

9-1950

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Recommended Citation

Gibbes, J. Heyward (1950) "The Relationship of Law and Medicine," *South Carolina Law Review*: Vol. 3 : Iss. 1 , Article 6.

Available at: <https://scholarcommons.sc.edu/sclr/vol3/iss1/6>

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THE RELATIONSHIP OF LAW AND MEDICINE

J. HEYWARD GIBBES*

In *The Republic* Plato undertakes, through deductive reasoning, to find a suitable definition of justice. He more or less readily succeeds in depicting the other cardinal virtues, temperance, courage, and wisdom; he finds justice more elusive, and it requires much thinking, with a trial and error method of dialogue technique, for him to come to the conclusion that "the division of labour has shown us the right way to the knowledge of justice—when each one has and does his rightful share, then will justice be realized". Plato's definition has, then, been summarized by the statement that justice prevails when each one attends to his own business.

As regards law and medicine, it might well be that the ends of justice would be better served if their paths did not cross, if their respective businesses were well done, and if they did not run the risk of obscuring justice through a merging of their spheres. This possibility remains, however, an ideal in that it can not be brought to reality in human affairs. The paths of law and medicine do cross, and it becomes important to see if this crossing is made in the interest of justice or otherwise.

Aristotle tells us that "he who sees things grow from their beginning will have the finest view of them". It may be, then, worthwhile if we can picture, in brief form, the evolution of medicine and law as we know them today.

LAW

The word law comes from the Anglo-Saxon *lagu* meaning "things lying in due place", hence, an orderly arrangement. As applied to human society, it is probable that the need for such rules of conduct was among the earliest felt when mankind found it advisable and expedient to band together in some form of social state. His natural instincts, to get and to beget, had to be curbed in the interests of the public good, while liberty of action for the individual was retained in maximum degree—just so long as such action did not encroach upon the rights of others.

This sounds simple enough, and it is likely that in early societies law was, in fact, relatively simple. It is supposed to have revolved around custom, the necessary restrictions being recognized by one and all, with no expert guidance needed.

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Everything points to the suggestion that over long periods of time what we now speak of as law, governmental mandates under which peoples live, was in large part synonymous with morals, and could be expressed in moral maxims. Wise men became the moralists, the formulators of moral precepts, and finally the collectors and custodians of rules of conduct that furthered the common interests. These they expressed in attractive affirmative statements of things that should be done in the interests of others. At the same time it was found that mankind was given to the doing of things that he should not do, and this led to the formulation of negative statements or prohibition of such conduct. We see both of these approaches to morals and law in the Ten Commandments: "honour thy father and thy mother; thou shalt not steal".

Things that have come down to us from Confucius indicate that his studies of the earliest Chinese records, imperfect because they were inscribed on bamboo sticks, showed them to consist mainly of chronicles and rules of conduct. These rules of conduct had come into existence through human experience, the good accepted and the bad rejected, and were made known to the general populace by word of mouth. In this sense, Confucius was one of the most attractive law-givers. The following is a sample of the high order of his injunctions.

"In your secret chamber even you are judged;
See you do nothing to blush for

Though but the ceiling looks down upon you."

The State as such apparently made few formal laws. Law was a matter of common knowledge, and each citizen was supposed to understand it.

As society became more complex, it required a more and more powerful government to control it. It became necessary for the state to make laws, to record them in permanent form and to take some steps to inform the citizens of them. The earliest of these so-called codes that has come down to us is that of Hammurabi, King of Babylonia, carved on a column of rock some eight feet high, and which lists the laws of the time. Even then the common citizen was supposed to be able to interpret them, for copies were set up in Babylon so that "anyone oppressed or injured, who had a tale of woe to tell, might come and stand before his image, that of a king of righteousness, and there read the priceless orders of the king, and from the written monument solve his problem". The professional lawyer had not yet appeared on the scene.

This simplicity could not last. States began to multiply in power and in number, and the will of the state had to be expressed and recorded in laws of ever increasing number and complexity. Pfeil says that "knowledge of the law became the privilege of a class", and, speaking of this course of events in English law, he says, "the courts, making law from the material presented for their consideration, demanded skillful pleaders — and in the course of a few generations a learned profession arose". Thus, we are brought to the completion of the picture as we know it today, of state-made laws and a legal profession to interpret them, and earning a livelihood from the procedure.

In this country our body of laws is supposed to have remained fairly static until the first third of the nineteenth century when agitation over slavery began to be reflected in laws governing that institution. Then came woman's rights and prohibition with all of the legal meshwork surrounding them. When it is realized that all of these matters were dealt with at both the national level and by all of the separate states of the Union one can appreciate that such simplicity as existed was succeeded by multiplicity and complexity, and that only a professional student of the law could be expected to understand and unravel them. Now that we have the social welfare legislation of the New Deal and Fair Deal eras, further complicated by bureaucratic rulings, and confused by courts that have turned philosophical and in part political, we must turn to lawyers with some degree of hope, and a little less confidence, that they might find their way through the mystic maze of it all.

Law, in the abstract, is an idealistic conception — a set of rules and regulations by which human society is ordered to the end that justice may be had by all. For this to be accomplished these rules should be simple, clear and understandable by people of average intelligence. We know that as of now this is not true. We find the judges of our highest courts, men who have spent a life-time studying law, differing in the interpretation of laws, and I am told that court decisions are no longer predictable on the basis of precedent and previous decisions. Thus, the ideal and the real have drifted apart, and the latter shows little evidence of striving toward the former. The average citizen, instead of being informed as to law, has become confused, somewhat amused, and decidedly cynical concerning it. He loses his amusement when he becomes enmeshed in its workings.

The legal profession has a record of public service and accomplishment that is outstanding. In all of our branches of government it

has played prominent parts. The close association of law and government places those who are trained in the law in favoured positions for rendering such service, and America owes a debt of gratitude to the legal profession in this connection. Many lawyers are men of high thinking and high character, cultivated in an intellectual sense, civic leaders and generally respected in their respective communities. It is when the rank and file of lawyers display themselves as partisans in litigation that the profession loses in public esteem and the law itself comes in for criticism. Smollet describes Commodore Trunion as "sweating with agony at the sight of an attorney", and it is more or less fashionable to pretend that we all do.

The layman sees much to suggest that the laws have been made by the lawyers for the lawyers, and that the complications of expression and intent contained in the laws afford occupation and profit for the lawyers. Then, he sees in the lawyer one who is striving to support a position, one who collects evidence *for* a preconceived idea, one who will welcome truth if it serve his purpose, and one who will hide the truth if it be to his interest to do so.

At its best, law becomes a definition of human rights, privileges, obligations and prohibitions; at its worse, it becomes a confusion of these same things.

MEDICINE

Medicine had its origin in mankind's desire to obtain relief from pain, to recover from illness and injury and to prolong his life. It is said that magic was the means through which he first sought such relief — and where else could he turn. His mental life was peopled with beneficent gods and evil demons, and his welfare depended upon the cultivation of the one and the appeasing or avoiding of the other.

As we have seen, the early law was of common knowledge. It was man-made, based on human experience, the conduct expected was clear and the penalties of misconduct plain. Not so with medicine. The gods were concerned in the matter, and specially qualified people were needed to propitiate them. These were found in the priests and medicine-men — in the beginning one and the same. The common origin of religion and medicine was simply an expression of early man's mystification concerning his coming forth, his going hence, and the misfortunes that came during his journey through life. The fact remains that he turned for medicine, as he did for religion, to a specialized group who thought for him and did for him as best they could.

The ways of medicine and religion soon parted. Religion became a corpus of beliefs, based on the assumption that the truth was known through revelation or otherwise, and enquiry became unnecessary or ill-advised. Medicine found that it did not know, and that its one hope of functioning well lay in the continued effort to find out. The necessary parting of the ways is nicely expressed by Gomperz who says, "when scientific doctrines are mixed up with religious tenets, the same lifeless dogmatism will commonly benumb them both". Medicine began to gather the crumbs from the table of science, enjoyed the taste, and forthwith set out to develop a science of its own.

There is no department of natural science that has not made its contribution to medicine, and the so-called social sciences have also come into the picture. Botany, zoology, biology, chemistry and physics, including nuclear physics, have laid the foundations of modern medicine, and medicine has developed special techniques in all of them as a means for investigating the structure and function of the human body. Many microscopic causes of disease, both animal and vegetable, have been identified, and their manner of operation determined. The body's reaction to such invasions have been studied, and these reactions have become identifiable as a means of recognizing the agents that cause them. Remedies for combatting such infections have made spectacular progress. When they are properly used, results are obtained in the clinic that are comparable to scientific procedures in the laboratory. It is conceivable that in this phase of medicine physicians might attain to the status of experts, capable of giving authoritative opinions in courts or elsewhere.

The study of the human mind and emotions is another story. Psychology has striven for scientific status. Introspective methods brought much real information, and it is probable that they laid a broad and substantial foundation of self-understanding through which some understanding of others could be had. Such methods were generally recognized, however, as being unscientific. They were not susceptible of experimental approach and they were not productive of irrefutable information. Behaviourism and experimental psychology appeared as objective attacks upon these problems, they made their contributions, and had their limitations recognized. Freud put his emphasis on the subconscious mind, initiating a movement that has not yet run its course. Investigations in this field have added somewhat to the understanding of the human mind, its evolution, its manner of working, and its hopes, desires and fears. Like other methods of approach it has left human psychology and psychiatry

in the realm of probability and has come no where near reducing them to certainty. It is in this field that the uncertainties of medicine lie. Mental and emotional reactions are component parts of all illnesses and injuries, and they differ in kind and degree with each individual concerned. An exact evaluation of them is many times impossible. On the other hand, emotional urges, expressive of the powerful influences of fear and love, may initiate disorders of bodily function that are of such degree as to simulate disorders that are caused by disease. And mental processes, rationalization of situations, giving rise to what we speak of as motives, may lead to forms of conduct and pretended disabilities that are difficult to distinguish from real ones. An appreciation of the limitations of knowledge in this sphere is as near to the truth concerning it as we can come today. Knowing that we do not know leaves us with a chance of finding out; thinking that we know when we do not is the surest way of not finding out. All too often it is here that law asks the aid of medicine, and it is here that medicine is frequently unprepared to speak with finality.

In summary, modern medicine has, in the past century, become in part an exact science. Certain aspects of it are as firmly established as are biology, chemistry and physics. A good deal of truth has been found; much more remains to be sought. James Bryce expressed the idea by saying: "The more we know, the more we find there is to know. And it is scarcely too much to say that our ignorance grows faster than our knowledge".

We come now to a consideration of the counterpart of the lawyer in his relation to the law, the doctor, who does what we call practice medicine. The idealism of medicine, as I have tried to briefly depict it, is such only in the abstract. When it is reduced to the concrete plane of utilitarian application through the efforts of the individual physician, the limitations of the mind and character of the doctor are reflected upon medicine itself. There are many genuine medical scientists who are practicing medicine; there are those who are earnest students of medicine; there are others who belong to the class of skilled artisans; while the largest group of practitioners are neither scientists nor students, are not too skilled in what they do, and yet who accomplish much in the practice of their art. Dr. Osler, not much given to cutting remarks, said that "it is astonishing with how little reading a doctor can practice medicine, but it is not astonishing how badly he may do it".

Medicine, in the abstract, is one of the most beautiful avenues through which one may seek the truth and approach to an under-

standing of man and his environment. It is a mental discipline of high order, rigid in its demands for diversified knowledge, accurate observation and logical thinking, productive of a high degree of satisfaction for those who come to it as scientists or students. But the practice of medicine immediately falls below the scientific level, whether the practitioner be scientist, student, or otherwise. For utilitarianism requires that this be true, sympathy for suffering interferes with objectivity of thought; wishful thinking obtrudes itself upon the scene; coincidences lead to misinterpretation between cause and effect; hope and fear tear us away from mental integrity; and adulation by patients is apt to destroy a becoming humility. The degree to which the doctor may become aware of and resistant to these satanic temptations will determine, in large part, his worthiness as a disciple of medicine as it stands today.

LAW AND MEDICINE

When we come to consider the contacts between law and medicine, we must realize that such contacts must be made chiefly through the lawyer on the one hand and the doctor on the other. We have seen that both of them necessarily fall below the level of the best that exists in their respective fields of knowledge, and we must be prepared to see such contacts produce results that leave neither law nor medicine altogether happy.

Efforts have been made at the educational level to make lawyers and doctors more or less familiar with the science and art of each other. Courses in medico-legal subjects have been taught in some medical schools for many years, and we now have an announcement of a law-science programme that has been instituted at Tulane. It is said that a former professor of legal medicine "will serve also as professor of law and professor of legal medicine in the College of Law and the School of Medicine, respectively, the two divisions in which the programme will operate at once". It is to be hoped that good may come out of it, but it may prove to be another "noble experiment". It smacks somewhat of an effort to mix oil and water, and it seems to me highly probable that such a programme might produce lawyers that are contaminated by medicine and doctors that are contaminated by law, for little more than a smattering of the one can be given to the other, and there is a risk, in all probability, that both law students and medical students may be drawn away from the straight lines of approach to their respective subjects.

At the educational level I should prefer to proceed with strict observance of methods of approach, lines of thought, traditional backgrounds, and aims ahead that are inherent, and basically differ-

ent, in the two professions of law and medicine. The lawyer-doctor and the doctor-lawyer might well prove to be an undesirable hybrid. Integrity of thought and conduct are the common grounds on which the lawyer and the doctor may meet, and our educational efforts should endeavour to engender these qualities in both. "If a noble disposition be planted in a young mind, it will engender a flower that will endure to the end, and that no rain will destroy, nor will it be withered by the drought". (Antiphon) Heraclitus observes that there is "one thing that worthy men choose in preference to all others — renown incorruptible". This is the sauce with which both medical and legal education should be served. They would then have common ground enough.

Efforts have also been made to enhance the value of medicine to law through the establishment of jurisdictional bodies on which medical men sit. This has found application in some of the states, especially in connection with insanity problems. Dr. E. H. Williams, in his book, *The Doctor in Court*, portrays some of these tribunals in action, and indicates that the plan has not worked too well.

It would seem that, as of now, contacts between law and medicine must continue to be made chiefly through the lawyer on the one hand and the doctor on the other. Where we have good lawyers and good doctors, such contacts may be good; where one of the two be bad, the contacts may or may not be good; where both are bad, the contacts can not be good.

Law asks of medicine questions dealing with mental competence, of the reality or unreality of illness, and of the degree of disability resulting from illness or injury. It must be readily apparent that dogmatic answers to such questions are often impossible.

We have seen that psychology and psychiatry are far from scientific exactitude, some of their appraisals may be genuinely exact, but all too often they are forced to conclusions that are based on assumption and probability. Thus, we still see in court "experts" on both sides of such questions.

The reality or unreality of illness is, at times, a difficult matter to determine. In most instances a skillful physician, with the aid of truly scientific procedures available to him, can arrive at a definite decision, so definite, now and then, that the decision is acceptable even to a biased lawyer or to the individual concerned in the decision. On the other hand, even problems of this kind may be so confusing as to leave honest doubt.

Questions concerning the existence and degree of disability following illness or injury present one of the most vexing problems that

confront the medical profession. They are vexing because they are nearly always difficult to unravel, they are vexing because the claimant's lawyer has, all too often, already arrived at his desired conclusion and is merely seeking evidence to support this conclusion, and they are vexing because the claimant is striving to establish a claim, not seeking relief in the medical sense. This maze of purpose and motive makes the truth a very elusive thing, indeed.

Compensation for illness or injury, or for disability following them, whether it be furnished by the government or insurance companies, immediately introduces the elements of suggestion and motive into the minds of sick or injured people, and certain groups of lawyers are supposed to enhance these tendencies. The compensating agencies have set the trap for themselves, and they struggle vainly when the trap springs. Suggestion may result, and often does, in true neuroses in the persons concerned, and they may genuinely think that they are more disabled than they really are, if we are to base our estimates on physical consideration alone. My feeling is that this group are really as disabled as they think they are, accepting Shakespeare's idea that "there is nothing either good or bad but thinking makes it so". Where conscious motive becomes the spur to claims for disability, we encounter a group who are exaggerators and pretenders, the so-called malingerers. They are very real, I can assure you, and in most instances can be recognized with complete satisfaction, as judged by medical standards alone. This recognition depends upon shades of differences in the mental, emotional and physical reactions between the neurotic and the pretender, and these differences may be far from clear to the medically inexperienced lawyer, judge and jury. It is here that truth is seldom present and almost never prevails.

The doctor in court is seldom happy, and is most often quite ineffective. He knows that he is on one side of a question that is neither all black nor all white on either side, that efforts will be made sooner or later to embarrass him, and that he must watch his step if he is not to be discredited either as a physician or as a witness. He realizes that "in every matter can the speaker's art awaken conflict by a double tongue", and that he is certain to be attacked by someone who has been trained to the double tongue. If, however, the doctor in court be not in fact a partisan, if he be wise enough to state only what he knows, and if he be modest enough to say when he does not know, he is well protected against attacks of opposing lawyers. If he be alert, he may become the tormentor instead of the tormentee.

The ineffectiveness of honest medical testimony in court is sometimes quite disconcerting to the physician. This grief over the blindness of justice is, however, generally reserved to the young, conscientious physician who has not had time for life, in general, and the law, in particular, to polish off some of his idealism. He will not mind it so much later.

I recall my first appearance on the witness stand. It was in the Federal Court in Columbia with Judge H. A. M. Smith presiding. I had examined a young man who was claiming that an abdominal hernia, which was plainly evident, had been caused by the sudden stopping of a train that had thrown him against a wash-basin in the smoking compartment. My examination indicated that the hernia was of long standing, as judged by the wasting of the tissues around it, much too long to be accounted for by a recent accident. I pointed this out clearly on direct testimony. Then came the double tongued lawyer on the other side who made me admit, not too reluctantly, that his client was a malingerer. I was cocked and primed, fresh from text books that defined malingering and that gave detailed methods for detecting the malingerer. I was fairly launched in this discourse, giving, as I thought, interesting and instructive information to the court and the jury, when the judge unceremoniously interrupted me with the statement that the court had no time for a lesson in medicine. I had been prepared to battle with the lawyer; I was devoid of ammunition for the judge. I left the court somewhat puzzled and a little bit mad. When I read in the morning paper that the jury had awarded damages to the plaintiff, a sense of injustice was added to my reactions.

Yes, the paths of law and medicine must cross. The very nature of things requires that such crossing must prove unsatisfactory for both. Ostensibly, they are both seeking the truth, and, even if the search were real, the thing sought is elusive enough. Dr. Osler tells us that "in seeking absolute truth we aim at the unattainable, and must be contented with broken portions". In reality, one side or both, in legal contests, are frequently engaged in obscuring the truth, and, under such conditions, even broken fragments are not recovered.

The hope of bettering the contacts between law and medicine must rest on methods for making better lawyers and better doctors, better in the sense of being better informed and better intentioned. Knowledge must be tintured with wisdom, and these two must travel in the company of good characters. When we have a breed of lawyers and doctors who are "honest in the dark and virtuous without a witness", law and medicine may meet in court, happy and unashamed, ready to restore some vision to a traditionally blind subject.