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## Editorials

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## EDITORIALS

### THE LOEB-LEOPOLD CASE AGAIN

*To the Editor:*

I wish to offer some comments on the views expressed on the Loeb-Leopold Case, in the editorials and the symposium printed in the November, 1924, number of the JOURNAL.

1. In the editorial entitled "To Abolish Partisanship of Expert Witnesses, etc.," it appears that the writer bases his opinion that partisanship was present on the use of certain diminutives by the defense psychiatrists. He makes out that it was the "cue of the defense" to do this. One would have to submit, if the writer of that article really has evidence that the defense lawyers instructed the defense psychiatrists to use these diminutive terms, but in the absence of such evidence, it is my opinion that the defense psychiatrists used these terms for quite another purpose than the one imputed to them. My personal knowledge of these men makes me feel that they would not be swayed in the choice of words by the defense attorneys if they did not consider that the situation itself indicated the use of diminutives in the way in which they used them. It is my opinion, in other words, that they used these diminutives quite independently of any desire that the defense attorneys may have had, as they were the proper words for the situation—and I do not mean that the situation demanding the use of these diminutives was the effect to be had upon the mind of the judge as imputed by the writer in his words, "to impress this character on the judge." It is useless to state the situation I have reference to as it is too subtle a thing for comprehension by one who has to be told. It is one of those things not gotten unless felt.

On the other hand, we can agree with Mr. Wigmore that there is a more ideal way to introduce the psychiatric expert and that he has suggested this more ideal way, namely, that said expert be used as a friend of the court. We can heartily agree with the last paragraph in this article; but the practical situation exists that courts, in general, are not empowered to pay adequately for such service.

Another important point, that seems to have been missed by the eminent writer, is that partisanship would not be avoided necessarily by the method suggested by him, because that method would not remove the partisanship which exists within the ranks of the profession itself. In this very case under discussion, with the same psychiatrists

as friends of the court, it is very probable that the same opinions would have been expressed because one group is of the "old school" and the other group is of the "new school." (I cannot explain on any basis of chance how the defense should have picked one school and the prosecution the other.) What I mean, in other words, is that one of the groups of psychiatrists employed in this trial has been satisfied with things as they are, while the other group has been pressing forward, utilizing the new advances in the modern sciences of psychology and of endocrinology, pioneering if you will. Does not the pioneer always seem rather rough shod to the man of culture? Which group is which in this trial, I will leave to the judgment of the average reader. But allow me to state that the feeling between the two groups is so strong that last June a few of those who have been interested in keeping up with the times split off from the parent organization and formed a new organization which is destined to make its mark in the field of criminology as the parent organization has done in the field of nervous and mental diseases.

2. This matter of partisanship applies also to the next article by Dr. Gault, who says that "partisan psychiatrists . . . split doubtful hairs, etc." His point is one of morale, but his remarks about "war-time morale" show a profound lack of understanding of the facts. The facts are that no amount of morale in war-time or peace-time will control a criminal, and that no amount of morale designed to "rivet (the attention of people) upon the act of disapproval" will ever prevent crime or adequately care for the criminal, whether by punishment or otherwise.

3. To continue this line of thought, this time applying our remarks to the letter from Judge Robert J. Wilkin, we may agree that from any viewpoint we can look at the criminal "with aversion," but not "with contempt." We can have a "deep distrust," but not a "feeling of loathing." We cannot from every standpoint "abhor him who is untrustworthy." There is a standpoint from which we can pity an untrustworthy person and treat him as sick. Such an attitude is not one of "undeserved sympathy and maudlin sentiment."

In the long run, and when worked out to its logical conclusions, it is much more cold and intellectual than the present "criminal law which seems to be tottering." No good thing ever "totters"—the present criminal law contains within itself the seeds of its own "tottering."

It appears to be a general law that the old gives way to the new—not that the old has not been useful, but that it has outworn its usefulness. The same is true of old methods in psychiatry and in the ad-

ministration of criminal justice. Neither of these diets recognizes a certain fact of supreme importance that is pressing for recognition, and that fact is that there is such a thing really and practically as defective emotionality, just as there is such a thing really and practically as defective intelligence. Failure to recognize such an important practical point is one of the seeds that is causing the tottering so lamented by the learned cultured.

One of the psychiatrists of Leopold says: "His emotional nature in its development is on an immature, childish level." This is trying to say in words that will be understood by all that this boy is emotionally defective. (Unfortunately, for fear of confusion, we do not permit ourselves to say "emotional idiot" or "emotional imbecile" or "emotional moron," because the terms idiot, imbecile and moron have been used for so long to denote defects and defectives in intelligence.) I have come to the same conclusions in an article published recently in the *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY*, in which I stated that the chief defect in the criminal appears to be in the field of emotions and of the attitudes.

Moreover, the physical basis for these emotional defects seems to be in a defective, nervous and glandular (endocrine) system. The examination of Leopold states that there are "definite signs of instability of the nervous system: a neurotic make-up," and proceeds to enumerate what these signs are. What lawyer, untrained and unlearned in biology, can hope to comprehend such matters? What psychiatrist, who has not kept up with the times in his own field, can expect to understand such advances in his field? And so, running true to form, we find one of the psychiatrists for the prosecution stating that he finds no evidence of mental disease in answer to a hypothetical question which stated facts that would lead anyone who is keeping up with the times to wonder how such an unstable person can avoid being mentally unbalanced. There was enough in that hypothetical question to make the learned doctor feel that he may have missed something in his examination if he had any feeling in the matter at all.

Loeb states, "There was nothing inside me to stop me," and he is found to have "marked signs of some nervous instabilities." No truer introspection was ever written, and it states the fact. The insane person who "pleads not guilty" to the "charge" of insanity made necessary by an archaic law is stating just as true an introspection, because it is a fact that no insane person is ever "guilty" of being insane any more than he is "guilty" of being sick with a fever. Similar archaic (this time ecclesiastical) law burned witches who pleaded "not guilty";

and they were not guilty. Our learned legal brethren are in the same erroneous position with regard to the "punishment" of the "criminal" that their equally learned confreres of past times were in with regard to witches and still are, in some states of the United States, with regard to insanity or mental diseases.

4. We are fortunate in having a few of the legal profession on our side. One of these gentlemen speaks of the case as an "hereditary catastrophe." We can agree with this sentiment, though we cannot expect a non-biologically trained person to get the whole story. Environment played its part, too, in the lives of these two boys. We can also excuse the remarks about dementia præcox.

However, we are all glad that the same brother of the legal fraternity has called attention to the inconsistency between the prosecutor's attitude and the findings of said prosecutor's own crime commission. There seems to have been room in the Illinois law to allow the admission of the testimony that showed these boys to be emotional defectives.

5. Our next writer, Mr. Cummings, is clever and diplomatic at one and the same time. He states that "the line of reasoning and investigation adopted by the experts would overthrow our entire system of administering justice." It is difficult to know whether he wishes to defend our "entire system of administering justice," or whether he wants to point out its weaknesses. If the latter, no one needs to emphasize its failure, both as treatment of crime and the criminal and as prevention. At present "justice" merely punishes. In the first place, the point of view is mediæval and, in the second place, it is not founded on good theory. By good theory I mean theory that will stand the test of time and hard use.

This gentleman brings up the point that "whether crime is always an evidence of disease and should be treated instead of punished, is an interesting speculation!" Of course, this is the biological point of view, and it must be particularly annoying to some to have such views so clearly expressed by one of the legal profession, even for the purpose of criticizing them.

6. Finally, let us turn, in the symposium, to the opinion of Dean Wigmore, who is clear as ever and forceful enough to arouse opposition. Let us consider the deterrence theory, which he rightly terms the "kingpin of the criminal law." We will not attack this theory from the usual angle, that it "fails to deter." I want to attack it on the ground that deterrence itself is bad "in the long run" because it does not *cure*, because it only represses, and because it dams back and causes

to fester in the body politic. It is good surgery to empty pus, and it is good social surgery to bring things to light. Old methods have almost always forced to cover! Following this view, it is good to take the lid off. It may be a nasty mess at first, just as opening a great pus pocket is a nasty mess. But the time is about ripe to perform some good social surgery, undoing and setting right the poor social surgery done by our non-biologically trained brethren, the legal profession, who, after all, have been dealing with a biological problem for which they are untrained and in which they are unlearned.

The sooner we perform such an operation, the sooner shall we find out who is socially unfit—who should be locked up (perhaps for life; at least until he is cured; not for three to five years)—whom we should quit breeding with.

Of course this is Determinism (with a capital "D," as our good friend spells it). But the psychiatrist, who is the determinist, is going to do much more for "social self-defense" than the "measures of the modern penal law" now do. It is a false statement, whether a psychiatrist made it or not, that "we try to help criminals to get through the situation!" What psychiatrists are trained to do is to prevent "weeds" ever growing in our "garden" as well as to keep weeds out of your garden after you find them there. It never asks that the "most dangerous criminals should be given indulgence." True, it asks that they be treated humanely, but it asks that they be treated as sick men, and that means that they should be locked up under psychiatric care and treatment "until they are well." The result would be that most of them would stay for life—there would be very little more of this three to five year business, which is just as silly as to send a case of typhoid fever to the hospital for three weeks whether he gets well or not.

And which would be the greater deterrent to crime, say, you learned gentlemen, if this kind of treatment should become generally known as the accepted modern treatment for the criminal—to be locked up until he is well?

H. I. GOSLINE, M. D.,  
(Director and Chief Psychiatrist of the Dallas Child  
Guidance Clinic, 3500 Gaston Ave., Dallas, Tex.)  
January 15, 1925.

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#### COMMENTS ON DR. GOSLINE'S COMMENTS

Since one of the few compensations for the editorial burdens is the privilege of having the last word in print, we are going to claim

that privilege here, for the purpose of clarifying the issue. If we can find out in a few words just where lies the opposition of views, the way to progress is clearer.

But, first, two incidental matters.

1. In the editorial article referred to by Dr. Gosline, we said that "the deterrence theory is the kingpin of the criminal law." We have recently had a striking confirmation of this assertion. A federal judge of long experience has just written to us, after reading the above-cited editorial, and his letter (which he permits us to quote) gives the following illustration:

"Perhaps you will be interested in an incident from my experience as a judge. When I went on the bench about a dozen years ago, there were many cases of stealing by postal employees. It was assuming the proportions of a real menace. All the culprits were of good reputation, having for the most part gone in through the Civil Service, most of them were rather young, and nearly all had dependents, either wives and families or elderly parents. I tried to distinguish between them, and sent some to prison and some not. I finally concluded that this was punishing the defendants who were voiceless or friendless, and that really all the cases were so similar that there ought not to be such a distinction between them. I therefore announced that after a certain date all sworn employees of the post office who stole would be sent to prison. It took some little determination to stick to this in the individual cases which were presented, but I did so. And it took some time, perhaps two or three years, for the new status to become generally understood in the department. I was told by one of the post office inspectors several years ago that the practice *had cut down such stealing six-sevenths*, and an assistant United States attorney told me more recently that it had *cut it down nine-tenths*. The sentences are not severe, one year and one day, which commutes to about four months; but there is no escape from it, except death. The saying in the department is, I am told, that a man who steals 'sentences himself.'"

2. Another confirmation of the editorial must here be quoted. The editorial said: "The reports of the psychiatrists called for the defense, if given the influence which the defense asked, *would tend to undermine the whole penal law.*" Well, in the last number of the *Harvard Law Review* I find a review of the recent book, by those eminent psychiatrists of the new school, Messrs. Hoag and Williams, entitled "Crime, Abnormal Minds, and the Law." The reviewer comments thus: "Legally, the somewhat astounding doctrine is proposed

that society has accomplished absolutely nothing by its criminal laws up to the present time, and that hereafter all set punishments, with the exception of psychiatric examination and prescription, should be abolished." Chapter XIX of that treatise seems to bear this out. So that the editorial interpretation of the tendency of the new school is confirmed.

Now for Dr. Gosline's comments. The "kingpin" of them is that he attacks the deterrence theory, "not from the usual angle, viz., that it fails to deter, but on the ground that deterrence itself is bad in the long run *because it does not cure, but only represses.*" That is the ultimate issue, the Cure theory versus the Deterrence theory. Now, the Cure ideal is a lofty and attractive one. But the following propositions may be offered as to its purport:

Proposition 1: *The Cure theory is a misnomer*, because its own advocates don't profess usually that the thing is, after all, curable. Dr. Gosline himself, in a later paragraph, repudiating the charge that the theory of the new-school psychiatrists asks "indulgence for the most dangerous criminals," says: "It asks that they should be . . . locked up under psychiatric treatment and care until they are well; the result would be that *most of them would stay for life!*" This must mean that they are incurable. Then why palter with a Cure theory, which becomes a mere pretense? Moreover, if they are to be locked up for life, what is the practical difference between an indeterminate sentence for life on the Deterrence theory and the same sentence on the Cure theory? It is all reduced to a difference of theory.

Proposition 2: *The Cure theory abandons the whole basis of our moral system.* Dr. Gosline reproaches Judge Wilkin for using the words "contempt" and "loathing" to express our attitude toward the criminal; he will only permit the words "aversion" and "distrust," because the criminal should be looked on just as we look on a "sick man." Well, if you ever find a group of citizens standing around the bedside of the victim of an arsenic poisoner with the arrested poisoner in the room, and the citizens thinking of the poisoner and his victim in just the same emotional terms, as being "sick," and the citizens reacting to the two men in precisely the same pulsations, you will know that Morality has gone to the bow-wows, and that that community has passed into a state of drab, cool, materialistic unmorality which would make Life a chill, scientific graveyard and laboratory combined. Let the sociologists speculate as much as they will on the primitive origin and evolution of the Moral Conscience. The great fact remains that it IS. Long thousands of unimaginable eons will elapse before Hu-

manity will ever grow away from it. In that interval, the mass of humans in every civilized community will *not* identify *moral wrongdoing* with *physical sickness*. All the psychiatrists in the world may, with their sphygmamometers and their scalpels, ignore the difference, if they please. But they will only be ignoring a fact. And the only result will be to cause a little local unrest and disorder among easy victims of superficial thinking, until the monstrous fallacy of their theory is fully perceived. Forgetting the Criminal Law entirely for the moment, then, let us remember that the new school of psychiatrists are asking us to abandon Morality itself.

Proposition 3: *The Cure theory thinks only of the specific person who has done a crime, and ignores the mass who have not yet done it.* The Deterrence theory aims at the outside mass, and thinks less of the case in hand. This difference was dwelt on in the editorial referred to. The two objectives are more or less irreconcilable, yet they ought to be both held in view. The point now is that the Cure theory offers nothing to help to the second objective.

Proposition 4: *The Cure theory, taken as the sole basis for criminal procedure, is suicidal.* Let us suppose that all the judges in the State are embodied in Dr. Gosline, and let us suppose that all the bad men in the State are embodied in one thug, who is breaking into Dr. Gosline's house with intent to rob and quite readily to kill if convenient. Dr. Gosline has never had contact with this thug before now; for the thug has never happened to be caught. But here he is, face to face. What is Dr. Gosline going to do about it now? "Let me cure you, my sick fellow"? Why, before our worthy doctor has a chance to utter the sentence, the thug will fill him fatally with lead. Thus the curer will never have the chance to perform his cure. Cure the sick men? Yes, if you can get all of them under control in time. But if the machinery of the criminal law is all to be scrapped because it is misguided, and is to be replaced by hospitals, then what becomes of the Cure theory if the other thugs burn down the hospitals and kill the doctors before the cure is performed?

The Cure theory is suicidal, if it means the abandonment of the present machinery of the Deterrence theory. If, however, it be restricted to a subordinate place, within the present machinery, operating in the very limited and feasible field of, say, juvenile offenses, until it can demonstrate its right to a safe and gradual enlargement, then it is hypothetically supportable. But not otherwise.

JOHN H. WIGMORE.