ESSAY I

Dicta

Introduction

We digress when, in intending to make a point, we either temporarily or permanently deviate from it. Digressions can be deliberate or unconscious. They can be to good or bad – or a mixture of good and bad – or to no effect. Distinguishing the digressive from the non-digressive is not always straightforward: comments offered as asides can strike at the very heart of a matter, just as narrative which a reader thinks peripheral might be the author's *fil conducteur*. Common-law judges often digress in the course of making legal decisions. The standard characterization of these digressions is that they are observations which are not integral to a decision that has been reached – that they could be taken out of a judgment without that judgment being undermined. The full legal Latin term for these observations is *obiter dicta*.

Legal theorists have not had a great deal to say about the concept of *obiter dicta*. Much of what can be said yields not just no interesting conclusions but no conclusions at all: observations about *obiter dicta* frequently meet with no less plausible observations running in the opposite direction, and the virtues and drawbacks of *dicta* often end up being sides of the same coin. There is no immediately obvious reason to focus on *dicta* when analysing law, moreover, for the history of common-law jurisprudence repeatedly reinforces the message that *dicta* are not law. In 1980, an eminent English judge admitted doubting that *obiter dicta* had any legal value whatsoever.[1] This did not mean that he had compunctions about uttering them: in that one year alone – and in many before and after – judges and counsel can be seen commending, doubting, or disapproving of remarks which he clearly made *obiter*.[2] But nor did it mean that he was hypocritical. It is hardly surprising that a judge

[1] *R* v. *Sang* [1980] AC 402, 444 *per* Lord Salmon.
[2] For 1980 alone, see *Re Ever's Trust* [1980] 1 WLR 1327 (*dictum* of Salmon LJ applied); *Re Holliday* [1981] Ch 405 (case decided May 1980) (*dictum* of Salmon LJ doubted); *Teesside*

who regards *dictum* dismissively should also be a source of it, for judges are no different from anybody else in being innately digressive. One would have to be a freakishly austere mouthpiece of the law, perhaps the most robotic common-law judge ever, to serve a career of any significant length without so much as once offering an *obiter* opinion in the process of contributing to a decision. Our minds wander, and we often speak our minds. Our thoughts about something often lead us to think about something else, and we end up articulating those tangential thoughts as well as – possibly even instead of – our primary ones. To digress is to be human, and judges are only human. Do these truisms not intimate everything we need to know about *obiter dicta* – that it is just a type of noise which judges cannot help but produce from time to time? What else is there to say?

It is easy to see why studying judicial exhibition of a standard human trait might look like a classic case of academic overthinking. This is especially so when one contemplates *dicta* as something produced. *Dicta* will hardly ever be completely pointless: judgments reserved and written before delivery will often contain carefully formulated *obiter* observations, as, indeed, might some judgments delivered orally (oral delivery of judgments being the norm in English courts until the second half of the twentieth century).[3] Nevertheless, many *obiter dicta* – even ones which are scripted rather than delivered extempore – will be casually cast out and borne of minimal reflection. There is the risk of hearing chimes emanating from silent bells once one starts delving into the motives that judges might have had for making observations which, in many instances, were delivered in the moment and off the cuff.

Yet, as we will see in this Essay, judges often do have distinct reasons for making – and, indeed, for declining to make – *obiter* pronouncements: it would be a mistake to assume that *obiter dicta* are only ever evidence of a judicial predilection for digression. The reasons for according *dictum* significance become obvious when one thinks of it as

Times Ltd v. *Drury* [1980] ICR 338, 354 *per* Goff LJ ('I would agree with the *dictum* of Lord Salmon [in *De Rosa* v. *Barrie* (1974)] . . . that there must be continuity of employment down to the time of the transfer . . .'). For the relevant *dicta*, see *De Rosa* v. *Barrie* [1974] ICR 480, 500 ('[I]f the transferors had given due notice to determine [the respondent's] employment . . . paragraph 10(2) of Schedule 1 to the [Contracts of Employment] Act of 1963 would have had no application to his case. I do not wish, however, to express any concluded view on this point because it has not been argued'); also (the *dicta* being referred to in *Re Ever's* and *Re Holliday*) *Rawlings* v. *Rawlings* [1964] P 398, 419 *per* Salmon LJ.

[3] See Roderick Munday, 'Permutations of the Court and Properties of Judgment' (2002) 61 *CLJ* 612, 614–15.

something not produced but received. One of the main purposes of this Essay is to examine how *obiter dicta* have been interpreted in English law. For what reasons are particular judicial observations classified as *obiter dicta*? To what uses might *dicta* be put? Precisely what legal status do *dicta* have? Has their legal status altered over time? Are there gradations of *dicta*? Answers to these questions offer some intriguing insights into the nature of the common law. The legal status of *dicta* is that they have secondary (or epistemic) authority: they are a source of legal information, opinion, and argument, but they are not an actual source of law. However, the judicial decisions in which they appear are a source of law. Other forms of secondary legal authority – juristic writings, foreign legal sources, legislative history, third-party or *amicus* interventions in judicial proceedings, dissenting judicial opinions, and concurring opinions produced separate from majority judgments – all differ from *obiter dicta* by virtue of being discrete; distinguishing these secondary sources from primary ones poses no significant difficulty. What sets *obiter dicta* apart is that they are not set apart. They are mixed into the substance of the common law.

Although there exists a broadly shared and largely reliable approach to distinguishing *dicta* from whatever content of a judicial decision contributes to the common law, it is not an approach which resolves every uncertainty as to what is the case-law component of a case (Section 7). Lawyers and judges do not always agree on – indeed are not always sure – what is and what is not *obiter* in a judgment. Yet it matters that a distinction between the binding and the non-binding content of a judgment can be drawn – not only because it is impossible, without the distinction, to recognize what it is within a judgment that will count as law in a court,[4] but also because, if it were impossible to identify some of the material within a judgment as *obiter dicta*, the lawmaking power of judges would not be confined to the facts of particular cases. Decided cases, as rule formulations applied to specific facts, are a source of law. But the possibility of these cases occasioning *obiter dicta* means that they may contain judicial observations on the law which are not part of, but which are unlikely to be presented separate from, the rule formulation that any particular case yields. If it were impossible to treat – because it was impossible to identify – these observations as distinct from the binding content of a judicial decision, courts would in effect have an unfettered lawmaking function.

[4] H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford University Press, 2012; 1st ed. publ. 1961), 105.

1 The Civilian Dimension

One of the clearest explanations of this last point – of why it is important to be able to distinguish *obiter dicta* from whatever case-content forms part of the common law – is to be found in a rather unlikely source. In his landmark *Méthode d'interprétation et sources en droit privé positif*, first published in 1899, François Gény declared it beyond doubt that the French judges of his day enjoyed considerable interpretive freedom when applying the positive law.[5] But did those judges have any degree of freedom to make law? They 'have the power to create it for a specific situation', Gény believed, but they could never 'produce a general rule',[6] because a judicial power not confined to the 'individualization of private rights' would violate the 'superior principle of separation of powers'.[7] Yet if case law can 'supply the gaps in formal sources, and direct the whole movement of legal life' when those sources are silent, Gény wondered, might we not accurately speak of French judicial decision-making as 'constituting . . . a kind of common law'?[8]

Gény resisted this conclusion. The latitude that judges enjoy when individualizing private rights (their capacity, to use Gény's favoured term, to engage in *la libre recherche scientifique*)[9] entails 'necessary limitations'[10] – what legal theorists sometimes, for somewhat obscure reasons, refer to as *le 'compromis Gény'*.[11] The judicial decision, like

[5] François Gény, *Méthode d'interprétation et sources en droit privé positif: Essai critique*, 2nd ed., 2 vols. (Paris: LGDJ, 1954 [1919]), I, 207–8.
[6] Ibid. II at 35.
[7] Ibid. I at 213, 208.
[8] Ibid. II at 89.
[9] See, e.g., ibid. I at 222, 224; II at 34, 69, 78.
[10] Ibid. II at 34.
[11] See, e.g., Duncan Kennedy and Marie-Claire Belleau, 'François Gény aux États-Unis', in *François Gény, Mythe et Réalités, 1899–1999*, ed. C. Thomasset et al. (Montréal: Yvon Blais, 2000), 295–320 at 297.

> According to Philippe Jestaz, the 'Gény compromise' is as follows: judges and doctrinal writers could pursue free scientific research [*la libre recherche scientifique*], thereby exercising an enormous social power. But there is a price to be paid for the exercise of this considerable power. The price is that neither case law [*jurisprudence*] nor juristic analysis [*la doctrine*] can . . . occupy anything other than a secondary or even tertiary place in the hierarchy of legal sources.

In identifying the source of the term *le 'compromis Gény'*, Kennedy and Belleau refer to a chapter by Philippe Jestaz in the same the volume ('François Gény: Une image française de la loi et du juge', in ibid. at 37–53). But nowhere in Jestaz's chapter, nor in a larger study in which that chapter was subsequently republished (Philippe Jestaz and

doctrinal writing, is a 'moral'[12] or 'second-order authority'[13] which 'often contributes to the formation'[14] of the 'formal source[s] of positive law'.[15] '[T]aken on its own', however, precedent cannot be 'authority ranking among the formal sources of our positive private law'[16] because 'case law ... remains subject to variations and contradictions'[17] – because judges, when engaged in 'the practical ... implementation of positive law',[18] produce opinions which, like juristic speculation, are essentially a form of 'free inquiry'[19] which can become 'disconnected from ... concrete questions'.[20]

The price paid for the judge's freedom to produce *obiter dicta* – the compromise – is that there cannot be a French common law. To treat a recorded judicial decision as 'positive common law'[21] risks 'an encroachment on the domain of legislative power',[22] for the record might contain, along with the ruling on the issue in dispute, incidental judicial commentary on legal difficulties which, though not presently before the court, might at a later date need to be resolved or revisited. If the whole of a recorded judicial decision, including the orthogonal commentary, is considered to be 'a formal source of private positive

Christophe Jamin, *La doctrine* (Paris: Dalloz, 2004)), can Jestaz be found referring to *le 'compromis Gény'*. Perhaps Jestaz used the phrase when speaking at the Gény centenary colloquium in Montreal in late October 1999 – the content of the *Mythe et Réalités* collection, including Jestaz's chapter, is drawn from that event – and perhaps Kennedy and Belleau, participating in the colloquium, heard it and assumed that it would appear in the published version of his remarks. Whatever the case, others have subsequently co-opted *le 'compromis Gény'*, sometimes attributing the phrase to Kennedy and Belleau, sometimes to Jestaz, and sometimes to all three: see Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge University Press, 2013), 59 (Kennedy and Belleau); Aboudramane Ouattara, 'Prolégomènes pour une épistémologie du droit en Afrique' (2013) 11 *Revue droit Sénégalais* 249, 284 n. 110 (Jestaz); and Ward Alexander Penfold, 'An Ineluctable Minimum of Natural Law: François Gény, Oliver Wendell Holmes, and the Limits of Legal Skepticism' (2011) 37 *Hist. Eur. Ideas* 475, 476 (all three).

[12] Gény, *Méthode d'interprétation*, I, 234 ('une autorité purement morale'), also II, 67 ('une simple autorité morale').

[13] Ibid. II at 69.

[14] Ibid.

[15] Ibid. II at 53, also II at 72–3; on *travaux de doctrine*, see ibid. II at 54–5.

[16] Ibid. II at 35.

[17] Ibid. II at 48.

[18] Ibid. II at 79.

[19] Ibid. II at 88.

[20] Ibid. II at 79.

[21] Ibid. II at 90.

[22] Ibid. II at 40 ('un empiétement sur le domaine du pouvoir législatif').

law, independent and *sui generis*',[23] the judicial rule-making power is not confined to determining the actual litigation before the court. Judges, like legislators, would have a general lawmaking function.[24]

In the English common law, as is well known, the distinction between the binding *ratio decidendi* of a case and the non-binding *obiter dicta* pronounced in the course of deciding the case serves as a brake against judges formulating common-law rules *ultra vires*. The *ratio decidendi* is the court's reasoning underpinning its decision on how the law applies to the facts, whereas *obiter dicta* are observations made by the deciding judge, or judges, which bear on matters other than the law as it applies to those facts. Since *obiter dicta* do not pertain to the legal determination of the facts which frame the dispute before the court, they cannot bind as precedent. We will consider in the next section how the distinction between *ratio decidendi* and *obiter dicta* emerged quite late in the history of the English common law, though the reason for its late arrival on the scene is easy enough to deduce: identification of some of the content of a case as *obiter* only becomes a pertinent task once cases come to be understood as sources of law. Perhaps more surprising, and worth reflecting on at least briefly before we turn to the English legal experience, is the fact that the concept of *obiter dicta* featured in the civil law tradition before it became established in the common lawyer's lexicon.

If we were to 'commend unto' the law student 'some special writers of the law', William Fulbeck observed in 1600, at the top of the list ought to be Oxford's then Regius professor of law, Alberico Gentili, 'who . . . hath in his learned labours expressed the judgment of a great statesman'.[25] After alluding to Theodosius II's endorsement of the so-called Law of Citations (426 CE) – that the opinion held by the greater number of jurists shall prevail when conflicting juristic opinions are cited in court[26] – Fulbeck notes that Gentili, though a critic of humanist jurisprudence, wisely joined with one of its most renowned proponents, Andrea Alciato, in considering the Law of Citations unsound. For Gentili and Alciato alike, according to Fulbeck, if a juristic opinion is to stand as legal authority then its status as such ought to depend not on the number of jurists sharing the opinion but rather on the weight the opinion holds

[23] Ibid. II at 72.
[24] Article 5 of the French Civil Code prohibits judges from assuming this function. On *obiter dicta* in the French ordinary courts, see Essay II (Section 3).
[25] William Fulbeck, *Direction or Preparative to the Study of Law* (London: Clarke, 1829), 68–9. The book was written in 1599 and first published in 1600.
[26] C. Theod. (438 CE) 1. 4. 3.

when 'examined' in 'accord with reason'.[27] This rejection of Theodosius' proclamation seems, on the face of it, to amount to nothing. The Law of Citations – or certainly Theodosius' version of it – is more nuanced than Alciato (and, following him, Gentili and Fulbeck) appeared to concede. Although the *Codex Theodosianus* treats the majority juristic opinion as the one which a court has to follow, it does not dismiss the weight of juristic opinion entirely: where opinions before a court are evenly split, the opinion reflecting that of Papinian (the jurist 'of superior genius') is presumed the weightier and is therefore supposed to prevail.[28] By the late sixteenth century, furthermore, it was unlikely to have been immediately obvious that Theodosius' reiteration of the Law of Citations was worth reckoning with, for the Law was a force long spent. 'The Law of Citations in this revised [i.e., Theodosian] form . . . was . . . [r]endered obsolete by the publication of the *Digest*' of Justinian, and, though 'it was included in the *Codex [Justinianus]* of 529 . . . it was excluded from the *Codex* of 534'.[29]

For Gentili, however, this was a Law easily underestimated. The early medieval period seems to have marked the beginning of its reappraisal – even its occasional revival (in the late eighth century, for example, the Law of Citations was incorporated into the *Lex Romana Curiensis*, a set of laws compiled for the Germanic population of Rhaetia in eastern Switzerland).[30] During the middle-ages and early Renaissance, civilian jurists were by no means entirely sold on the Law of Citations, but nor were they wholly dismissive of it; followers of the fourteenth-century Italian jurist, Bartolus, for example, were inclined to argue that Bartolist opinions ought to be upheld by the courts because they were *communis opinio doctorum* – opinions held by a juristic majority.[31] Fulbeck was commending Gentili for his willingness to align himself with Alciato – himself a prominent Bartolist,[32] and a jurist from whom Gentili

[27] Fulbeck, *Direction or Preparative*, 84.
[28] C. Theod. 1. 4. 3. If neither opinion was endorsed by Papinian, the court would determine how the case was to be decided.
[29] Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), 282.
[30] See Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999), 39. According to Vinogradoff, the incorporation was garbled: Paul Vinogradoff, *Roman Law in Medieval Europe*, 2nd ed. (Oxford: Clarendon Press, 1929), 21–3.
[31] See, e.g., Matthaeus Gribaldus Mopha, *De Methodo ac Ratione Studenti* (Lugduni: Coloniensi, 1544), book I, ch. 13 at 75–7.
[32] Alciato is frequently accredited with having composed a verse beginning with the proposition that in law, first place goes to Bartolus ('In iure primas comparatus caeteris hartes habebit Bartolus'). See, e.g., Christop Hegendorf, *Epitome tyrocinii iuris civilis*

distanced himself on other matters[33] – in expressing distaste for a rule which favoured the most widely shared legal opinion over the one most satisfactorily reasoned. For Fulbeck, the significance of Gentili's stance would have been more than merely historical, for even in the late sixteenth century, the period in which both Gentili and Fulbeck wrote, the rule still had its defenders. In 1591, for example, the Venetian jurist, Angelo Matteacci, asserted that although some medieval lawyers had been willing to attach weight to opinions of particular jurists, it was still the case that the majority juristic opinion had a stronger foundation (*fit fundata*) than the opinion of jurists set against it, even if the opinion of the jurists in the minority was inherently fairer and could be said to strive for stronger rights (*quae validioribus nititur iuribus*).[34]

Instinctively, one might presume that, for those civilians who placed store in *communis opinio*, the minority or unfavoured opinion was tantamount to a dissenting opinion. But medieval civil lawyers seem to have conceived of the majority opinion as a form of *ratio* and the unfavoured one as akin to *obiter dictum*. Gentili himself considered it a fact – albeit a lamentable fact – that opinions which, after discussion, become established as the reasoned judgments of a community (*deuentum*) of lawyers will carry more authority than 'anything entering into the calculation which is *obiter*, the incidental *dictum* of some Doctor'.[35] That the majority juristic opinion carried more authority than the *dicta* of outlier jurists did not mean that the authority of *communis opinio* was unassailable. In Justinian's *Corpus Iuris*, the opinions of Papinian, and of other Roman jurists who complemented his labours, are, like judicial rulings, taken to be true statements of the law, or *necessary* authority ('as good as law, ... as if their studies were derived from imperial constitutions').[36] By contrast, the *communis opinio* to be discerned from the writings of medieval glossators and doctors was *probable*

(Basel: Westhemerus, 1540), 32; Mopha, *De Methodo ac Ratione Studenti*, 75; Richard Hall, *De quinquepartita conscientia, libri III* (Duaci: Bogard, 1598), 158.

[33] See Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1990), 187–8.

[34] Angelus Matthaeacius, *De via et ratione artificiosa iuris universi libri duo* (Venice: Meles, 1591), 123. See also ibid. at 124–5 ('*[C]ommunis* . . . *opinio* . . . has been bold enough . . . to give guidance and legal answers to the world's councils and to prescribe courses of action to those seeking legal advice. You may easily infer from this in what great regard the jurists are to be held').

[35] Alberico Gentili, *Lectionum et epistolarum quae ad ius civile pertinent. Liber I* (London: Wolf, 1583), 218.

[36] C 1. 17. 1. 6. On judicial rulings as true statements of the law, see D 1. 5. 25; also D 50. 17. 207.