" and the "Criminal Imbecile", etc., preceded the more serious work, and perhaps are more interesting to the layman.

subject, and inclined to aid an intelligent judge, can, even under great handicaps, accomplish. But the lawyer is surprised to find that Dr. Goddard thinks that the Gianini case established "a new standard in criminal procedure," because "it recognizes that *weakness* of mind, as an excuse for crime, is of the same importance as *disease* of mind"; he continues: "puts feeble-mindedness in the same category with insanity, and requires that it, like insanity, be considered in all discussions of responsibility. When we add the now accepted fact that the feeble-minded are at least as numerous as the insane, we see the far-reaching significance of this standard set by the Supreme Court of Herkimer County, New York." (page 2).

Of course this is not true. It seemed to be true in this Gianini case, as well as elsewhere, because the medical profession, which taught the law to give one meaning to the word insanity, has now limited it to one-half of the subject.[10]

Whatever the frailties of judges and lawyers may be, and they are many, and however unsatisfactory the application of the principles of law to the particular case, when the defense of insanity is raised, may have been, the law has always allowed for mental incompetency.

> "If there is any ground for complaint, therefore, it is not that the law excludes truth or theory, but that it does not exclude humbug and ignorance. It is better that the doors should be left open, for experience will rectify errors, and may profit by discoveries. But no complaint is more groundless than that insanity, of whatever nature, cannot be allowed for sufficiently in any court of justice."

With these words the late Justice Campbell of the Supreme Court of Michigan closes a most interesting paper, prepared by him in 1870, upon the subject: "Does the Law deal fairly with Questions of Insanity?"[11] Justice Campbell's article, nothwithstanding the

[10] While I have not the book at hand, I have been advised that a recent book on Mental Disease, generally accepted by the medical profession, and referred to as an authority in medical education, declares that the word insanity is not a medical term, but is used only by the law and the legal profession.

[11] The article herein referred to was read before the Medico-Legal Society of New York, on December 8, 1870. We refer to the publication thereof, appearing in Medico-Legal Papers, First Series, published in 1889, by Clark Bell of New York. The article is found on pp. 234 to 249 of the 3rd illustrated edition of the work. This article antedates the opinions of the Michigan Supreme Court written by Justice Campbell, affecting Medico-Legal questions, shown in *People* v. *Hall*, 48 Mich. 482, and in *People* v. *Millard*, 53 Mich. 63.

lapse of time, contains the best discussion of the law, upon the responsibility of the alleged insane, that I know of. In the clearness and simplicity of his language, and in the absolute correctness of his attitude towards the law, and his fairness to the medical man, the article is comparable to Lord Erskine's speech, delivered in 1880, in defense of James Hadfield.

I will rest with one other illustration (although there are many suggested in Dr. Jacoby's book) of the embarrassment resulting to the law from the changes in scientific psychiatry.

Dementia praecox is the form of insanity which is most favored by the medical profession at this time, and it is given a prominent place in Dr. Jacoby's book. While doubtless Kraepelin's work was of substantial value in the study of mental disease, the law should not be severely criticised if it does not at once drop all the learning from medical science which preceded Kraepelin, and regard dementia praecox as the last word on this subject. Clevenger's work on Medical Jurispurudence of Insanity was well regarded by both professions at the time it appeared in 1898, but the words "dementia praecox" are not found in either of the two volumes. On the contrary he has a chapter entitled "Vesanias," being Chapter XX in Volume I. Vesania is an unknown quantity in more recent books, and is not found in that of Dr. Jacoby.

Dr. Reese's text book on Medical Judisprudence and Toxicology was one of the earliest American books upon this subject, and the original author, and the revisors of the recent editions, were men associated with the University of Pennsylvania, and it has appeared continuously as a Blakiston publication, also of Philadelphia. The Sixth Edition is dated in 1902 and the Eighth Edition in 1911. The treatment of insanity, and the classification thereof, in the Sixth Edition (see pages 323, etc., thereof) is substantially different from that given in the Eighth Edition (see page 295, etc., thereof). Dementia praecox appears first in the Eighth Edition, as a principal division in the varieties of insanity.[12]

Therefore a judge, who had accepted medical learning on the subject of insanity previous to the time when the profession generally adopted Kraepelin's views, would be required to completely change his ideas upon this matter. I am impressed with the thought that when Dr. Jacoby insists that judges should learn medicine, he would be content only if the court should know and adopt, as a principle of law, opinions which Dr. Jacoby and his associates at

[12] Dementia praecox was not known to the compilers of the Century Dictionary in 1890. The supplement thereto, published in 1911, first mentions the words.

the present time deem to be correct. The Court should disabuse his mind of that which he had with much labor learned previous to the adoption of the prevalent views in the medical profession with reference to dementia praecox.

Differing radically with the author in this matter, I believe that the principal failing of the medical expert, especially in the branches of knowledge dealing with the human mind, is the air of finality with which he writes and talks. Almost continuously since the time of Hippocrates has this been the attitude of medicine towards the law. It is the comfortable assurance of the scientist that every expert going before him, and differing from him, was wrong, but that the view entertained by the present writer is not only correct but it is final. The expert becomes impatient with the layman, and especially with the judge and the lawyer who do not accept, upon those terms, the present statement of the psychiatrist. One has only to review, in a cursory manner, what is called the progress of science in this branch of knowledge, to be impressed with the fact that the views of Dr. Jacoby may not in all particulars be right, and may possibly in the future be modified.

A timely antidote to this attitude of the medical profession is found in an article which appeared in the December, 1917, Atlantic Monthly, entitled "The Human Soul and the Scientific Prepossession." I am not accepting a brief in support of the views of Mr. Warner Fite, the author of that article, upon psychology in general, but it does seem that he is not far afield when he closes his vigorous article with the following:

> "All of these prepossessions find their logical expression, however, in the cult of scientific management and scientific efficiency, which, I should say, represents the real German propaganda in this country for a generation past. Every one has his own theory of the war. To me it seems that if the war has any deep-lying significance, it is war of humanity against the scientific prepossession."

Dr. Jacoby and I agree that there are miscarriages of justice in the administration of law in the criminal courts (and where is there not?), but we differ radically regarding the causes and the cure. The author in several places states that his book is limited to "borderline" cases in psychiatry. Among other things he believes that the law should accept his (it may be a medical) doctrine of restricted responsibility. He appreciates that the province of the law is to determine responsibilty, and that this question may not be the same as the pathological one which presents itself to the

medical man in his practice. While the expression of the legal principle of responsibility of the alleged insane (as derived from what is called the McNaghten case) is not altogether satisfactory, it is at least workable. The purpose of a legal prosecution is to determine the clear cut issue whether the defendant was, under the rules of law, responsible for his act. If he was responsible, the jury should find him guilty, and if he was not, the jury should acquit him. This rule has the merit at least of being comparatively simple. Even with the aid of medical advice it has not resulted in a correct verdict by any means in all cases. If by "border-line" cases the author means those in which the medical expert is uncertain, the law humanely applies the rules that a respondent in a criminal case is presumed to be innocent, and that he must be proven guilty beyond a reasonable doubt. These elementary principles of criminal law have, also, been found to be reasonable and to be advisable. Such a doctrine as restricted responsibility would not result in a more desirable administration of criminal justice.

It was a matter of surprise to learn, recently, from a conservative authority in psychology and allied sciences, that, during the past quarter century, and as a result of the work of laboratories established for that purpose, "tests have been developed that are rapidly making the diagnosis of mental diseases as accurate as that which has become possible in the earlier developed clinical branches."[13]

Assuming that this statement is only moderately true, it is unfortunate indeed that the administration of justice should not in some manner be supplied with this accuracy. Even the medical profession, and certainly the public at large, understand that this statement is far removed from the results which are seen to this day in criminal trials, when mental disease is involved.

It is because I know that Dr. Jacoby has a large and cordial hearing in the medical profession that I regret both the attitude, which he assumes with reference to the legal aspects of this subject, as well as what he has written. I do not dwell upon the many other items, similar to the foregoing, in which I feel he is wrongly advised. In these respects the book is a dangerous one, not only because it evidences Dr. Jacoby's attitude when he enters the court as a medical expert, but also because his book gives to the medical profession a false impression of the law, and a wrong idea of the

[13] See Dr. W. B. Pillsbury's article "The New Developments in Psychology in the Past Quarter Century," appearing in Volume XXVI of the Philosophical Review for January 1917, at pp. 58 and 59.

province of the medical expert, of the judge, and of the jury, in criminal cases.

It is apparent that his book will lead his fellow practitioner, who has not equal education or experience as has the author, in mental diseases, to assume that he can pose as a medical expert in court upon these subjects, and that he can fit himself for this difficult and serious undertaking by reading the author's book. It will result therefrom (as has been the case frequently in the past) that when the queston of insanity is under consideration in a court of justice, there will be presented to the judge and jury the views, not only of the learned, but also of the tyros in medical knowledge,—all of them talking with the same assumption of infallibility, but not all of them talking alike. This is the principal reason for failure in the administration of justice in these cases. It is a cause of regret that, unintentionally perhaps, this book will aggravate the evil, rather than allay it. There is altogether too much in medical instruction and literature tending to make the medical witness critical of the ministers of justice.

The Supreme Court of Michigan felt compelled, in its opinion in *People* v. *Dickerson*,[14] to hold that some provisions of the Michigan statute of 1905, with reference to expert witnesses, were void, and its conclusion in that opinion contained the following:

> "We do not overlook the fact that the statute here considered was designed to correct an evil long recognized as tending to bring the administration of the criminal law into disrepute, in cases where insanity is urged as a defense, but we are of the opinion that the true remedy for this evil rests in the development of a livelier sense of responsibility to the public for the proper and decent administration of justice on the part of both the legal and the medical professions, rather than in revolutionary legislation. That both professions recognize and deplore the existence of the evil, there can be no doubt, and recent activities in both lend reason for hoping that the scandal which has often attended the introduction of expert testimony will, in the future, cease to be a reproach in the administration of criminal law."

Agreeing cordially with the views of the court in this respect, I commend the same to members of the medical profession who may read and be influenced by "The Unsound Mind and the Law."

CLARENCE A. LIGHTNER.

Detroit, Michigan.

[14] 164 Mich. 148 (1910).