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The Psychologic Study of Judicial Opinions

"The man who expresses abhorrence for a certain act is much nearer the possibility of such an act himself than is he who can view it undisturbed and with a judicial attitude of mind; he therefore must summon all his reserves to escape it." DR. WILLIAM A. WHITE in *Mechanism of Character Formation*.

IN RECENT European literature on criminology, one frequently finds reference to psychology as a means of detecting crime and criminals. In America, psychologists lecture to detectives, informing them on the uncovering of criminals and incidentally on the manufacture of evidence. But why not apply modern analytic psychology for detecting also the hidden impulses determining judicial decisions? Human motives and mental mechanism are not altered when one assumes the judicial function. If the judicial decision is controlled as other human acts, then the judicial conduct is also determined by a chain of causation running back to earliest infancy. Judicial acts may also be expressive of emotional tones or values, and of emotional associations acquired in past experiences. This often occurs, even long after the experiences themselves have been crowded out of consciousness and memory, because they were relatively painful or shameful. Analytic psychology can uncover such potent yet submerged early impulses governing our acts as adults. It is my purpose to expound and to illustrate this psycho-analytic method as a means of studying judicial opinions.

To do this before readers unfamiliar with modern analytic psychology, it may be well to begin with some general statement of this psychologic theory and method, and to contrast this new mode of analysis with the older form of criticism. This will be followed by a concrete study illustrating the new method. Necessarily I am compelled to limit my statement of the underlying

theory to a more or less dogmatic form. I believe however, that my conception thereof is fully warranted by inductions made from abundant investigations. I also hope that in the main, it will appear to the educated reader as being at least inherently probable, and I trust that it is fairly in accord with the accepted theories of the professional psycho-analyst. Perhaps I should say that such theories are still in the making and that only a partial agreement has been attained. So far as possible I will avoid disputed territory.

THE THEORY SUMMARIZED.

The fundamental concept of such a study as I am about to undertake is expressed by Dr. Pierce Bailey in the following words: "The opinions gravely emitted by the critic [or the judge] are also his confession, for there has been left room for choice and the critic's [or judge's] choice reveals those phantasies of his which are the product of his constitution and his experience."¹ First I will endeavor to elaborate this conception, that every opinion is also a confession, and that its genetic understanding constitutes a revelation.

For the psycho-analyst, "Man is a unified mechanism, responding in every part to the adequate stimuli given it from without by the environment of the present, and from within by the environment of the past."² Therefore, knowing the present action, and the immediate stimulus from without, as if by a process of subtraction, we may uncover the contributing motive from within, which is the product of past experience. Therefore, to the extent of our psycho-analytic resources we can discover the nature of those past experiences which now give character to the present act. The character of every act expresses the character of the actor.

CHARACTER FORMATION.

Character is but the conscious and unconscious imprint of past experiences upon our psyche, producing those fixations and changes of interest, and of energy-expenditure, which we observe in human development. Since character is always the subjective record of those past experiences, which have remoulded the infantile desires, it should be possible to disclose those experiences from a careful

¹ Scribner's for July, 1915, vol. 58, no. 1, p. 120.

² Origin and Nature of Emotions by George W. Crile.

view of character manifestations. As a means for doing this, analytical psychology is but a more scientific and more penetrating mode of character study. So far as we have the understanding of the mental mechanisms involved in character development and character expression, we may uncover personal character as it is revealed by the activities of subconscious impulses, as well as those that are operating at the focus of consciousness. It is a psychologic fact that, with most persons, the most conscious motives are usually the least influential in giving character to conduct.

Every act or speech is prompted by a double motive, combining both conscious and subconscious elements. One motive is the defense of whatever we consider commendable in ourselves. The second motive is to justify a compensatory phantasy for what we are not, and yet wish others to believe concerning us. In other words, the complex determinants of our conduct always include more or less motives, both conscious and unconscious, which are narrowly conditioned, and in that sense intensely personal.

PSYCHIC EVOLUTION.

Thus viewed, the only differences between the conduct of humans consists in the varying degrees of consciousness, and of the degrees of maturity in which our desires and mental processes are functioning. This evolutionary rating of our desires and methods is determined by the measure in which: (a) we are conscious of the real origin and character of our juvenile impulses and methods and their manner of influencing us in maturity; (b) the extent of our understanding of the behavior of past experiences in their causal relation to the present desires, especially those desires which are usually unconscious; (c) the difference in the quality and extent of our understanding of the behavior of things, especially in their more remote relation with the more obvious factors of our present problem; and (d) the use which we make of such understanding, that is, the extent to which we check or merely justify our predispositions. Another way of stating this matter is to say that, in their subjective aspects, all our differences of conduct are due to differences in the maturity of our desires, and of our intellectual methods, and differences in the quantity, diversity, and complexity of the co-ordinated materials of past experiences.

From this psycho-analytic view-point we suppress and so out-grow all moral judgments, and content ourselves with understanding human behavior, objectively and impersonally viewed, and with the making of evolutionary classifications. That is, we think in terms of relative psychic maturity, rather than in terms of "moral" feelings.

PSYCHOLOGY AND SOCIAL SCIENCE.

The psychologic viewpoint, which has been thus dogmatically stated, has a very direct bearing upon all our social sciences. The alienists finds in it cause for re-shaping his conceptions of insanity,³ and discovers therein new therapeutic measures in an important class of emotional disturbances.⁴ Applied to our anthropological data this psycho-analytic method is shedding new light on primitive culture.⁵ Likewise it promises to revolutionize our attitude toward the criminal and his treatment.⁶ The juvenile offender is also becoming psychologically understood.⁷ Thus also do we acquire a different understanding of the European War⁸ by the application of this improved psychologic intelligence, as well as of the German Kaiser.⁹ Even the politician is not exempt.¹⁰ On the European continent much more has been accomplished along these lines than in America. There a beginning has been made toward modifying our theories of education¹¹ in conformity with this newer psy-

³ See: Jelliffe and White on Diseases of the Nervous System; and Jung on The Psychology of Dementia Præcox.

⁴ Freud's Theory of Psycho-neurosis, by Dr. E. Hitchman, and The Theory of Psychoanalysis by Dr. C. G. Jung. Also the Psychoanalytic Review.

⁵ See: Dreams and Myths by Dr. Karl Abraham; Wishfulfillment and Symbolism in Fairy Tales by Ricklin; The Psychology of the Unconscious by C. G. Jung.

⁶ See: Criminology and Social Psychology, by Schroeder, *Medico-Legal Journal*, April, 1917; History of Prison Psychoses by Nitche and Williams; The MacNamaras: Martyrs or Criminals, *The Forum*, Sept. 1915; In Defense of a Chinese, *Everyman*, June, 1916.

⁷ Healy—Pathological Lying, Accusation and Swindling; also: The Individual Delinquent;

⁸ War and Individual Psychology, by E. Jones; *The Sociologic Review*, July, 1915.

⁹ Dr. Morton Prince on the Psychology of the Kaiser, 1915.

¹⁰ Dr. Morton Prince in 1914 in N. Y. *Times* published a study of Theodore Roosevelt.

¹¹ O. Pfister, *Die Psychoanalytische Methode*. Translated under title: The Psychoanalytic Method. See, also, Dewey, *Democracy and Education*.

chology. This viewpoint and method may be applied towards enlarging our understanding of the genesis and essence of religion.¹²

GENERAL THEORY APPLIED TO JUDICIAL DECISIONS.

Now I wish to show how this new theory can be applied to re-shaping our understanding of juridical action. By the deductive application of the general psycho-analytic principles we come to the conclusion that every judicial opinion necessarily is the justification of the personal impulses of the judge, in relation to the situation before him, and that the character of these impulses is determined by the judge's life-long series of previous experiences, with their resultant integration in emotional tones. These experiences may deal with more or less similar though remote situations, but the emotional values acquired through those remote experiences are carried along through life and transferred to each succeeding event by processes of which the average person knows very little before the study of genetic psychology. The more ignorant we are of these mental mechanisms the more certain we are apt to feel that we know all about our own impulses. Thus it comes that all of us, including our judges, have many predispositions with varying degrees of potency, which unconsciously attach themselves to the conscious consideration of every problem. In other words, there never can be a judge without predispositions, which in our moralistic phraseology we denounce as prejudices. From the standpoint of the newer psychology the constant presence of predispositions or prejudices is no longer questioned. The only practical problem is to locate the evolutionary stage at which the controlling conscious and unconscious impulses (desires, predispositions or prejudices) were formed and the developmental level at which the conscious intellectual processes are functioning for the justification or checking of relatively immature impulses. In other words, the only important consideration is the intellectual status of the judge in the light of an evolutionary classification of his desires, his mental processes, and the degree of awareness or knowledge of the genetic and evolutionary relations of these factors.

¹² Erotogenesis of Religion. A Bibliography by Theodore Schroeder, Bruno's Chap Book, February, 1916, and articles therein listed. Pfister, Zur Psychologie des Krieges und des Friedens, *Wissen und Leben*, Dec. 1914; Sig. Freud, Zeitgemasses über Krieg und Tod, *Imago*; IV, No. 1, 1915. Trotter, The Instincts of the Herd in Peace and War.

Through such insight we come to believe that every choice of conclusion, argument, precedent, phrase or word, is expressive of a dominant personal motive and is symptomatic of the evolutionary status of the judge's mentality. His choices must be studied in the light of their alternatives, and we expect to find that from the standpoint of motive these choices possess some elements of unification. When we remember that our dominant impulses must be a defense against or for something which is in our subconscious feelings or in the actual phantasies of the moment, then the choices expressed in a judicial opinion reveal the earlier impulses of phantasies back of the present conscious act, or perhaps the personal experiences still farther back, which are essential to the creation of the precise character of these present desires, or impulses, or phantasies. So may we read the life of the judge backwards. Thus it is that every opinion is unavoidably a fragment of autobiography for those who know how to read the impulses and experiences behind the words, unconsciously expressed in their choice, by methods that are not at the command of the ordinary reader. Every opinion thus amounts to a confession.

THE OLD AND NEW METHOD CONTRASTED.

From the viewpoint of a such a psychology, every prosecution is something more than a mere trial of the accused. In the course of the prosecution the obvious factors of the trial are seen in interaction with the character of the judge. The judge also is always on trial. In the interplay of human motives, the choices, even unconsciously expressed in the rulings of the court, necessarily reveal as much of the character of the judge, as of the prisoner at the bar.

According to the old manner of appraising judicial opinions, we accepted at their face value, the reasons assigned by the judge, just as though they were an adequate explanation of his decision. Soon it will be different. May it not be that the prior existing impulses of the judge attach themselves to every factor of every case under his judicial consideration? The facts of the case do not create the impulses but merely focalize them more or less in consciousness. Many of these impulses have an undesirable efficiency, just because they are working subconsciously and in accord with immature and archaic methods of cerebration.

From this viewpoint we treat the judicial opinion as a mere intellectualization or justification of the judge's desires, which we can rate according to an evolutionary classification. These desires are only the surface manifestations of a life-long chain of influences. The judge may delude himself with the belief that the last items in this life-long chain of events supplies the only effective motive, but the evolutionary psychologist knows better. From many genetic studies of human emotions, the analytic psychologist knows that every human experience leaves its impress upon the mental life of the individual and so becomes a factor, great or small, in predetermining what must be the outcome of the next experience.

His training enables the genetic psychologist to see the effect of emotional tones and associations, originating in the juvenile experience and now attaching themselves to the present situation, and dominating it by processes quite unknown to the judge.

RESULTS VERSUS MOTIVES.

Former critics of judicial acts concerned themselves with the kind of decisions which the judge rendered. The critic of the future will concern himself more with the quality of the judges' personal bias, that is, with the experiential sources, the maturity of the motive, and of the intellectual method, evinced in judicial action. From this viewpoint we ignore ethical values and are content with a discovery of the evolutionary classification of those desires which controlled the judge's choices as expressed in the decision. Formerly, criticism was little more than a conflict of dogmas, expressive of conflicting desires. Under the psycho-analytic method, judicial opinions are to be studied with a view to discover the genesis and the behavior of the subconscious and concealed impulses, which actually predetermine the result. Thus we may synthesize the conflicting dogmas and reach a solution of judicial problems, on a higher intellectual level than that on which the controversy arose.

OBJECTIVE VERSUS SUBJECTIVE FACTORS.

From this standpoint the written opinion is little more than a special plea made in defense of impulses which are largely unconscious, at least, so far as concerns their origin or the immediate power of the past experiences. Sometimes influential motives

are consciously sought to be concealed. Even then the determining motives for concealment are largely unconscious. In all cases these more unconscious impulses are but suppressed desires (suppressed energy) which always find another mode of expression and therefore are always quite unintentionally revealed to the analytic psychologist. These unconscious confessions never lie, though inefficient observers may be oblivious of their true meaning. In the light of genetic psychology the judicial intellect is to be studied, not according to the results of decisions, but according to the conscious and unconscious motivation which predetermined the result, and the relative degree of the consciousness of those impulses, that is, according to the relative maturity of the mental process involved in the justification or checking of the desires.

For the purpose of such a study as I propose, we must forget the usual meaning of judicial judgments in terms of dollars, so as to discover their meaning in terms of the judge's unconscious or half conscious psychologic imperatives, especially those which he did not mean to reveal. Likewise we must forget our own emotional or other sanction of "justice," or expediency, and fix our attention wholly upon the discovery and understanding of the character-impulses which the opinion always defends. Only thus can we discover what the decision means as a revelation of the emotions, the phantasies, the desires, the persistent past life and the present intellectual status of the judge.

PRECEDENT VERSUS MATURITY.

In the sense of evolutionary psychology, the judge's intellectual maturity is not determined by his memory of precedents, ancient or modern, but rather by the extent to which he habitually checks his infantile lust for power by more or less conscious and efficient co-ordination, of varying extents of the remote and obscure factors in the objective realities of his problem. This may be partly shown by the choice and the use he makes of precedents. Another factor in such a rating is the relative influence of unconscious motives, and the consequent mental processes exhibited by the judge. These motives and intellectual processes, the evolutionary psychologist can classify roughly, according to their

degrees of remoteness from the infantile mode of feeling and thinking.¹³

THE MENTAL MECHANISM INVOLVED.

Every judicial opinion necessarily reveals a variety of choice. There is a choice of materials from that offered in evidence, as well as among possible precedents and arguments. A choice is made in that which is approved, as well as that which is ignored, or expressly disapproved. There is a choice of material brought in by the judge and not a matter of record. There is choice in all that is emphasized, slighted or distorted. A choice is evinced in the very words by which these other choices are expressed. Every such choice is a fragment of autobiography because it reveals not only the present conscious motive, but also the still potent, past and immature experiential causes, which determined the unconscious impulses submerged in, but controlling the avowed motive. To the extent to which we have become familiar with psychic evolution, and with mental mechanism in general, we can efficiently and genetically analyze the manifest desires expressed in the final opinion.

By such methods the psycho-analyst comes to see that which is concealed from the ordinary observer and which is often operating from the subconscious, though determining the immediate conscious action. In other words this is only applying a scientific efficiency toward the genetic understanding of human nature as developed and revealed in the judge. If the judge is momentarily unconscious of these past experiences and of their present influences, probably this is so because he had some unhappy conflict about them at the time, which conflict made it pleasant for him to exclude these experiences from consciousness and from memory. That is to say, he is happier in forgetting the painful aspects of those experiences and perhaps the experiences themselves. Therefore, they are quite permanently excluded from consciousness, are forgotten.

THE SUBMERGED PERSONALITY.

The tendency of these internal conflicts is to create two or

¹³ For one aspect of the meaning of evolution in intellectual methods, see Schroeder, Intellectual Evolution and Pragmatism in *The Monist*, January, 1916; also: Dewey, Democracy and Education; also: Psychic Aspect of the Pragmatic Issue, *The Monist*, 1917.

more inconsistent, inharmonious, distinctly separate aspects to our character; that is we tend measurably toward a condition which in the extreme is known as dual or multiple personality. One of these aspects of our character remains as a submerged personality, operating subconsciously and is dissociated from that conventional part which is the more pleasing. Because of this we are impelled to thrust it unduly upon the public notice, unconsciously hoping thereby to divert the attention away from the suppressed and painful personality. Just to the extent of such a division in his personality, the judge is relatively incapable of adequately and consciously co-ordinating all the factors of a problem, or to give to each part such influence as is due to it from the relatively impersonal or objective viewpoint. This is one way in which he reveals himself to us, because his conflicts make him feel so intensely about some factor of each present problem as to distort his sense of proportion. This intensity of feeling originates in an anxiety concerning that part of his life which he is least anxious to reveal, most anxious to keep submerged even below the apex of his own consciousness. That in the presence of the public he can not bear to think about it is only another way to saying that he is unwilling, emotionally unable, to allow the public to look this other personality square in the face, or to face himself for what he really is.

THE EMOTIONAL CONFLICT.

Even when such a person is perfectly conscious of the desire to conceal his past the accompanying anxiety will always betray him. So long as it exists, this emotional fear will show itself by compelling an over-emphasis in the relatively unimportant matter behind which he seeks to screen himself. Because of the intensity of the anxiety which exists as suppressed energy, he is unable to treat all the persons, the evidence or the argument, with equal candor, equal calm, or equal fulness and fairness, according to objective standards. When we see what is avoided, slighted, or emphasized we already see the submerged personality unconsciously revealing itself. This then indicates the method of work, and the underlying psycho-analytic principles with the aid of which we are now going to study one judicial opinion.

THE PREVIOUS RECORD OF JOHN DOE.

For the purpose of illustrating this psycho-analytic method, as

a means for studying the motivation of judges, I will apply it to an unpublished decision, let us say, in the case of *People v. John Doe*. The defendant was an unpopular and undesirable citizen. Before the same judge whom we will call Jones, Doe had been previously convicted of inflicting a psychologic injury. On that occasion the obvious disparity between the total absence of actual injury done by the defendant and the severity of a long prison sentence imposed therefore, evidenced that the judge had a very strong subjective motive to prove his own conventional super-righteousness. This was shown in the fact that the exaggerated punishment can only be explained by subjective, that is emotional valuations, not caused by the objective factors of the crime to be punished.

Thereafter, through a group of "undesirables" like himself, Doe began a series of vigorous attacks upon several public men in many respects classifiable with Judge Jones. In consequence thereof, several of these in relatively high office lost their positions, or felt compelled to withdraw while under fire from the Doe group. Suffice it to say, that the officials returned to private life were more or less intimately related to Judge Jones, at least through his emotional associations. Of course this would tend to intensify his hostile feeling toward Doe. I purposely avoid being more specific because I do not desire the originals of this study to be identified. While in the detail Judge Jones' reactions and motives vary from those of other judges, I do not wish to leave the impression that he is exceptional as to the operation of his unconscious impulses. Therefore it is my wish not to single him out for special criticism, by those who have not sufficient psychologic intelligence to give his situation a sympathetic understanding. My complaint is not against Judge Jones, but against immature mental processes. If this essay should fall into the hands of any of the half dozen persons, who, in spite of my vagueness, may be able to identify the originals of this study, it is to be hoped that they will be silent about the matter, because no good purpose is promoted by emphasising the purely personal aspect of this case, or by blackening the memory of the late "Judge Jones."

THE CASE NOW TO BE INVESTIGATED.

In this situation Doe was again arrested, charged with the publication of a pamphlet alleged to be "obscene." The "obscene" matter consisted of charges of sexual irregularities against a

guardian in connection with a ward under his official control. Doe's attorney filed a demurrer and claimed that the matter alleged was not "obscene." Judge Jones sustained the demurrer. I will not claim that this decision was a cunning disregard of the legal merits. On the contrary, the result of this decision I heartily approve, but I claim that whatever the conscious motive may have been, the form of the decision was determined by unconscious processes, outside the realm of the law. This unconscious motive will be investigated. The Judge justified his conclusion in an opinion hitherto unpublished, which will be the basis of this study. In that opinion Judge Jones used the following language:

"In *United States vs. Journal Company*, 197 Fed. 415, defendant published the *revolting, unchaste and immoral* details of the evidence adduced on the trial of the celebrated 'Beattie' murder case and was indicted under the federal statute. A motion to quash the indictment was sustained, it being there held that the defendant had the right to do so. In that case *no possible good purpose* could be subserved in dealing out to the public the *revolting, noxious, immoral and horrible* details of the evidence of the crime committed and the motive which prompted it. *The publication in that case was simple pandering by defendant to the morbid curiosity and lust* on the part of the public for such *disgusting stuff*, and, as observed by the court in the opinion, the court in that case, after admitting that no precedent for the conclusion reached *could be found, said*:

"The delicacy of the subject, the great desirability of maintaining the efficiency and purity of the mail, and the necessity that the freedom of the press shall at all times be preserved, make it manifest that in considering this particular class of infraction or supposed infraction, of the law, those having to administer the same should be actuated by the highest sense of right and justice to all, never losing sight of the fact that in carrying out the purpose of government, the rights of the citizens and of the public, especially as defined and given by the constitution, must be observed and respected, and that the guaranty of freedom of the press was granted, not alone because of the necessity, therefore, for its protection, but that thereby many of the dearest and most essential rights and privileges of the citizens might be assured and protected.'"

After this quotation from the opinion in the *Journal* case, Judge Jones continues thus:

"Surely if the *revolting and disgusting matters complained*

of in that case which in the interest of the public morals had better never been published, the dissemination of which, through the public press could by no possible stretch of the imagination subserve any good or useful purpose, unless perhaps to increase the subscription and fill the coffers of the defendant, but which could only appeal to the morbid and baser intellects of its readers, was justified in upholding the freedom of the press of the country, the publication and circulation of the affidavits in this case, having in view the purpose sought to be accomplished thereby, the interest of the public in that purpose, the language in which they are couched, the fact that they are sworn statements of the matters and not mere idle rumors, and all the other facts and circumstances proper to be considered in connection with this particular case, must and does justify the act here done, of which complaint is made." (The italics are mine).

THE PROBLEM STATED.

In these paragraphs we are to find some psychographical data, revealing concealed or subconscious motives, that were effectively at work. The arguments used, opposed or omitted, the precedents cited, criticised or ignored, and the words adopted to express the conscious desires, each and all express a choice, exhibiting more or less general character. Behind the more general outward characteristics there exist more specific and less apparent motives. Behind these motives there must have been concrete experiences without which exactly these motives could not have come into being. Therefore it is that a careful analytic study of Judge Jones' choices, as revealed by the quoted opinion, promises to give us important biographical information. Therefore let us study the content of the opinion more critically.

THE OBVIOUS EXPLANATION UNTRUE.

The friends of the judge, and of John Doe, would naturally tend to praise the judge for his fairness. It might seem to them that he had outgrown his former evident aversion to John Doe and to his clan of "undesirable" citizens, and now was showing eminent fairness in giving Doe the benefit of the doubt, on the demurrer. However, such belief in the growing fairness of the judge's motives might be founded only in the desires of its sponsors and not derived from an efficient observation of the judge's motives as revealed by the psycho-analytical method.

The written opinion nowhere attempts to weigh up the doubts,

as was done in *United States vs. Comerford*.¹⁴ Neither does it, on its face, give the defendant the benefit of any doubt. Again, we nowhere find in the opinion even a mention, much less a discussion of precedents or theories which might lead to contrary conclusions. Furthermore, the opinion is not written with such calmness as is the indispensable pre-requisite of that spirit of fairness which comes from an impersonal consideration of doubts as to the issues involved. There is much excitement manifested in this opinion, and this excitement indicates an intensity of personal feeling such as precludes any very close approximation to the impersonal attitude. From such considerations we conclude that the dominant factor, which at least in part determined the result, must have been some narrowly conditioned and intense personal motive on the part of the judge. The larger part of such motives is usually operating subconsciously.

The supposition that the present result was produced by an impersonal consideration of the authorities, and of the inductions by which these may be justified, is negated by another fact. Judge Jones wholly ignored scores of decisions,¹⁵ the general language of which would equally have justified him in overruling the demurrer, if that had been his dominant desire. Some of these contrary and ignored precedents came from the highest court of his own state, and many others from the federal courts. It is significant that these contrary precedents were not even referred to in the decision on the demurrer. To follow one exceptional opinion while ignoring the existence of many, which if not distinguished or overruled, would lead to a contrary result, again negatives the assumption of an impartial and dispassionate weighing of the pertinent factors of the problem. Such observations compel us to abandon the belief that a superior sense of fairness produced the result under investigation. Consequently we look for concealed or unconscious desires, as possibly being the real determinants of the characteristics of Judge Jones' decision.

UNCOVERING THE JUDGE'S CONFLICT.

While this exceptional precedent is offered as a justification for the judge's dominant desire in this particular case, he indulges in

¹⁴ (1885), 25 Fed. 902.

¹⁵ "Obscene" Literature and Constitutional Law, p. 425, gives a table of such cases.

extravagant vituperation, when writing of that precedent. By that strong language he makes it plain that he has some strong feelings about it. The manner of expressing those feelings shows that he intensely disapproves of the exceptional precedent which, notwithstanding, he somehow felt compelled to use in self-justification. Thus we learn that the judge is much disturbed by an intense emotional conflict. Necessarily the judge does not consciously intend to reveal to us those aspects of his conflict which are painful to him. Indeed the unhappy anxiety is caused by a conscious or subconscious desire to conceal the painful aspect of a past experience which is now again brought into action in connection with a conscious present desire. Our emotional conflicts are generally of that nature. Obviously then our task is one of uncovering the factors of the conflict, and especially the submerged factor, and therein to discover the experience which produced it.

I have examined the decision in *United States vs. Journal Company*, cited by Judge Jones. I find that the report does not reproduce the alleged obscenity which was the basis of that prosecution, and of Judge Jones' denunciation. To have any objective import, that is—to have any significance except as to the judge's feelings, valuations of this sort must be relative, and objectively derived. In other words, Judge Jones had an objective justification for his denunciation of the *Richmond Journal's* "obscenity", only if he knew in detail of what it consisted, and then objectively and impersonally compared that with other "obscenities" which have received judicial characterization, and of the precise details of which the judge is equally well informed. Judge Jones offered no such comparison. Therefore presumably he had no such indispensable, exact information before him, as could make a comparison possible. This conclusion is further confirmed by the judicial habit of excluding "obscenity" from the records of the court, even in the indictment based upon "obscene" publications. From this we are compelled to conclude that the excitement which found expression in rather extravagant vituperation was not occasioned by the objective realities; that is, it was not at all induced by the actual knowledge of the actual "obscenities" published in the *Richmond Journal*. On the face of the opinion it is equally manifest that the vituperation was not directly motivated by Doe's "obscenity", nor by any consideration of likeness or unlikeness existing between these two "obscenities."

EXCITEMENT FROM THE PAST.

From such observed facts, the psychologist is impelled toward the conclusion that the excitement of the judge does not have its most influential source in the objects upon which it now expends itself. The mental mechanisms involved are well known. The intensity of our wish to conceal a discrediting incident in our lives, is exactly equal to its shamefulness for us. Just to the extent that a present situation arouses in us pre-existing associated feelings of shame, so far our emotional balance is impaired. This excitement unduly focalizes the attention upon some obvious factor of the problem with the resultant relative obscuration of other equally important factors. The choices thus expressed only reveal emotional defensive valuations. According to the strength of the impulse toward concealment do we suffer an impairment of the ability to subordinate our immature and half conscious predispositions to the arbitrament of the facts. This shows itself in a distorted perspective—in a sense of values which for its character and justification depends upon an inadequacy of comparison and of co-ordination of the related objectives. No matter at what level of consciousness or unconsciousness our concealing impulses are functioning, in so far as they influence our conduct, that modification includes somewhere a corresponding relative exaggeration concerning those matters in the present situation which, in our feelings, are even unconsciously associated with the shameful items in our past. It is in the light of these laws of emotional behavior that we must now proceed with our analysis.

Applying these general laws of emotional behavior to the situation before us we may conclude that at some time the judge must have experienced a situation like that which most excites him in the facts to which he is reporting his reaction. The unconscious desire is to neutralize the present anxiety. Even though quite conscious of this need, he just as unconsciously chooses that material for censure which will best ward off suspicion where it is most dreaded. It is the psychology of the old, old, trick of the thief who points to another and cries "stop thief."

Be it noted that the excitement was forced into the comment on the Journal case, and in justification of the intensity of feeling. The detailed facts were not derived from the published record and therefore could only have been created from the judge's

phantasies. No one could get excited over any mere abstraction or generalization, unless his own feelings or phantasies supply the offensive detail. The subject of his vituperation therefore furnishes us a key to the thoughts which form the basis of Judge Jones' fearful apprehension. Before accepting this suggested conclusion, we must look further into the other judicial choices, expressed in Judge Jones' opinion, to see if we can find the same or any other element of unification in their motivation.

WHAT JUDGE JONES OVERLOOKED AND WHY.

A lawyer with even a little knowledge of our development toward a relative freedom from judicial despotism, knows that such progress has been made by robbing the courts of the power to pass judgments for secret reasons and upon secret information. It is, therefore, of the very highest importance that the press should have the greatest freedom in publishing and criticizing every particle of judicial proceedings. This is so, because without such freedom of the press the courts inevitably revert to despotism. Furthermore, without freedom for such publicity the courts would often be unjustly suspected and discredited. Thus both the liberty of the citizen and maintenance of their confidence in courts demand the exercise of freedom in publishing judicial proceedings. While it is possible to imagine some contrary reason, only a judge too excited to co-ordinate all these factors could wholly overlook such important considerations for maintaining freedom for the publication of judicial proceedings, even though they relate to the sexual motive for a murder, as in the Beattie case.

Therefore, when Judge Jones does ignore these important considerations, and declares that such publications "could by no possible stretch of the imagination subserve any good or useful purpose" and repeats that sentiment within a few lines, we see once more that he is only intellectualizing a wish, or expressing a personal feeling and not an objective fact. The intensity of his wish and the corresponding fear made him blind to some very important and possible good purpose, obvious to most lawyers of moderate learning. We now know that such automatic human impulses are never prompted by craving for self-harm. Therefore, we conclude that Judge Jones, in denouncing the "obscenity" published by the Journal Company, and in deny-

ing the existence of obvious weighty considerations therefore, by declaring that no good purpose could be thereby subserved, was unconsciously pointing to the identical thing in the situation before him of which he was most ashamed in himself. In other words, unconsciously the judge was only saying that by no possible stretch of his imagination could any good purpose be served by publishing such "revolting, noxious, unchaste, immoral and horrible" information concerning himself.

The intensity of his feelings suggests that the judge's dominant fear probably determined, not only the result reached in the case, but the choice of phrases and omissions, by which the result was justified. If then we would probe further into the concealed phantasies and motives of this judge, for the check or justification of our tentative hypothesis, we must look more minutely into his choice of argument, of omissions and of emphasis, and particularly into the precise nature of that which provoked his vituperation.

First let us inquire into the possibilities of choice open to a judge in search of a justification for sustaining this demurrer. Such other judge might have held that the statutory words "obscenity," etc., were so uncertain that it would work a great wrong to apply them to the particular publication before him. For this he could cite a number of cases.¹⁶ Good reasons might even have been found for declaring the statute unconstitutional for uncertainty.¹⁷ In view of Judge Jones' conclusion and evident desires, it is very important that such considerations, and especially such authorities as *U. S. v. Comerford*, were wholly ignored. Again the judge might have delivered a eulogy on liberty of the press, and held that the particular publication before him was protected thereby. He might even have gone further and found much reason, if not authority, for holding the "obscenity" statutes unconstitutional as violative of guarantees of freedom of the press.¹⁸

¹⁶ *U. S. v. Comerford* (1885), 25 Fed. 902; *Cook v. State* (1901), 26 Ind. App. 278, 59 N. E. 489; *Ex parte Jackson* (1885), 45 Ark. 164; *McJunkins v. State* (1858), 10 Ind. 140.

¹⁷ See: "Obscene" Literature and Constitutional Law, chapters 13 to 21.

¹⁸ *Free Speech for Radicals*, chapter 8; "Obscene" Literature and Constitutional Law, chapters 5, 6-11.

However, to have done many of these things would have increased the risk and tempted the repetition of such attacks as Doe's friends had made upon Judge Jones' class of political office-holders. If, therefore, Judge Jones possessed any such closeted skeleton as has been hinted, then naturally there would be at least an unconscious aversion to any of these other justifications for sustaining the demurrer. This is so because nothing could be said in their support which would not have endangered Judge Jones' skeleton to exposure. Neither would such considerations lend themselves readily to the uses of a puritan mask to ward off suspicion, or otherwise tend to neutralize the fears induced by a closeted skeleton.

Again, the judge might have delivered a eulogy on the public service of John Doe in daring to ignore the sexual taboo, in order to expose to "righteous" public wrath a faithless officer of the court. If our tentative theory is correct, this was probably impossible for Judge Jones because the strength of his fears so focused his attention upon the evils that flow from exposing the sexual irregularities of those in official positions, that he could not see, nor express the thought that Doe had really rendered a social service.

The judge might have censured the faithless servant in question whose unusual sexual eccentricities were exposed by Doe, as another manner of venting enthusiasm. From any conventional viewpoint, these were far more revolting than what is known of those published of the Beattie murder trial, on which Judge Jones expended considerable vituperation. This suggests the query: Why does the opinion contain no vituperative denunciation of the sexual perversions of the faithless guardian exposed by Doe, and yet is so extravagant in denouncing the Beattie sexuality, which had no very immediate relation to the issue before the court? Why did the episodes concerning wine, women and prostitutes in the Beattie case excite the judge a great deal more than the sexual perversions involved in the publication of Doe? For the psycho-analyst the apparent explanation is suggested that Judge Jones had no special emotional conflict or personal fear as to sexual perversion, but must have had a strong personal fear of a prostitution "skeleton". This independent inference again coincides with our previous deductions.

THE USUAL UNCONSCIOUS DEFENSE.

The one thing which weakens this tentative conclusion is the fact that, under such circumstances, the ordinary defensive puritan reactions operate quite uniformly and would tend to insure for John Doe an extravagantly severe penalty, and not a dismissal.

This ordinary defensive reaction is illustrated in the case of a judge in New York City. As a young man he had the reputation of being a "rounder" and "chippy chaser". On the bench he has the reputation of inflicting severest penalties upon prostitutes and "white slavers." The emotional anxiety acquired through his youthful derelictions now impels him to ward off suspicion by out-puritaning the puritan severity against sinners like himself. Manifestly, this judge is unconsciously inflicting a vicarious atonement upon others for sins he has committed. It is the same psychology that makes a new emotional religious convert the greater zealot. Why did not Judge Jones' defensive reaction produce a similarly increased severity toward John Doe?

Another example of this type of defense is found in a federal judge in the west. He had before him a second-hand book dealer, a man of great erudition, who neglected a profession of more than average success largely because of his love for books. A part of a large and superior private collection of rare and unusual books was the foundation of his business career. A post office spy enticed him into a sale of a specially illustrated de luxe edition of Boccaccio. No one had been in the slightest degree injured and yet the judge (in spite of such a case as *Matter of Worthington* (1894), 30 N. Y. Supp. 361, 24 L. R. A. 110) inflicted upon this man of culture the unusual penalty of two years imprisonment. This is a penalty of about the same size as that inflicted upon those who robbed the government of \$11,000,000.00 on sugar import frauds. Such comparisons aid us in forming a judgment of relative penalties. Some time after the release of this bookseller, an official investigation of this judge's sexual eccentricities resulted in his hasty retirement from the bench and from the view of officers of the law. This confirms the psychologic theory that the excessive punishment of the bookseller was motivated by a morbidly guilty conscience, provoking over zealousness to preclude suspicion of sensualism from resting upon himself. In his misdirected zeal

for self-preservation he overshot the mark, and perhaps contributed to his own undoing. The intelligent bookseller knew a little of human nature, and did not complacently submit himself to the role of a sacrificial offering.

A better known example of such defense might perhaps be found in the puritan intensity of the late Anthony Comstock. Here we see a life work under the influence of an obsessing though probably unconscious defense against and an over compensation for some sexual tendency or experience, very shameful in his own eyes, but probably, of minor importance. At present I will not be more specific. In this man we see a special application of a general law which Prof. Jastrow states in these words: "One's work and one's career become a confession."¹⁹

However, so far as I now know, Mr. Comstock's intensity never relaxed from the conventional puritan standard of "obscenity", to release any one at whom the finger of disapproval had once been pointed. He always out-heroded Herod. Why did Judge Jones act differently if our tentative psychologic explanation of his fears is correct?

THE PURITAN PSYCHOLOGY.

The puritan type in general is constantly manifesting towards matters of sex an aversion which finds no adequate warrant in the obvious facts. From observing very great numbers of such reactions we formulate these generalizations, that the intensity of their outward and public aversion to the sensual usually is but the measure of the intensity of their desire to conceal the cause of the shame—a sensuality within, of which they are ashamed. The intensity of that shame also measures the intensity of the sensualism which is masked by it, and the intensity of the defensive denunciation is usually applied to those very acts in others which are most troublesome within oneself and which he would conceal by precluding suspicion. This is the psychology of the man whose own concealed shame unconsciously makes him unduly suspicious, and who therefore thinks that every one suspects him. This motive being largely subconscious is ever present, and so operates largely without consciousness of its influence, or of the modes of its operation.

¹⁹ Character and Temperament, p. 2.

In the light of this psychic mechanism we begin to understand why Judge Jones expressed no words of denunciation of the sex perversion committed on a ward in breach of a trust of public concern. Judge Jones probably had no subjective conflict, either conscious or subconscious, concerning any sexual perversion of his own, and so could view with proper judicial calm the sexual perversion of the guardian, accused by Doe. In this situation the judge might even view the unfortunate and unhappy pervert with commendable understanding and compassion. Not so with the sexuality involved in the Beattie case. Although, according to accepted standards, the latter is usually regarded as the less revolting, yet Judge Jones accorded to it all his denunciation. Evidently our former tentative explanation again proves adequate to explain also this last choice. In the light of general concepts of psychologic behavior, we see that Judge Jones had conflicts within, tense moments of anxiety, precisely because his own "closeted skeleton" must have been too much like that brought to consciousness by the Beattie case. The resemblance between the judge's "skeleton" and the Beattie sexuality was too close to permit of judicial calm. Thus he was compelled by an inner necessity to express himself intensely concerning that, although his comment was not at all material to the issue to be decided, and even though it tended to discredit the only case upon which he relied for justification.

JUDGE JONES' PROBLEM AGAIN.

One question still remains before we can accept our tentative conclusion, that on the part of Judge Jones fearful phantasies from his own past inspired the discharge of John Doe, as well as the other choices involved in his opinion. It is desirable to explain more specifically why Judge Jones' defensive motive did not operate in the usual way and so induce the same vituperative outbreak against John Doe's alleged "obscenity", and an excessive penalty for Doe, instead of a dismissal. Perhaps we can secure a still more intimate view of Judge Jones' emotional conflicts and excitement.

We must here re-iterate our earlier observations that the decision was not free from conflict. A careful re-reading of the quoted paragraphs shows that this conflict was between a strong general motive to disapprove the exceptional precedent, which

impulse evidently came into conflict with a stronger concrete motive for using the disapproved precedent as a means to relieve the judge's pressing anxiety. Objectively considered, this conflict was one between a strong wish to punish Doe and a stronger fear creating the impulse to discharge him. We ask what was there in the present situation to produce such a conflict. For an answer, let us revert to the previous record of John Doe as that is already reported.

There we saw that Doe had friends, who had driven some of Judge Jones' fellow-officeholders from public life, partly by the exposure of their sexual irregularities. With that vision before him and a similar record behind him, it might naturally be quite impossible for Judge Jones to maintain a judicial poise, while listening to the rattle of the bones in the Beattie skeleton-closet. To protect himself against public suspicion, he evidently had a very strong impulse toward giving Doe a severe penalty. But there were Doe's friends who refused to acknowledge the unwritten law that sexual personalities must not be used against political enemies. In this light we can understand why the strong general desire to penalize Doe heavily, was suppressed by the fear of an exposure from Doe's friends. This last fear was the more potent, because more concrete and the danger more imminent. This then is a close range view of his emotional disturbance.

Thus our last remaining doubt is dissipated. Now we see a very adequate possible answer to our question, as to why Judge Jones' defensive necessities did not produce the usual puritan type of reaction. Furthermore we also see more clearly the nature of the emotional conflict which impelled Judge Jones to denounce the exceptional decision in *United States v. Journal Company*, which he manifestly disapproved most heartily, and which he yet was impelled to use in self-explanation. Again, the necessity for appropriating that decision to his own use did not arise from the absence of other precedents to justify the same result. Plenty of those existed, but not one of these other precedents answered to the unconscious subjective need of the judge for a chance to censure "revolting, noxious, unchaste, immoral and horrible" relations with prostitutes.

A very concrete and probably a conscious fear of Doe's friends seems to have compelled Doe's release. In making

that decision, Judge Jones suppressed a very strong aversion to Doe. That repressed feeling now manifested itself in the unconscious exaggeration of the desire to select the decision in *United States v. Journal Company*, in justification, because in that decision alone could the judge find adequate opportunity for the kind of self-vindication which ordinarily would have expressed itself in a long jail sentence for John Doe. In that unconscious excess of misapplied zeal, did the judge expose that which he was most concerned to conceal. Let me add, that this same mechanism is always operative toward unconscious self-exposure. Furthermore, this is equally true whether these feelings attach themselves to such impersonal things as money, or to the feeling of more personal human relations to individuals or classes or to matters of sex.

I have only sought to illustrate a new scientific theory and method brought over into the law from another field of research. The conclusion reached by its application carries with it only a relative presumption of accuracy such as attaches to the theory itself and to this particular attempt to apply it. In other words, our result is not yet to be accepted as a demonstrated truth. Before this can be done it would be necessary to check it by an investigation of the life of Judge Jones. This is obviously beyond the scope of my purpose.

LIBERTY OF THE PRESS.

This brings me to another choice evinced by Judge Jones, and many other judges in dealing with problems of freedom of speech. In sustaining Doe's demurrer, in effect he sustained the liberty of the press. It might, therefore, have been appropriate and tempting for some judges to have offered some words of general eulogy upon the liberty of the press. Not one word is said in that behalf. Why not? The answer may be found in the previous record of Doe's associates. It will be remembered that these associates had already used this liberty of the press to bring about the political ruin of others with whom the judge must have felt strong kinship. If Judge Jones had a skeleton in his own closet, necessarily he could have no very deep interest in maintaining freedom of the press for such men as this John Doe consorted with. Now we see the fading of a seeming paradox. The same defensive motive which induced a denunci-

ation of the "obscenities" in the Richmond Journal, also precluded Judge Jones from upholding the general freedom of the press, and yet compelled him in similar self-defense to sustain Doe's freedom in this particular instance, and to criticise the one exceptional case which was his only reliance for an outward excuse, in the hour of need.

From a very considerable study of the subject, I am inclined to the opinion that right here and now in these States of North America we have a greater variety of penalized opinions than in any country in the world.²⁰ The penalties are not so severe, nor the laws so uniformly enforced as elsewhere, but they exist. Very many cases have come before the courts, and sometimes, as in the case of *People v. John Doe* above, those accused of psychologic crimes have been allowed to go unpunished. However, I cannot recall a single case where a statute has been held unconstitutional because in violation of our guarantees of liberty of speech and of the press. Why is this? Can it be that other judges also are having their decisions in such cases determined by a sub-conscious fear of liberty, which fear is inspired by feeling interests attached to skeletons in their closets? If so, the evasions of the constitutional issue which are so apparent in many of these cases are explained, as also is the very evident and general judicial aversion to such freedom, in consequence of which our constitutional guarantees of intellectual freedom have all been explained away. Under the present prevailing "interpretation" or interpolation of our Constitutions, freedom of speech and press means just exactly what it meant in England and in the American Colonies before the American Revolution. The constitutional language has been interpreted in terms of the *Star Chamber*, *Mansfield*, *Kenyon* and *Blackstone*, instead of the language of *Jefferson*.

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²⁰ Courteney Lemon, "Free Speech" in the United States, *Pearson's Magazine*, December, 1916, pp. 531-539.