

**THE CRIMINAL RESPONSIBILITY OF  
LUNATICS; A STUDY IN COMPARATIVE  
LAW, THESIS APPROVED FOR THE  
DEGREE OF DOCTOR OF LAWS IN THE  
UNIVERSITY OF LONDON**

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The criminal responsibility of lunatics; a study in comparative law, thesis approved for the degree of doctor of laws in the University of London by Heinrich Oppenheimer

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**HEINRICH OPPENHEIMER**

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## PREFACE

THE feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavours have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found. Discouraged by such experiences, others have thought it well-nigh impossible to bridge over the gulf which in their opinion must ever separate the two hostile camps; they think that the visual angle from which the two professions look at the problem is too different to allow of a solution acceptable to both. I do not share this pessimistic view, nor the policy of the *laissez faire* which is its logical outcome. If all attempts hitherto made to bring the dispute to a peaceful ending have failed, and were doomed to failure from the very outset, the reason is not far to seek. Almost all the writers who have approached the investigation in a conciliatory spirit, have sought success by forsaking the claims of their own professional brethren and blindly recognising the opponents' claims; and surely deserters do not make good peace-makers. Yet in no other way could these writers hope to reach their goal. For how is the lawyer to distinguish between fact and hypothesis in the literature of psychological medicine? In no other branch of medical science

are there such vast tracts of *terra incognita*; and all of them the alienist fills with theories useful enough for his own purposes, but of no value to the practical criminologist to whom facts alone can serve as material to work upon. Even Sir James Stephen went astray here; for, accepting as gospel every word Dr. Maudsley has written upon the subject, he tried to insinuate into our rules of law the purely speculative opinions of that distinguished writer quite as much as the established facts of mental medicine which he had imbibed from the same source. On the other hand, the leaning, which some physicians have expressed, towards the views held by lawyers has too often been of a purely platonic character, unattended by any real insight into the legal principles embodied in such views, or inspired by a tendency to flirt with the doctrines of the anthropological school. How few of those medical writers, who express themselves satisfied with the existing rules, have a fair idea of what even that elementary notion 'criminal responsibility' really means! Messrs. Pitt-Lewis, Smith, and Hawke have chosen what naturally suggests itself as the most obvious means of escape from this difficulty, viz. co-operation of lawyer and physician. But their work strikes the reader as a mere juxtaposition of the opinions of the two classes of collaborators, followed by an attempt at compromise by mutual concessions. Though a truce may possibly be brought about in this way, deep and lasting peace will, I am afraid, not be concluded until a master mind, thoroughly familiar with both aspects of the question, brings to bear upon it the searchlight of criticism. Meanwhile, the author, though fully alive to his shortcomings, has in the following pages undertaken the task of applying what little legal knowledge he combines with a limited psychiatric experience, to a critical study of the problem.

As regards the method of inquiry, an investigation from the standpoint of comparative jurisprudence appeared to hold out the best prospects. The material with which the legislator has to deal, is exactly the same in different countries; it can obviously not be material to the penal liability of a madman whether he claims to be 'The Saviour,' 'Le Sauveur,' 'Il Redentore,' or 'Der Heiland.' And though allowance has to be made for differences, in different legal systems, in the conception of crime itself, yet the spirit of the law is so much alike in states of Western European civilisation that the study of the provisions of foreign systems cannot fail, one should think, to supply with valuable hints both the critic and the would-be reformer of our own. The student of the foreign literature on the subject cannot push very far his researches before being struck by the very remarkable fact that in almost every country the same antagonism exists between law and medicine as that with which we are familiar in our own. What is here proclaimed by the medical profession as the royal road to salvation, is condemned with no uncertain voice by their colleagues in those states where that very postulate is realised in legislation, so that one feels tempted to ask with old Horace how it comes about--

"ut nemo, quam sibi sortem  
Sen ratio dederit, sen fors objecerit, illa  
Contentus vivat? laudet diversa sequentes?"

The puzzle will find its solution as we proceed with a detailed analysis of the methods, adopted in different codes, of regulating the liability of the insane accused of crime.

The author knows only too well that his feeble powers will hardly enable him to do anything like justice to the subject upon the investigation of which he has embarked, and he cordially invites criticism. To one fault, however, he trusts



he need not plead guilty, viz. to the charge of having been carried away, in any part of this book, by either a medical or a legal bias.

In conclusion, the author gladly avails himself of this opportunity to express his gratitude for their kindness and courtesy in placing at his disposal those codes which were not accessible in any of the London libraries to their Excellencies the Ministers of Bolivia, Colombia, Guatemala, and Roumania; Count Mutsu of the Japanese Embassy; Mil. R. Vesnitch, Envoy Extraordinary of Servia in Paris; and the Peruvian Minister in Paris; as well as to Monsieur Berg, Juge d'Instruction in Luxembourg, and to Monsieur Ernest Eisenmann, Avocat in Paris.

5, ESSEX COURT, TEMPLE,  
*December, 1908.*

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