MR. JUSTICE WILLIAM JOHNSON, JURIST IN LIMINE: VIEWS ON JUDICIAL PRECEDENT

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I

THE PSYCHOLOGICAL PROCESS OF JUDGING

A. SUPERSTITIONS LEVEL OF MAN'S MENTAL PROGRESS

We have already become familiar with Johnson's awareness of the unconsciousness of mankind "of the shackles which superstition and tyranny had thrown around" it. He was also sensitive to the part which the law had played in preserving such a state of affairs: His keen and analytic mind was unwilling to accept as final what he knew was the illusive mirage of reality. The situation was a frustrating one—so much so that few minds today are prepared to accept the challenge which such a dynamic attitude entailed for him. He began anticipating beyond the capacities of the minds of those around him. It increased his anguish that he was so quick to detect the aggressions of those in whose society he lived who were alert to attach to a scintilla of rationality the full force of their displaced hatred and prejudice. Few could understand him. Surely, Jefferson could but there was only one Jefferson. Johnson was intellectually and emotionally almost alone.

Johnson considered it the aim of civilization to attain what he called rational liberty as a substitute for the mental anarchy which was prevalent. What situation did he find when he began to work toward that end? The American Revolution had released some critical forces but when it was over the principal explanation of almost everything was, as it had been before, tradition. Most conduct had no better basis than the fact that it had been compulsively inculcated by one's parents and that it bore the stamp of some outside authority. A major source of jurisprudence, then, was the mandate, "honor thy

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† Member of the (Detroit) Michigan Bar. A.B., J.D., University of Michigan; author, "Mr. Justice William Johnson and the Unenviable Dilemma," 42 Mich. L. Rev. 803 (1944); "Mr. Justice William Johnson, Creative Disserter," 43 Mich. L. Rev. 497 (1944); "Mr. Justice William Johnson and the Common Incidents of Life," 44 Mich. L. Rev. 59, 243 (1945); and other articles in this and other legal periodicals.—Ed.

father and thy mother." Dissent of any kind, therefore, had the quality of family disobedience. The chain action which made of superstition an instrument of continuity with the archaic past was almost unbreakable, since the child was emotionally unprepared to break a chain which tied him to civilized society. Thus were children brought up without the capacity for choice. Democracy was confined to political choice—and that within narrow limits—but there was to be no choice of the mind. There could be no real empathy under such conditions, only obedience through fear and repetitive behavior. Each generation passed on its own fears to its children with the effect that education was less a means of preparing the child for life than the best available means of maintaining traditional controls for the parents' sake. Law, which became the prevailing institution, was only a passable and tolerated means of somehow or other preserving order. It had little—if anything—to do with the affective bases of human relationships; and when law-in-action did play a part it was all too often to satisfy the individual's need to discharge his affect upon an object rather than to promote justice in its deeper connotations. There was an all-embracing atmosphere of mental enslavement and, therefore, continually smouldering resentment, which was eventually to break through in the form of open rebellion against actual human slavery. In a word, we find a clear psychodynamic relationship between the state of mind of the contemporary society and the emergence of the "slavery question."

Johnson began his attack on the enslaved mind by adopting the method of strict scrutiny of its manifestations. Principle and precedent, useful as they could be when choice and evaluation were possible, had been the tools of mental degradation when misapplied. We have seen that at an early stage he was tempted by natural law doctrine which he eventually discarded; but he did not offer as a substitute "an intuition more subtle than any articulate major premise"182 which, though it furnishes opportunities for the same kind of biased judging, has of late been glorified into a judicial method.183

182 Oration delivered at St. Phillips Church, Charleston, p. 22 (1813).
183 J. W. Jones, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 194 (1940), under the heading "Intuition in the judicial process" says: "No one can doubt that a soundly based science of psychology would be of immense value to legislators, judges, and officials by helping them gauge the effects of their enactments or decisions upon the individual and upon society at large, and to fix and measure liability in particular cases. So far, little more has been done than to emphasize the part played by intuition in judicial process." See also p. 124 where the author shows how natural law may be used as a cloak for personal views. See Levin, "Mr. Justice William Johnson, Creative Dissenter," 43 Mich. L. Rev. 497 at 515, note 47 (1944).
B. "Angry, Vindictive Judging" as a Consequence of the Enslaved Condition of Man's Mind

The psychological process of judging is assumed by some to be presently fully understood, but there is much yet to be learned. Chancellor Kent has left his mark on American jurisprudence. Shirley recalled, however, that "the shrewd old chancellor" could boast of the immense advantage he had over his brethren because they did not understand French or civil law. "I could generally put my brethren to rout and carry my point," he boasted, "by my mysterious wand of French and civil law. The judges were republicans, and very kindly disposed to everything that was French, and thus enabled me, without exciting any alarm or jealousy, to make free use of such authorities, and thereby enrich our 'commercial law.' I gradually acquired proper directing influence with my brethren, and the volumes in Johnson [the New York reporter], after I became judge in 1804, show it." 184

If we understand law as a communicative means, whereby the understanding gained by the individuals in society are reciprocally communicated to its various members and perceived and experienced by each we may study law and the judicial function and the judicial process more scientifically. And, what is more, since judging is a universal function indulged in by all of mankind, by the layman, the legislator, the executive, the priest, the lawyer and the psychologist as well as the professional judge, conclusions concerning the judicial process may shed light on all other judging processes and vice versa.

"Angry, vindictive passions of men," observed Johnson, "have too often made their way into judicial tribunals." 185 While human aggression is a fact—as much so as the weather—its discovery in places formerly considered free from its destructive influences should help society proceed toward a greater measure of self-control based upon understanding rather than prohibition. Cultural sublimation is not enough. With it must needs go increased awareness of one's own psychodynamic processes and those of others. Without such knowledge and both the conscious and unconscious self-control that goes with it there can be no real psychic basis of guilt. Indeed, our criminal juris-

184 SHIRLEY, THE DARTMOUTH COLLEGE CAUSES 257 (1879); also "Heiskell's Reports, Volumes 1 and 2," 1 SOUTHERN L. REV. 446 (1872).
185 Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 at 377 (1816). In a letter to Thomas Jefferson, dated April 11, 1823, Johnson spoke of the predominance of "little passions" in men of prominence. Johnson was especially quick to oppose "unfounded doctrines" which afforded facilities "for giving undue bias to public opinion, and... of interpolating doctrines which belong not to the law." Ramsay v. Allegre, 12 Wheat. (25 U.S.) 611 at 614 (1827).
prudence is based upon an assumption of cause which has but little to support it; for, it is seldom that the individual has the personality training and knowledge to overcome his misdirected childhood. Yet the resistance to understanding one's self is tremendous. The most courageous and aggressive conduct upon the part of dissenting individuals has throughout the course of history been required to make even slight progress. With this background of the history of the mind of man, we may the better appraise Johnson's efforts and, indeed, his occasional turbulence.

II

JUDICIAL PRECEDENT

A. Abuses of Reporters

Lord Campbell said of his own work as a reporter: "When I was a Nisi Prius reporter, I had a drawer marked 'Bad Law' into which I threw all cases which seemed improperly ruled."\(^{186}\) This bold selection of precedent by a reporter would be accepted by most lawyers with a smile; but let a judge discard a case as bad law and the cry is raised that he is undermining the stability of our institutions and rendering law so uncertain as to make it impossible for a lawyer to render an opinion to a client. No doubt Johnson had become quite familiar with the kind of reporting which reflected the ideas of the reporter as to what the law should be, and also with the type of precedent-making indulged in by Chancellor Kent. He consequently considered it a serious misdeed for a reporter to misreport a case. It amounted to the substitution of fantasy for fact since the false precedent could be nothing less than a "phantom." Since the extension of authority beyond its legitimate scope had always successfully used this means Johnson was on the lookout to see that the new democracy was not so deceived.

B. A Psychodynamic View of Dictum

With Johnson the reluctance to indulge in dictum or to rely upon it was a personality trait. Every judge writes dictum at some time or other and every judge to some degree relies upon the dictum written by others in the same sense that he is permitted to draw upon all sources of human knowledge and experience for his judgments. Meticulous analogous conjunction of fact and law is well nigh impossible and such requirement would soon become a tool of the compulsive

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\(^{186}\) Camp. Chanc., 458 quoted in Croake James, Curiosities of Law and Lawyers 86 (1899).
literalist. But the allurement of the exercise of authority is very great. The practice of writing dictum like incorrect reporting is common. When it becomes judicial habit it implies the ability of each judge to substitute a textbook of his own authorship for the applicable legal principle; fact and law, thus, become unrealistically separated.

In the hands of a dominant personality, precedent counts for very little when important issues are at stake. This was undoubtedly true of Chief Justice Marshall who repeatedly disregarded precedent but always solemnly repeated the need to follow fundamental principles. The decision in the case of *Marbury v. Madison* has been considered by many as judicial supererogation for the reason that it was dictum on the important and far-reaching assertion of the right to declare acts of Congress unconstitutional. We are not concerned at this point with the merits of the general question of judicial review on constitutional grounds. The fact that the charge that the decision was unnecessary and the question not justiciable is made suggests the possibilities for the exercise of power by a judicial body when no appeal—except to lethargic and fearful public opinion—from such a decision is possible. Johnson came to the Supreme Court a year after Marshall had rendered this decision.

Johnson insisted that the judicial function in any case required close adherence to the facts underlying the precedent to be applied. "The rule of law," said he in *Love v. Simms's Lessee*, "that a plaintiff must recover on the strength of his own title, and not the weakness of his adversary's, must be limited and explained by the nature of each case as it arises." This seems quite a simple statement made in passing but a closer examination will reveal that it is the very essence of a dynamic jurisprudence, for here we find the doctrine—so obnoxious to the textbook mind—that the principle itself is altered by the application of it. This is an expansive doctrine and, possibly, too modern for some moderns. That Johnson knew what he was doing in announcing such a view appears in *Patapsco Insurance Company v. Coulter*—"restricted doctrines will also be found correct, which in a more general sense, might well be questioned." He was too well equipped for

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187 1 Cranch (5 U.S.) 137 (1803); also Bank of the United States v. Owens, 2 Pet. (27 U.S.) 527 (1803).
189 9 Wheat. (11 U.S.) 515 at 524 (1824). (Italics the writer's.)
140 3 Pet. (28 U.S.) 222 at 235 (1830). The full passage reads: "The case of Green vs. The Phoenix Insurance Company, decided in New York, was certainly a
the adversaries of his day with that unusual insight which enabled him to see in these trends the all too common legalistic distortions, evasions and other devices of rationalization. Dictum was to be treated with suspicion—not merely disregarded. A display of erudition seemed to him to becloud the issues with a smoke screen of protective intellectualization.

While it was acknowledged that Johnson usually avoided dictum, he was nevertheless severely criticized for indulging in the writing of views not necessary for the decision of the case in the opinion in Elkison v. Deliesseline.\footnote{\textit{Caroliniensis} I 4 (Charleston, 1823).} Caroliniensis characterized portions of the opinion as “extra judicial”.\footnote{\textit{Id.} p. 19.}

“But now I put it to my fellow-citizens, and to the world, to tell me, in what portion of the habitable globe, in which civilization and refinement reign, or civil liberty rears her head, it was ever required of a judge, as a part of his duty, to seize hold of a sentiment expressed by Counsel, irrelevant to the point, finally decided, and not censured at the moment, and to make it the subject of a judicial remark, in a written opinion. I protest, my countrymen, against this, as contrary to all rule and propriety; as unprecedented in practice, as it is unfair in principle: as cruel as it is ungenerous.”\footnote{\textit{Id.} p. 20.}

The same critic called it a “volunteer opinion”\footnote{\textit{Id.} p. 20.} which, he asserts, was disapproved by everyone in court; and he quoted from that portion of Johnson’s language in his opinion in the Amanda—of which the following is a more complete excerpt—in which Johnson disparaged the authority of nisi prius decisions:

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very strong case to establish the doctrine that a loss by fire, proceeding from negligence of the master and mariners, was not a loss within the policy, although baratry be one of the risks. It will, however, be found, by looking into the reasons which governed the Court in that case, that its conclusions were drawn partly from the too general expressions of an elementary writer, and partly from analogy with other decisions in which the expressions of the court, unless restricted to the cases before them, were justly deemed authority for the decision there rendered. The question was one of the first impressions, and one on which the best-constituted minds may well have been led to contrary conclusions. It was, however, no unreasonable claim upon the profession made by Lawrence, Justice, in the case of Phyn vs. The Royal Ex. Ass. Company, with regard to his own doctrines in Moss v. Byron, ‘that what fell from him there must be taken in reference to the case then in judgment before the Court.’ Thus, restricted doctrines will often be found correct, which in a more general sense might well be questioned.” \textit{Id.} at 234, 235.
\end{quote}

\footnote{\textit{46 Mich. L. Rev.} 131 at 148, et seq. (1947).}
In the very able argument in this case, the decision in the case of DeLovio and Boit reported in 2 Gallison has been much commented upon; and was in fact the authority upon which the Libel was preferred; and I feel embarrassed now to dispose of this part of the argument lest I should be charged on the one hand, with disrespect of the opinion of one of my learned brethren, and on the other exhibit the indecent spectacle of maintaining with him a controversy before the public. Thus balanced I have resolved not to review that decision, because as I have observed in another case, in common with my own decisions, those of my brethren on circuit are not authority; and I shall never feel myself at liberty to canvass them anywhere but in my study or in the Supreme Court. I have still another reason: those who have observed my judicial habits will have noticed that I seldom, if ever, rest my opinions upon nisi prius decisions. I think it a public misfortune that they are ever published: for they commit a judge to posterity without an opportunity of correcting his errors; add to the already enormous bulk and expense of a Law Library; often make business for our Courts which never would have originated otherwise; and finally give a bias to legal opinions which ought to be received exclusively from tribunals of the last resort.

There are other questions of great commercial importance in this case, but I shall adhere to my constant practice of never seeking for more than one sufficient ground to decree upon.145

C. Application of Abstract Principles to Specific Circumstances

"Refining too much"146 upon legal principle led to much difficulty in litigation. The English law was anchored to the idea of precedent

145 The decision in DeLovio and Boit was by Justice Story on circuit. The unpublished opinion of the Amanda tried on Circuit by Justice Johnson is set out in full in the City Gazette of Charleston, S.C., of January 18, 1822. See CAROLINIENSIS 30 (Charleston, 1823), for the reference to the Amanda. See also pp. 29 and 48. "Under these few words 'shall regulate commerce,' a State right of greater magnitude, than any she has ever claimed, or exercised, is to be swallowed up in that tremendous gulf, the implied powers of Congress. So, says Judge Johnson, in an extra judicial opinion, published to the world; published too, against a determination which he previously promulgated in a previous decision, that he never wished to see a nisi prius opinion of his in print. The amiable and distinguished Judge Story's nisi prius reports ought not, in the mind of our judge, go down to posterity, until they are revised and confirmed by some tribunal of dernier resort. But everything that comes from his extra judicial pen, no matter how hurtful to the public weal, is to be submitted to without further review."

146 "The difficulties in this case appear to me to arise from refining too much upon the legal principles relative to ecclesiastical property under the laws of England.
as reported\textsuperscript{147} by the opinions of judges and the reporters. The written word has often invited the mind of man to challenge it. When it has been approved it has been cherished as wise precedent; but when it has obstructed the wishes of the one who is hindered by the record of the past the adherence to the written word has been stigmatized as literal or pharisaic. Neither view is objectively scientific. In \textit{ McClung v. Silliman}\textsuperscript{148} we find Johnson observing that the case presented “no ordinary group of legal questions. They exhibit a striking specimen of the involutions which ingenuity may cast about legal rights. . . . The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its \textit{application} to the subject glaringly incorrect.\textsuperscript{149} . . . It is not the first time that this court has encountered similar difficulties, in its advance to questions brought up from other tribunals. It has avoided them, by deciding that it is not bound to \textit{encounter phantoms}.”\textsuperscript{150}

It was common for Johnson to agree with counsel that the court in a cited case had \textit{appeared} to go to the length contended for but he would add that these expressions relied upon had to be considered as “mere obiter opinions, since the decision of the cause did not depend upon them.”\textsuperscript{151} Nor was this a judicial pose, for we find him applying

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I find no difficulty in getting a sufficient trustee to sustain the fee, until the uses shall arise.” Town of Pawlet \textit{v.} Daniel Clark, 9 Cranch (13 U.S.) 292 at 337 (1815).
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\textsuperscript{147} Edmund Burke once wrote: “To give judgment privately is to put an end to reports; and to put an end to reports is to put an end to the law of England! . . .” Quoted by John H. Wigmore in “The Cumulative Burden of Reports,” 25 J. AM. Jun. Soc. 174 (1942).

\textsuperscript{148} 6 Wheat. (19 U.S.) 598 (1821).

\textsuperscript{149} Id. at 598, 601. (Italics the writer's.)

\textsuperscript{150} Id. at 603. (Italics the writer's.) See also last sentence of Johnson’s note on Calder \textit{v.} Bull appended to the case of Satterlee \textit{v.} Matthewson, 2 Pet. (27 U.S.) 380 at 416 et seq. (1829).

\textsuperscript{151} Dawson's Lessee \textit{v.} Godfrey, 4 Cranch (8 U.S.) 321 at 323 (1808); also Marine Insurance Co. \textit{v.} Tucker, 3 Cranch (7 U.S.) 357 at 385 (1806), where he rejected a doctrine “probably suggested by some incorrect expressions attributed to Lord Mansfield” in a certain opinion that “was certainly in no wise material to the decision of that case . . .”; and also Gelston \textit{v.} Hoyt, 3 Wheat. (16 U.S.) 246 at 333 (1818), where he concurred with the majority but said that the opinion delivered goes into “consideration of a variety of topics which do not appear to me to be essential to the case . . .”

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In The Atlanta, 3 Wheat. (16 U.S.) 409 at 419, 420 (1818) he said: “It has long been with me a rule of judicial proceeding, never, where I am free to act, to decide more in any case than what the case itself necessarily requires; and so far only in my view can a case be considered as authority. . . . I have no objection to reserving the question on such a case, until it shall occur.” For example, also, his method of analysis in Barry \textit{v.} Coombe, 1 Pet. (26 U.S.) 640 at 651 (1828): “On this part of the cause, the case of \textit{ Stokes v. Moore} has been cited (1 Cox 218), and insisted on, as
the same test of "judicious" conduct to the activities of General Greene. In his *Life of Greene* he said of Greene: "His letters addressed to the executive of the states respectively, exhibit something more than strong good sense; they are marked by a judicious application of his topic to the peculiar circumstances of each state." 152

D. Dynamic Function of Precedent Compared with Function in Physical Sciences

His ability to detect departures from the setting in which the precedent arose was little short of the uncanny. But uncanniness often means only that the general level of knowledge has not yet attained such facility at understanding. In a number of instances his condemnation of the efforts of counsel, the courts, the writers and reporters for extending actual adjudication beyond the facts which gave rise to a particular decision rested in a strong feeling as to the nature of the judicial function. If his emotions became strongly aroused, as they did at times, it was because he saw more clearly than others; because he understood the tendency of the human mind to stretch precedents, whether legal or otherwise, beyond their actual and functional environment—the all too prevalent inclination to mistake one's own statement of reason as a common denominator of the wishes and needs of society. He, nevertheless, employed precedent to prove his point, as in his note on _ex post facto_ legislation:

"It is laid down, indeed, as a principle of the Roman civil law, 'that in cases which depend upon fundamental principles, from which demonstrations may be drawn, millions of precedents are of no value.' Ayliffe, 5. And the English law concurs with the Roman in this, 'that an extrajudicial opinion, given in or out of court, is no good precedent; for it is no more than the _prolatum_, or saying, of him who gives it.' An opinion given in court, if not necessary to the judgment given of record, is, according to Vaughan, no judicial opinion at all, and consequently, no prece-

furnishing an argument against the sufficiency of the signature of Barry in this cause. But in the case of _Stokes v. Moore_, it must be observed that both the judges who sat in that cause admit, that this was not the principal question in the cause, and it was decided upon the ground, that the memorandum was proved not to express the entire agreement between the parties. But if considered as authority in this point, it is only necessary to advert to the ground upon which the opinion is expressed, 'that the name there was not a sufficient signature, under the statute,' in order to discover, that it does not impugn the opinion entertained by this court in the present cause."

152 I WILLIAM JOHNSON, SKETCHES OF THE LIFE AND CORRESPONDENCE OF NATHANIEL GREEN 329 (1822). (Italics the writer's.)
dent; for the same judgment might as well have been given, if no such, or a contrary, opinion, had been brought; nor is such an opinion any more than a *gratis dictum.* Ayliffe, 9."

These views as to the function of precedent and the place of the judiciary in giving them effect were sincerely applied in his own case. He followed a rule of withholding his own opinion "upon successive cases as they shall occur" and made it quite clear that he preferred to found his opinion upon his own "researches and resources." On constitutional questions he always delivered a separate or dissenting opinion.

A court decision is an interpretive response to the request for the solution of an ambiguity in the experience of individuals or groups. At a later date the communication will no longer be responsive since the interpretive circumstances calling for the communication no longer exist. It is only when present judgment, seeking to solve a new ambiguity, needs the advice of the previous judging experience that the past has anything to offer to the present by way of a short cut. Limiting precedent to the *ratio decidendi* is no less important in achieving correct analogy in the law than in the physical sciences. The physical scientists also arrive at a judgment based upon a set of facts. The subsequent scientist wants to know what the judgment was upon these facts. He then may either challenge the judgment or employ it as advice applicable to the current problem. Past experience is invoked *in aid of a present result* in all cases, without exception. This holds true even in the case of the most compelling mandates when the compulsion is but one form of persuasion. It would appear, then, that the judge who

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153 The note to Satterlee v. Matthewson will be found in 2 Pet. (27 U.S.) 380 at 415; the quoted portion is on p. 416a (italics the writer's). See also p. 416b, where Johnson said: "The learned judges, in the case of Calder v. Bull, rely on Blackstone and Wooddeson for a contrary doctrine; but on examining these writers, the latter will be found to be anything but an authority to their purpose; and that in the former there is nothing furnished that can be held conclusive on the subject.

"High and respectable as is the authority of these distinguished men, it is not unpermitted to say that when they speak of the known and settled and technical meaning of words, they submit their opinions to that arbiter of truth to whose jurisdiction all men have an equal right to appeal. I think I have gone far to show that their quotations do not fix the meaning of the phrase under consideration with immovable firmness. . . . Certainly, in Lord Raymond's time it had not received this technical established signification, and how it can be proved to have acquired it since, is not very easy to perceive."

154 Hodgson v. Marine Insurance Co., 5 Cranch (9 U.S.) 100 at 114 (1809).
155 The Atlanta, 3 Wheat. (16 U.S.) 409 at 433 (1818).
wishes to state things in his own way in order not to mislead others with inapplicable advice will not be so easily misled himself. "I approach the case," said Johnson, in the celebrated case of The Nereide, "with all the hesitation which respect for the opinion of others, and a conviction of the novelty and importance of 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." 167

These are the words of one who is aware of the omnipresent factors of conflict in social relationships but, more important, of one who feels strongly the responsibility for approaching such problems without the bias of authority. Authority is to be respected for its worth but the obligation to weigh and analyze a novel situation was not to be resolved by the mere reference to the opinion of others whether expressed in a case or elsewhere. Whereas other judges spoke of the "delicacy" of a situation but acted as if no such delicacy existed, with Johnson such an utterance meant a serious amount of self-scrutiny—as the situation implied.

E. Function of Generalities

We have already seen that Johnson admonished that the rule of law "must be limited and explained by the nature of each case as it arises." But it must not be concluded that this meant that general rules had no value whatever. In Rose v. Himely he went as far as to say that, where the jurisdiction of a foreign court was concerned, "not being at liberty . . . to lift the mantle of justice cast upon their decrees, it is as to other tribunals of justice, immaterial what errors it covers; neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations, will sanction a deviation from this general rule." 168 He also on a number of occasions adverted to the existence of "universal rules." Although it is not made clear what he meant by such rules it may be inferred that he did not mean to convey a rigid conception of unalterable finality. 169 More often he

167 9 Cranch (13 U.S.) 388 at 431 (1815).
168 4 Cranch (8 U.S.) 509 at 512 (1808).
169 For an earlier discussion of Johnson's idea of universal law or natural law as interpreted by the writer, see Levin, "Mr. Justice William Johnson and the Common Incidents of Life: II," 44 Mich. L. Rev. 243 at 269 (1945).

In Fletcher v. Peck, 6 Cranch (10 U.S.) 87 at 143 (1810), he had said that a state could not revoke its credits "on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity"; and also that the "security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions."
warned against generality. Almost one hundred years before Justice Holmes, Johnson had already put into practice Holmes’ warnings. “Dangerous as it always is, in a court of justice, to generalize in the propositions which it decides,” he asserted in one of his early cases dealing with a question of insurance, “it is peculiarly so in questions arising on policies of insurance”; and then he added: “The present proposition is obviously couched in terms too general to admit of an answer in the affirmative, without restriction or modification.”

In his dissent in Mills v. Duryee, 7 Cranch (11 U.S.) 481 (1813) he declared that “there are certain eternal principles of justice, which never ought to be dispensed with, and which courts of justice can never dispense with, but when compelled by positive statute.” On a number of occasions Johnson quoted legal maxims, particularly from the Latin, as in Hawkins v. Barney’s Lessee, 5 Pet. (30 U.S.) 457 at 466 (1831): “Interess republicae ut finis sit litium and vigilantibus non dormientibus succurit lex, are not among the least favored by the maxims of the law.” In Marine Insurance Co. of Alexandria v. Tucker, an early opinion, 3 Cranch (7 U.S.) 357 at 384 (1806) he said: “I will only remark, that it was judicious in the counsel, to abandon an opinion, as inconsistent with natural reason, as it is with the established doctrine of the law of insurance.” In Doe v. Winn, 5 Pet. (30 U.S.) 233 at 245 (1831), he stated that the general rule was infinitely more important than a rule of evidence.

Buck and Hedrick v. Chesapeake Insurance Co., 1 Pet. (26 U.S.) 151 at 159 (1828) (italics the writer’s). See also Campbell v. Pratt, 5 Wheat. (18 U.S.) 428 at 431 (1820), where he concluded that “this exposition of the decree is perfectly consonant with general principles” but only after he had asserted that if the distribution in question were conformable to the decree “it is vain to refer to general principles.”

In The Atlanta, 3 Wheat. (16 U.S.) 409 at 426 (1820) he spoke of that which “consumes the vitals” of the rule.

Commenting on the land laws of Virginia, he found that her land system was “altogether peculiar, and presented so many aspects in which it was necessary to consider it, in order to afford protection to the interests imparted by it, that it might, with much apparent reason, have been supposed to require something more than the general principle, to secure those interests.” Hawkins v. Barney’s Lessee, 5 Pet. (30 U.S.) 457 at 465 (1831). This illustrates very well the fact that the challenge of principle may be employed as well to protect property rights as to take exception to the fixed nature of such rights. There is no political or moral bias in the operation of psychodynamic processes. These characteristics may become altered in complexion by the ambivalent use the individual makes of them.

In Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738 at 883 (1824) in answer to an argument made on general principles he stated that “this doctrine has my hearty concurrence in its general application.” It was common for him to agree with principle and then proceed to distinguish the application of it. In his dissent in Minor v. Mechanics’ Bank, 1 Pet. (26 U.S.) 46 at 81 (1828), we find principle clashing with principle, for he argued against extending a principle “to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice.”

In his dissent in Governor of Georgia v. Sundry African slaves, 1 Pet. (26 U.S.) 110 at 134 (1828), Johnson reluctantly resorts to precedent: “It is almost a work of supererogation to resort to precedents on such a question; but if necessary, there is no want of precedents, to prove, that the district court was bound to go on, and render justice to the libellant, according to the forms of admiralty, as far as it could proceed.”
Since abstraction is an arrangement into genera and species it is in fact also generalization. Both abstraction and generalization were condemned because of the illusion of reality created by their misuse. In one of his dissenting opinions Johnson found, after diligent attention to the questions in the cause, that he could not help coming to the conclusion “that its difficulties are rather artificial or factitious.”

This was said after a quarter of a century on the Bench and some few years after he had written in Ogden v. Saunders that all the “notions of society, particularly in their jurisprudence, are more or less artificial.” This will account for the comment that the decisions of the prize courts “do not derive their effect from their abstract justice.”

It explains also why, in a dissent delivered the next year, he announced that legal claims must be supported by legal proof and that “abstract rights of parties become immaterial, if not susceptible of substantiation by evidence.” His conception of the judicial process embraced an advanced insight into the connection between law and fact which gave to fact the more dynamic position. And it is nothing short of extraordinary that his psychodynamic reactions not only remained the same throughout his career but can be traced with unusual accuracy by those who would take the pains to study his life and work for what it dis-

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162 12 Wheat. (25 U.S.) 213 at 290 (1827). (Italics to writer's.)
163 Rose v. Himely, 4 Cranch (8 U.S.) 241 at 285 (1808).
In L'Invincible, 1 Wheat. (14 U.S.) 238 at 258 (1816), Johnson made the following comment on a case offered by counsel: “That case certainly will not support the doctrine contended for in this case. It is true that the court there lay down a principle, which in its general application is unquestionably correct, and which, considered in the abstract, might be supposed applicable to the present case. But this presents only one of innumerable cases which occur in our books to prove how apt we are to misconceive and misapply the decisions of a court, by detaching those decisions from the case which the court propose to decide.”

See also his refusal to give an opinion on the abstract in Pierce v. Turner, 5 Cranch (9 U.S.) 154 at 171 (1809).
See also Dorr v. Pacific Insurance Co., 7 Wheat. (20 U.S.) 581 at 611 (1822), where he also rejected an argument from the abstract: “It is unquestionably true, in the abstract, that a certificate of survey is not legal evidence; because the examination of the surveyors themselves would be better. But parties may by compact adopt that or any other, as the criterion for deciding on their relative rights; and in the case before us, the rights of the parties are made to depend on the fact of the survey, rather than on the truth of it. They have chosen a rule of decision for themselves, and we are not to inquire into their motives or prudence in doing so.”

164 His interest was mainly substantive evidence. He had a distaste for “formal and ordinary recurrence to proof.” Johnson's Eulogy of Jefferson in Selection of Eulogies Pronounced in the Several States in Honor of John Adams and Thomas Jefferson 311 (1826). This showed itself also in his aversion to refinements and technicalities of all kinds and also his criticism of the complexities of common law pleading.
closes of the processes of individual experiences rather than merely as accompaniments of events of history.

The modernity of Johnson’s approach stands out when we read in a recent opinion of Mr. Justice Frankfurter in a contempt case: “the administration of law, particularly that of the criminal law, normally operates in an environment that is not universal or even general but individual.” If an emphasis on the individual sources in law is indicated by this language we may have reason to hope for a return to the dynamic beginnings made by Johnson and progress from there forward. But we do not have any strong basis for belief that even Mr. Justice Frankfurter would be willing to say that the Supreme Court as the supreme arbiter should vigorously and fearlessly apply the best available knowledge in reaching its decisions—instead of reflecting the reduced common denominator which blind adherence to the idea of continuity implies. There is nothing in the Constitution of the United States which compels the Supreme Court to follow instead of to lead in the science of understanding government. The policy of restraint because of lack of fitness does not prevent the Supreme Court from becoming more fit by virtue of the knowledge it applies! So long as it has some work to do—be it much or ever so little—its members must perform their tasks as informed and enlightened men. The history of courts which have merely acted as “a brake on other men’s conduct”—to recall Mr. Justice Frankfurter’s description of the Court’s function—has not left a record of accomplishment in the progress of the understanding of justice that deserves to survive as an immutable precedent for the future.

Curiously enough, Mr. Justice Reed’s opinion for the majority reiterated substantially what had been once stated by Mr. Justice Frankfurter to be the place of the law. “The law,” wrote Mr. Justice Reed, “deals in generalities and external standards and cannot depend on varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor.” Granted that it is not good judgment to curtail the

165 Concurring in Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029 (1946). Shortly thereafter Mr. Justice Frankfurter in Fisher v. United States, 328 U.S. 463 at 478, 66 S.Ct. 1318 (1946), wrote: “For Fisher is not the name of a theoretical problem. We are not dealing here with an abstract man who killed an abstract woman under abstract circumstances and received an abstract trial on abstract issues.” See discussion of this case infra, p. 497.
166 Pennekamp v. Florida, 328 U.S. 331 at 348, 66 S.Ct. 1029 (1946). The
hard-won gains which are summarized in the words “freedom of the press,” nevertheless, Justice Reed’s statement of the nature and function of law is obviously fragmentary and scientifically obsolete. Nor is it in accordance with legal history and experience, even though he supports his view with a reference to a typical ambivalent remark of Justice Holmes about the “personal equation.” That the law does in fact depend on varying degrees of the personal equation in the performance of the judicial function can be demonstrated by reference to the creation of numerous rules of trial procedure applicable to trial by jury all aimed to protect the mind of the juryman from partiality, prejudice and unconscious influences; by reference to the affidavit of prejudice which challenges the right of the court to proceed because of bias; by the example of all the laws and statutes which bar a judge from sitting in a cause because of interest in the outcome or the operation of unconscious motivations where there is consanguinity. And, if we venture into fields other than contempt of court, we can begin with the discretion of the chancellor in equity cases, proceed to man-

statement of Mr. Justice Frankfurter referred to is from West Virginia Board of Education v. Barnette, 319 U.S. 624 at 655, 63 S.Ct. 1178 (1943), and reads: “Law is concerned with external behavior and not with the inner life of men. It rests in large measure upon compulsion.” See comment by the writer in Levin, “Mr. Justice William Johnson and the Common Incidents of Life: I and II,” 44 Mich. L. Rev. 59 at 103, and 243 at 291 (1945).

Some of Justice Frankfurter’s earlier utterances reveal a similar resistance to the recognition of non-external factors. It is quite common in psychodynamic experience in so-called “normal” behavior to project outwardly, which implies also overlooking one’s own tendencies and qualifications. In Fisher v. United States, 328 U.S. 463 at 477, 66 S.Ct. 1318 (1946), he spoke of “the layman’s ventures into psychiatry” which had beclouded the case. Yet, his own references to psychological factors in Pennekamp v. Florida, though very much to the point, were those of a “layman.” Until judges are educated to understand thoroughly the working materials with which they are occupied in discharging their duties, considerable incompetency of both bench and bar is to be expected. But under such compromise conditions any effort by “laymen” to implement the vastly neglected field of psychodynamics should be encouraged. Even crude results by the use of such knowledge by bench and bar is better than reliance upon obsolete procedures. The resort to expert and trained opinion in this field is surely not very far off.


Some years earlier Justice Frankfurter approved of Holmes’ attention to what Frankfurter paraphrased as “the psychologic forces that were rationalized into legal doctrines. . . .” Wigmore, “Mr. Justice Holmes,” Mr. Justice Holmes, edited by Felix Frankfurter, 233, note 53 (1931).
damus as a discretionary writ and then to degrees of murder in criminal
cases and from thence to a discussion, on the basis of scientific findings,
of the individual sentencing tendencies of judges. What Justice Reed
has done here is to repeat the error, which is so common, of assuming
that the search for equal laws wherever possible precludes forever the
further developments of the law in the direction of understanding how
the external standards may by their application and other uses actually
accomplish a miscarriage of justice even according to present meanings
of the term. This development is possible only by studying the psycho­
dynamic origins of all legal procedures and their manifold uses and
misuses by the individuals for whom they are designed and by whom
they are to be administered.

Mr. Justice Frankfurter's reply is one of his most courageous in
substance and expression. We have already quoted a portion of the
concurring opinion. "No judge fit to be one," he went on to say, "is
likely to be influenced consciously except by what he sees and hears
in court and by what is judicially appropriate for his deliberations."
He proceeded then with one of the most vigorous pleas for the con­
sideration of the effect of unconscious forces on the judicial process we
have read anywhere in a judicial opinion:

"... However, judges are also human, and we know better
than did our forbears how powerful is the pull of the unconscious
and how treacherous the rational process. While the ramparts of
reason have been found to be more fragile than the Age of En­
lightenment had supposed, the means of arousing passion and
confusing judgment have been reinforced. And since judges,
however stalwart, are human, the delicate task of administering
justice ought not to be made unduly difficult by irresponsible
print."

He found support in an English decision:

"... It can only be that the judge who, after hearing the
statements, has to pronounce sentence, may, quite unconsciously,
have his judgment influenced by matters which he has no right
to consider... Not all defamatory matter can amount to con­
tempt of court..." Oliver, J., in Rex v. Davies, supra, at 445,
446. ... To deny that bludgeoning or poisonous comment has
power to influence, or at least to disturb, the task of judging is
to play make-believe and to assume that men in gowns are angels.
The psychological aspects of this problem become particularly
pertinent in the case of elected judges with short tenure.

"The administration of law, particularly that of the criminal
law, normally operates in an environment that is not universal or even general but individual. The distinctive circumstances of a particular case determine whether law is fairly administered in that case, through a disinterested judgment on the basis of what has been formally presented inside the courtroom on explicit considerations, instead of being subjected to extraneous factors psychologically calculated to disturb the exercise of an impartial judgment.\textsuperscript{167}

What is most unfortunate, however, is that Justice Frankfurter, as he had done on another occasion, found it sufficient to refer to a legal precedent to prove the psychodynamic fact that unconscious factors may influence a judge’s performance of tasks without the reference to any other literature on the subject.

F. New Sources of Law

Mr. Justice Murphy’s dissenting opinion in \textit{Fisher v. United States}, following shortly after \textit{Pennekamp v. Florida}, is, however, the first open and avowed stand taken in the Supreme Court for the recognition of the “increasing knowledge of psychology and psychiatry.” As a Recorder’s Court judge in Detroit, Michigan, sitting on the criminal docket, he had been one of the pioneers in America in the application of the science of psychiatry to problems of penology and criminality. There can be no mistaking that the opinion is of the trail-blazing variety, worthy of recognition with the worthiest written and will go down in our history of jurisprudence as beginning a more dynamic

\textsuperscript{167} Penenkamp v. Florida, 328 U.S. 331 at 357, 359, 366, 66 S.Ct. 1029 (1946). (Italics the writer’s.)

In his essay in Mr. \textit{Justice Holmes 231, note 33 (1931)}, edited by Felix Frankfurter, he observed that “the familiar and unconscious play an enormous role in the exercise of the judicial process” and again quoted an English judge as a precedent, the “powerful and conservative” Lord Scrutton. “This psychological factor,” added Justice Frankfurter, “is, of course, of infinitely greater significance where a court possesses the powers of our Supreme Court.”

The criticism of the assumption “that men in gowns are angels” recalls the remark attributed both to Wirt and Pinkney concerning Chief Justice Roger Brook Taney who was outstanding for his deep-seated judicial prejudices and for his seeming ability to conceal them—that he, Wirt or Pinkney, “feared that angelic manner of his, more than all his other attributes.” \textit{Steiner, Taney 523 (1922)}.

Pinkney is credited with having once said of Taney: “I can answer his arguments, I am not afraid of his logic, but that infernal apostolic manner of his, there is no replying to.” Id. 87.

This ambivalence between appearance and unconscious and conscious motivations is one of the common incidents of life in a culture which puts a premium upon the appearances far out of proportion to any social value these may have.
approach for judicial thinkers. The majority of the Court had refused to give effect to evidence of the accused's psychopathic aggressive tendencies and low emotional response and borderline mental deficiency in determining whether there was such deliberation and premeditation as was essential to first degree murder. The obsolete sanity test of "right and wrong" was again applied and, though the Supreme Court has supervisory jurisdiction over the lower courts, it applied the doctrine of restraint to what is its usual and ordinary and constitutional function and passed the matter on to the legislature or "at least for the discretion of the courts of the District." Mr. Justice Frankfurter did not discuss the direct question chosen for emphasis by counsel for petitioner. "This case has been much beclouded by laymen's ventures into psychiatry," he declared; and he predicated his dissent upon the procedural ground that the charge to the jury was so tenuous on the subject of premeditation "that the jury ought not to have been left to founder and flounder within the dark emptiness of legal jargon," and that the instructions consisted of "thread bare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case, mingled with talk about mental disease." Mr. Justice Murphy, however, was direct:

"Here we have more than an exercise in statutory construction or in local law. It is a capital case involving not a question of innocence or guilt but rather a consideration of the proper standards to be used in judging the degree of guilt. What the Court says and decides here today will affect the life of the petitioner as well as the lives of countless future criminals in the District and in the various states. However guarded may be the Court's statements, its treatment of petitioner's claims will have inevitable repercussions in state and federal criminal proceedings. Moreover, these claims, whatever their merit, afford a rare opportunity to explore some of the frontiers of criminal law, frontiers that are slowly but undeniably expanding under the impact of our increasing knowledge of psychology and psychiatry. These factors are more than sufficient to warrant a full and careful consideration of the problems raised by this case."

"If, as a result, new rules of evidence or new modes of treatment for the partly defective must be devised, our system of

169 Id. at 487.
criminal jurisprudence will be that much further enlightened. Such progress clearly outweighs any temporary dislocation of settled modes of procedure. Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization."

The frontiers of criminal law are the frontiers of jurisprudence. The line of demarcation drawn between civil law and criminal law is an artificial one and has changed through the ages. Prohibition is still the dominant psychodynamic mechanism for the ordering of society and its evidences are in the varying degrees of action taken to avoid restraint and in the highly prized superstitions which leave the individual to be the victim of the ignorance of his parents and of society. The view set forth by the dissent of Mr. Justice Murphy and joined in by Justices Frankfurter and Rutledge marks an advanced conception of the nature of the judicial function, a conscious effort again to seek and apply new evidence concerning human motivations as contrasted with the idea that the Court is to be mainly an avoiding and excluding body.

Id. at 491, 493-494, reversing Fisher v. United States, (App. D.C. 1945) 149 F. (2d) 28. Expert evidence was introduced to show defendant was a psychopathic personality. Instruction was asked that the entire personality be considered, "his mental, nervous, emotional and physical characteristics, as developed by the evidence of the case" on the question of premeditation. This was refused. Arnold, J. said: "modern psychiatry has given us much scientific information which disturbs the former certainty of our judgments of individual responsibility and moral guilt. It has revolutionized the methods of treatment and rehabilitation of prisoners. But the principal place for the application of such a therapeutic point of view where the court exercised discretion in the amount of the sentence and in the treatment of criminals is in our penal institutions. In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law." Id. at 29.

See ARNOLD, THE SYMBOLS OF GOVERNMENT 269-270 (1935) where a prejudicial attitude on the future of psychiatry and government is expressed. However, we do not agree with the idea that psychiatry has introduced the idea of an abstract man with a subconscious mind. It is conceivable in our opinion that as knowledge advances the idea of an unconscious mind will disappear but not the study of human motivation.


The Supreme Court many years ago pronounced a patent for an invention as a mental result and the invention as "the product of the inventor's brain." Marsh v. Nichols, Shepard & Co., 128 U.S. 605 at 612, 9 S.Ct. 168 (1888); also Smith v. Nichols, 21 Wall. (88 U.S.) 112 at 118 (1874). Such far-reaching statements of
There is much of such new evidence already available the use of which has been blocked and obscured by a preoccupation with endeavor to make a science out of compulsion and prohibition. At the most today law is a "science" of the effect of similar prohibitions in allegedly similar situations. The whole psychodynamic field of relationships has been left to others to study and for the courts to deal with on a hunch basis. Almost half a century ago the physicists began to discover the mistake to which their absolutisms had led them; only then did physics begin to make strides. Yet, to the untrained eye the material world does not even present a problem in relationships. How much more so ought this to be the case in dealing with human society which from the very earliest primitive days has been constantly at work trying to improve relationships.

It does seem that at some time in man's history the capacity to judge was forcibly restricted to those who could make their own judgments effective. Such a theory of law has no real foundation except the history of its experience which is replete with huge failures which are only beginning to be understood as such. Until the human capacity to judge is more wide-spread and until those who judge cease merely to repeat the mistakes of the past we are not even ready to think of a final theory of law notwithstanding the seeming effort to undermine competing fallacious doctrine. Much study of psychodynamic processes must precede any summations. And, if we are to follow any "rule," a good rule to follow is that where the prohibition is greatest so also is the inadequacy greatest. Nor do we suggest that such prohibitions be forthwith relaxed, for this would bring with it anarchy and complete social chaos. But rather that we realize the why of such processes and begin to think in terms of helping man to judge for himself on matters heretofore accepted as closed.

The awareness of unconscious procedures cannot be achieved overnight. Nevertheless, some things may be noticed immediately. We may now observe that the prohibitions of legal systems are directed mainly at maintaining that sharp split between conscious and unconscious motivation which is at the root of nearly all mental illness as well as many somatic disturbances. This indicates an intimate reciprocal relationship between medicine and law. Both our intellect and our affective functions are devoted to the task of adjustment to an atmos-

psychodynamic import have never been applied by the Court to the problems of jurisprudence except in the most unscientific and casual manner.
phere of choice between no-behavior and yes-behavior. Hence, follows a routinization of the intellect for the express purpose of being able better to observe similarities in the narrow field of command and its precedents. So much is this true that the law has proven ineffective to cope with so difficult a task. It had to receive much aid from the individual himself in the development of automatic responses to forbidden situations. One had to develop a "conscience" or perish for violations of the taboo. And, where the conscience did not entirely take care of the control, paralysis and other diseases might incapacitate one for breaching law and custom. Rationalization and superstition are also aids to the same end but they are psychodynamically more "efficient" since they succeed in absorbing some affect in the process; but actually it is only a pseudo-efficiency. A large portion of the affect which is pent up by misdirected prohibitions finds outlets in wars—political, religious and humanitarian. These outlets were legalized into trial by combat between individuals and then trial of ideologies by war. In a word, there is much to be learned about the sources of law. We have suggested only a few avenues into which inquiries may lead.

III

Psychodynamic Importance of Johnson's View of Dicta and Inaccurate Reporting

It has been our method to discuss the psychodynamic aspects of various incidents in the life of Johnson as we proceed so as to avoid that compartmentalization which usually characterizes studies of early history and its actors. This method enables us better to place facts in their total context, thereby avoiding much of the color which distance gives to men and events. At this point we see, for example, that Johnson's aversion to dictum and to misapplied principle, his bold opposition to the phantoms of the abstract and his refusal to be guided by any notions of infallibility are not isolated political positions taken by a member of a certain party who happened to be appointed to the Supreme Court. Rather do we find the most striking consistency in one thing—and that is the consistency with which psychodynamic pressure was exerted toward the release of knowledge from the prisons of the past. He saw that from time immemorial tradition, history and superstition had been successful to the detriment of mankind in blocking any efforts to expand the powers of the human mind. This influence had been so powerful that not only were those who administered
society averse to such expansion but also those who would benefit by the change were similarly imbued.

Can it be that anthropologists—even before the advent of modern psychiatry—had revealed jurisprudence as a surface science and, therefore, not able or willing to penetrate beneath the most obvious layers? The answer must be “yes.” From the vantage point employed by Edward B. Tylor we discover the primitive method as the prevalent one even among moderns. In distinguishing the savage from the modern Tylor asserts that the savage

“... by no means goes through life with the intention of gathering more knowledge and framing better laws than his fathers. On the contrary, his tendency is to consider his ancestors as having handed down to him the perfection of wisdom, which it would be impiety to make the least alteration in. But we civilized moderns have just that wider knowledge which the rude ancients wanted. Acquainted with events and their consequences far and wide over the world we are able to direct our course with more confidence toward improvement. In a word mankind is passing from the age of unconscious to that of conscious progress.”171

This was written in 1881. Since that time the ability of man to direct his course has been materially enhanced—but the actual use of such self-knowledge now awaits the will of a politically-minded universe which is very much confused by the distortions which “wider knowledge” could help to dissipate.

No better use of principles is possible without an adequate basis of self-knowledge and the training in the ability to detect the numerous and devious ways in which the psychodynamic tools or instruments which man has adopted and developed have distorted and confused him. In primitive man the mind has left all members of society the prey to the archaic superstitions of their predecessors, living in the self-degrading traditions of their ignorant elders. No patronizing interest in primitive life, which transmutes the dull and routinized ritual by which they are mentally enslaved, into alluring and modernized “folklore” can remove the essential hypocrisy in such adoration of superstition. And in the case of modern man, who is supposed to know better but is beginning too slowly to face his errors, the tragedy of capacity thrown to the winds is continually reenacted. Therefore, modern man is but little above the level of the primitive in his reliance on superstition and his rejection of the facts about himself. Since the

171 *Anthropology* 439 (1881). For additional thoughts expressed by Tylor see infra, pp. 519, 520.
law is the most prevailing of all institutions it is likewise rendered impotent to go beyond the simple prohibitory conceptions of nomadic tribes.

It is no longer possible to think of the law as an isolated culture technique. The conventional method of studying the life of a jurist is to ask: What specific reforms in the law did he advocate or with what large political movements did he identify? Our method, however, is to examine all utterances and acts in the attempt to arrive at some psychodynamic synthesis which will in some measure explain the individual's strivings of a lifetime and to glean from such effort whatever we may find concerning the dynamic sources of law as it affects the individual and society. Accordingly, when we point out Johnson's careful examination of the decisions of the past it is not because we are anxious to launch an academic attack on obiter dicta. Rather is it that we see in this manifestation a dynamic trend of personality in relation to law and social pressures which take the form of prohibitions. It is the continued and unrelenting integrity which must be noticed even though it is repeated time and again.

With this background we may better understand why Johnson was so critical of the reporters. It was just another living through of his struggle for self-knowledge. His complaints must not be considered merely as carping criticisms of unrealistic disaffection. Generalizations of character which are made to appear as disinterested analyses often contain more than a negligible quantity of prejudiced and hostile projection of one's own inner self. But it is not easy to examine persons and their accomplishments with complete detachment. Nevertheless, because the integrity of our perspective requires it we should try to examine these clashes with reporters with a minimum of affective bias.

We must also remember that reporting of court decisions in earlier days was careless and biased—but no more so than court decisions themselves. "It is to be regretted," Johnson wrote in one of his later opinions, "that the case referred to had not been more fully reported. As it is not preceded by any statement of facts, abstracts of the history and laws of this society, or the arguments of counsel, the insulated unexplained opinion of the court, as it is printed, must be ever unintelligible to all descriptions of readers, except those whose professional duties lead them to the study of the novel and extensive institution whose interests are involved in it." 172

The need for the exercise of caution had been dwelt upon by others.

172 Mutual Assurance Soc. v. Faxon, 6 Wheat. (19 U.S.) 606 at 606, 607 (1821).
also. Ephraim Kirby, himself a Connecticut reporter at the time of the Revolution, deplored the lack of proper histories of adjudications so that “the principles of the decisions were soon forgot or misunderstood, or erroneously reported from memory. Hence, arose confusion in the determination of our courts, the rules of property became uncertain, and litigation proportionately increased.”

A. Criticism of Unjustified Stretching of Principles by Reporters

Civilization—or culture, as some call it—has advanced step by step because of man’s peculiar and ambivalent use of that quality of intellect which enabled him to note similarities of experience and to generalize about them and then, forthwith, to challenge their authenticity or dominating authority. The historical correctness of the omnipresence of this psychodynamic phenomenon is not a matter for dispute. It shows itself in every phase of human activity and in every social grouping no matter how far geographically removed or no matter how far apart in the cultural scale of development. It is apparent in all religious dogma, in the dogmas of chemistry and physics, in the dogmas concerning mental behavior and in the emotional attachment to precedent as something apart. In the main the mind has heretofore functioned very poorly. Gathering fact alone could not be a basis for a claim for “superiority.” The physical scientists have been especially remiss in attaching an intangible and mystic value to their ability to note similarities. But they have failed miserably in synthesizing their knowledge and relating it to life as a whole. Often unconsciously and often consciously these scientists have used fact gathering and the capacity to generalize from research as a fulcrum for personal aggression. Therefore, the detached scientific purpose of generality has

174 The most eminent jurists and students of jurisprudence have not succeeded in maintaining a scientific point of view. Professor Williston of the Harvard Law School, the eminent and beloved scholar, thinker and writer in the field of contract law, tells in his reminiscences of his troubles with the famous Dean Langdell, his superior, “Langdell,” he recalls, “was not much interested in the historical development of the law except as it led to the discovery of legal principles. When the principles were discovered he would trace their consequences with relentless logic as that employed by the sternest Calvinist. Decisions inconsistent with them, he said were wrong. He has been called in consequence a legal theologian.” Williston, Life and Law 99 (1940).

In an earlier article we said concerning the misuse of principles: “No human can doubt the value of principles as means of accomplishing greater understanding. This
had little hold on man as is the case with more primitive minds. Primitive man quickly learned how to make use of logical methods even though his dynamism was principally affective. Principles became weapons or personal defenses and the primitive leaders soon learned that most men could easily be deceived into believing that their real security lay in the ritualistic worship and practice of generality. Civilized man has not improved very much over this earlier process.

Hence, the doctrine or principle that is stretched too far is akin to the magical methods of primitive man. It is a searching for emotional security by exhausting the effects of what has already transpired in the past. Viewed psychodynamically, the adherence to precedent is an *ex post facto* use made of an earlier means of solving a problem. In this complex world such secondary uses are required very much in the same way as an inventor resorts to the prior art. But the insistence on precedent-adherence in its primitive forms means an end to personal liberty in its broadest connotations. It implies the degradation of the capacity of present man and his inability to judge for himself. Only when we look down the course of the history of man’s struggle with his mind may we fully appreciate what Johnson was trying to do. His aversion to routine *ex post facto* thinking was intense. With characteristic and consistent caution—based on experience—he first tried to understand the principle, the prior art, so-to-speak; and then he returned to the earlier habitat of the principle to find out what it did in truth solve or attempt to solve. For example, in *Smith v. Union Bank* he answered an argument in conflict of laws: “But if we look into books, we do not find it there. . . . If we look into facts, we find no evidence there, to sustain such an exception. . . .” 175 So in an equity case he admitted the principle that equity will not lend its aid to an unconscionable bargain but he challenged counsel who tried to apply the principle because “the argument carries this principle

is true in economics, mathematics, language, law or any branch of science. The high road of principles has been, however, the mechanism of the epigram, the aphorism or the simple truism which temporarily solves a situation of conflict by excluding all other knowledge and ‘fences in’ the emotions. The most prevalent sign of pessimism throughout the world, without exception, is the resistance to the study of those psychodynamic facts which may be called the common incidents of the mind. Any effort, with a few exceptions, even to inject into discussion this most common of all elements, invites the same emotional attack that was once discharged toward a heretic or dissenter in the days of the Inquisition.” Levin, “Mr. Justice William Johnson and The Common Incidents of Life: II,” 44 Mich. L. Rev. 243 at 290 (1945).

175 5 Pet. (30 U.S.) 518 at 526 (1831).
rather too far as applied to this case."\(^{176}\) He studiously avoided the argument which "proves too much."\(^{177}\)

He was not the first nor the last of the judges\(^ {178}\) to strike out against *obiter dictum* or the stretching of principles. But it should be noticed that with Johnson dictum was frowned on for more than merely legal reasons. He consistently followed a practice of disavowing it. His remarks in *Hodgson v. United States* are typical not so much because of the refusal to indulge in excessive adjudication as by reason of the suggestion that the legislature might well take over that responsibility:

"From these considerations, it seems to result, that the court is driven to the necessity of deciding this case, upon its intrinsic merits, and reserving its opinion upon successive cases as they shall occur. This necessity is forced upon us by the alternative either to decide that no misrepresentation, however gross, of the size of the vessel, will avoid a policy, or that any misrepresentation, however minute, will have that effect. It is to be hoped, in the meantime, that some statutory provision may be made which will relieve the court from a similar embarrassment."\(^ {179}\)

\(^{176}\) DeWolf v. Johnson, 10 Wheat. (23 U.S.) 367 at 392 (1825). In Johnson's remarks on the publication of Attorney General Rodney's letter to President Jefferson in regard to Johnson's decision in *Gilchrist v. Collector of Charleston*, (C.C. S.C. 1808) 10 Fed. Cas. No. 5,420, p. 355 at 360, he said that the Attorney General had "drawn reasons from inconvenience, which may prove a great deal too much for the public security."


\(^{178}\) In the recent case of *Faitoute Iron & Steel Co. v. Asbury Park*, 316 U.S. 502 at 513, 62 S.Ct. 1129 (1942), Mr. Justice Frankfurter said in his opinion: "From time to time, ever since *Sturges v. Crowninshield*, 4 Wheat. 122, 199, it has been stated that a state insolvency act is limited by the Contract Clause of the Constitution in authorizing composition of preexisting debts. So it is, but it all depends on what is affected by such a composition and what state power it brings into play. The dictum from *Sturges v. Crowninshield* is one of those inaccurate generalizations that has gained momentum from uncritical repetition."

\(^{179}\) *Hodgson v. Marine Insurance Co.*, 5 Cranch (9 U.S.) 100 at 114 (1809).

See also *United States v. Attorney General of Louisiana*, 3 Pet. (28 U.S.) 57 at 67 (1830), where Johnson said: "We would not be understood to intimate that the United States are entitled to this money; for they had no power to sell; nor do we feel ourselves bound to remove the difficulties which grow out of this state of things." See also *Yeaton v. Bank*, 5 Cranch (9 U.S.) 49 at 54 (1909), where he said: "I have no doubt of the power of Congress to deprive them also of their summary remedy; but it has not yet legislated to that effect." See also Levin, "Mr. Justice William Johnson and the Unenviable Dilemma," 42 Mich. L. Rev. 803 at 812 et seq. (1944).
B. Psychodynamic Basis of Intellectual Display

Johnson was seldom—if ever—carried away by scholarship and erudition or a resort to classical authority. Here again he was in the vanguard of understanding. Today we have enough data about human behavior available to enable us oftentimes to detect in the display of learning the ambush of concealed aggression actually employed for purposes of personal and partisan manipulation of the universe. Obscurant dictum has frequently found its seeming support in citation of text and case.

A passage in Croudson v. Leonard,\textsuperscript{180} an early opinion, sheds light on Johnson's mental approach to legal problems. The occasion was the presence of a jurisdictional question. "I do not think it is necessary," he said, "to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of Fitzsimmons, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise."\textsuperscript{181} Johnson was essentially an original thinker moved by the creative impulse which animates an inventor. His opinions seldom contain what is readily found in the texts but they are full of the observations of the operation of an active and discriminating mind looking mainly at the multiform varieties of human experience—the common incidents of life.

Even when he relied upon precedent Johnson did not rush too quickly to cite authority and was seldom disturbed by the absence of cases. "It may be true that there are no cases upon this subject prior to that of Hughes v. Cornelious, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of Hughes v. Cornelious, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule or its applicability to actions on policies is nowhere controverted."\textsuperscript{182} Whether he was concerned with a novel principle or the application of a well-known principle to a new state of facts, he was not at a loss to find precedents if he needed them. He could find that the common law had sufficient precedent for the rule "in its received principles."\textsuperscript{183}

\textsuperscript{180} 4 Cranch (8 U.S.) 434 (1808).
\textsuperscript{181} Id. at 435.
\textsuperscript{182} Id. at 436.
\textsuperscript{183} Ibid. In Jackson v. Huntington, 5 Pet. (30 U.S.) 402 at 436 (1831), he said
Many years later, when he had occasion to consider the decisions of the State of Virginia which he said the court was “in the habit of regarding with the highest respect . . . upon causes arising under their own statutes,” he found it unnecessary to corroborate them by citation of authority. “But any one,” he added, “desirous of pursuing the inquiry, will find the law on this subject very well collected and digested in Mr. Starkie’s 3d vol. of his Treatise on Evidence, and page 1225 of Mr. Metcalf’s edition.”

In Miller v. Stewart, Johnson filed a strong dissenting opinion in an action involving the law of erasures in instruments where the name of another county had been inserted in a bond by interlining. His discussion of the authorities and his criticism of the reporter discloses some dynamic juristic attitudes and again the dislike of unnecessary display of refined legalistic effort:

“There is a great paucity of decisions, in modern times, on the subject of razures and interlineations. If we mount to its origin, in regard to a rule of property: “His freehold was then held to be out of him, to be converted into a right of entry or right of action, and as such, no more the subject of a legal transfer at common law, than an ordinary chose in action. It being so settled in New York, it is in vain to enquire further; but, en passant, it may be observed, that there are few principles of more ancient or more dignified origin. It is the law of kings, that the fact of possession proves the right of possession; and the idea is thrown out by Blackstone, that it probably passed down from greater to less, until it extended to every man’s close.” Routine acceptance of a settled rule was not enough as in Lidderdale’s Executors v. Robinson, 12 Wheat. (25 U.S.) 594 at 598 (1827): “That this, then, is the settled law of the state in which this contract and this cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness on a general principle, and on authorities of great respectability in other states.” In his separate opinion in Inglis v. Trustees of The Sailor’s Snug Harbor, 3 Pet. (28 U.S.) 99 at 140 (1830), Johnson found authorities where none were said to exist: “It has been said that there are neither adjudged cases nor dicta of elementary writers on the subject of the law as it stood previous to the 43 Eliz.; but this, I think, is not quite correct. In Swinburn on Wills, as well as Godolphin’s Orphan’s Legacy, both books of great antiquity and high authority, we find all the rules for construing, enforcing and effectuating charities which have been maintained and acted upon in the chancery, since the 43 Eliz., laid down as the existing laws of charitable devise...”

In the Bank of The United States v. Weisiger, 2 Pet. 331 at 350 (1829), Johnson remarked that the court was “inclined to think, that it has been rather too hastily conceded, that no case similar to the present has ben adjudicated.” In Caldwell v. Taggart, 4 Pet. (29 U.S.) 190 at 202 (1830), in discussing certain aspects of judicial process said that “there is no want of learning in the books, on this subject. The general rule is laid down thus...” And in Minor v. Mechanics’ Bank, 1 Pet. (26 U.S.) 46 at 81 (1828), he remarked that while a court in adjudicating upon questions of practice should have regard to public convenience “it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice.”

we find it, in the year-books, and in Perkins, who cites them, given, as the ground of suspicion and inquiry. And so, unquestionably, it ought to be, and frauds or mutilations, to which the parties having the custody of deeds are privy, cannot be taken too strongly against them. But when we encounter the doctrine, as laid down in Pigot's Case, 'that when a deed is altered in a point material, by a stranger, without the privity of the obligee, even by drawing a pen through the midst of a material word, that it shall be void,' without reference to the fraud, privity, or gross negligence of the obligor, it certainly is time to pause; and I highly approve of the hesitation of my brother Story, in Cutt's Case, as to the authority of Pigot's Case. As an adjudication, the value of that case should be limited to the single point, 'that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond.' The case does not call for the decision of another point, for it is upon a special verdict, and that the only question submitted. Yet, the reporter, who seldom lets an opportunity escape him, that furnishes an apology for exemplifying his indefatigable research, makes it authority for a score of positive decisions, and the introduction to a mass of law, upon questions totally distinct. But it should be noted of this learned judge, that his reports, like the text of Littleton, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day, and expressing his opinions upon juridical topics." 186

His language does not spare the reporter. But in the light of what we have already said about his exercise of the judicial function we may discover in the criticism a correct psychodynamic reflection of judicial method.

C. Other Instances of Dereliction by Reporters

In Finlay v. King's Lessee, we have a comparable instance: "There was a case cited in argument to sustain the judgment below, on which so much reliance was placed, that I shall not pass it over unnoticed. It is the case of Thomas v. H owei, reported in Salkeld and Modern (1 Salk, 170; 4 Mod. 66), and very defectively reported in both. The report in Salkeld does not give the half of the case; and that in 4 Mod. gives a very unsatisfactory account of the reasons which governed the court." 187 And in Inglis v. The Trustees of the Sailor's Snug Harbor, 188 he declared what he considered the only point decided in a

186 Id. at 717.
188 3 Pet. (28 U.S.) 99 at 137 (1830).
cause referred to "notwithstanding the marginal notes of the reporter to the contrary."

In the famous case of Ogden v. Saunders, Johnson approached the abstract question of the general power of the states to pass laws for the relief of insolvent debtors by carefully examining two earlier decisions. Here again he looked with more than ordinary scrutiny at the report of the cases for any attempts to overextend the precedent of these cases by generalization:

"And this brings under review the two cases of Sturges v. Crowninshield, and McMillan v. McNeill, adjudged in the year 1819, and contained in the 4th vol. of the reports. If the marginal note to the report, or summary of the effect of the case of McMillan v. McNeill, presented a correct view of the report of that decision, it is obvious, that there would remain very little, if anything for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found, that there is a generality of expression admitted into the former, which the case itself does not justify. The principle recognized and affirmed in McMillan v. McNeill, is one of universal law, and so obvious and incontestable that it need be only understood to be assented to."

After finishing with the McMillan case he went on to discuss the case of Sturges v. Crowninshield, remarking that the report of that case "needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication."

In Minor v. Mechanics’ Bank, Johnson dissented vigorously from the holding of the majority. His opinion reveals a careful analysis of early cases and authorities, abounding in references to Coke, Sergeant Williams, Sergeant Salkeld, Saunders Croke’s Eliz., Maule and Selwyn, Bur. Reports, Rolls Abridgement, Hobart, Kebble and Silley’s Practical Register, Wood and others. The question was whether a nolle prosequi could be entered as to one defendant after verdict and judgment for the principal on a bond, leaving four out of five joint and several obligors on the bond liable on the judgment. Mr. Justice Story had asserted in his opinion that "there is no decision exactly in point, to the present case." But we know Johnson well enough by

189 12 Wheat. (25 U.S.) 213 (1827). See note 178, supra, for Mr. Justice Frankfurter’s comment on Sturges v. Crowninshield.
190 Id. at 272.
this time not to be startled by the vigor of his attack on the statements of jurists who preceded him. He proceeded to dislodge the assumed authority of Serjeant Williams by pointing out that the knowledge of earlier times had been confused by subsequent learning. This deserves special comment, for, although Johnson was averse to *ex post facto* thinking, he was usually alert to show that earlier and more primitive concepts had later become distorted by rationalizations. This is not a resort to a precedent but rather an unfolding of the layers of deceptive logic of later times. Johnson wrote:

"But it is said, and so Serjeant Williams asserts, 'that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained, until modern times.'

"My own opinion is, from all the investigation I have been able to make, that it was much better understood, in former times, than it is at this day. That if it were now better understood, we should perceive fewer of those inconsistencies which are supposed to exist in the decisions on this subject. Thus, Serjeant Williams has mixed up the cases on torts, with those on contracts, in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes *Green v. Charnock*, Cro. Eliz. 762, which was trespass *quae clausum fregit*. And for other cases which he says establish the principle 'that a *nolle prosequi* is not of the nature of a *retraxit*, or a release; but an agreement only, not to proceed as to some of the defendants, on a part of the suit,' without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass or tort. . . . It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favor, this judgment should be reversed for error. But the conclusion that it is no bar, is now to be deduced from a string of decisions, in every one of which, Serjeant Williams himself admits, that no recovery could be had against the defendant who has been discharged by the *nolle prosequi*. It is true, he attributes this bar to the nature of the action; by this, at least, acknowledging that the material question, in the trespass cases, never could arise in the present case." ¹⁹²

He then proceeded to analyze the "only case, in which the question in this case came distinctly before the court." However, he did not fail to offer some praise for the work of a text writer:

¹⁹² Id. at 83, 84, 87.
"There is a modern book of practice of great respectability (I mean Sellon, tit. Nolle Prosequi), in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that ‘the plaintiffs take nothing by their bill, but, for their ‘false clamors be in mercy;’ which can at least detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole cause of action, operates, in effect, as a retraxit." 193

Johnson disliked needless enumerations because this "would be to incur the imputation of vain parade." 194 At times he cited authorities "to show the antiquity and universality" of doctrine. In the same paragraph from which this quotation was taken he referred to "some reporters whose authority has been consecrated by the respect of ages," and he remarked that "innumerable ancient cases might be cited from the best reporters of the application of the rule." 195

We note again in passing, upon reading the last few excerpts, that there runs through all of Johnson’s writings statements which affirm the existence of certain first principles which govern mankind but which have been obscured by mankind’s rationalization and by mis-directed and misused learning. Johnson’s emphasis on these principles seems almost inconsistent with his questioning of general principles. If, however, it is understood that he believed in all of the efforts of science by experiment and investigation to improve mankind these first principles in a dynamic sense must have meant the same to him as the finding of observable basic facts of human behavior. 196

In Shanks v. Dupont, 197 which came up from the state court of South Carolina, there was raised a question of the effect on the right to inherit of the failure of heirs to be born of allegiance to the State

193 Id. at 85, 86.
195 Fullerton v. Bank of United States, id. at 615. His preference for modern decisions is here indicated.
of South Carolina. In a spirited dissenting opinion Johnson, with his usual alert discrimination, found that again he had to question a reporter’s accuracy:

"The decision in the case of Palmer v. Downer does, it is true, admit the right of election; but besides that that case is very imperfectly, and I may add, unauthentically, reported, it is most certainly overruled in the subsequent case of Martin v. Woods." 188

He was no kinder to Gordon’s Digest which indulged in some of the objectionable reporting practices against which Johnson was mentally committed:

"Before I quit the case it may be proper to notice a passage in a book recently published in this country, and which has been purchased and distributed under an act of congress; I mean Gordon’s Digest. There is no knowing what degree of authority it may be supposed to acquire by this act of patronage; but if there is any weight in the argument in favor of expatriation, drawn from the acts of congress on that subject, I presume the argument will, at some future time, be applied to the doctrines contained in this book. If so, it was rather an unhappy measure to patronise it; since we find in it a multitude of nisi prius decisions, obiter dicta, and certainly, some striking misapprehensions, ranged on the same shelf with acts of congress. On the particular subject now under consideration, art. 1649, we find the following sentence: ‘Citizens of the United States have a right to expatriate themselves in time of war, as well as in time of peace, until restrained by congress;' and for this doctrine the author quotes Talbot v. Jansen, 3 Dall. 133, and the case of The Santissima Trinidad, 7 Wheat. 348; in both which cases, the author has obviously mistaken the argument of counsel for the opinion of the court; for the court in both cases expressly waive expressing an opinion, as not called for by the case, since, if conceded, the facts were not insufficient to sustain the defense.

"The author also quotes a case from 1 Peters’ C. C., which directly negatives the doctrine, and a case from 4 Hall’s Law Journal, 462, which must have been quoted to sustain the opposite doctrine. It is the case of The United States v. Williams, in which the chief justice of the United States presided, and in which the right of election is expressly negatived, and the individual who pleaded expatriation is convicted and punished." 199

188 Id. at 266.
199 Id. at 266, 267.
In his dissent in *United States v. Palmer* he proclaimed: "I here enter my protest against having these questions adjourned to this court. We are constituted to decide causes, and not to discuss themes, or digest systems." 200 Later, in his dissent in *Columbian Insurance Co. v. Catlett*, 201 he again struck out against marginal notes and correct principles "thrown together without order and without object":

"But it is supposed, that the cases of *Baillie v. Modigliani*, and of *Caze & Richaud v. Baltimore Insurance Company*, have established a contrary doctrine. It appears to me, that it is by placing too much confidence in the general language of indexes, and marginal notes, and misapprehending the doctrine on which this case turns, that the mistake arises. We have nothing but a manuscript report of that case of *Baillie v. Modigliani*, and obviously one for which the learned judge, by whom the decision is made is very little indebted to his reporter. We find in it a mass of correct principles, thrown together, without order, and without object, and which, I make no doubt, is the skeleton of a very learned and correct opinion; and one which, had we the whole of it, would have furnished a full exposition of the doctrine of this case, as well as of that. But, as a decision, the case of *Baillie v. Modigliani* does not touch the present case." 202

D. Johnson’s Controversy with Wheaton

Johnson on two separate occasions severely criticized Henry Wheaton, the Supreme Court reporter. It would avail little to enter into the legal analysis of these controversies here. More significant is the fact that Wheaton was charged with incorrect reporting—which if sustained meant incorrect precedent to add to future confusion. The first instance was in Johnson’s opinion in *Conrad v. Atlantic Insurance Company*.

"But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelusson v. Smith*. I have never acknowledged its authority in my circuit, on the point supposed to be decided by it; to wit, the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment; and I propose now to show, what I think anyone may see by a close inspection of the facts, even as stated in the report, to wit,

202 Id. at 402.
that the question there supposed to be decided, really never was raised by the special verdict. It is true, it was argued, and no other question, judging from the report, was argued. But when the court came to inspect the record, it must have seen, that the special verdict did not raise the question as between the parties to that suit. And, moreover, I find, that the reporter has omitted one very material fact found in the special verdict; which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of Cramond, the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term."

While in the same opinion he relied upon a "sensible rule laid down . . . in a book of grave authority" he resolutely proceeded to question the authority of the specific case which had troubled the court.

He again reproved Wheaton in one of his most outspoken and daring opinions—his concurring opinion of Ramsay v. Allegre. It was here that he declared himself so strongly against the encroachments of the Admiralty Courts upon common law jurisprudence:

"I concur with my brethren in sustaining the decree below, but cannot consent to place my decision upon the ground upon which they have placed theirs. I think it 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; and dicta, as well as decisions, that cannot bear examination, ought not to be evaded and permitted to remain on the books, to be commented upon, and ac-


204 The following is from the opinion, id. at 453: "It often happens, after the most protracted discussions, that the court differ from counsel in their views of the questions actually raised on the record, and on grounds which have not been argued. In the case of Thelusson v. Smith, I hold it to be incontrovertible, that the question of priority could not have been adjudicated upon, on the verdict, as set out in the record . . ."

"I, at least, would have it understood, that I concurred in the judgment in the case of Thelusson v. Smith on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question, in a case in which the sale of the land was a mere nullity; as is distinctly affirmed in the present decision, because the assignment divested all the interest in the insolvent, so as to place it beyond the action of the fieri facias, issuing on the judgment of the United States."

The case of Thelusson v. Smith is reported in 2 Wheat. (15 U.S.) 396 (1817).
quiesced in, by courts of justice, or to be read and respected by those whose opinions are to be formed upon books. It affords facilities for giving an undue bias to public opinion, and, I will add, of interpolating doctrines which belong not to the law. There need be no stronger illustration given than this case affords. Here is a libel, in personam, on a contract, in the admiralty, filed expressly upon the authority of the case of The General Smith. I had never read the report of that case, that I recollect, until the argument in this cause; or, if I had, I attached so little importance to anything in it besides the point that it decides, as to have forgotten that such doctrines were to be found in the reports of our decisions. But, upon being examined, what does it amount to? A gentleman of the bar, whose knowledge, particularly in the admiralty, commanded the highest respect in this court, is reported to have laid down a doctrine in very explicit terms, which, I will venture to say, has no authority in law; and the court, carried away probably by the influence of his concessions, echoes them in terms which are not only not called for by the case, but actually, as I conceive, contradicted by the decision which is rendered. 205

Underlying the determination to search out error in the old and new reports was the awareness that the mind too easily is tempted to accept a simple, unjustifiable solution, because of the existence of an "authority." This was very much of a novel approach for a jurist of those times and may be unmistakably detected in the following language of the opinion:

"I allude to that quotation from 1 Roll. Abr. 533, which is copied into Bae. Abr. p. 196 of the 1st vol. and there, together with the note which refers to Cro. Car. 296, has remained the permanent source of many an error to those who have not taken the trouble to examine into the authority for the law laid down." 206


Compare Johnson's words: "... this silent and stealing progress of the admiralty" with Justice Story's language quoted in note 206, infra.

206 12 Wheat. (25 U.S.) 611 at 618 (1827), and note 145 for Johnson's comment on Justice Story's opinion in the case of DeLovio and Boit reported in 2 Gallison, (Oct. 1815). In this opinion at page 398 Story commented on Johnson's opinion in Ramsay v. Allegre where Johnson "does not consider the doctrine here laid down as settled." Story set out in this opinion to regain some of the ground which Admiralty Courts had lost. It is interesting to note that he also charged "a silent and steady march" of extension but in favor of the common law courts: "From a historical view of the cases in the books, it will abundantly appear, that it has been constantly in danger of losing
He must have had Mr. Justice Story in mind when he added:

"Some of those loose obiter dicta in which the most eminent and prudent judges sometimes indulge, have been attributed to an eminent English jurist, which have been thought to cast some doubt upon these doctrines in modern times." 207

Judge Winchester's decision in the case of The Sandwich, "learned as the decision may be," he disposed of by the devastating characterization that "it is obvious, that it is but a tissue of errors." 208 With usual candor—which should no longer surprise us—Johnson acknowledged responsibility for his own error in the case of The General Smith:

"In the first place, I stand before the public as bearing my share of the responsibility incurred for certain opinions expressed in the case of The General Smith. For the just extent of my responsibility in that case, I must rely on the repeated decisions which I have made in my circuit in hostility with that doctrine. But I am willing to treat it as my own error, and shall, on that ground, claim the privilege of treating it with a greater freedom; at least, I shall endeavor to administer the antidote [sic] if I have diffused the poison, and claim credit for an unequivocal proof of my repentance by a public acknowledgment that it was inexcusable." 209

He then proceeded to analyze the report of the case which had set forth the argument of Mr. Pinkney, who had argued against the materialmen, and added:

"Now, I have too high an opinion of Mr. Pinkney's law-reading, and of his talents as an advocate, not to be well convinced that in this, as well as the residue of the argument attributed to him, he must have been misunderstood. And I find my sanction for this belief upon the face of the report itself; for, with the exception of the nullity of the lien claimed against a domestic ship, the authority which he quotes to sustain his doctrine, contradicts it in so many words." 210

Its most useful jurisdiction. On the other hand, the courts of common law, by silent and steady march, have gradually extended the limits of their own authority, until they have usurped, or acquired concurrent jurisdiction over all causes, except of prize, within the cognizance of the admiralty." P. 421, 422. The note written in 2 Gallison, quoting Hoffman, called Story's opinion, "in truth, a learned and elaborate essay on admiralty jurisdiction..." See also Johnson's opinion in Croudson v. Leonard, 4 Cranch (8 U.S.) 434 (1808).

207 12 Wheat. (25 U.S.) 611 at 624 (1827).
208 Id. at 627.
209 Id. at 635.
210 Id. at 636, 637.
Again Johnson charged error in the report:

"But this also, when we find the rest of his reported argument so clearly a mistake, we have good reason for hesitating to ascribe to him. And the rather, for that, so well read a lawyer would not have advanced so bold a doctrine, without attempting to find some shadow of authority for it. Even Mr. Winder, who argued against Mr. Pinkney, does not venture to put his case upon the law of England, but relies upon the law of the continent, and insists on a right arbitrarily to adopt it here." 211

Wheaton did not permit these criticisms to go unanswered. He appended to the report of the case of *Ramsay v. Allegre* an answer to Judge Johnson's charges in the form of a footnote from which the following excerpt is taken:

"The editor of these reports feels it to be a duty which he owes to self-respect, and to the independence of the bar, to take some notice of the comments made in the above opinion upon the account given in the third volume of this work, of Mr. Pinkney's argument in the case of The General Smith. Whether the editor was so unfortunate as to misunderstand the argument of that truly learned person, he is willing should be determined by the test proposed in the above opinion. No other reason is there given for questioning the accuracy of the report, than that Mr. Pinkney was too well read a lawyer, and too able an advocate, to have urged an argument which is contradicted by the authorities he cites in its support. . . .

"In making these remarks, the editor has certainly not been influenced by any feelings of disrespect towards the learned judge by whom the above opinion was delivered, nor even by a desire to controvert the peculiar doctrines maintained in that opinion. It is his own character for accuracy and integrity as the reporter of the decisions of this court which the editor feels to be assailed, and therefore, seeks to vindicate. It is a duty which he owes to the court, to the profession, and to his own reputation, to maintain the fidelity of the reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless. In closing his labors, the editor has the consolation of reflecting, that it has been his humble aim to do justice to the learning and talents of the bar, and to uphold the honor and dignity of the bench. How far he has succeeded in this attempt, it does not become him to speak; but he is willing to submit to

211 Id. at 638.
the impartial judgment of his professional brethren, whether the above accusation is supported by evidence.”

E. Preliminary Analysis of the Dynamics of Johnson’s Opposition

At this stage the reader may ask—“What have you shown us here? An obstinate and disputative jurist who indulged in error but was quick to find it in others, a disaffected individual who supererogated a higher knowledge to himself and so forth . . . :” The answer must lie in a complete recapitulation of what we have attempted to show regarding Johnson’s cultural evaluations. However, in specific reply it must be evident by this time that in and out of law he was one of the truly eminent pioneer thinkers of modern times. It is one of the illusions of civilized men that perfection is attainable in human relationships without error and change, whereas in the material sciences trial and error is the very essence of the highest attainment. What Johnson was aiming at, psychodynamically viewed, was the overthrow of the authoritarian conception of the common law and its dislodgement as a superstition. The danger of a despotism of ideas originating in a feudal past seemed to him as imminent as the tyranny of a monarch or of parliament. It was a major and unprecedented course for a jurist to take and has heretofore not been fully appraised. Only in the light of our modern knowledge of human behavior may we give to his dynamic questioning of spent authority its well earned place in American history; and only if we attempt to apply some of his methods may we attain a jurisprudence based upon knowledge of primary rather than secondary fact.

We are better able to appraise Johnson’s effort when we recall Tylor’s concluding remarks to his epochal work, Primitive Culture, made about a half century later. After pointing out that “the oft-closed gates of discovery and reform” were then standing open at their widest, he sounded a pessimistic note of a contrary probability:

“It may be that the increasing power and range of the scientific method, with its stringency of argument and constant check of fact, may start the world on a more steady and continuous course of progress than it has moved on heretofore. But if history is to repeat itself according to precedent, we must look forward to stiffer duller ages of traditionalists and commentators, when the great thinkers of our time will be appealed to as authorities by men who slavishly accept their tenets, yet cannot or dare not follow their methods through better evidence to higher ends. In

212 Id. at 640-642.
either case, it is for those among us whose minds are set on the advancement of civilization, to make the most of present opportunities, that even when in future years progress is arrested, it may be arrested at higher level.”

In simplest terms, civilization has developed out of the primitive—as Tylor has shown. But what must also be noticed is that in the process elements of primitive life which have value for man and his society have largely been repressed and suppressed. Therefore, in a real sense the studies in human behavior mean a return to the understanding of the dynamic factors of primitive behavior of children and adults and the conversion of the viewpoint of repression and suppression into greater awareness and consciousness. “Better evidence” carries with it the thought that it is evidence which is common to all and may benefit all in their efforts to find worthwhile meaning in life—but it carries no promise of permanent validity. Nor can the search for evidence justify withholding its findings on the theory that it is dangerous for the common man to be informed.

The constant struggle between the old and the new found its way into Johnson’s challenge to the claim of authority beyond its proper scope. Nevertheless, it would be incorrect to say that Johnson abhorred learning. As a scientist he saw learning as an adjunct of experiment and, therefore, could not fail to sense the need of keeping close to the facts. Neither law nor any of its ramifications were to be considered finalities. To him law was a function—just as science was a function—and not a goal in itself. He could hardly be classed as a utilitarian; he certainly did not see the law as its own end. Nor did he yield to the temptation of making out of the rule of the majority—as did Holmes—an arbitrary surrogate for the personal despotism of the sovereign, though he recognized its force.

Johnson’s outstanding quality was self-analysis. He saw his own fallibility and, therefore, could recognize it more readily in others. At one time he declared that “man without his partialities is but an unsocial animal; and must be more or less than human, if he loves not where he has been caressed or dislikes not where he has been injured.” Yet, in his jurisprudence his objectivity has seldom been equalled. It was this very partiality which he saw so clearly that required the utmost diligence lest personal prejudice as Holmes warned us be made into law.

213 2 Edward B. Tylor, Primitive Culture 452 (1877).