THE INTRICACIES OF *DICTA* AND DISSENT

Common-law judgments tend to be more than merely judgments, for judges often make pronouncements that they need not have made had they kept strictly to the task in hand. Why do they do this? *The Intricacies of* Dicta *and Dissent* examines two such types of pronouncement, *obiter dicta* and dissenting opinions, primarily as aspects of English case law. Neil Duxbury shows that both of these phenomena have complex histories, have been put to a variety of uses, and are not amenable to being straightforwardly categorized as secondary sources of law. This innovative and unusual study casts new light on – and will prompt lawyers to pose fresh questions about – the common law tradition and the nature of judicial decision-making.

NEIL DUXBURY is Professor of English Law at the London School of Economics. He is author of *Patterns of American Jurisprudence* (1995), *Random Justice* (1999), *Jurists and Judges* (2001), *Frederick Pollock and the English Juristic Tradition* (2004), *The Nature and Authority of Precedent* (2008), *Elements of Legislation* (2013), and *Lord Kilmuir* (2015).

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NEIL DUXBURY
London School of Economics and Political Science

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For Ted White

He became involved in the intricacies of the law, reading as avidly as though the pages were full of easy gossip. He was interested in the workings of his colleagues' minds, their strategies, the words they chose. A few times he was disappointed by the arguments which were not followed through, by the vague assertions and the weak grasp of case law. There were several judgments which he read after lunch, written by his younger colleagues on the High Court, judgments he could not have written himself, since they were so detailed and all-embracing in their knowledge of technical matters such as patents, copyright and the intricacies of tort and property rights. He was more interested, however, in broader questions, in the cases which could raise much larger issues than the mere right and wrong of the arguments presented to the court.

Colm Tóibín, *The Heather Blazing*

As many truths as men. Occasionally, I glimpse a truer Truth, hiding in imperfect simulacrums of itself, but as I approach, it bestirs itself & moves deeper into the thorny swamp of dissent.

David Mitchell, *Cloud Atlas*

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PREFACE

The trouble with Roscoe Pound, Karl Llewellyn once observed, is that he seemed torn between seeking 'to travel on the level of considered and buttressed scholarly discussion' and feeling compelled to write 'bed-time stories for the tired bar'.[1] Perhaps Llewellyn would have thought this my affliction too. *Dicta* and dissent are topics which yield plenty of anecdotes and *aperçus*, and, when writing some parts of this book, I found myself trying to guard against mimicking a fireside narrator. I suspect I did not succeed – and certainly know why I might not have succeeded – in resisting this impulse entirely. Flick through the book and it should be obvious that it belongs to the tradition of Pound the scholar. Yet my main imaginary readership while writing it has not been academics. Rather, it has been barristers and, especially, judges: I am trying to account for certain types of judicial pronouncement – why judges make them, what other judges and counsel do with them. My wished-for audience – the courtroom participants who produce and utilize *obiter dicta* and dissenting opinions – will surely never turn up, or certainly not in large numbers. Nevertheless, this book is a performance with that audience very much in mind, by someone who cannot help but wonder what its judgment would be were it ever to materialize.

For helpful written advice on Essay I, I am immensely grateful to Ross Cranston, Matthew Harding, Philip Sales, and Stephen Sedley. As regards Essay II, the same goes to Tatiana Cutts, Brenda Hale, Nick Sage, and (for comments on Section 2) Jan Zglinski. George Leggatt went above and beyond by providing detailed comments on both essays. Cambridge University Press's four anonymous readers provided incisive feedback on the original proposal and the overall project. I made uninterrupted progress on the book early in 2020 because the LSE Law Department kindly granted me leave for the Lent term. Although, at the end of that

[1] Karl N. Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 *Columbia L. Rev.* 431, 435 n. 3.

term, a scheduled visit to the University of Virginia inevitably went the way of travel plans worldwide, Kent Olson in Virginia's Law School library still generously fulfilled by email the various esoteric requests that I had planned to land physically on his desk.

To make some sentences less cumbersome, I occasionally write about 'English' judgments or dissents when I really mean judgments or dissents by judges in the appeal courts of England and Wales, and even though I know that some of the judges doing the judging or dissenting are not English. When presenting abstract scenarios involving the use of singular pronouns I am deliberately inconsistent, in some instances opting for the female and in others for the male. Stylistic quirks confined to particular passages in the book are accounted for in local footnotes. When referring to cases reported since 2001, I use the neutral citation only, unless there is a reason to do otherwise. While the time at which I put the book to bed (late September 2020) has little or no bearing on most of the project, it might be worth keeping it in mind when reading the penultimate section of Essay I. The cover art, finally, will seem a curious choice. Any suitably intrigued reader might want to look at it alongside the Hopper which graces my first book, published in 1995.

TABLE OF CASES

The table is confined to cases which feature (or which contain observations featuring) in the main text, and cases considered in footnotes.

PROLOGUE

Not until the nineteenth century did the doctrine of precedent become an established feature of the common law. Before then, English lawyers understood the common law to be not case law but general customs which, though not written down as laws, were legally enforceable in the courts of the realm – those customs, according to William Blackstone, 'by which proceedings and determinations in the king's ordinary courts of justice are guided and directed'.[1] The common law was, by definition, within the common knowledge of judges, and so there was no reason for lawyers to mention it in writs or pleadings.[2] Cases tended to be treated not as common law but rather as evidence of what the common law was.[3] While nobody today would dismiss the proposition that decisions of courts can be common law, case law and the common law are certainly not one and the same. When the Austrian law professor, Josef Redlich, reported in 1914 on the use of the case method of instruction in American law schools, he had a simple explanation for its success: American law is common law, and the common law is case law.[4] Even

[1] Blackstone, 1 *Commentaries*, 68. (*Commentaries* = William Blackstone, *Commentaries on the Laws of England*, 4 vols. (University of Chicago Press, 1979 [1765–9]).)

[2] So it was that Henry Finch considered it 'not good' legal technique to 'plead that there is a custom among merchants throughout the realm' regarding the recognition of bills of exchange, for 'that which is current throughout the realm, is common law, not custom'. Henry Finch, *Law or a Discourse Thereof* (New York: Kelley, 1969 [1627]), 77.

[3] See, e.g., Edward Coke, *The First Part of the Institutes of the Lawes of England. Or a Commentarie upon Littleton* (London: Societe of Stationers, 1628) at 254a ('our book cases are the best proofs what the law is'); Matthew Hale (d. 1676), *The History of the Common Law of England*, ed. C. M. Gray (University of Chicago Press, 1971), 45 ('Judicial decisions . . . are less than a law, yet they are a greater evidence thereof than the opinion of any private persons'); also *Jones* v. *Randall* (1774) Lofft. 383, 385 *per* Lord Mansfield ('precedent, though it be evidence of law, is not law in itself').

[4] Josef Redlich, *The Common Law and the Case Method in American University Law Schools: A Report to the Carnegie Foundation for the Advancement of Teaching* (Boston: Merrymount Press, 1914), 35 ('[I]n all the states of the Union, the law of America has still remained, above all things, common law . . . *[C]ommon law is case law and nothing else than case law*'). (Emphasis in original.)

case-method practitioners, the constituency whose initiatives Redlich was lauding, baulked at so reductive a description of the common law. That the common law equates with case law is 'hardly even a half truth', one US law professor responded, for the 'common law on any point existed . . . before any case in which it may be applied'.[5]

Just as common law is more than mere case law, case reports are not only composed of common law. Many, as often as not most, of the judicial pronouncements contained in a judgment are not judge-made law, or even determinations as to applicable statutory or customary law. This book is composed of two long, labyrinthine essays on two such types of pronouncement: *obiter dicta* and judicial dissent. The point of the book is not to offer a specific theoretical perspective on these phenomena, or to advance normative claims about them, but rather to try to understand *dicta* and dissent as contributions to common law, primarily English common law, judicial reasoning.

Between *dicta* and dissent there are likenesses and differences. Both are contained in cases and produced by judges. While neither is binding authority, judges in English courts are not entirely averse to following them when no primary legal source supplies an answer to a disputed question. In a rudimentary sense, they are one and the same in that dissents do not belong to the *ratio* of a judgment and so must be *obiter dicta*. They are certainly distinguishable in so far as *dicta* are tangential to a *ratio* whereas a dissent is antithetical to it – though this distinction is somewhat muddied by the fact that a judge's opinion might amalgamate assent and dissent (as when a judge dissents from only part of the decision, or when she concurs on the outcome but rejects the majority's reasoning in support of it). Other characteristics, though they do not distinguish *dicta* and dissents, are more regularly ascribable to one rather than the other. Dissents are usually entire judicial opinions, for example, whereas *dicta* are more likely to be opinions within opinions.

Although dissents are *dicta*, it is uncontroversial to think of *dicta* and dissents as different legal species. One might reasonably ask why it is worth thinking about *dicta* at all. Certainly very little has been written about them. Jurisprudential debate has focused primarily on how to identify the *ratio decidendi* of a case – the content of the case, that is, which is not *obiter dictum*. To purport to discern the *ratio* of a case is, by

[5] Simeon E. Baldwin, 'Education for the Bar in the United States' (1915) 9 *Am. Pol. Sci. Rev.* 437, 447. Baldwin was, at this point, a law professor at Yale. For his own perspective on case law teaching, see Simeon E. Baldwin, 'The Teaching of Law by Cases' (1900) 14 *Harv. L. Rev.* 258.

default, to maintain that one knows its *obiter* content too. Yet determining which judicial pronouncements fall into which category is an exercise fraught with difficulty. It cannot be for a judge deciding a case to make these determinations, for if this were feasible his capacity to make law would be unconstrained: he would be able to expound on any legal matter whatsoever and then assert that his proclamations were not to be treated as *obiter dicta*.

In modern common law theory, the standard response to this predicament is that while judges are free to expound on the law however they wish in the course of deciding a case, only the reasoning necessary to their decisions can bind as precedent. Legal reasoning cannot be necessary to a decision simply because a judge who advances it deems it to be so. There is, however, no rigorous test enabling us objectively to identify the reasons necessary to judgments.[6] It is understandable that modern jurists should have been exercised by the indeterminacy of *ratio decidendi* as a concept, given that the *ratio* is the binding part of a judgment. What is perhaps more surprising is how little attention has been accorded to the similarly indeterminate nature of the concept of *obiter dicta*. For the fact of its indeterminacy is significant: whether a case is distinguished or is followed as precedent will sometimes be attributable to the fact that today's court has been convinced, or has convinced itself, that an element of the reasoning contained in the case should, or should not, be classified as *obiter dictum*. Exceptionally, and controversially, a court might even conclude that although the reasoning in the earlier case indeed is *obiter dictum*, it should be followed as if it were not.

Common-law judges have generally seemed unfazed by the absence of a boundary between *ratio* and *dicta*. They are content, by and large, to let others discern for themselves what the *rationes* of their judgments are, and they are equally at ease extrapolating *rationes* from other judges' judgments. The process of extrapolation would be easier, of course, if judges were to try to confine themselves to making legal pronouncements bearing upon the case to be decided by the court. But judges often make legal observations which have no connection to the court's decision: they will very deliberately pronounce *obiter*.

Judges have all sorts of reasons for making *obiter* observations. They might be seeking to bring some nuance to a judgment, or signalling to the lower courts and the legal profession how they would rule on a matter not

[6] See Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008), 67–90.

yet litigated were it to come to them for decision, or hoping to influence how the common law develops or how the language of a statute is construed. They could even be settling scores with other judges. A judge will also, with certain types of *obiter* pronouncement, be making a calculation. The *dictum* might obfuscate the judgment. It might come back to haunt the judge who delivers it, or be passed over by later courts in favour of other, competing *dicta*. Much that is *obiter dictum* in a judgment invites no comment. But the *dictum* which makes a legal point has a fate: it is ignored, or received indifferently, or accorded significance, perhaps considerable significance, by those who can change the law to which the *dictum* speaks, or who argue over what that law is or how it might be improved.

As compared with *dicta*, judicial dissent is a more readily graspable topic – one about which lawyers, and others, have had a good deal to say. At the heart of the topic there is a simple dichotomy. When a judgment is not unanimous, there will be a majority and a minority. Not everyone in the minority need be a dissenter. A judge in the minority is only a dissenter if she was unable to reconcile herself to the court's decision. As secondary legal sources, the dissentient content and the *dicta* in a case are distinguishable: in the context of the case, dissenting judicial opinion is rejected legal reasoning, whereas judicial opinion expressed *obiter* is neither rejected not accepted. This is not to maintain that, measured against *dicta*, dissenting opinions are inferior persuasive authorities. Dissent is a challenge to a *ratio*. It can render a precedent fragile or the trajectory of the common law unsettled – perhaps especially when, in a dispute which raises strong legal arguments pulling in different directions, the consequence of dissent is a decision by bare majority.

Analysts of judicial dissent – few of whom focus on the activity specifically or even primarily as a feature of English judgments – have tended to concern themselves with a cluster of issues: whether courts do better or worse to allow dissent, how different legal systems conceptualize and register dissent differently, comparative dissent rates among judges, courts, and court systems, what judges' motivations for dissenting might be, and – the most enthusiastically addressed issue of all – what it means to speak of 'great' dissents and dissenters. All of these issues are intriguing. But dissent as an English case-law phenomenon raises other issues besides. Judges in English appeal courts are never obliged to deliver composite unanimous judgments apart from in some criminal law cases. While, since the late-twentieth century, it has become more common for these courts to produce single (unanimous or majority)

judgments, appellate judges have traditionally delivered – and very often still do deliver – separate opinions from which the judgment is to be ascertained. A tradition of separate opinion writing means that judges can dissent. But it can also make it difficult, or create a disincentive, to dissent. If I am the sole dissenter on a five-member court, and the other four judges deliver individual opinions, the majority's *ratio* is likely to be more dispersed, more difficult to identify, and therefore less easy to dissent against, than would be the case had I only to contend with a single majority judgment. That I can produce a separate opinion also means that I can be creative: I might dissent on some legal points but not on others, or I might not dissent at all but nevertheless deliver an opinion containing dissent-like *dicta*. One of the more interesting lines of enquiry regarding dissents in English courts – though it is not unique to these courts – concerns why and how judges might avoid dissenting, and the manoeuvres they might undertake if they want to exhibit dissentient inclinations without delivering a dissenting opinion.

The rest of this study is supposed to make these preliminary remarks seem less obtuse. There are junctures in both Essays, particularly in the second one, when the focus shifts to settings outside England – even, occasionally, to matters outside law. But do not be deceived. Both Essays are rooted in, are fundamentally about, English case law. One can only wonder how that pre-eminent critic of judge-made law, Jeremy Bentham, might have reacted to them. To think of cases as law, he maintained, is to entertain a ludicrous fiction.[7] A study which accords significance to the detritus strewn across the wilderness of single instances,[8] to the case-content which even the content's producers do not treat as law, would surely have left him – his walk-on part in the middle of the first Essay all but confirms this – with his head in his hands. Yet even Bentham had his charitable moments. '[N]othing could be much further from the truth', he wrote to James Madison, 'than if, in speaking of the *matter* of which the English common law is composed, a man were to represent it as being of no use . . . [I]t affords,

[7] See Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government*, ed. J. H. Burns and H. L. A. Hart (London: Athlone Press, 1977 [*c.*1774–*c.*1776]), at 119–20, 330; also Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), at 271–5, 286–9.

[8] See Alfred Tennyson, *Aylmer's Field* (New York: Macmillan & Co, 1891 [1793]), 14 ('the lawless science of our law/That codeless myriad of precedent/That wilderness of single instances').

for the manufactory of real law, a stock of materials which is beyond all price'.[9] *Dicta* and dissent certainly do not belong to Bentham's theory of law and adjudication. But he did not, or did not always, dismiss them as juridical irrelevances. While, he insisted, nothing good can come of treating judicial utterances as 'real law', he appears eventually to have accepted that it would be foolish to maintain that legislators – the makers of real law – should discount them as sources of legal knowledge and reasoning.

[9] Jeremy Bentham, 'To the President of the United States of America' (1811), in *The Works of Jeremy Bentham*, 11 vols ed. J. Bowring (New York: Russell & Russell, 1962 [1838–43]), IV, 453–67 at 460–1 (emphasis in original).