

Review Essay

The Other Things Said

The Intricacies of Dicta and Dissent by Neil Duxbury
(2021) Cambridge University Press, 278 pp
ISBN 9781108794886

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Abstract

The common view in legal education and practice has been that obiter dicta or ‘the things said in passing’ are not part of the corpus of legal reasoning that is binding, which then begs the question, ‘If so, what is their value?’ This review essay offers a detailed overview of Neil Duxbury’s *The Intricacies of Dicta and Dissent*, highlighting the significance of Duxbury’s contribution to the literature on this important subject. Against a backdrop of few book-length treatments of these commonly deemed ‘subsidiary’ forms of legal reasoning, Duxbury offers a comprehensive historical account of dicta and dissent in adjudication, and of their varied impacts on legal development. Though falling short of advancing a normative account, Duxbury’s book nevertheless provides a nuanced and balanced description of the natures of dicta and dissent, engaging with the complexities of judicial reasoning beyond a conventional black-and-white approach. In so doing, this book sets the groundwork for any normative analysis of the role dicta and dissent can play in shaping common law principles. It is anticipated that this book will remain an invaluable contribution to the field of judicial interpretation, especially as a necessary, vital resource upon which future scholarship may build.

Please cite this review essay as:

Constance Youngwon Lee, ‘The Other Things Said’ (2024) 46(1) *Sydney Law Review* 119.

DOI: <https://doi.org/10.30722/slr.19656>

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I Introduction

The Intricacies of Dicta and Dissent provides a critical contribution to legal scholarship by offering a detailed examination of frequently overlooked forms of judicial reasoning. While acknowledging the abundance of scholarship on judicial reasoning more broadly, Neil Duxbury's book stands out for its sustained attention to two forms of reasoning which are often deemed subsidiary.¹ His central enquiry is whether the relegation of dicta and dissent to secondary sources of law should preclude a genuine examination of their potential to influence the development of common law. By discussing the ontology of dicta and dissent as distinct forms of reasoning, notwithstanding their embeddedness in a primary source of law (the judgment itself) Duxbury raises questions about their legal authority. It is this intentional emphasis on the inherent complexity of judicial reasoning which makes this work unique, opening the door for a more fruitful discussion of dicta and dissent. This book presents an insightful exploration of the potential value of dicta and dissent decidedly on their own terms and not as 'mere' offshoots of the *rationes* of the same judgment.²

As a sequel to Duxbury's previous work, *The Nature and Authority of Precedent*,³ the principal value of this book is epistemic. This is apparent in the way the author explores various theories of interpretation, critically assessing the force and limitations of their arguments, and in how he reflects on the obstacles that the legal method habitually faces in distinguishing the ratio from other parts of a judicial decision. Duxbury's rigorous historical assessments offer the possibility of a more nuanced appreciation of the role of dicta and dissent in common law contexts. Using a wide lens, he captures the intricacies of dicta and dissent and the ways in which these two forms of reasoning have shaped legal discourse for centuries and continue to influence the evolution of common law.

Duxbury boldly accepts the challenge integral to any exploration of the nature of dicta and dissent, in terms not only of theoretical depth but also of epistemic scope. However, this expanse does not deter the author who insists that, like the nature of the judicial office itself, the task (however challenging) must be discharged. As Duxbury recognises, the vexed nature of these 'extra judicial statements' means that ignoring them would be as perilous as submitting to the inherent risks they pose. All this informs his multi-faceted approach, and he embarks on the exercise of historical exploration with the caution, reticence and hesitancy appropriate to the subject matter.

In this context, the sheer breadth of Duxbury's inquiry is impressive. Though his focus is understandably the English common law, his account is replete with references to comparative judgments from appellate courts in the United States, Canada and Australia. Nor is his inquiry limited to a certain area of law, spanning constitutional law, the law of contracts, torts and even property law. These comparative analyses enrich the author's account overall, strengthening his

¹ Neil Duxbury, *The Intricacies of Dicta and Dissent* (Cambridge University Press, 2021) Prologue.

² *Ibid* 13.

³ Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008).

theoretical observations with a degree of comprehensiveness. As such, Duxbury's thorough account has the potential to benefit both proponents and critics of the view that obiter dicta and dissent carry legal weight in and of themselves.⁴

The overall vision for the book is a constructive one: to provide an explanatory framework by which lawyers and judges might better understand the process of adjudication. To this end, Duxbury's intention is twofold: to describe what constitutes dicta and dissent, and to prescribe their practical and epistemic value for legal practice. Though Duxbury does not explicitly identify the supporters and critics of dicta and dissent, it can be inferred from his treatment of the topic that supporters may include legal scholars who appreciate the practical and epistemic value of these concepts in legal practice. These supporters may argue that dicta and dissent are essential for understanding both the reasoning underlying legal decisions and the trajectory of meaning. On the other hand, critics of these forms of juristic reasoning may argue that they pose inherent risks and uncertainties to the legal system and that placing emphasis on them may translate to confusion and uncertainty in legal practice.⁵

The book comprises two extended essays: the first dealing with obiter dicta, the second with dissenting judgments. Both essays are organised similarly and are informed by a historical perspective. This approach allows the author to provide a nuanced commentary on the nature of dicta and dissent while remaining sensitive to the evolving attitudes of the judiciary towards their value over time. On this point, Duxbury's focus on the integrity of the common law is reminiscent of FA Hayek's theory of the spontaneous order, in which a series of cases over time leads to a self-organising system.⁶ This premise may well account for the author's interest in dicta and dissent as part of a broader system of legal communication, rather than just the ratio. This review examines the content of the book, critiquing it systematically according to the author's own structure, and considering first dicta and then dissent. It concludes with a few comments on the overall aim, and the strengths and weaknesses of the work.

II On Dicta

Duxbury begins the first essay by speculating on the ontology of obiter dicta. He acknowledges the fraught nature of the concept, and laments the lengths to which legal theorists have gone in debating it without reaching any definitive conclusions. He notes the prevalent view that dicta are not actual sources of law but secondary parts of the judgment. While the general view denies that dicta form part of the *stare decisis*, Duxbury questions how dicta can be dismissed when they are so intertwined with 'the [very] substance of the common law'.⁷ In other words, in spite of its fraught nature, discussions of the value of dicta cannot be sidestepped. He admits that this is

⁴ Duxbury (n 1) xxiv–xxv.

⁵ Ibid 14–17.

⁶ FA Hayek, *The Constitution of Liberty* (University of Chicago Press, 1978) ch 11. See also FA Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *American Economic Review* 519.

⁷ Duxbury (n 1) 5.

a potentially complex issue and risks judicial adventurism given the unfettered discretion to delineate the boundaries between dicta and ‘valid’ law. Despite this risk, the author maintains the need for a sustained discussion of dicta’s nature and value.

This noted, Duxbury embarks on an exploration through the centuries, across the English law reports, to trace dicta’s development. Using an etymological lens, he begins with the definition of obiter dicta as ‘judicial statements’ made in the ‘context of legal statements’ that are not directly relevant to ‘the matter at hand’.⁸ In exploring the diachronic nature of obiter dicta, he notes that they are not identifiable by the original utterer but retrospectively by someone whose interests are impacted by the judgment at a later date (‘ex post facto’).⁹ To structure this discussion, Duxbury divides dicta into functional categories and subcategories, including ‘loose dicta’, ‘weighty dicta’ and ‘standard dicta’.¹⁰ The classification system immediately highlights the breadth and gradation of the subject for enquiry. Additionally, the chronological approach draws attention to the scope and complexity of evaluating dicta, emphasising the significance of the simple act of engaging in conversations about them.

Duxbury’s discussion reflects a historical approach, focusing on dicta’s etymological development against the backdrop of legal and social progress. He notes the emergence of *stare decisis* in line with the growth of judicial power in the 16th century. This growth, in turn, elevated the production of dicta to the status of ‘a recognisable function of the judiciary’,¹¹ though it was not until the 17th century that dicta were deemed to have legal authority in a more formal sense, with the possibility that some dicta might even be ‘binding’.¹²

The author then asks whether dicta ought to be conceived as more than mere observations made in passing.¹³ As well as tracing the historical evolution of dicta, he explores their epistemic potential in aiding legal interpretation. Duxbury directly challenges the notion of dicta as redundant commentary, suggesting that it can be used to clarify ambiguities in expression caused by human error in statutory interpretation,¹⁴ or to tidy up the loose ends falling outside a court’s ruling.¹⁵ This idea clearly draws on HLA Hart’s concept of the ‘penumbra’ which describes where legal terms fall outside the core of settled meaning.¹⁶ And it is dicta’s explanatory function as a guide to judges and lawyers which gives them their normative value.

However, Duxbury’s jurisprudential acumen while evident is also narrow. Where he diversifies, he does so without clear explanation. His selective use of legal theories outside the British jurisprudential tradition without enunciating the reasons

⁸ Ibid 3.

⁹ Ibid 26.

¹⁰ Ibid 28–9.

¹¹ Ibid 24.

¹² Ibid.

¹³ Ibid 43–5.

¹⁴ Ibid 38–9.

¹⁵ Ibid 39.

¹⁶ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593, 607.

for the selection might expose him to accusations of cherry-picking the normative positions that best favour his case. For example, the author appeals to Aristotelean philosophy to dismiss arguments that dicta are not adequately supported by public opinion, but does not explain this jurisprudential choice. By importing Aristotle's concept of *communis opinio*,¹⁷ the author is able to argue that dicta must be considered in light of public opinion to ensure they align with the community's values and norms.¹⁸ Moreover, by leveraging Aristotle's dialectical method, the author effectively defends the value of dicta as an essential tool for judges to uphold the rule of law while also recognising the need to balance their authority with the collective conscience.¹⁹

Another example of arbitrary jurisprudential selection is the author's invocation of Lon Fuller's functional natural law concept of the law's internal morality.²⁰ Fuller emphasised the importance of legal systems producing legal rules that people can realistically follow. In considering the need for legal rules to be realistically tractable, Duxbury presents a practical argument for the preservation of dicta in legal precedent. This use of Fuller's ideas adds depth to Duxbury's analysis, providing a cogent theoretical framework to justify considerations of dicta. Duxbury's theoretical insight, in turn, offers a platform for deeper discussion of the potential dangers of dicta. In this sense, the author's attempts to diversify the grounds of his normative evaluation reflect a conscious effort to adopt a more panoramic perspective.

The author then turns his attention to the risks and potential dangers of an unbridled use of dicta by judges. These arise from the indiscriminate use of dicta, which may have unintended consequences for the rule of law. With this cautionary note, Duxbury weighs these risks against dicta's potential to act as a safeguard against ultra vires lawmaking. He argues that the dicta in question must be retained within the common law precedent to maintain the appearance of judicial independence.²¹ In other words, the normative value (in both function and perception) of dicta in preserving the rule of law and maintaining the balance of power must be carefully considered when assessing their true value in the legal system.

In addition, the author anticipates potential criticism of the argument that dicta serve to advance constitutional norms.²² While acknowledging the attendant risks of indiscriminate dicta in allowing judges to overstep their roles, Duxbury also highlights the important role dicta can play in shaping and refining legal norms. As noted, dicta can act as a check on ultra vires lawmaking, especially in cases where

¹⁷ Aristotle, *The Art of Rhetoric*, tr Robin Waterfield, ed Harvey Yunis (Oxford University Press, 2018) bk 1, ch 2. See also Aristotle, *Politics*, tr Ernest Barker (Oxford World's Classics, 2009).

¹⁸ Duxbury (n 1) 10–11.

¹⁹ Émile Durkheim, *De la division du travail social* [The Division of Labour in Society] (Presses Universitaires de France, 2nd ed, 2004) 46.

²⁰ Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) ch 2.

²¹ Duxbury (n 1) 100. See further on this point, Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36(1) *Melbourne University Law Review* 175.

²² The author later notes the reasons for his differentiation. In constitutional law, the observation of the rule of binding precedent appears weaker than in other areas of law: Duxbury (n 1) 185.

the legislature has failed to address an issue adequately.²³ To mitigate the risks of excessive judicial power through dicta, Duxbury proposes²⁴ a Dworkinian approach that considers the ‘weight of opinion’, which is grounded ‘in reason’ and bounded by sound constitutional structures.²⁵ By approaching dicta with a reasoned and structured methodology, judges can ensure that their pronouncements retain normative value and contribute to the ongoing development of the common law.²⁶

The author concludes the first essay by considering the implications of taking dicta too seriously. There is a fear that the complex nature of judicial reasoning may facilitate the undermining of judges’ perfunctory role in *most* cases.²⁷ The assertion is that, given the complexity of judicial reasoning, conferring more weight to dicta will necessarily increase unfettered judicial discretion. This is reminiscent of what Julius Stone referred to as the risk of increased ‘leeways of choice’.²⁸ Duxbury asks whether this would be the result in *all* cases. To his mind, what critics fear is already true to some extent — judges are not simply deducing and applying the law based on a set of determined facts but are, rather, making choices based on their personal value commitments.²⁹

In so doing, Duxbury concedes that judicial reasoning generally encompasses the risk that judges might rely on their personal commitments in service of making judgments. However, he questions whether the threat of increasing judges’ discretionary powers through dicta is always problematic. Certainly, the risk is greater in terms of ‘binding dicta’, but he argues that to avoid considering *all* dicta on these grounds, especially where judicial discretion is already unavoidable, would be throwing the baby out with the bathwater. He thus concludes that the value of dicta might warrant the acceptance of some risk. This evaluation of the potential risks and benefits of dicta demonstrates the nuanced nature of Duxbury’s assessment of precedent. Through a multi-dimensional engagement with complex concepts, oscillating between theoretical and practical considerations, while giving heed to diachronic factors, the essay represents a critical and reflective approach to legal reasoning.

III On Dissent

In his second essay, Duxbury expands on his analysis of dicta, highlighting the ways in which it can be a useful tool for legal professionals. He argues that dissent — which is, technically, obiter dicta — can play an important role in shaping legal discourse, as well as fostering a more robust and dynamic understanding of the law. In particular, he suggests that dissent can be valuable in situations where the law is in flux or where there is significant disagreement among legal experts about how to

²³ Duxbury (n 1) 9.

²⁴ Ibid 100.

²⁵ See Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986). See also Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999) ch 1.

²⁶ Duxbury (n 1) 76.

²⁷ Ibid 100.

²⁸ Julius Stone, *Precedent and Law: The Dynamics of Common Law Growth* (Butterworths, 1985) 168.

²⁹ Duxbury (n 1) 106.

interpret a particular legal principle or precedent. At the same time, Duxbury acknowledges that dissent can be problematic, particularly when it is used as a means of challenging well-established legal principles or is employed for strategic purposes. He notes that some judges may use dissent as a way of signalling their ideological leanings or their willingness to push the boundaries of legal interpretation, rather than as a genuine attempt to engage in reasoned debate about the law. In such cases, dissent may serve to undermine the authority of the judiciary and to create confusion or uncertainty in legal decision-making.

As with his discussion of dicta, Duxbury prefaces his critique of dissent by examining its lexicology. He starts by isolating the definition and ordinary meaning of the term ‘dissent’. Viewing it in broader terms than simply as a species of dicta, he acknowledges the pitfalls of adopting a narrow conceptualisation. As to the descriptive question, Duxbury cites the American legal realist Oliver Wendell Holmes to expose the underlying complexities and controversies around dissent’s definition. Holmes noted that it would be foolish for someone (‘a bad man’) to rely on dissents as a defence.³⁰ Using this realist account as a springboard, Duxbury first interrogates the ordinary meaning of dissent by distinguishing it from plain disagreement.³¹ Dissent is a position taken against another, as opposed to disagreement which is opposition to another’s arguments. This broader framing of dissent highlights the importance the author places on dissent’s context dependency in a relational context. Duxbury follows by contending that success in terms of using dissent in future cases is contingent not only on the judge’s favoured ideological position but also on whether the position itself was feasible in the first place.

Duxbury observes that the term ‘dissent’ carries associations beyond the simple act of taking a different position. While the relationship between the dissenter and the dissented perspective is always asymmetrical, with the dissenter at the bottom, this does not necessarily mean that the dissenter’s underdog status is favourable per se. On the other hand, it would be equally misguided to assume that dissenters are always to be cast in an adverse light, as merely argumentative or contrarian.³² The truth is far more nuanced. A person who takes a differing position is not necessarily right or wrong in all contexts, and their perspective must be evaluated on its merits. The author thereby debunks at the outset a few misleading stereotypes associated with the term. Once again, he labours over the importance of critically examining these legal concepts in light of their associations in order to fully appreciate their implications.

In his effort to broaden the concept of dissent, the author explores the idea in legal systems beyond English law courts. The reason for this appears epistemic. Judicial dissents are not uniform; nor are they unique to English law, and can vary across legal systems. A thorough treatment would therefore warrant examining their variations as influenced by the various contexts (and the various legal systems) in which they occur. The author approaches the subject matter open to delving into the

³⁰ Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10(8) *Harvard Law Review* 457, 460, quoted in Duxbury (n 1) 127.

³¹ Duxbury (n 1) 131–2.

³² *Ibid* 127.

complexity of the topic and meticulous in his attention to detail. His aim of providing a more nuanced understanding of these concepts made evident in the essay on dicta becomes even clearer in his essay on dissent.

In Section 6 of the second essay, Duxbury highlights the influence of judicial culture in English appellate courts on the acceptance of dissenting opinions. He observes that unanimity has historically been highly valued in English courts, and that this can be attributed to the lack of written records in medieval English courts. The absence of a written record meant that any disagreement among judges had to be worked out through discussion, and unanimity was seen as a way of maintaining a cohesive and authoritative judgment. However, over time, this pull towards unanimity weakened and dissenting opinions have become more acceptable in English courts. Despite this, the author believes that the temptation to conform to the majority view still exists. There is plenty of evidence to support Duxbury's view that the pull towards unanimity remains strong. For example, in the Australian High Court, the (now retired) Chief Justice Susan Kiefel was vocal in extolling the benefits of 'fewer individual judgments' on the grounds of clarity, stability and public confidence in the High Court's decisions.³³ As Duxbury suggests, this 'judicial approach' is not uncommon and unanimity is still seen as the ideal to strive for³⁴ — something reflected in the way judgments continue to be written and presented.³⁵

Moreover, Duxbury highlights the importance of historic, cultural and community contexts in understanding the role of dissent in judicial decision-making. While unanimity may be less of a priority than it once was, it continues to affect the way judges approach their work, and the way their judgments are perceived.³⁶ The author's nuanced analysis of the influence of judicial culture on the acceptance of dissent underscores the complexity of the topic and highlights the need for careful consideration of the various factors at play.

Duxbury also argues that, even on a minimalist view, dissents play an essential role in the legal reasoning process as formulations of legal principles.³⁷ He dismisses criticisms that Hart's 'rule of recognition'³⁸ denies dissent's status as a source of law. Duxbury concedes that the rule of recognition might fail to establish which dicta carry special epistemic weight.³⁹ But he clarifies a notion attributed to Hart that dissent has no legal significance: the argument that 'rights and duties are not altered by dissent' does not 'deny the possibility of rights and duties altering' when 'new law is created in response to ... dissent'.⁴⁰ In the first essay, Duxbury illustrated this point by identifying that, in certain jurisdictions, dicta have been

³³ Justice Susan Kiefel, 'The Individual Judge' (2014) 88(8) *Australian Law Journal* 554, 557.

³⁴ Duxbury (n 1) 200–4.

³⁵ Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2017 Statistics' (2018) 41(4) *UNSW Law Journal* 1134.

³⁶ See Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

³⁷ Duxbury (n 1) 185.

³⁸ HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 94–5.

³⁹ Duxbury (n 1) 100.

⁴⁰ *Ibid* 162–3.

recognised and given weight even when the rule of recognition has been modified.⁴¹ He builds on this point when he suggests that the test to assess dissent's value is not as straightforward as simply reverting to 'the rule of recognition'. There are clearly other factors at play in determining dissent's epistemic value.

Duxbury goes on to maintain that statements of general legal principle which do not form part of the legal reason for the decision can, nonetheless, hold significant sway, even to the point of becoming the case's legacy. To dismiss dissenting judgments would be to weaken 'law as a science', in the expression of Lord Atkin.⁴² He refers to Lord Atkin's own opinions in landmark decisions such as *Liversidge v Anderson*⁴³ and *Donoghue v Stephenson*⁴⁴ whose dissenting judgments assumed 'iconic' status and were accorded precedent-like authority.⁴⁵ Duxbury notes that in the 19th century, judges even began to consider the possibility that some dicta might be binding in the same way as ratio decidendi.⁴⁶

Once again, the author's pattern of reasoning involves closely examining the semantics of legal concepts to gain a better understanding of their basic attributes and the implications that follow. As in his earlier exploration of dicta, Duxbury looks beyond narrow legal definitions to explore wider effects. Through this, he demonstrates his legal expertise as well as the complexity of the legal concepts he is treating. Through such careful examination, he offers legal professionals a more sophisticated understanding of how dissent operates within the broader legal system.

In this way, Duxbury's discussion of dissent raises important questions about the role of judges and the extent to which they should be allowed to depart from established legal principles in pursuit of their own ideological agendas. Again, the author recognises the potential benefits of dissent, while conscious of its limitations and risks. His analysis will interest legal scholars and practitioners, but also appeal to anyone with an interest in the relationship between law, politics and society.

IV Comments

Ultimately, *The Intricacies of Dicta and Dissent* is a valuable contribution to the ongoing conversation about the role of dicta and dissent in shaping the common law. The author makes a compelling case for the proposition that dicta can have significant impact on the development of common law principles. Duxbury contends that dicta, although not part of the legal reasoning of a decision, can still become a case's legacy. Borrowing the words of Lord Devlin: 'A judge-made change in the law rarely comes out of a blue sky. Rumbblings from Olympus in the form of *obiter*

⁴¹ Ibid 102.

⁴² Lord Justice Atkin, 'Appeal in English Law' (1927) 3(1) *Cambridge Law Journal* 1, 9, cited in Duxbury (n 1) 235.

⁴³ *Liversidge v Anderson* [1942] AC 206. See at 242 where Atkin JA describes the Court of Appeal as being 'infected with the "subjective virus"'.

⁴⁴ *Donoghue v Stephenson* [1932] AC 562.

⁴⁵ Duxbury (n 1) 236–7.

⁴⁶ Ibid 237.

dicta will give warning of unsettled weather.’⁴⁷ The dormant potential of *dicta* can signal what course the law should take.

In addition to shedding light on the elusive nature of *dicta* and dissent, the author aims to provide a practical framework for lawyers and judges to better understand the process of adjudication. To that end, the book serves both as a descriptive exercise (to explain the nature of *dicta* and dissent) and a prescriptive one (to outline their practical and epistemic value for legal practice). Through his comprehensive analysis, Duxbury makes a significant contribution to the field of legal scholarship, offering valuable insights that will be of interest to anyone who engages with common law jurisprudence. Ultimately, the book provides a constructive payoff, equipping readers with a deeper understanding of the intricacies of judicial reasoning and the potential impact of *dicta* and dissent on the development of common law.

Moreover, in examining these impacts, Duxbury does not hold back on addressing *dicta*’s potential to inhibit or disrupt the growth of common law principles.⁴⁸ He acknowledges that their nature is double-edged. The same force that enables *dicta* to contribute to the growth of common law principles can also be a drawback. For instance, a judge’s statement in *dicta* that a certain principle should not be applied in a certain way can hinder the development of the law by discouraging future courts from exploring that principle in greater detail.

Standing in a rather short line of legal theorists in studying these concepts on their own terms, Duxbury’s contribution is valuable partly because he dares to accept the challenge. Indeed, what sets this work apart is his willingness to engage in discussions about the complexities and mysteries of judicial reasoning, and his recognition that contrary opinions can be productive in advancing our understanding of legal concepts. In this undertaking, he proves successful. Through his use of jurisprudential and historical insights, Duxbury offers a comprehensive and nuanced account of the theoretical and practical potentials of *dicta* and dissent, while accounting for jurisdictional idiosyncrasies and the realities of legal practice.

To the extent that the author adopts a descriptive methodology, he remains safe from accusations of parochialism. This means that insofar as his assertions remain observational — for example, where he uses case law precedents solely to demonstrate the evolution of judicial attitudes towards *dicta* and dissent — he manages to maintain a neutral stance on normative issues. However, a possible weakness of Duxbury’s account might be found in an omission here. Where judicial interpretation remains strictly legal, it cannot appeal to normative claims for its authority.⁴⁹ Traditionally, theories of judicial interpretation rarely reach out to moral philosophy, anthropology or epistemology to resolve their immediate concerns.

It follows that such an insular purview in discussions of judicial reasoning has had the general effect of making the judicial task appear elusive, shielding it

⁴⁷ Ibid 42, quoting Patrick Devlin, ‘Judges and Lawmakers’ (1976) 39(1) *Modern Law Review* 1, 10.

⁴⁸ Ibid 43.

⁴⁹ Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 37–52.

from wider scrutiny, but also diminishing its perceived authority over time.⁵⁰ In other words, this type of esotericism facilitates too quick a transition from descriptive characteristics to prescriptive demands, without addressing the latent normative issues. Duxbury's shying away from conversations about the reasons for judicial interpretation means that his discussion reaches a limit at the point where his analysis turns prescriptive. In a time when it is widely accepted that the 'disembodied judicial officer' is a myth,⁵¹ the need for transparency about his choice of normative reasons and his precise methodology for discussions of dicta assumes greater urgency. In this context, Duxbury's book may have benefitted from a simple recognition of the normative silences that characterise discussions on dicta and his thoughts on the best direction for future conversations.

⁵⁰ See Harold J Berman, *Law and Language: Effective Symbols of Continuity*, ed John Witte Jr (Cambridge University Press, 2013) 65.

⁵¹ Erika Rackley, 'Representations of the (Woman Judge): Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22(4) *Legal Studies* 602. See also Mike McConville and Luke Marsh, *The Myth of Judicial Independence* (Oxford University Press, 2020) ch 10.