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Dissenting Opinions

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The right to dissent is the essence of democracy—the will to dissent is an effective safeguard against judicial lethargy—the effect of a dissent is the essence of progress.

I have often heard that dissenting opinions reflect unfavorably upon a court, especially where the views of the majority are vigorously attacked. I agree that this may be true if the attack is justified. If it is not justified and the views of the majority are sound, the reflection is on the dissenter. I welcome dissents. They test the soundness of my own opinions. If I am right, the dissent makes the soundness of my position even clearer. If I am wrong, the dissent should point the way for the correction of the error by this or some future court. A supreme court decision which cannot stand the test of a vigorous dissent should never stand as a decision of the court.

I am firmly of the opinion that dissenting opinions are the prescription needed to keep any court healthy. So long as a court has one or two judges with deep convictions and strong feelings and who are not afraid to express themselves in accordance therewith, the other members of that particular court will not, through inertia, short-sightedness or lack of study, be permitted to relax into a state of mind equivalent to the old, and spurious, idea that "what was good enough for our grandfathers is good enough for us." So long as there is a dissenter on any court, the other justices will examine carefully their own views on any particular subject. If a dissenting opinion points out the errors in the majority opinion, the attorney on the losing side is given encouragement to petition for a rehearing, a review by a higher court, and in some instances, to petition for certiorari in the United States Supreme Court.

If a judge, who does not agree with the majority opinion, remains silent, he is, to my mind, shirking his duty not only to himself, but to the attorneys and the general public. He is shirking his duty to himself in that he will not stand and fight for what he believes in; he is shirking his duty to the attorney for the losing side in that he is not aiding him in his endeavor to do his best for his client; he is shirking his duty to the general public which, in most instances, is responsible for his appointment to the bench and his continued position there. I feel that the public has a right to know what my views and beliefs are in the various fields of the law, and that it is my duty to see that those views and beliefs are a matter of public record through published dissenting opinions.

Judicial history shows that the dissenting opinion has exercised a corrective and reforming influence upon the law. The majority opinion is, in

form and substance, the collective, composed and edited view of the majority. In a dissenting opinion, however, the judge is on his own, and can express his personality, his philosophy and his uncensored convictions. Dissenting opinions are powerful weapons against error; they frequently explain the majority opinion. When there is a dissenting opinion, the attorney for the losing side can be assured that the case has received a thorough airing in the conference room and that the majority opinion is not a one-man decision blindly concurred in by the other justices. Judges are human beings and donning the judicial robe does not evaporate their human feelings. The conference room is not a prayer meeting where everyone is expected to nod "Amen"; it is more like a battleground where opposing philosophies meet in hand-to-hand combat. Every single member of the general public and every member of the bar should want a "fighting judge" who will do his best to see that justice is done. There are two sides to almost every question; an attorney can not always be on the winning side nor can any single member of the general public rely on *always* being on the side of the majority.

The law is not an exact science, and a group composed of three, five, seven or nine men with different backgrounds, beliefs, social, economic and political philosophies can not be expected to think alike. That they should think alike is not a sound objective to be attained. The great merit of the common law has been the balance between the two opposite needs of the legal system: stability in the law, and evolution of legal principles to conform to changing economic and social conditions. If all men thought alike and if all men were afraid of change, there would be no progress and no endeavor. The law can not, and must not, stand still while the rest of the world moves on.

One of the important roles played by the dissenting opinion in the development of American jurisprudence is its effect on legislation. For example, the dissent of Mr. Justice Iredell in *Chisholm* v. *Georgia*[1] became part of the supreme law of the land in the Eleventh Amendment[2] to the Federal Constitution. One of my own dissents was instrumental in securing an amendment to a section of the civil code having to do with the community or separate character of a recovery of damages for personal injuries received by a married woman.[3] I have been led to believe that my dissenting opinions with respect to the use of illegally obtained evidence in California courts may be given favorable attention by the Legislature of California so that the California rule may be brought into line with that which prevails in the federal courts. My dissenting opinion on the denial of a hearing by the

[1] 2 U.S. 419 (1793).

[2] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

[3] Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73 (1949).

Supreme Court of California in *Mathews* v. *The City of Albany*[4] resulted in a change in the Rules on Appeal so as to permit the Supreme Court to look into the facts when the petitioner claimed that the District Court of Appeal had misstated them in a material respect.

On the other hand, the dissenting opinion plays a protective role insofar as injudicious legislation is concerned in pointing out wherein such legislation is unconstitutional. To prevent laws enacted by the Legislature from making too great inroads into the rights of the individual guaranteed by the Constitution is the plain but often neglected duty of the courts. In cases involving civil liberties many of the dissents of Holmes and Brandeis are now accepted as sound law. The dissenting opinion also serves as a brake on reactionary tendencies of some judges to hold unconstitutional legislation enacted for the betterment of the public health, morals and welfare. There are numerous examples of laws passed for the public good which have necessarily encroached, to some extent, upon private rights. Many laws enacted for the protection and betterment of men and women employed in the nation's industries have been involved in cases where the dissent later became the law. A well-known example of a dissent of this character involved the minimum wage law which provided for decent working hours and wages for women and children. The first case (in which a clear-cut decision was reached) to come to the attention of the Supreme Court of the United States was *Adkins* v. *Children's Hospital*,[5] where the court was divided 5 to 3 (one Justice being disqualified) in holding that there was no connection between hours worked and wages paid to women and children and the public health, morals or welfare such as would justify destroying by law the freedom of contract of the employers and the women who worked for them. In that case, Chief Justice Taft and Mr. Justice Holmes wrote dissenting opinions. Mr. Justice Holmes pointed out that freedom of contract had been read into the Fourteenth Amendment under the word "liberty," and that Congress had the power to pass restrictive laws which interfered with freedom of contract to the end that conditions leading to ill health, immorality and the deterioration of the race might be obviated. In *West Coast Hotel Company* v. *Parrish*[6] the majority of the court overruled the *Adkins* case and held in a 5-4 decision in line with the dissent of Mr. Justice Holmes that the liberty protected by the Constitution was not an absolute right but a right, or liberty, qualified by what was best for the health, safety, morals and welfare of the people. In other words, laws passed for the protection of the public at large, or a portion thereof, were not necessarily unconstitutional as a deprivation of liberty (freedom of contract) without due process of law. In *Takahashi* v.

[4]36 Cal.App.2d 147, 98 P.2d 1025 (1940).
[5]261 U.S. 525 (1923).
[6]300 U.S. 379 (1937).

Fish and Game Commission[7] it was held by the majority of the Supreme Court of California that this state could constitutionally, by statute, exclude aliens who were residents of this state from fishing in its coastal waters. I dissented. The case was taken to the Supreme Court of the United States and there reversed in line with my dissent. An excellent example of a dissenting opinion which later became the law is found in the case of *Minersville School Dist.* v. *Gobitis,*[8] where the United States Supreme Court held, Mr. Justice Stone dissenting, that a statute requiring a compulsory flag salute by school children did not unconstitutionally restrict freedom of religion. This case was overruled four years later by *West Virginia Board of Education* v. *Barnette,*[9] which followed the reasoning of Mr. Justice Stone's dissent in the *Minersville* case. There are many other examples which might be set forth here. I am desirous only of calling your attention to the roles which have been played, and will always be played, by the dissenting opinion.

Another role played by the dissenting opinion is that it is a forecast of things to come. The writers of dissents are usually men who look forward—not back, nor to the immediate present—but to the future.

In an article written by Mr. Justice William O. Douglas, Associate Justice of the Supreme Court of the United States, he said:[10]

> "Holmes, perhaps better than anyone either before or after him, pointed out how illusory was the lawyer's search for certainty. Law is not what has been or is—law in the lawyer's sense is the prediction of things to come, the prediction of what decree will be written by designated judges on specified facts. In layman's language law is the prediction of what will happen to you if you do certain things. This was the lesson Holmes taught; and every lawyer knows that it is sound. . . . Uncertainty is increased when new and difficult problems under ambiguous statutes arise. And when constitutional questions emerge, the case is, as we lawyers say, 'at large.' For the federal constitution, like most state constitutions, is not a code but a rule of action—a statement of philosophy and point of view, a summation of general principles, a delineation of the broad outlines of a regime which the Fathers designed for us.
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> "These are the things that Holmes summed up when he described the lawyer's continuing and uncertain search for certainty. They indeed suggest why philosophers of the democratic faith will rejoice in the uncertainty of the law and find strength and glory in it.
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> "Certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable; for a complete subservience to the political regime is a sine qua non to judicial survival under either system. One cannot imagine the courts of Hitler engaged in a public debate over the principles of Der Fuehrer, with a minority of one or four deploring or denouncing the principles themselves.

[7] 30 Cal.2d 719, 185 P.2d 805 (1947).
[8] 310 U.S. 586 (1940).
[9] 319 U.S. 624 (1943).
[10] 32 J. Am. Jud. Socy., 104, 107.

> One cannot imagine a judge of a Communist court dissenting against the decrees of the Kremlin.
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> "Disagreement among judges is as true to the character of democracy as freedom of speech itself. The dissenting opinion is as genuinely American as Otis' denunciation of the general warrants, as Thomas Paine's, Thomas Jefferson's, or James Madison's briefs for civil liberties. . . .
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> "The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed. A judge's reaction to vague statutory language is bound to be like his reactions to the generalities of constitutional clauses. The language that he construes gathers meaning and overtones, significance and relevancy in terms of his own life and experience, his personal set of values, his training and education, and the genes of the blood stream of his ancestors. It would be as futile to argue that judges are not human, as it would to prove that politics and legislatures can be divorced.
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> "When we move to constitutional questions, uncertainty necessarily increases. A judge who is asked to construe or interpret the Constitution often rejects the gloss which his predecessors have put on it. For the gloss may, in his view, offend the spirit of the Constitution, or do violence to it. That has been the experience of this generation and of all those that have preceded. It will likewise be the experience of those which follow. And so it should be. For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it. . . . The constitution was written for all time and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow, legalistic notions that dominated the thinking of one generation."

There will always be uncertainty in the law—it is necessary for democracy. The law is a substitute for force and violence and is the only path to peace that man has yet devised. The law is an attempt to reconcile the divergent rights of individuals and groups. When judges can not agree, it is a sign that they are dealing with problems on which society itself can not agree. Judges should be honored, rather than criticized, for proclaiming their honest views.

Chief Justice Hughes ably defended the merits of the dissenting opinion when he wrote that:

> "There are some who think it desirable that dissents should not be disclosed as they detract from the force of the judgment. Undoubtedly they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. . . . The judge that quavers or retreats before an impending crisis of the day and finds haven in dialectics or weasel words or surrenders his own conviction for a passing expediency is likewise not born for the woolsack. . . . If they are true to their responsibilities and traditions, they will not hesitate to speak frankly and plainly on the great issues coming

> before them. They will prove their worth by showing their independence and fortitude. Their dissents or concurring opinions may salvage for tomorrow the principle that was sacrificed or forgotten today. . . . In these critical days leaders in every walk of life must dare choose publicly and with pride, our constitutional scheme of things in all its applications. They must dare choose it above all lesser things and reject the easy invitation of expediency or complacency. When the leaders make that choice, men of lesser stature and affairs will dare stake their all for freedom."

To my mind it is of far greater importance that a man raise his voice in defense of the right as he sees it than that a court should be subjected to ridicule because that man has seen fit to speak with the courage of his convictions. Freedom of speech is one of the greatest rights guaranteed to the individual by the Bill of Rights and is an essential ingredient of any democracy. It applies no less to the dissenting judge than it does to the average citizen. An extensive survey of the roles played by the dissenting opinion would lead inevitably to the conclusion that freedom of the minority to give expression to social, economic and political philosophies that differed from those subscribed to by the majority of any court has promoted democracy to a much greater degree than has the prestige of the court been threatened or harmed by ridicule because of the conflict of views expressed by members of the court. Be that as it may, since courts are an indispensable part of the democratic process, the same right to freedom of expression should be accorded judges as is accorded legislators or the executive in their respective fields—if differences of opinion exist as to what the law is, those differences should be stated, as history has shown that the view expressed by the minority often becomes the view of the majority. As Archibald MacLeish wrote:

> "What's changed is freedom in this age—
> What great men dared to choose
> Small men now dare neither win nor lose."