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INSANITY AS A DEFENSE TO CRIME: WITH ESPECIAL
REFERENCE TO THE THAW CASE.

FREDERICK W. GRIFFIN.¹

The notorious Thaw case has now, for upward of two years, abused the public ear, outraged the public decency and cost thousands upon thousands out of the public funds. It has grown excessively fatiguing and, certainly, any attempts to revive a flagging interest in it ought to be visited with general disapproval. But we are assured, and rightly assured, by Judge Pryor in the public prints, that there is, to borrow the phrase of the weather bureau, "No relief in sight"; since Thaw, at any time he may see fit, can renew his application for freedom and rehearse the whole tedious detail over again, repeating his attempt until he is successful or death comes to his or our relief. This being so, he will, perhaps, succeed, for the people's patience will break down finally under insistent clamor; and that will be yielded to importunity which to justice has been denied. In this posture of affairs, a well-meant effort to chase away this nightmare—to suggest such changes in our practice and our laws as will save us from the same interminable consequences in future similar cases—ought to be considered as standing on a different footing from that on which rests a proposal to rehash the case itself and should be entitled to a more respectful reception.

In almost every jurisdiction, the law relating to insanity as a defense to crime will be found, I believe, to be in a more or less confused condition; in general, not susceptible of being expressed in terms of scientific precision, and losing itself, at critical points, in meaningless or vague phrases. The principal causes of this unsatisfactory state of the law can be, I think, briefly indicated.

I.

Our first inquiry is, by what right does society deal with crime at all? It cannot be denied, I presume, that, as a matter of historical fact, every system of punishment, every code of pains and penalties, has been produced by two agencies, to a certain extent irreconcilable with each other. The first is the sense of the

¹Of the New York City Bar.

necessity which exists (and is felt by every society to exist), for the punishment of certain kinds of human action—varying of course with varying conditions. This is the reason, and, as I shall herein claim, the only reason why society has the right to punish crime. But though the only reason for the right, it is not by any manner of means the reason which solely explains every penal code that has ever existed among men. Another cause there actually is, and this is the desire, or the passion of revenge, moving society, moving aggregate bodies just as it moves the individual members of them. How far is this desire for vengeance to be justified? Theoretically, as I think, not at all, and if theoretically not at all, practice ought to conform with theory as far as possible. Unfortunately, however, some portion of this element must, in practice, still continue to exist in every system of pains and penalties. As long as the multitude, and the men composing it, have passions, the existence of those passions must be recognized by the legislator; and those offenses—of which there are always some—which stir organized society, as they stir the individual, with hatred and a sense of outrage, must continue not only to be punished, but avenged. Otherwise, resort will be had by this or that individual to self help; society will be, *pro tanto*, disintegrated by the process; dissatisfaction and disaffection will disturb its placid surface, and the confusion and disorder which legislation is instituted to prevent or allay will be brought about not by theoretical justice, but the practical unwisdom of the lawgiver.

After all is said, however, the passion of revenge is no rational basis, in whole or in part, on which to rest a system of punishment. It never should be admitted as an element, except as a necessary concession to the brutal instincts and tendencies of men. Any system founded on reason must omit it, as far as possible, under existing conditions. Now what connection has this element of revenge, which we recognize as actually existing in every penal code, with the question of the punishment of the criminally insane? It has, in my judgment, everything to do with the causes which have produced our popular and legal notions on the subject. We are merely called on to contemplate the reverse of the picture. If vengeance is the end to be attained by the criminal law, if it is, in other words, an emotional code, those of us who are demanding a murderer's blood, for instance, out of passion, feel, if we are fair-minded, that we ought not to glut that vengeance on one who is irrational—who knew not what he did. The prisoner therefore is to

be spared by the operation of that same passion which at one time clamored for his punishment. This incoherence of view is characteristic of the method, which deals emotionally or sentimentally with subjects susceptible of being reasoned on.

We ought, therefore, to found our punishments on the true reason of the right and to punish nothing which does not have the tendency to obstruct the pursuit of society's legitimate objects. Certainly, society has the right to prevent, if it can, the occurrence of those acts which, if generally acted on, would result in its own dissolution. No higher right can be claimed for corporate action than this. If society cannot do this, it can do nothing. Of such offenses, murder is undoubtedly one. It must be prevented, if possible; at least it must be minimized. And this must be done by punishment. The objects of punishment are twofold: "*Ut poena ad paucos, metus ad omnes perveneat.*" First, it operates in respect of the individual, to prevent a repetition by him, at least, of his offense. Secondly, it operates as a deterrent to others by way of example or warning.

Now, the punishment for murder has always been and by right ought to be rigorous. It is easier, in all things (including murder), to do a thing the second time than it was to do it first. Remembering this, society does not fulfil its duty to itself and its members if it allows the possibility of a second murder by the same individual. Capital punishment may or may not be justifiable. It is the usual penalty in civilized states; and has obviously one great advantage over all other suggested modes. It effectually accomplishes the first of the above-named objects: in respect of the individual, no repetition of his act is possible. Of no other conceivable method of punishment can this be said; but as the advocates of those other modes promise the same certitude, the distinction is not important here.

II.

But however punished—the sole object of punishment being the safety of society and its individual members, and the method adopted being the most efficacious for preventing a recurrence of his act—let the punishment for murder be meted out to the murderer, especially, I was going to say, if he is insane. If a man commits a murder for gain, out of jealousy or of lust, we can, to a certain extent, prognosticate the probabilities of his committing another murder. We at least can guess that he will not repeat his act unless gain is in sight or his passions or instincts

are again aroused. In other words, in respect of the sane murderer, he is not motiveless, he is actuated by impulses which we can understand. But who can predict the waywardness of the insane? Take an undoubted case, by way of example. A gentleman is mentioned in the books who was under a delusion that his victim's head was an ostrich egg—perhaps not a very unnatural delusion, after all—and he cracked it open with an ax, though why he should have deemed it his duty to crack the ostrich egg, I do not know. Now, he was insane—which is another way of saying that he will repeat his experiment when under the influence of the same delusion. If he had been sane, if his delusion was a mere mistake, I can understand why he should be acquitted. He is not likely to make the same mistake again; he may take to studying conchology. But who can foretell the recurrence of the delusion—who can say when the dreams of its possessor will not be peopled with ostrich eggs and eventuate into another nightmare of murder? This illustrates what I mean. Society is never safe with the insane murderer at large. Indeed, it never imagines itself safe except in those cases where, however it may seek to delude itself on the subject, it really doubts the insanity. In plain cases of undoubted insanity, it never hesitates. Take Holmes' case as an example. He murdered some thirty or forty persons, more or less. Was he insane? If language has any meaning, no one can doubt it. But this, it is said, is homicidal mania, and this is no excuse for crime. Why not? Homicide for homicide's sake cannot be permitted. I agree. But surely one who murders, with no motive but the lust of killing, is as insane, to say the least, as the man who has a definite motive otherwise, sufficient for himself but not recognized by the law; and this will be so, as long as we continue to perceive that the whole is greater than a part.

It may be thought that the punishment of the criminally insane has no tendency to deter others from imitating these offenses; and, in theory, this may be so. Practically, however, let it be understood that insanity is no defense to murder, and I do not believe that any single pronouncement will go so far to diminish crimes of that character. This is of course only another way of saying that I do not believe in the *bona fides* of the plea of insanity in the majority of murder cases.

I would, therefore, punish murder with the sole view of protecting society. I would hew to that line, let the chips fall where they may. I would eschew all ideas of vengeance, whether the passion

undisguised and rampant, as in the hoarse voice of the multitude clamoring for blood or dignified or concealed with the refined disguises which are congenial with much current thought. Let us not try to emulate the Godhead in inflicting punishment on crime *per se*; let us not attempt to deal with crime as sin, that is, to inflict punishment on crime for any other reason than for our own protection or for the advancement of our own legitimate purposes here on earth. When analyzed, we shall perceive, that this is only one of the forms in which passion disguises itself and takes on a far-resounding nomenclature to conceal an ignoble thing. As such, it is expressly forbidden to us, "Vengeance is mine; I will repay, saith the Lord." For punishment on these principles our human capacities are singularly incapable. When we come to know all the antecedent facts and surrounding circumstances, so far as we can know them, of any particular crime—we have difficulty in condemning. Every lawyer feels that if he can make a jury understand how the offense came to be committed and to appreciate the motive which impelled to it, he has gone far on the road to an acquittal. Given the circumstances, says Goethe, and any man can be conceived as committing any crime. These circumstances in another, the finite mind can never perfectly or adequately know, but it can perceive enough shrewdly to suspect that Omniscience, unless it have a superhuman standard, cannot punish at all.

The tenderness with which we regard the criminally insane is an extension or survival of the superstitious reverence with which our barbarian ancestors regarded them. Every primitive people look upon the idiot with affectionate reverence and on the furious madman with awe. We are not, however, to continue to be bound by these amorphous traditions, when our reason assures us that our sympathy will be misplaced. Insanity may be caused in various ways. It may be caused, for instance, by an accidental blow on the head or may be the mysterious product of heredity—the laws of which are so little understood. But neither accident nor heredity nor causes of the like explain, as an almost universal rule, the homicidal maniac. A life of gross dissipation, an habitual indulgence in disgusting vices, have "confused the chemic labor of the blood and tickled the brute brain." This is the "wicked broth" which explains the insane murderer. Concerning it, one may well ask, as has been suggested, whether the insanity thus caused is not in itself worthy of death rather than an excuse for murder.

III.

But if we are still to continue to treat insanity as a defense to crime, it is important that we ascertain what form and degree of insanity shall be thus treated. With the countless distinctions with which the medical profession are familiar, I do not think we are directly concerned. They are of use to those gentlemen in their science and may form the reasons on which they base their opinions. But it is for their opinions that they are summoned to the witness-box. However the insanity has been caused or however it is scientifically classified, the question which is important to us is, what shall be the test which shall distinguish the culpable from the guiltless? Let us begin at the beginning and admit that no one is completely sane; but between the average man and the insane murderer there is an enormous interval. How shall we bridge over that interval? What shall we give the jury as a test? It must be admitted, I think, that judges have very often "darkened counsel" rather than enlightened them by their words on this subject. There are differences, or shades of differences, in all the attempts that have been made. The subject cannot be exhaustively considered here; but the test often, if not usually—in part, at least—relied on, takes its origin from some expressions used by Lord Chief Justice Tindall in delivering the answers of the judges to the questions propounded to them by the Lords in referenc to McNaghton's killing of Mr. Drummond, whom he mistook for Sir Robert Peel. I say, from some expressions employed, for I do not think, as I shall state further on, that they ought to have been torn from the context in which they occur. Those expressions are to the effect that, to find the prisoner responsible, he must be capable of distinguishing right from wrong and to know that what he has done is wrong; and to know the nature and quality of his act.

It is obvious that this test can be applied in such a way as to convict anyone except a congenital idiot; or in such a way as to allow a very considerable fish of the malefactor species to escape from the judicial net: and this would seem, on the surface of things, to be an objection to it as a working definition. Know right from wrong! According to what standards? No man commits a crime without what seems to him to be an adequate reason, a sufficient motive; in other words, a justification for it; and it is far more rare than is imagined that a criminal ever afterwards comes to doubt that adequacy, independently of the punishment

which the law and social usage and the like inflicts upon him. Take from him his often-heralded remorse, his fear of legal punishment, the terrors of the Church, the panic caused by the rude histrionism of the "third degree," and I am persuaded you will find little left. No murderer in a deliberate way ever comes really to see that what he has done is particularly wrong. According to his own standard of right and wrong, therefore, he has done right. But by which of the standards recognized among us is he to be judged? Right or wrong by the law of God? There is no law of God that he recognizes. Are we to judge him by the standard which we recognize? That standard fluctuates according to our theological and social opinions. Freeman, the Pocasset murderer, believed that he was ordered by God to immolate his children and several individuals of the same sect agreed with him. He was adjudged insane, although he knew the difference between right and wrong in the law of God as he understood it, and believed that he was doing right under that law. Do not many of us believe that a husband has a right under God to avenge his wife's dishonor in the blood of the adulterer; nay, do not some of us think that he is dishonored if he omits to do it? And concerning the nature and quality of his act, how he knows it. Some men have an acute realization of things and some an obtuse. It is all an affair of relation. What dullness of sense and memory shall constitute insanity?

Now, suppose we ask ourselves in all this confusion what, after all, we are trying to do when we try a man for murder? What law are we vindicating? The answer will go far, if I mistake not, to blow away these vague and loose phrases which make a pretense of defining which they disappoint and substitute for them a clear, well-defined and simple test, and one easily applied. We are trying him not because he has infringed upon the law of Nature or of Nature's God, nor because he has violated the law of the church or outraged the morals of the community; but because he has offended against the positive law of the state. If there is no positive law, common or statutory, you cannot punish him through the courts. As this is the reason why he is to be punished, is it not enough to ascertain that he knew his act came within it and was thus forbidden? I believe that, in most cases, a ready and true answer could be returned to this question. The adoption of it as a test would go far to dispose of much dubiety. The appeal of Freeman to a higher law; the claim of Thaw that he

was a self-constituted St. George, would go for nothing—which I think is their real value. Its adoption would go far, also, in my judgment, toward composing the traditional hostility between lawyers and doctors on the subject of insanity. The antagonism—like most antagonisms between sensible people—has had its origin largely in misunderstanding. Questions are asked the insanity expert without anything except a vague and indeterminate standard of responsibility being placed before him. Thus left at large he naturally answers from his own point of view. He knows that every criminal is deficient mentally or insane—he knows that abominable wickedness and raving insanity are frequently one and the same thing; he knows that in the abstract man has no right to punish at all—and he answers the question out of his general notions, no one can say incorrectly.

I intimated above that Lord Chief Justice Tindall's language had not been properly understood. Indeed, I have said nothing which this celebrated opinion does not justify. When he says right or wrong, he means right and wrong in law. The fluent language is limited expressly by him toward the end, to "right and wrong according to the law of the land." We have, therefore, once been in the right path, but, misled by a partial reading, we have wandered far astray. Another point discussed by this opinion, directly involved in the Thaw case, is that of insane delusions. The law on the subject is succinctly and correctly stated. I shall not exceed the limits of this great authority in what I shall say hereafter.

IV.

Having discussed the foregoing considerations, let us now see how the Thaw case was actually managed. It will not of course be imagined that in what I say I am censuring any particular individual. It is the state of the law and the practice under it that I think are open to improvement.

The main facts of Thaw's case are indisputable. A young man, born rich, accustomed to enjoy all that money can control, naturally induced to believe in its omnipotence, had taken a soiled dove under his protection and finally had made her his wife. His victim, White, had been beforehand with him—with what kind and degree of moral turpitude we need not stop to inquire—but we will assume that Thaw honestly believed the lady's story to the effect that White by the aid of drugs had at first committed a rape upon her, a virgin up to that time, although she admitted

that afterward she had maintained voluntary illicit relations with him. Admitting the truth of this account—for, in admitting that Thaw believed it, we, for our purposes, imply its truth—we yet cannot admit that it justified a homicide in law. If all this were so, Thaw had no lawful right to kill. Nor do the other circumstances alleged to have entered into his mind, either alone or in connection with the other facts of the case, give him this right. Those circumstances, if true, establish that White was a moral monster and that his dealings with Thaw's wife were not sporadic incidents or accidents in his life, but merely facts of the general scheme of it. I think we can all agree that a person of this description is, to use Macduff's expression, "not fit to live." But there is and can be no doubt that the law does not and cannot recognize Thaw's right to be the executioner. He was not then married to his wife and bore to her no relation and owed to her no duty which the law recognized. Any member of the community could show as valid a warrant as he. Moreover, if White were so monstrously perverted as is charged, he was clearly as insane as ever Thaw was when he killed him, and, if I mistake not, in the same way and from the same causes.

Assuming, therefore, Thaw to be a free moral agent, by law he had forfeited his life. The character, or want of character, of his victim, as above described, certainly abates somewhat the natural "horror at his taking off." Indeed, on this hypothesis, in one way—the sentimental way of looking at it—Thaw had done a service to society. But the courts have no right to be sentimental, and when they undertake to be so, they do an enormous amount of injustice alternately to the public and its victims. No one who has grasped the fundamental notion involved in the very definition of law, that it is general, can doubt that its nature forbids particular individuals from engrafting exceptions on it.

• How then is the case so to be dealt with that society's paramount interest in the supremacy of the law can be vindicated and yet that the particular circumstances, assuming Thaw's good faith, may operate in extenuation or mitigation of his offense, so far as they ought, in his favor? Theoretically, I have no hesitation in saying—by his conviction by the courts of law and by the well-considered and well-conditioned exercise, if thought fit, of executive clemency. Practically, however, I admit that there is another way, not expressly legalized, that I know of, but undoubtedly implicated in the very constitution of our trials. Without

troubling themselves, perhaps, to give a logical reason for their action, perhaps conscious of their inability to do so, juries do, in every man's experience, exercise the actual, if unjustifiable, power which they possess and mitigate the rigors of the law by refusing to convict. There is this to be said in respect of their right: that, after all, they are to exercise a final responsibility. This responsibility in the clearest and most flagrant cases they always exercise with reluctance, and often, in other cases, as it seems to me, with reprehensible cowardice decline to exercise at all.

In the midst of the first trial, on the suggestion of the district attorney, the court appointed a commission of experts to determine whether the prisoner was then sane. The common law has always forbidden the trial as well as the conviction of an insane person; and most states, including New York, have enacted declaratory statutes on the subject. The question on such a suggestion is not, of course, whether the prisoner was insane at the time he committed the act charged against him, but whether he is insane at the time of the trial, and there is no necessary connection, in the eye of the law, between the two periods. In other words, in law as well as in fact, the insanity may have come upon the prisoner since the alleged crime, or it may be a continuance of the same phase.

Admitting the law to be as I have stated, it was one of the misfortunes attending this ill-starred case that the application should have been made at the time it was. The commission, sitting pending the trial, composed of specialists, make up their report that Thaw is sane—that is, sane at the time of the trial, not necessarily sane when he committed the homicide. But the distinction in this case goes for little. That a man can be sane one minute before his crime and sane one minute after it, and insane at the moment of its perpetration, has been, indeed, in judicial annals, more than once declared; and this is manifestly the theory—admitting that it has coherence—upon which Thaw's application for release has been founded. Such a position ought, however, to be scrutinized closely. The commission thus sitting is more or less in a hurry while the main trial is awaiting the termination of their labors, and must have felt a temptation to deal with their duties perfunctorily. However arrived at, it reports that Thaw is sane. The trial proceeds. Now, suppose he had been convicted? Would not the appellate tribunal, sitting to revise this finding, feel that, perhaps, Thaw would have been acquitted on the ground of insanity if it had not been, not for this evidence (for the evidence on which the report was made was

not produced), but for this judgment of learned men on the subject? The effect of authority in matters of opinion differs in different individuals. There are some men of independent minds who seem to pay little or no heed to it; but the vast majority of men are, I think, simply overwhelmed by it. Practically, in this case, the jury would have been told that if they found Thaw insane, they differed from this body of high authority on the subject. If this would not have operated to reverse such a verdict, it would have been felt by all to be what I have called it—an unfortunate occurrence as it was managed.

At this first trial, though the law was plain, the astute counsel for the defense endeavored to free Thaw by an appeal to those general circumstances, manifestly immaterial as against the plain rule but cogent when addressed to the pardoning power which, as I have said, the jury actually possesses and sometimes rightly or wrongly exercises. In this they were greatly assisted by the absurd rules of evidence that the presiding judge felt bound by, which resulted in admitting a mass of testimony wholly irrelevant to the issue to be determined, but of enormous influence looked at as appeals to mitigate the rigor of the rule. Indeed, one might have asked himself whether he were in the presence of a tribunal governed by the common law and was not rather in attendance on a French trial where "the wind bloweth where it listeth." The temptation which the situation furnished could scarcely fail to be taken advantage of by the defense. In fact, it was counsel's clear moral duty to take a fair chance for a clear verdict of acquittal, and a fair chance it was. Indeed, if it had not been for the astonishing display of vigor and acumen on the part of the district attorney—I say astonishing even to those accustomed to witness the displays of the extraordinary, if irregular, capacity of this remarkable man—it looks to me as though the attempt would have succeeded. The dramatic exhibition of the wife—seeking to withdraw to her own narrow shoulders the responsibility from her husband at any expense of womanly modesty and womanly shame—on the moment, to use the affectation of Addison's day, "captured the town." All of us would have acquitted her while under the spell of the occasion. Unemotional, indeed, must that man have been who could listen to the sad and sordid tale without his heart's becoming more or less liquid; who could contemplate unmoved the spectacle of this pathetic, fragile creature, standing in the crash of tragic circumstance, to which her little existence, her brief "pilgrimage of life" had thus far conducted. In the pyro-

technics of the courtroom we could all see fitfully this last product, this last victim of the Fates: the neglected childhood, the necessitous youth, not surrounded by the common safeguards which civilization is wont to cast around her daughters, her "madness of superfluous health," yearning as youth and health must ever yearn, for pleasure, misnamed happiness, her "fatal gift of beauty" alluring, and a certain playfulness and gracefulness of mind retaining the affections of men who, perhaps, meant her not altogether ill. In fine, we could all see and realize how every step had prepared for the next and how an inexorable fate, without conscious realization on her part, had resulted in this tempestuous explosion of brutal passion. She had been the mouse, the little *ridiculus mus*, who had heedlessly, almost joyfully, gnawed the net and released these lions of lust and jealousy, of revenge and of murder. Oh, we could all say something for her. But she was not on trial. The arguments brought out all the weakness of the case and enabled some of us to see how near we had been to making a mistake. The stage had been well set, the accessories skilfully combined, the principal performer had played admirably, but when it came to the argument the counsel who had done so well found himself paralyzed. The appeal had been to the emotions and he felt how powerless he was to state the case in terms of reason addressed to the intellect. The panic-stricken prisoner could produce a murder out of the delirious ingredients; but the husband who, in his wife's name and for her honor's sake, had fired the shot, showed by the exhibition he had allowed or coerced her to make, how little of genuine manliness there was in him. He was a poor subject for his counsel's panegyric. It was a much bespotted, strangely bedraggled St. George who had emerged from his controversy with the dragons. And the best that his counsel could do was to escape in a cloud of words. But there was no complete failure; there was no disaster; and another trial was necessitated.

It was determined at the second trial not to attempt to repeat the experiment. It had been fairly tried, but it had failed. The known belief of the district attorney that Thaw was insane made the second trial almost a stipulated result. He was acquitted on the ground of his insanity. But on what evidence? On substantially the same evidence as that given at the first trial, only a different effect was sought to be given to it. Considering that the first trial had practically settled that the facts of Thaw's defense respecting White and others were true had failed to secure his acquittal; the second trial proceeded on the theory that they were

not only false, but so false as to indicate that a man who could believe in them was insane; and Thaw escaped with his life. Now, I call this an extraordinary result. If a man has certain beliefs and they are such as a normal man can believe, indeed if they be founded on truth, he has nevertheless no right to take the life of the man to whom they relate; but if these same beliefs are figments of the imagination, if they are delusions, he has that right; at least he is not to be punished if he acts on it. I do not admire this state of the law. If it does not show that the law is "a ass, a idiot," it cannot be rated higher than "Crownner's quest law." If a man has actually cheated me out of \$10,000, I cannot, with impunity, take his life. But if he hasn't and doesn't owe me a cent and I am under a delusion that he has and does, I can.

I am aware that the question may be said not to be this and that the complete statement of the case is that the fact one entertains these delusions, though the delusions themselves are no defense, is a fact from which one can infer mental unsoundness. In respect of some delusions, this may be so; but when we consider that Thaw's act is constantly being perpetrated by sexually mad and jealous persons who are not legally insane, how far are we to carry our conjectures? What point must mental unsoundness reach in order to justify murder? Let it be admitted never so much, that Thaw's wife was, long before she married or even knew him, violated by White; that everything in her character which subsequently shocked Thaw is attributable to that circumstance; that White had similarly violated all the daughters of the Tenderloin, nay, that he is responsible for the existence of prostitution in the city of New York; that Harry Thaw looked on the perpetrator of these enormities as St. George looked on the dragons of his mythical time, with the same disgust, the same loathing, the same horror—still, I say, the existing law of the state of New York did not justify him in taking White's life. How, then, is the case altered by considering all this to be false, which nevertheless he believed to be true—no matter how incredible it all is, no matter how deluded he must be, unless you go farther and give evidence of mental unsoundness transcending anything to be implied from it? This evidence was, I suppose, intended to be supplied by the experts. But their testimony was all implicated in those delusions and evolutions out of them. The experts do not make it clear whether Thaw is to be considered insane because he believed in these delusions or because he acted on them—a point of enormous importance to Mr. Anthony Comstock—for whether he

is a paranoiac or not seems to turn on the distinction. They said he had an "exaggerated ego." Now, every man has an ego, and it is only out of complaisance to the human race, or when speaking relatively, that we do not assert that every man has an exaggerated ego. It is the ego which constitutes the individual; it is the insistence on the ego which serves as his contribution to any share of success he may have—I say contributes, for it is a shallow philosophy which will suppose it the whole or even the chief ingredient of the whole. As long as the ego is wrapped up in one's self-consciousness it is sufficiently large, it is sufficiently "exaggerated." Nor does it become diminished by one's own reflections concerning it. Only when it shall have issued into outward fact, eventuated in outward endeavor, do the attrition of experience and the reception it has met with in the world reduce it to something like its proper dimensions. As long as by its conformity with the spirit of the age it develops into accomplishment, it cannot be considered exaggerated, however huge the bulk of it. But when, for want of this conformity, the difference between its promises and its accomplishments becomes observable, we call its possessor "a conceited ass" and the like; and when the difference is excessive we say that he is a fool, if it is also grotesque and insane, if it develops into crime. An ego which has fallen on evil times leads one born to kingship to assume the rôle of opera director or to occupy the pulpit; and of one successful in the devious ways of politics, to undertake the correction of current orthography and to degenerate into Omniscience.

This brief account of the natural history of the ego prepares us not to be astonished when we learn that, as an indication of insanity, an exaggerated ego, looking at it alone and sequestered from other considerations, is of nearly worthless value. Your man of genius possesses it; so also does every fool. Full-blown specimens can be seen on the boards of any theater in this town every night. Your artist in the fine and sensuous arts almost always exhibits it. What is more to our immediate purpose, no great criminal, however sane he is admitted to be, ever existed who did not own and flagrantly flaunt, if need be on the scaffold, an enormously exaggerated ego. When we are asked to classify the possessors of the inflated ego we must ask further questions. And if we find that they have a proclivity to crime we may class them as criminal, but not necessarily as insane.

As the exaggerated ego is a deduction from the circumstances of the crime, so the other symptoms mentioned are deductions from

that ego. They say Thaw's belief that he can try or direct his own case better than his counsel shows him to be insane. I see nothing in it except what is to be expected of an undisciplined youth who has been in the habit of having his own way. But in sober earnestness I ask if a lawyer ever practiced whose clients, as a whole, did not consistently believe this? Just as he thinks he can try cases, so he sets up to be a literary light and an inordinate desire to write for review or magazine is a sure sign of the paranoiac, say the doctors. In the name of our idolatry, let us pray that this is not so, if we get a dollar a line for it. But all these symptoms mentioned by the experts are simply consequences flowing from the exaggerated ego, and as such are equally applicable to whole classes who are not insane, and eminently characteristic of the entire criminal world. I am not, however, quarreling with the doctors. Thaw is insane, I agree; but he is insane in the sense in which any abominably wicked person is insane.

V.

But this is not, as we all know, the end of the Thaw case. Having asserted, at the first trial, that the facts testified to concerning White were true and showed that he deserved death; at the second, that they were false, but that he was under the delusion that they were true—within eleven months of his commitment he petitions for his liberation that, whether true or false, he was never under a delusion concerning them. If the case heard before Judge Mills had been presented to either of the tribunals which tried him, Thaw must have been sentenced to be hanged. And I wish humbly to state that a condition of the law or the practice under it which permits this playing with a case, as though it were a shuttlecock, is a travesty on justice. A writ of *habeas* cannot, indeed, be made to perform the office of an appeal or writ of error, and Judge Mills was certainly right when he treated the verdict and judgment of the trial as *res adjudicata*. No court can impute anything against the verity of that finding. But the question as to whether Thaw has since that adjudication recovered his wits may be an exceedingly embarrassing one if addressed to a judge who may think that, in a legal sense importing immunity from punishment, he had never lost them.

In England an acquittal of a murderer on the ground of insanity results in his incarceration at the pleasure of the Crown. After such an acquittal there should be no appeal to a court of law for his liberation, but only to the source of executive clemency. Courts are not constituted to deal with the complications of such a situa-

tion. After the jury at the trial has found the prisoner insane, a judge is asked to find him sane. The inquiry is not, indeed, confined to the same period of time, and it is of course conceivable that an insane person may become sane, though the burden of proving this change ought, in my judgment, to rest heavily upon him; but where, as here, the assertion practically is that not only is he sane now, but was sane then—and the evidence is addressed with equal propriety to both periods—I think the court ought to take the position that it is essentially asked to set aside a verdict peculiarly within the province of a jury to return and to refuse to exercise its power to do this. It follows also that the hearing ought to be confined to this fact of recovery and the evidence excluded which does not bear upon it. But, supposing the court, on whatever considerations, comes to the conclusion that the prisoner is sane now, but believes also that he was sane then—in other words, feels obliged to release him from the effect of the verdict of insanity, but would also like to discharge that part of the verdict which acquitted—he is as a man, if not as a magistrate, in a very unsatisfactory dilemma. Out of this dilemma he has no power to escape, and so the law ought not to place him in it.

And this last phase of the matter is of more than ordinary significance when we consider how verdicts of this sort are made up. In nine out of ten cases, dread of responsibility explains them. Juries do not believe the man guiltless, but they shrink from shedding his blood. On the other hand, they do not dare to release him. The result is a compromise by which the responsibility is evaded and the safety of society, as is hoped, secured. Both objects might be accomplished if the matter were left to the pardoning power of the state. The governor can exercise a discretion which it might be improper for a judge to contemplate; and he can refuse a release from the insane asylum if, by granting it, he thinks he will let loose a criminal. An objection to this course that it would be unconstitutional has met with approval in some jurisdictions. I think, however, an unobjectionable but efficacious measure of the sort can be framed. If this cannot be, let us at least bear in mind that a person acquitted of murder on the ground of insanity is not only insane but criminally insane; and, let us so frame the verdict of acquittal and the judgment thereon as to make it a complete and final and conclusive return to any writ of *habeas* sued out for his freedom.