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JUDICIAL CONFIGURATIONS

PERMUTATIONS OF THE COURT AND PROPERTIES OF JUDGMENT

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A. Introduction: Experimentation and Improvisation

A PREVIOUS paper explored how the composite judgment has swiftly, and without ceremony, taken its place as one of the routine judicial tools in the Civil Division of the Court of Appeal.[1] It was pointed out that approximately one in seven of that Division's judgments are now delivered in this unified, collective format. This proportion may still be rising. Indeed, it is even possible that these collectivist tendencies are leaching across into the Criminal Division, where it is noticeable that the Court more frequently emphasises that its solitary judgments actually represent the united labour of all three members.[2] It was also argued in the earlier paper that the English judiciary's drift away from its traditional, individualistic approach to the delivery of judgments is likely to have an impact on both the "texture" and the content of appellate judgments. The tone of many appellate decisions, especially the composite ones, is distinctly *dirigiste*: they can almost approximate to a dilute form of legislation, simply because the court is self-consciously presenting a decisive, united front. More generally, the shape of the English judgment is metamorphosing, too. Some judgments are now accompanied by a summary and index, the latter normally stated not to be part of the judgment itself.[3] This

* Fellow of Peterhouse, Cambridge. This paper derives in part from an address delivered by the author on September 23, 2001 on the occasion of the 19th Annual Conference of the Australian Institute of Judicial Administration, held in Hobart, Tasmania.

[1] See R. Munday, "All for One and One for All: The Rise to Prominence of the Composite Judgment within the Civil Division of the Court of Appeal" [2002] C.L.J. 321.

[2] *Hassan* [2002] EWCA Crim 1727 is one recent example. True, the case concerned a conspiracy to import cannabis with a British street value of £44 million. However, the comparative ease with which the court dispatched the appellant's grounds of appeal does make one wonder why exactly Henry L.J. felt it necessary to make explicit, "This is the judgment of the court to which all members have contributed."

[3] *E.g.*, *Sutherland* v. *Hatton* [2002] EWCA Civ 76. For another example of a composite Court of Appeal decision that comes complete with a summary ("which forms no part of this judgment"), an index and three appendices, see *R. (on the application of W)* v. *Mayor and Burgesses of London Borough of Lambeth* [2002] E.W.C.A. Civ 613. The occasional Divisional Court case, too, incorporates a summary and index: *e.g.*, *Hoverspeed Ltd.* v. *H.M. Customs & Excise* [2002] E.W.H.C. (Admin.) 1630. Appendices have figured in several cases: *e.g.*, *Morgan Grenfell & Co.* v. *Isituto per i Servizi Assicurativi del Commercio* [2001] EWCA Civ 1932.

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almost gives them the semblance of reports of a departmental committee rather than traditional English judicial utterances. Some judgments now come with subtitles, and even postscripts are appended.[4] Meanwhile, neutral citation,[5] with numbered paragraphs that occasionally read more like bullet points than connected prose,[6] compounds this impression. One could add that many judgments today are unquestionably more concerned to take in the broad picture and set out to regulate entire classes of case rather than simply settling the *lis* before the court, as has hitherto been English law's normal practice. Plainly, we have entered an era of active judicial experimentation.[7]

In addition to an introductory summary that is faintly reminiscent of a schoolchild's essay plan, the case of *Sutherland* v. *Hatton*[8] has another ominous feature that perhaps merits attention. Hale L.J. relegates the court's full analysis of the facts to an extended appendix.[9] It is commonly said that one of the pre-eminent features of the common-law judgment, which differentiates it sharply from its Continental counterparts, is the court's almost obsessive attention to the facts. The facts are inextricably woven into the law. The common-law judge's judgment is grounded in and grows out of fact. Pierre Legrand has suggested that in the common law "it would not be excessive to observe that the facts take the place of the system: their enhanced role is the result of an absence, that of a conceptual system; in sum, the facts occupy the

[4] Thus, in *English* v. *Emery Reimbold & Strick Ltd.* [2002] EWCA Civ 605, three "conjoined" appeals in which the Court of Appeal—needless to say, in a composite judgment "to which all members (had) contributed"—gave guidance on a judge's duty to give reasons, Lord Phillips M.R. added a short postscript underscoring for the slower of understanding "the two lessons to be drawn from these appeals" (at [118]). See also, *Fox* v. *H.M. Customs & Excise* [2002] E.W.C.A. (Admin.) 1244.

[5] See, *e.g.*, R. Munday, "'Official' Law Reports, Neutral Citation and other Curiosities: Another Visit to the Grand Canon" (2001) 165 J.P.N. 342.

[6] See R. Munday, "Law Reporting: Maintaining a Literate Common Law" (2002) 166 J.P.N. 284, 288–290. Lord Rodger of Earlsferry, in contrast, has suggested that, if anything, in view of the attention now paid to paragraphing thanks to neutral citation, "a short succession of short, staccato paragraphs can, whether intentionally or not, give a judgment an added appearance of decisiveness" ("The Form and Language of Judicial Opinions" (2002) 118 L.Q.R. 226, 236–237). Maybe so, provided that their number is strictly rationed. Eerily, when a Court of Appeal determines, for whatever motive, to deliver its reasons compositely, but "in very short form", with half a dozen sub-headed sections, all but one comprising only a single terse paragraph, the English lawyer's sense of *dépaysement* is surely complete: see *R. (on the application of Boulton)* v. *Leeds School Organisation Committee* [2002] EWCA Civ 884 at [2] *per* Sedley L.J.

[7] Even in criminal cases it is possible to detect an increased procedural fluidity. In *Hanratty* [2002] EWCA Crim 1141, for instance, a vast judgment, the three members of the Court of Appeal delivered a single, composite judgment but took the unusual course of dividing up the labour, with the Lord Chief Justice delivering paras. 1–74 and 203–215, and with Mantell L.J. being responsible for paras. 75–128 and Leveson J. for paras. 129–202. At the opposite end of the spectrum, in *Andrews* [1998] EWCA Crim 2885 (according to the "Bailii" version of the transcript) Roch L.J. provided a precis of the full judgment "for the benefit of those who have neither the time nor inclination to read the full judgment."

[8] Cited note 3 above.

[9] [2002] EWCA Civ 76 at [75]–[224].

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empty square." One is tempted to wonder whether, along with composite composition—a distinctively civilian habit, Hale L.J.'s relegation of detailed consideration of the facts to an appendix is not another sign of the times, a further potential surrender of common-law method, witting or unwitting. As Legrand points out, whilst "the common-law judge persistently operates at the level of the messy facts (and) is concerned with disorder", the civilian is preoccupied with order and inhabits a legal world where debate is conducted at the level of posited law, not of fact.[10] If the courts are growing ever more directorial, indulging themselves with the fantasy that they are the architects of a grand, overarching monument of handsomely-proportioned, interlocking legal principle, facts would naturally become an encumbrance.

These all constitute considerable changes. Has anybody noticed them taking place? Do even the judges suspect their potential lasting import? One might for instance have expected these shifts in judicial method to have figured prominently in Lord Rodger of Earlsferry's address to the Society of Public Teachers of Law in 2001, in which he accurately observed that "(English judicial) opinions are evolving from a form of communication that was normally oral to a form of communication that is normally written."[11] Mystifyingly, they did not—although, curiously, Lord Rodger did allude to two stray composite judgments delivered in the House of Lords of all places, where the composite delivery of judgments has only occurred very rarely.[12]

As recently as 1977, Lawson could write that "The judges in the Court of Appeal reserve judgment in only the most difficult cases. In the Civil Division they probably amount to between one-tenth and one-twentieth of the whole ... Accordingly, we must start from the position that the oral judgment is the rule."[13] Court of Appeal working practices have dramatically transformed since 1977. Nowadays, although it will still bring the traditionalist up short, it is far from uncommon to find appellate judgments that include phrases like "From all that I have *written* above[,] it is obvious ..."[14] A written culture is already upon us. The composite

[10] "What Borges can Teach Us" in *Fragments of Law-as-Culture* (1999: Deventer, W.E.J. Tjeenk Willink p. 76).

[11] "The Form and Language of Judicial Opinions" (2002) 118 L.Q.R. 226, at pp. 233–234 and 247 (postscript).

[12] For references, see R. Munday, "All for One and One for All", at p. 322, n. 2. The House of Lords, of course, has produced single judgments in other major cases, although not in the form of a single speech to which all the Law Lords have contributed: *e.g. Duncan* v. *Cammell Laird* [1942] A.C. 624; *Rookes* v. *Barnard* [1964] A.C. 1129. Equally, there exist a few examples of pairs of Law Lords collaborating in the composition of a single speech: see below, text accompanying note 112.

[13] "Comparative Judicial Style" (1977) 25 Am. J. Comp. Law at pp. 364–365.

[14] *Clibbery* v. *Allan* [2002] 2 W.L.R. 1511, 1540 at [99] *per* Thorpe L.J. (emphasis added).

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judgment, I would argue, is emblematic of that written judicial culture. English law's move away from an essentially oral tradition to a written system is unquestionably of fundamental significance. Technology, it should perhaps be added, has given an inevitable stimulus to this process. The practice of handing down written, composite judgments has been facilitated by word processing and the speed with which drafts of judgments can now circulate between members of a bench seeking to agree a common text. Nevertheless, whatever has motivated its change in method, it does seem curious that something as profound should have been introduced by our judiciary—possibly in part under pressure to deliver litigant-friendly, cost-conscious efficiency—without widespread prior discussion, even within the legal community. It is possibly even more remarkable that this should have occurred at a time when a number of our most senior judges are anxious to parade their would-be comparative credentials.[15] Surely, the central elements of any legal culture, which have always been taken for granted—even those of an English law, whose self-assurance appears now to be fast evaporating away—are deserving of more consideration than that.

It is legitimate to inquire whether our judiciary has borrowed its recent practice of delivering of composite judgments from another or other legal systems. After all, it would be natural to imagine that current preoccupations with convergence, European integration, globalisation and so on might provide the mainspring for this modulation in judicial procedures. The issue of the merging or submergence of national identities now extends into every area of English law and procedure. Somewhat improbably, the theme of European convergence even surfaces in the ecclesiastical courts. In *re Christ Church, Harwood* Manchester Consistory Court recently determined, for the first time,[16] that a memorial, erected by parents in breach both of the express terms of a faculty and of relevant graveyard regulations bearing their daughter's likeness in a photographic engraving, could nevertheless be retained in an English graveyard. In the course of a wide-ranging, evocative and sometimes moving judgment, having passed in review the styles of graveyard memorials found in various parts of Europe, Holden, Ch. inquired:

> But do we want a merging of these practices in all continental nations and here, so that all distinctive national characteristics disappear, or are overwhelmed by imported ones? Perhaps, in an economically integrated Europe that is a desirable thing. But

[15] See, e.g, Lord Woolf C.J.'s "Foreword" to Basil S. Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (1997: Oxford, Hart Publishing) pp. vii–viii.
[16] [2002] 1 W.L.R. 2055 at [37].

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> arguably the nations of Europe make a fuller contribution to their social unity by keeping some of their own distinctive and idiosyncratic characteristics. In any event, if we are prepared to lose the specifically English character of our ancient and even of our modern churchyards, we should do so by conscious choice, rather than by imperceptible though inexorable drift.[17]

Many of the changes identified above could be argued to fit within other broad patterns. The move towards written forms of judgment might be perceived to echo those increasingly written forms of argument introduced into civil litigation by the trim-line Civil Procedure Rules. Both these trends have a faint Continental flavour. A Continental drift might be confirmed in other matters. Although he was not encouraged to amplify his remark, in a recent interview Lord Phillips of Worth Maltravers M.R. ventured the opinion that "judgments are very long, and sometimes longer than they need to be. By and large, judgments have got a bit over long."[18] "Over long", by what yardstick? How long do judgments need to be? Continental courts would certainly deem English judgments too long—as would the average undergraduate. Alternatively, the agitated condition of the English judgment might just as easily reflect a symptom of that fashionable managerial obsession that now affects universities, schools—and, indeed, all facets of public life. Why should three or five judicial brains, which are in general agreement on the solution to a case, the logic runs, be occupied when two or four of them could be profitably employed in other quarters? Bitter experience, however, warns us that this quest for streamlined rationality all too frequently promotes inefficiency and loss of confidence with and within the institution. Finally, the new styles of English judgment may reflect our judges' desire to appear more acceptable, more "relevant" to the community they serve. Obviously, they wish to distance themselves from an attitude epitomised in Judge Michael Argyle's exquisite remark: "A lot of judges play golf. And if you play golf you couldn't possibly be out of touch." Composite judgments, clipped numbered paragraphs, indexes, moral lessons spelled out in *post scripta*, the subordination of fact to principle, all these features combine to create an impression that the law is coherent and readily intelligible even to those who dwell outside the legal conventicle. Might this not also explain why our senior judges—

[17] *Ibid.* at [25]. This theme of diversity and uniformity is addressed in several of the essays in Legrand and Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003: Cambridge, Cambridge University Press) forthcoming.

[18] S. Hawthorne, "The Master of All He Surveys" (April 2002) Counsel, at p. 11. Lord Phillips is, of course, quite correct. Having recently sampled the last 25 years of reported cases, I have been struck by the increasing length of English civil judgments.

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Lord Bingham of Cornhill,[19] Lord Woolf C.J.,[20] and Lord Phillips of Maltravers M.R.[21]—are anxious to grant press interviews? It is a strategy that can of course backfire once one is perceived as attempting to manage the media. However, such information as is forthcoming would suggest that, when refashioning the English judgment, Europe is not the model to which the judges have been particularly looking. The example of the United States is sometimes acknowledged to be closer, although it is likely that no particular model is being followed. The process is partly one of improvisation and "trial and error". In the words of Holden, Ch., then, it may simply be "inexorable drift."[22]

I would maintain that the "style" and, more particularly, the manner of composition of English judgments may actually matter rather more than has hitherto been appreciated. We cannot necessarily assume that the courts will be minded in the future to treat many things in this domain as sacrosanct. Nevertheless, before too much erodes away, it seems vital to take stock, and to determine which elements exactly are important, and why. (We might also ask ourselves another obvious question: Why are other legal systems, which, we know, are not without their faults, not also hell-bent on altering their ways?) The changes in English judgments are clearly perceptible; the reasons for them are not always so evident. Some changes, I suspect, are simply a result of "drift", inexorable or otherwise; some, we shall see, are entirely explicable in terms of the tested traditions of the common law; others, however, are less easy to explain. Although this paper will attempt to offer some explanations, and even justifications, for our morphing methodologies, regretfully I do not have the impression that the changes form part of a fully thought-out, coherent strategy. On the contrary, many have almost an impromptu quality—a phenomenon that argues strongly for a more considered approach. There are two distinct issues. On the one hand, there is a question as to whom precisely the courts imagine they are addressing (for whom are they writing, is perhaps more accurate) when they deliver judgment? Then, there is the question whether the quality of their product, in terms of that audience or those audiences, is affected by the different modes of delivery. These are far from negligible questions.

This second paper will examine some of the wider issues cast up when courts ring the textual changes, adopting different permutations. None of the questions, it must be stressed, is easy to

[19] *The Times* (2001) 16 July.
[20] *The Daily Telegraph* (2002) 29 July.
[21] Cited note 18 above.
[22] Note 17 above.

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formulate; none, it seems to me, has an easy answer. All the same, the paper will consider the somewhat tendentious matter of "judicial style", a subject dear to some comparatists' hearts. It will explore the knotty question, glossed over even by many writers on precedent: What exactly is the virtue of the concurring judgment? It will also consider how the quality of judgments may be affected by collaborative composition in a comparative context, taking in what little comparative evidence there is to inform the debate. It is futile to pretend that this paper offers final answers to any of these questions, for they raise issues of disconcerting complexity. Yet, to pass them over in silence would be scandalous.

B. Systems in Flux: Affirmations of Individualism in the Court of Appeal and in the Judicial Committee of the Privy Council

Although the previous paper[23] deliberately highlighted the rise to prominence of the composite judgment, when one takes in the entire panorama of the courts a more accurate picture is one of a system in flux. It is true that the majority of composite judgments avoid ascribing the responsibilities of authorship to particular members of the court. Either they give no indication as to which member of the court was primarily, or even entirely, responsible for the judgment[24] or they resort to stiff formulae such as "the judgment of the court to which all members of the court have made substantial contributions"[25] or, rather improbably, to which "all members of the court have contributed equally".[26] From time to time, however, individual credit is given. In *Kuwait Airways Corporation* v. *Iraqi Airways Co.*, for instance, Brooke L.J. was at pains to spell out, "This is the judgment of the court to which all its members have contributed. Rix L.J., in particular, is substantially responsible for paras. 22–35 and 43–54 of the judgment."[27] The Court of Appeal may not always feel entirely easy with a method of delivering judgment which deprives individual members of the court of due credit for their especially valuable

[23] "All for One and One for All", cited note 1 above.

[24] *E.g.*, *Matthews* v. *Ministry of Defence* [2002] EWCA Civ 773 *per* Lord Phillips M.R. This practice might lead one to infer that the judgment has been drafted entirely by the person who delivers it.

[25] *E.g.*, *Morgan Grenfell & Co. Ltd.* v. *Istituto per a Servizi Assicurativi del Commercio*, [2001] EWCA Civ 1932 at [1] *per* Clarke L.J. See also *Arthur J.S. Hall & Co.* v. *Simons* (1998) 14 December, unreported per Lord Bingham C.J. ("all members have very substantially contributed"); *Steel and Morris* v. *MacDonalds Corporation* (1999) 31 March, unreported *per* Pill L.J. ("each member has contributed substantially").

[26] *E.g.*, *Greig Middleton & Co. Ltd.* v. *Denderowicz* [1998] 1 W.L.R. 1164 *per* Saville L.J.

[27] [2000] EWCA Civ 284 at [1]. For further examples of composite judgments where authorship is acknowledged, see "All for One and One for All", at pp. 337–338.

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contributions to the final product. Composite method may be collective, but once in a while individualism breaks through.[28]

More significant, however, is the case of the Judicial Committee of the Privy Council whose members, for the first time in the Council's history, have seized upon the opportunity to hand down individual speeches in one category of cases adjudicated by that body. Although this unexpected development has excited no comment, as we shall see, the Committee's enthusiasm for this new-found freedom has been total, rather bearing out, in this context at least, the Duc de la Rochefoucauld's tart observation that "Nothing is given so profusely as advice."[29] Although the Judicial Committee's new practice may appear to be a counter-trend that actually contradicts some of what has gone before, I would suggest that the reasons that lie behind the Committee's new methodology nevertheless contribute to illuminating the more general questions raised in this paper. The Committee's change in practice perhaps also underlines the experimental mood of the courts today.

Under paras. 13(a) and (b) of Schedule 6 of the Scotland Act 1998, subject to leave being granted, appeal may be taken to the Privy Council from decisions handed down by the Scottish High Court of Justiciary and the Court of Session, provided that the determination involves a devolution issue within the meaning of para. 1 of that Schedule. Since the entry into force of this provision, a handful of appeals, almost all involving putative infringements of the right of fair trial guaranteed under article 6 of the European Convention on Human Rights, have been taken to the Judicial Committee of the Privy Council.[30]

[28] In "All for One and One for All", at p. 349, n. 149, I suggested that some composite judgments are the product of obvious collaboration and one can fancy that one recognises different styles of authorship.

[29] *Maximes*, cx: "*On ne donne rien si libéralement que ses conseils*".

[30] *Brown* v. *Stott (Procurator Fiscal (Dunfermline))* [2001] 2 W.L.R. 817 concerned a woman, apprehended in the early hours of the morning for stealing a bottle of gin from a supermarket. The police had formed the view that she was somewhat the worse for wear through drink. Therefore, exercising their powers under the Road Traffic Act 1988, s. 172(2)(a), they had required the lady to say whether or not she had been driving her car, which, they knew, was parked in the superstore's car park. Under s. 172(3) of the Act, if Mrs. Brown had refused to answer this question, she would have committed an offence. Mrs. Brown acknowledged that she had been driving. The High Court of Justiciary had held that the lady's right of fair trial had been violated by this high-handed statutory requirement to furnish evidence against herself. The Judicial Committee disagreed, unanimously. In a second case, *McIntosh* v. *Lord Advocate* [2001] 3. W.L.R. 107, appeal was successfully taken to the Judicial Committee against the High Court of Justiciary's decision that drug trafficking and general proceeds of crime legislation (the Proceeds of Crime (Scotland) Act 1995), which invites courts to make wide-ranging assumptions about the illegal origins of a convicted defendant's assets when considering whether or not to make a confiscation order, had again led to proceedings which had deprived defendants of their right to a fair trial. In a third case, *Millar* v. *Dickson* [2002] 1. W.L.R. 1615, four appellants successfully appealed against the High Court of Justiciary's rulings that the temporary sheriffs before whom they were tried for various criminal offences constituted an independent and impartial tribunal within the meaning of art. 6(1) of the European Convention. (After these cases were heard, the High

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Scottish legal circles have energetically debated whether human rights violations actually raise a devolution issue at all, justiciable before the Judicial Committee.[31] The Privy Council, however, has concluded that such cases do indeed raise a devolution issue within the meaning of the Scotland Act 1998. Broadly, the argument runs: since the Lord Advocate, a member of the Scottish Executive, is responsible for criminal prosecutions and under s. 57(2) of the Scotland Act has no right to do any act incompatible with Convention rights, the Judicial Committee is properly seised to consider the question on appeal from the Scots courts "whether or not a purported or proposed exercise of a function by a member of the Scottish Executive is incompatible with a Convention right."[32] Hence, the decisions mentioned above.

In a recent issue of the *Modern Law Review* Aidan O'Neill Q.C. subjected the Privy Council's rulings on devolution issues to close political analysis,[33] notably arguing that through its decisions the Judicial Committee has ensured a measure of uniformity in the application of human rights law North and South of the Border. O'Neill's paper also sought to show how through successive decisions the members of the Committee's "political" views have shifted under collective pressure. Interestingly, for all its sophisticted analysis, O'Neill's article omits to mention the considerable revolution in legal method to which these (now seven) Judicial Committee decisions each bear witness. For students of the legal system, a singular feature of these Privy Council decisions must be that *all five members of the Judicial Committee of the Privy Council deliver opinions*; and concurring opinions at that. Many lawyers will recall the days when the convention—one could equally

Court handed down judgment in *Stars* v. *Ruxton, Ruxton* v. *Starrs* 2000 J.C. 208, holding that temporary sheriffs were not an independent and impartial tribunal under art. 6(1)). A fourth case concerned three conjoined appeals challenging the legislative competence of the newly founded Scottish Parliament, in which it was claimed that that body's first piece of legislation was incompatible with art. 5 of the European Convention: *A* v. *The Scottish Ministers* 2002 S.C. (P.C.) 63. A fifth case challenged Scotland's fixed fee legal aid scheme and, more particularly, the Scottish Executive's failure to amend the unyielding 1999 legal aid regulations: *McLean* v. *Buchanan* [2001] 1 W.L.R. 2425. A sixth case concerned two causes where it was contended that, contrary to art. 6(1), the prosecuting authorities had failed to comply with the requirement to bring the parties to trial "within a reasonable time": *Dyer* v. *Watson* 2002 S.C. (P.C.) 89. In the most recent case to have been heard at the time of writing, *Mills* v. *H.M. Advocate* (No. 2) 2002 S.L.T. 939, the Committee has ruled upon the consequences that flow from breach of an appellant's right to a hearing within a reasonable time, guaranteed under art. 6(1) of the European Convention.

[31] See notably, *Montgomery and Coulter* v. *H.M. Advocate* [2001] 2 W.L.R. 779.

[32] *Brown* v. *Stott* [2001] 2 W.L.R. at p. 848 *per* Lord Hope of Craighead. Lord Hope, in an instructive address delivered to the Law Society of Scotland's annual conference, has set out the reasons why the Judicial Committee was selected as the tribunal for hearing devolution appeals in preference to the House of Lords: "Edinburgh v. Westminster and others" (1997) 42 Journal of the Law Society of Scotland 140, 141–143.

[33] "Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council" (2001) 64 M.L.R. 603. O'Neill pursues identical themes in "Judicial Politics in the Judicial Committee" (2001) 46 Journal of the Law Society of Scotland 17.

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well call it a fiction—was observed that since, technically speaking, the Privy Council was proffering its advice to Her Majesty, only a single opinion was ever delivered by its Judicial Committee. All dissent was in consequence suppressed. As Lord Wright noted, in the course of a fulsome tribute to Sir Lyman Duff,

> The system necessarily in force on the Judicial Committee is for only one judgment, which is its report to the Crown on the question submitted. It is a single majority judgment; no record is kept of differences or dissents on the Board and the Privy Councillor's oath of secrecy prevents disclosures, so that a particular member's view may be known only to his colleagues.[34]

For long this represented the established practice. Indeed, this self-denying ordinance had been formally set down in an Order issued on 4 February 1878. The Order, decreeing that "no disclosure be made touching the matters treated of in Council, and no publication made by any man how particular voices and opinions went," had been precipitated by the sequel to the Judicial Committee's decision in *Ridsdale* v. *Clifton*.[35] In this case, news of a dissent, suppressed at the insistence of the majority of judges, had been leaked to the press. The 1878 Order was intended to avoid any repetition of this outrage.

Not until March 4, 1966 was a fresh Order promulgated, permitting the Privy Council to depart from this settled practice. The 1966 Order, however, only allowed for the novelty of dissenting opinions:

> Any member of the Judicial Committee of the Privy Council present at the hearing of any appeal, cause or matter who shall dissent from the opinion of the majority of the members present as to the nature of the report or recommendation to be made to Her Majesty thereon shall be at liberty to publish his dissent in open Court together with his reasons.[36]

Thus was the dissenting opinion born and the fiction of the Judicial Committee proffering unanimous advice to the sovereign punctured.[37] However, as Blom-Cooper and Drewry noted in their classic work, *Final Appeal*, "Th(e 1966 Order) did not ... confer any power on the

[34] (1955) 33 Can. Bar Rev. 1123. Arguably, Lord Wright does dissent from his brethren's opinion *via* the medium of this article.

[35] (1877) L.R. 2 P.D. 276. The case, which came from the Canterbury Court of Arches, involved a Folkestone vicar who appealed against findings that he had offended against ecclesiastical law by such scandalous conduct as wearing an alb and chasuble during Holy Communion, using circular wafers in place of the customary bread, placing a crucifix on the screen between the chancel and the nave, and so on.

[36] Judicial Committee (Dissenting Opinions) Order 1966 (S.I.1966, p. 1100) para.3.

[37] From the beginning of the twentieth century, Australian members of the Privy Council had argued for this alteration in practice, finding the ancient restriction little to their taste.

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judges to deliver assenting judgments, as is the practice in the House of Lords."[38]

A number of questions arise. By what authority does the Judicial Committee today, in devolution cases, deliver itself of multiple assenting judgments? What is the likely wider significance of this development for the future format of decisions of the Judicial Committee? Does this new practice connect with other recent alterations in judicial practice in England and Wales?

By what authority do Privy Councillors hand down individual opinions?

The Privy Council's authority, one must assume,[39] derives from the Judicial Committee (Powers in Devolution Cases) Order 1999, art. 4(1)(a), which generally provides that "The Judicial Committee shall, in relation to devolution proceedings, have all the powers, rights, privileges and authority as the appropriate superior court." Article 4(2)(b) goes on to state that in the case of references from Scotland the "appropriate superior court" in civil cases is the Court of Session, and in criminal cases is the High Court of Justiciary. Judges in both these courts are entitled to deliver individual concurring judgments. This provision therefore authorises the Judicial Committee, almost by a side-wind, to do what in all other circumstances it has been consistently prohibited from doing—granting each member of the Committee an individual, rather than simply a collective voice in the final decision.[40] This development appears even to have taken some Scots judges unawares. In his annual address to the Law Society of Scotland it is striking that, whilst exploring the reasons why the various differences and similarities between the procedures of the Privy Council and the House of Lords make the former a more suitable vehicle for the determination of devolution issues, Lord Hope of Craighead remarked:

> Unlike the House of Lords the reasons of the Judicial Committee are expressed in a single judgment when tendering

[38] *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (1972, Oxford) p. 110 [punctuation supplied]. See also Alder, "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 O.J.L.S. 221, 235: "(I)n the Judicial Committee of the Privy Council, only two opinions are permitted, a collective majority opinion and a dissent." (I am not at all sure that this is explicitly predicated by the terms of the 1966 Order, although it does appear to represent the invariable practice.)

[39] I say "assume" because members of the Judicial Committee may not have been aware of the source of their authority to deliver individual opinions. One Law Lord to whom I spoke had simply taken it for granted that the Committee was entitled to do it as of right. That cannot possibly be correct.

[40] In contrast, reasons given for the report of the Lords of the Judicial Committee when hearing petitions for special leave to appeal in devolution cases are delivered collectively by a single judge: see, *e.g.*, *Follen* v. *H.M. Advocate (D.P. 1 of 2000)* [2001] D2 UKPC 1. This mirrors the practice followed by the Appeal Committee of the House of Lords when deciding whether or not to grant petitioners leave to appeal.

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> their advice to Her Majesty, whereas in the Appellate Committee of the House of Lords each member of the Committee prepares his own speech even if he is to concur in a speech which has been delivered by one of his colleagues.[41]

There is no mention of individual judgments to be handed down in devolution cases; nor, for that matter, of dissenting opinions in the Judicial Committee.

What in likelihood is the wider significance of this change in the Council's practice?

The entire question of concurring and dissenting speeches needs to be situated within a wider debate that has engaged the Judicial Committee for many years concerning its rightful identity. Long before the 1966 Order, the question had been agitated: to what extent can the Judicial Committee be assimilated with a court? The judicial personnel who sit on the Committee are for the main part identical to those who man the House of Lords. Although some of the legal systems from which the appeals come may be exotic and varied, the questions addressed to the Privy Council are legal questions. Even if the tradition persists that the Committee normally only hands down a single collective opinion, the opinion looks broadly similar to any other judgment delivered by an English appellate court. On more than one occasion the Privy Council has pointed out that, to all intents, it *is* a court in all but name. In *British Coal Corporation* v. *R.*, for example, Viscount Sankey, L.C. affirmed that "It is clear that the Committee is ... a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council."[42] Similarly, in *Ibralebbe* v. *R.* the Privy Council said of its own opinions: "Such Orders are essentially judicial acts and it leads only to confusion to treat them as if they lay the in the field of legislation, or, for that matter, of the administration of government in any ordinary sense."[43] Little wonder, then, that the Privy Council should have gradually come to

[41] "Edinburgh v. Westminster and others", (1997) 42 Journal of the Law Society of Scotland 140 at p. 142. Lord Hope's statement of House of Lords practice is possibly contestable. There have in fact been occasional instances when members of the House of Lords have delivered composite dissenting judgments. In *Home Office* v., *Harman* [1983] 1 A.C. 380, for example, Lords Simon of Glaisdale and Scarman collaborated in the preparation of the speech delivered by the latter. Technically, however, one could still claim that Lord Simon did deliver an individual speech to the extent that he stated in a couple of sentences how privileged he felt to have participated in the drafting of a speech which expressed views he shared (at p. 307).

[42] [1935] A.C. 500, 510–511.

[43] [1964] A.C. 900, 913 *per* Viscount Radcliffe. See generally Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800–1976* (1979, London); McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion Writing in Final Appellate Tribunals" (1953) 31 Can. Bar Rev. 592; Alder, "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 O.J.L.S. 221.

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behave more and more like a court. Most recently, the senior Law Lord, Lord Bingham of Cornhill, in an interview granted to *The Times* and an address delivered in Gray's Inn, has delivered a fresh fillip to the question of the proper status of the Privy Council. Amongst suggestions he has put forward for the House of Lords and the Judicial Committee, there figures a call to review whether the Privy Council ought not to surrender its historical jurisdiction of hearing appeals from certain disciplinary bodies, notably those that preside over the affairs of dentists, doctors, opticians and other health professionals.[44] Were these jurisdictions to be sloughed off, the business of the Privy Council would even more closely resemble that of a conventional court.[45]

Now, in Scottish appeals involving devolution issues, the traditional way has been abandoned: even though they all concur, the five judges can each insist on having their say—even if, as it turns out, they have little or nothing material to add to the views of their colleagues. The new practice, of course, runs the risk of replicating exactly the kind of confusion that multiple judgments can already engender in other courts. In fact, the writing is already on the wall. In *McIntosh* v. *Lord Advocate* it is notable that only two of the judges, Lord Bingham of Cornhill and Lord Hope of Craighead, delivered full speeches. Of the three remaining members of the Judicial Committee, however, two stated that they agreed with the speech of Lord Bingham, whilst Lord Hoffmann said that he agreed with the speeches of both Lords Bingham and Hope.[46] We are on familiar territory: the classical problem posed where one has a three-

[44] The argument appears to be that because other professions, such as architects and accountants, do not have this avenue of appeal, it ought not to continue in respect of the medical professions: *The Times*, 16 July 2001. It is certainly the case that a sizeable proportion of the Judicial Committee's time is taken up with such appeals. In 1999 the Committee heard *in toto* 57 cases, of which 11 came from the professions and one was lodged under the Pastoral Measure 1983; in 2000 of the 55 appeals heard (which included three in devolution cases) 10 concerned the decisions of professional bodies; and in 2001 of the 66 appeals heard (which included five in devolution cases) 15 related to decisions of professional bodies. One does not have the sense, however, that the Judicial Committee operates under a crippling workload. Nor does there seem any pressing need to relieve it of approximately one fifth of its judicial business. For the full text of Lord Bingham's speech, see "The Highest Court in the Land", a lecture delivered in Gray's Inn in October 2000.

[45] Not all of Lord Bingham's suggestions immediately sound appetising. In particular, I would respectfully suggest that it is sad that his Lordship felt it necessary to question whether appeals should continue to be heard by a tribunal, which anyone studying its website would assume to be rather under-employed, from some of the poorest jurisdictions on the planet where the sum in dispute is "in some cases as low as $500". Were Latin utterances still permissible before English judges, I would contend that this looks suspiciously like a true case of *de minimis non curat lex*. On the subject of legal Latin, see further R. Munday, "Does Latin Impede Legal Understanding? The Case of 'Res Ipsa Loquitur'" (2000) 164 J.P.N. 995.

[46] [2001] 3 W.L.R. 107. In a similar way, in *Mills* v. *H.M. Advocate (No. 2)* 2002 S.L.T. 939, only Lords Steyn and Hope deliver full speeches. Lords Nicholls of Birkenhead and Scott of Foscote, however, indicate their agreement with both opinions, whilst Lord Mackay of Clashfern allies himself only with that of Lord Hope. Despite delivering an independent speech, however, Lord Steyn adds that he agrees with "(Lord Hope's) reasons on all aspects of the case" (at [24]).

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member appellate court, all of whom agree on the resolution of the case but one favours one explanation, another favours a different explanation, and the third judge contents himself with saying "I agree."[47] Similarly, a close reading of *Brown* v. *Stott*, which the Judicial Committee succeeded in compressing into 81 economical pages of transcript, reveals other inconvenient features with which we are familiar—a degree of needless repetition as well as variant statements that could well offer hostages to fortune in the future.[48]

Why have the members of the Judicial Committee hearing appeals in devolution cases availed themselves so readily of this opportunity to deliver multiple judgments? A number of answers suggest themselves. On the one hand, it might be assumed that, because they also sit regularly in orthodox courts, members of the Judicial Committee simply feel more comfortable with this method of proceeding. Alternatively, given the importance of the interests that are prone to be at stake in devolution cases, the judges may feel it politic to convey the appearance of giving the fullest attention to the issues that have come before them: individual attention to the issues is better reflected in individual judgments. Again, the modified practice may supply further evidence that the Judicial Committee is wearying of the fiction that it is not actually a fully-fledged court.

Even if the Judicial Committee in devolution cases now invariably hands down five full opinions, its developing practice appears to be more nuanced. Whilst five judgments were delivered in *Brown* v. *Stott*, their Lordships operated an obvious division of labour: only the Scots Law Lords (Lords Hope and Clyde) addressed the, for them, domestic question as to whether the case concerned a devolution issue at all. The three non-Scots judges only addressed the question of breach of article 6 of the European Convention. It is almost as though it would have been indelicate had Sassenach outsiders—using the term loosely—Lords Bingham and Steyn, elected to intrude into an internal Scots legal feud.[49] If such was the case, however, it is notable that Lord Hope (with whom Lord Clyde agreed) makes the point, quite correctly, that the Government of Wales Act 1998 and the Northern Ireland Act 1998 contain similar provisions to the Scotland Act 1998. This demonstrates, Lord Hope

[47] See my comments on Parker L.J.'s judgment in just such a case, *W.F. Harrison & Co.* v. *Burke* [1956] 1 W.L.R. 419, in "Notice of the Legal Assignment" (1981) 131 N.L.J. 607.

[48] *Brown* v. *Stott (Procurator Fiscal (Dunfermline))* [2001] 2 W.L.R. 817; see n. 30 above.

[49] Lord Hope had in fact already dealt with the devolution issue at greater length in the earlier case of *Montgomery and Coulter* v. *H.M. Advocate* [2001] 2 W.L.R.779. The selfsame phenomenon is visible in *A* v. *The Scottish Ministers 2002* S.C. (P.C.) 63, where only Lords Hope and Clyde deliver full speeches on the sensitive question whether or not the Scots Parliament overstepped the human rights mark in its very first piece of legislation. One does feel uneasy that non-Scots judges fear to intrude into putative Scots grief.

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said, that "these systems seek to achieve uniformity in the determination of (devolution) issues throughout all parts of the United Kingdom by reserving to the Judicial Committee of the Privy Council the power of final decision in all these matters." This being so, the delicacy—if such it was—shown by the non-Scots members of the Committee looks hopelessly misplaced.

Division of labour, and co-operation and consultation between the personnel of the court are not of course unique to the Privy Council. Take just two comparatively recent examples. First, in the unedifying squabble before the Court of Appeal, *Douglas* v. *Hello! Ltd.*,[50] in which a Hollywood heartthrob took exception to photographs of his wedding, surreptitiously taken one would suppose by a guest, appearing in a magazine with which he had no prior contract, the three judges pooled their intellectual resources. Thus, Brooke L.J. simply adopted the thoughts of the third judge, Keene L.J., on the impact s. 12(3) of the Human Rights Act 1998 now exerts on the grant of interim injunctions applying the *American Cynamid*[51] principle, as well as echoing Sedley L.J.'s suggestion that an intruder might possibly have taken the offending photographs.[52] Sedley L.J., meanwhile, also broadly agreed with Keene L.J.'s analysis on the section 12 point.[53] This sort of judicial collaboration is of course commonplace. More unusual perhaps is *R.* v. *Dimsey; R.* v. *Allen*[54] in the House of Lords. These two appeals both involved offences of cheating the public revenue and the ticklish interpretation of s. 739(2) of the Income and Corporation Taxes Act 1988. As Lord Hutton explained in his speech in *Allen*, the two appeals were heard together over four days in June. Allen's counsel adopted counsel for Dimsey's argument on the point of statutory construction. Nevertheless, the cases are presented independently by the House and two separate, interlocking judgments are delivered. And this, even though Lord Hutton, delivering the judgment in *Allen*,[55] fully agreed with the

[50] [2001] 2 W.L.R. 992. Sedley L.J. pungently described the dispute as an "intrusion ... by uncontrolled photography for profit of a wedding which was to be the subject of controlled photography for profit" (p. 1030, para. [141]).

[51] *American Cynamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.

[52] See [2001] 2 W.L.R. at p. 1007, para. [54]. Keene L.J. addresses this issue at paras. [150–154].

[53] See [2001] 2 W.L.R. at p. 1028, para. [136]. This is not of course meant to suggest that the phenomenon of judicial co-operation is a novelty. On the contrary, it is an institution. Take Goff L.J.'s judgment in *re Gray's Inn Construction* [1980] 1 W.L.R. 711, 725: "Having had the advantage of reading Buckley L.J.'s judgment whilst it was still in draft, and of discussing the case with him on several occasions, I am happy to say, with respect, that I agree in its entirety with the judgment which Buckley has just delivered." (This revealing sentence somehow is more reassuring than Sir David Cairns's guarded statement, "I also am in a position of being able to agree" (*ibid.*)).

[54] [2001] 3 W.L.R. 843.

[55] *Ibid.*, pp. 860–876.

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reasons given by Lord Scott of Foscote, who delivered the House's opinion in *Dimsey*, on the point of statutory interpretation.[56]

The above invites two observations. The first is relatively parochial; the second, however, introduces broader themes. The first observation, prompted by the alteration in the Judicial Committee's time-honoured practice in devolution cases, is simply that, although no-one is agitating wildly for this reform, it must now look far more probable that the Judicial Committee of the Privy Council in due course will be induced to alter its ways in other categories of case. Decisions in all cases in which the Judicial Committee "sits in judgment" will surely come to be delivered in the form of both individual dissenting and concurring speeches, and the Judicial Committee thereby will be assimilated more closely into the wider family of United Kingdom courts. Only die-hard traditionalists or those with a disproportionate feeling for the constitutional niceties would lament this development. The second observation is possibly more telling. It is that the Judicial Committee's new practice in devolution cases is yet one more procedural change observable in the practice of the appellate courts—a change that, ironically appears to buck the trend by assimilating the very method which is gradually losing ground in the Court of Appeal. These changes stimulate comparative reflection. They also encourage consideration of the judicial role more generally and of the quality of judicial decision-making in its various procedural manifestations within common law systems. It seems important to bring these changes into the open. They have been introduced without prior discussion. It is not obvious that they are neutral. They may not, all of them, necessarily be benign, let alone beneficial.

C. Distinguishing Properties of a Common Law Judgment

From time to time comparatists have addressed the subject of "judicial style".[57] There probably is such a thing. Its essence, however, is not readily identifiable beyond certain initial

[56] *Ibid.*, pp. 847–860. The division of functions here seems to be dictated by the fact that whereas Lord Scott dealt with the point of statutory interpretation, Lord Hutton concentrated upon the potential impact of art. 6 of the European Convention on Human Rights on a statute that compelled the taxpayer to reveal information that might later ground a prosecution.

[57] See, *e.g.*, Basil Markesinis, "A Matter of Style" (1994) 110 L.Q.R. 607 and sources cited, reprinted in *Foreign Law and Comparative Methodology: A Subject and a Thesis* (1997, Oxford: Hart Publishing) pp. 126ff.; H. Kötz, "Scholarship and the Courts: A Comparative Survey" in D.S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (1990, Berlin: Duncker & Humblot) pp. 183ff.; Basil Markesinis, "Judicial Style and Judicial Reasoning in England and Germany" [2000] C.L.J. 294, reprinted in *Always on the Same Path: Essays on Foreign Law and Comparative Methodology. Volume II* (2001, Oxford: Hart Publishing) pp. 305ff.

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generalities. Two observations nevertheless seem called for regarding the study of "judicial style". First, many accounts of English judgments in particular now seem a trifle dated and, no pun intended, come across as somewhat stylised.[58] Secondly, when analysing "judicial style" one needs not only to ferret out what is truly distinctive within, say, English "judicial style" but to press on and ask the even harder, value-ridden question, Does this peculiar way of declaring the law exhibit particular virtue? At a time when our courts are blithely turning from their traditional ways, it would be reassuring to know that an infant is not going out with the bath-water.

Called upon to characterise his system's "judicial style", a common lawyer[59] might adopt several gambits. He might urge the quaint, quasi-conversational character of common-law judgments, their readability and their scrupulous attention to the facts. There is something inherently attractive and, one might assume, significant in a system that tolerates passages as evocative as Lord Denning M.R.'s celebrated *incipit* in *Hinz* v. *Berry*:

[58] This criticism could in fact be made more tellingly. It is noticeable that comparative analyses of "judicial style" have tended to concentrate exclusively on the most senior courts in their jurisdictions' hierarchies. It is all very well pointing to the condensed, other-worldly quality of the judgments of the French *Cour de Cassation*, but as anyone familiar with French law would concede, these bear little resemblance to judgments handed down by first instance courts in France, most of which incidentally are the product of individual judges and not of benches of magistrates (see further, note 71 below). One might even wonder whether what is striking, in part, about "judicial style" is its seeming uniform quality within common-law systems, but its relative diversity of forms within civilian systems.

[59] It will be noticed that I refer both to English and common-law judgments almost indifferently. In common law jurisdictions it is the tradition that our judges speak as individuals. I am of course aware that styles of judgment vary from the common law courts of one jurisdiction to another, and that there may well be variations of style between courts of different levels and, indeed, between individual judges. But these variations probably have little impact on the arguments presented in this paper. As John Matson, who was Chancellor of the University of Canterbury (New Zealand) between 1973 and 1977, suggested in a paper delivered just over a decade ago, "The reasoned analysis of law and fact, and the intellectual discussion of problems which constitute the judgments of courts in the common law world, differ little in linguistic nature from one country to another. New Zealand judgments are perhaps more matter of fact than those of English courts, and not adorned with the occasional literary and classical allusions which grace the latter. Such allusions often reveal the classical education which ... was the usual intellectual equipment of the social class from which the bar and the judges were drawn. In *Re Berkeley Securities (Property) Ltd.* ([1980] 3 All E.R. 513, 528), Vinelott J. was faced with circumstances which a New Zealand lawyer might well have described as a "Catch-22 situation". An expression generally understood since Joseph Heller's novel *Catch-22* was published in 1961. But what Vinelott J. said was: "The question appears to present a paradox worthy of Epimenides." In New Zealand on the other hand the standard of linguistic education, especially the study of classics, has always been low" ("Lawyers' Language" (1990) 4 Cant. L.R. 302, 312).

The same can be said for "civilian" jurisdictions, too. Civilian jurisdictions are far from espousing identical styles in their judgments. Although both are delivered collegiately, the carefully structured but relatively free-flowing judgments of the German *Bundesgerichtshof* are a far cry from the terse, austere, almost Delphic pronouncements of the French *Cour de Cassation*. And the comparatively relaxed format of the Belgian *Cour de Cassation's* judgments cannot be confused with those of their French counterpart.

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> It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some ten years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child. On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island ... *etc.*[60]

Alternatively, take the first paragraph of Megarry J.'s judgment in *Re Flynn*:

> Errol Flynn was a film actor whose performance gave pleasure to many millions. On June 20, 1909, he was born in Hobart, Tasmania; and on October 14, 1959, he died in Vancouver, British Columbia. When he was 17 he was expelled from school in Sydney; and in the next thirty-three years he lived a life that was full, lusty, restless and colourful. In his career, in his three marriages, in his friendships, in his quarrels, and in bed with the many women he took there, he lived with zest and irregularity. The lives of film stars are not cast in the ordinary mould; and in some respects Errol Flynn's was more stellar than most. When he died, he posed the only question that I have to decide: Where was he domiciled at the date of his death?[61]

The prose is colourful and personal. It is an exuberant celebration of a self-confident bench, unafraid of allowing the impassive judicial mask to slip. And whether it be Rougier J. wryly addressing the subject of *corvus monedula* (the common jackdaw)[62] or invoking Voltaire in the context of that legislative dog's dinner, the Dangerous Dogs Act 1991,[63] whether it be Lord Bridge inveighing against the outrageous imposition of a retirement age for judicial members of the House of Lords,[64] Lord Hailsham making plain what he thinks about the sort of person who would complain about a boiled hawk moth larva in a tin of peas,[65] Lord Steyn grumbling at the fact that he must deliver judgment on a point he

[60] *Hinz* v. *Berry* [1970] 2 Q.B. 40, 42. Similar examples abound in the judgments of Lord Denning: see, *e.g.*, *Miller* v. *Jackson* [1977] 3 All E.R. 338, 340.

[61] [1968] 1 All E.R. 49, 50. As Kötz has remarked, "A Continental lawyer feels like being submerged in a oxygen bath when he reads (this) opening statement": "The Role of the Judge in the Court-room: The Common Law and Civil Law Compared" (1987) 1 T.S.A.R. 35, 42.

[62] *Holden* v. *Lancashire Justices* (1998) 162 J.P. 789.

[63] *R.* v. *Ealing Magistrates' Court, ex p. Fanneran* (1996) 160 J.P. 409, 416D-E: "... it seems to me that the Dangerous Dogs Act 1991 bears all the hallmarks of an ill-thought-out piece of legislation, no doubt in hasty response to yet another strident pressure group. Add to that the foolish nephew, an observant and zealous policeman and the result is that a perfectly inoffensive animal has to be sent to the gas chamber, or whatever method of execution is favoured, its only crime being to have a cough. It would take the pen of Voltaire to do justice to such a ludicrous situation."

[64] *Ruxley Electronics and Construction Ltd.* v. *Forsyth* [1996] A.C. 344, 354D.

[65] *Smedley's Ltd.* v. *Breed* [1974] A.C. 839, 845.

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has already addressed exhaustively in an earlier case,[66] or Ward J. angling for inclusion in Megarry's *Third Miscellany-at-Law* with an over-extended aqueous metaphor calculated to make the reader squirm,[67] individuality screams from the page. Of course, it is quite correct that the common-law judge's use of language lends his judgments their "distinctive edge". This thesis, however, requires some qualification. Just as we distinguish between classical tragedy and its offshoot *Grand Guignol*, it is surely an error to take as the common-law norm the more parodic judgments of Lord Denning (or in the United States context, presumably to fix upon the purple prose of that remarkable personality, Judge Michael A. Musmanno[68] or, nowadays, the mocking sarcasm of Judge Samuel B. Kent of Texas).[69] The fact is that the vast majority of common-law judgments are prosaically thorough and, if anything, more solemn than the cases would sometimes necessitate. The average English judgment does not drip mordant phrases, literate witticisms and sagacious apophthegms, nor does it ooze pathos, exploit drama or seduce the emotions. The system permits these judicial extravagances, but they are far from being the staple. They are the province of a relatively small number of hardy souls whose desire to cut a dash, to vent their feelings and so on cannot always be held in check.[70]

These personal characteristics of the common-law judgment are not however its most distinctive feature.[71] What lawyers from other

[66] *Mills* v. *H.M. Advocate (No. 2)* 2002 S.L.T. 939 at [3] ("Having already given a judgment on this point, I feel diffident about doing so again. I fear I must return to the point": punctuation supplied).

[67] *Ravenscroft* v. *Rederiaktiebolaget Transatlantic* [1991] 3 All E.R. 73, esp. at pp. 76 and 87 (reversed by the Court of Appeal (1992) *The Times*, 6 April).

[68] There are several examples in Megarry, *A Second Miscellany-at-Law: A Further Diversion for Lawyers and Others* (1973: London, Stevens & Sons Ltd.) esp. pp. 154–157. It is curious to report that, in contrast to passages from some of his judgments, Michael A. Musmanno's books, such as the autobiographical *Across the Street from the Courthouse* (1954: Philadelphia, P.A. Dorrance & Co.) and even *Verdict! The Adventures of the Young Lawyer in the Brown Suit* (1958: New York, Doubleday) seem oddly subdued.

[69] See, *e.g.*, *Smith* v. *Colonial Penn Ins. Co.* (1996) 6 November (civil action no. G-96–503 in the U.S. District Court for the Southern District of Texas, Galveston Division); *Republic of Bolivia* v. *Philip Morris Companies Inc.* (1999) 1 March (civil action no. G-99–100); *Labor Force Inc.* v. *Jacinport Corp. and James McPherson* (2001) 7 June (civil action no. G-01–058); *Bradshaw* v. *Unity Marine Corporation Inc.* (2001) 27 June, 2001 U.S. Dist. LEXIS 8962 (civil action no. G-00–558).

[70] One might indeed wonder whether the more individualistic speeches are not likely to become increasingly things of the past. Judgments are not exactly free-style texts at the best of times. However, the spreading fad for sub-headings, indexes, collaborative methods of composition and postscripts, along with the structured paragraphing imposed by neutral citation, may well create a climate inimical to the more colourful judicial flights of fancy.

[71] It is sometimes imagined that humour is the exclusive preserve of the common-law judgment. I am not at all sure that this is the case. Although the Delphic austerity of the French Cour de Cassation's judgments is unsurpassed, first instance courts in France, it seems to me, do resort to humour, or at least adopt an overtly ironical tone, from time to time. Thus, when a Tribunal de grande instance described an actress's "sexe dénudé" in a privacy case as "le seul repli de chair qu'il lui restait à dissimuler et qui constitue l'ultime refuge de sa vie privée", can one not detect a suppressed snigger: Trib. gde inst., 14 May 1974, D. 1974.766? Or what

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jurisdictions do find truly remarkable is how candid the common-law judge can be, even to the point of admitting to doubts. As Basil Markesinis points out, as compared with its civilian counterparts, the common law judgment is "more informative of what is really going through a judge's mind when he is trying a case".[72] The House of Lords decision in *Pepper* v. *Hart*,[73] the case in which the House determined to reverse its earlier practice of ignoring the "*travaux préparatoires*" when interpreting ambiguous legislation, affords an instructive example. Lord Bridge actually admits that when the court first considered the meaning of the Finance Act 1976 in that case, he "was one of those who were in the majority at the conclusion of the first hearing"—a majority whom Lord Griffiths helpfully points out construed the legislation in a way that contradicted the provision's stated purpose, as described by the relevant minister in the House of Commons.[74] At the second hearing, before a full court of seven Law Lords, however, Lord Bridge acknowledged that he had altered his opinion. Judges from non-common law jurisdictions are not given to such candour. Professor Kötz once observed: "A German or French judge would rather swallow his tongue than [...] say that he personally found the case difficult, that he was impressed by the ability and competence of counsel or that he felt a certain witness

of the Béthune Tribunal de grande instance's judgment in a divorce case in which the husband alleged his wife's adultery and the court explained away the wife's having been seen to kiss Michel F. in the following terms: "Attendu, d'autre part, en admettant qu'il s'agisse de baisers sur la bouche, que cette license ne serait gravement injurieuse que si elle était répétée, un baiser isolé ne fait qu'égratigner le contrat conjugal; cette égratignure doit normalement se cicatriser et ne rend intolérable le maintien du lien conjugal ...": Trib. gde inst. Béthune, 12 June 1973, D. 1975.242, note F.B. The Cambrai tribunal de police's account of the poster advertising Brigitte Bardot's film, *La bride sur le cou*, makes instructive reading, too: Trib.pol Cambrai, 13 December 1961 J.C.P. 1962.II.12541. Similarly, one could quite easily imagine an English court employing the same language as the Tribunal correctionel in Limoges when dealing with a case in which two accused on one occasion had exposed themselves and urinated in the direction of some police officers and on another had relieved themselves in front of a police station. In response to the question whether such *émonctions* might have *froissé la pudeur* of hardened police officers, the court ventured, with barely suppressed irony: "D'autre part, quelle que soit la license des moeurs, elle ne procède jamais que de la participation de quelques-uns alors que la loi a été édictée pour la protection de tous, et il y a, heureusement même chez les fonctionnaures de police, bon nombre de citoyens encore doués de délicatesse et de sensibilité": Trib. corr. Limoges, 13 June 1975, D. 1976 Somm.17. And was there not deliberate humour in the description of a case in which an overweight woman was unable to wear a seat-belt as "force majeure" (Trib. pol. Bressiure, 26 February 1976, Gaz.Pal. 2–4 January 1977, p. 15, note Doll.)? Our obsession with the activities of the higher courts obscures part of the picture. To quote the Chinese proverb, the frog at the bottom of the well sees only part of the sky. What is significant, I would suggest, is that in England all courts, from the lowest to the highest, operate in this relatively unrestrained way.

[72] Basil Markesinis, "A Matter of Style" at p. 127 and 129.

[73] [1993] A.C. 593.

[74] *Pepper* v. *Hart*, one might add, supplies an instructive sidelight on judicial character. Lord Griffiths could not restrain himself from declaring that "on this question of construction I was in a judicial minority of one at the end of the first hearing of the appeal" ([1993] A.C. at p. 619D). He was of course in the majority at the second hearing. Now, why would a judge particularly wish us to know that?

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was a liar." Kötz then added that in contrast, "When it comes to writing [*sic*] a judgment (the English judge) will not hesitate, by way of eloquent statements of policy, by metaphors, by figures of speech, by witty understatements or overstatements, by reference to his own personal feelings about the case, to increase the persuasive power of his judgment."[75] *Pepper* v. *Hart* is anything but an isolated example. The courts not infrequently allude to difficulties they have experienced in coming to their conclusions.[76] A member of the court may wish to explain, with barely disguised pain, why he is dissenting from his brethren.[77] Oddest of all, a court may admit to the rough-and-ready character of its decision. Take, for instance, Lord Denning M.R.'s striking comment in *Jackson* v. *Horizon Holidays Ltd.* that the damages awarded to the hapless family looked "about right".[78] It will be clear that such admissions, assuming that they serve a useful purpose within the system, do not sit comfortably with composite drafting of judgments.

The frankness with which common-law judges reveal what they are thinking is therefore remarkable. In case the point is not sufficiently made, *Kansal (No. 2)*[79] affords a recent example of strong disagreement and candid revelations in the House of Lords. In July 2001, in *Lambert*,[80] the House had ruled on the meaning of the transitional provisions of the Human Rights Act 1998. Broadly, *Lambert* had held that the Act is retrospective in its effects as regards any proceedings brought by a public authority, but not in respect of appeals in those proceedings. Thus, an appellant is not entitled to found his appeal upon the fact that something occurred at his trial, before the entry into force of the 1998 Act, which would today be incompatible with human rights law. Three months later, in *Kansal (No. 2)*, the House was asked to review this eccentric interpretation of the Act. The composition of the House was identical to *Lambert*, save that Lord Lloyd of Berwick sat in place of Lord Clyde. Lord Lloyd, upon whose short speech I shall focus, made no secret of his quandary. He admitted to having "... grave doubts whether the majority decision in *Lambert* could be

[75] "The Role of the Judge in the Court-room: The Common Law and Civil Law Compared" (1987) 1 T.S.A.R. 35, 41.

[76] See, *e.g.*, *Wisely* v. *John Fulton (Plumbers) Ltd.; Wadey* v. *Surrey County Council.* [2000] 1 W.L.R. 820, 822 and 829 *per* Lord Slynn and *per* Lord Millett; *Shelley* v. *Paddock* [1980] Q.B. 348, 357 *per* Brandon L.J. ("I have found this case more difficult than the other two members of the court"); *R.* v. *Derbyshire County Council, ex p. T* [1990] Fam. 164, 171 *per* Woolf L.J. ("... although my mind vacillated in the course of argument, I am ultimately persuaded by the able arguments of Mr. Wall ...")

[77] *E.g.*, *Nagarajan* v. *London Regional Transport* [1999] 3 W.L.R. 425, 428 *per* Lord Browne-Wilkinson.

[78] [1975] 1 W.L.R. 1468, 1473G.

[79] [2001] 3 W.L.R. 1562.

[80] [2001] 3 W.L.R. 206.

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supported. Had I been a party to the hearing in *Lambert*, I would have found myself in the embarrassing position of not agreeing with anyone, even though three different views were expressed."[81] Lord Lloyd would have disagreed with the conclusion of the majority, who felt that the language of the Act was sufficiently clear to allow for an interpretation that excluded appeals from the retrospective effect of the legislation. He would have disagreed with Lord Steyn's judgment, whose import was to deprive a portion of the statute of all effect. He would, however, have agreed with almost all of Lord Hope's speech, but for the final and crucial step in the latter's argument. Lord Lloyd next briefly set out how he *might* have given judgment in *Lambert*, had he been part of the court, adding, "But I doubt whether I would (have delivered such an opinion), since the point was never argued on behalf of the Crown."[82] Lord Lloyd finally explained that he had nevertheless to address these issues because, "Unfortunately two of your Lordships have given further reasons for supporting the decision in *Lambert*, and two of your Lordships have held that the reasoning in *Lambert* is erroneous. In those circumstances it would not have been right of me to sit on the fence."[83] There follows a remarkable passage in which Lord Lloyd first makes perfectly plain that the reasoning in *Lambert* "is erroneous, and if it be necessary to say so, plainly erroneous." The only satisfactory solution, he admits, would be for *Kansal (No. 2)* to be re-argued before a seven-member panel of Law Lords. ("That is the traditional way in which problems of this kind are dealt with.") Then, whilst acknowledging that other cases, including the appeals of the "Guinness Appellants",[84] are waiting in the wings and that a final resolution of this question is vital, Lord Lloyd admits that a re-hearing before seven Law Lords cannot be arranged in time: "So the conflict remains unresolved, and the only question is whether as a panel of five, we should depart from the decision in *Lambert*. I am quite satisfied that we should not."[85] For these reasons, he says that he is unwilling to disturb the House's "plainly erroneous" decision on the meaning of the Act so soon after it was handed down.

[81] [2001] 3 W.L.R. 1562, 1568 at [15]. Lord Lloyd, it should be said, was not the only member of the court who felt that he was on the rack. Lord Steyn, too, sensed that "the artificial distinction" drawn by the majority in *Lambert* was "mistaken" (at [26]), but considered that it would now be wrong to depart from that earlier ruling.

[82] *Ibid.*, at [16].

[83] *Ibid.*, at [17].

[84] See *Saunders* v. *UK* (1996) 23 E.H.R.R. 313; *IJL, AKP and GMR* v. *UK* (2000) *The Times*, 13 October. In the event, the Guinness appellants' appeals were rejected on the ground that, prior to the entry into force of the Human Rights Act 1998, the European Court had no jurisdiction to issue what was tantamount to a declaration that an English Act of Parliament was unlawful: *Lyons, Parnes, Ronson and Saunders* [2001] EWCA Crim 1860.

[85] [2001] 3 W.L.R. at 1569, at [19].

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A common lawyer might not at first realise how extraordinary is this judicial baring of the soul. Lawyers with a civilian background, however, would find it impossible to imagine that a judge from their own jurisdictions would for one moment admit in their final, published judgment to any of Lord Lloyd's doubts and hesitations. It is the extreme openness of the judgments which sets them apart. They are not unanimous dooms handed down by a monolithic bench whose real thoughts can only be guessed at. The strength of the common-law method, then, is its humanity and the evidence that each member of the court has fully met his or her responsibilities and given the arguments presented scrupulous attention.

Such an approach is not unreasonable. Indeed, it is perfectly arguable that the approach could be directed towards ensuring a high measure of customer satisfaction amongst litigants who take their cases before the Court of Appeal, Civil Division. And such a view is possibly confirmed by some modern research. For long it was assumed that the principal, if not sole reason why individuals appeal lower court decisions is that they are interested in winning their cases. Posner once summarised this outlook perfectly in his bluff declaration that, "everyone prefers winning to losing and winning big to winning small".[86] How people may win, therefore, has been assumed to matter far less. Does this emphasis on pure self-interest actually explain people's behaviour? In the United States research suggests that this outcome-based outlook may not accurately reflect reality. The majority of appellants, at least in the United States, appear to be individuals rather than corporate or governmental entities.[87] It has been demonstrated that many individual litigants appeal in situations where the potential economic costs outweigh any material benefits they might eventually derive from winning. Although many disputes relate to mundane matters, these individuals nevertheless consider them important enough to justify the high cost of appealing.[88] Moreover, appealed cases often involve issues that the legal system defines as "low value" and which it even actively deters individuals from pursuing. In an empirical study, which for the first time actually investigated why people do appeal, Barclay unearthed evidence

[86] *The Federal Courts* (1985, Cambridge, Mass.: Harvard University Press) p. 8.
[87] S. Barclay, *An Appealing Act* (1993, Ph.D. dissertation).
[88] S. Barclay, "Posner's Economic Model and the Decision to Appeal" (1997) 19 Justice System Journal 77. Interestingly, in her study, "Who loses out on Paradise Island? The case of Defendant Debtors in County Court", in Iain Ramsey (ed.), *Debtors and Creditors: A Socio-Legal Perspective* (1986, Abingdon, Professional Books), Maureen Cain discovered that half of the small sample of individuals questioned gave as their reason for bringing suit in the county count "a point of principle". Moreover, 47.4% of the plaintiffs Cain interviewed (mainly, institutional litigants) gave as their reason for suing "general deterence" (esp. pp. 109–110 and 117–118).

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suggesting that, counter-intuitively, "individuals are less interested in winning their cases than we have traditionally been led to believe. Instead, ... litigants are motivated primarily by the desire to be treated fairly."[89] For Barclay, it is therefore essential "to accord the process-based approach its place as the rightful complement to the outcome-based approach." Both approaches, he admits, may be "equally valid means for understanding individual behaviour, and both approaches should be treated as equally potential means to explore examples of individual decision making." Nevertheless, the shift in thinking he advocates "alters the traditional focus on winners and losers" and thereby "offers a more dynamic view of the role of the courts and the legal system, in which success is measured in terms of the seriousness with which one's ideas are considered in reaching the decisions of relevance."[90]

Now, it may be that United States findings are not immediately transposable into the English context. Several points of difference might be suggested, such as the fact that historically the United States is an aggressively rights-based system with a long-established preoccupation with procedural fairness or the consideration that widespread distrust of that system could derive from the many first instance civil cases that are tried by juries, elected judges and so on. All the same, it seems that much of Barclay's evidence rings true for England and Wales, and at the very least identifies the importance of the question, what exactly are appellants in civil cases looking to achieve? One striking point made in Barclay's work, which has an important resonance for the issue of composite judgments, was his finding that

> (T)he presence of the three-judge panels in the appellate court in contrast to single-judge benches in the trial court was an important aspect to many litigants. When asked to consider whether they would get a better deal in the appellate court, almost every litigant who appealed thought that they would get a better deal and named the presence if more than one judge in the appellate court as the primary reason.[91]

[89] *An Appealing Act: Why People Appeal in Civil Cases* (1999, Evanston (Ill.): Northwestern University Press; The American Bar Foundation) p. 3. Barclay's research is not out on a limb, but dovetails into a broader perspective adopted by some political scientists that "disputants pursue grievances not only in terms of material interests, but also in terms of norms about integrity, self-image, self-respect, and duties to others" (*e.g.*, S. Merry and S. Silbey, "What do Plaintiffs Want? Re-examining the Concept of Dispute" (1984) 9 Justice System Journal 151, 160); R. Shamir, "Litigation as a Consummatory Action: the Instrumental Paradigm Reconsidered" (1991) 11 Studies in Law, Politics and Society 41. It also conforms to some scholars' view that, more generally, process offers a superior vehicle to outcome for understanding the relationship between individuals and institutions and the state: *e.g.* J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996, Cambridge, Mass.: MIT Press).

[90] *An Appealing Act*, pp. 155 and 159–160.

[91] *An Appealing Act*, pp. 64–65.

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A litigant who appeals will tend to assume that not only will the appellate court be composed of better qualified personnel, but that his contentions will receive more intense attention from all three members of the court than it was accorded by the single judge at first instance. Confronted with a composite judgment, the litigant only has the court's assurance that this was actually the case.

The common-law judge's capacity to speak his mind attains possibly its strongest form in the right to dissent. Although there exist some notable exceptions,[92] the right to deliver dissenting opinions is not frequently found outside common-law systems. One tends therefore to think of dissenting judgments as something integral to English legal system, but this was not always so. The history and sociology of dissents are quite curious.[93] Until the sixteenth century, unanimity was the rule in English courts. As late as the eighteenth century, we find Lord Mansfield's reporter, Sir James Burrow, expressing undisguised pride in the fact that the members of the Court of King's Bench rarely, if ever, dissented. In *Perrin* v. *Blake* Burrow felt constrained to comment,

> It is remarkable that, excepting this Case and another in this Volume, there has never been, from the 6th of *November* 1756, to the Time of the present Publication, a final Difference of Opinion in the Court in any Case or upon any Point whatsoever. It is remarkable too, that excepting these two Cases, no Judgment given during the same Period has been reversed, either in the Exchequer Chamber or in Parliament.[94]

Not surprisingly, the judiciary shares a feeling that legal principles ought to be clear and ought to point in one direction. Dissent, therefore, is often a matter for regret. Judges are prone to open their dissenting judgments with a few words expressing sorrow at not sharing their colleagues' mistaken views. Blom-Cooper and Drewry have described the dissent as "the most apparently poignant judicial tragedy in a legal system founded upon the dramatic conventions of certainty and unanimity."[95] For similar reasons, judges sometimes suppress their dissent but still feel the necessity to make this known. In *Re Toshuku Finance UK plc*, for instance, Lord Hobhouse made the admission:

> With some reluctance, both for the reasons given by my noble and learned friend, Lord Hoffmann, towards the end of his opinion and because I found the arguments of Mr. Philips and

[92] Two well-known exceptions are the European Court of Human Rights and Germany's Constitutional Court (*Bundesverfassungsgericht*).
[93] See generally John Alder, "Dissents in Courts of Last Resort: Tragic Choices?" (2000) 20 O.J.L.S. 221.
[94] (1770) 4 Burr. 2579, 2582.
[95] *Final Appeal* (1972, Oxford) p. 83.

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> judgments of Nicholls L.J. and [Sir Richard Scott] V-C more persuasive than have your Lordships and would not have accepted that the authorities are incapable of reconciliation, but, in deference to the unanimity of your Lordships' opinions, I concur in the order proposed.[96]

Lord Hobhouse was concurring with his brethren but was also making his personal opinion on the matter plain. This is not the universal picture, of course. Some judges—and, in this respect too, Lord Denning was a notable example—make no apologies, but can even exult in their vigorous dissents.

The practice of delivering dissenting judgments is of course well documented and is customarily justified on a number of grounds. These include the following. *First*, it might be asked, Why should it be assumed that the majority must be right and that the minority's views are therefore unworthy of consideration? It seems wrong to conclude that any minority view only merits suppression. Alternatively, *secondly,* the democratic principle may be prayed in aid, and any uncertainty dissenting voices introduce into the law can be argued to indicate a healthy, questioning society. Judges are thereby shown to be more than mere voting ciphers; their open disagreements mirror those intractable disputes over competing societal values that divide society at large.[97] For my part, I would suggest *thirdly* that there is advantage simply in knowing that one's brethren may differ openly from oneself, thereby exposing the failings in one's reasoning to public scrutiny. This may serve as a spur, inspiring more muscular, more complete construction of one's own arguments. *Fourthly*, it is sometimes claimed that the dissenting voice may be picked up in subsequent decisions, serving as it were as a foothold for future legal change. The dissenting judgment may catch the public eye and may stimulate debate that eventually alters the *status quo*.[98] More often than not, of course, dissents are quietly forgotten. *Fifthly*, in a more philosophic vein it has been argued

[96] [2002] 1 W.L.R. 671, 684. Coincidentally, in the same issue of the Weekly Law Reports, in *Jones (Anthony)* [2002] 2 W.L.R. 524, where the House of Lords considered whether the English rule that allows a criminal trial to proceed in the absence of an absconding accused is compatible with human rights law, Lords Bingham and Nolan reluctantly suppressed their view that a doctrine of waiver may apply, in light of the strong contrary opinion entertained by Lords Hoffmann and Rodger of Earlsferry (at [15] and [18])? Are uneasy compromise and intellectual fudge destined to become the order of the day? (Lord Hutton, it should be said, took a more robust stance (at [36])).

[97] See notably, Postema, *Bentham and the Common Law Tradition* (1986: Oxford: Clarendon Press). Currently, it might be mentioned that dissents are registered in the English Court of Appeal and House of Lords in approximately 10% of cases.

[98] In *Kansal (No. 2)* [2001] 3 W.L.R. 1562, Lord Hope admitted that he had considered withdrawing his judgment, "out of loyalty to the view of the majority," once he realised that there was a clear majority in favour of following *Lambert*. "On balance," he nevertheless went on to say, "I have decided that I ought to adhere to it, in case it may still be necessary in some future case to consider the question … What follows, with only a few changes, is my judgment as originally circulated" (at [30]).

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that the dissent is evidence of the common law being truly the application of reason to historically contingent societal values. Dissent reveals something important about our attitude to the law and to judicial decisions. As Postema explains, "The authority and weight of judicial opinions ... is the authority of an *expert* reporting his or her findings, not the final or formal authority of an official whose saying *makes it so*."[99] In this context, a legal principle is but a working hypothesis, the best that can be formulated for the time being. It is impermanent, subject to flux, erosion and further manipulation. The dissent, therefore, illustrates the common law's assumption that the underlying principles of the law are meant to be subject to perpetual, unrelenting re-appraisal.

Today, no particular pressure is exerted on judges in the appellate courts to conform. True, in the mid-nineteenth century some thought was given to the question of dissenting speeches by a Select Committee of the House of Lords. Although there was a little support, notably from Lord Romilly M.R., for suppressing dissenting speeches on the grounds that this would supposedly conduce to the dignity of the court, the Committee rejected calls for the introduction of a single composite judgment in all final appellate courts.[100] Since the 1850s, in the House of Lords, apart from a brief period when Lord Diplock was the senior Law Lord (between 1981 and 1984),[101] no serious attempt has been made to impose consensus. The members of the House can of course discuss the case in hand informally after the close of argument.[102] Draft judgments are circulated as a matter of course amongst the Law Lords. Nowadays, one can also sense that an allocation of labour takes place, with particular members being selected in the first instance to make an essay at drafting a speech in a given case, which possibly falls within their specialist interests, and then seeing whether the other members of the court can align themselves with that speech. Nevertheless, there is nothing inherently shameful or unhealthy in the delivery of a dissent in either the House of Lords or the Civil Division of the Court of Appeal.

Dissent is one thing; concurrence may be another. The practice of delivering concurring judgments again reflects that strong individualist streak in our judicial nature, identified above.

[99] *Bentham and the Common Law Tradition* (1986, Oxford) p. 9.

[100] Parliamentary Papers, House of Lords 1856, (46) xxiv Q. 24, 25, 35, 339, 590, 784. See Alder, (2000) 20 O.J.L.S. 221, at pp. 235ff.

[101] See Robertson, *Judicial Decisions in the House of Lords* (1998) p. 26

[102] Do judges sometimes affect unanimity when plainly it is absent? Take *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [2001] 3 W.L.R. 1021, where Lord Bingham of Cornhill suggests that Lord Nicholls of Birkenhead's speech "commands the unqualified support of all members of the House." If one reads the 100 or so pages of speeches, however, it appears obvious that the Law Lords are all saying slightly different things on a range of issues.

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Concurring judgments, however, are difficult to characterise. Indeed, it is striking how seldom the practice has been addressed in academic writing. In one sense, the concurring judgment is a weaker form of judicial self-expression than the dissent. The judge delivering it is not differing, possibly vehemently, from his brethren. A concurring speech is not necessarily born of strength of feeling. The judge simply has reached an identical conclusion by a different route, feels the duty or desire to set matters out in his own words, perhaps wishes to add a personal gloss to the other judgments or to address a point passed over in his colleagues' judgments. Yet at same time, and for these selfsame reasons, the concurring judgment is also a more intense form of judicial self-expression. Despite the fact that he does not differ in the result and his utterances in likelihood will have no palpable effect on the result in the case, the judge nevertheless feels prompted to make a contribution to its final resolution. In spite of the advent of the composite judgment, one senses that the instinct to deliver concurring judgments remains strong. Its origins, as Harry Lawson may have implied, may lie in the career paths of our judges. Lawson dubbed English judges "the third side of an argumentative triangle", noting that "they carry their own advocacy with them to the Bench". Even when he becomes a Law Lord "a judge does not change his persuasive habit".[103] Judges, most of whom even today will have spent at least a couple of decades arguing cases at the Bar, do not readily turn Trappist or shrinking members of an appellate team. Their training and professional careers have endowed them with different natures. Even as first instance judges, they will sit alone and acquire the habit of openly speaking their minds in all the sundry litigation that comes their way. So strong is this prompting that on occasions when a members of an appellate court feels that there is little or nothing to add to what his colleague has said and he elects not to deliver a full judgment, he will feel bound to apologise for this. Thus, in *UCB Corporate Services Ltd.* v. *Williams* Peter Gibson L.J. made explicit: "Although we are differing from the judge, whose careful judgment might well have been upheld but for the subsequent decision of the House of Lords in *Etridge* on a point relevant to the constructive notice issue, there is nothing which I would wish to add to the judgment of Jonathan Parker L.J. with which I am in full agreement."[104]

[103] "Comparative Judicial Style" (1977) 25 Am. J. Comp. Law 364, 365 and 366. Lawson also makes the allied point, not unconnected with these themes, that "It would be idle to expect English judges to write in a less discursive manner than the way they speak" (at p. 366).

[104] [2002] EWCA Civ 555 at [106]. See also *Barclays Bank plc* v. *Burgess* [2002] EWCA Civ 291 at [36] *per* Ward L.J.: "I entirely agree with the judgment of Chadwick L.J. and although we

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Since the concurring judgment may become an endangered species if composite judgments continue to gain ground in the Court of Appeal, it would be useful to sketch out the possible advantages of this practice, before examining the competing reasons why concurring judgments might be viewed as disadvantageous to the common law. Apart from the fact that it allows an outlet for the honed instincts of the former barrister turned judge,[105] the arguments in favour of the concurring judgment, I would suggest, include the following. To a great extent, they track the arguments in favour of dissenting judgments. *First*, concurring speeches are a reminder that within a common-law system, where the judges fashion the law—and this is readily apparent from the volume of litigation the Court of Appeal hears and the fact that the majority of appeals are abandoned at that level,[106]—cases are not just about outcomes. Litigation is not simply a form of dispute settlement, for its own sake. It matters how a solution is arrived at. Moreover, the solution must persuade a critical and often disputatious audience of fellow judges, counsel and of course academics. It is not sufficient, therefore, that there is a principle; the search is for the *right* principle. This is a matter of argument, sometimes quite fierce debate. The concurring judgment, over course of time, is part of the unremitting search for the correct formulation of the principle. *Secondly*, just like a dissent, the concurring judgment, with its alternative viewpoint or its distinctive wording or qualification of the principle, may either generate the orthodoxy of tomorrow after the manner described by Aidan O'Neill, Q.C. in his study of the decisions of the Judicial Committee of the Privy Council in Scottish devolution cases, or contribute to adjusting the critical mass of opinion on a given point.[107] *Thirdly*, I would suggest that, as in the case of dissent, the knowledge that one's fellow judges may string together a more coherent or better expressed argument spurs one on to apply oneself wholeheartedly to the task of elaborating a judgment that will carry conviction. Concurrence offers the occasion for *une concurrence intellectuelle* which perhaps sharpens the faculties and keeps the judges on their toes. *Fourthly*—and this point ought not to be underestimated—the concurring judgment demonstrates to the citizen, and most importantly perhaps to the disappointed litigant, that matters which are of the most intense

are differing from an experienced judge, there is nothing I can usefully add; *Venables* v. *Hornby* [2002] EWCA Civ 1277 at [39] *per* Peter Gibson L.J."

[105] There seems no reason to think that the advent of a small number of High Court judges from amongst the ranks of the solicitors need alter this.

[106] This, after all, was what Lord Denning always claimed had lured him back to the Court of Appeal after serving for a spell in the more tranquil surroundings of the House of Lords.

[107] See "Judicial Politics and the Judicial Committee", cited note 33 above.

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interest to him or her have been accorded fitting attention by *all* members of the tribunal. After all, one appeals, at some personal inconvenience, against a lower court's judgment to a court with a more numerous and, presumably, better qualified judicial personnel. It will look unsatisfactory if those judges appear not to have given the matter their individual and undivided attention. In the eyes of litigants at least, the composite judgment, with its formulaic opening statement, "This is the judgment of the court", is liable to appear remote and lacking in any personalised touch. If parties have troubled to appeal, one would anticipate that they will expect their case, if anything, to receive more intense attention from the appellate judges than it received in the court below, and they will appreciate evidence of that attention, too.

There is, then, an argument that dissenting and concurring judgments are to a great extent cut from the same cloth. Together, they guarantee a high measure of openness in the system, as well as conferring on English judgments a pronounced, personalised stamp that, in likelihood, contributes to making them more acceptable to litigants than impersonal, bureaucratic collective dooms. Concurring judgments play their part in keeping the system honest; and transparently honest, at that.

That mazy beauty of the common law

Concurring judgments, however, have disadvantages, too. The first is that they do not promote clarity in the law. Although Diplock L.J. did once describe the judiciary's entitlement to reach the same conclusion by different routes as "the beauty of the common law; it is a maze and not a motorway,"[108] this entitlement can also make the search for the *ratio decidendi* of the case in future litigation resemble *The Hunting of the Snark*.[109] With multiple formulations of a rule to choose between or more than one approach to a problem being advocated, the quest for a *ratio* may demand intense intellectual effort—or even desperate measures. The problem is that whilst dissents for the main part can be excluded from the future equation, concurring judgments cannot so easily be overlooked. This would explain why some concurring judgments are suppressed. Sometimes we know this because the judge has told us that he has done so[110] or because the draft judgment unexpectedly resurfaces at

[108] *Morris* v. *C.W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, 730.

[109] "They sought it with thimbles, they sought it with care . . .": Lewis Carroll, *The Hunting of the Snark* (1876: London, Constable) Fit. v, st. 1. For a vigorous discussion of some of the disadvantages of concurring judgments, see L.C.B. Gower, "Reflections on Law Reform" (1973) 23 Univ. Toronto L.J. at pp. 257–259.

[110] *E.g.*, *U.C.B. Corporate Services Ltd.* v. *Williams* [2002] EWCA Civ 555 at [106] *per* Peter Gibson L.J.

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a later date. Thus, if one examines a published selection of the speeches of the great Northern Irish judge, Lord Macnaghten, this volume includes that judge's speech in *Lawrance* v. *Lord Norreys*.[111] Anyone who studied the published report of that case, however, would conclude that Lord Macnaghten did not deliver an opinion, save to concur with the speeches of Lords Herschell and Watson. Only after Lord Macnaghten's death did his full speech come to light, along with a letter from Lord Herschell in which the latter suggested that he incorporated Lord Macnaghten's judgment with his own. It would seem that this is what occurred. And most entertaining Lord Macnaghten's speech is, too.[112]

More grave perhaps are the steps the court may subsequently have to adopt to wring any sense at all out of a case in which several members of a court have delivered judgments that vary in their terms. To take an example from the law of contract, let us briefly examine the House of Lords' decision in *Bell* v. *Lever Bros.*,[113] an important decision which supposedly lays down the fundamental principles relating to mistake at common law. In *Bell* v. *Lever Bros.* all five Law Lords delivered speeches. Lords Hailsham and Warrington dissented. Their views, therefore, can to all intents be discounted. Three members of the House agreed that the plaintiffs' plea of mistake failed. However, whilst agreeing with the conclusion in the case, Lord Blanesburgh came to his decision essentially on a point of pleading. Only two members of the majority truly addressed the substantive issue; and their statements of the law governing mistake at common law do not exactly coincide. The result has been that, despite its own internal inconsistencies, the speech of the Law Lord with the more enduring reputation—Lord Atkin in preference to Lord Thankerton—has been treated as authoritative. Moreover, Lord Atkin's very words have not always necessarily been quoted, but convenience has often dictated the citation of Denning L.J.'s self-styled "correct interpretation of that case", delivered in his renegade judgment in *Solle* v. *Butcher*.[114] The mental convolutions are not especially

[111] (1890) L.R. 15 A.C. 210.

[112] See *A Selection of Lord Macnaghten's Judgments 1887–1912* (1951: London, Butterworths, published for private circulation) pp. 12–18. Sir Frederick Pollock said of Lord Macnaghten's judgments that they were "genius beyond the reach of art": *For my Grandson* (1933, London, John Murray) p. 172. Arguably, this is yet another composite speech delivered in the House of Lords: see note 12 above.

[113] [1932] A.C. 161.

[114] [1950] 1 K.B. 671. At the very moment of going to press the Court of Appeal, in its composite judgment in *Great Peace Shipping Ltd.* v. *Tsavliris (International) Ltd.* [2002] EWCA Civ 1407, has declared *Solle* v. *Butcher* to be bad law. The distinct equitable doctrine of mistake may in consequence be gone. However, one can anticipate that the phenomenon identified in the text will persist and that the summary of the doctrine of common law

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edifying. This is not *elegantia juris*.[115]

Although *Bell* v. *Lever Bros.* was a decision of the House of Lords, this selfsame phenomenon is regularly encountered in judgments handed down by the Court of Appeal. A recent decision of that court in a company law case, *Smith* v. *Henniker-Majors & Co.*,[116] illustrates the difficulties graphically. The case was acknowledged to "raise issues of some general importance in the fields of company law, agency and the amendment of pleadings",[117] and notably the interpretation of s. 35A of the Companies Act 1985 in which Parliament has on two occasions attempted to implement the Teuton-inspired art. 9(2) of the First Council Directive on Company Law (68/151/EEC). The question posed was: Does s. 35A enable a director, who has made an honest mistake as to the meaning of a provision in the articles of his company, to rely himself on his own mistake in order to give validity to something which would lack validity were it not for that mistake? All three members of the court delivered judgments, endeavouring to determine what was meant by the expression "the board of directors"; what was the irreducible minimum requirement to constitute a board? In outline, Robert Walker L.J. defined this as "a genuine decision taken by a person or persons who can on substantial grounds claim to be the board of directors acting as such (even if the proceedings of the board are marred by procedural irregularities of a more or less serious character). This is not a precise test and it would have to worked out on a case-by-case basis."[118] Carnwath L.J., on the other hand, agreeing with the first instance judge, Rimer J., dissented from this view, which relies upon a slippery distinction being drawn between nullity and procedural irregularities. Carnwath L.J. declined to lay down a general test, preferring not to state a view regarding directors in circumstances other than those presented in *Smith*, where the director was also the chairman of the company, responsible therefore

mistake set out by Lord Phillips M.R. and May and Laws L.JJ. at para. [76]—along with Steyn, J.'s remarks in *Associated Japanese Bank (International) Ltd.* v. *Crédit du Nord* [1989] 1 W.L.R. 255, 268, which the court expressly approved (at [90])—will acquire a similar lapidary status to that of Denning, L.J.'s distillation of the common law of mistake in *Solle* v. *Butcher*.

[115] Is there not perhaps also a paradox of sorts here? The higher we ascend in the court hierarchy, the greater are the numbers of judges with which we pack the benches. As a rule of thumb, the higher the court, the more significant the issues or the value of the interests at stake. Hence, the greater the interest in settling matters clearly. One logic might lead us to anticipate that numerous benches would therefore bestow greater emphasis and precision on the decisions they hand down than are to be found in those of lower courts. With dissenting and concurring opinions, however, the effect can almost be the opposite.

[116] [2002] EWCA Civ 762.

[117] *Ibid.* at [1] *per* Robert Walker L.J.

[118] *Ibid.* at [41]. The judge later admits with regret that his progress to this conclusion was "tortuous", had "occasioned some delay and additional expense", and "is not a wholly satisfactory test" (at [52] and [53]).

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for the proper application of its constitution.[119] Schiemann L.J., who openly avowed that he approached the case "with a predisposition to find in favour of (the third party) rather than in favour of the director",[120] concurred in the result proposed by Carnwath L.J. but, although conceding that the word "person" is wide enough to comprehend both third parties and directors of the company, construed s. 35A nevertheless to inhibit a director, who is the author of his own misfortune, from profiting *vis-à-vis* third parties from his own mistake.[121] Company lawyers, wrestling with the *ratio* of this case, will perhaps catch a glimpse of what Robert Browning saw "in the natural fog of the good man's mind".[122]

There can be little doubt that what in part motivates the Court of Appeal to deliver composite judgments is a desire to lay down distinct and clear formulations of the rules, precisely in order to avoid the profusion of opinions presented in much of that Court's conventional case law. The single, unanimous voice possesses the additional benefit that it can lend distinct emphasis to the Court's ruling. The judges, of course, cannot imagine that by this device all future debate will be stilled, but the margin of uncertainty can be narrowed. Yet, it seems to me, this argument for composite judgments is not without its difficulties. The first problem with this approach is that the new composite behaviour flaunts the lawmaking function of the Court of Appeal. The Court is unanimously enunciating a rule to govern future conduct in a far more obvious and deliberate manner than that to which English law has hitherto been accustomed. This may make a common-law traditionalist feel somewhat uneasy. The second problem is that the composite decisions, which are often handed down in the most legally testing cases, lack a certain credibility. It is scarcely conceivable that three or more lawyers, who have been elevated to the Court of Appeal in recognition of their acumen, articulacy and independence of mind, can literally "agree" to every word, to every twist and turn of a complex piece of legal ratiocination. There has to have been some intellectual compromise, some tactical self-restraint somewhere along the line. Unity is a product of negotiation; it is not a *datum* of legal life. Moreover, when we are told that all three members of the court have contributed equally (both a fantastic and an ambiguous claim)[123] or that particular portions of a judgment are substantially the responsibility of one particular judge,[124] the true situation

[119] *Ibid.* at [110].
[120] *Ibid.* at [123].
[121] *Ibid.* at [128].
[122] *Christmas Eve and Easter Day* (1850: London, Chapman & Hall) canto iv.
[123] See *Greig Middleton & Co. Ltd.* v. *Denderowicz* [1998] 1 W.L.R. 1164 *per* Saville L.J.
[124] *E.g.*, *Kuwait Airways Corporation* v. *Iraqi Airways Co.* [2000] EWCA Civ 284.

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becomes a little clearer. But composition apart, there is the further credibility problem that, irrespective of the true situation, it will always *appear* that whilst one judge, in whose name the judgment is delivered, will seem to have done the work, the other members will look to have been resting on their oars, just ensuring that the bench looks fully manned.[125] As I suggested earlier, this new practice may not be calculated to increase consumer satisfaction with the Court of Appeal.[126] Thirdly, there is the more philosophic consideration that the composite judgment trades that virtue of the common law identified above, its extreme openness, for a smidgen of certainty. One hypothesis is that with the composite judgment we no longer know what the judges are really thinking: we have lost a part of what the German comparatist, Hein Kötz, once likened to "an oxygen bath".[127] Moreover, the composite judgment is simply not the ideal vehicle for expressing the full range of judicial emotions and rhetorical devices. The three members of the court are not going to utter a joke or quote a fragment of literature in unison. Strong phrases and ringing prose have no place in a composite world. Three judges can scarcely credibly share an exact doubt, admit to having oscillated in their opinions or to having full-bloodedly changed their minds. The composite judgment may lack elements that mean something in the context of English law and may discard an important component, its freedom and, hence, its humanity. Alternatively, and worse still, presented with a composite judgment, we may know presumptively what one member of the court thought, but sense that the other two may simply have kept their own counsel. If it continues to make inroads into the Court of Appeal's established methods of handing down judgments, this method of proceeding is almost bound to generate a working practice whereby one member of the court is conventionally assigned the task of writing the judgment and the others see whether they can go along with it. Given that we live in an era of increasing specialisation and that few judges can affect to detailed familiarity with all areas of civil litigation, the

[125] Nor does the anonymous judgment meet the point, although it is noticeable that a goodly number of composite judgments released as transcripts do not indicate authorship. The credibility of the contrivance is put more sorely to the test in a rare case like *Taylor* v. *Lawrence* [2002] EWCA Civ 90, [2002] 3 W.L.R. 640, where a five-man Court of Appeal handed down a composite judgment (on the subject of judicial bias). The prime intention in this case, one infers, was to hand down unequivocal guidance on how such cases were to be adjudicated upon in the future and, perhaps, to avoid the embarrassment of individual appellate judges criticising a brother judge, who would seem to have acted with insufficient circumspection. Not only does a five-hand judgment look unconvincing—one wonders just what mechanism produces a 13,221-word speech—but also, when one looks at the sort of principles delineated by the court, which comprised the Lord Chief Justice, the Master of Rolls and three of the most senior Lords Justices of Appeal, one is struck by how impressionistically some of those principles are expressed: see notably at [64], pp. 658–659.

[126] See text accompanying notes 86–91 above.

[127] See note 61 above.

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tendency naturally will be for the member of the court with the requisite expertise to be allocated this task.[128] Any such development will merely exacerbate the suspicion that the composite judgment is a hollow device that economises judicial effort under colour of enhancing legal certainty.

"Mr. Justice Crane: 'I agree'"[129]

Another important consideration, however, needs to be factored into the equation. Hitherto, the argument has proceeded upon the basis that in English courts in which benches of judges sit, all members of the court regularly and fully exercise their entitlement to speak their minds. What happens in reality? As an example, let us consider a Divisional Court case that caught the public eye. In *Thoburn* v. *Sunderland City Council* the Divisional Court recently heard a quartet of appeals against conviction by so-called "Metric Martyrs." As Laws L.J. acknowledged in what seems a piece of calculated understatement, the four appeals "raise(d) issues which have excited public feeling." The cases involved prosecutions of three greengrocers and a fishmonger, scattered between Sunderland, Hackney, and Camelford, who used weighing machines calibrated in pounds and ounces rather than in metric measures, and the appeal of a fruit-and-vegetable street trader who objected to terms the London Borough of Sutton had imposed on renewal of his license. The appellants were as characters drawn from the pages of G.K. Chesterton, who simply and harmlessly sought to assert their Englishry. The respondents, meanwhile, were those whom Chesterton would have surely disparaged as humourless servants of officialdom.[130] The case employed no less than seven counsel, Sunderland City Council even taking the singular precaution of instructing a Q.C. to represent it in the magistrates' court. In its small way, the case was a constitutional landmark. The appellants may not have been contesting a levy of shipmoney, but it was accepted that the cases of Steve Thoburn, Colin Hunt, Julian Harman, John Dove and Peter Collins raised serious constitutional issues "between the claim of European law to

[128] In some areas, where composite judgments seem especially common—*e.g.*, Family law—one wonders whether this is not already occurring.

[129] *Thoburn* v. *Sunderland City Council* [2002] 3 W.L.R. 247, [2002] E.W.H.C. (Admin.) 195 at [83]. There is no particular reason for selecting this case in preference to the thousands of other similar examples, save that I have a vivid recollection of how incongruous this "judgment" seemed at the time.

[130] The website *www.metricmartyrs.com* reveals that even H.M. The Queen's Sandringham estate sawmill has been found to have been acting in breach of these selfsame EU regulations, following a visit by Norfolk trading standards officers. One can only guess at the bewilderment of the Norfolk populace struggling to come to terms with a sawmill that sold timber measured in traditional feet and inches. The people of Norfolk will never be able to repay the debt they owe to the vigilance of Norfolk County Council's trading standards officials.

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be supreme in each of the Member States and the traditional doctrines of the common law relating to the supremacy of Parliament".[131] The court may not have admitted it, but the case also tapped into some of the biggest issues on the contemporary political agenda concerning the relationship between Europe and what is left of Britain. Euro-fanaticism was ranged against Euro-scepticism in this contest over fundamental legalities. Laws L.J. crafted an intricate, considered judgment, debating with care the arguments counsel had mustered. It stretches to 17,536 words. Then, Crane J. utters the familiar incantation, "I agree."[132] If one places oneself for a moment in the shoes of a French, German or Italian judge, this behaviour will appear bizarre. This is not "an oxygen bath." Why would a judge do that?

The fact is that in the appellate courts, the Court of Appeal included, it is all too frequent to find that one judge delivers judgment and the other members (or member, for the two-man Court of Appeal is becoming ever more frequent) of the court content themselves with stating "I agree". As I showed in the previous paper, in 1999 this occurred in 44.1% of Court of Appeal cases reported by the Incorporated Council of Law Reporting. In 2000 this proportion rose to 49.4%, but in 2001 fell to 37.7%.[133] The reality is that what might loosely be described as full concurring judgments are relatively unusual, only occurring in roughly half the cases heard by the Court of Appeal.[134] They are

[131] [2002] 3 W.L.R. 247, at [1] *per* Laws L.J.

[132] Crane J.'s only other contribution, of which we are made aware, is that he agreed with a letter sent to counsel by Laws L.J. after close of argument suggesting a further point for their consideration: *ibid.* at [77].

[133] See "All for One and One for All", at p. 325. Add to these figures the percentages of cases in which composite judgments were handed down and the proportion of cases in which multiple judgments were delivered in these years was as follows: in 1999, 46.7%; in 2000, 39.7%; and in 2001, 48.2%. Although I have not sought to verify this, my distinct sense is that these figures would be roughly replicated in those Court of Appeal decisions that are not selected for inclusion in the Incorporated Council's law reports.

[134] By way of a rough-and-ready experiment, I explored whether the proportion of cases carried in the Incorporated Council of Law Reporting's reports in which two members simply signified agreement had increased over the past quarter century. Scanning these "official" reports, I found as follows:

	Percentage of composite judgments	Percentage of cases in which only one full judgment delivered	Total
1975	11.9	7.6	19.5
1980	8.6	4.8	13.4
1985	15.8	15.8	31.6
1990	8.7	23.6	32.3
1995	12.2	27.0	39.2

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certainly not the norm. It has been maintained to me by certain appellate judges that a further reason why composite judgments have come into vogue is precisely because it is felt that a pair of judges tersely indicating that they agree with the solo effort of the third member of the court looks unconvincing. Moreover, it is said that if the two of few words actually agree with the full judgment of the leading judge, it is unfortunate that the latter is always referred to as the sole author of the judgment when, in truth, it is the joint opinion of all three members of the court. Whilst agreeing that the gambit "I agree" lacks intellectual conviction and is unlikely to earn those who utter it with monotonous regularity a throne in the judicial pantheon, I am not persuaded that the latter point carries any great weight. To refer to *Roerig* v. *Valiant Trawlers Ltd.*[135] as a decision of Waller L.J., overlooking the fact that both Sedley and Simon Brown L.JJ. indicated their full agreement with the judgment is a familiar and harmless fiction, in the time-honoured sense that it is a statement that everyone knows to be, to some degree, untrue.[136] We may refer to *Thoburn* v. *Sunderland City Council*[137] as a decision of Laws L.J., but we also know that it was a ruling of a unanimous court. This is not really a problem, and in isolation certainly does not appear to justify resort to composite judgments. *Ubi difficultas?*

D. A Comparative Reflection: Monsieur Baudouin's Experiment

Is anything to be learned from the way in which other jurisdictions order their judicial decision-making? A conventional comparative

(The figures for 2000 may be found at [2002] C.L.J. 325. In the table above I have not recorded the countless additional cases where one member of a three-man court contented himself with "I agree").

A word of caution, however. The reason for judges simply saying "I agree" may have altered over the last quarter of a century. In 1977 Lawson pointed out that even in the Court of Appeal the custom was for the judges to deliver judgments extempore, immediately upon the close of argument: "(T)here is no place in the English system for the judicial conference; indeed there is seldom any time for it. The judges may be able to exchange a few words during an adjournment or *sotto voce* on the Bench at the close of argument. Then the presiding judge will usually start speaking and the others may add a few words or merely concur" (Lawson, "Comparative Judicial Style" (1977) 25 Am. J. Comp. Law 364, 365. This is no longer the practice today. The majority of today's exiguous concurring judgments are delivered after the court has taken time for deliberation. No-one is caught "on the hop". No-one can claim lack of time to give thought to what the prime mover in the court has decided to say. That said, as I scanned the Court of Appeal decisions, particularly those dating from the era of Lord Denning M.R., who was noted for insisting upon delivering judgment hot upon counsel's submissions, I found no evidence of "I agree" syndrome. On the contrary, in every case in the Incorporated Council's reports for the years I surveyed, in all cases in which Denning presided at least one other judge, and normally both the sidesmen, gave a judgment. Needless to say, I encountered no case where Lord Denning had had any truck with a composite opinion.

[135] [2002] 1 W.L.R. 2304, [2002] EWCA Civ 21.

[136] In another sense, it bears within it seeds of truth. The named judge visibly did the bulk of the work, and it is only appropriate that his or her labours should be recognised.

[137] Cited note 129 above.

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approach would be to analyse the operation of composite judgments within another legal system (or other legal systems). Although many jurisdictions employ composite judgments, does that alone make them meaningful or straightforward subjects of comparison? There are several interwoven problems. *First*, there is the inevitable comparatist temptation to see what one wants to see, and to make it fit into one's own world view. One of Gabriel García Márquez's short stories tells of a very old man, with bedraggled wings, who falls into a couple's backyard one night during a torrential downpour and, until another freak comes to town with the travelling fair, becomes the subject of intense speculation. The local priest comes to inspect this odd winged creature, whom the villagers claim to be a fallen angel:

> Alien to the impertinences of the world, (the old man) only lifted his antiquarian eyes and murmured something in his dialect when Father Gonzaga went into the chicken coop and said good morning to him in Latin. The parish priest had his first suspicion of an impostor when he saw that he did not understand the language of God or know how to greet His ministers.

Later, the doctor pays a call:

> The doctor ... could not resist the temptation to listen to the angel's heart, and he found so much whistling in the heart and so many sounds in his kidneys that it seemed impossible for him to be alive. What surprised him most, however, was the logic of his wings. They seemed so natural on that completely human organism that he could not understand why other men did not have them too.[138]

Both doctor and priest struggle to fit what in reality does not fit at all within the familiar, orderly structures of their respective rites and scientific methods. In a similar way, in order to make meaningful comparisons within the sort of field examined in this paper, any number of alien social, historical, linguistic and institutional variables would require to be taken into account. For instance, in order to compare the respective judicial practices of the English Court of Appeal and United States Federal courts,[139] one would need also to factor in such key elements as the extensive rôle

[138] "A Very Old Man with Enormous Wings. A Tale for Children" in Gabriel Garcias Marquez, *La increíble y triste historia de la cándida Eréndira y de su abuela desalmada* (1972, Barcelona: Barral Editores) translated in *Collected Stories* (1991, London: Jonathan Cape) pp. 186–193. I have lightly amended the commercial translation. The reaction of the priest in Charles Maturin's *Melmoth the Wanderer* is not dissimilar, who, "after listening long at the invalid's door, pronounced the language in which he was soliloquising *not to be Latin*, and, after a conversation of some hours with him, refused to tell what language the stranger spoke to himself in, and forbid all inquiry on the subject" (1820: London, Constable) vol. I, chap. v.

[139] The experience of US federal courts in the delivery of composite opinions was briefly discussed in "All for One and One for All", at pp. 347–348.

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law clerks play in the actual composition of many American judges' opinions,[140] the different parts played by advocacy within the respective systems,[141] and so on. *Secondly*, there is the problem that even when one alights upon a system with putatively relevant attributes, the apposite institution with which to compare our Court of Appeal, Civil Division may not be self-evident. For example, were one to imagine that the composite style of judgment practised in the French legal system supplies a suitable point of reference, although from one point of view they might initially appear the natural institution of comparison, the choice of French courts of appeal (*cours d'appel*), France's intermediate level of jurisdiction, would look distinctly eccentric to any French lawyer—just as would the choice of that comparatist's chestnut, the *Cour de cassation*. *Thirdly*, one encounters the difficulty of how to determine, let alone calibrate, the effectiveness and the public perception of judiciaries that hand down composite rather than personalised judgments within systems that have no experience of any different method of proceeding. Moreover, if one were looking to compare, say, the respective "inner views" within those systems, it is extremely improbable that judges, practitioners, litigants and any other category of individuals whose views might be deemed relevant would share anything approaching a common outlook. The conventional comparative approach looks either extraordinarily complicated to manipulate or destined to produce only hazy, impressionistic data devoid of practical utility.

But is there perhaps another route? What if lawyers or judges from a system with a strong composite tradition put non-composite drafting techniques to the test? Some evidence of the effect different styles of judging may produce comes from a relatively unexpected quarter. In 1992 M. Jean-Marie Baudouin, a judge of the Montpellier Court of Appeal, published a short paper in which he reported on the results of an experiment he had conducted at the French *École Nationale de la Magistrature* in Bordeaux. The paper

[140] On the rôle of law clerks, see sources cited in note 150 below.

[141] See, *e.g.*, Lawson, "Comparative Judicial Style" (1977) 25 Am. J. Comp. Law 364, 366: "The drastic curtailment of the time available for oral advocacy before American appellate courts has helped to make the preparation of argument not only a written but also a corporate enterprise ... and concurrently with the development of the judicial conference, the appellate opinion has become corporate also." Depending upon which elements one chooses to lay emphasis, one can cause the picture to mutate like a kaleidoscope. Thus, musing upon the differences between English, American and French judgments, Lawson at one point singles out the corporate nature of American court opinions, "combined with the search of a *communis opinio*", claiming that the effect is "to cause the convergence between American and French judicial styles and their divergence from the English." Additionally, the form of discourse encountered within those three systems diverges in the sense that "in England discussion takes place between Bench and Bar, whereas in America and France a large part of it, perhaps the most important part, is among the judges and their auxiliaries, law clerks in the former and *avocats-généraux* in the latter" (p. 365).

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asked, provocatively, "Does Collegiality Guarantee Sound Judgments?"[142] To French lawyers' ears, its answer may have come as a surprise. Although the character of the French judiciary and its methods of training are quite different from our own,[143] this has relatively little bearing upon M. Baudouin's experiment. It is more important to recognise that competition for places at the *École* is intense and the cadre of students admitted indisputably comprises an intellectual *élite*.

It was upon these students that M. Baudouin performed his experiment. What did he seek to achieve? Although very many first instance cases in France are actually heard by judges sitting alone, French legal tradition strongly favours collegiality—benches of judges handing down collective judgments. Owing to demands on manpower, this principle is called into question from time to time. Hitherto, on every occasion the principle of collegiality has won out. Orthodox French doctrine upholds its collegial tradition on a number of grounds. The two arguments most frequently put forward are, on the one hand, that benches of judges guarantee the integrity of judgments and, on the other, that the mixture of older and younger judges ensures that the traditions of the bench are upheld and handed down to succeeding generations of judges.[144] It is also claimed that in a collegial setting the personal quirks of individual judges can be compensated for and countered by the other members of the bench.[145] M. Baudouin's intention initially was to test these propositions, using 165 of the *École's* students as the guinea pigs. The experiment he devised involved a particularly difficult legal-cum-moral problem, involving female circumcision. In essence, parents from Mali, living in France, wished to have their daughter circumcised in accordance with Malian tradition, and the decision the court had to reach was whether or not to remove the child from her parents to prevent this act and then to decide what further precise orders might be appropriate in the case. This was an agonising problem, which has come before French courts on more than one occasion. The students worked in teams or

[142] "La collégialité est-elle une garantie de la sûreté des jugements?" Rev. trim. dr. civ. 1992. 532–538.

[143] The *École Nationale de la Magistrature* was set up in 1958 in Bordeaux, staffed by *maîtres de conférence*, all of whom have served as judges. The *École* is responsible both for training the 100 or so young women and men who are destined to become judges in France each year and for assuring a continuous judicial training for existing judges. The induction course, which is a general and practical judicial training, lasts 31 months—quite a contrast to the severely restricted activities of the English Judicial Studies Board. The French judicial career path, too, differs widely from our own: the French bench these days is both young (by the mid-1990s almost 50% of French judges were under 40 years of age, as compared with merely 13% in 1970) and, like many European countries, heavily feminised (in recent annual recruitments, between 70 and 80% of entrants to the *École* have been women).

[144] *E.g.*, Maurice Garçon, *Lettre ouverte à la justice* (1966: Paris, Albin Michel) pp. 71–73.

[145] Francçois Gorphe, *Les décisions de justice. Étude psychologique et judiciaire* (1952: Paris, Sirey) pp. 39 and 163.

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singly, some of them at various stages adopting the roles of other participants in the proceedings—such as defence lawyers, *procureurs* representing the public interest and so on. Their judgments were evaluated. Without pursuing unnecessary details, M. Baudouin's broad conclusions were as follows:

(i) *First*, "It cannot be ruled out that decisions taken by a single judge offer greater guarantees than those handed down by benches of judges."

In essence, M. Baudouin found that judges sitting alone made greater reference to legal sources than those who sat in benches and delivered judgment collegially. They were also felt in general to produce the better solutions to the case and, more particularly, did so if they happened previously to have played some other role in the proceedings.[146]

(ii) *Secondly*, "We noted that reflection is stronger and that problems are studied more deeply when someone is confronted by the internal contradictions in those problems than when debating them with someone else."[147]

Overall, M. Baudouin therefore concluded, "Collegiality, in itself, does not possess the virtues customarily attributed to it. Its merit depends upon the circumstances in which it is employed and upon the interpersonal relations between the various participants in the legal process."[148] For anyone brought up within a collegial tradition, these results will give pause. Similarly, for those who, without the most careful forethought, consider that common-law ways can be safely laid aside in the name of legal clarity, judicial

[146] Although one ought not to read too much into this unique experiment, it is tempting to wonder whether these tentative findings do not in some general sense vindicate the common law's way of doing things. Its tradition of recruiting judges from amongst the ranks of practising lawyers, as in the case of those French students who had not just played judicial roles in M. Baudouin's experiment, may well afford the judges a broader experience and vision which may legitimately be expected to enrich their judgments, once elevated to the bench. Additionally, one might reasonably have intuited that judges who sit alone, lacking the moral support of colleagues, precisely because they do sit alone, may have no need to compromise their opinions in the bid to arrive at agreed common conclusions, but will feel a greater need to reinforce their judgments with meticulously crafted legal arguments. The need to justify is all the stronger in the case of judges who operate solo.

[147] Rev. trim. dr. civ. 1992, at p. 533. These conclusions look plausible. Intuitively, one senses that the dynamics of deliberation are likely to have an effect on decision-making and on the formulation of arguments. I am tempted to draw a cautious parallel with recent findings of psychologists at Glasgow University, whose study of jury deliberations would suggest that conventional 12-member juries are simply too large to allow for true interaction or to permit "true consensus" (see James Randerson in *New Scientist*, 4 September 2001). In the Glaswegian study, Simon Garrod remarked, significantly, that "In a small group (of five), other people can finish or modify what you're saying", allowing a final decision to emerge from the amalgamation of everyone's opinions.

[148] *Ibid.*, p. 537.

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emphasis or administrative convenience, these results must raise a faint question mark.

E. Concluding Observations

Although this paper, along with its predecessor, has focussed principally upon the composite judgment, it seems clear that a more generalised experimental mood has gripped the courts. And, as yet, it is uncertain how far the innovations will be taken. Judges do seem genuinely surprised when informed that in anything up to one in seven cases the Civil Division of the Court of Appeal now delivers a composite judgment. Nevertheless, one is assured by senior judges that there is absolutely no intention to introduce the practice universally and that no pressure is being placed upon members of the court to "we it", as Lawton L.J. is credited with saying. Maybe so.[149] The judges, however, cannot bind their successors. They seem not to have had to answer to anyone, and have had persistent recourse to composite judgments without prior debate. As I suggested in the third section of this paper, concurring judgments may have unsung virtues. One's anxiety must be that as composite delivery becomes an accepted form of judgment in all classes of situation, once the potential savings in judicial time are perceived, and once the idea takes root that single appellate judgment can deliver seemingly clear and crisp principles of law, thereby dispensing with the more intense and sometimes downright frustrating intellectual exertions necessitated by multiple judgments, it will become *the* accepted mode of handing down judgment. As the saying goes, the camel's nose is inside the tent.[150]

In my submission, some of the changes in practice noted in these papers are of potential significance. It may well be that the brief assents that all too frequently punctuate appellate decisions[151] do

[149] One curious contradiction that surfaces in this paper is that whereas the Judicial Committee of the Privy Council, in a procedure that runs counter to its entire history, feels that the important issues that it is addressing in appeals from Scotland invariably merit five opinions, the Civil Division of the Court of Appeal increasingly inclines to the view that the most important issues it addresses merit single composite judgments. Are these viewpoints reconcilable?

[150] See generally D. Walton, *Slippery Slope Arguments* (1992, Oxford, Clarendon Press). There are, of course, other changes in working methods in the appellate courts of which one has similar suspicions. There is, for example, a small number of law clerks attached to various of the senior judges. Both the former ("A Seat in the Lords?" (August 2002) Counnsel, p. 20) and the latter (Lord Bingham, quoted *ibid.*; Lord Philips, quoted in S. Hawthorne, "The Master of All He Surveys" (April 2002) Counsel, at p. 11, cited in note 18 above) assure us that the clerks are not, and will not, be employed à *l'américaine* to participate in the composition of judgments (see, *e.g.*, Richard A. Posner, *Federal Courts: Challenge and Reform* (1996, Cambridge, Mass.: Harvard University Press); George Rose Smith, "A Primer of Opinion Writing for Law Clerks" (1973) 26 Vand. L. Rev. 1203; Joseph Vining, "Bureaucracy and Legal Method" (1981) 80 Mich. L. Rev. 248; Lauren K. Robel, "Caseload and Judging: Judicial Adaptations to Caseload" (1990) B.Y.U.L. Rev. 3). Once again, one could suggest that the seeds have been sown.

[151] See note 134 above.

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reveal how hollow some of our practices are becoming. The remedy does not necessarily lie in dispensing with concurring speeches—or, looking ahead, in putting judges under eventual pressure, even indirectly, to acquiesce in a collective judgment delivered at the behest of a senior member of the bench presiding on that occasion. It may also be that the Privy Council's record in Scottish devolution cases offers a reminder that multiple speeches generate complexity and uncertainty. However, it may equally suggest that change is not entirely rectilinear and that the bench's ingrained predisposition robustly to speak their individual minds remains vigorous. There is clearly a need to take stock and to reflect fully on the competing merits and demerits of our accepted ways of transacting judicial business, and indeed of making the law. Composite judgments may add weight to appellate decisions and may satisfy a need to believe that there can be decisive, categorical legal answers. Even allowing courts flexibility to opt for collegiality as and when it is felt especially appropriate may be no bad thing, provided that we know in what categories of situation this is likely to occur and what, if any, the effects are likely to be.[152] However, the countervailing disadvantages in terms of loss of public credibility and loss of systemic openness, in terms of loss of that desire painstakingly to grope for right principles—and, most intriguingly, even in terms of a possible loss of quality in negotiated, collegiate judgments, need to be taken into account also.[153]

A second, and allied, point may have emerged from these two studies: the relative poverty of the literature on English legal system. There is no shortage of books on the subject which enumerate the supposed nuts-and-bolts of legal system, sometimes

[152] There does seem a desire amongst the upper judicial cadre to instil greater openness into the system. Thus, Lord Steyn, in his Neill Lecture, which admittedly focussed upon the rôle of the Lord Chancellor, advocated greater openness about the selection of which judges sit in which cases: "If the Lord Chancellor has the power to dictate in a given case the composition of the highest court in the land, he will be entitled to exercise it and nobody will in practice known when the power has been exercised directly or indirectly. *Not much legal certainty and transparency there.*" (*The Case for a Supreme Court*, 1 March 2002, All Soul's College, Oxford, p. 9.) Similar reasoning could apply to the decisions of the Court of Appeal to go into composite mode, especially given that litigants, who might count as interested parties, are not consulted beforehand.

[153] This is without mentioning the historical incongruity of collegiality in an English context. Why have some Continental systems espoused a "strict" collegial principle? In France (where in fact a high proportion of first instance courts are manned by single judges) collegiality is tied up with the Revolutionary break with the *ancien régime*, and the desire during that period to clip the wings of a detested judiciary. These are not exactly our motives. From a different comparative perspective, the English move towards collegiality could also look odd given that in one collegiate system, Germany, one of the really hard-fought legal battles of the last century, involving the German Constitutional Court (*Verfassungsgericht*), was the struggle to establish the right of members of that Court to publish dissenting opinions. This is in the cases that really matter—this right, not unnaturally, being seen as a means of giving further effect to democratic ideals, following the totalitarian horrors of the Second World War.

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encasing the product in an apologetic cladding of sociological modernity. Yet, virtually none of the issues treated in these papers—issues that, many of them, I would argue, go to the heart of our system—seem anywhere to receive considered treatment. It is possible that one reason for this is that those who would approach these themes fail to take a comparative standpoint. The Italian writer, Umberto Eco, introduced the English translation of some of his early writings, *Diario minimo*, with the following anecdote:

> "Some time ago, a group of anthropologists invited African researchers to France so that they could observe the French way of life. The Africans were amazed to find, for example, that the French were in the habit of walking their dogs."[154]

Obviously, this is meant to suggest that what we take for granted as normal, even banal, may in fact be abnormal in other contexts, or may even be abnormal in its own context once we really *look* at it. To pirate the words of G.K Chesterton, the function of the comparative imagination is "not to make strange things settled, so much as to make settled things strange".[155] Once one begins to look closely at the system, almost as an outsider, one discovers any number of "settled things", such as concurring judgments, that suddenly require explanation but which, upon examination, may nevertheless fit within a coherent pattern of which previously we were perhaps only dimly conscious. On close inspection, one also may discover that those "settled things" are not quite as one always assumed. To give just a couple of examples of the latter, since these studies have focussed principally upon the Court of Appeal, let us briefly consider who actually sits in the Court of Appeal.

Time was when one could safely assume that the normal constitution of a Court of Appeal would have comprised three Lord Justices of Appeal. Not so nowadays. If one can, once again, refer to the profession's "official" law reports, it is striking how many of the (presumptively) most important decisions of the Court of Appeal include puisne judges, retired judges, and two-man courts. Indeed, as the table for the 2001 Incorporated Council of Law Reporting's reports set out below shows, no less than 13.8% of Courts of Appeal included a retiree; 28.3% included *at least* one puisne judge; and 9.9% of these appellate cases were tried by two-man courts.[156]

[154] *Misreadings* (1993: London, Jonathan Cape. Trans. W. Weaver), p. 4.

[155] "A Defence of China Shepherdesses" in *The Defendant* (1907: London J.M. Dent & Sons Ltd.) p. 84.

[156]

3 Lord Justices	2 Lord Justices and 1 Justice	1 Lord Justice and 2 Justices	2 Lord Justices	1 Lord Justice and 1 Justice	2 Lord Justices and 1 retiree
(Ch.) 15	6	—	1	1	6
(Fam.) 10	—	—	1	—	—
(QB) 18	11	5	1	1	4
(WLR) 33	5	13	9*	1	11

* In *Amber* v. *Stacey* [2001] 1 W.L.R. 1225 the two-man Court was composed of a Lord

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Turning to criminal cases, and examining the 43 cases reported in the two volumes of the 2001 *Criminal Appeal Reports*, which one can probably assume will include the most important cases affecting criminal law, procedure and evidence, one discovers that on not one single occasion did the Criminal Division comprise three Lord Justices of Appeal. Only once were even two Lord Justices present: at the appeal of Derek Bentley, where the Lord Chief Justice sat with Kennedy L.J. and Collins J. Otherwise, on 36 occasions the Court was made up of one appellate judge and two puisne judges; on five occasions the Court was composed of one Lord Justice, one puisne judge and a recorder; and there was one two-man Court, comprising a Lord Justice and a recent retiree, Sir Richard Tucker. The more senior recorders, one could add, are sitting more frequently as members of the Court of Appeal, Criminal Division. On occasion, the recorder actually delivers the judgment. One then has the curious situation that, although of course he will have the backing of the more senior members of the court, a recorder is handing down judgment in an appeal taken against the ruling of a fellow recorder. These statistics, it seems to me, pose a series of questions. The increasing number of two-man Courts of Appeal in civil cases, for instance, invites the inquiry whether this practice does not put the Court under greater pressure to reach unanimous decisions than would exist were the court to comprise three judges. The more frequent presence of recorders in appeals before the Criminal Division also raises some obvious questions.

Reverting finally to the narrower matter in hand, the collegiate drafting of judgments, I intuit that recent alterations in judicial methodology could lead to changes in the character of the English judgment and in its role in the elaboration of English law. It is not obvious that these will be changes for the better. My analysis, I acknowledge, is far from crisp. I take some comfort from the realism with which Wittgenstein confronted the question, Is a blurred concept a concept at all? He answered, allusively: "Is an indistinct photograph a picture of a person at all? Is it even always an advantage to replace an indistinct picture by a sharp one? Isn't the indistinct one often exactly what we need?"[157] I seek merely to provoke debate. The indistinct picture, I would argue, is "exactly what we need"—or at least, will serve that preliminary purpose.

Justice of Appeal and a retiree, Sir Anthony Evans.

[157] *The Philosophical Investigations*, ed. E. Anscombe, (1958, Oxford, Basil Blackwell) para. 71.

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