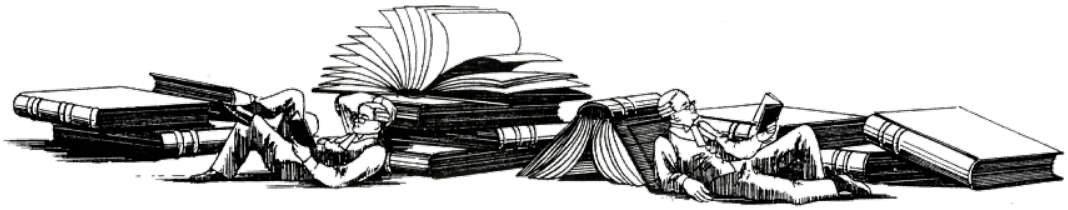


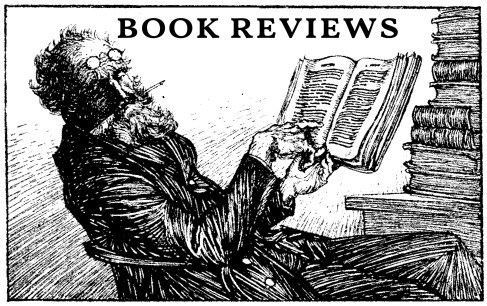
NOTES ON THE STYLE OF THE LAW

Reviews: Dicta, Dissent, Judges, and Jokes

by

ELIJAH Z GRANET

reviews — literary criticism — books — rhetoric — humour —



REVIEWED

The Intricacies of Dicta & Dissent
by Neil Duxbury
Cambridge University Press
£27.60 (paperback), 260 pp

Judges, Judging, & Humour
eds. Jessica Milner Davis & Sharyn Roach Anleu
Palgrave Macmillan
£89.99 (paperback), 335 pp

How do we decide which judge is right? The traditional method of resolving judicial disagreement is to resort to *communis opinio*, that is to say, to the opinion held by the majority of judges. Yet, where judges are split, or incoherent, the law sometimes points to a single jurist as having the insight to resolve the issue. In the *Codex Theodosianus*, the opinions of Papinian are held out as likely to be the true statement of the law, because the faculties of that ancient lawyer were universally revered. This has come in for criticism. The 16th jurist Angelo Mateacci rejected the idea that any minority opinion could be elevated to law simply by the jurist handing it down, because the majority opinion was inherently more well-founded. The counterpoint, via William Fulbeck, writing in 1600, was that juristic opinion is a matter of weight, not of number. That

weight, in turn, can depend both on reasoned analysis of its persuasiveness, but also on the nature of the jurist expressing it. In the 14th century, John Buridan posited the idea of 'probable authority', by which a particularly expert or wise judge, with an earned reputation for reason, was in any case *likely* to be right. This is the phenomenon of Papinian, of Bartolus in 15th Portugal, or indeed of Hillel in the Talmud.

This puzzle of legal theory opens Neil Duxbury's masterful volume *The Intricacies of Dicta and Dissent* (Cambridge), and pervades the entire volume. The alliterative subjects of the books' twin essays are the ultimate expressions of judicial individuality, the moments when a judge commits the supererogatory act of writing where the law does not require it. With impressive erudition, Duxbury demonstrates the evolution of *dicta* and dissent both in England and in civilian systems, with the author's comparative expertise on the civil law providing a welcome respite from Anglocentrism in this area of legal studies. The former topic continually circles around the question of weight. In an age when unreported judgments proliferate, and citations can be found for virtually any proposition, the question of establishing which (if any) *dicta* matter is a vexed one.

This is in part because it relies on 'persuasive authority', a nebulous, perhaps even oxymoronic concept; after all, to quote the HCA's Heydon J, speaking extra-judicially, 'Authorities are followed because they are authorities, not because their reasoning is admired.'[1] Authority normally does not need to persuade. Persuasive authority, then, is a chimeric concept, whose tortured development Duxbury expertly follows. There is a discomfort with the idea that a judge might simply decree law by waxing poetically on a point not argued before the court, and figures from America's Marshall CJ to the Lord Reid have warned against treating *obiter* as automatically proving some legal proposition. On the other hand, some judges, such as the law lord, the Lord Wright, argued (somewhat self-servingly) that the eminence of the apex court meant *dicta* from that source were *solmeniter* rather than *obiter*; in other words, akin to a latter-day Papinian. In practice, of course, it is regularly the case that *obtier dicta* are given a status akin to authority, and some *obiter dicta* (perhaps most famously Denning J in *High Trees*)[2] establish entire areas of law.

Yet, like many things in law, the theoretical and conceptual underpinnings of this have not been explored. Consequently, the first essay is absolutely essential, not only for its scholarship and breadth, but also because Duxbury is remarkably and laudably generous in his footnotes, citing far more cases than is necessary to prove any point. Consequently, that the book's footnotes serve the proper purpose of good legal footnotes—as a handy annotated bibliography, a map for a journey along the authorities. These are truly superlative footnotes.[3] Anyone needing to check a point on persuasive authority need only crack open this book, go to the relevant footnote, and she will find the relevant law amply set out. In this way, the book may become an unlikely but invaluable practitioners text in cases where there is disagreement about weighting certain persuasive authorities.

1 'Threats to Judicial Independence: The Enemy Within' (2013) 129 LQR 205, 210

2 [1947] KB 130, HC

3 Save only Duxbury's decision to cite only neutral citations where available, when the practitioner is best served by a law report, since that is required for citation of authorities, and is in any case the highest authoritative text, but this is a common problem and does not significantly affect the overall extremely high quality of the footnotes.

The book's second essay, on dissent, ends up being, appropriately enough, something of a dissent. The same exemplary scholarship from the first essay is still on display. In particular, there is a wonderfully detailed discussion of dissent in civil law system. There is a tendency amongst common lawyers to assume that civilians don't dissent. The less polite ones may privately think, like the New York Court of Appeals judge Stanley Fuld, that the willingness of common law judges to dissent is a reflection of such judges possessing 'a lot more intestinal fortitude, tougher hides, if you will, than their brethren in Europe.'[4] In fact, the picture is much more nuanced, and common law is not a dissenter's paradise nor are civilian systems dogmatically against any forms of dissent.

The nuance is taken further by the point that dissents are not always easy to identify; is a speech concurring in part with the outcome a dissent? Is an opinion which agrees with the majority, but the judge is *dubitante* a dissent? Most of all, in the great tradition of *seriatim*, is any one speech a dissent or a majority, or is it all really just a long conversation in the Lords? This uncertainty about dissent and majority has always had opponents, perhaps most famously Marshall CJ in the USA, but also in England. The Judicial Committee of the Privy Council avoided dissent until the 1960s, on *inter alia*, the grounds that it was untenable to have advice to the Sovereign be conflicting. Today, the Criminal Division of the Court of Appeal is mostly prohibited from dissenting in cases,[5] for a variety of confused reasons which seem to boil down to paternalistic worries losing defendants will point to the dissent as proof of their innocence or a vindication. It makes, as Duxbury shows, very little theoretical sense why, if dissents have such drawbacks, rules against them ought to be confined to only one area of law, or conversely, if dissents have such public benefits to developing the law, why we deny this in criminal appeals.

The picture becomes even more mixed in light of the anti-dissent wave in the English judiciary in recent years, which has left *seriatim* looking like an Australian phenomenon rather than an English one.[6] The modern push for more and more opinions of the court and the rejection of dissent (and even more of assenting opinions) occupies the final, dissentient, part of the essay. Duxbury makes the case, calmly, scholarly, and subtly, that the tendency to hide away the behind the scenes judicial disagreement robs the public of insight into the process, and presents to us a partial, artificial view of judging. This rising trend, against which the author gently fights, takes away not only the romantic aspects of dissent—the Cardozo J image of a judge speaking not to the court but rather to History—but also the quotidian aspect of higlighting and discussing areas of law which the majority decision may not have even considered. Lord Wright's point about the weight of an apex court does have some merit here, in that the apex court judges are usually bright chaps (or chapesses) and their opinions, 'losing' or 'winning' are usually valuable insights as to the law. Outcomes of cases may be binary, but law is a discursive field, and so legal analysis must necessarily contain multitudes, not a single voice.

Duxbury's dissent is a most welcome one, and the essay is, appropriately quite persuasive. Indeed, each

4 'The Voices of Dissent' (1962) 62 Colum L Rev 923

5 See the Senior Courts Act 1981, s 59

6 And even in Australia, *seriatim* is in decline; see, *eg*, J Gans, 'The Great Assenters', *Inside Story*, 1 May 2018.

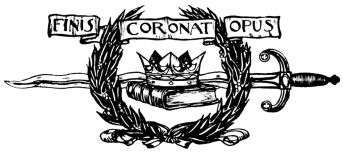
essay alone in this volume would be well-worth the purchase price, and it is a tome which I shall constantly be referencing in years to come. Anyone writing on either *dicta* or dissent shall firmly stand upon the shoulders of this book. There is, though, one small point which I feel is neglected and which future study ought to cover: the role of style. To what extent are the great dissents, the iconic *dicta*, the important aside remarks, quoted and quoted as authoritative because they are remarkably well-written? If dissents are sometimes cited because they are well-reasoned, or because of the reputation of the wisdom of the jurist, surely they are just as often cited because the stylistic choices make the passage exceptionally memorable and more convincing than the dry reasoning of the majority. Writing and style is intertwined with persuasiveness, and the great judges are often remembered as much for their turns of phrase as for their actual decisions (here Holmes J comes to mind). The iconic *dicta* tend to have the ineffable brilliance of perfect, unforgettable style; think, for instance, of Stewart J's 'I know it when I see it'.[7] This is an area with little discussion in these essays (which is reasonable given how much they already cover), and one ripe for future exploration.

Duxbury's essays examined the question of judges' persuasiveness, but there is a perhaps equally important aspect of judicial character: judicial humorousness. Judges, after all, are vehicles for the humour of incongruence; they are out of touch, hidebound, confused by the modern world. The standard jokes about judges (*eg*, counsel having to explain the Beatles as 'a popular beat combo, M'lud') have persisted for decades precisely because they resonate with lawyers and the public as reflecting the stock character of 'judge'. The collection *Judges, Judging & Humour* (Palgrave Macmillan) is a disjointed series of papers on the topic of judges and humour, divided into three parts: humour about judges, judges' use of humour in the courtroom, and judicial decisions about humour. In these divisions, the collection starts to show its weaknesses, because it is astonishing there is no part about humorous judgments. Jokes, puns, and wry sarcasm are plentiful in written judgments, yet this is essentially absent from the volume. Instead, we get terribly dry sociological discussions, like one about the use of humour in Swedish courtrooms. The chapters together have minimal connection in theme, even within the part, and this reads like a fix-up of vaguely connected scientific papers rather than a true unified scholarly work. It may be that it isn't meant for lawyers, but who other than legal academics would seriously be interested in a book about the relationship between judges and humour?

Worst of all though, this book makes an unpardonable error for a work about humour: it is not in any way funny. A serious history of humour is missing the point if it ignores actually using humour, and ironically showing it doesn't take humour seriously. The gold standard for this is probably Jeremy Dauber's *Jewish Comedy: A Serious History* (Norton, 2017), which despite dealing with the most serious and grave subjects imaginable (it's Jewish history, after all), consistently recognises that a study of humour must contain some good jokes. If we want to understand why and how people laugh in the courtroom, or why judges put jokes into decisions, or how judges evaluate workplace jokes, then we must understand why the the jokes at hand are funny enough to puncture the extremely serious atmosphere of court. Instead, this book was a long slog with no reward. If it were a standup, it would have been well-worth a heckle. Ironically, the only part of the book worth reading is the foreword by a funny former judge (the Hon Michael Kirby AC CMG), who

7 *Jacobellis v Ohio* (1964) 378 US 184, 197

manages to outdo the the hundreds of succeeding pages, by showing that judges can actually make funny jokes. If you must read this book, I suggest you stop after the foreword ends.



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