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MR. JUSTICE WILLIAM JOHNSON, JURIST IN LIMINE:
DISSENT AND THE JUDGING FACULTY*

A. J. Levin†

I

JUSTICES JOHNSON AND HOLMES AND SOME DYNAMIC
ASPECTS OF DISSENTA. *The Role of Dissent in Democratic Societies*

THERE is little more in the legal literature on the subject of dissent than, on the one hand, the feeling that somehow it helps to present more than one side of a question and, on the other, that dissent is confusing and unsettling, and, therefore to be avoided. The part that dissent has played in preventing "history" from becoming the routine repetition of events, the function it fulfills in saving mankind from a mechanical adherence to an authoritarian concept of society, the psychodynamic need of the individual for self-expression—particularly evident in democratic societies—these and other related approaches have had not only inadequate treatment but hardly any consideration at all on the part of those who write about laws and law-making.

1. *Motivations underlying Dissent—Aggression of Reason*

Even those who have been notable dissenters have been quite obscure as to the motivations underlying their need to differ. Thus, Justice Brandeis, in one of his outstanding dissenting opinions, concluded with considerable animus, "If we would be guided by the light of reason, we must let our minds be bold."¹ But others in society, after all, also believe that they are being guided by the light of reason and feel they must support their reason with appropriate courageous action. Another part of the psychodynamic picture would require the addition of the thought that we must let our minds be bold lest the aggressions of others under the cloak of reason be established as a mode of conduct for us and a law

* This concludes Mr. Levin's studies on Mr. Justice Johnson. Two companion articles appeared in 46 MICH. L. REV. 131, 481 (1947-1948).—*Ed.*

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¹ New State Ice Co. v. Liebman, 285 U.S. 262 at 311, 52 S.Ct. 371 (1931). See also reference to a similar remark in Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412 (1924) and MASON, BRANDEIS, A FREE MAN'S LIFE 580 (1946). But a modern psychologist warns us that people though they think and talk rationally live irrationally. RANK, BEYOND PSYCHOLOGY 11 (1941).

for society. Those who would let their minds be bold and who would become aggressive toward the reason of others must be informed; otherwise the struggle is between the blind and the blind. It is one thing to know with scientific awareness that boldness is required in a situation but quite another to be able to recognize the unreasoned aggressions beneath either militant righteousness or rigorous mechanisms of self-control. It is in the disparity between the latter and the former that we discover some of the principal evidences of the aberrations of so-called "normal" civilization.

2. *A Revolution in the Outlets for Aggression*

Jared Sparks, clergyman, editor and publisher, reviewed Johnson's *Life of Greene* in the *North American Review* of October, 1822. He wrote that he was sorry to discover "a degree of implacability" in the work. "We sometimes meet with a word," he complained, "which has not yet found its way into our vocabularies, such as 'dampening,' 'retroact,' . . . 'aggressive' . . ."² What strikes us in this criticism is not only that we have here another illustration of Johnson's dissent but also an apt illustration of what gives rise to dissent.

Here again we call attention to the fact that the American Revolution was a revolution of the mind. It was the most formidable event in history in the direction of choice as a substitute for compulsion. Choice means dissent. Sparks was one of that vast preponderance of thinkers who feared this trend although himself a creative scholar. His reaction is an index of wider implications. Contemporary thought bore the deep traces of earlier attitudes which legalized war, chivalry, duelling, the ordeal and trial by combat. These and other manifestations of aggression were surrounded with the aura of romance, adventure, honor, prestige, and divine favor. Thomas Carlyle adored his "berserker" Norse kings who hacked away at those whom they elected to be their enemies. The mixture of combativeness and love has been the favorite theme of poets. The brave who distinguished themselves in arms were not stigmatized as being "aggressive." The stigma of "aggressive" was reserved for those who dissented from the domination of authoritarian thinking wherever

² 15 N. AM. REV. 423 at 429 (1822); and see 46 MICH. L. REV. 131 at 137 (1947). The connection between language and human cultural development is a close one and the psychodynamic aspects of the part language has played has hardly been touched upon, as Rank's comment in the preceding note indicates. However, it is safe to say that a predilection for new words goes with a dissenting or creative mind. Thus, Bentham coined the words "international" and "minimize." BENTHAM, *THE THEORY OF LEGISLATION*, Ogden ed., xxvii (1931).

such boldness showed itself—whether in religion, law or the physical sciences. Those who sought to advance the knowledge of man about himself were promptly disposed of by ostracism, excommunication, torture, imprisonment or death. The *auto-da-fé*, for example, was legalized aggression against dissenters.

But the beginnings of some change were visible. It was a contemporary of Johnson who first articulated it into exquisite poetry. The coming of Shelley upon the scene marked the beginning of the time when poets would write verse about the feats of men who advanced human understanding and struggled for the progress of the human mind. *Ozymandias* was published in 1818 and *Prometheus Unbound* in 1820. The former deprecated the aimless and futile aggressions for personal power; the latter glorified the latent power of the human mind left free and unfettered to defy power "which seems omnipotent." It may be called the poem of modern science—the keynote of which is dissent founded upon the conclusions drawn from trial and error and the insight which comes from discovering psychodynamic factors now just beginning to be understood.

It is when we realize that this change, so apparent in retrospect, has passed the conscious notice of historians and even of psychologists that we can better see our civilization in psychodynamic perspective. Spinoza, Copernicus, Galileo and Bruno were considered the dangerous ones rather than those who engaged in out-and-out war and combat. Dissent was the unforgivable crime until the American and French Revolutions. These historic events by no means made it easy for the dissenter. But the political atmosphere of democracy and individual freedom had perforce to include the right to disagree. Freedom of the press and freedom of religion mean freedom of the mind and the right to disagree with claims of omnipotent power.

Thus we see two main channels of aggression in the course of history. The one is the aggression of combat and destruction; the other is the aggression of creative and constructive dissent. These are not hard and fast classifications, for they are interchangeable or may become allied as in scientific warfare. But they will serve as illustrations of psychodynamic trends. Nor do we assert that what is termed conveniently as "aggression" is a fundamentalist concept. The word includes much that is not even understood. Furthermore, there are other outlets of human energy and other means for the release of emotion and tension which would have to be considered. But the preeminence of aggression as a *factor* is unquestioned.

3. *Origin of the Right to Protest—the Jester*

The guaranty of freedom of speech and freedom of the press, though qualified by circumstances in some instances, greatly accelerated the use of dissent as a means of sublimation of otherwise more direct combat. And with this deflection from physically directed aggression came social benefits as a result of the focusing of so much energy toward creative scientific endeavor of all sorts. No wonder that freedom of speech and of the press became "inalienable" rights, for, unconsciously at least, the framers of the Constitution realized that the discharge of psychodynamic energy in the progress of a democracy would be largely through the ways of peace, even though this did not carry with it the idea of peace of mind.

This seems to be borne out by the previous unpretentious history of the right to protest. For, in earlier days the *right* to protest, as a right, with one exception, simply did not exist. That exception is the case of the uncensored jests of the court jester or clown usually appointed by the king or some other high officer. The "fool" alone could say with impunity what was in his mind, although at times he was subjected to physical punishments and arbitrary silencing. "Fools," we are told by Dr. Doran, "were free to speak before there was a liberty of the press, or even a press at all."³ But the liberty of these fools was not unlimited for we know that, although they were really wise men, they were compelled to transmute their criticisms or advice into the more palatable form of quips and jests. But it was a Lord Chancellor who took the next step and imported a jester who was "employed not with license to speak bold and droll truths to their master, but with the commission . . . of deceiving a nation."⁴ Shakespeare's plays have recorded this step in the development of human liberty in the portrayal of the clowns of his great dramas. Nor is this method obsolete. In our day many will remember the genial Will Rogers, the unofficial and self-appointed critic of the government, who, with wit, humor and insight, took to task Congressmen, Senators, Cabinet Officers and even the President.

The poets and pamphleteers followed the jester in the course of the struggle for free expression. These were voluntary dissenters and not officially appointed for the purpose of challenging the king's judgment or supplying it. The judicial dissenter, with the rarest of exceptions, simply did not exist. There was really only one of the stature of Sir

³ DORAN, *THE HISTORY OF COURT FOOLS* 51 (1858).

⁴ *Id.* 107-108 and 232-233. The official fool was preceded by the house fool who survived the court fool.

Edward Coke who dared to question the authority of the king. By and large, the judicial officer was the agent of administration and was required to do justice within accepted notions of legal propriety.

Jurisprudence has become a compartmentalized science. The student of the law does not consider that there might be a connection between the institution of the court jester and the emergence of a Justice Johnson who becomes an open, avowed and officially invested dissenter. But any attempt at a psychodynamic evaluation must unfold the layers of culturally induced opacities which have, because of false notions of "dignity" or "sanctity," obscured dynamic relationships of the utmost importance and have shut the doors of better knowledge. Let us then consider some aspects of this relationship as it affects the origins and development of jurisprudence.

4. *The Jester and the Judicial Dissenter*

a. *Communication and self-control*

The jester is itself a part of an effort at communication. We must find for it some place in man's efforts to communicate with others of his specie. We can observe at least six steps in the psychological processes directed toward that end. First, man learned, as Sir Henry Maine pointed out, to postpone his intentions— ". . . it was a step forward when men learned to pause before attacking instead of attacking at once."⁵ Various means were employed to delay aggressive action such as seizure of property—distress—and long and extended indulgence in technicalities of the forms of pleading and other refined procedures. But it must not be assumed that psychodynamic Fabian policy is not also aggressive. Nevertheless, this furnished a much needed cooling off period. These procedures were in part, at least, psychodynamic avoidance mechanisms—of which there are others functioning for different purposes. Second, there are the personalized and internalized mechanisms of restraint whose manifestations have been recently considerably clarified but the

⁵ MAINE, *EARLY HISTORY OF INSTITUTIONS* 302 (1875). The passage from which the quoted portion is taken is an excellent example of Maine's scientific integrity and detachment in search for legal origins. His complete objectivity in observing data, which reveals the speciousness of the superficial investment of judicial and legal institutions with awesome and mystic dignity, is a sound standard to be followed in any search for the psychodynamic factors of jurisprudence.

The idea of delayed attack and postponed instinctual satisfaction leads directly to the very primordial evidences of what gives rise to legal society. In other words, law seems to be entirely predicated upon the basis of frustration. This is because law prohibits. Conducted experiments on the effect of delay when excitations are aroused resulted in sleepiness in both men and animals. 8 *PSYCHOSOMATIC MEDICINE* 359 (1946).

precise origin of which is just becoming the subject of general investigation. Some of these are the dream as a device somehow connected with the postponement of unrealized intention, the mechanism we call "conscience" which enables us to be law-abiding without a policeman watching over us, the psychotic delusions and so-called "normal" illusions which serve as substitutes for reality, the growing list of psychosomatic symptoms such as the paralyzed arm, the hysterical conversions, tics and many ailments which either are the direct result of conflict or are at least related to it, the shedding of tears as a substitute for attack as was the case with the Sioux Indians who, according to Parkman, sobbed when they greeted a stranger. And the list is far from complete. Third, there are substitutes for physical aggression and release of energy which are not internalized but are turned outward, such as the case of the aggressive and "chronic" litigant or the jester who opposes by means of thought and words. And fourth, there are those affective or emotional transfers of feeling which achieve legal behavior with a minimum of compulsion—all of those socially cherished attitudes and relationships which are suggested by such words as "empathy," "rapport," "loyalty" or "love." Fifth, there are all those efforts to convert human energy into intellectual or other cultural embodiments in which the person's personal relationship to society finds some solution in the activities which have been labelled "sublimations." In this class belongs the doctor, the lawyer, the scientist and the preacher. The value to society as the result of such activities is often accidental and does not always bear a direct relationship to the conscious purpose of the individual, because often an aggressive drive is behind the exaggerated pretense of social welfare. We can place law in a sixth classification which touches all of the rest most intimately. But we can say that here belongs the idea that man's ability to communicate with man and with nature somehow depends not only upon his ability to employ his intellect to observe similarities—"laws"—but also to employ his total personality to "see" relationships and to feel into them. To see the similarities has hitherto been the main objective of legal training; to see relationships has been almost wholly neglected. But these are neither all-inclusive nor hard and fast categories. However, once we have understood the part these play in the psychodynamics of legal behavior we will have covered the largest portion of the ground. At this stage we consider only the third groupings, the jest which is turned outward.

There is an old saying that a jest breaks no bones. In other words, the jest is a psychodynamic compromise which substitutes a thought for physical aggression. Everyone has met the aggressive jester who attacks

with words instead of with his fists—and everyone has at some time or other employed the jest for this very reason. The jest serves as a substitute for a disturbance of the peace and it is possible to think that its moderate use even against one's self is condoned because we all recognize its utility, just as we accept and glorify actual physical aggression short of foul play in a football game.

Though we do not approve of the trickster, he is psychologically not far removed from the jester because he too substitutes thought for physical aggression. Anthropologists have from time to time attempted explanations of the prevalence in primitive life of the trickster-deity or the hero-creator who appears in myths and folklore as a comic character, a player of pranks, a burlesque hero or buffoon. The explanations of these tales are often belabored. An analysis of them from the psychodynamic viewpoint resolves many of these secondary elaborations of mythologists into more primary ones. Moreover, the facts found are of great value. For example, it has been noticed that the comic deity or hero often performed his antics at a solemn occasion when a sacred rite was being carried out.⁶

⁶ See LOWIE, *PRIMITIVE RELIGION*, pp. 312-313 and 121, 132, 271 (1924). Also LOWIE, *PRIMITIVE SOCIETY* 373 (1920), where the author calls attention to the court jester, who may insult even the king.

The comic has been employed in ways that seem strange unless its psychodynamic function is revealed. Thus in the Island of Bali it is a part of the death ceremonies. Miguel Covarrubias tells of these people for whom cremation is an occasion for gaiety since it represents the accomplishment of their most sacred duty: the burning of the dead to liberate their souls so they can attain the higher worlds and be free for reincarnation into better beings. *ISLAND OF BALI* 359 (1938). The above reasons for this practice are psychologically an admission that the comedy is part of a dissenting procedure. The emphasis on liberation of the soul gives the unmistakable character of protest to the idea of reincarnation. Only then will the unpleasant repression of actual living be replaced by a better state of affairs.

Joel Chandler Harris, in his introduction to *UNCLE REMUS, HIS SONGS AND HIS SAYINGS* xiv (1920), says that the story of the Rabbit and the Fox is characteristic of the Negro and, with the usual synthesis which goes with unusual insight, points to the psychodynamic facts which should be noticed.

Among the Hausa of West Africa the spider is the king of cunning and folk-lore. He is favorably identified with deceit and trickery which is seldom punished if it is sufficiently clever. TREMEARNE, *HAUSA SUPERSTITIONS AND CUSTOMS* 48 and elsewhere, index under spider (1913).

See also FROBENIUS, *THE CHILDHOOD OF MAN* (1909). Laws were identified with the spider by Solon who compared them to cobwebs which let the light things fall through but the meshes of which were broken by the weightier things which thus escape. Mr. Justice Holmes in his dissent in *Meyers v. United States*, 272 U.S. 52 at 177, 47 S.Ct. 21 (1926), said of certain arguments that they seemed to him "spider's webs inadequate to control the dominant facts." The significance of such symbolism as applied to law is to indicate a strong dislike for the legal restraints which seem only *partially* effective in

It would appear that these primitive characters of fact and fiction partake of the same dynamism as the clown or court jester. We see here a twofold process. First, there is the compromise of aggression on the part of the comic performer; and, second—but no less important—the exhibition is a legalized symbol of protest or dissent against the authority of the group. It is frequently a large scale expression of instinct translatable into such modern language terms as “liberty,” “freedom” and “independence,” underneath which lurks the idea of lack of inhibition. The ambivalent combination of levity and solemnity may be psychologically compared to the checks and balances of constitutional government which preserve freedom through the imposition of restraints.

b. *Common sublimations of combativeness*

The formulation of such legal and quasi-legal concepts as deceit, fraud, false pretenses or the less legalized means such as lying, hypocrisy, face-saving, diplomacy or any type of pretense or rationalization is the result of persistent protest against personal restraint which puts a curb on *open* combativeness. These types of protest, which society seemingly disavows, it nevertheless preserves in war, statecraft, etiquette and games of sport where trickery, strategy and deception survive. We deal here with differences of degree only. No one would wish to outlaw trickery in the game of football where deception is part of the “law” of the game. But we surely should try to understand why we act with such obvious inconsistency.

In the case of mental illnesses, where the regression to primitive behavior is marked, we find a reappearance of these earlier efforts at solutions. The child who has found little love and acceptance in his early environment begins at a premature age to match his combativeness with his family and society and the solution often causes him to resort to strategem to attain his ends. Though compelled to conform, the child

solving man's desires either as an individual or a member of society. He was concerned with what he once described as little decisions “which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law.” These interstices were noticed by Justice Johnson. Referring to the equity power and the means of exercising it he remarked that “. . . after the common law courts have ingrafted into their practice as much as can be there assumed, the Legislature is compelled to exercise the rest; or else leave a large space for the appropriate field of judicial action unoccupied.” *Livingston v. Moore*, 7 Pet. (32 U.S.) 469 at 548 (1833).

Of the American Indian, who was rather advanced in the scale of primitive life, Francis Parkman wrote in *THE CONSPIRACY OF PONTIAC* 228-229 (1910) that barbarism is to civilization what childhood is to maturity; and all savages, whether cowardly or brave, whatever may be their country, their color, or their lineage, are prone to treachery and deceit.

often retains for a lifetime his own primitive means of dealing with such situations. Some of the so-called "witches" of New England, who would be considered as "hysterical" types today, were reported by observers as having engaged in witty conversations for days and others were quieted by reading jests.⁷ In other words, these were compromise aggressions taking the form of intellectual dissent and harking back to an earlier period. Their emotional meaning was retroactive—with a present implementation of childhood means.

It would not likely occur to more than the few, who may be looking for psychodynamic similarities in all institutional experience, that there is a relationship between the phenomenon of the jester or the omnipotent hero or deity and the judicial dissenter. The limited interest is itself evidence of the extent to which culture tends to shut out such knowledge. But it is a great step forward when an official of the government not only exercises the right to dissent but insists that in questions involving the relationship between the individual and his government—as in constitutional questions—it is important that *seriatim* opinions be delivered in order that the future be saved from a miscarriage due to unanimous authority.

c. *The emergence of judicial dissent*

Justice Johnson was the first jurist of our time to realize the function of dissent in a democracy and to put his views into practice. He thereby overcame the fear which in previous times classed dissent of any sort as so dangerous as to be *permitted* only to the jester. True, there had been other dissenters before him in the field of religion, of politics and of science but these did not act under the official protection of the government. The legislator may be a possible exception but he has usually

⁷ Cotton Mather in his "Memorable Providences" reported of Goody Glover that "her Tortures in a small while would pass over, and Frolicks succeed, in which she would continue many hours, nay whole days, talking perhaps never wickedly, but alwaies wittily, beyond herself. . . . But she frequently told us, that if she might but steal, or be drunk, she should be well immediately." BURR, *NARRATIVES OF THE WITCHCRAFT CASES, 1648-1706*, p. 111 (1914). The significance of the psychodynamic fact that solemnity and jest are combined among primitives appears in the regression to primitive mentality in cases such as these. Cotton Mather goes on to tell us that he tried to get the unfortunate girl to read while in her "Frolicks,"—"I brought her again one that I thought was a Good Book; and presently she was handled with intolerable Torments. But when I showed her a Jest-Book, as *The Oxford Jest* or *The Cambridge Jest*, she could read them without any Disturbance, and have witty Descants upon them Too." (Id., p. 112). Jest was tolerable because it permitted the release of affect against the restraint the Good Book offered. Undue restraint is conducive to the desire to retaliate for the suffering caused against "culture" as an inhibiting cause.

dissented on specific issues for political objectives and less to unshackle "the expansive powers of the human mind."

Form, fiction and precedent were systematically examined by Johnson's analytic mind. These self-perpetuating tools of the common law were looked into afresh to test their capacity to solve the new and complex problems of the new democracy. He discovered in the slavish adherence to the old mechanisms the influence of paralyzing fear, the distorting work of the "monsters of the imagination." He ventured boldly in an angry atmosphere which itself most conclusively proved his thesis. For this perseverance he was considered "peculiar" by those who were exercising the "peculiar" traits of mind which he was attacking. It was the task of the jurist, as he conceived it, to understand rather than to believe. Civilized life he saw as a continuity of primitive society which had in its turn gone through the trials and errors of an earlier period. The menhirs and tumuli and legal dolmens of archaic times are, indeed but the superstitious ties with obsolete situations.⁸

⁸ It was not long before the theory of evolution gave support to such a critical attitude. Edward Clodd cited examples not only from barbaric but also from civilized peoples "as witnessing to that continuity of ideas which is obscured by familiarity and ignored by prejudice." *MYTHS AND DREAMS*, Preface (1885). In myths are found the germs of philosophy, theology and science. (*Id.* 7). The myth is no doubt a copious source of law. Its hold on the mind is often stronger than mandate of law and in innumerable instances shapes the course which law takes. To speak, therefore, of the sources of law without an understanding of the psychodynamics of myth formation and the emergence of superstitions is to approach the study of the law after much of its history has already taken place. Legends and traditions are potent forces in the making of law; hence, the making of legend and tradition must also be understood, else the law will be understood only as it comes through the screens which conceal dynamic processes. Recently, Mr. Justice Robert H. Jackson has pointed to the fact that a vast proportion of "law" that is applied today in the courts "had its origin long before the government. Some of it is as old as the Scriptures, much of it is traceable in ancient codes, very little is really added by ourselves." "The Trials of War Criminals," 32 A.B.A.J. 319 at 320 (1946).

We call attention to the fact that we do not subscribe to the idea of the "evolution" of ideas as expressed by Clodd and others following the Darwinian influence. The organic and biological metaphor are always tempting and, perhaps, often unavoidable. But ideas do not grow or evolve like plants.

Sir Henry Maine was one of the first to call attention to the non-legalistic sources of law. In answering the Austinian theory of sovereign command he insisted that the entire mass of historical antecedents determines how the sovereign shall act. "All that constitutes this—the whole enormous aggregate of opinions, sentiments, beliefs, superstitions and prejudices, of ideas of all kinds, hereditary and acquired, some produced by institutions and some by the constitution of human nature—is rejected" by the Austinians. MAINE, *EARLY HISTORY OF INSTITUTIONS*, Am. ed., 360 (1875).

Since writing the above article on Johnson the writer has published an article on Maine's contribution toward a study of the mental origin of institutions with particular reference to patriarchal origins which have played so important a part in the genesis

4. *The Struggle against Mental Inertia*

Johnson understood the meaning of the American Revolution because he saw in it one of those convulsive efforts of mankind to overcome mental inertia.⁹ He was not afraid to undertake a change although it endanger security and cause uncertainty. While he was not entirely free from reactions of fears he surely acted with less reliance upon customary ways of thinking than most people. He agreed with Jefferson "that laws and institutions must go hand in hand with the progress of the human mind."¹⁰ Hence, his boldness was creative and not, as is so often the case, destructive. He directed much of his energies against the magical pressures of the past for socially desirable purposes but ultimately for individual betterment.

The genesis of dissent and its intensity are related but must, nevertheless, be separately identified. Dissent may express itself in the Declaration of Independence, a revolutionary invention, the announcement of the discovery of a new principle in physics or chemistry or in the commission of crime. The difference is most often one of degree. The psychodynamic import to the individual of rebellion of any kind is one thing; the reaction of the members of society to it is still another—but even here there is relationship by identification and other methods. While opposition is a dominant factor in the genesis of dissent we may not overlook the part which curiosity plays in its motivation. In science, especially, the search for the new is a positive thing even though each new discovery may annihilate an old belief. But we can be sure from the manner in which scientists become protagonists and from the intolerance they often exhibit, that curiosity and aggression are, in research, closely allied. The zealous humanitarian is a dissenter against some of the most firmly held ideas which society has cherished and often is more militant than the ones whom he seeks to bring around to his point of view. Communist Russia, for example, conceives itself devoted to a humanitarian purpose. But its dissent is psychodynamically uninformed. It assumes that the specific knowledge which it preaches concerning economics is the solution to all of the world's ills. But the dialectic of

of modern psychiatry. Levin, Maine, McLennan and Freud, 11 *PSYCHIATRY* 177 (1948). This was followed by a study of the factor of child rejection in history, psychiatry and mythology as bearing upon the continuation of the patriarchal-matriarchal pattern of legal society. Levin, *The Oedipus Myth in History and Psychiatry*, 11 *PSYCHIATRY* 283 (1948).

⁹ 2 JOHNSON, *SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANIEL GREENE* 453 (1822).

¹⁰ Letter dated July 12, 1816 to Kercheval. 10 FORD, *THE WRITINGS OF THOMAS JEFFERSON* 42 (1892).

economics is no different psychodynamically than any other dialectic. Hence, Russia is today an outstanding example of screened aggression. The dogma of Marxism, despite the general view that the Russians are realistic, renders them the most unrealistic of peoples. A dissenting philosophy which will not admit of any dissent is an unreal philosophy.

Mr. Justice Holmes with some seeming inconsistency had little use for "the psychology of the average." The criticism of the "cultural lag" has been quite common in more recent years. But it was more unusual for a jurist in Johnson's day to refuse to be dominated by the thought mechanisms of the day. "Individuals are impelled to enterprise," he wrote, "and the human mind acquires vigour, independence and acuteness, from the reflections and discussions which are forced upon it. Awakened from that state of torpor and of habit, in which nine-tenths of mankind doze away their lives, and in which it is too much the interest of the rulers of the earth to keep them absorbed, men discover that, however bitter and harnessed, and flayed and goaded, still the physical strength is with them, whether the car of state is to be kept in motion or overturned; and rulers become (somewhat too late) sensible that they have duties to fulfill toward the governed."¹¹ We all know that new books, new political ideas, new inventions, new operas, new symphonies, new fashions and many other novel creations have been rejected at first. Some years ago Sir Henry Maine attributed fictions to the infancy of society—which is recognized today as a primitive stage. "They satisfy," he wrote, "the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present."¹² As an historian, Johnson was keen to observe "the tranquillity of conscious security"¹³ which could lead the individual astray; the same mental trait he found to explain some of the resistance encountered in the group mind when required to take necessary steps to make the Revolution a successful venture. "A whole community," he remarked, "is not easily impelled to an important change of habits or opinions."¹⁴ He found men to be "but slow calculators, and easily seduced to the enjoyment of pleasures, and the gratification of vanity."¹⁵ Here we have unmistakable evidence that Johnson's dissent

¹¹ 2 JOHNSON, SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANAEL GREENE 224.

¹² *Id.* 307.

¹³ MAINE, ANCIENT LAW (1894).

¹⁴ 2 JOHNSON, SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANAEL GREENE 56.

¹⁵ *Id.* 152. See also Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 MICH. L. REV. 497 at 533 (1944).

was not sporadic or actuated by political opportunism. Nor could it be considered in any sense a pose. It is clear that it was the result of understanding of some of the most compelling motivating forces which either roused the human mind to activity or caused it to "doze" away in torpor and habit. Much has been learned since his day. But few have ever devoted more sincere and consistent effort to implement mental progress with official duty.

5. *The Part of Reason in Governing Human Action*

a. *Holmes and the level of dominant ideas*

Holmes once spoke of law as "a great anthropological document" and stressed the study of it "as an exercise in the morphology and transformation of human ideas." "It is proper," he declared, "to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century." He found that "it is still only the minority who recognize how the change of emphasis which I have called the law of fashion has prevailed even in the realm of morals."¹⁶ He might have added for completeness that the study of the dominant ideas should necessarily include the study of the non-dominant ones. Much research must still be undertaken to learn how *all* ideas arise and function in legal societies. This is perhaps implied in the additional statement that "law is human—it is a part of man, and of one world with all the rest."¹⁷

Elaborating on this thought of Holmes, we envisage history as a vast record of conscious and unconscious data of psychological strivings toward better communication between men. "Communication" is here used in its broadest mental implications to include every type of human endeavor. To restrict such investigation to logical mental processes as presently understood leads to dead end. Justice Holmes wrote to Mr. Wu—in private—"I hate to discourage the belief of a young man in reason. I believe in it with all my heart, but I think its control over the actions of men when it comes against *what they want* is not very great."¹⁸ Beneath the eschars of reasoned culture are indeed the sensitive energies which may upon slight provocation discard all that does not satisfy the emotional and instinctive demands of the moment—even though they may be clothed in the garb of rationality or ideology. The more one

¹⁶ HOLMES, COLLECTED PAPERS 212 and 213 (1920).

¹⁷ Brown University Commencement Address, 1897, id. at 165.

¹⁸ Letter dated December 12, 1921, SHRIVER, JUSTICE OLIVER WENDELL HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 153 (1936). (Italics supplied.) Compare comment of Rank, note 1, supra.

observes rational conduct the more clearly does it appear that Holmes was correct. Not only has reason failed to make of the world a place where reason prevails but there is demonstrated at every step of man's history the fact that man has been unwilling to pierce the veil which would reveal the underlying motivations of conduct. In the main, civilized man has not improved much upon the procedures of primitive man. The ability to reason is man's most important attribute but the use he makes of it—even allowing for the advances made by science—is deranged and catastrophic. Our employment of mental processes is still at the level of the infant¹⁹ and the savage. We must turn again to the anthropologist for facts.

b. *Anthropological data*

Savages like children, have no steadiness of purpose, observed Sir John Lubbock (Lord Avebury).²⁰ He noticed another trait more commonly recorded by many field observers. He found that the mind of savages was not capable of very much strain; or, as he put it, the mind of the savage "is easily fatigued."²¹ The American Indian, according to Francis Parkman, was devoid of reflection and seldom took cognizance of abstract ideas.²² Elsewhere he spoke of that "savage lethargy of mind" from

¹⁹ See MARETT, FAITH, HOPE, AND CHARITY IN PRIMITIVE RELIGION 124 (1932).

²⁰ SIR JOHN LUBBOCK (LORD AVEBURY), PRE-HISTORIC TIMES, Am. ed., 583 (1875).

²¹ SIR JOHN LUBBOCK (LORD AVEBURY), THE ORIGIN OF CIVILISATION AND PRIMITIVE CONDITION OF MAN 9 (1875). What the author calls fatigue requires further elaboration in the light of the modern data on the subject of emotional conflict. However, the fact-finding is unimpeachable. The savage becomes "forgetful when voluntarily communicating information. On his attention being fully aroused, he often shows much quickness in reply and ingenuity in argument. But a short conversation wearies him, particularly if questions are asked that require efforts of thought or memory on his part. The mind of the savage then appears to rock to and fro out of mere weakness, and he tells lies and talks nonsense." Id. 9-10 quoting from Sproat's account of the Ahts of N.W. America.

As to how this trait of the mind has operated in the field of the law in former times, see Levin, "Mr. Justice William Johnson, and the Common Incidents of Life," 44 MICH. L. REV. 59 at 74-75 (1945).

McLennan, who locked horns with Maine in a bitter controversy about the patriarchal theory of civilization nevertheless agreed with the idea that forms of expression are to be reckoned with. He points out how in the case of Roman law the history is incomplete "as written on the face of it." Legal processes went through forms of howls and gesticulations and other forms "pregnant with meaning and instruction." What Michelet called "the poetry of law . . . the symbolic forms that appear in a code or in popular customs, tell us as certainly of the early usages of a people, as the rings in the transverse section of a tree tell of its age." STUDIES IN ANCIENT HISTORY, Am. ed., 7, 8 (1886).

²² PARKMAN, CONSPIRACY OF PONTIAC 43 (1897).

which it is so hard to rouse the Indian.²³ We are familiar with the taciturnity of the Indian. However, when we recall the oratorical ability of the Indian chieftains and their capacity to express their wishes in forceful metaphor, we must conclude that these appraisals of anthropologists and historians must in some respects be qualified. We would say that evidences of mental fatigue often represent only fixations of interest which are to a large extent environmental rather than indicative of lack of mental capacity. After allowing for degrees of capacity among primitives at different levels of civilization we still find that potentialities have seldom been tested in a psychodynamically favorable atmosphere. Statements of travelers seem extreme as, for example, that the South Africans could not raise thought above things of sense.²⁴ Yet the observation no doubt records the dominant trait which is feeling rather than thinking.

These accounts must be read together with Johnson's conclusion which we have set forth a few paragraphs earlier, that men are "slow calculators" and that most men are content to "doze away" their lives. Since he felt as he did it would follow that his dissent was not only an attempt to exclude himself from this generalization but a conscious effort to accomplish some change. Some decades later Sir John Lubbock (Lord Avebury) still felt that mankind was in reality but on the threshold of civilization.²⁵

6. *Primitive Methods of Discharging Affect*

a. *Resignation of judiciary to fear mechanisms*

We are not dealing with conditions which have already transpired. On the contrary, once we realize that the general level of education is still incapable of assimilating facts and views which may dislodge traditional methods of discharging affect we may expect to find confirmation of primitive attitudes in the highest places. Indeed, in proportion to the degree of knowledge available one may even say that we are worse off

²³ PARKMAN, *THE JESUITS IN NORTH AMERICA* lxxxix (1897).

²⁴ LÉVY-BRUHL, *PRIMITIVE MENTALITY* 23 (1923), quoting Frédoux; and id., 24, 25.

Radin envisages the life of the primitive in terms of activities of a practical nature that the modern scholar and ethnologist is apt to misunderstand. He refers to monographs of ethnologists as often developing into "unconsciously distorted presentations of primitive culture" yet some individuals, totally lacking in scientific training, "but with a well-developed sensational side to his nature, can give an inherently more correct picture." PAUL RADIN, *PRIMITIVE MAN AS PHILOSOPHER* 14 et seq. at 18 (1927).

See discussion in GEO. W. HENRY, *ESSENTIALS OF PSYCHIATRY* 51 et seq., also 116 (1928).

²⁵ SIR JOHN LUBBOCK (LORD AVEBURY), *PRE-HISTORIC TIMES* (1875).

than the primitives because we have the means of knowing better. And we may have good cause to despair of any substantial progress when we find the Supreme Court of the United States taking the view that in acting as "supreme arbiter" it must only reflect the level of general behavior; that, no matter how incorrect, a rule must stay if it is supported by tradition which has not been dislodged by an out and out cataclysm of some kind. Even though the evidence by all standards of available knowledge is inadequate and incompetent a judge has but to invoke the *mana*-laden words "history," "ancestors," "continuity" or "tradition"—these are but a few—to legalize further the most abject superstition and support the most primitive fears. In this regard Mr. Justice Holmes was extremely deficient, for he had found out that a tradition was often based upon what he considered an unreasoned survival which had lost its meaning. But these very "unreasoned" survivals are in fact psychodynamically reasoned. The reasoning is, however, on a primitive level which reasons that fear may be dispelled by the simple procedure of adherence; hence, the survivals represent, in fact, unwillingness to give up earlier and more primitive patterns.

The scientist who is aware of the progress made and the great amount of information now available about the mental processes must wonder about the real nature of the judicial function when he reads that the English common law of centuries back is the authority to be relied upon in seeking to determine the factors that bear on guilt even though psychodynamic processes are involved. And his wonder is increased when he finds that Blackstone, who believed in witchcraft and superstition, is quoted as an authority on the scope which is to be given to an action "of the mind" in a case involving the determination of what is treason. In *Cramer v. United States*, Mr. Justice Douglas, in his dissent, was considering the function of the overt act in showing that the traitorous project had moved out of the realm of thought into the realm of action and in an appendix to the opinion we read:

"Blackstone recognizes the distinction between evidence of intent and the overt act: 'But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore, in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor

upon.' When it comes to the offense of adherence to the enemy he gives examples of adequate overt acts, some of which may be innocent standing by themselves."²⁶

Mr. Justice Jackson, speaking for the majority of the Court stated that "mental attitudes and expressions should not be treason."²⁷ In other words, everyone agreed that the issue to be decided was inextricably connected with the mental nature of the problem.

The amazing thing is that, although everyone recognized they were dealing with mental dynamisms, in the lengthy opinions and copious marginal notes and appendix not one reference, be it ancient or modern, appears to any writings on the subject of mental behavior.²⁸ The vast advances made by students of mental processes and the enormous quantity of scientific data now available were completely by-passed. While judicial notice was taken of the writings of historians, articles which have appeared in law reviews and other miscellaneous "authorities" no mention is found of the achievements of psychologists or psychiatrists²⁹ and their discoveries in the field of human motivation. Had the case involved wages and hours or the Sherman Anti-trust Law there would have been (as has been the fact) extensive notes and references in the text of the opinions and in the margins dwelling upon the economic and sociological, political and historical aspects of the questions to be considered. The psychological sciences, which offer the only scientific information which can be had on the dynamics of human behavior and an attempt at some synthesis in the complex maze of human motivation, have yet to receive other than the scantiest notice. For all that would appear from such

²⁶ 325 U.S. 1 at 71, 65 S.Ct. 918 (1944). Justice Holmes once remarked that "all thought is social, is on its way to action. . . ." The remark is, of course, incomplete and ambivalent on its face. When thought starts its course of action it may use "social" objectives for a highly personal living through process which is only superficially so but actually is aggressively motivated. This is so common an occurrence that it hardly needs example, yet few admit that this is so. The quotation appears in Wigmore's Essay in MR. JUSTICE HOLMES, edited by Felix Frankfurter, 224 (1931).

²⁷ *Cramer v. United States*, 325 U.S. 1 at 28; 65 S.Ct. 918 (1944).

²⁸ Much space is devoted to determining the intent of the framers of the Constitution. It is stated that these men were influenced by eighteenth century liberal thought, both English and French. It is conceded, however, "that the French influences, more philosophical than legal in character, were particularly strong with Franklin, who took a significant part in framing the treason clause. Franklin had been a member of the French Academy of Sciences since 1772 and had many friends among French intellectuals." *Id.* at 15, note 21, in opinion of Mr. Justice Roberts.

Thus, the Court took judicial notice of the contribution of science and philosophy of the Revolutionary period but took no notice of current thought.

²⁹ Dissenting opinion of Mr. Justice Murphy in *Fisher v. United States*, 328 U.S. 463, 66 S.Ct. 1318 (1946) came later.

disregard these sciences might as well not exist. Except for a sporadic unexplained footnote appearing occasionally in a case there has been no judicial notice applied to this field of scientific thought. The study of the mind in action has yet to receive the enlightening benefits of *Muller v. Oregon*.³⁰

b. *The avoidance mechanism examined*

We have hitherto dwelt upon the aggressive use of principles. But there is another side to the psychodynamic approach to the use of principles. It may be considered as another phase of an ambivalent field of psychic activity. We refer to the resort to principles—or precedents as they are called by lawyers—for purposes of avoidance. This seems paradoxical and may be so labelled if one chooses to substitute it for ambivalent; but we prefer the latter term because it does not carry with it so much implication of insolubility. When one uses a precedent to lighten one's labors there is an element of avoidance of conflict with environment. The application of previously acquired knowledge is thus applied to release some of the tension which arises with every cultural problem to be solved. The fact that it is earlier knowledge is the important thing in such case and not that it is better knowledge, since the earlier data is already there and does not require experiencing. No doubt in any cultural life complexity prevails so that this reliance upon past experience is of value to the individual and society. The distinction is between being guided by the "prior art" so-to-speak and being dominated by it. Furthermore, the lack of insight into human motivations which generally obtains makes it easy for persons to pretend to follow principles while actually following their own impulses. In the latter case freedom of choice is preserved but it is only *the freedom of those who succeed in having others believe that they have acted with complete detachment*.

We have seen that the savage seeks the easy way out of mental labor and fatigue. The avoidance procedure among civilized peoples serves the same end, removed only in degree. All persons indulge in avoidance and not merely the men whom Johnson referred to as the "slow calculators." The avoidance mechanism has pervaded all stages of cultural experience. In a large sense it has had its beneficial effect when we consider civilized life as representing continuous attempts to maintain peace and thus avoid aggressive conflicts. One has cause to wonder why

³⁰ 208 U.S. 412, 28 S.Ct. 324 (1908). In a previous article we pointed out that even judicial notice is not an adequate means for broadening the evidence base. See Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 MICH. L. REV. 497 at 515, note 47 (1944).

it has been so unsuccessful. Perhaps, with good ground it may be maintained that avoidance is in itself a failure because it is a substitute mechanism. And, if such be the case, some cognitive substitute or substitutes which would make it possible for people to get along with less sacrifice of their own personalities at the same time that they were able to cooperate with like minded persons may in some distant future be realizable. But for the present we must not permit any "dream" of the future to entice us away from understanding how we function, no matter what such investigations may lead to and what habits of mind may be dislodged.

Let us proceed to a few examples, bearing in mind that we are looking for evidences of the avoidance device in any and all institutional processes and especially, since this is a study in legal processes, in judicial, executive, legislative or any political action.

The drinking ordeal of the Kondes of East Africa is typical, we think, of primitive procedure. The ordeal of drinking the *muavi* cup, which decides between innocence and guilt affords an easy way to settle on a question of disputed rights.⁸¹ Here the drinking custom furnishes a procedural precedent which solves knotty problems in a very quick way. We are only degrees removed when we substitute the third degree for an earnest examination of all of the complex factors which determine legal guilt. Sir James Fitzjames Stephen saw the connection between primitive magical simplicity and the avoidance by modern procedures. Mr. Justice Frankfurter recently recalled and applied Stephen's insight in *McNabb v. United States*,⁸² where he condemned the forceful extortion of confessions and rejected the "reprehensible" third degree, saying: "It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection"; and in the margin he

⁸¹ LÉVY-BRUHL, *PRIMITIVE MENTALITY* 221 (1923). Sir Henry Maine found this tendency to avoid in legal practice. See MAINE, *EARLY HISTORY OF INSTITUTIONS* 52 (1875). See also note 21, *supra*, and MAINE, *POPULAR GOVERNMENT* 171 (1886). It is not intended here to adopt Maine's theory of inherited characteristics without qualification, even though correct in numbers of instances, since it is a large subject and should not be treated lightly, even in passing.

One of the commonest forms of avoidance is the effort to avoid an unfavorable solution of one's conflict. The ancient Romans used to solve this difficulty by resorting to soothsayers and the like. If the animal's head when about to be sacrificed did not tilt in the right direction it was not uncommon forcibly to turn it in order to have the approval of the gods. Whitley Stokes, the biographer of Sir Henry Maine, furnishes a more modern version. He quotes Sir Sayyid Ahmad to the effect that even in Moslem India the statute book is often preferred to avoid "the mental proclivities of the individual judges before whom their disputes may have to go for decision." *LIFE OF SIR HENRY MAINE* 62 (1892).

⁸² 318 U.S. 332 at 344, 63 S.Ct. 608 (1943).

aptly quoted an example from Stephen, who had said concerning the extortion of confessions: "There is a good deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.'"

Psychodynamically viewed, all vicarious judgment is an avoidance procedure, whether it be by the magical cup of *muavi* or red pepper or the verdict of a jury or the order of a judicial officer. The greater the sanctity which is attached to the institution or procedure which is invoked to take over the responsibility of individual decision in a situation of conflict (here the word is employed in its broadest connotations) the more apparent is it that the individual has admitted his own incapacity. For when there is a yielding to the magical or the supernatural the individual has given the unknown predominance over the known, the secret over the patent. Hence it is that the rejection of the idea of the divine right of kings by the American Constitution was a much more significant *mental* achievement than is ordinarily realized.

"The result of a belief in magic," warned Allier, "while providing man with an imaginary explanation, is to end the uneasiness he would experience in the presence of disconcerting phenomena, to supply him with grounds for expecting victory over the causes of his fright. Man, however, pays dearly for what he receives from this belief. Having therein discovered a solace for his troubled mind he no longer thinks of seeking elsewhere."³³ For the same reason, evasion is closely linked with avoidance. If we are to mark the difference between the two it would be that in the case of evasion there is an attempt to avoid by conscious indirection or simulation the law or custom of the group which has already been accepted as a tolerable means of solving conflict.

c. *Generality as avoidance*

The commonest of all avoidance mechanisms is, of course, the rational result we call a "generality" or "principle" or "precedent." While still a Massachusetts judge, Justice Holmes said of Judge Endicott, "I think of him as not avoiding the difficulties of a case, as not seeking refuge in generalities. . . ."³⁴ We can hardly overlook the findings of anthropologists concerning primitive life when we read what Holmes has observed about modern life. "But I have no doubt," he wrote, "that the generaliz-

³³ ALLIER, *THE MIND OF THE SAVAGE* 63 (1927).

³⁴ SHRIVER, OLIVER WENDELL HOLMES, *HIS BOOK NOTICES AND UNCOLLECTED PAPERS* 130 (1936). Other references to the particular and the general will be found on pp. 23, 47, 93, 164, 175, 176.

ing principle will prevail, as generalization so often prevails, even *in advance of evidence*, because of *the ease of mind* and comfort which it brings.”³⁵

The “refuge in generalities” again furnishes an example of ambivalence in that it is so closely linked to the refuge in ambiguity—another avoidance mechanism. What supplies the ambivalence is that general principles are meant to clarify situations by providing precedents of conduct and summations of observations of experience. This is as true of the laws of physics as the laws passed by the legislature. But the moment a general law is found it becomes ambiguous until it is applied to a specific set of facts—and even then it may retain its ambiguity. Hence, as Johnson said of the contract clause of the Constitution it is “the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.”³⁶ To find refuge in ambiguity means to avoid a final decision and thus to ease the mental labor, a disposition which becomes a disease in extreme situations. If the ambiguity is suddenly resolved the individual may become panic-stricken because of the strain put upon his emotional structure. However, every lawyer knows that he spends much of his time solving ambiguous situations. Ambiguity is not, as some would like to believe, a phenomenon of language only: it is an everpresent phenomenon of experience.³⁷ It is symbolized in ancient mythology by the story of the hero at the crossroads who must choose one of two roads; or avoid the road altogether. The story of the Riddle of the Sphinx tells of the tragedy which befalls those who “guess” wrong, that is, solve life’s ambiguities incorrectly.

There is a disposition to consider avoidance as an isolated finality and this appears in some expressions of anthropologists. Avoidance is a means of withdrawal from danger in all situations if we call living in the world without adequate knowledge to function well as dangerous. In that sense one’s interest in science is motivated by “fear,” although the word, fear, is an omnibus which carries many passengers. Science proceeds on the assumption that things have not gone so well that we can rest on our oars. It does not consider that conflict in the world may be avoided or

³⁵ HOLMES, COLLECTED PAPERS 223 (1920). See also *id.*, 240. (Italics supplied.)

³⁶ From *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 212 at 291 (1827). See Levin, “Mr. Justice William Johnson and the Common Incidents of Life: II,” 44 MICH. L. REV. 243 at 252 (1945). See also *id.* at 257 for reference to “the nature, object and terms” of a contract.

³⁷ *Id.* 248. See also Levin, “Language, Symbol Cycles and the Constitution,” 71 U.S. L. REV. 258 at 264 (1937).

should be avoided by supine mental hibernation. Its avoidance objective is ultimately directed to positive function and the avoidance of the usual animal status. It is only a partial view to see only one "side" of the avoidance ambivalence. The "opposite" of withdrawal from danger is the attraction to the things we require for living even at the risk of danger. The infant from the moment of birth takes in food. The child runs away from the cruel parents but responds quickly to the voice of those who he knows love him. "Taking in" is a vital process, a positive activity and not an avoidance mechanism. But it may become such when one function is employed to predominate and blot out others, as when excessive eating is an unconscious means of allaying other pressures.³⁸

d. *Examples of judicial avoidance*

Is this discussion of the psychodynamic evidences of avoidance to be disposed of as "academic" or "theoretical?" Clearly not, because it is as prevalent today as in earlier primitive times and is the most readily used mechanism for easing the labor of decision. In an opinion delivered several years ago, Justice Clark, of the Second Circuit Court of Appeals, remarked that "*the pain of decision* should not be *avoided* by reliance on some procedural technicality."³⁹ This is not a statement of a primitive medicine man or shaman but of a modern jurist of outstanding calibre administering law in an advanced democracy. In other words, there is a parallelism between the complexity of primitive life and the relatively greater complexity of modern life which does not, therefore, dispense with the mechanisms of more primitive civilization. This realization may hurt one's pride or undermine his feeling but it is demonstrated at every turn as *unavoidable* fact. The fact that we are cultured does not take away our pre-cultured human qualities and substitute entirely new ones. A popular writer suggests a reason why it is that persons are tempted to regress: "Democracy is no political creed for tired or thoughtless men and women. This is the chief reason why it has failed absolutely in some countries, and notably those countries that suffered most from the War [the First World War]. When we are nervous, tired, or dreamily pre-occupied, we do not want to have to make decisions. It is easier to

³⁸ Experiments have been made with animals which have resulted in the finding that an organism tends to avoid a stimulus object to be avoided and that this is relevant to theories of learning. It has been asserted that the effect of a reinforcing stimulus varies inversely as the remoteness of the stimulus from the act which is reinforced. See Bugeski and Miller, "A Spatial Gradient in the Strength of Avoidance Response," 23 J. EXP. PSYCHOLOGY 495 and 505 (1938).

³⁹ Cover v. Schwartz, (C.C.A. 2d, 1943) 133 F. (2d) 541 at 550. (Italics supplied.)

hand over all responsibility and simply obey orders, just as it is much easier to be a good soldier than a good citizen.”⁴⁰

Avoidance in some forms is palpable but in many others it is not easily detected. On the one hand it is a psychodynamic activity in individual life of many external dispositions.⁴¹ But that does not seem to satisfy. We, therefore, have the other side, namely, the effort of the individual to make of his avoidances a pattern not only for his life but for all society. So reliant does the individual become upon these outlets as methods of self-control that the individual believes that the whole world must do likewise lest it become uncontrolled. In other words, these avoidances are also projected onto society and become laws and institutions and methods of administering others. It takes a considerable amount of detachment—for which few are prepared—to discover one’s own personal “defences” institutionalized into religious, political, literary and scientific expressions. For example, the doctrine of judicial restraint has practical value within certain limits but this does not prevent us from detecting in this a dogma of constitutional interpretation. In a case decided not very long ago Mr. Justice Frankfurter revealed both sides of the ambivalence which gives rise to avoidances, that is, the “positive” and the “negative” sides—words which are used only for want of better ones at this time. In *Railroad Commission v. Pullman Co.* the claim of the Pullman porters was described as touching “a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.”⁴² It must be clear to one who is looking at the legal and constitutional problem from the dynamic viewpoint that

⁴⁰ PRIESTLY, RAIN UPON GODSHILL 214 (1939). See also Levin, “Mr. Justice William Johnson, Creative Dissenter,” 43 MICH. L. REV. 497 at 547 (1944).

Two essays by Judge Learned Hand are extremely frank in their admissions about the workings of the mind in the judicial process. “To most of us,” he declares, “who, like the defendant in *Trial by Jury*, love this young lady today, and love that young lady tomorrow, *freedom is a curse*; we slink back into our cages however narrow, and *our disciplines however archaic*. They are the defenses against the *intolerable agony of facing ourselves*. We prate of freedom; we are in *deadly fear of life*, as much of our own American scene betrays.” In MR. JUSTICE HOLMES, edited by Felix Frankfurter, 129 (1931). See also Judge Hand’s essay, *id.* 119, and another reference to fear, *id.* 124. The performance of one’s functions under conditions of “intolerable agony” would, of course, give rise to avoidances and the law which would evolve would be largely colored by the unconscious and conscious need of the individual to lessen the agony and fear. Answers to such problems confronting the judicial mind do not appear in the legal texts or in the case law. (Italics are supplied, except in title, TRIAL BY JURY.)

⁴¹ In individual experience avoidance may easily be detected without technical training if one’s observation is not blocked by the very avoidances which are to be discovered.

⁴² 312 U.S. 496 at 498, 61 S.Ct. 643 (1941).

Mr. Justice Frankfurter was saying—notwithstanding the objective realities of the situation—that *he* was sensitive to the conflict to be resolved. Such sensitivity has frequently been expressed by judges but the word “delicacy” is more often used.⁴³ But Mr. Justice Douglas left no doubts when, in commenting on the *Pullman* case, he said: “*Avoidance* of constitutional adjudications where not absolutely necessary is part of the wisdom of the doctrine of the *Pullman* case.”⁴⁴ Mr. Justice Frankfurter, indeed, yielded in his opinion to the avoidance mechanism when he said in the *Pullman* case: “Few public interests have a higher claim upon the discretion of a federal chancellor than the *avoidance* of needless friction with state policies.”⁴⁵

e. *Natural law as an avoidance*

Now, in pointing out these avoidances we are not singling out any specific individuals as examples of competence or the lack of it. The level of information on these subjects is yet restricted. We choose our examples

⁴³ The opposite pole of over-zealous belief is an exaggerated sense of delicacy which is also an avoidance mechanism, as Sir John Lubbock observed in commenting on conversations among primitives. LUBBOCK (LORD AVEBURY) PRE-HISTORIC TIMES (1875).

⁴⁴ *Chicago v. Fieldcrest Dairies*, 316 U.S. 168 at 173, 62 S.Ct. 986 (1942). (Italics supplied.)

⁴⁵ 312 U.S. 496 at 500, 61 S.Ct. 643 (1941). (Italics supplied.) Recently Mr. Justice Frankfurter uttered the extreme version of the avoidance mechanism when he declared in *United States v. Lovett*, 328 U.S. 303 at 320, 66 S.Ct. 1073 (1946): “But the most fundamental principal of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible.” The “authority” for such a statement cannot possibly rest in *fundamental* concepts. Mr. Justice Frankfurter’s insistence that the judicial function is one of statesmanship and is a “political” one indicates that the avoidance is a matter of individual choice depending upon whether the particular judge feels that the action is or is not urgent. See essay by Felix Frankfurter in MR. JUSTICE HOLMES, edited by Felix Frankfurter, 48 (1931). This is apparent in the very opinion we have cited where Mr. Justice Frankfurter refuses to consider the *motive* of the Congress in enacting a law because the motive was presumed. The majority examined the background of the law and chose to act upon the constitutional question in order to determine the object of the law. It is as much “history” to consider the context as it is to indulge in generalities about fundamental approaches in avoidance of the more laborious task of examining legislative motives. Rules of interpretation about “saving” legislation are no less dialectic because expressed by Justice Holmes.

Once we appraise a situation as involving “*needless friction*” we have already implied that communication is on a plane to be avoided, that is, the positive element of resolution of conflict is not the concern of the courts. This has little to do with whether legally the *courts* should or should not interpose in a positive way. See discussion of the Duke of York’s case (1460) in Levin, “Mr. Justice William Johnson and the Unenviable Dilemma,” 42 MICH. L. REV. 803 at 828 (1944). The judges there belittled their own learning and avoided the conflict pertaining to the decision on the title to the Crown. From a more objective viewpoint the question is, rather, whether the action to be reviewed represents another step to better communication irrespective of narrow political implications. Is it

because they are illustrative of psychodynamic processes as related to institutional development and application. When we have chosen an individual it is because his individuality is reflected in a psychodynamic result which is characteristic of all persons to greater or lesser degree. We would refrain from the method of becoming a flaying protagonist. There is so much to do to advance our understanding even in small measure that sweeping condemnations in broad terms of those who have contributed to the advancement of the human mind—even though partially incomplete or even erroneous—are evidence of the avoidance of the hard labor of analytic thought. Mr. Ben W. Palmer's recent indictment of Holmes and modern thinkers is presumably in the interest of furnishing something to take the place of the apparent "lack of synthesis." But the harshness of his attacks betrays a resentment toward those who would not see the world as he sees it, that is, in an ordered and systemized configuration, either concealed forever from human knowledge, or concealed until a majority votes on what is natural. It is clear that disturbances of the mystic natural pattern must, according to Palmer, be scolded and labelled into submission as is evident from the treatment accorded the pragmatists, whose principal "fault" must be that they added a bit of courage to those who would undertake the unpleasant work of uncovering some facts about human motivations—before attempting to synthesize: "It is a counterfeit philosophy answering none of the great philosophical questions as to ultimates arising out of man's

another evidence of the "expansive powers" of the human mind or rather a drawing in for temporary safety reasons?

⁴⁶ "Defense Against Leviathan," 32 A.B.A.J. 328 at 332 (1946). (*Italics supplied.*) It is seldom pointed out, moreover, that natural law doctrine is related to compulsory reminiscence, looking backward and thinking and acting with a retroactive inclination. The idea of present selection is "dangerous." Man is, accordingly, incapable. Only those who lived before us had the wisdom, or else pre-existing fact (natural law) has furnished, by some magical communication, the answers to our problems. It is a regression to the primitive rather than a human advance, or, to borrow Judge Learned Hand's candid words, it is slinking "back into our cages however narrow, and our disciplines however archaic." (*Supra*, note 40.) See VERRILL, *THE INQUISITION* 15 (1931).

Strangely enough, a better case can be made out for *stare decisis* than its proponents have shown. As "prior art" the decisions of the past offer guidance but still preserve the element of choice which is liberty modified by experience. The search for "equivalents" has value but it is not the only value. For an earlier discussion of retroactivity and the search for certainty, see Levin, "Mr. Justice William Johnson and the Common Incidents of Life: I," 44 MICH. L. REV. 59 at 107-108 (1945).

The avoidance mechanisms are discernible in too many situations to be fully set out here. A common example is excessive literalism which furnished a well-marked path for action; but on a reality level literality may mean improved communication rather than reliance on the past.

perennial effort to interpret the universe. It offers its adherents an *avoidance* of those questions and invites them to live from day to day in successive mansions of scepticism or eclecticism.”⁴⁹ Anyone who has really attempted to understand the universe can hardly be chargeable with avoidance, in all fairness, if he is first trying scientifically to direct his individuality toward elimination of those deceptions of mind which are in fact avoidances. The natural law doctrine has from the very beginning been a psychodynamic endeavor on the part of individuals to do as they pleased but to avoid responsibility for the decision made. It is the most common and obvious example of avoidance there is. The ordeal of early English law—and other systems—with its cruelties was always under divine (natural law) guidance which “decided” the issue so that the parties and all concerned were able to avoid coming face to face with the realities of their acts. It is quite true that the pragmatists have not furnished us with any final answers about the riddles of the universe or a complete synthesis of everything. But William James and others before him and after him with their pragmatism as a dissenting method thereby opened the mind—even though only a little—and freed it from its natural law imprisonment. Man’s *capacity* for choice became a reality—if he so chose. If to be able to exercise choice is an avoidance then, indeed, natural law may equate for Mr. Palmer the very ideas he deems so obnoxious. It is the most serious of afflictions to which all of mankind is addicted—an ailment of civilization which must be accorded all of the careful therapy which is now applied to more secondary ailments—that those who speak of one thing are only revealing a *part* of what the psychiatrists call the “syndrome.” The same ones who speak of liberty with the intensest fervor often insist on the most rigid conceptions of *stare decisis* and those who oppose authoritarian political control insist on an authoritarian ideological control be it natural law or pure law. It is not the inconsistency which is deplored but the failure to be aware of what is going on within one’s self, for the psychology of the group reflects that of the individual.

Natural law doctrine makes possible the emphasis on the appearance of similarities rather than upon the real existence of equivalents. If authority is in the unknown then there must be a medium who communicates the will of the unknown. History has shown that the medium has always too readily relied upon signs and omens which are either handed down or are conveniently used as the leverages of power. It is convenient to have an index of the complex; but it is still another thing to worship it or to be mentally enslaved by it. The prevailing notion of law too often pictures

a shelf upon which legal volumes rest which contain the answer to the riddle of life if one would but open it. It is not so much better *laws* that we need—this notion implies—but better *digests*. That this certainly is an ambivalent sort of thing is almost always overlooked although those who do so would admit that they are trying to preserve liberty by means of precedent. It is a psychodynamic question we are dealing with here and not the usual controversial debate which invites a political partisanship. We are concerned rather with the picture of the drowning man clutching to straws which he imagines to be life-rafts.

If law is to mean the compulsive adherence to precedent not only for the immediate practical needs of cooperative living but for the avowed aim of stifling the mind's function then it is, indeed, a defunct science. This substitution of *belief* in precedent for choice is the very denial of everything democratic government stands for. But choice without knowledge, except in those rare instances of unusual insight, means the opening of Pandora's box. Even the brilliant mind trained in the material sciences is glad for the respite which comes with the rule which seems to lead out of the maze of perplexity. Choice arouses opposition from those who are, for reasons most often unknown to them, unwilling to indulge in it or are unable to do so or actually do so by indirection. This has always been so. Choice under these conditions very often means dissent and only the few practice it openly. The primitive and later American are hedged about by a set of conventions whose breach may subject them to indignity, ostracism and death. Hence it is that "the unpardonable sin," as Johnson's forced departure from South Carolina indicates, consists in setting up one's private judgment against recognized social authority, in perpetrating an infraction of private taboos.⁴⁷

⁴⁷ LOWIE, *PRIMITIVE SOCIETY* 440 (1920). See also by the same author *ARE WE CIVILIZED?* (1929).

William Graham Sumner has summarized the reaction of dissent on the group:

"Since it appears that the old mores are mischievous if they last beyond the duration of the conditions and needs to which they were adapted, and that constant, gradual, smooth, and easy readjustment is the course of things which is conducive to healthful life, it follows that free and rational criticism of traditional mores is essential to societal welfare. We have seen that the inherited mores exert a coercion on every one born in the group. It follows that only the greatest and best can react against the mores so as to modify them. It is by no means to be inferred that every one who sets himself at war with the traditional mores is a hero of social correction and amelioration. The trained reason and conscience never have heavier tasks laid upon them than where questions of conformity to, or dissent from, the mores are raised. It is by the dissent and free judgment of the best reason and conscience that the mores win flexibility and automatic readjustment. Dissent is always unpopular in the group. Groups form standards of orthodoxy as to the

7. *Psychodynamic Aspects of Precedent*

The psychodynamic effect of precedent is at least twofold. It not only eases labor of the mind and therefore furnishes relief but it also offers extensive possibilities for the positive transfers of feeling toward the precedent system. This latter phenomenon is recognizable as magic or superstition and appears in all mystic attachments to history or tradition. What the primitives call *mana* is really much simpler than some anthropologists would have us believe. Psychodynamically it is largely a projection of one's own self-esteem with some mixtures of a variety of unmixed aggressions or functions outwardly displaced. Thus, the individual invests with *mana* a part of what he considers valuable in himself but he does not so believe. He prefers to think and feel that it is the amulet, or the talisman, or the sacred cow, the totem, the man of importance, or the law which independently possesses the cardinal qualities which really emanate from him. Usually the *mana* acts also as a brake on the very person who feels its influence; hence it is likewise a mechanism of self-control useful on a primitive level. What seems to be too welcome to the rationalizing mind is the submission to some authority most often of its own choosing—forgetting for the moment the question of the influence of environmental forces. The search for precedent, the anxious groping for some authority and the avidity with which this exploration becomes allied with the mystic are no doubt due in large measure to a knowledge of the lot which befalls the dissenter. From earliest time man has been unwilling to dissent. And even though he is in fact rebellious he prefers to conceal the fact and to envisage his rebellion in terms of social purpose. The strong attachment to traditions and superstitions becomes a way of holding rebellion in check and is of itself evidence of the inadequacy of other present methods of individual and social control. The psychodynamic approach to the problem is only in its early stages but has already revealed the crudeness of the means and also the almost complete lack of willingness to understand on the part of the largest portion of the world population.

a. *Mental relief*

It is not our purpose, as must already appear, to bring forth Justice Johnson as the perfect judge, though he was extraordinarily competent

'principles' which each member must profess and the ritual which each must practice. Dissent seems to imply a claim of superiority. It evokes hatred and persecution. Dissenters are rebels, traitors, and heretics. We see this in all kinds of subgroups. Noble and patrician classes, merchants, artisans, religious and philosophical sects, political parties, academies and learned societies, punish by social penalties dissent from, or disobedience to, their code of group conduct." *FOLKWAYS*, 95 (1906).

when judged by standards of his day and even by those of ours. He was the first judicial officer in the modern era who attempted to pierce the artificial veil of culture, but he was far from being entirely free from the emotive pressures to which all humans are subjected.

The interplay of conflicting motivations is detectable to the watchful observer when he reads in one of Johnson's opinions such words as these: "It is a *relief* to us to find that there has been an expressed adjudication on both these points,"⁴⁸—an unmistakable admission of the function of precedent in lightening the judge's mental labor. Here is no mere amenity of opinion writing. It is a frank confession and demonstration of how the psychic economy works and is removed only in slight degree from the same psychodynamism when found in primitive mentality. The significance of the statement is further accentuated when it is recalled that the case was one involving the choice of freedom or bondage, the possible liberation of a Negress and her three children from slavery. Unconscious forces are easily unbalanced by the disturbance of situations in which slavery is involved. Conflicts arising out of the rejection of the practice of shackling of human freedom or the desire to enslave or subordinate others are easily roused into dynamic action. Witness the Civil War. It is a relief to avoid them.

The continual conflict, which is a dominant characteristic of a culture which sees too sharply the outlines of the duality of individual and society, be it family, tribe or state, leaves its unmistakable traces of an alliance with that Janus-faced psychodynamism known as ambivalence. When a judge prides himself upon his intuition—as many do—he is saying *in effect* that he possesses an uncanny ability to disregard or cut through precedent at the same time that he is applying it. He resolves the duality in favor of his own individuality but does so ambivalently. Thus, there is an element of dissent in the exercise of "intuition." The one who successfully solves the conflict by "intuition" may indeed find extra relief; for, he is not only acting individualistically—because he believes he is not bound by the rules—but he actually believes that his ability lies in being able to sort out and detect the applicable rules and to invoke them for the purposes of decision. There is a feeling of magical omnipotence which goes with intuitive thinking. The "sovereignty of choice" is a species of dissent. The anarchical and individualistic choice which democracy tends to encourage is seldom formless. The individual finds it inconvenient and often impossible to act according to ideals, plans

⁴⁸ *Mason v. Matilda*, 12 Wheat. (25 U.S.) 589 at 591 (1827). A similar remark appears in *Patapasco Ins. Co. v. Coulter*, 3 Pet. (28 U.S.) 222 at 233 (1830).

or configurations. Thus, dynamic energy—sometimes termed unrest or dissatisfaction—may find its outlets in a strong wish for peace, that is, personal peace. In extreme cases the pressure of dissent is so strong that nothing short of a state of euphoria will suffice to quiet destructive impulses.

b. *Dissent and the manic and depressive states*

A psychodynamic analysis of dissent cannot stop with the glib and commonplace characterizations of dissent and dissenters, and yet at the same time it must give effect to the underlying reasons why persons rely on such valuations. These reasons are the unmistakable evidence of the very process we are trying to examine objectively. To be more specific, the critics are part of the psychodynamic scene—be they dull or brilliant.

Modern psychiatry teaches that the difference between the so-called normal behavior and abnormal behavior is of degree and not of kind. From such a vantage point one gains very little as to the nature of dissent and correlative acquiescence—called “law”—from such labels as “radical” or “conservative,” though one does learn something about those who employ the terms recklessly. The most superficial investigation reveals that the minority conservative is also a radical and dissenter. Psychiatry, venturing into normal behavior, might, we believe, find in such ambivalences the evidence of what in more extreme cases is noticed as the oscillation between manic and depressive phases of personality; and, proceeding to the group, might discover in the “mass neuroses” of war, riot and insurrection and hatred movements the diffusion of individual affect and its patterns of discharge. We might then find that dissent contains more of the element of the manic phase and that excessive insistence on conformity partakes more of the depressive phase, with its attendant pull-back to compulsive repetitory behavior. Nor should it surprise or startle the scientifically inclined person who is capable of some detachment to learn that dissent may be put to the task—as has so often been the case throughout history—of achieving some sort of compulsory order which it opposes in the beginning. This does not necessarily mean that it must be so. After allowing for the need for compulsion, when dealing with levels of education where no better procedures have been devised, the highest aim of creative dissent must be the continual diminution of the orbit of compulsion and the extension of the scope of understanding and individual choice.

While dissent may also become an avoidance mechanism—as where great inner tension is relieved by inciting disagreement and by provocation of controversies which serve as immediate occasions for psychic

relief—dissent performs the positive function of furnishing the check on compulsive processes. There are many excessively strict consciences abroad whose possessors mistake their own inner pressures for the needs of society. The imposition of one's own conscience demands upon others furnishes many nefarious instances of the workings of the avoidance mechanism. A familiar pattern is to project one's own difficulties to the outside world and this makes possible considerable personal relief as the experience with political dictators and the many other innumerable cases would reveal. As is usually the case, these persons are also dissenters against what they have chosen as the objective of their attacks.

c. *Conscience*

A reason for the fact that the dissenter is often a sad and depressive person may be deduced from what Charles Darwin said about conscience even before modern psychiatry began to study such questions systematically. He observed that in the moment of action man will no doubt be apt to follow his stronger impulse but that after gratification "the social instinct" brings about retribution. "He will then," added Darwin, "feel remorse, repentance, regret or shame. . . . He will consequently resolve more or less firmly to act differently for the future; and this is conscience; and conscience looks backward and serves as a guide for the future."⁴⁹ It is now known that "conscience," whatever be its cause, is at the root of every mental illness and depressive condition. It is what causes people to fear to dissent as contrasted with refraining from dissenting voluntarily.

The meaning of "conscience," notwithstanding efforts to define it, is by no means clearly outlined or fixed; nor is its function always apparent. Enough scientific data is available for us to say that it is a psychic mechanism of communication variously employed. It is, therefore, a legal mechanism. The individual controls himself and is

⁴⁹ DARWIN, *THE DESCENT OF MAN*, c. 4 (1874). Conscience may be viewed by the student of jurisprudence as a partly automatic or unconscious precedent-following procedure. The following, more modern explanation, also includes Darwin's analysis: that conscience is a relic of the prohibitions on aggressiveness imposed in childhood—inhibiting aggressive acts before they get started in overt form. DOLLARD, *FRUSTRATION AND AGGRESSION* 86 (1939). Since dissent is an aggressive activity, conscience serves to inhibit its emergence in its very beginnings. See comments on the "indisposition" of the members of the Supreme Court in former days to dissent, WILLISTON, *LIFE AND LAW* (1940). The reasons often given are rationalizations—such as the need to maintain the credit of the Court lest it be weakened. The Court then becomes the symbol of each judge's conscience. Modern psychiatry has spent much of its efforts on the study of the harmful and beneficial operations of what is called "conscience" as psychodynamic processes.

controlled by it. Conscience may supply to the individual the prohibitory injunction against murder more effectively than the criminal code. When it breaks down, the criminal code goes with it. Conscience is the internalized censor—often a much needed Javert in the mind of a saint; for even the saint does not always recognize the degree to which his saintliness is unconsciously self-controlled.

This pull-back resides not only in presently suppressed sources of unconscious motivation but has its outcroppings in every day mannerisms and, indeed, in judicial expressions. Diplomatic politeness, which is almost universal, is seductive because of the inability of the political world to face what appears to it as the aggressive force of fact—often called truth. The man who says "I am sorry I cannot agree with you" attests, notwithstanding the edicts of etiquette, to his fear of becoming a dissenter. And so it is also with the letter-writer who "begs to advise," although the expression here is often chosen automatically. It is a seemingly trivial but striking evidence of man's fear and his willingness in the face of social pressure to indulge in self-humiliation.

The business of being a critic of man's compromises with his aggressions has always been a hard one. The critic must be able to understand, lest he assume the role of the martyr, that everpresent ambivalence whereby the mind of man at one and the same time finds refuge from disorganizing impulsive action in identification with authority and, then, in reaction to the restraint seeks to avoid the very subordination it has invented.

8. *Mental Processes of the Judges*

The judicial process is not a thing apart, though many would have it so. Judges employ the run-of-the-mine psychodynamisms of every day society. The judge also says in his own stilted style: "I am sorry but I cannot agree with you," or "I regret that I must take this course," or "It pains us. . . ." Johnson's first dissent in *ex parte Bollman* which arose out of the Aaron Burr conspiracy, begins with these words: "I have the *misfortune* to dissent from the majority of my brethren. As it is a case of much interest I felt it incumbent upon me to assign reasons upon which I adopt the opinion that this Court has no authority to issue the writ of habeas corpus now moved for."⁵⁰ And several years later in *Pierce v. Turner* he repeated this psychodynamism when he confessed that he was "*unfortunate* enough to dissent from his brethren."⁵¹ and in *Mills v.*

⁵⁰ 4 Cranch (8 U.S.) 75 at 101 (1807). (Italics supplied.)

⁵¹ 5 Cranch (9 U.S.) 154 at 168 (1809). (Italics supplied.)

Durycia,⁵² some years later, he used the identical language last quoted to introduce his dissent. Thus, with all his boldness, Johnson feared.

This reluctance on the part of Johnson is not to be summarily brushed aside as due, perhaps, to an over-aggressivity on his part compelling him to compensate by a show of remorse, as something that was "peculiar" to Johnson. Chief Justice Marshall, who was at times impatient with Johnson and certainly was not sympathetic to his continual dissenting, selected even more apologetic language in his dissent in one of his rare dissents, *United States v. Dandridge*:

"I should now, as is my custom, when I have the *misfortune* to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the Circuit Court of Virginia gave general surprise to the profession, and was generally condemned. A full conviction that the commission of even gross error, after deliberate exercise of the judgment, is more excusable than the rash and hasty decision of an important question, without due consideration, will, I trust, constitute some *apology* for the time I consume in stating the reasons and the imposing authorities which guided the Circuit Court in the judgment that has been reversed."⁵³

It is no mere coincidence that almost the very words which Johnson chose to express his inner resistance to oppose the majority appear in the later dissents of Mr. Justice Holmes; nor do we, in ruling out the chance factor, imply that there was any imitation on the part of Holmes, when he began his dissent in *Chanler v. Kelsey* with these words: "I have the *misfortune* to differ from the majority of my brethren in this case. . . . I think that the principles involved are of such importance as to justify a statement of the reasons of my dissent."⁵⁴

⁵² 7 Cranch (11 U.S.) 481 at 485 (1813).

Also in *Daly's Lessee v. James*, 8 Wheat. (21 U.S.) 494 at 540 (1823), where he said: "On this point, therefore, I concur with the Supreme Court of Pennsylvania, and only *regret* that I cannot concur both with that Court and this on the other bequest." (Italics supplied.)

⁵³ 12 Wheat. (25 U.S.) 64 at 89 (1827).

⁵⁴ 205 U.S. 466 at 479, 27 S.Ct. 550 (1907). (Italics supplied.) Also in *Kepner v. United States*, 195 U.S. 100 at 134, 24 S.Ct. 797 (1904), where he said: "I *regret* that I am unable to agree with the decision of the majority of the Court," and *Muhlker v. N.Y. & Harlem R.R.*, 197 U.S. 544 at 571, 25 S.Ct. 522 (1905); *Madisonville Traction Co. v. St. Bernard Co.*, 196 U.S. 239 at 257, 25 S.Ct. 251 (1905). (Italics supplied.)

Mr. Justice Woodbury declared that he had "the *misfortune* to differ" in *Wilson v. Rousseau*, 4 How. (45 U.S.) 646 at 692 (1846).

Mr. Justice Curtis who sat with Chief Justice Taney on the Supreme Court wrote at one time of his experience: "On the only important occasion which I had the *misfortune* to differ from the Chief Justice on such points, I thought he, and they who agreed with

The way of the dissenter is not a psychological bed of roses, whether in the ordinary communications of daily life, in the field of religion, in the challenge to the presuppositions of science, in politics or in the exercise of the judicial function. If there is aggression behind dissent so is there, then, some remorse, at times more intense than others. We are, accordingly, justified in drawing a conclusion from primitive life and the psychic experience of contemporary peoples in our culture. We refer to the custom of resorting to the protection of a talisman or its equivalent, the magic word. These are expiatory and are meant to act as a charm against retaliatory forces. It makes it easier to dissent if one knows that a magical routine expression can cure some of the danger. Atonement is the concomitant of "sin" and there is no greater "sin" in the mind, as it is trained in our culture, than to disagree or, even worse, wish to disagree, to commit the crime which the Japanese called having "dangerous thoughts."

Once Johnson took pen in hand and overcame his original resistance he did not falter in expressing "a strong opinion in opposition to that of the Court."⁵⁵ And this was true also in the case of Holmes who, quite determinedly, wrote in the famous dissent in *Northern Securities v. United States*: "I am unable to agree with the judgment of the majority of the Court and, although I think it useless and undesirable as a rule to express dissent, I feel bound to do so in this case and give my reasons for it."⁵⁶

B. *Exploration of Self-Serving Declarations as Origin of Dissent*

I. *The Ambivalent Nature of Holmes' Reluctance to Dissent*

In exploring for the psychodynamic origins of dissent we are not bound by self-serving declarations any more than is the judge in a trial who rules out such evidence as inadmissible. The difference is that the judge excludes the evidence with the finality which long-continued

him, carried the powers of the Court too far." Quoted in STEINER, *LIFE OF ROGER BROOKE TANEY* 323 (1922). (Italics supplied.)

⁵⁵ *Yeaton v. Bank of Alexandria*, 5 Cranch (9 U.S.) 49 at 54 (1809).

⁵⁶ 193 U.S. 197 at 400, 24 S.Ct. 436 (1904).

Justice Holmes was most outspoken about the reasons for a reluctance in his dissent in *Tyson v. Banton*, 273 U.S. 418, 47 S.Ct. 426 (1927). See pp. 445, 446, where he says: "We fear to grant power and are unwilling to recognize it when it exists. . . . It is covered by apologetic phrases like the police power . . . police power often is used . . . to apologize. . . . I do not believe in such apologies. . . ." And it should be noted that he gives fear its place in judicial conduct though he disapproves of it while speaking of the action of others. Thus his attitude is ambivalent. At the same time that he yields to fear he condemns it in his associates. This is common and not a mechanism peculiar to him.

precedent so often evokes. Our procedure, on the contrary, is not to consider such evidence as taboo or something evil but to weigh it for the light it may shed on the dark origins of such self-analysis. Consequently, when Holmes declares that he thinks it "useless and undesirable" to dissent we must place this sweeping generalization against the fact that he preached dissent and did in fact dissent with relish and insight. The facts thus deny the denial even though he may expatiate about the need for continuity, which is hardly reconcilable unless upon psychodynamic factors, with his inveighing against the compulsion of tradition. Few men, no matter how great, escape the pressures of the rationalizing process even though they believe they are as flint against them. An examination of only a few instances will reveal the correctness of this statement as applied to Holmes. But we do not execrate. Holmes was not a hypocrite nor may we challenge his integrity because he was patently inconsistent psychologically. Nor is it basic to say, as did one popular biographer, that he "hated to dissent, that he by no means desired to be known as fighter, reformer, or dissenter. . . ."⁵⁷ That Holmes said such things is true but so many facts of a contrary nature could be produced as to render such generality innocuous so far as its value in a psychodynamic study is concerned. For example, consider the repeated insistence that life was action; and his conception of language—with which we have heretofore expressed disagreement—as "the skin of a living thought" which may vary according to the circumstances; or his idea that society was an organism.⁵⁸ All of these expressions indicate an inward urge to let the creative impulses have their way even though the conflict was so great as to evoke a strong denial. We must probe beyond popular notions to discover the unmistakable evidence that Holmes was throughout his life depressed by fear—a fear so strong as to have driven him to extremes of pessimism and mental depression which he did not hesitate to reveal in his philosophic utterances although he was hardly aware of the strength of his conflict. His fear was a fear of himself, of the powerful dissenting forces within himself. Because of the pressure of these upon his personality, he was unconsciously forced into a mechanism of self-control which involved the denial of the emergence of these forces. We may examine a few of these confessions, although it is fairly certain that Holmes would have repudiated their value in the scientific study of his judicial method.

⁵⁷ BOWEN, *YANKEE FROM OLYMPUS* 375 (1944). It is not intended by this critique for scientific reasons to deprecate the work as a whole which reveals many facts of the early life of Holmes which an author with less insight would have overlooked.

⁵⁸ For the writer's criticism, see "Mr. Justice William Johnson and the Unenviable Dilemma," 42 *MICH. L. REV.* 803 at 814 (1944).

2. *Projection of Holmes' Fear of Himself*

While both Johnson and Holmes on occasions considered it a "misfortune" to dissent it seems that Johnson had the element of fear in his makeup rather well in hand whereas Holmes was much more ambivalent. Johnson viewed fear more objectively and consistently and was less depressed by it. While we do not have much more than his writings to go by we find evidences of a better emotional structure in Johnson than in Holmes. One may conjecture that this was due in no small degree to a better infancy and childhood but any conclusion on this score must await further evidence. Johnson was a more jovial and optimistic man, hopeful of man's place in the universe if he would but set to work on the capacities of his mind. There is more resignation in Holmes' writing which has all but obscured the powerful creative impulses which he so often belittled. While Holmes saw great possibilities in the study of unconscious motivations he did little more than acknowledge that they had to be reckoned with.

Holmes was essentially a sad and lonely man despite his friendships and his interests. His eminence and achievements did not resolve his downcast mood. Such things are matters of study and not of castigation if the future of mankind is to avoid some of its past errors. In the understanding of how such emotive factors of individual behavior affect society lies the key to the jurisprudence of the future and its implementation. A critic, who would in three paragraphs thrice speak "of a great danger of *infection* in the realm of thought" due to the "absolutist" philosophy of Holmes at the same time that he calls attention to his "pragmatism" and his failure to offer any check "to experiments with human beings as legislative guinea pigs,"⁵⁹ is hardly aware of the ambivalent nature of

⁵⁹ Ben W. Palmer in "Hobbes, Holmes and Hitler," 31 A.B.A.J. 569 at 570 and 573 (1945). This article and subsequent ones are highly animated attacks on the progress of man in his seeking to answer his enigmas by first analyzing his own mental processes. The difference which this critic seems to cause to stand out is the use of fear by projecting it outwardly rather than toward an objectively evaluated creative purpose. The presence in Mr. Palmer's article of such phrases as "danger of infecting those within our castle," "delousing processes or probationary quarantines" and "the seeds of poison weeds in the gardens of our souls" (id. at 570) may be psychodynamically compared with the fear of infection which overcame the residents of Charleston. See 46 MICH. L. REV. 175 et seq. Despite these criticisms it is easy to point out that in the above article, and the later ones following it, Mr. Palmer discloses some of the outstanding features of the Holmes attack. He condemns Holmes for his poetic language while at the same time rendering his thesis almost subservient to linguistic flourish and introduces a later article with a sonnet of his own creation dealing with liberty and order and horror of chaos, brutality and disorder. "Liberty and Order: Conflict and Reconciliation," 32 A.B.A.J. 731 (1946). He rebukes Holmes' theory of force but speaks of surcease

his own thought processes or those of Justice Holmes. Apparently Holmes is condemned for manifesting absolutist trends which are obviously counterbalanced by experiment but somehow or other this is supposed to differ from absolutism in the garb of natural law under which the individual manages pragmatically to choose his destiny but really does not appear to do so. We remain unconvinced, for it was Holmes who, as much as anyone of our day, awakened law and politics and philosophy from an absolutist lethargy. We think there must be some study of psychodynamic processes lest reproof is authoritatively substituted for understanding. We may then discover fear of danger in unlooked for places. All are subject to some "fear" which implies protection of one's self against the elements in the world about us which may cause us harm—nor do we exclude ourselves from its operation. But it is the recognition of its exaggerated place which distinguishes scientific objectivity from highly personalized faultfinding.

There has always been something of evil attached to inconsistency. This is because more has been expected of the average person than his training or insight permits him to fathom. And what is true of the average is true also among the most careful thinkers who have for the most part had to gain their knowledge of psychodynamic processes through their own suffering and insight—such as it was. The conscious resort to falsity and inconsistency is still to be condemned and rejected by better knowledge because of the practical needs of social communication. But inconsistency in those profound thinkers who have stirred the mind of the world is a matter for study only and there is no place for condemnation in such instances. Everyone is subject to the ambivalences⁶⁰ of life

from the fatiguing pressure of ideas at war with each other. Indeed, the essays are replete with warnings about the *enemy* against whom society must be prepared. He criticizes Holmes for his pragmatism but agrees with Holmes that it's what we believe in that counts, for he tells us that the historian knows that what moves people is not the truth "but what they believe to be true." "The Historian and The Lawyer," 32 A.B.A.J. 530 at 532 (1946). As to the last-quoted statement, it is the view of the writer of this article that Holmes never wholly subscribed to pragmatic doctrine. The idea that had to fight for its place in the market might be a false one but so might it be a correct one. Too many statements emanating from Holmes on the importance of science in law would bear proof that there was no magic in the conquering idea. Rather did he warn that without struggle the idea might never see the light; that there was something in fighting for faith in ideas. The fact that an idea worked did not give it final validity. Experiment, as is implied by Holmes' utterances, is a mental process and not a measure of worth.

⁶⁰ Honesty which is often equated with consistency is usually considered a matter of conscience but psychodynamically this does not necessarily follow. People refer to a severe critic in Congress, for example, as an honest politician when they really mean to say that he is a strong dissenter irrespective of party affiliation. Thus, honesty is a switch-word not unlike a pun, that is, it refers to the group standards of conscience and also may describe

and those who can detect them are yet few. With this thought let us probe a little further into Holmes' thinking and personality, realizing full well that precise formulation at such a distance is to furnish us with some perspective rather than a detailed picture.

3. *Loneliness as a Means of Self-Control*

His prevailing mood was clearly that of despair. What has been missed by his adulators as well as his critics must be taken into account by anyone who attempts a dynamic appraisal. His seeming submission to authority in specific instances was really an identification with the lack of it; his yielding to the majority was the initiation of a psychodynamic process which made it possible for an institution to exist which could change its "mind" as time and circumstance required. We have already seen that with Johnson he did not have a high estimate of the use the average person made of his mind. It would, therefore, run contrary to his innermost feelings to attach any real finality to the will of the majority. His attitude toward the majority well-nigh reached that of open and avowed contempt the intensity of which without doubt, even though supported by anthropologic fact, had its roots in earliest childhood experiences. He once told the students at Brown University that the man of high ambition "must leave even his fellow adventurers and go forth into a deeper solitude and greater trials. He must start for the pole. In plain words he must face the loneliness of original work."⁶¹ Here, certainly, is no mental genuflection, no surrendering to the absolute sovereign of the particular moment be it the sovereignty of one or of many. It is because he despaired so at the prospect of working alone in a world that refused to understand that he unconsciously devised the mechanism of working *through* the majority, of achieving results by

the vigorous opposition of group demands. Puns are linguistic—as distinguished from actual—solutions of conflict. The verbal identity simulates an actual identity and humor, though "low-grade" for that very reason results. It is significant, however, that conscience when it is off guard considers opposition to itself as being according to code. Honesty in such case means emotional integrity, which is a principal characteristic of childhood. The child's keenness to a sense of hypocrisy is his greatest mental asset but in a world which puts a premium on rationalization he must soon, unfortunately, give this up for politeness and other forms of placative conduct. This is itself the cause of much conflict and often appears in judicial conduct. It results in the curious inversion which approves of the "honesty" of youth and its straightforwardness at the same time that it disapproves of the spirit of rebellion as evidence of immature conduct. See Levin, "Mr. Justice William Johnson and the Unenviable Dilemma," 42 MICH. L. REV. 803 at 809 and 810 and notes (1944).

⁶¹ From Commencement Address delivered in 1897, HOLMES, COLLECTED LEGAL PAPERS 165 (1920).

means of it. It is a sad commentary on civilization that such a course should be necessary but the existence of the compelling circumstances cannot be gainsaid. "I will but add a word," he said to the Bar of Boston in 1900: "We are all very near despair. The sheathing that floats us over its waves is compounded of hope, faith in the unexplainable worth and sure issue of effort, and the deep, sub-conscious content which comes from the exercise of our powers"; and then he spoke to the young men who heard him of "long years of doubt, self-distrust, and solitude."⁶² The best known of his earlier exhortations to independence of thought is also perhaps the most emotionally charged:

"No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all *sadness of conviction*, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you *the black gulf of solitude more isolating than that which surrounds the dying man*, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end."⁶³

Poetic language? Surely, the feeling which gave voice to these innermost thoughts cannot be charged with misleading intent since few are even capable of such candid self-revelation. It is part of the conflict which civilization presents which leads one to speak in poetry what people might not listen to if said in ordinary prose. For, what Holmes is saying

⁶² Id. 248-249.

⁶³ From "The Profession of the Law" delivered in 1886, id. 31-32. (Italics supplied.) It should be especially noted that in the quoted passage Holmes speaks of the prophetic vision which is "more real than that which commands an army." In other words, in a world which has relied upon force there is no avoiding it until men know better; but the reality of existence to him was the realm of thought—no doubt more so than in most individuals. The army came after the mind, even though he saw the need for ideas using the army in the struggle of existence. The advocacy of force is often equated for the recognition of force as an ultimate value. But the two are not the same.

here is, more prosaically stated, that after all it is not the majority which counts but the individual, that it is only the "unshaken will" of the dissenter which may, even at the risk of death, overcome the imprisoning force of social compulsion; that the joy of seeking the unknown is also the realization of intellectual ambition in a world which forces one to retire to the "*secret isolated* joy of the thinker." No absolutism here!

While these thoughts spurred him on, the fear within him was great and pressing. It was this fear which at times motivated the expression of the other phase of the ambivalence, namely, the command aspect of the law. But throughout his writings there is always present the idea that the law as practical matter was one thing and the mind of man which must transcend legal commands is still another. At no time did he resign completely. Thus, he envisaged the law as the stern command of a woman sitting by the wayside and cautioned the wretch who would defy her sacred commands because he who "has thought to creep through ways where she was not, finds that his path ends with her, and beholds beneath her face the inexorable face of death."⁶⁴ Yet through painful steps and "world-shaking contests" mankind "has worked and fought its way from savage isolation to organic social life."⁶⁵

⁶⁴ Id. 27-28.

⁶⁵ Id. 27. In a number of his private writings there is too willing a resignation to the seeming inevitable facts of biological existence without waiting for further evidence. It is the despairing note which is disengaging, but this must be understood as a protest against the unrealism of rationalized existence which had done so poorly for mankind to date. It is an attempt at an ultra-scientific explanation which has the merit that it does not involve any conscious self-deception, although Holmes was often unconsciously ambivalent. Under this heading are the assertions that we must think of "our existence not as that of a little god outside, but as that of a ganglion within. . . ." "Essay on Natural Law," id. at 316. He has little faith in reason and much in the argument of force and prejudice. Letter to Mr. Wu, SHRIVER, HOLMES, BOOK NOTICES, UNCOLLECTED LETTERS AND PAPERS 151, 173 (1936). While he spoke of prejudices he was cognizant of "preliminary judgments based on a knowledge admitted not to be exhaustive but which on the peril of one's soul one had to act as life is short." Id., 173. "Every society," he stated, "is founded on the death of men." Id. 181 and 183. "Nature has but one judgment on wrong conduct, . . . the judgment of death. If you waste too much food, you starve; too much fuel, you freeze; too much nerve tissue, you collapse. . . . I nevertheless almost am prepared to say that every joy that gives to life its inspiration consists in an excursion toward death, although wisely stopping short of its goal." HOLMES, COLLECTED LEGAL PAPERS 272 (1920). Yet he ambivalently said of the labor of lawyers: "Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the *undying* body of *society*." Answer to Resolution on Death of Daniel S. Richardson in SPEECHES BY OLIVER WENDELL HOLMES 47 (1918). He was skeptical about "cosmic ultimates" in a very confidential letter: "This is private talk, not to be quoted to others, for one is shy and sensitive as to one's inner convictions. . . ." Id. 185. Another letter ends . . . "O Cosmos Now lettest thou thy ganglion dissolve in peace." Id. 202. He spoke of having "had many black years" and

4. "Sovereign Choice" as a Dissenting Mechanism

While Holmes was "slow to consent to overruling a precedent" he saw that in the "conflict between two social desires" doubts would arise and "where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."⁶⁶ Here again we have evidence of the everpresent ambivalence, the contrasting polar dynamisms—in this case precedent versus choice, or, otherwise expressed, authority and dissent. In limiting choice to doubtful cases he was, as he would say, drawing the line; but the fact is that he underestimated the part which ambiguity plays even in seemingly unequivocal situations. This need for some certainty (if we may so label it) finds its most unpleasant expression in the feeling of utter unhappiness often attending any attempt to destroy the illusion of its existence. His frequent references to death as the penalty for not following precedent, that is, doing original thinking indicates a strong pressure from within that is akin to the more primitive phases of childhood and to that prevailing among primitive men. "It is one of the virtues of culture," we are told by modern researchers in behavior, "that the goals of action and very often the behavior sequences which lead to the goals are ready-made, so that in frustration situations with children random behavior is less necessary in establishing gratifying substitute responses than it is in other animals."⁶⁷ The tendency is for "substitute responses to be fixated and used on subsequent occasions."⁶⁸ The "ready-made" goals as applied to law are the legal precedents but the fixation of substitute responses deals with personal behavior.

5. *Distinction Between General and Personal Precedent*

In other words, in our legal thinking we have failed to distinguish between types of precedent. It is utterly wrong to assume that a precedent which is either a goal or a fact-finding device will function according to its character. Each individual has his own substitute precedents of con-

expressed a need "to want something fiercely and want it all the time, sticking to the rugged course." *Id.* 203. While he believed that "to live is to function. That is all there is in living," (*id.* 142), he was constantly in fear that his mind would end in a *cul-de-sac*. *COLLECTED LEGAL PAPERS*, *supra* this note, pp. 245-246 and *SHRIVER*, *id.* 173. He lived to a greater degree than most persons in what seemed to be the solitude of thought. *COLLECTED LEGAL PAPERS* 270.

⁶⁶ *COLLECTED LEGAL PAPERS* 239 (1920).

⁶⁷ *DOLLARD, FRUSTRATION AND AGGRESSION* 58 (1939).

⁶⁸ *Id.*, 101.

duct which may draw on the ready-made ones for no other purpose than personal gratification; or what is a simple but deep-seated compulsive device⁶⁹ which satisfies the individual may be sought to be imposed by projection as a valuable precedent for society. Accordingly, Holmes could—as everyone at some time does—acquire some measure of relief from his own personal conflict by an engrossment of his mind in the ideas of continuity, tradition and history. It then would follow that the courts must give effect to these ideas although in another breath Holmes—like most other people—would deny the very repression which is thus accomplished. Nor could there be any doubt that these ideas properly understood and applied have a realistic basis in the psychodynamic processes. But we cannot overlook his repeated denials while our mind is focused on his affirmations. Conformity is a personal precedent for him notwithstanding at other times nonconformity is so strong a force that it becomes the psychodynamic equivalent of death. Modern psychiatry has by this time demonstrated by innumerable instances and overwhelming proof that the projection of one's self outwardly may have as its prime purpose the transformation of the external world for therapeutic reasons, as a healing process for the particular individual.⁷⁰ The precedent which is sought to be imposed on the whole of society and which is made to seem as the answer to all social ills turns out often to be no more than a personal cure, a sedative or perhaps an analgesic. And what is more unfortunate is that there is no discrimination so that the ready-made patterns which really have objective value as guides to action suffer the same fate. The result is that the "prior art" is also adopted as personal precedent and is expropriated to serve the needs of individual adventure.⁷¹ It would appear to us, then, that there is an enormous hiatus

⁶⁹ As to precedent formation among children who have had emotional difficulties see Levin, "Mr. Justice William Johnson and the Common Incidents of Life II," 44 MICH. L. REV. 243 at 262 et seq. (1945).

⁷⁰ See HENRY, ESSENTIALS OF PSYCHIATRY 64 (1928).

⁷¹ An interesting example to illustrate how both types of precedent may combine for a social purpose is found in a quotation from Tom Paine who said: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he *establishes a precedent that will reach himself.*" Quoted by Mr. Justice Robert H. Jackson in *Cramer v. United States*, 325 U.S. 1 at 48, 65 S.Ct. 918 (1944). Here Paine, who was a very aggressive person, lays down a rule for society but is also giving expression to his own need for self-control.

The part of self-punishment or, more accurately, self-control, as a method of social compliance has been given no attention in legal discussion. Excommunication is the social instrument for dealing with non-conformists but this does not end the matter. Bronislaw Malinowski tells that among the Tobrianders, when there has been a breach of exogamy, if "scandal breaks out every one turns against the guilty pair and by

between the psychodynamic aspects of precedent as an element of self-control and the implementation of the precedent as an objective source of information about conduct and the use of such information for the purpose of social guidance. In primitive life it is the *personal* application of social precedent in the various magical rituals which is confused and merged with the attainment of objective social values. In other words, self-control is the same as social control. While self-control is essential, of course, it is in the confounding of the psychodynamic operation of self-control mechanisms with social precedents that most of our individual and social distortions arise. It is in this field that the confusion between an individual's belief and social purpose becomes most incongruous and causes most of the resistance to the advancement of the human mind as an applied knowledge. It is more than merely good caution to supplement freedom of speech, of the press and of religion with a high degree of capacity on the part of members in society so as to enable them to function better and at the same time to make it possible for them to detect the effort to project individual control mechanisms onto society. Indeed, "Know thyself" must become an essential part of the training for law and government.

We do not share the doubts of Judge Jerome Frank about the possibility of greater objectivity on the part of judges. We are not ready, surely, at this early stage of development of the human mind as a self-scrutinizing mechanism to dismiss the problem of judicial bias or any bias, for that matter, with rather discouraging misgivings and dubiety. We would have expected the author of *Law and the Modern Mind* to offer more than this: "But that is no complete solution. Perhaps there is none; perhaps there is."⁷² The work of extracting the semblance of process from that perplexing jumble of human hit and miss which is usually included under the term culture has barely begun. However, such a view cannot be dismissed lightly when it comes from one who gave to the science of jurisprudence some of its most objective perspectives as to the processes which give rise to legal formulations and who single-handedly initiated a science of precedent-formation—a work which has continued steadily in numerous publications. Such a view must be considered as a challenge. But I shall not attempt an answer here.

ostracism and insults one or the other may be driven to suicide." CRIME AND CUSTOM IN SAVAGE SOCIETY 80 (1926). He also states that as among primitives, where the motive for suicide "is complex, embracing the desire of self-punishment, revenge, rehabilitation, and sentimental grievance" so among civilized men the traces of the existence of comparable mental attitudes exist. *Id.*, 95.

⁷² In book review in 59 HARV. L. REV. 1004 at 1011 (1946).

6. *Holmes and His Dissenting Father*

No systematic comparison between Holmes the Justice and his father, Dr. Oliver Wendell Holmes, has yet been made. It is one which should be made because it will be found to be a fruitful source of the study of some revealing facts of Holmes' psychodynamic history and render it possible to trace these into legal thought. We venture only a few observations here—not as a digression—but for the direct bearing which they will have upon the judicial process. First of all, both the father and son were eminent and forceful dissenters. This was also true, it will be recalled, in the case of Johnson and his father who was one of those who started the "ball of revolution" rolling in South Carolina. But the father, Dr. Holmes, enjoyed dissent, thrived on it and even—as is the case in much scientific dissent—was able to capitalize on it. One finds in his writings little fear of ostracism or death because of dissent but a contempt for those who would threaten. Instead of causing him pain, dissent was for him a source of psychic pleasure, which is as it should be if we are not to have morbid scientists. His bulwark was the ability without fear to evaluate the majority objectively and to be sure that he was strong and the majority was weak—which it usually is. At the same time he apparently did not *hate* the majority, a singularly remarkable trait in one who was so scientifically critical of it, since he often combined jest and humor and poetic plain-speaking with science. He was, evidently, able to bask in the full effulgence of warm acceptance by many of those whom he criticized. One might go as far as to say that Dr. Holmes' life is a sample with a few exceptions of an attainable and enviable empathy in the relationship between the critic and society and indicates that a much different level is possible than the one which generally prevails. It has important implications for the study of the relationship between the creative dissenter and society as a problem in communication. Better than most persons he was able to combine a liking for people with a dislike of their false ideas and sham procedures. This is most difficult—for it is one of the commonest and most accepted practices to *appear* to love humanity as an expiation for feelings of hatred.

While the Doctor was one of the pioneer students of the dynamics of human motivation, the mind in action, the son—more sensitive and fearful than his father—hoped that future men would explore that to which he had merely called attention. He would rather apply whatever insight he had than attempt to formulate it. And what a wide expanse of difference in the polarity of their perspectives! Whereas the son thought of a word "as the skin of a *living* thought" the father said that every

word we speak "is the medal of a *dead* thought or feeling," struck in the die of some human experience, worn smooth by innumerable contacts, and always transferred warm from one to another.⁷³ Holmes, Sr., dissented with relish and with confidence; Holmes, Jr., dissented with fear. Holmes, the Justice, often yielded in despair to the majority but Dr. Holmes, the psychologist, not only hoped for better things but reflected on how to achieve them. "We wonder, therefore, when we find a soul which was born to a full sense of individual liberty, an unchallenged right of self-determination on every new alleged truth offered to its intelligence, voluntarily surrendering any portion of its liberty to a spiritual dictatorship which always proves to rest, in the last analysis, on a *majority* vote, nothing more or less, commonly an old one, passed in those barbarous times when men cursed and murdered each other for differences of opinion, and of course *were not in a condition to settle the beliefs of a comparatively civilized community.*"⁷⁴ While Justice Holmes spoke rather generally of unconscious motivations, Dr. Holmes delved scientifically in the "underground workshop" of thought.⁷⁵ And while Justice Holmes seemed to give in with sadness to the force of prejudice Dr. Holmes held it out in front of him to look at it with the careful and analyzing eye of a scientist. "Old prejudices," he declared, "that are ashamed to confess themselves, nudge our talking thought to utter their magisterial veto."⁷⁶

⁷³ From *ELSIE VENNER* c. 28 p. 514 (1887). He believed, however, that ideas are intimately connected with growth in the sense that an idea "is an impression made on a living tissue, which is the seat of active nutritive processes." *MECHANISM IN THOUGHT AND MORALS* 57 (1871). The implication of "growth" by reason of this connection is possible as a figure of speech but, is also questionable, even though more plausible.

Justice Holmes' ambivalence on the subject of language and formula is illustrated by the following which should be contrasted with his emphasis on the living nature of language. "To rest upon a formula is a slumber that, prolonged, means death." Holmes, "Ideals and Doubts," 10 *ILL. L. REV.* 1 at 3 (1915). While he urges us to "think things instead of words" he warns us that "you cannot give it definiteness of contour by calling it a thing"—he was referring to a business which is made to seem like land by calling it "property." *Truax v. Corrigan*, 257 U.S. 312 at 342, 42 S.Ct. 124 (1921).

⁷⁴ *HOLMES, MECHANISM IN THOUGHT AND MORALS* 314-315. Also *id.*, 500, where he speaks of the "almighty Majority-Vote." (Italics supplied.)

⁷⁵ *MECHANISM IN THOUGHT AND MORALS* 38 (1871). This remarkable address delivered to the Phi Beta Kappa Society in 1870 expressed ideas which were to become the core of modern psychiatry.

See *id.*, 41, for his discussion of dreams and sleep. This work is referred to in *CLODD, MYTHS AND DREAMS* 183 (1871) and also in *OBENDORF, THE PSYCHIATRIC NOVELS OF OLIVER WENDELL HOLMES*, edited by Oberndorf, 7 (1943).

⁷⁶ *MECHANISM IN THOUGHT AND MORALS* 44 (1871).

7. *Johnson and Dissent to Expand Knowledge*

Johnson was nearer to the Dr. Holmes type of dissenter, although there is some measure of the Justice Holmes fear evident but to a markedly lesser degree. While Johnson did not say that the majority was presumptively wrong he questioned the authority of the average mind, the "slow calculators." Both Johnson and Dr. Holmes dissented in order to further knowledge and understanding. Each was interested in adding his contribution to the progress of the mind in action. This must be done lest the majority dominate not only our conduct but our thought. Justice Holmes, on the other hand, dissented in order to let the majority do the experimental work which he found himself unable to do for psychological reasons. Johnson and Dr. Holmes were themselves creative dissenters; whereas Holmes, the Justice, was content reluctantly to dissent for the purpose of indirectly accomplishing what he did not choose to do himself, because he was held back by what he himself called the "can't-helps."

8. *Dissent as a Majority Phenomenon*

The uneasiness which we have already found as an accompaniment of dissent and which has not become channeled into an avoidance mechanism—may also be detected at times in the *majority* opinion where comparable psychodynamic factors exist. Thus, the prevailing opinion of the Court—with or without dissent—may contain an apologia for a decision. The rational exposition in such cases does not adequately reveal an unexpressed, though actually felt, motivation. Our appellate courts are psychodynamically fearful bodies and this is, as we have already suggested, because they are invested with an omnipotence which permits them to live out earlier patterns of behavior. Most of our appellate bodies confer and decide in secret session.

There is much truth in Holmes' statement "disguise it by veiling words."⁷⁷ Usually there is a mixture of response to reality and unconscious motivation in the conventional declination to act on grounds of policy and wisdom which is so often stated to be for the legislature or the executive. When Johnson had to adjudge the rights of the Cherokee Nation, which was a minority group seeking recognition of certain rights which conquest had well nigh obliterated, he declared: "Courts of justice are properly excluded from all considerations of policy. . . ."⁷⁸ The psychodynamic problem here is not necessarily the same as the political

⁷⁷ *Springer v. Philippine Islands*, 277 U.S. 189 at 211, 48 S.Ct. 480 (1928).

⁷⁸ *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 at 30 (1831). In *Georgia v. Sundry African Slaves*, 1 Pet. (26 U.S.) 110 at 125 (1828) he found it necessary to vindicate judicial action.

one. What Johnson said is still "good law." But we are left free to ask—"What are some of the psychological factors which have motivated the judges in their concessions of power to others"? Johnson put it largely on the ground of unfitness in the wider sense. But that is not a sufficient reason because it does not go far enough. Very often the unfitness is declared after the judge has already unconsciously taken sides. The declaration of unfitness is partly a realistic avoidance and partly an unconscious avoidance due to identification, projection and other psychodynamic factors. It is not enough that the jurisprudence of the future dispose of such questions as the conflict between the casuistical concept of natural law and the pragmatic.⁷⁹ If the disguises are unfortunate nothing short of further scientific application will be of any help.

9. *Judicial Hesitancy*

We have seen that a judicial declaration as to delicacy of the question may be an avoidance procedure. But this does not mean that the hesitancy is not justified by the complexity of the facts presented. Deliberation is a functional psychic means of avoidance of precipitate conflict which is felt to be dangerous. If not carried to excess it is a valuable mechanism. But this does not always follow. For example, in his separate opinion in *Trustees of Dartmouth College v. Woodward*, Mr. Justice Story declared that it had not for one moment escaped him "how delicate, difficult, and ungracious" was the task devolved upon the Court.⁸⁰ Yet he concluded that the Court had nothing to do but "pronounce the law as we find it. . . ." The contrasting nature of these statements shows that the conflict was not resolved.

Johnson in his opinion in *Fletcher v. Peck*, a bold and creative opinion, wrote: "I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty."⁸¹ And in *Gibbons v. Ogden*, where federal control over commerce was involved, he approached the question as one of "great importance and great delicacy."⁸² "It is with extreme hesitation," he declares in *The Rapid*, "and

⁷⁹ *Live Poultry Dealers' Assn. v. United States*, (C.C.A. 2d, 1924) 4 F. (2d) 840 at 842, where Judge Learned Hand said: "It is impossible to draw a line which shall be immune from casuistical attack, and perhaps it is unfortunate that the somewhat arbitrary and pragmatic nature of what courts do in such cases has been so frequently disguised by a show of deduction."

⁸⁰ 4 Wheat. (17 U.S.) 518 at 712 (1819).

⁸¹ 6 Cranch (10 U.S.) 87 at 145 (1810).

⁸² 9 Wheat. (22 U.S.) 1 at 223 (1824). The quoted words are from the following context: "The judgment entered by the court in this cause has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent upon me to exhibit those views. I have also another

under a deep sense of the *delicacy* of the duty which we are called upon to discharge that we proceed to adjudge the forfeiture of private right, upon principles of public law highly penal in their nature, and unfortunately, *too little understood*.”⁸³ Likewise, in *The Nereide*: “Circumstances, known to this Court, have imposed upon me, in a great measure, the responsibility of this decision. I approach the case with all the *hesitation which respect for the opinion of others*, and a conviction of the novelty and importance some of the questions are calculated to inspire. The same respect imposes upon me an obligation briefly to state the course of reasoning by which I am led to my conclusion.”⁸⁴ Here again is the everpresent ambivalence, novelty versus the opinion of others, which produces “hesitation.”

But after we have observed these evidences of hesitation and some fear we must still reach the conclusion that Johnson more than any other jurist disagreed for functional purpose. He felt an emerging awareness, imparted by the new sciences which were appearing on man's cultural horizon, which saw uncertainties and ambiguities in human relationships, which had to be faced, where others saw only tabus and general principles. Sometimes the task was simple. “The principles of law involved in this cause are *few and simple*, and well established; and all the difficulties consist in so arranging the facts as to apply the principles correctly. . . .” expresses the most basic of all legal methods.⁸⁵ In his opening remarks in *Campbell's Executors v. Pratt*, however, *complexity* was seen and acknowledged: “This cause has its origin in the great case of Pratt, Francis, et al., which appeared in this court some years ago with the formidable bulk of nine hundred folios! The rights of the parties had become exceedingly perplexed in the progress of large and multifarious transactions, originating in the speculations of Morris, Nicholson & Greenleaf, in the land of this city.”⁸⁶ The task of sorting facts upon which to apply principles is but a phase of the interrelation of reality to the processes of the intellect.

Because language is our prime intellectual instrument of communication Johnson studied its uses and limitations, its employment in the protection of human rights and also its other side—that of creating the

inducement: In questions of great importance and great delicacy, I feel my duty to the public best discharged by an effort to maintain my opinions in my own way.”

⁸³ 8 Cranch (12 U.S.) 155 at 160 (1814). (Italics supplied.)

⁸⁴ 9 Cranch (13 U.S.) 388 at 431 (1815). (Italics supplied.)

⁸⁵ Jackson v. Huntington, 5 Pet. (30 U.S.) 402 at 430 (1831).

⁸⁶ 2 Pet. (27 U.S.) 354 at 355 (1829).

means of doubt and confusion. He was the arch enemy of unnecessary ambiguities which might have been avoided. "My object in expressing my opinion in this case," wrote Johnson, "is to avoid having an ambiguous decision imputed to me, or an opinion which I would not wish to be understood to have given."⁸⁷ Dissent means to be able to differentiate even when in agreement as to what should be done in a particular case; and conversely, differentiation implies frequent disagreement. The fact of concurrence in result does foreclose the expression of different insight, as in *Hudson v. Guestier*: "I concur in the reversal of the decision of the court below, but on different grounds from those which influence the opinion of my brethren."⁸⁸ The *avoidance* of ambiguity in the *entirety* is a large and impossible commitment. Anyone who undertakes it is suspect of indulging in an avoidance procedure for resolution of personal conflict, the application of personal precedent to social problems. Such persons are the "perfectionists" of common parlance. Nevertheless, the conscious effort to understand *how* the mind is enticed by *seeming clarity* as distinguished by adult *functional rationality* is what really distinguishes mature thought from superstition.

10. Dissent to "Keep the Door Open"

At the early period of our history when everything was more obviously in the trial and error stage Johnson was not ready to close the door. This was especially true in constitutional cases whether he concurred or dissented. "Entertaining different views on the questions in this cause from the majority of the court," he asserted in dissensions in *Weston v. City Council of Charleston*,⁸⁹ "and wishing generally that my reasons for my opinion on constitutional questions should appear, where they cannot be *misunderstood or misrepresented*, I will briefly state the ground upon which I dissent from the decision now rendered." As we have seen, he knew only too well for the composure of some how the opinions of others were misapplied. He had no intention to preserve confusion. In *Cherokee Nation v. Georgia*,⁹⁰ where he concurred, he gave the same reason: "In pursuance of my practice, in giving an opinion on all constitutional questions, I must present my views on this."

His differentiating mind reveals an awareness of its own objectives

⁸⁷ *Marine Insurance Co. v. Young*, 5 Cranch (9 U.S.) 187 at 191 (1809).

⁸⁸ 4 Cranch (8 U.S.) 293 at 298 (1808).

⁸⁹ 2 Pet. (27 U.S.) 449 at 470 (1829). A century later the dissent in this case was adopted in substance in *Graves v. New York*, 306 U.S. 466, 59 S.Ct. 595 (1939).

⁹⁰ 5 Pet. (30 U.S.) 1 at 20 (1831).

in what he said in *Martin v. Hunter's Lessee*: "In this view I acquiesce in their opinion, but not altogether in the reasoning, or opinion, of my brother who delivered it. Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our own way."⁹¹

"Whoever will candidly weigh the intrinsic difficulties which this case presents," declared Johnson in *Green v. Biddle*, "must acknowledge that the questions certified to this court are among those on which any *two minds may differ*, without incurring the imputation of wilful or precipitate error."⁹² Some who delight in depreciation might be too ready to find an uncanny similarity suggesting imitation in the language of Justice Holmes in *Bartels v. Iowa*: "I think I appreciate the objection to the law but it appears to me to present a question upon which *men might reasonably differ* and, therefore, I am unable to say that the Constitution of the United States prevents the experiment being tried."⁹³ But what is often deemed uncanny is nothing more than due to the obscured vision which has shut out the likenesses which appear to have presented themselves to those with keener insight. The two statements represent similar psychodynamic processes directed to the most difficult of all human functions—the detached judgment.

II. *The Gilchrist Case*

"Wilful and precipitate" dissent is not creative dissent. It does not allow for the time needed to judge properly all the elements of a conflict situation because the one who judges is judging—if that term may be used—an entirely different conflict, namely, his own. Here we must not confuse with aggressive arbitrariness the application to the situation of what we call strength of character and personal courage without which many a new thought would never have seen the light. Even if it should appear to some that Johnson at times seemed to carry independence too far such judgment would have to be appraised against the difficulties

⁹¹ 1 Wheat. (14 U.S.) 304 at 362 (1816). On the subject of Johnson's *seriatim* opinions see Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 MICH. L. REV. 497 at 512 et seq. (1944). See also preliminary remarks in *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 at 222 (1824); *Durronseau v. United States*, 6 Cranch (10 U.S.) 307 at 323 (1810); *Inglis v. Sailor's Snug Harbor*, 3 Pet. (28 U.S.) 99 at 135 (1830); *Ramsay v. Allegre*, 12 Wheat. (25 U.S.) 611 at 614 (1827); *Satterlee v. Mathewson*, 2 Pet. (27 U.S.) 378 at 415 (1829); *Huidekoper v. Douglas*, 3 Cranch (7 U.S.) 1 at 72 (1805).

⁹² 8 Wheat. (21 U.S.) 1 at 94 (1823). (Italics supplied.)

⁹³ 262 U.S. 404 at 412, 43 S.Ct. 628 (1912). (Italics supplied.)

which confronted him from the very beginning. *Ex parte Gilchrist*⁹⁴ decided by Johnson is a good example of personal excitation which would have tried the strongest mind. The case was decided on circuit in opposition to Jefferson's Embargo Act. C. A. Rodney, the Attorney General of the United States, had published an opinion criticizing Johnson's decision. Jefferson, who had appointed Johnson, had expressed concern about the decision "because of the quarter from whence came" such resistance.⁹⁵ Here was a human problem presenting a conflict between loyalty and one's own individuality as directed to performance of official duty. Johnson, thinking that Jefferson had instigated Rodney's opinion, published a reply that tells quite a little about Johnson's motivation in the decision. It is singularly consistent with what we have already learned about his approach to problems. Johnson did not object to criticism, he replied, since he believed "an opinion that cannot withstand a free and candid investigation must be erroneous." But he declined to be silent when this meant "being borne down by the weight of reasoning or awed by power." This is interesting as indicating that both reasoning and power could act inordinately. But the real key to the decision seems to be found in his comment on the plight of the Collector of Charleston: that "he may also have felt that sentiment of injury which affects the mind of everyone upon the undue restriction of the exercise of his own faculties."⁹⁶ In other words, Johnson had yielded on the side of liberty. This feeling had always been strong with him. His identification with the Collector in that situation was a confessed identification in favor of a human symbol of liberty and the consequent rejection of the restraint imposed by the Executive Order. Such identifications are a common occurrence in the judicial process and, indeed, in all human experience,⁹⁷ though not always so deeply felt and candidly acknowledged.

⁹⁴ 10 Fed. Cas. 355, No. 5420 (1808).

⁹⁵ See 2 ADAMS, HISTORY OF THE UNITED STATES DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 263 (1890).

⁹⁶ Rodney's Letter and Johnson's Reply will be found appended to the Report of the case in 10 Fed. Cas. No. 5420 p. 355.

⁹⁷ Identification with a losing party or one whose character has been impugned is frequently the basis for an attempted solace of words. Judges fear attacks on character because they are emotionally involved. In *Wormley v. Wormley*, 8 Wheat. (21 U.S.) 421 (1823), Justice Johnson said that the whole matter had been put together to admit of "distorted views" by reason of mixing up of the interests of trustee and cestui and went on to say: "It is, however, some satisfaction to me to be able to vindicate their (the defendants') innocence while I feel myself compelled to subject them to a serious loss." *Id.* at 463. See likewise *The Venus*, 5 Wheat. (18 U.S.) 127 (1820), where he expressed

Johnson was quite ready to admit that he may have erred. "It is enough, however, and all that a Judge, who has understanding enough to be conscious of his own fallibility, can pretend to, that there existed grounds at least specious for the issuing of the mandamus. . . . *There never existed a stronger case for calling forth the power of a court*; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality and an honest intention to discharge our duty."⁹⁸ Eventually Johnson confessed error with some qualifying remarks.⁹⁹ However, there was no error in his method notwithstanding his own frank admission. The memory of *Marbury v. Madison*¹⁰⁰ was still quite fresh in his mind. He had entertained some doubts as to the effect that should be given to the decision as a restriction on *nisi prius* judicial action.¹⁰¹ Here was a clear case where Johnson did not consider it a "misfortune" to dissent even though he later followed the precedent of a different rule of law.

12. *Outspoken Dissent*

In *Page v. Patton*¹⁰², his dissent was plain-spoken and without apparent regret. "As I understand the decision just delivered, it affirms a principle to which I certainly cannot yield my assent." Yet this is rather restrained when compared to the opening language in *Ramsay v. Al-Legre*¹⁰³ where he declared that "it was high time" to check this silent and stealing progress of the admiralty, in acquiring jurisdiction to which it has no pretensions. "Unfounded doctrines ought at once to be met and put down. . . ." In *Columbian Insurance Co. v. Catlett*¹⁰⁴ there was no shrinking judicial courtesy exhibited toward his brethren: "I concur with

satisfaction in having enabled an honest man to save his property and "vindicate his reputation." *Id.* at 131. See also note on Tom Paine, note 73, *supra*.

⁹⁸ *Id.* at 131. (Italics supplied.)

⁹⁹ *M'Intyre v. Wood*, 7 Cranch (11 U.S.) 504 (1813). In the concluding words of the opinion Johnson said: "A case occurred some years since in the Circuit Court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a mandamus to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that mandamus was issued upon the voluntary submission of the collector and the district attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria*." *Id.* at 506.

¹⁰⁰ 1 Cranch (5 U.S.) 137 (1803).

¹⁰¹ Dissent in *Ex Parte Bollman*, 4 Cranch (8 U.S.) 75 (1807).

¹⁰² 5 Pet. (30 U.S.) 304 at 317 (1831).

¹⁰³ 12 Wheat. (25 U.S.) 611 at 614 (1827).

¹⁰⁴ 12 Wheat. (25 U.S.) 383 at 397 (1827).

the court in all the points decided in this cause, except that which relates to freight. On that, it is my impression, that they have misapprehended the case, the question and the doctrine on which it turns. If so, it is not to be wondered at, if it should appear that they have decided upon the authority of adjudications which have no bearing upon the case." In *Patterson v. Winn*,¹⁰⁵ however, there is a mixture of firm criticism and some regret. Though he concurred with the decision he would not accept the opinion of Mr. Justice Story: "I am very well content that the judgment in this court should be reversed, as it went off below, on grounds which had little to do with the merits of the case. But I regret that no other grounds have been found for reversal than such as I feel it my duty to enter my protest against." But the regret here expressed is rather a criticism—the regret that the other judges had not quite understood or been able to. Nevertheless, while he was essentially a man of candor and direct statement, he was also not slow to recognize it in others. "This cause has been discussed very much at large," he wrote in *DeWolf v. Johnson*, "and with a degree of talent, candor, and research, very satisfactory to the court."¹⁰⁶

II

THE JUDGING FACULTY

A. *Maturity of the Judging Faculty*

Johnson with all of his fortitude was neither impetuous nor bellicose. The task was new, the work was difficult, the understanding little. Yet he was not quixotic. He did not create windmills in his own imagination in order to tilt against them, although he did battle against the phantoms of others. Carson has said that his "legal instincts outran his powers of expression."¹⁰⁷ If by "legal instincts" Carson means to include that range of cognition which is fed from the streams of unconscious thought¹⁰⁸ then

¹⁰⁵ 5 Pet. (30 U.S.) 233 at 243 (1831).

¹⁰⁶ 10 Wheat. (23 U.S.) 367 at 377 (1825).

¹⁰⁷ CARSON, HISTORY OF THE SUPREME COURT 228 (1892). See for earlier comment, Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 MICH. L. REV. 497 at 527 (1944).

¹⁰⁸ These words are put in quotes because the subject matter as to motivation is in controversy at some points. But there is no controversy on the general division into conscious and unconscious factors although even in this regard there are some limitations due to the inevitable necessity of verbalizing findings. Some few individuals have been able to give effect to a psychodynamic awareness or cognitiveness which in the average person would be considered a part of his unconscious. This is certainly true of Shakespeare who knew much about human motivation which has only recently been discovered by

it is a fair estimate—except for the inference that his power of expression was inadequate.

It is this meaning of "instinct" which Holmes must have had in mind in one of his cases when he sat as Chief Justice of the Supreme Judicial Court of Massachusetts. In commenting on a group of cases cited as precedents he observed that "perhaps the reasoning of the cases had not always been as sound as the instinct which directed the decision."¹⁰⁹ It is this "instinct" which is the psychodynamic source of the "judgment or intuition more subtle than any articulate major premise"—that now famous phrase which appeared in his dissent in *Lochner v. New York*.¹¹⁰ And, paradoxically, it is this also which Holmes meant when he spoke of the accident of "immediate overwhelming interest which appeals to the feelings and distorts the judgment."¹¹¹ In any case we are sure that Holmes was aware of the fragmentary nature of conscious knowledge and that the foundation of judgment may be "inarticulate and unconscious."

Holmes once wrote of a creed that he believed to be "the creed of ignorance and immaturity when honestly held. . . ."¹¹² In this respect he was in perfect accord with his father who longed for the soul with "self-determination" who would not "*voluntarily*" surrender liberty to ignorance. Concessions will always have to be made, of course, to keep the peace in any group where diverse attitudes prevail. But such compromises must be made reluctantly in order to prevent the mind and the constituents of the group from remaining fixed at the mental level of a majority vote. The present relish for history and similar "seductive clichés" is the simplest avoidance of the difficult effort—and fear—involved in the hardest of all psychodynamic processes, that is, differentiation, and living and acting in accordance with it. It would be, indeed, the equivalent of self-immolation if the jurist would consider his function to be to keep the peace of society irrespective of the advances which have been made in the knowledge of the factors which enter into the very activity of judging. No mature jurist could wish to act in such an office.

psychiatry as part of the unconscious. Much of what Shakespeare "knew," even though not entirely articulate, has now been scientifically classified. The significance of the existence of a Shakespeare is that a broadening of the range of knowledge of human motivation *is possible*.

¹⁰⁹ *Danforth v. Groton Water Co.*, 178 Mass. 472 at 476 (1901).

¹¹⁰ 198 U.S. 45 at 74, 25 S.Ct. 539 (1905).

¹¹¹ Dissent in *Northern Securities Co. v. United States*, 193 U.S. 197 at 400, 24 S.Ct. 436 (1903).

¹¹² *Abrams v. United States*, 250 U.S. 616 at 629, 40 S.Ct. 17 (1919).

History is largely the record of immaturity alleviated only yesterday by the protection of the rights of free speech, the right of belief, the right of locomotion—and all the others in the Bill of Rights which seem to be in imminent danger of being lost. The jurist who would reflect only the customs of the dominant groups irrespective of the gains made in the sciences of behavior could hardly meet the qualifications of mature judging which have been stated as: "The ability to size things up, make one's own decision. . . . Basically, maturity represents a wholesome amalgamation of two things: 1—dissatisfaction with the status quo, which calls forth aggressive, constructive effort, and 2—social concern and devotion. It is morale in the individual."¹¹³

B. Johnson as a Mature Jurist

By these tests Johnson was a mature jurist. Our study of his life and writings has shown a consistent and even stubborn purpose to depart from the conventions of "make-believe." He seemed to sense, with a mind looking way into the future, that creative differentiation could not be avoided if the law was to function in a world of diverse peoples and viewpoints. While Holmes spoke of "delusive exactness" he was cautious and kept aloof from a turbulent world. Johnson actually went into the fray to battle against those who would palm off such delusions as real. We do not have enough material to judge accurately but it does seem that with such objectives Johnson's occasional impetuosity must be placed against a social environment of a less competent nature as ample cause for provocation. We see no evidence of immaturity in his courageous effort to advance the level of the mind from superstition to knowledge.

C. Johnson's Knowledge of the Part Played by Immature Factors

That Johnson had the insight to be aware of the influence of childhood on the maturity or immaturity of later judgments accounts for the unusual penetration of his thinking and the self-confidence which

¹¹³ Quotation is by Major General C. B. Chisholm from Strecker and Appel in that extraordinary and courageous series of lectures entitled "The Psychiatry of Enduring Peace." General Chisholm, who is Deputy Minister of Health Department of National Health and Welfare, Canada, delivered these as The William Alanson White Memorial Lectures. The quotation is from page 7 of the pamphlet which was printed in 1946. See also 9 *PSYCHIATRY*, February 1946.

Subsequently, Dr. Edward A. Strecker dwelt further on the subject of maturity in his severe censure of home training, "What's Wrong With American Mothers?" 219 *THE SATURDAY EVENING POST* (No. 17) 14 especially 93, 95 et seq. (October 26, 1946).

comes from increased self-knowledge. In his comments on the early life of Greene we find a number of observations which prove to us that his psychological attitudes were not casual. He tells of the vague expectation which prevailed in Greene's family and neighborhood that he was one day to become a prominent personage. But he promptly relegates this prognostication to the effect of superstition and the popular belief in omens. Not satisfied with the statement of a mere conclusion, he proceeds to analyze a number of such prophecies and points to the fact that where such tales of prognostics "had reached the ears of their imputed object, they had, not infrequently, some effect in giving a direction to his views, and a stimulus to his exertions."¹¹⁴ This is sound psychodynamics. But if this be deemed a chance remark, we turn to his assertion that—"Such is the ascendancy of the mind; and fortunate it is for society, when a *judicious direction* is given to the early efforts of aspiring genius."¹¹⁵ And we learn too that he was aware "how deep and durable are the impressions of *nursery tales* even upon the strongest minds."¹¹⁶ The effect of these early mental influences was also noticed in the conscious training of their children by the North American Indians for careers of hostility to their neighbors. Their "national animosities," he wrote, "are faithfully transmitted through their women, and are among the first lessons inculcated on the infant mind."¹¹⁷ This is, indeed, a lesson for modern society!

D. *Dissent as the Vehicle of the "Conservative"*

It is illustrative of the ambivalence of the judicial mind in action that it was in a *dissenting* opinion that Mr. Justice Roberts recently complained of the "evil resulting from over-ruling earlier considered decisions" and the unsettled state of affairs which would follow and the "deplorable consequence" of the "administration of justice" falling "into disrepute."¹¹⁸ Such anxiety, however, reflects only the political

¹¹⁴ I WILLIAM JOHNSON, SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANAEL GREENE 8.

¹¹⁵ *Id.*, 9. (Italics supplied.)

¹¹⁶ *Id.*, 100. (Italics supplied.)

¹¹⁷ *Id.*, Appendix c., p. 514. See also Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 MICH. L. REV. 497 at 539 (1944).

¹¹⁸ *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 at 112, 64 S.Ct. 455 (1943).

In April, 1845, Mr. Justice Story, after many years of service on the Supreme Court, found himself alone and a dissenter. He bemoaned the fact that "new men and new opinions" had succeeded the "Old Court." These new opinions were in the majority now. Hence, he felt that "the vital doctrines" of the Constitution were no longer in the

aspect of dissent. Legal society has not been sufficiently successful in administering the affairs of the world to warrant the belief that the time has come to call a halt to the mental processes of differentiation. Dissent is the vehicle of the "conservative" as well as the "liberal"—words which describe the conscious alternatives of an unconscious ambivalence rather than fixed patterns of partisanship. After the advent of the "New Deal" justices the dissenting role was the vehicle of protest of the so-called "conservative" justices, Roberts, VanDevanter, Sutherland and others. Whatever one may believe politically there has never yet appeared a completely conservative or completely liberal justice. Indeed, one of the strangest phenomena of judicial conduct—though psychodynamically explainable—has been the policy of non-restraint in patent matters alongside almost complete avoidance in other fields of judicial activity. The inescapable conclusion is that with very few exceptions writers in the field of jurisprudence have told us little of value about the judicial process. It all points to one deduction and that is that there is no place for what is called conservatism in the *study* of the functions of the mind in relation to legal processes and results and the need for constant review of tentative findings from time to time.

Another glance at Justice Holmes demonstrates how little the individual knows about his own trend of thought. What Dr. Oliver Holmes said about Byles Gridley, the tutor, in *The Guardian Angel* may be said of the characteristic ambivalence of his son the Justice, who also displayed "the strange union of trampling radicalism in some directions and high-stepping conservatism in others. . . ."¹¹⁹ So we find one of Holmes' admirers attempting to explain away the popular impression that Justice Holmes was a radical asserting that this is not the case "that he is a firm believer in the régime of private property and the traditional economics."¹²⁰ The words "radicalism" and "conservatism" are typically

ascendancy. "I am the last member now living of the old Court and I cannot consent to remain, where I can no longer hope to see those doctrines recognized and enforced. For the future, I must be in a dead minority of the Court, with the painful alternative of either expressing an open dissent from the opinions of the Court, or, by silence, seeming to acquiesce in them." Letter to Ezekiel Bacon, April, 1845, quoted by STEINER, *LIFE OF ROGER BROOKE TANEY* 229 (1922). This was Story's second complaint about being alone. In 1837, after Taney's appointment as Chief Justice, he had written that he was "the last of the old race of judges. I stand their solitary representative with a pained heart and subdued confidence." He thought of resigning but remained on. *Id.*, 189.

¹¹⁹ THE PSYCHIATRIC NOVELS OF OLIVER WENDELL HOLMES, edited by Oberndorf, 133 (1943).

¹²⁰ COHEN, *LAW AND THE SOCIAL ORDER* 367 (1933).

ambivalent terminology and psychodynamically must be related to the complexities of personality and society. But to the extent that "radicalism" implies a strong feeling of opposition to the average psychological pressures of society Holmes was unquestionably an outstanding radical. No explanation can erase the reality of this estimate.

E. *The Function of Dissent in Hastening Conscious Progress*

To the politician the dissenter is a "disturber"—as often he is—but to the scientist dissent, based upon the advancement of the knowledge of psychodynamic processes, is inevitable. For the scientist knows, as did Tylor in the latter part of the last century, that . . . "mankind is passing from the age of unconscious to the age of conscious progress,"¹²¹ perhaps more rapidly than we imagine.

III

CONCLUSION

When we look at what Johnson was trying to bring into being it is no exaggeration to say that judicial jurisprudence has lost a century. He was himself, perhaps, too easily led to believe that "the motives that govern the hearts of men, are soon discovered by the discerning, through the veil too commonly thrown over human actions; often before the individual is himself conscious of their full effect in influencing his conduct."¹²² Very little discernment was achieved during that century and little desire to discern can be noticed. Such essays as have been written on the judicial process with some few exceptions abound in the usual references to the importance of unconscious factors and end there. That is also true of judicial opinions which admonish us to attend to such factors but avoid them with all of the assurance which comes from the indifference of omnipotence. Even Holmes' reluctant probing beneath the surface—just below but no more—gave rise to much debate as to whether dissents should not be suppressed. His followers came to the defense but the reasons advanced did not proceed beyond those already given by Justice Johnson a century earlier. Dissents were to be allowed because the public has the right to know, because it has

¹²¹ TYLOR, *ANTHROPOLOGY* 439 (1881).

¹²² I WILLIAM JOHNSON, *SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANAEL GREENE* 25. See also reference to "political delusion," *id.* 4 and the "delusion in the public mind," *id.* 34. Also his complaint about "the disguise thrown over the real grounds. . . ." *id.* 230. Also the "delusive prepossessions always influencing commanders and historians. . . ." *id.* 365. Also reference to "delusion," *id.* 389, note.

been the uniform practice, because able dissent accentuates decision, and because *stare decisis* is not an inexorable command. Nowhere do we find any claim for the need and right of dissent as an *essential* of democratic government in which the judiciary is the supreme arbiter over all actions. Nor do we find in the utterances and writings of Holmes and his followers any suggestion that dissent is a creative instrument which Johnson saw as a means for accomplishing man's self-betterment by further understanding and implementing the "expansive powers of the human mind." Is dissent to be only the means of accentuating judicial opinion—of merely dealing with matters within the self-selected range of judicial choice rather than of pointing to wider ranges of judicial competence? Should anyone doubt the need for a revised perspective we refer him to the statement made but a few years ago that "there is no social group in existence in which such freedom [that is, to form a rational opinion] exists."¹²³

How long can the law like the camel live on its own hump of precedent judicially interpreted by methods which have been found inadequate from the very beginning of man's history? We need only to look about us to discover the fact that man lives under an illusion of well-being which is externally conditioned. By a wish strong enough to submerge all else we have been led to believe that a faith in similarity and uniformity without anything further will solve all of life's perplexities. This faith was vigorously challenged by Johnson. The advent of Holmes did not introduce a new jurisprudence. In some respects, as we have shown, Johnson had greater insight than Holmes. It is quite correct to say that the range of inquiry has progressed over what was admissible in the period immediately preceding the advent of Holmes. But Johnson had already shown a better way than resort to judicial reason by referring to the context of events, the common incidents of life. We now have compartmental approaches such as that of "politics," "economics," "sociology" and several others—all of which are related to the artificial notion of police power or general power. To borrow Holland's phrase so aptly quoted by Holmes we have "a chaos with a full index."¹²⁴

This concludes this series of studies of Justice William Johnson and constitutional jurisprudence in which emphasis has been placed on the individual psychodynamic sources of law. It was made possible because

¹²³ BOAS, *ANTHROPOLOGY AND MODERN LIFE* 188 et seq. (1928).

¹²⁴ Quoted by Holmes in 1870 and found in SHRIVER, *HOLMES, HIS BOOK NOTICES AND UNCOLLECTED PAPERS* 41 (1936).

of Johnson's own awareness of the distortions in which he found himself and his readiness to set down his reflections in his writings. He knew that judging processes were impaired when "a strong, deep-seated feeling nurtured from earliest infancy, decides with instinctive promptness. . . ." ¹²⁵ While lawyers, judges and politicians, in the accustomed manner of controversial combat, debate the place which should be allotted to modern psychodynamic researches, it is appropriate to close with an observation which Johnson made over a century ago but which is today the very foundation of all studies of the mind in action: "Less reality often furnishes groundwork for more fiction." ¹²⁶

¹²⁵ 2 William Johnson, *SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANAEL GREENE* 275.

¹²⁶ *Id.* 242.