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THE DISSENTING OPINION—ITS USE AND ABUSE

EVAN A. EVANS*

Beginning almost with the establishment of courts composed of a plurality of judges, the dissenting opinion and its proper place in judicial pronouncements has been the subject of discussion by members of the bench and bar. In the United States Supreme Court the dissenting opinion was, from the first, a rather common occurrence. In one of the very first cases wherein opinions were announced,[1] the first opinion to appear was the dissenting opinion of Justice Johnson.

In the first few years of the Supreme Court's existence, each Justice expressed his individual views on each case, and these views were recorded as their official opinions. The youngest in point of service announced his views first, then followed the opinion of the next most recent appointee, and so on to the Chief Justice. This practice of requiring the Junior Justice to first express his opinion, I understand, has been followed in most, if not all, appellate courts when cases are being considered in conference. Why, I do not know. Perhaps the practice is due to a recollection of college days—a relic of hazing. It is indeed somewhat embarrassing for a new appointee to make his analysis and briefly express his conclusions before eyes that observe closely and to ears trained to detect flaws in reasoning and in expression. Its one commendable feature is that after this acid test had been applied a few months to the neophyte, he becomes self-reliant, if not defiant. While the explanation may be somewhat fanciful, it is possible that this state of mind may account in part for the prevalence of dissenting opinions.

This first case in the Supreme Court is interesting in another respect. Justice Cushing expressed views similar to those of Justice Johnson, while to Justice Wilson must be given the credit for the first "I doubt" opinion.

This case is interesting to the student of dissenting opinions in an-

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*Judge, United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois.

1. Georgia v. Brailsford, 2 U. S. 402 (1792).

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other respect. The first opinions were announced on an application for a temporary injunction. This was followed by a hearing to dissolve the injunction and dismiss the bill. At this second hearing Justice Johnson was not present. The application to dissolve the injunction was denied, however, and this time Justice Iredell and Blair dissented. To be accurate, Justice Blair doubted rather than dissented when he said:

> "My sentiments have coincided, until this moment, with the sentiments of the majority of the court; but a doubt has just occurred, which I thought it my duty to declare."[1a]

Justice Iredell gave expression to an apology preceding his dissent, which practice has been followed over and over again by able Justices writing most persuasive opinions. He adds:

> "It is my misfortune to dissent from the opinion entertained by the rest of the court upon the present occasion; but I am bound to decide according to the dictates of my own judgment."

It has always been a source of disappointment to observe so many able men, lawyers and judges, precede their arguments with an apology. The very fact that so many dissenting opinions begin with an excuse, in the nature of an apology, suggests a lack of justification for their pronouncement.

Surely a public official, charged with the responsibility of deciding a question properly presented for decision, needs offer no excuse for his failure to agree with his associates.

Running through the dissenting opinions are numerous reasons and excuses for their pronouncement. In *Bank of the United States v. Dandridge*,[2] Justice Marshall said:

> "I should now, as is my custom, when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the circuit court of Virginia gave general surprise to the profession, and was generally condemned."

This is a most unique reason. How is a judge to know whether the bar will be surprised by the majority opinion?

Justice Taney in 1838, shortly after coming on the Supreme Court, excused his dissent in the following language:

1a. It occurs to the writer, now, that if he dissented every time he entertained a doubt, even a serious doubt, he would quite frequently dissent from his own opinions.

2. 25 U. S. 64, 90 (1827).

> "It has, I find, been the uniform practice in this court, for the justices who differed from the court on *constitutional* questions, to express their dissent. In conformity to this usage, I proceed to state briefly the principle on which I differ."

Justice Brewer said:

> "I am unable to concur in the opinion and judgment in this case, and deem the matter of sufficient *importance* to justify an expression of my reasons therefor."

Justice Harlan said:

> "In view of the *importance* of these cases, I do not feel that any dissent from the opinion and judgment of the court should be expressed unless the grounds of such dissent be fully disclosed."

In *Muhlker v. New York & Harlem R. R.*,[3] Justice Holmes dissenting says:

> "I regret that I am unable to agree with the judgment of the court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it."

Until I made this study I did not suppose Justice Holmes ever thought it necessary to apologize for, or offer justification for, a dissenting opinion. My surprise was greater, however, when I read Justice Holmes' statement in another case, where he said:

> "Although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it."

Justice Holmes is the only Supreme Court Justice, so far as my study goes, who has ever gone so far as to describe dissenting opinions as "useless and undesirable." When this statement was made, Justice Holmes was sixty-six.

Justice Brewer in another case stated:

> "I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation."

The excuse, I agree, was ample justification for dissenting.

Justice Holmes dissenting in another case said:

> "I am happy to know that only a minority of my brethren adopt an interpretation of the law which, in my opinion, would make eternal the *bellum omnium contra omnes*, and disintegrate society so far as it could into individual atoms."

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3. 197 U. S. 544, 571 (1905).

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In *Maryland Clay Co. v. Edward Goodnow*,[4] Justice Pearce said:

> "My convictions of the principles which should control the decision of this case are so strong that I am constrained to dissent from the opinion of the Court, though I am aware that dissenting opinions are very often, and sometimes correctly, regarded as idle, if not pernicious, work. Nevertheless they are sometimes justified in order to relieve the dissenting judge from the imputation of that which, unexplained, might appear to be merely captious difference or obstinate adherence to individual opinion."

The modern practicing lawyer seemingly has very definite views on the subject and they are decidedly in accord. I asked numerous of my lawyer friends whose opinions I valued highly to write me. Before quoting from them, I read from an article by William A. Bowen,[5] who used this vigorous language:

> ". . . the Dissenting Opinion is of all judicial mistakes the most injurious. Its effect on the public respect for courts is difficult to exaggerate. It is, happily, a habit of the public mind to regard the judiciary as the worthy and safe repository of all legal wisdom; but this respect must receive a sad shock when every court is divided against itself, and every cause reveals the amateurish uncertainty of the judicial mind. It is not to be dreamed that all men should be of one mind. But it is surely to be expected that the wranglings of our judges be at least decently veiled.
>
> "Obviously, if the Dissenting Opinion is injurious at all, it will be most unfortunately so in those cases which are of the greatest public moment. Yet it is the almost unbelievable fact, that it is the uniform justification of dissenting judges that the *importance* of the case warrants and demands their dissent . . . . it is that in the history-making cases, of which but a few punctuate a century, our courts have been most infirm, most vacillating, most confused. . . . Of the many injurious aspects of the Dissenting Opinion, one of the most destructive is that by emphasizing the personal composition of courts it is subversive of their great anonymous authority. The more impersonal their character, the more willing is the respect they earn."

A judge writes:

> "A dissenting opinion is just one more opinion. . . . My conclusion is that justice can be done as well, and maybe better, without writing opinions in a very large majority of cases. I doubt whether a dissenting opinion is ever really justified. It certainly is not unless it enunciates a principle of law that is new in the cases and that has been wholly overlooked by a majority of the court."

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4. 95 Md. 330, 51 Atl. 292 (1902).
5. Bowen, *Dissenting Opinions* (1905) 17 GREEN BAG 690.

Mr. H., a Chicago lawyer, writes:

"It seems that it would be unwise to . . . make justification for a dissenting opinion dependent upon any line of demarcation between questions of fact and those of law . . . that the dissenting opinion should be filed where any new substantial principle of law is applied . . . also where an old principle is given a clearly new application either by the majority . . . or the minority. . . . It should not be filed simply because the dissenter disagrees with the majority . . . other than on the two grounds just stated, save in cases that likely may be further reviewed by a higher tribunal. Such tribunal and the parties ought to have the aid that the dissenter's opinion might give.

"I think there is no harm done but rather much good by dissents in cases where the propriety of the dissent is plain, surely less harm arises than in the recent example occurring in the Supreme Court of one of our states consisting of seven judges. A unanimous opinion was given on an important subject and afterward on rehearing an opposite unanimous opinion was given."

A judge of a state supreme court writes:

"I had a pretty firm conviction before I came here that dissenting opinions ought not to be written because they have a tendency to lessen the authority of the decision of the court. I am still firmly convinced that there are very few, if any, cases in which a dissent should be written where the questions involved are mere questions of fact . . . . that dissenting opinions ought not to be written in cases involving questions of law unless the situation is such that it seems plain that some good purpose will be promoted by writing the decision as in cases which involve the construction of statutes where the remedy lies in the amendment or repeal of such statutes.

"Then there are cases which lie more nearly in the field of economics or political science where I feel that a dissenting opinion may be justified. Such, for example, as the question of the valuation of public utilities.

"Then again there are questions in which a dissenting opinion may serve a useful purpose where it points out a limitation upon broad and general language contained in the majority opinion. But on the whole I still feel that the cases are rare in which dissenting opinions should be written. My own observation is that dissenting judges are apt to be those who are not inclined to enter into the discussion of cases in the conference room with a mind open to conviction by those who take a different view of the case. . . . There are cases in which one has such a strong personal view that in order to live with himself he feels that he must record a dissent."

A highly respected lawyer writes:

"Dissenting opinions are very seldom of value.

"The number of judicial decisions is so great and the opinions are so long that the reports should not be increased in volume by dissenting opinions except in very special circumstances. There is necessarily so much uncertainty about the law that it is ordinarily inadvisable for judges to keep up discussion in the reports.

"If a judge has unusual political, social or economic views or theories of jurisprudence it would be better for him to expound them in essays or speeches rather than in dissenting opinions."

A thoughtful judge writes:

"A judge announcing a dissenting opinion finds himself in the anomalous position of being a part of a court authoritatively clothed with power to declare the law and to declare and assert final judgment, and at the same time openly announcing that the dissenter does not believe the court has made a correct decision. If we were to extend the situation one step further to the place where the dissenter announces that he would not be bound by the majority we should find the latter in contempt of the tribunal of which he is a member.

"This situation it seems to me obviously leads to the conclusion that if members of the court openly and emphatically protest the incorrectness of the decision they set an example for the citizenry, largely uneducated in courts and the theory of the law, to follow the example set by the dissenting judge, and without appreciating the correct limitations of action as compared to thoughts, to go still further and openly announce that they will not be bound by the court decision. The inevitable tendency, therefore, it seems to me is to discourage confidence and trust on the part of the people in the tribunals upon which they should look as the citadels, wherein are guarded their civic rights.

"It may be that in cases involving important public questions largely affected by change of economic and political conditions, dissenting opinions may be of value in that they suggest theories of Government and of economic policy concerning which there is doubt, and which may in time come to be the established rule. I can appreciate that under such conditions dissenting opinions may be of great value. In ordinary cases, however, I am of the opinion that they supply no need; that they disrupt and confuse rather than clarify or benefit."

An attorney whose standing at the bar of the nation is unusually and deservedly high, writes at length, and with strong convictions. He says:

"One principle of the use, both by the Bench and the Bar, of decisions is that statements in the opinion, however direct as to a rule of law, are not binding precedents, and often are not valuable precedents, unless they deal with a point which is necessary to the decision. We classify such statements as *obiter dicta*, and with this phrase, although not quite contemptuous in its character, we treat them as something not entitled to be valued in every case.

"This rejection of that which is stated by even a member of the majority who concurred, as of little value where it was not necessary to the decision, seems to me to apply with greater force to dissenting opinions. A statement which may be *obiter dicta* in the majority opinion, nevertheless has met the approval of the majority of the court as proper for inclusion in the opinion.

"A dissenting opinion is a totally different thing. Such opinions are not written for the purpose of showing the reasons for the decision. If we recognize the fact frankly, I think we would agree in saying that they are written for the purpose of showing the views of the particular judge, which have after careful consideration in conference, been rejected by his associates. They thus have no value as precedents, and this is true notwithstanding the ability and standing of the judge who dissents. If he were to write a treatise on the law and state as a principle one which had been rejected by the court of which he was a member, his statement would not be received as authority.

"It, therefore, seems to me that such opinions have no value, and this is another way of saying that they accomplish no good.

"The other question is whether they are harmful. In my judgment, they are. They, of course, always are an attack upon the decision of the court. They do not invalidate the decision or change the rights of the parties, who, of course, are bound by that judgment itself. Their purpose is to discredit the conclusion which the court has reached, and thus to take away from it that respect, both of the parties and the public, which is really essential to the administration of the law through the courts. When the decision of a court is spoken of with disrespect, if not contempt, because it was by a divided court, the disrespect which is thus expressed is really disrespect for that which has become law, because the decision is the law of that case.

"Of course, the effort of the dissenting judge is always to show that he is right and the majority is wrong. He thus uses all the ability and learning which he is supposed to devote to the public good in discrediting the judgment of the court of which he is a member. It is, of course, often a sort of a consolation to a judge to express his own personal views and to show how wrong the contrary views of his associates are, but there is nothing about the judicial department which makes its machinery in any way subservient to the accomplishment of this purpose. The parties and the public are called upon to respect and to obey the judgment of the court, and I think that the same tribute of respect is due from each one of the members of the Bench when a concurring majority has finally reached a decision."[6]

It is a trait of our profession to be always hopeful. Even in defeat our heads are unbowed. We are always going to win on appeal.

The unanimity of views expressed by lawyers and judges was disturbing. It shook my confidence in the soundness of my convictions, but it did not change them. A happy thought raised my hopes. I decided

6. I sent my inquiry to lawyers and judges without thought of their reactions. The replies were approximately 100% against dissenting opinions. At the close of the address numerous lawyers approached me and told me that they favored dissenting opinions and that the views of the lawyers who had written me did not truly reflect the sentiment of the Bar.

to write the faculty members of representative law schools. I hoped they might be more judicious. Maybe they would agree with me.

I always think of my position as being somewhat like that of a student taking a postgraduate course in law school. Our classes are not large, and we have quite a lot to say about how they are conducted. The lawyers, however, are the instructors. They are specially qualified to teach the matters whereof they lecture, subjects covered by their appeals. Our opinions might be called examination papers. We are quite sure to be marked 50, unless there happens to be more than two parties to the suit.

And so I appealed to a prejudiced jury—to the law school professors. The responses were favorable—more, they were enthusiastic. Oh boy! How the law professors do love dissenting opinions!

Still even here there were a few dissenters among the lovers of dissenters. They were very few, however. The unanimity of the law school professors in favor of dissenting opinions is greater than the unanimity of opinion shown by lawyers and judges against dissenting opinions.

Space prevents my doing justice to the professors' replies. I quote from a few of them.

> "Strike out the dissenting opinions and you strike out 90% of the intelligent contribution of the courts."
>
> "Judicial decisions from which there is dissent are extremely useful as educational tools."
>
> "I should regard it as a distinctly reactionary movement were the practice of writing dissenting opinions discontinued. I do not believe that there are more dissenting opinions in the Supreme Court of the United States than are advisable. On the other hand I am disappointed on occasions that there are not more of them."
>
> "I feel strongly that dissenting opinions are extremely valuable to the profession and that they contribute much to the development of the law."
>
> "From a teaching point of view dissenting opinions are of great assistance in presenting both sides of a legal question."
>
> "I can't refrain from hazarding a single conjecture as to the possible explanation of Judge Evans' response from lawyers. Is it perhaps another reflection of the reprehensible refusal of too many lawyers to recognize the intellectual content of the law and of their inclination to find easy refuge in a *rule*—which can be readily applied to the next situation which arises. If this indictment is a fair one, dissenting opinions come easily within a classification of mere troublous complication. There is a common denominator to which the lawyers' condemnation of dissenting opinions and law teachers can be reduced, viz., a distaste for 'theory.'"
>
> "I can not believe that dissenting opinions cause real confusion to able lawyers."
>
> "I regard the dissenting opinion in a proper case as almost

as valuable as that of the majority and sometimes as more valuable. I will also add that some of the most effective materials for teaching purposes are those found in the dissenting opinions. Without them I am afraid we would have to tear up our present case books."

"Through the media of dissenting opinions in the courts great issues are often brought into bold relief and thus the public mind is focused upon them. To my mind the privilege of presenting the minority view is as important to the public welfare in its exercise in the courts as it is in the halls of Congress."

"Answering your question, Are dissenting opinions more hurtful than helpful?—my answer is decidedly more helpful. Unanimous opinions show wherein the law is settled. Divided opinions show wherein the law is unsettled or in a state of flux. A dissenting opinion alongside a majority opinion shows why the law is unsettled or in a state of flux. What a brilliant literature in the law would have been lost if the dissenting opinions of Mr. Justice Holmes had been suppressed. Stability which results in the suppression of dissenting opinions is too much like the unanimity of opinion which supports a Hitler. It is but appearance—it is hollow."

"Law must perform the paradoxical function of providing both stability and elasticity to the web of society: stability, to furnish a reasonable degree of certitude and continuity; elasticity, to promote progress. Law is stable at points where intelligent opinion agrees as to what it is. It must be elastic at points where intelligent opinion differs as to what it is. The dissenting opinion performs the function of rationalizing the elastic element in the law."

"My reaction is that dissenting opinions are extremely valuable, often vastly more valuable than the majority opinion in the same case, practically always more helpful than hurtful and only in very rare instances, if ever, downright hurtful."

"The members of the faculty here were unanimous in favor of dissenting opinions."

The specific objections to dissenting opinions may be grouped under five heads: (1) they weaken the court in the esteem and confidence of the public; (2) their effect is to open up for future litigation questions which the court's decree should have settled; (3) they are impotent to alter the majority opinion; (4) they unnecessarily add to the volume of judicial opinions already too numerous; and (5) they adversely affect the prompt and effective disposition of litigation.

Are any or all of these objections well taken?

(1) Do they lessen public confidence in the court? Doubtless they do somewhat, particularly so far as the general, unthinking public is involved. To those who know that the law is not an exact science and cannot be made so, it is doubtful if a dissenting opinion ever weakens re-

spect for the court. In fact, such opinions must be, to the thoughtful reader, as well as to the litigants, proof conclusive that the questions presented were thoroughly and seriously considered and this conviction should go far to develop respect.

(2) Do dissenting opinions invite future litigation over the same question? It does not seem to me that this charge is sustained by the facts.

Dissenting opinions are read with more interest and eagerness by students of law, by professors and perhaps by judges, than by the practicing attorneys. They serve to make clearer just what the majority opinion holds. While they may provoke discussion concerning the soundness of the rule expressed in the majority opinion, they seldom afford the basis of a second suit involving the same question.

(3) Are they wholly impotent? A candid survey of the influence of dissenting opinions convinces me that on the whole they have not been as productive of results in the realm of future litigation as is claimed for them. True, they have carried more weight than was ascribed to certain *obiter dictum* expressions by a lawyer practicing in our court who became somewhat peeved over his adversary's too confident reliance on such *dicta*. This lawyer thus described an *obiter dictum*:

> "It is like an illegitimate offspring, conceived in mistake and born in error, with no parent but the one that gave it birth, and the fair name of that blighted by the birth of it. Brought into the family of the good and proper, it is disowned by those who stand its sponsors, whenever it seeks to take its proper place among them. It is cast out by reason because it is without right.
>
> "Tolerated, but not adopted, found but not followed, fit for space, but not for place, writing without right, print without principle, done but to be undone. It is far-fetched and unfair, it is not wicked but worse. It flatters the fool and fights the fair. It is words without wisdom. More than nothing, yet less than something. To follow it is to go from error to wrong, and the perversion of right, placing with the things that are, the things that seem to be.
>
> "Usually bad reason, always bad taste and never good law. It is fiction and a failure. Ill-conceived, ill-considered and ill-born. Like the hanging culprit, it stands on nothing and kicks at law."

If this brilliant lawyer would use such strong language about a harmless little *obiter dictum* what would he say if he gave free flow to his pen on the subject of dissenting opinions?

In considering the efficacy of dissenting opinions, it must be remembered that some dissenting opinions ultimately become the law of the land either through a change of opinion on the part of the court or because

they produced a change in the constitution or in the legislative made laws of the land.[6a] An excellent case in point is that of *Motion Picture Patents Co. v. Universal Film Mfg. Co.*[7] This case squarely overruled *Henry v. Dick Co.*[8] In both cases, the question presented involved the right of a patentee to impose conditions upon the use of a patented article which the patentee either sold or licensed another to use. In the *Henry v. Dick Co.* case there were three dissenting Justices, the vote being 5 to 3. In *Motion Picture Co. v. Universal Film Co.*, the views of the minority in the *Dick Co.* case became the views of the majority of the court which by a vote of 6 to 3 denied a right to the patentee which was recognized as his in the *Dick Co.* case.

Justice Clark, speaking for the court, said:

> "It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry* v. *Dick Co.* . . . must be regarded as overruled."[9]

As one of the reasons for justifying this conclusion he further said:

> "Through the twenty years since the decision in the *Button-Fastener Case* was announced there have not been wanting courts and judges who have dissented from its conclusions, as is sufficiently shown in the division of this court when the question involved first came before it in *Henry v. Dick Co.*, 224 U. S. 1, and in the disposition shown not to extend the doctrine in *Bauer v. O'Donnell*, 229 U. S. 1."[10]

The recent case of *West Coast Hotel Co. v. Parrish*[11] is known to you all. Perhaps in the interest of harmony, your speaker should "further sayeth not."

Then too, there is the case which we all readily recall, the most im-

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6a. For a complete list of Supreme Court decisions overruled in subsequent decisions, see note to dissenting opinion by Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 406 (1932). The following are decisions overruled since this note was published: The case of Funk v. U. S., 290 U. S. 371 (1933), overruled two cases, Hendrix v. U. S., 219 U. S. 79 (1911), and Jin Fuey Moy v. U. S., 254 U. S. 189 (1920); West Coast Hotel Co. v. Parish, 300 U. S. 578 (1937), overruled Adkins v. Children's Hospital, 261 U. S. 525 (1923); Crawford v. U. S., 212 U. S. 183 (1909), was disapproved in U. S. v. Wood, 299 U. S. 123 (1936); B. & O. R. R. v. Goodman, 275 U. S. 66 (1927), was limited by Pokora v. Wabash Ry., 292 U. S. 98 (1934); and Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 (1932), was disapproved in Helvering v. Bankline Oil Co., 58 Sup. Ct. 119 (1938). On this showing it cannot be said the Supreme Court has been vacillating.

7. 243 U. S. 502 (1917).
8. 224 U. S. 1 (1912).
9. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 518 (1917).
10. *Id.* at 515.
11. 300 U. S. 379 (1937).

portant case ever decided by the Supreme Court—the *Dred Scott* decision.[12] Perhaps most of us are prone to over-estimate the importance of this decision on the subsequent history of this country. It undoubtedly influenced public sentiment. But I submit it took a lot more than a Supreme Court decision to finally fix the status of the negro or arouse the nation to a state where civil war was unavoidable. It may have helped, but it was not the sole, the proximate cause to the civil war.

In appellate courts other than in the Supreme Court dissenting opinions at times serve a useful purpose in that they may induce the last named court to take the case on certiorari and perhaps to influence that court in its final decision. The writer knows of at least four cases where dissenting opinions were written largely in the belief that their pronouncement would result in the Supreme Court's granting certiorari and in all four cases the dissenter's hopes were realized.

(4) The charge that dissenting opinions tend to lengthen judicial pronouncements and therefore add to the burdens of the practicing attorneys must be conceded. But there are other ways of lessening this burden more effectively than by the elimination of dissenting opinions. (a) One method calls for the pronouncement of oral opinions by the court where the judgment of the lower court is affirmed and where the issues are free from doubt both as to law and fact. This practice should be more extensively followed. (b) Another method, which must be adopted sooner or later, is the selection for publication of only a limited number of decisions pronounced by any intermediate appellate court.

Is the fifth objection meritorious? Do dissenting opinions adversely influence the effective disposition of litigation? I doubt if an intelligent answer to this inquiry is possible. We can only speculate.

The dissenting opinion affords an interesting study for the student of psychology. Lawyers may condemn, judges may apologize, but dissenting opinions will and should be written. Their number will depend largely upon two circumstances,—the personnel of the judges and the cases that arise for adjudication. Certain judges possessing certain traits and qualities will not only write dissenting opinions but they will write majority opinions which are provocative of dissent. A notable example of this kind was Justice Harlan who in the last few years on the bench not only became a notable dissenter but a rare provoker of dissents. Not satis-

12. Dred Scott v. Sandford, 60 U. S. 393 (1857).

fied with disposing of the questions presented by the appeal, he lectured his associates who differed with him. The decision in the *Jim Crow* case illustrates the extreme to which he would go at times.

In the proceedings in the Supreme Court upon his death, Attorney General Wickersham said of him:

> "Justice Harlan had learned, in the fierce warfare of personal strife during the Civil War, and in the intensity of political contests after the war, to beat his brute and human enemies as his fathers had learned to subjugate the wilderness. But he never well learned what it was to follow a leader—at least, not a living one. He was a student and disciple of Marshall. . . . Among living men he could lead but he could not follow. Where others agreed with his views he would march with them, but when they differed he marched on alone. His was not the temper of the negotiator."

A phase of dissenting opinions which has interested me involves the extent to which a judge should continue to express his minority views when the same question arises in subsequent cases. An illustration is to be found in Justice Holmes' dissent in *Madisonville Traction Co. v. St. Bernard Mining Co.*[13] The question involved was the right of removal from state to federal court in a condemnation proceeding. Shortly thereafter the case of *Mason City & Fort Dodge R. R. v. Boynton*[14] was presented for consideration. Again one of the questions was the right of removal in condemnation proceedings. Justice Holmes wrote the opinion in this case and his first sentence reads: "In *Madisonville Traction Company v. St. Bernard Mining Co.*, 196 U. S. 239, it was decided that proceedings of this character could be removed to the United States Circuit Court." In short, without question, he accepted as the law, the pronouncement of the majority of the court, in the case wherein he dissented.

The effect of such later acceptance of the views of the majority of the court weakens the argument that dissenting opinions ultimately become the law of the land.

No one can study the opinions of the Supreme Court in public utility valuation cases without being convinced that a minority consistently held out against the majority respecting the frequently announced doctrine that reproduction cost is the dominant factor in determining value. It occurs to me that there is some justification for the persistence of the

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13. 196 U. S. 239 (1905).
14. 204 U. S. 570 (1907).

minority. I refer not to the specific holding, of course, but to the group of cases of which this is illustrative. In suits where the Congress or the legislature of the various states may correct a situation stressed in the dissenting opinion, there is little excuse for repeated expressions of dissenting opinion. However, where the matter is one which can be corrected only by a change in the Constitution of the United States and where the difference of opinion is expressed by the ratio of 6 to 3 or 5 to 4, the minority has a serious problem to decide whether to continue dissenting and look for a change in the personnel of the court which change may reflect itself in a changed majority position.

The most radical and prompt change in views of the majority of the court is to be found in the case involving the income tax law passed during the second Cleveland administration. When that case was first decided the law was upheld by a 4 to 4 vote. Within six months, however, a rehearing was had. The ninth Justice sat and voted to sustain the constitutionality of the law. But one Judge who had been with the majority changed his mind. A minority thereupon became the majority of the court and the law was declared unconstitutional.

At this point I invite your attention to another class of dissents which were common during the latter part of the world war and shortly thereafter. I refer to the criminal cases where convictions occurred under the Espionage Act.[15] In most instances the particular offense consisted of speech or printed matter, spoken or written by critics or alleged enemies of our government. These legislative enactments were sustained as constitutional and the prosecutions thereunder upheld. The later decisions, those announced after war was over, were generally accompanied by vigorous dissents. True, there was a different statement of facts in each case but the difference between the majority and the minority opinion was not limited to the difference in the facts so much as to the inherent difference between members of the court respecting the extent to which an individual might go in criticising the government activities in time of war.

Here again the question arises respecting the extent to which the dissenter should continue to voice his dissent. Having spoken about the subject, was it not for the judges to leave it to Congress to modify or repeal the Act? If Congress failed to act, did not such failure evidence a de-

15. 40 STAT. 217 (1917), 50 U. S. C. § 31 (1928).

sire on the part of the ruling majority to retain such legislation? Under such circumstances, is a judge who continues to dissent not attempting to exercise legislative rather than judicial functions?

Judges have an excellent opportunity to study human nature and the motives of human conduct. The study of the human species known as the practicing lawyer is itself most interesting. There are lawyers who in the trial of a case first develop an animosity toward the opposing litigant. In the preparation for trial, his hostility is extended to the lawyer who is unfortunate enough to be his adversary. During the trial of the case he includes the trial judge in his list of opponents. On appeal, he tries not the issues of the law suit but first the trial judge, then the opposing lawyer, and, if he has time, his client's case.

The life of an advocate not only tends to develop tenacity but also fosters the ego, which in turn is builded on pride. When a successful advocate after years of practice goes on the bench, it is not always possible to submerge qualities which are the result of years of cultivation. Naturally these qualities, unless well controlled, may constitute the basis of the abuse in dissenting opinions. The observation of Justice Holmes in the last sentence of his dissenting opinion in *Coppage v. Kansas,* "I still entertain the opinions expressed by me in Massachusetts," is an illustration of this kind of exasperating utterance.

Then, too, perhaps some judges, like some lawyers, have been bitten by what might be called the publicity bug. They never get over the attack. These specimens thrive on publicity, newspaper or magazine, and press notoriety almost always goes to the dissenter, not to the majority. There is some hope of recovery from an attack of Publicitus in the case of a politician or other public official. A good defeat at the polls is often an effective cure. But in the case of a judge, the hope of recovery is very slight.

But there are dissenting opinions, and by far the most of them, are due, not to over combativeness nor to an itch for publicity on the part of the judge who wrote them. They grow out of an honest and intelligent difference of opinion, a difference that is irreconcilable.

No one can read the last two lectures of Justice Hughes, published by the Columbia University Press, under the title "The Supreme Court of the United States, Its Foundation, Methods and Achievements: An Interpretation," "Liberty, Property and Social Justice," without recognizing that differences of opinion are almost certain to arise in a court com-

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posed of nine members over the application of the due process provision of the Fourteenth Amendment of the Constitution. The line which prescribes the legitimate exercise of the police power of the state is, to say the least, heavily shadowed and not always easy to ascertain. In fact, such a line defines an enlarging circle, the enlargement being forced by an increasing population and by changing methods of transportation, of business and of living. That lawyers on the bench or off the bench should differ over the correct application of this due process clause to the many state and national laws, which have been enacted during the past twenty years, is not surprising but natural. The larger the number of judges on a court the greater the chance of a difference of opinion. To expect any self-respecting judge to acquiesce in every conclusion to which he does not subscribe is hardly to be expected. After all, there is something to this living with oneself suggestion, appearing in one of the letters from which I have quoted.

All public officials, including judges, must stand the test of hostile public opinion. They may ignore the well directed shafts of malicious criticisms. But a judge cannot live happily without the good opinion and respect of his own self. And it is the desire to meet official duty fully and fairly that accounts for most of the dissenting opinions. That a dissenter may be, or even is, generally wrong does not meet the urge to express reasons and conclusions honestly reached after laborious study and which are at variance with the views of the majority. Such differences of opinion in my judgment are deserving of expression, regardless of whether the difference is one over the facts or over the law. When expressed in moderation, with sincerity and conciseness, dissenting opinions will never detract from respect for courts nor will they develop unrest or dissatisfaction. They are the only means which a conscientious official has of recording his views in a case upon which he is required to render judgment. He, and he alone, must determine whether his differences are such as to justify a separate statement of his conclusions.

My candid opinion is that dissenting opinions may be lessened in number—that concurring opinions should be decidedly lessened in numbers. I cannot reconcile myself to a practice which would eliminate or even control the dissenting opinion.

There are two dissenting opinions to which I wish to refer briefly before closing. Both of them are recent. Both illustrate what has been covered by the foregoing discussion.

The first one relates to a dissent by the Supreme Court from a majority opinion voiced by 58 eminent lawyers. A short while ago—not so long as to permit any of you to forget—there were instituted in the Federal Courts, many cases which involved the powers of the Congress, of the President, of the Judiciary, of the Government itself. Many of these "burning questions" had reached the litigation stage. Some had been decided. Others were before the courts for decision.

The strain was such that 58 eminent lawyers concluded that they would advise the courts on how to decide the constitutional questions. Their deliberate opinion, so vigorously spoken by said 58 eminent lawyers, seemed to accomplish at least one result. It solidified the Supreme Court in its dissent from the views expressed by the eminent 58.

The occasion is not ripe for a full discussion of how and why the Supreme Court fell into its error of not accepting the views of the eminent 58. I find myself unconsciously drawn to said 58. I, too, have expressed opinions which failed to find acceptance by the Supreme Court.

Like the *obiter dictum* of which my lawyer friend spoke so feelingly, these opinions were "fit for space—but not for place; words without wisdom—more than nothing, yet less than something."

I have long studied the opinions of our respected Supreme Court. My conclusion is that the members of that Court are not great respecters of persons. The merits of the case, not the eminence of the counsel, seemingly control their decisions. My advice to the 58 eminent lawyers is this: "The next time you undertake the unrequested burden of deciding questions for the Supreme Court, Don't Be Too Cocky." Humility becomingly adorns the eminent as well as the lawyers unknown to fame.

My second reference is one where it appears to me that a dissenting opinion might have been unnecessary.

On January 3, 1938, the Supreme Court decided the case entitled *United States v. Raynor*,[16] which reversed a decision of the Circuit Court of Appeals for the Seventh Circuit. Our court reached its decision by a two to one vote. The Supreme Court also reached its decision by a two to one vote. However, the majority in the Supreme Court was with the minority in our court, and the minority in the Supreme Court was with the majority in our court.

16. 58 Sup. Ct. 353 (1938).

Judge Briggle and I constituted the majority, and Judge Lindley, the minority, in our court. In the Supreme Court the opinion was written by Justice Black and the dissenting opinion by Justice Sutherland with Justices McReynolds and Butler concurring.

The case involved the construction of a criminal statute and turned upon the meaning of the word "similar." Dictionaries gave different meanings to this word. It is correctly used at times to indicate resemblance and not exact identity. It is also properly used to mean identity or "exactly alike." Judicial decisions have construed the word to denote a partial resemblance only, while others have used it to denote sameness in all essential particulars. The majority of the Supreme Court reached the conclusion that in the instant case it should not be limited in its meaning to identical.

Was not this a case where the dissenting opinion might have been omitted notwithstanding the individual opinions of the dissenters. True, the dissenting opinion said, "We think the well reasoned opinion of the court below should be accepted." For these kind words the majority of our court is duly grateful.

But what may be expected from the dissent? The statute has been construed. Henceforth it will be applied as the Supreme Court has directed. The majority opinion fully recognizes the force of that canon of construction which requires a criminal statute to be strictly construed. Hence there was no controversy over any legal question. Congress may amend the Act if the construction given by the majority is not acceptable to it, as it likewise could have amended the Act if the minority view had been adopted.

The fact that I like the minority opinion better than I do the majority opinion (and I am indulging in no disrespect to the Court when I say so) does not lessen my conviction that this case illustrates how the number of dissenting opinions might be reduced.

I now ask your indulgence while I explain my Tables. I do not want you to conclude that because of their size I am encroaching on the practices of the patent bar. Proof of my intention not to do so may be found in the fact that all of these big tables are done in black. No patent lawyer ever presented a chart that was not done in at least four different colors.

Table I is merely a compilation of the opinions (majority, dissenting, and concurring) of the Supreme Court from volume 5 to volume 279. The

top section covers the decisions up to 1879 and closes with the hundredth volume of the United States Supreme Court Reports. The second section covers the succeeding 23 years or eighty-seven volumes. The third section is for 26 years and embraces ninety-one volumes.

In the first period we find a total of 5,419 opinions, with 716 dissents and 142 concurrences. In the second period we find 5,635 opinions, with 649 dissents and 113 concurring opinions. In the third period, there were 6,065 opinions, with 799 dissents and 184 concurrences.

I have divided the reports into units of ten volumes each. The number of opinions for each unit of ten volumes appears in the second column and the total opinions of each ten units is also given. Likewise, there appears the date which ends each group. The first hundred volumes cover a span of approximately 85 years. The next eighty-seven volumes cover a span of 23 years. The last ninety-one volumes cover a span of 26 years. The increase in number of decisions, as well as in number of volumes needed to print them, has been rather surprisingly small from 1879 to 1928.

TABLE I.

MAJORITY AND DISSENTING OPINIONS OF THE SUPREME COURT.

Volumes		Opinions		Dissents		Concurrences	
5- 10		223		9		8	
11- 20		429		24		13	
21- 30		375		32		7	
31- 40		438		52		17	
41- 50		415		68		12	
51- 60		543		107		22	
61- 70		642		78		13	
71- 80		763		94		13	
81- 90		631		102		20	
91-100	1879	960	5419	150	716	17	142
101-110		1008		73		9	
111-120		823		58		8	
121-130		617		30		5	
131-140		600		54		7	
141-150		614		83		9	
151-160		567		66		10	
161-170		542		112		24	
171-180		537		115		27	
181-187	1902	327	5635	58	649	14	113
188-197		525		105		14	
198-207		556		99		24	
208-217		518		73		19	
218-227		608		42		14	
228-237		772		68		14	
238-247		789		108		14	
248-257		712		137		37	
258-267		729		66		16	
268-279	1928	856	6065	101	799	32	184

Table II shows a different classification of the statistics appearing on Table I. I likewise attempted to compute the percentage of dissents.

The total number of opinions checked was 17,119. The total number of dissenting opinions was 2,166; and the total number of concurrences was 439. The percentage of dissents to total number of opinions written was 12.65%; the total number of dissents and concurrences was 15.21%; the highest percent of dissents for any ten volumes is 20%. The highest percent of dissents for any one volume is 40.47%. Referring particularly to the dissents in volumes 188-279, inclusive, we find there were 298 dissents wherein only one Justice dissented; 261 opinions wherein two Justices dissented; 183 opinions wherein three Justices dissented; and 74 opinions wherein four Justices dissented.

The same analysis of the concurring opinions is made. It is rather surprising that in Table IV we find the number of dissenting opinions

TABLE II.

SUPREME COURT RECORD.

Volumes	Opinions	Dissents	Concurrences
5- 27	927	49	26
28- 47	826	110	31
48- 67	1103	183	29
68- 87	1444	207	37
88-107	1857	229	25
108-127	1506	91	15
128-147	1210	123	13
148-167	1166	165	31
168-187	1016	210	48
188-197	525	105	14
198-207	556	99	24
208-217	518	73	19
218-227	608	42	14
228-237	772	68	14
238-247	789	108	14
248-257	712	137	37
258-267	729	66	16
268-279	856	101	32
Totals	17,119	2166	439

Percentage of dissents		12.65
Percentage of dissents and concurrences		15.21
Highest percentage of dissents for 10 volumes		20.00
Highest percentage of dissents for 1 volume	(37)	40.47

Dissents volumes 188 to 279, inclusive:

1 Justice	298
2 "	261
3 "	183
4 "	74

Concurrences volumes 188 to 279, inclusive:

1 Justice	139
2 "	57
3 "	11
4 "	6

wherein only one Justice dissented is now less frequent than where two or three or four Justices dissented. This was not so in the earlier reports. I was surprised to find that the percentage of dissenting opinions was not much larger during the last thirty years than it was previously. In fact, it would seem that the golden era of dissenting opinions was in the '80's in volumes 168 to 187, inclusive. The high water mark was reached for a single volume in 1838.

Table III contains a report of the number of opinions and dissents by the various Justices who were active in the years covered by the chart. I have not tried to cover the record of every Justice.

This chart is interesting in another respect. From it one gets a better idea who were the prolific opinion writers. If the compilation be correct, it appears that Justice Waite wrote the most opinions.

The number of dissents as compared to the number of majority opinions written is likewise interesting.

TABLE III.

JUSTICES' DISSENTING RECORD.

	Volumes	Majority Opinions	Dissents	Concurrences
BLATCHFORD	45	426	7	
BRADLEY	68	370	138	16
BRANDEIS	40	332	148	49
BREWER	84	515	228	41
CLARKE	18	132	95	12
CLIFFORD	42	403	130	11
FIELD	99	525	245	25
GRAY	83	424	85	12
HARLAN	126	594	259	25
HOLMES	95	843	158	47
HUGHES	24	147	29	6
McLEAN	38	232	71	15
MARSHALL	30	564	8	1
MATTHEWS	24	229	17	1
McREYNOLDS	46	356	130	28
MILLER	70	494	148	14
STORY	34	489	25	6
SWAYNE	38	313	69	10
TAFT	24	266	14	5
TANEY	42	374	56	14
WAITE	40	872	61	5
WHITE	104	650	226	59

Table IV covers the period from October 8, 1929, to June 1, 1937, or twenty-two volumes. These figures deal with the Justices who have recently been on the Supreme Court. It covers a total of 1281 opinions. The percentage of dissents is 13.9 or slightly more than the period from volume 5 to volume 279. More interesting is the fact that the dissents are today more frequently by a plurality of Justices than by a single Justice, which in the

earlier period was not so. Out of a total of 178 dissenting opinions 138 are by a plurality of Justices.

Under the heading—record by individual Justices—I have recorded the number of majority opinions written by individual Justices as well as the number of dissents in which the same Justices participated. It should be noted, however, that the heading—dissents—does not mean that the Justice wrote the dissenting opinion, although under the heading—majority—it should be observed that the Justice wrote the majority opinion.

The number of opinions written is likewise interesting. Justice Hughes wrote the greatest number, 174, and Justice Van Devanter, the least number, 37, in eight years. The period covered by Justice Hughes' record is a little over seven years.

Justice Stone has the largest number of dissents, with Justice Brandeis, second. Justice Cardozo's record covers only seventeen volumes. Jus-

TABLE IV.

DISSENTING OPINIONS.

Oct. 8, 1929 to June 1, 1937	Volumes 280-301
Total Opinions	1281
Total Opinions Wherein Dissents Appear	178 (13.9%)
41 four Justices; 50 three Justices	
47 two Justices; 40 one Justice	
Total Concurring Opinions 65 (5%)	

RECORD BY INDIVIDUAL JUSTICES.

	Volumes	Majority	Dissents	Concurrences
BRANDEIS	22	117	75	16
BUTLER	22	139	56	13
CARDOZO	17	126	61	26
HOLMES	5	47	17	2
HUGHES	21	174	18	3
McREYNOLDS	22	121	60	19
ROBERTS	20	150	18	6
STONE	22	159	80	35
SUTHERLAND	22	136	40	8
VAN DEVANTER	22	37	32	8
SANFORD	2	6	0	0
TAFT	1	4	0	1
PER CURIAM	22	55	2	1

Subject matter where dissents appear

State Regulatory Statutes	17	Admiralty	6
Federal Income Tax	19	Railroads	7
Federal Estate Tax	6	Aliens	3
Patents and Copyrights	3	State Taxes	28
Clayton and Sherman Acts	4	Procedure	6
"New Deal" Legislation	9	Insurance	5
Miscellaneous Federal Taxes	4	Bankruptcy	3
Corporation Law	3	Federal Acts	4
Utilities—Rates	15	Miscellaneous	23
Criminal Law—State and Federal	18		

tices Cardozo, Stone, and Brandeis each wrote a large number of the dissenting opinions, whereas Justice Van Devanter, I believe, wrote only one of the 32 dissenting opinions in which he joined.

I have also tried to collect in this chart the subjects on which the court most frequently divided. The large number of dissents in tax cases would be surprising if it were not for the fact that there are more tax cases these days than appeals on any other subject of litigation. For that reason I doubt if the percentage of dissenting opinions in tax cases is greater than in some of the other subjects.

One other subject I considered separately. The public interest in Justice Holmes as a dissenter is great, and I felt justified in studying his record more closely. I also sought to compare the first half of his Supreme Court experience with the latter half. It appears that during the first fifty volumes of decisions wherein Justice Holmes participated, he dissented or joined in dissents in 48 cases. He concurred in 19 additional cases. In the next period covering forty-eight volumes of Supreme Court Reports he dissented 130 times and wrote concurring opinions in 20 cases. In other words, his dissenting opinions during the latter half of his career on the bench were approximately 2.7 times as many as during the first half. The second period began when Justice Holmes was 75 years of age.