Introduction

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This book presents new research on the history of legal medicine from the early seventeenth century to the 1960s. It ranges widely in subject matter, from abortion and infanticide to medico-legal education and the politics of the coronership, while its geographical scope extends from colonial Maryland and Enlightenment Germany to *Belle Epoque* Paris and twentieth-century England. However, this book is not just a sampler of current historical work on legal medicine. It is intended to form a coherent historiographical intervention in a field which has long been studied largely in isolation from social, political, and even legal history.

Much existing historical work on legal medicine lacks a sufficiently strong sense of the ways in which particular historical settings have affected the development of medico-legal knowledge and practice. For want of adequate contextualization, scientific and technical advances have usually been understood in self-referential terms.[1] At the same time, historians' view of not only the history of criminal justice but also, for example, the history of women and the family, of local government, and of health and safety at work has been limited by lack of awareness of their medico-legal aspects.[2] Our aim in this book is to show what the history of legal medicine stands to gain from new approaches to the social history of law and medicine, and to explore some of the ways in which medico-legal history can enrich our understanding of history in general. *Legal Medicine in History* is thus not so much a history *of* legal medicine as a set of studies of the place of legal medicine *in* the social, legal, administrative and political histories of societies in which it has been practised.

The terms of reference in this field present a problem which we do not pretend to have 'solved'. Rather, the terminological difficulties which have beset all attempts to define the field of medico-legal knowledge and practice are themselves revealing, for they reflect its great historical variety and contingency. As part of their ongoing struggle to achieve greater professional recognition, medico-legal practitioners have repeatedly sought to

define more precisely their sphere of competence, and to standardize the usage of the various terms used to denote their areas of knowledge and expertise. Much ink has been spilt over what William J. Curran has called 'The confusion of titles in the medico-legal field' (1975),[3] but as the medico-legal bibliographer Jaroslav Nemec observed in 1973, 'All efforts ... to define the scope or even agree upon the name of our subject have been in vain'.[4] The problem is not one of semantics, but of the different ways in which the field of medico-legal relations has been conceived and organized in different jurisdictions and at different times. In many countries, legal medicine was long regarded not as a specialty but as part of the professional duties of every medical practitioner, while as several of the papers in this volume illustrate, what is now usually termed 'legal' or 'forensic' medicine has at various times and places included not only what we know as clinical forensic medicine and forensic pathology, but also elements of medical law and ethics, 'medical police', public health and poor-law medicine. With the growth of medical and scientific specialization during the past 150 years, much of what formerly belonged to legal medicine has gradually been hived off to form separate disciplines or specialties, but the definition of 'legal medicine' still retains a considerable degree of ambiguity.

In this book, 'legal' or 'forensic' medicine is taken to be the application of medical knowledge in the broadest sense to help solve legal problems or satisfy legal requirements. This definition is intended to include: (1) all manner of clinical and post-mortem investigations carried out by surgeons, apothecaries, midwives and physicians on the instructions of legal officers or tribunals; (2) all kinds of medical evidence presented to investigating magistrates, coroners' courts, and civil, criminal or ecclesiastical tribunals, whether in the form of written reports or as oral testimony; and (3) the provision of medical certificates and testimonials for legal or quasi-judicial purposes, including those of penal administration. Medical matters which were merely the *subject* of legal proceedings – such as disputes over fees, medical ethics or alleged malpractice – have been excluded, with the partial exception of abortion, which features in these pages as the subject of both medical testimony and legal argument. Like all definitions in this hybrid field, this one is somewhat arbitrary, but it provides a basis on which to distinguish a set of institutionally and professionally organized medico-legal relations from all the more-or-less accidental encounters between law and medicine in the past.

With a few exceptions, notably Stanford Emerson Chaillé's 'Origins and progress of medical jurisprudence, 1776–1876' (1876/1949) and Erwin Ackerknecht's 'Early history of legal medicine' (1950–1), the Anglo-American historiography of legal medicine remained slight up to 1960.[5] During the 1960s and 1970s, growth of interest among practitioners was

reflected in a number of brief general outlines of the history of legal medicine intended primarily for medical audiences.[6] The fruits of more serious historical research also began to appear in such works as J. D. J. Havard's *The Detection of Secret Homicide* (1960), Nigel Walker's *Crime and Insanity in England* (1968, 1973) and the historical bibliographies of R. P. Brittain (1962, 1970) and Jaroslav Nemec (1969, 1973).[7] But with the notable exception of the history of forensic psychiatry, the history of legal medicine still remained largely in the hands of senior or retired medico-legal practitioners and crime journalists, and, as Brittain and Myers observed in 1968, much of what passed for 'research' in the subject in fact consisted of the reproduction of anecdotal materials and unverified hypotheses gleaned third- or fourth-hand from a few, usually unacknowledged, 'classic' sources.[8] The rapid growth of scholarship in medical history from the early 1970s onwards left the history of legal medicine largely untouched, while the upsurge of interest in the social history of crime and criminal justice during the same period was not at first matched by any corresponding growth of interest in the history of medico-legal practice.

In the late 1970s this picture began to change, partly due to Thomas Forbes's numerous empirical studies of causes of death and early instances of medical testimony recorded in London and Middlesex coroner's inquests and the Old Bailey Sessions Papers.[9] Forbes did not advance any new interpretations of the historical development of English legal medicine, but the richness of his source materials undoubtedly helped to stimulate interest in the subject. In 'Crowner's Quest' (1978) and *Surgeons at the Bailey* (1985), Forbes showed that there was a considerable amount of medico-legal practice in London during the eighteenth and early nineteenth centuries.[10] But as Forbes himself pointed out, despite his forays into the pre-1750 era, little was known about the nature or extent of English medico-legal practice in the early modern period. This was in marked contrast to the wealth of information on medico-legal doctrine and practice in Renaissance and Enlightenment Germany presented by Esther Fischer-Homberger in her 1983 monograph, *Medizin vor Gericht*.[11]

During the past decade, however, social historians of medicine have begun to exploit legal records for the glimpses they provide of the activities of medical practitioners in the sixteenth, seventeenth and eighteenth centuries, and some of these investigations have yielded important evidence of early medico-legal practice in England. All three of the papers in the first part of this book implicitly call into question the longstanding assumption of England's relative 'backwardness' in legal medicine by comparison with continental Europe in the early modern period. Helen Brock and Catherine Crawford's study of seventeenth-century Maryland – a small, isolated community with no medical institutions and only basic legal ones – shows

that even in a frontier society it was not unusual for medical practitioners to provide expert testimony in cases of suspected abortion, infanticide, homicide and suicide, and to carry out medico-legal dissections as early as the 1640s. This evidence from a remote English colony suggests that medico-legal practice was probably far more common in England itself during this period than has generally been assumed, an expectation which is supported by David Harley's study of medico-legal practice in Lancashire and Cheshire between 1660 and 1760. Drawing on a wide range of sources, including the records of both civil and ecclesiastical courts, Harley shows surgeons, midwives, apothecaries and physicians carrying out a variety of medico-legal tasks, ranging from the provision of medical certificates and testimonials to the post-mortem examination of the victims of suspected poisoning. Both these papers highlight the leading role played by midwives as experts on sexual and obstetrical questions, not only in cases of suspected infanticide, abortion and rape, but also in legal proceedings brought to determine the paternity of bastard children and impose maintenance orders on illegitimate fathers.[12]

The first three papers in this volume also suggest a need to reappraise the role of the coronership in early English forensic medicine. Medico-legal practitioners and historians have long enjoyed something of a love–hate relationship with the coronership and the inquest. As the traditional centrepiece of the Anglo–American medico-legal investigative system, the coronership has inspired a grudging affection on the part of even its fiercest critics on account of its sheer antiquity and the many bizarre features of its history.[13] Yet at the same time it has generally been seen as one of the main obstacles to the achievement of an efficient and 'rational' system of medico-legal investigation, and thus as one of the chief causes of the alleged backwardness of Anglo–American forensic medicine.[14] This overriding concern with the functional efficiency of the coronership as a system of medico-legal investigation has arguably resulted in a narrow and distorted view of its past, and has led practitioners and historians to underestimate the constructive role which it may have played in the development of medico-legal practice in the early modern period. In the nineteenth century, coroners were frequently denounced by medical writers for their reluctance to employ medical witnesses to carry out post-mortems or present medical evidence at inquests. But as Brock and Crawford's, Harley's and Jackson's papers all suggest, in the seventeenth and eighteenth centuries some – perhaps a good deal – of the demand for more medical evidence at inquests came from coroners themselves rather than medical practitioners. Moreover, Brock and Crawford show that in some Maryland inquests where the coroner does not appear to have summoned any medical assistance, the inquest juries included men who can be identified as surgeons,

whom the coroner very likely chose because of their medical knowledge and experience. This suggests that we may need to reassess the role of the coroner and his jury in the development of medico-legal practice in the early modern period. Although the English criminal trial jury has been the focus of considerable historical research,[15] the coroner's jury has received much less attention. However, Michael Macdonald's work on suicide in seventeenth- and eighteenth-century England ascribes a key role to coroner's juries in the apparent 'secularization of suicide' during this period indicated by the massive decline of *felo de se* verdicts in favour of findings of accidental death, death by act of God, or blameless self-destruction while of unsound mind.[16] In this case a major secular shift in attitudes was translated into concrete forms of social practice via the deliberations and decisions of coroner's juries, who thus appear as important mediators between public opinion and legal practice in the early modern period.

A comparable shift in attitudes and practices is documented in Mark Jackson's study of infanticide investigations in the north of England during the seventeenth and eighteenth centuries. Jackson shows how statute law, judicial opinion, pre-trial practice and public opinion interacted to produce two distinct phases in the medical evidence of infanticide between 1624 and 1803. He demonstrates widespread familiarity with the special presumption of childmurder enacted by the statute of 1624, and an equally widespread and growing dissatisfaction with its severity, which eventually led to the statutory presumption being discreetly set aside not only by juries but by magistrates and judges. By the 1760s, legal authorities at all levels were setting aside the statute and prosecuting infanticide according to the common-law standards of proof that were applied to most other crimes. This shift from statute back to common law was reflected in, among other things, more frequent recourse to medical testimony and a growing interest in tests of live-birth (especially floating the infant's lungs), as opposed to the previous emphasis on indications of still-birth, such as signs of foetal immaturity. The validity of the hydrostatic lung test became the subject of debate both inside and outside the courtroom, and the technical sources of medical uncertainty were given considerable publicity. As will become apparent from Mary Wessling's paper later in this book, similar concerns played a part in the intensification of research on the lung test in Württemberg towards the end of the eighteenth century. Humanitarian sentiment appears to have been profoundly implicated in the legal and scientific history of infanticide evidence and, arguably, in the growth of forensic medicine generally in both England and continental Europe at this time.

While all three of these papers substantially modify our picture of Anglo–American 'backwardness' in matters medico-legal in the early modern period, it nevertheless remains the case that medico-legal

scholarship was remarkably slow to develop in England by comparison with Italy, France and Germany.[17] Indeed, it is largely the contrast between the steady production of continental treatises on legal medicine from the seventeenth century onwards and the relative paucity of English contributions before the nineteenth century which has led historians to assume that there was little medico-legal practice to be discovered in early modern England. But while several commentators have suggested that the English legal system must have retarded the growth of medico-legal science in England, they have tended merely to cite the differences between 'inquisitorial' and 'accusatorial' legal systems without exploring their respective effects on the development of legal medicine.[18] Catherine Crawford's comparative study of the place of medical expertise in continental Roman-canon and Anglo–American common-law systems during the early modern period argues that the differing methods and standards of proof that characterized the two systems had important implications for legal medicine. Not only the legal status of medical experts, but the ways in which medical expertise was obtained and incorporated into legal proceedings, strongly encouraged the development of medico-legal science in Roman-canon jurisdictions. In particular, the absence of juries, the obligation to record all proceedings in writing, and the need to justify decisions by reference to authority led to the creation of an extensive literature on legal proof of which forensic medicine formed an integral part. Moreover, the German procedure of officially consulting university professors in difficult legal cases stimulated the production of scholarly commentaries on medico-legal problems by virtually commissioning them. In the English case, Crawford argues, it was not so much the coroner system as common-law trial by jury and common-sense standards of legal proof which militated against a formally privileged position for medical expertise and against the development of scholarship on questions of medico-legal proof.

Mary Wessling's study of the medical evidence of infanticide in eighteenth-century Württemberg exemplifies many aspects of this analysis of continental procedures, while recalling some of the themes of Mark Jackson's paper. In Württemberg, too, the infanticide question focused attention on forensic medicine generally in the later eighteenth century and greatly stimulated medical interest in the problems associated with physical evidence of live-birth. Wessling shows how the Enlightenment drive to minimize the use of torture in criminal proceedings generally and in infanticide trials in particular, in the interests of a more rational and humane administration of justice, increased the pressure on medical evidence to provide the courts with certainty. Under this pressure, existing standards of medical knowledge and inference in the conduct of post-

mortem examinations of infants and in the preparation of initial medical reports were increasingly found wanting. In a series of cases tried in the 1770s, physicians at the University in Tübingen made detailed technical criticisms of hydrostatic lung tests for the duchy's high court, which they backed up by experimental and pathological investigations intended to identify potential sources of error and suggest more reliable alternatives to the test. Wessling suggests that it was their involvement in these cases and the increasingly critical role of the physical evidence that led the Tübingen medical faculty to extend its teaching of legal medicine and to produce a series of influential monographs on the medical evidence of infanticide.

As in England, so in Württemberg, a major force behind the growth of medico-legal knowledge at this time seems to have been a widespread opposition to the death penalty for infanticide. This opposition found its way into criminal proceedings in quite different ways in each jurisdiction, but had remarkably similar effects in stimulating the growth of forensic medicine in each case. Jackson's and Wessling's papers suggest that one role of forensic medicine at this time was to provide systems of criminal justice with greater flexibility by effectively enlarging the scope for judicial discretion and providing opportunities for more humane attitudes to punishment to affect legal practice. In seventeenth- and eighteenth-century England, one way of evading the rigours of the infanticide statute was by what Hoffer and Hull have called 'benefit of linen'.[19] Evidence that clothes had been prepared for an infant came to be accepted as proof that its mother had not intended to kill or conceal it; this exempted the case from the 1624 statute and allowed the woman to be tried according to ordinary common-law rules. In France, flexibility in the direction of leniency could be achieved by adjourning an infanticide trial 'for further enquiry' and releasing the accused while the 'enquiry' was fictitiously and endlessly conducted.[20] By such means, in both adversarial and inquisitorial systems, the rigidity of the law could be informally softened in cases where it seemed unduly harsh. We suggest that medical evidence, too, could be useful in this way. In England, medical testimony could contradict the 1624 statutory presumption in particular cases, while in Württemberg, expert scrutiny of the medical evidence could produce the hint of doubt that justified refusing to authorize torture in order to complete the proof of a capital crime.

The law against infanticide was not the only criminal statute thought to be too harsh in eighteenth-century England. The 'pious perjury' whereby juries deliberately undervalued stolen goods to bring thefts below the statutory threshold of felony was an accepted method of adapting the law to fit contemporary notions of reasonableness.[21] Another was the gradual extension to all and sundry of benefit of clergy, the medieval privilege exempting clergymen from capital punishment by secular courts.[22] Viewed

in this context, forensic medicine offered additional opportunities for tempering justice with humanity, by means that were more congenial to Enlightenment and Benthamite thinking than white lies and institutionalized evasions. The potential of medical evidence to introduce *doubt* as well as clarity into legal proceedings may well have enhanced its judicial role in an era when certain capital statutes and the use of torture were becoming increasingly unacceptable to public opinion.[23] This is not to say that late eighteenth-century medical witnesses were necessarily predisposed towards leniency, nor to impute disingenuousness to other trial participants, but to suggest that medical evidence had a historical significance which may or may not have been apparent at the time.

Enlightened reformers of the late eighteenth and early nineteenth centuries such as Johann Peter Frank saw forensic medicine and its complement medical police as having important roles to play in public health work and in the administration of the civil law.[24] These ideas were especially influential in Scotland, where the growth of legal medicine throughout the nineteenth century faithfully reflected the philanthropic ideas of the Whig–Liberal reformers who first introduced it from the Continent around 1800.[25] Brenda White's paper shows how, in less than forty years after Andrew Duncan, Sr, began teaching the subject in 1792, medical jurisprudence in Scotland advanced from being considered an obscure and politically controversial subject of doubtful relevance to achieving the status of an integral part of Scottish medical education. The Scottish system of teaching forensic medicine and medical police together arguably made Scottish doctors more aware than their English-trained counterparts of the broader socio-legal and moral implications of their practice. The fact that the two subjects were taught jointly helped give legal medicine a higher profile in Scotland than in England, and it prepared Scottish medical graduates to play an active part in public health administration as well as in medico-legal practice generally. In conjunction with the Scottish pattern of police and public health reform, this led to the emergence in Scotland of the distinctive figure of the 'medical policeman', who combined the offices of burgh police surgeon and medical officer of health.

In England, too, the early nineteenth century saw a rapid expansion of medico-legal education. But there was never any English equivalent to the Scottish system of teaching forensic medicine together with medical police, and whereas in Scotland medical jurisprudence gradually built up a solid institutional presence in the university legal and medical faculties, in England it never gained more than a precarious foothold in the teaching hospitals and university medical schools. There were no English teaching posts in forensic medicine as prestigious as the regius professorships at

Glasgow and Edinburgh, and legal medicine never achieved the same importance in English as it did in Scottish medical education.[26] Nor did English medico-legal practice succeed in developing the intimate working relationship with everyday legal and medical practice that it came to have in Scotland.[27] During the twentieth century, English medico-legal practitioners have made a number of attempts to enhance the academic status of their subject and create a strong institutional focus for the development of medico-legal expertise. But none of these efforts have been very successful, and even today, English forensic medicine does not enjoy the professional standing or moral authority of its Scottish counterpart.

Much of the history of legal medicine has been written in terms of the gradual emergence and increasing recognition of medico-legal expertise, usually identified with forensic-pathological and toxicological expertise and interpreted very much in the light of present-day assumptions about what constitutes expert knowledge and who possesses it.[28] Historically, though, medico-legal expertise has been anything but a fixed quantity. The meaning of such expertise has varied enormously from one historical setting and period to another, and as several of the papers in this collection show, the history of legal medicine features a more numerous and varied cast of experts – including midwives, surgeons, apothecaries, general practitioners, prison medical officers and police surgeons – than does current medico-legal practice. The sources of expertise and the qualifications required for the performance of various medico-legal functions have also varied widely, and have seldom been the subject of universal agreement at any given time.

Throughout the history of legal medicine, expert status has regularly been contested by different occupational groups and specialties. In her 1977 essay 'Hebammen und Hymen' (Midwives and the hymen), Esther Fischer-Homberger has shown how during the sixteenth, seventeenth and eighteenth centuries, scientific opinion on the hymen varied with the relative status and competing medico-legal interests of medical men and midwives. In the sixteenth century, medical men denied the existence of the hymen in an attempt to discredit midwives as medico-legal authorities on the question of virginity. But during the seventeenth century medical men again became curious about the hymen, and in the eighteenth century they decided that it did exist and was indeed an indication of virginity, thus belatedly acknowledging the validity of midwives' traditional knowledge. But by this time the authority of medical men on such matters was firmly entrenched.[29] This example serves to introduce a theme which will be met with more than once in the remainder of this book, namely the close reciprocal relationship between medico-legal expertise and its objects of knowledge and practice. Expertise is not entirely relative, but its multiple

historical meanings can only be grasped if expertise itself is made the object of historical enquiry, rather than being treated as an absolute standard by which to judge the shortcomings and achievements of the past.

Of all the various medico-legal specialties, forensic psychiatry is the one where medical authority has met with most resistance. Two papers in our section on 'Special offenders' are case studies of the ways in which psychiatric expertise established its authority in the courtroom. Joel Eigen's paper on medical evidence in criminal trials involving the insanity defence during the half-century before the McNaughtan Rules (1843) shows how medical men persuaded Old Bailey judges and jurors to accept counter-intuitive and psychologically complex views of criminal insanity. By examining the transcripts of many obscure trials involving the insanity defence, Eigen shows how esoteric psychiatric concepts such as partial insanity first gained acceptance in the criminal courtroom. During the eighteenth century, the 'facts' of insanity were the common property of laymen and doctors alike, for they consisted of overt behavioural phenomena, such as incoherent conversation, indicative of total loss of reason. However, from about 1800, medical men with special experience of insanity began to challenge the lay view that sanity, and hence criminal responsibility, could be inferred unproblematically from behaviour. Armed with new psychological concepts such as 'lesion of the will', they claimed that certain forms of mental abnormality were imperceptible to laymen and that sustained professional contact with the mad made it possible for medical experts to detect insanity in persons whose conduct appeared entirely rational. In his analysis of five cases in which attempts were made to enlarge the conceptual scope of the insanity defence, Eigen shows how mad-doctors sought to persuade judges and jurors of the validity of these novel insights.

Eigen's study also provides a corrective to a theme which has dominated nearly all previous work on the history of forensic psychiatry – that of *conflict* between the law and medicine over the definition of insanity.[30] He suggests that, at least in this period, there was active *collaboration* between law and medicine in this area, based on a conjunction of interests. The late eighteenth and early nineteenth centuries saw the decisive development both of defence advocacy in English criminal trials and of psychiatry as a medical specialty.[31] In Eigen's cases we see defence lawyers, mad-doctors and judges effectively colluding to facilitate the introduction of new medical-psychological concepts into English legal practice. This contrasts with the more familiar story of long-sustained conflict between the law and medicine over the framing and application of the insanity defence. The McNaughtan Rules, formulated after the controversial trial of Daniel McNaughtan in 1843, set out precise legal criteria for deciding on the criminal responsibility of mentally abnormal offenders.[32] The Rules have