

Fall 1928

Medicolegal Proposals of the American Psychiatric Association

Karl A. Menninger

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Karl A. Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 *Am. Inst. Crim. L. & Criminology* 367 (1928-1929)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

MEDICOLEGAL PROPOSALS OF THE AMERICAN PSYCHIATRIC ASSOCIATION

KARL A. MENNINGER, M. D.¹

In introducing the proposals which the American Psychiatric Association has within the past 90 days officially stamped with its approval, I want to read first an article which recently appeared in a popular magazine, by Dr. A. L. Jacoby, who was director of the psychopathic clinic, Recorders' Court, Detroit, Michigan, and whose recent death has been a very great loss to psychiatry and also to criminal practice. Dr. Jacoby's article, which is in a popular vein, begins with this:

An attorney came to the office of the Psychopathic Clinic of the Recorder's Court, Detroit, and the following conversation ensued:

"Doctor, you examined John Smith, who is charged with Robbery Armed." "Yes, I did."

"Well, I just saw the report of your examination in the court files. From that report I conclude that Smith is not right mentally."

Upon consulting the clinic record of the case, the doctor said, "Yes, that's right. Smith showed upon examination, the results of his long continued use of alcohol, together with strong neurotic tendencies. These neurotic tendencies have manifested themselves most frequently when he is in trouble. He has had on occasions in the past paralysis, attacks of blindness, and innumerable bodily pains, all of hysterical type, and each series of symptoms occurring when he is in difficulty with the law."

"Exactly, now what I want you to do, doctor, is to testify in court for my client. With all those things wrong with him, nervously and mentally, he certainly is not responsible for this robbery, and I want to get him off."

"Well, you have picked a very dangerous man to get off. His record shows that he is forty-five years old and has been in court eight times before this for stealing offenses, and that he has never worked at a legitimate occupation for longer than three months period at a time, and that he has been involved in a lot of unsavory occupations such as bootlegging, gambling and pandering, so that you see he is not entirely a harmless person when at large."

"I know that, but I don't care anything about that. It has nothing to do with the legal question. This court has to determine whether he is guilty of the offense of robbery of this particular grocery store, and it doesn't make any difference what he has done before that. Now if he is mentally sick and not responsible he can't be found guilty of that robbery."

¹The Menninger Clinic, Topeka, Kan.; Professor of Criminology and of Mental Hygiene, Washburn College.

There then ensued a long discussion concerning the questions of his responsibility, sanity, and criminal intent. The doctor informed the attorney that he could not testify that Smith was insane and irresponsible, because the examinations and study of his case has shown that, while Smith was deviated from the average individual in his behavior and in his reactions, his deviation was of the kind which was very dangerous to the social weal, and that the best disposition of his case would be a long period of institutional quarantine.

The attorney said that the psychiatrist's function in court is that of giving an opinion as to whether the accused could recognize the difference between right and wrong, and as to whether he was capable of forming a criminal intent at the time of the commission of the crime. He was much disgruntled when he was told that the psychiatrist cannot determine sharp lines of demarcation between responsibility and irresponsibility, or between sanity and insanity because these questions are questions of arbitrary legal definition, just as arbitrary and unscientific as the legal definitions of felony and misdemeanor.

This attorney was, of course, eager to secure an acquittal for his client, no matter what the cost might be to the community, and the so-called "insanity dodge" seemed to offer an excellent aid for him. However, the psychiatrist was not in any way interested in securing either a conviction or an acquittal. He was eager to study the personality of the offender, to ascertain the underlying causes for the criminal behavior, and in attempting to outline the treatment which offered the most promise of preventing further criminal behavior on the part of Mr. Smith. The psychiatrist had studied the case, and had concluded that in view of Smith's long anti-social and criminal record the best treatment to prevent further crime on his part was quarantine in a prison.

The so-called "battle of experts" of which we have heard so much recently, and which has been charged against the experts, is not a "battle of experts" primarily, but is only a part of the gladiatorial contest between attorneys on questions of highly irrelevant and arbitrary legal definitions. Two perfectly honest, sincere, highly trained psychiatrists may each examine the case of John Smith, and come to the same diagnosis of his case, namely, a mild degree of alcoholic deterioration with hysterical manifestations. One of these honest experts may perfectly honestly testify that John Smith is insane, and therefore, irresponsible for this particular robbery, because he has a mental disorder, and, therefore, not normal or sane. The other expert, equally honest, equally sincere, and with the same understanding of Smith's diagnosis, may testify that John Smith is sane and responsible, because, although he has a disordered mind, the disorder is not of the nature or amount to excuse him on the basis of the arbitrary legal right and wrong test. These two experts would appear then to take widely divergent views of John Smith's mental state, when as a matter of fact they are totally in accord as to the diagnosis of the case, and in total accord as to the best treatment for the case, with the view of preventing further crime on his part. So long as attorneys and the legal machinery are more interested in matters of legal definition, than in the protection of the community against crime, such spectacles will be with us.

This conscientious nature of the modern criminal trial is the underlying cause, in the overwhelming majority of cases, of disagreement between experts. The scientist is primarily interested in causes and effects. With reference to delinquency, he is interested in the causes of the delinquency, and in treating those causes so the delinquency may be removed. He is not primarily interested in attaching labels of "sanity" or "insanity" or of "responsibility" or of "irresponsibility" to the offender. However, he is often dragged into the position of doing just that by the very nature of our criminal trials.

I read this as illustrative in rather vivid language of the state of dissatisfaction which the psychiatrists have had towards the medico-legal situation, in particular the misunderstanding which the public and perhaps a small part of the legal profession has of them.

The legal method of criminal procedure was, of course, developed upon historic rather than scientific principles, representing crystallizations of custom and tradition with respect to the control of social life rather than scientifically evolved conclusions. Medical science developed precisely the same way. Until a few hundred years ago the physician did what the books said had been done centuries before that. For over a thousand years the same method of treating a disease was used because the old fathers, like Hippocrates, Galen and Paracelsus, had said that was the way to do it; consequently any physician who departed from that method of treating a patient was regarded as unorthodox and a Philistine. About 150 years ago, however, the scientific method began to be applied to the matter of human sickness. And I do not need to dilate upon the progress of medical science, but they followed the trial and error method, the collection of data and the comparisons of hypotheses indicated by that data in the development of antitoxins, anesthetics, thyroxin, 606, and so on. All this pertains to the handling of one kind of human problem, namely, physical disease.

For another kind of human problem, namely crime, the logical inference is that a similar change in method from the historical to the scientific might be expected to yield equally gratifying results. It may be objected at once, by some, that crime is not analogous to disease. What one's organs may do may be a medical problem, they will say, but what one's arms and legs may do, insofar as they touch the rest of society, is a legal problem. Why the liver and heart should be confined to the doctors and not the arms and legs is not clear. Conduct and behavior have not been regarded until very recently as governed by scientific laws. Yet it is upon precisely such an assumption that modern psychiatry is based and is develop-

ing an increasingly wide sphere of action. Beginning with modest research in the obscurity of "asylums," for those most ill-behaved of all mortals, the "insane," psychiatry has emerged from those dark and dismal lands, the back yards of medical science, with certain very definite proposals as to the nature of the laws governing human behavior. The psychiatrists regard the human individual as striving for the comfortable and efficient adaptation of animal body and instincts to the complex requirements of social life. The principles of abnormal psychology, learned in the silent observation of asylum patients, have been found applicable to the minor queernesses of ostensibly normal citizens. The same rules of behavior governing the very queer people called "crazy" were found to apply to the somewhat queer people called nervous, or oversuspicious, or malicious, or just "ornery."

Hence, psychiatrists no longer regard themselves as keepers of the "insane," or students of the end states of mental deterioration, but as physicians studying and ministering to warped personalities of all types. Some of these warps are only subjectively painful; other types are such as to determine behavior which constantly brings them into conflict with society. These are the "insane" and the "criminal."

Long ago legal prescriptions specified that anti-social behavior which seemed to yield immediate profit or advantage to the participator should be called *crime* and should be followed by officially inflicted revenge called punishment. The idea was advanced that this revenge would do some good, in that it would frighten this participator and other potential criminals from repeating the offense. Huge statistics have been amassed to show that this does not follow. Yet many people continue steadfastly to believe it, and vigorously worded assertions of its truth may be read in almost any newspaper, every day. Some may criticize it for being too severe, others for not being severe enough; still others insist that it is severe but not certain enough. But all of these unscientific and very opinionated authorities are agreed that if human ingenuity can only devise sufficiently fearful retributions for the offenders, the offenses will cease.

The idea that back of such behavior there should exist a complex of physical, chemical and psychological springs which are infinitely more painful than any such blundering "punishment," never occurs to these sentimentalists. The idea that a person may commit a crime without having the slightest conscious idea of why he does it, or with an entirely erroneous idea of why he does it, never occurs

to them. The fact the syphilis of the brain of a paretic criminal is more likely to be cured by "606" than by 10 years in prison never occurs to them. The fact that a woman with the mind of an eight-year-old girl cannot adapt herself to the social demands of society without assistance is never considered, either by the hard-boiled gentlemen who want to cure prostitution by life imprisonment or by the other type of sentimentalists who want to save their souls by rescue missions. These people attack the problem with their emotions—hard or soft—rather than with their intellects.

The scientists have made a start in the attack on the crime problem. Here and there over the country, medical laboratories have been established in association with criminal courts and prisons. Physical, chemical, X-ray and psychological examinations are made of the human material which comes in with the symptoms of social failure. Careful histories are taken; careful social investigations are made. The cases are handled in precisely the same way that a medical case would be handled in a modern hospital. An attempt is made to understand the physical, social and psychological factors contributing to the diseased personality which cannot properly adjust itself in life.

What advantage, you will say, have these clinics over present methods? What advantage, in a word, have these scientists over the judge in a case, or over a lawyer who is honestly considering the pros and cons of his client charged with a crime? Wherein can the task of the legal profession in administering this great social problem be made lighter by the assistance of physicians.

Well, the physicians, particularly psychiatrists, that particular branch of medicine which has to do with the abnormalities of behavior, intelligence and emotion, possess a great many advantages which I think you will concede. For one, they use the scientific rather than the historic method of procedure and hence have no prejudices or at least fewer prejudices. Take, for example, the matter of rape. We do not have the slightest idea, for example, whether the standard treatment of the rapist, does any good or not. We do not know whether 5, 10 or 20 years of life imprisonment cures any rapist. The scientific method would be to consider and study several thousand cases of rape treated by one method and several thousand cases of rape treated by another method, and make an effort to determine the factors responsible for this type of behavior break, and to suggest, on the basis of principles derived from other experiments, the best way to eliminate that cause. It would then apply this method of

attack on a selected group of rapists and compare the results achieved with the results found to have been achieved by the conventional and established 5-10-20-year imprisonment treatment.

The second advantage which the scientists have is their trained attitude of objectivity, *i. e.*, their utter detachment from sympathy with or against the offender. This is precisely the opposite of the position of the advocate or the prosecutor. The physician proceeds without predilections of either sympathy or vengeance, punishment or indulgence. Many who talk bitterly against scientists and advocate hard-boiled punitive measures, are unaware of the fact that it is nothing other than sentiment which dictates their hard-boiled attitude. The scientists have neither praise nor blame, neither criticisms nor laudations, in their attitude. They approach the problems as a surgeon approaches an abdominal operation, without pleasure or pain, without fear or pity, without hate or love. It is simply a problem to be solved on its merits.

Thirdly, the physician has immensely profited by his recent experience in the diagnosis and treatment of psychopathological manifestations and anti-social conduct not yet criminal. This relates again to the rapid advance of psychiatry since the World War, and since the important contributions of Freud, Prince, Jelliffe and White, Southard, and many others.

In the fourth place, the scientists frankly avow the aim of protecting society rather than of achieving justice. It is often claimed that the psychiatrist is more interested in the individuals than in society; this is only true in private practice, and not always then. The psychiatrist has to consider both sides of the problem, but from the standpoint of assisting society and in reducing the menace of crime, psychiatrists aim only at the ideal of protecting society from individuals incapable of living safely within it. The fact that the psychiatrist is not in the least interested in justice, and perhaps even doubts its existence, might lead us to much philosophical and metaphysical discussion. The fact is that doctors never talk about the justice of a medical case; the hospital is never concerned with whether or not the treatment of a case is just treatment, but only whether it is expedient or beneficial. Similarly, scientists engaged in advising with respect to criminals would be not at all concerned with whether or not what they advised was just.

Finally, psychiatrists have this great advantage over laymen, including the lawyers, and most of the non-psychiatrically trained physicians, that they recognize crime to be a *symptom* rather than a *dis-*

ease. Once upon a time all fever was treated alike because it was regarded as a disease. Now we recognize that there are many kinds of fevers to be treated in many different ways. Similarly, the time will come when stealing or murder will be thought of as a symptom, indicating the presence of a disease, a personality disease, if you will, which may be any one of a dozen different sorts, and requiring any one of a dozen or score of different treatments.

But instead of functioning to aid the legal profession in this great social problem, the psychiatrists find themselves forced into positions of partisan representation, such as indicated by the article I read at the opening, as expert witnesses on one side or the other of trials in which their chief function is not the promotion of social weal, not the assistance of the processes of law, but the classifying of occasional spectacular cases as belonging on one side or the other of a hypothetical line of so-called "sanity." Misunderstanding, ridicule and condemnation has naturally followed.

Dissatisfied then with this state of affairs, the American Psychiatric Association, in its annual convention three years ago, appointed a committee to study the problem and formulate a statement of the position and recommendations of this association. These have been put in printed forms and I will distribute them as I read some of the sections to you.

The committee felt that the problem assigned them was not merely one of what we as psychiatrists should recommend to the lawmakers in regard to bills regulating expert testimony, but was one of reinterpreting to society the function and the objectives of the psychiatrist, particularly insofar as these concern the type of behavior which is technically and popularly regarded as criminal. The committee felt that it was exceedingly important to divert the attention of the public from the relatively minor issue of *alienistics* to the major issue of *psychiatrics*; that is to say, to the study of mental disease and its manifestations and its treatment. The report continues:

In the practical application of psychiatry to problems of criminal law, the prevalent concepts of tradition and long usage conflict sharply with psychiatric attitudes. Popular theories of retribution and established methods of dealing with offenders almost entirely prevented a scientific envisagement of crime until recently when psychiatrists, in spite of their original limitation of field, discovered and demonstrated that types and trends of abnormal psychology extended far out from the asylum into the court room, school and home. Psychiatric experience and technique were found equally applicable to the irascible employee, the retarded school

child, the persistent stealer, the compulsive drinker, the paranoid murderer, and textbook cases of epilepsy, melancholia and schizophrenia. Faced with the legal partitions of misbehavior into "insane" and "criminal," psychiatrists found themselves with no technical interest in nor agreement with these partitions, but with a driving concern in all the unpropitious trends of human character, with all acts, thoughts, emotions, instincts and adaptations, either socially or individually adverse. Some of these constitute committable "insanity," some of them do not; but all of them are psychiatric problems.

Behavior disorders classed as crime, therefore, interest the psychiatrist scientifically. He recognizes the administration of criminal justice to be a social problem entrusted to the legal profession and desires to aid that profession in the most intelligent and effective performance of what is perhaps the most difficult of all social duties. Granted a position of neutrality and objectivity rather than a forced partisanship which misrepresents and embarrasses him, he may inform the court as to the scientific findings in a specific case, and advise relative to its best ultimate disposition.

The psychiatrist cannot, however, make affirmations or denials with respect to metaphysical or legal matters concerning which he does not have scientific information. This includes the matter of "responsibility" which is so often raised. This probably means the capacity to change one's conduct in response to the direction of certain painful associations and the legal notion implies a power of volitional reasoning with respect to a contemplated act and the capacity to withhold from that act when and because it is known to be considered wrong legally and morally. Of course this is not the sense in which the public understands it or uses it. In the latter case it is merely an echo, the crystallization of primitive reactions known as talion law. There was a time when even inanimate objects were commonly held to this kind of accountability. If a man tripped over a chair and injured himself, it was "responsible" and must be punished by being broken or burned. Until comparatively recent times animals were held responsible for injuries they committed. But ultimately inanimate things and animals came to be exempted from the ritual of responsibility, and slowly but progressively children, idiots and finally most of the "insane" were likewise exempted. Various curious tests then had to be decided upon to determine the "responsibility" of persons suspected of "insanity" (i. e., of an "irresponsible insanity"). Once they were compared in appearance and conduct with wild beasts, later with the mentality of a 14-year-old child. This was actually the criterion of "responsibility" in use in courts not so many years ago. Current even today in many states is the slightly less hoary "right and wrong" test, persisting in spite of common knowledge that people are actuated by various compulsions to do things they themselves regard as wrong in the most shameful sense. Psychiatrists realize that the capacity to feel remorse or to fear consequences does not imply power to control conduct.

The psychiatrist then is disqualified both by reason of his training and experience and by reason of his point of view from testifying with reference to the individual responsibility of an offender for his acts. There is

furthermore good legal reason why no psychiatrist should be asked such a question, or the question as to whether a man knows right from wrong. The psychiatrist is a witness, not a judge or jury. These are questions that a jury must answer, on the evidence before them, which ought to include the evidence of psychiatrists, as to the facts which their examination of the defendant has revealed to them, and as to their opinion, if any, on the question, "Is he mentally capable of knowing that his act was forbidden and punishable?" If not capable, obviously, the jury will find no responsibility, but as the law is, the decision of responsibility, hence of capability, rests with the jury and for a lawyer to ask a psychiatrist to decide responsibility should give him the right to decline to answer.

With reference to punishment the difference in attitude between informed psychiatrists and that crystallized in contemporary legislation and case law may be briefly expressed as follows:

It cannot be seriously denied that fear plays an important rôle in deterring most persons from the commission of legally prohibited acts. It is the contention of psychiatry, however, that the motive of fear is not the only motive of conduct, lawful or unlawful. In accordance with this view, therefore, a rational program for the administration of criminal justice must recognize other means of coping with anti-social conduct than the simple appeal to the fear emotion. As long as the law confined itself to a reliance upon fear as the principal deterrent force, there was not much need of psychiatry. With the increasing recognition of the complex mental factors which enter into the commission or failure to commit a certain act, however, psychiatry and psychiatrists must necessarily be drawn into a rational administration of justice; and this is true not always in those cases in which a definite mental disorder, be it disease or defect, is present, but in the general run of cases. For only by recognition of the motives behind criminal conduct can the treatment prescribed by the judge be intelligently calculated to protect society and rehabilitate the criminal, if possible, at the same time. Moreover only through the aid of trained psychiatrists, assisted by psychologists and sociologists, can those forward-looking reforms in the administration of criminal justice such as probation, the indeterminate sentence, or parole, be effectively administered.

In a word, individualization is necessary on the part of the court and other institutions dealing with the offenders, and rational individualization must rest on a recognition of those mental and social factors involved in the criminal situation which make each crime and each criminal an unique event. The psychiatrist seeks for the subject of his study, not retributive action, but diagnosis and scientific attempt at therapy, plus the protection of society. This, in a sense, is an "inhuman" attitude in that it is a departure from the instinctive mechanism that rules most of humanity; the clamor for vengeance is more "human." But treatment may sometimes be as painful as the sacrifice prescribed by the legal ritual. Opening a boil or setting a fracture may be painful, and the psychiatrist, too, may prescribe painful treatment, but it is never retributive punishment, and never a program basing its efficacy on the fallacy that fear is the sole determinant of human behavior.

I pass over a summary of the theoretical position of psychiatry which is listed there in nine paragraphs and read the practical recommendations which the committee made to the association. The committee recommended that the American Psychiatric Association should advocate the following:

(1) Types of legislation such as the recent Massachusetts enactment and the expert testimony bill of the American Institute for Criminal Law which put the psychiatrist in a position of counselling the legal authorities as to the disposal of social offenders, implying the development of the necessary machinery (clinics, court psychiatrists, etc.).

(2) The following proposals of The American Institute for Criminal Law and Criminology with respect to trial procedure:

(a) "That the disposition and treatment (including punishment) of all misdemeanants and felons, i. e., the sentence imposed be based upon a study of the individual offender by properly qualified and impartial experts cooperating with the courts."

(b) "That no maximum term be set to any sentence."

(3) The court appointment from a qualified list, of the psychiatrists testifying in regard to the mental status, mechanisms or capabilities of a prisoner, with opportunity for thorough psychiatric examination using such aids as psychiatrists customarily use in practice, clinics, hospitals, etc., with obligatory written reports and remuneration from public funds.

(4) The elimination of the use of the hypothetical question and the terms "insane" and "insanity," and "lunacy," and the exemption of the psychiatrist from the necessity of pronouncing upon concepts of religious and legal tradition in which he has no authority or experience, such as "responsibility," "punishment," and "justice."

(5) The permanent legal detention of the incurably inadequate, incompetent, and anti-social offenders irrespective of the particular offense committed, and the development of the assets of this permanently custodial group to the point of maximum usefulness within the prison milieu, industrializing those amenable to supervised employment, and applying their legitimate earnings to the reimbursement of the state for their care and maintenance, to the support of their dependent relatives, and to the reimbursement of the persons injured by their criminal activities.

(6) The release of prisoners upon parole or discharge only after complete and competent psychiatric examination with findings favorable for successful rehabilitation, to which end the desirability of resident psychiatrists in all penal institutions is obvious. (Practically identical with another of the proposals of the American Institute.)

(7) The codification of the commitment laws of the various states. "Insanity" has come to mean nothing but certifiability, i. e., the social desirability of enforced hospitalization. It seems quite unnecessary to have a score of different methods for determining the basis of this step.

(8) The teaching of courses in criminology in both law schools and

medical schools by persons trained in both criminal law and criminal psychiatry.

Respectfully submitted,

HERMAN ADLER, M. D., Chicago.
L. VERNON BRIGGS, M. D., Boston.
BERNARD GLUECK, M. D., New York.
WILLIAM HEALY, M. D., Boston.
RAYMOND F. C. KIEB, M. D., Ossining.
LAWSON G. LOWREY, M. D., New York.
WINFRED OVERHOLSER, M. D., Boston.
FRANKWOOD E. WILLIAMS, M. D., New York.
WILLIAM A. WHITE, M. D., Washington, *Vice-Chairman*.
KARL A. MENNINGER, M. D., Topeka, *Chairman*.

We have no illusions as to the finality or perfectness of this report. We appreciate the opportunity of presenting it to this organization, not only because we crave and pray your comments and criticisms and help in making it better, but also because we regard it as somewhat significant that the legal and medical professions at this particularly important contact point are making this much of a getting-together to talk over a thing which in the past has been a matter of misunderstanding and acrimony, a problem which has puzzled many thoughtful men in both professions, and one which even today has reached no very satisfactory solution. Aside from the legislation in Massachusetts no state has accomplished very much toward making the situation any more what the lawyers desire or what the psychiatrists desire. Probably they both desire the same thing. Certainly they both have the same ultimate objective, namely, the furtherance of the social weal. And psychiatrists feel that this particular program, from our point of view at least, has something to commend it. We are perfectly aware that this must be a dynamic document and not something to be filed away like the Magna Charta. The revisions that are to be made must come from people who are expert in the provinces which it touches. We have eliminated some things that members of the legal profession thought unconstitutional. We have inserted several others that they have suggested. We hope for more of these suggestions and criticisms and we appreciate this opportunity to invite them.