INSTITUTIONAL UNITY VS FREEDOM OF EXPRESSION: A DISSENT ANALYSIS OF THE RICHARDSON COURTS

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I INTRODUCTION

An obvious illustration of the theme "Roles and Perspectives in the Law" can be found in the differing opinions expressed in court judgments. This is seen most acutely through the issuing of dissenting judgments[1] in those Courts, such as the Court of Appeal, which sit in panels.

This paper undertakes an empirical analysis of the dissent patterns of the Court of Appeal during Sir Ivor Richardson's Presidency. Specifically, the paper considers if there has been a change in dissent rates, and what are likely, in the New Zealand context, to be the drivers of what has been described as a manifestation of "institutional disobedience".[2] Finally, it offers some tentative views on what might be the implications of the analysis.

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1 The term "dissenting judgment" can mean judgments which are dissenting as to outcome and those which are partly dissenting ie which concur as to outcome but differ as to the reasoning or interpretation adopted in arriving at that outcome. For reasons, which are developed at a later point in this paper, the term "dissenting judgment" is used in this study to mean only judgments that dissent as to outcome.

2 J Louis Campbell "The Spirit of Dissent" (1983) 66 Judicature 305-312.

II WHY UNDERTAKE EMPIRICAL STUDIES?

At the time of his retirement as President, an empirical analysis of Sir Ivor's own Court seemed entirely appropriate given His Honour's well known calls both judicially and extra-judicially for empirical evidence as a basis for testing theoretical assumptions.[3]

The need for empirical evidence in relation to the substantive aspects of a decision is increasingly well accepted, at least insofar as explicit economic questions are raised. Until comparatively recently, however, there was very little in the way of empirical analysis in this country of the decision-making processes of courts themselves.[4] This is in sharp contrast to the position in other jurisdictions, particularly the United States, where some very ambitious econometric modelling has been undertaken.

Beyond the recognition of Sir Ivor's own interest in the subject, empirical data may be the only source of public information about the way a particular Court functions. Such public analysis of courts as does occur in New Zealand tends to be informal and dependent on descriptive or anecdotal evidence. Empirical studies, if methodologically sound, provide a basis for objective and more rigorous analysis.

Some of the ways in which the Court of Appeal functions are relatively transparent. For example, section 398 of the Crimes Act 1961 provides that except in limited circumstances, the Court will not issue separate judgments in relation to criminal appeals. As a result, anything other than unanimous decisions in criminal appeals remain extremely rare.[5] Similarly, section 59 of the Judicature Act 1908 provides that if the Court is equally divided then the judgment appealed from is taken to be affirmed.[6] Other

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3 *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563, 574 (CA) Richardson J; *R v Hines* [1997] 3 NZLR 529, 539 and 550 (CA) Richardson P; Sir Ivor Richardson Foreword in "Essays in Law and Economics" (1996) 26 VUWLR, 196.

4 The exceptions are recent papers by Sir Ivor Richardson, and Dr Russell Smyth. See Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 261; and Dr Russell Smyth "Judicial Robes or Academic Gowns? – Citation of Secondary Authority and Legal Method in the New Zealand Court of Appeal" Rick Bigwood (ed) in *Legal Method in New Zealand*, (Butterworths, Wellington, 2001) 101.

5 The exceptions appear to be those criminal appeals that generate human rights issues. See for example, *R v Poumako* [2000] 2 NZLR 695 (CA).

6 Although the Court of Appeal occasionally sat in even numbered panels as late as the 1950s, the practice appears to have largely ceased. See, for example, *Redpath v Melville Ford & Co Ltd* [1950] NZLR 362 (CA).

obvious norms are an adherence to the principle of *stare decisis*, and the importance of secrecy of deliberation and of outcome prior to publication.

Nevertheless, many of the processes by which the Court of Appeal conducts its deliberations remain private, and appropriately so. The importance a particular Court places on consensus and collegial decision-making is largely unknown to outsiders. The same is true of the process by which Judges are allocated to cases, and how the composition of a particular Court is determined.[7]

Empirical studies can also test lawyers' and others' "perspectives" on the way cases are decided. For example there appears to be a general impression or belief that rates of dissenting judgments have increased in recent years, the validity of which can be tested through empirical studies.

However, empirical studies are only as useful as the soundness of the data and methodology on which they are based. Absent sound methodology, empirical studies are little improvement on anecdotal evidence, and potentially misleading. The 'human' element in any process of adjudication creates necessary limitations on the usefulness of empirical material, which can perhaps be seen in some of the United States studies.

III THE EXISTING LITERATURE

In 2001, Sir Ivor Richardson published an article "Trends in Judgment Writing in the New Zealand Court of Appeal".[8] His Honour had collected together and analysed extensive data relating to various facets of the decisions of the Court of Appeal for the years 1960, 1980, 1990, 1997 and 2000. A number of conclusions were drawn by Sir Ivor from that data.

Not surprisingly, there has been an enormous increase in the number of decisions delivered by the Court of Appeal. Between 1960 and 2000, there was a 500 per cent increase in the Court's workload.[9] Logically enough, that has led to a significant increase

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7 Although the structure and composition of panels was not the principal focus of this paper, some limited preliminary empirical research was undertaken into this issue. The results suggested that there was no great disparity in the frequency with which Court of Appeal Judges sat with one another - that is to say there were no particular 'groupings' which were more common than others. The only exception was that newly appointed Judges appeared to sit more frequently with the President than more experienced Judges. In 1996, Justices Blanchard and Keith who were appointed that year, sat much more frequently with Sir Ivor than did Justices Gault and Henry.

8 Richardson, above, 261.

9 Richardson, above, 262.

in the workload of individual Judges as measured by judgments per Judge. Presumably as a reflection of that, judgments are smaller in terms of length of decision.[10]

Sir Ivor also considered the incidence of multiple judgments, which, he noted "have significant implications for the workload of individual Judges and for the Court as a whole." He indicates that: "In 1960, multiple judgments were delivered in 22 percent of the cases; in 1980, it was 25 percent; in 1990, it was 9 per cent; and in 1997 and 2000, it was 6 per cent and 4 per cent respectively".[11]

Sir Ivor suggested that there were at least three factors at play: First, workload pressures will tend to encourage joint judgments; secondly, at a particular time the Court may put a lot of emphasis on trying to send out a clear statement about the law; thirdly, the incidence of multiple judgments was affected by the personalities and attitudes of the particular set of Judges on the Court at the time.

In addition to Sir Ivor's paper, a significant body of work is being undertaken at the University of Auckland into the decision-making processes of Australian and New Zealand courts. In particular, a great deal of work has been undertaken by Dr Russell Smyth into citation practices.[12]

Some extensive and relatively ambitious empirical research has been undertaken in the United States. For example, citation analysis has been used to measure judicial influence.[13] The number of citations to the published opinions of Federal Courts of Appeal Judges was used to measure the influence of individual Judges. The assumption was that the more citations a Judge receives, the greater must be his or her influence. The study also analysed the effects of factors which the authors suggested as relevant in explaining the differences in the influence of individual Judges such as law school attended, law school performance, gender, race, prior experience, political affiliation, and the circuit upon which the particular Judge sat.

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10 Richardson, above, 263.

11 Richardson, above, 263.

12 Sir Russell Smyth "Judicial Robes or Academic Gowns? - Citation of Secondary Authority and Legal Method in the New Zealand Court of Appeal" in R Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 101.

13 William M Landes, Lawrence Lessig, and Michael E Solimine "Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges" (1998) J Legal Stud 271.

A similar study published by Kosma[14] focused on citation analysis of the decisions of Supreme Court Justices. It modelled the appointment process as the selection of a capital investment, treating a Judge's output as the precedents generated, and using citations as a proxy for an opinion's value.

Some of the American studies challenge the outer limits of what is objectively observable. A study by Lim, for example, hinged on categorisation of the ideological direction of particular cases.[15] For example 'anti-government' as opposed to "pro-government", "anti-employer", "pro consumer" and so forth. The paper then attempted to quantify the effects of individual and institutional *stare decisis*, and decompose the various factors affecting an individual Judge's decision-making.

It is doubtful that it is possible in any jurisdiction to make an ideological distinction as clearly as that paper suggests. If that is correct, then no matter how sophisticated the models or studies subsequently developed, the results obtained will not advance matters especially far.

O'Brien[16] conducted an historic review of the pattern of individual opinions as opposed to opinions for the Court of the United States Supreme Court. The study, which was conducted from 1800 to 1994, showed a substantial increase in the rise of individual opinions as opposed to opinions for the Court. This trend began most markedly with the appointment of Chief Justice Stone in 1941 although a slight decrease in dissents occurred under Chief Justice Rehnquist. Largely, however, that Court has moved away from institutional unity, a trend which the author suggested was unlikely to be reversed.

IV WHY DISSENT STUDIES?

Whether or not dissents matter is a contentious issue.

Those such as United States Supreme Court Chief Justice Marshall (1801-1835) believed strongly in unanimity, considering that unanimous decisions built the court's prestige and

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14 Montgomery N Kosma "Measuring the Influence of Supreme Court Justices" (1998) J Legal Stud 333.

15 Youngsik Lim "An Empirical Analysis of Supreme Court Justices' Decision Making" (2000) J Legal Stud 721.

16 David M O'Brien "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions" in Cornell W Clayton and Howard Gillman (eds) *Supreme Court Decision-Making New Institutionalist Perspectives* (University of Chicago Press, Chicago, 1999).

legitimacy. He therefore discouraged dissenting opinions and wrote the overwhelming majority of the court's opinions, even when he disagreed with a ruling.[17]

Others, such as present Supreme Court Justice Scalia, strongly defend the filing of dissenting judgments claiming, that:[18]

> Dissents augment rather than diminish the prestige of the Court. When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting – and conducive of respect for the Court – to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern.

Whatever the merits of the respective positions from the point of view of legal theory, dissents have important implications. Dissenting judgments will frequently generate uncertainty within the law. Beyond the difficulties which uncertainty creates for those advising on the law, uncertainty will generate increased recourse to the courts. This will create additional workflow across all courts, appellate and first instance.

Furthermore, split decisions from the Court of Appeal are more likely to be appealed to the Privy Council, thus creating additional recourse to that institution. At a time in which New Zealand contemplates fundamental changes to its court structure, an assessment of the relative stability or otherwise of the Court of Appeal is particularly useful. If for example, the Court of Appeal is a comparatively stable institution in terms of the jurisprudence it is creating, then that could be one factor contributing to a diminishing role for a final appellate court. That in turn becomes relevant to the types of policy considerations which are presumably under debate such as of the size and cost of the proposed new court.

V THE DRIVERS OF DISSENTING JUDGMENTS

Before beginning the empirical analysis, it is instructive to consider what, from a theoretical point of view, are likely to be the drivers of dissents. The validity of those theoretical factors can then be tested in the empirical work.

Given that dissenting judgments express differing "perspectives" on the law, or the appropriate outcome of the law in a particular case, it follows that there will be certain types of cases in which dissents are more common than others. Specifically, dissents are likely to be more common in those cases that require a strong element of discretionary

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17 O'Brien, above, 92, referring to David Morgan "Mr Justice William Johnson and the Constitution" (1991) 57 Harv L Rev 328.

18 Antonin Scalia "The Dissenting Opinion" (1994) J Supreme Court History 33-44.

decision-making. That could arise because the existing state of the law is unclear and requires reconciliation, or more interestingly because the point at issue requires a value judgment or policy based-decision.

In the statutory context, such cases are likely to arise when a statute requires the application of principles or standards rather than rules.[19] Fogarty argues that statutory provisions which require courts to give effect to values confer a discretion on the court as to their application. In other words, there is room for reasonable persons to disagree as to their application. He argues that courts will develop a jurisprudence which is in truth a policy as to the application of those standards.

The development of policy is one of a number of potential judicial responses to open-ended or highly discretionary statutory provisions. Another is to simply decline to intervene as occurred in *R v Hines*[20] which concerned witness identification. Decisions which do involve development of policy are nevertheless likely to be a source of increased dissent rates.

Another potential driver, which was identified by Sir Ivor in his paper,[21] was judicial caseload. He argues that an increase in caseload should lead to a decrease in dissent rates owing to pressure of work. Interestingly, one overseas commentator has suggested that an increased caseload leads to an increase in dissents.[22] The basis for this was that the lack of time resulting from the increasing caseload meant a lack of time to hammer out differences between Judges so as to produce unanimous results.

The overseas studies also suggest that court composition is a significant factor.[23] This has at least two dimensions: first, high turnover rates of Judges create a potentially disruptive situation and so generate instability; secondly, the particular personality of the

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19 John Fogarty QC "Giving Effect to Values in Statutes" (Paper presented to New Zealand Law Society Seminar on Statutory Interpretation, Wellington, April 2001). Another presenter was Professor John Burrows.

20 *R v Hines* [1997] 3 NZLR 529 (CA).

21 Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 261, 263.

22 David M O'Brien "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions" in Cornell W Clayton and Howard Gillman (eds) *Supreme Court Decision-Making New Institutionalist Perspectives* (University of Chicago Press, Chicago, 1999) 108, referring to the views expressed by Chief Justice Burger (1969-1985).

23 Allen Walker, Richard Epstein, and Owen Dixon "On the Mysterious Demise of Consensual Norms in the United States Supreme Court" (2000) 50 J Politics 362-389.

Judges is relevant. The suggestion is that those appointed from backgrounds which place a high premium on individual expression such as academic backgrounds are more prone to dissent rates. Of importance, also, is the particular "management style" of the head of the Court. Some will have a management style which seeks to forge consensus more than others.

From an entirely practical point of view, the advent of the personal computer is likely to be correlated with an increase in judgments through the ease with which research can be conducted and even greater ease with which paper can be produced. Interestingly, data from the United States Supreme Court suggests that an increase in the number of law clerks has been associated with an increase in judgments produced.[24] It is understood that Court of Appeal Judges have for some years now, had one law clerk each.

VI DATA AND METHODOLOGY

The source of data for this study was two-fold. First, the New Zealand Law Reports. Secondly, Brookers Ltd electronic Court of Appeal decisions.

The New Zealand Law Reports suffer from the obvious limitation as a data source that they do not report all judgments. The only cases reported are those which are considered to be significant. Significant decisions will tend to be those in which the law is unclear or controversial that is to say, those which are fertile ground for dissent. It follows that selection of this data source will operate in favour of inflating dissent rates or rates of multiple judgments.

To that extent the absolute figure generated may not be an accurate reflection of the position. However, that effect should be a constant factor. In other words provided the Law Reports from 1960 are compared with the Law Reports from 2000, and not the Law Reports from 1960 with a full text database, then any general trends should be defensible.

The Brookers Ltd database has the advantage of being comprehensive, including all Court of Appeal decisions for the relevant period. It does not extend back beyond 1995, creating obvious limitations for historical work.

It is also important to note that the data sources which were used in this study differ from those used in both the Richardson and Smyth studies.[25] This means that the raw statistics will differ although it would be hoped that the trends would be consistent.

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24 David O'Brien, above, 103.

25 Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 261; and Dr Russell

The challenge with the methodology adopted in this study was to avoid making a subjective evaluation in the course of the collection and analysis of the data. As previously noted,[26] this paper focuses on dissents as to result as opposed to cases which show a dissent on reasoning and a concurrence on results. The latter are noted as a multiple judgment but not treated as true dissents. The reason is that to be entirely accurate about whether the reasoning in a particular judgment was or was not different from the reasoning in another judgment, involved becoming increasingly subjective. Reasoning is not always apparent on the face of a judgment, and any attempt at educated guessing would undermine the integrity of the final result.

Two studies were conducted. The first used the Brookers Ltd database to analyse the dissent rates during Sir Ivor's Presidency. It was hoped at the outset of the study to attempt to gain an assessment of the President's management or consensus style. As a result only those cases on which Sir Ivor sat as President were selected for analysis. The rationale being that, while extending throughout the Court, His Honour's management style should be seen most acutely in those cases on which he sat.

The second study was of historical dissent rates from 1950 to 2000 using the Law Reports as the data source. This encompassed all Court of Appeal decisions for the relevant period and was not restricted to those cases on which Sir Ivor sat.

VII RESULTS

Table 1 shows the six Richardson Courts.[27]

Smyth "Judicial Robes or Academic Gowns? – Citation of Secondary Authority and Legal Method in the New Zealand Court of Appeal" Rick Bigwood (ed) in *Legal Method in New Zealand*, (Butterworths, Wellington, 2001) 101.

26 See Part I Introduction.

27 Source: The New Zealand Gazette; the New Zealand Law Reports.

TABLE 1: The Richardson Courts

Justice	**Richardson 1 (17/2/96-23/2/96)**	**Richardson 2 (1/4/96-15/4/96)**	**Richardson 3 (15/4/96-7/3/97)**	**Richardson 4 (1/6/97-3/7/00)**	**Richardson 5 (28/7/00-9/01)**	**Richardson 6 (13/9/01-present)**
Hardie Boys (ret 23/2/96)	+					
Gault	+	+	+	+	+	+
McKay (ret 7/3/97)	+	+	+			
Henry (ret 3/7/00)	+	+	+	+		
Thomas (ret 9/01)	+	+	+	+	+	
Keith (as from 1/4/96)		+	+	+	+	+
Blanchard (as from 15/4/96)			+	+	+	+
Tipping (as from 1/6/97)				+	+	+
McGrath (as from 28/7/00)					+	+
Anderson (as from 13/9/01)						+

Some of the Richardson Courts were of relatively short duration. The dominant Court was Richardson 4 (Justices Gault, Henry, Thomas, Keith, Blanchard and Tipping), which existed for nearly three years from 1 June 1997 to 3 July 2000. During this time, the composition of the Court was extremely stable.

The first set of figures record rates of multiple judgments and dissents for the Richardson Presidency. Figure 1 depicts the percentage of opinions of the Court (that is to say, decisions in which only one judgment was recorded) of total judgments issued. The

overall trend during Sir Ivor's time as President is towards an increase in opinions for the Court (that is to say, fewer cases in which multiple judgments are generated). In 2001, this figure was as high as 95 per cent.

When Table 1 is compared with Figure 1, the increase in multiple judgments which is recorded from 1996 (83 per cent) to 1997 (52 per cent) could be due to changes in Court composition. From February 1996 to June 1997 (Richardson courts 1 to 3), three new Judges were appointed. From mid June 1997, the stable Richardson court 4 came into existence, contemporaneously with a trend towards a decrease in multiple judgments.

Sir Ivor's own statistics record that by 1997, the number of cases being considered by the Court of Appeal reached a plateau[28] at the same time that unanimity increased. This makes it difficult to measures the impact of judicial workload on multiple judgments for this period.

Not surprisingly, a similar trend is observable in relation to percentage of cases in which dissents were generated from 1996 to 2000. This is shown in Figure 2.

From an historic low in 1999 of 0.8 percent, the rate increased in 2001 to 2.4 percent. Whatever is causing the downward trend in multiple judgments is likely to also be causing the (generally) downward trend in dissents.

Taking those cases on which Sir Ivor sat as President, Table 2 indicates that there was a considerable variation in the extent to which individual Judges generated dissents. Presumably, a similar trend would be observable if a wider sample of cases were selected for study. It suggests that individual factors or the personality of the Judges on the Court at a particular time are a very significant aspect of the reason for the trends observed.

TABLE 2: Dissenters

1996-2001 (Richardson Courts)

Justice	Numbers
Richardson	4
Gault	2
Henry	3
Thomas	15

28 Sir Ivor Richardson, above, 262.

Justice	Numbers
Keith	2
Blanchard	2
Tipping	1
Neazor	1
McGechan	1
Williams	1

The second aspect of the study involved historic data. Figure 3 records the percentage of opinions of the Court for total judgments from 1950 to 2000. Whilst a number of fluctuations have occurred, the overall trend across the 50-year period of study is towards fewer multiple judgments.[29]

The practical factors identified earlier in this paper such as the availability of law clerks, and the personal computer would have suggested an increase in multiple judgments. This has not occurred. Judicial workload may be the reason. Alternatively, one could postulate that modern courts have a greater degree of commitment to unanimity from an institutional point of view than did earlier courts.

Again predictably enough, a similar trend is observable in the case of percent of cases in which dissents were generated although the figures suggest a slight increase in dissent rates in the last fifteen years. This is shown in Figure 4.

In the absence of any other indicator as to why this should have occurred, the trend may again be attributable to the personality factors referred to previously.

Dissent rates appear to be reasonably random across types of cases. The only possible exception arises in Bill of Rights Act cases, where dissent activity is relatively common. This might support an argument that broadly-based legislation, conferring common law-like jurisdiction, generates dissent. The trend was not sufficiently observable, however, such as to enable the position to be put any more strongly.

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29 It is worth emphasising at this stage that the absolute figures for 2000 are greater than those generated from the Brookers Ltd study as the New Zealand Law Reports will of their nature tend to reproduce more significant or controversial decisions.

There is some non-empirical but observable data which supports the contention that Sir Ivor has a commitment to consensus. We now take for granted, the practice of 'joint judgments'. This is in fact a relatively modern innovation. Historically the practice was for a Judge to pen a short concurrence. On his appointment to the Court of Appeal, Sir Ivor appeared to largely forge the creation of joint judgments based (presumably) on compromise and consensus. His Honour was party to most of the first few judgments which adopted this practice. It is quite likely that this commitment to unity would have also been a feature of his Presidency. That could be an additional reason for the historically low rate of dissent during his term.

VIII CONCLUSIONS

The empirical studies indicate that rates of multiple judgments and rates of dissent are historically very low. The factors which have caused that appear to be the relative stability of the court's composition and also potentially an increase in judicial workload. The individual propensity of particular Judges to engage in dissent activity is an important factor in the rates generated.

Tentative conclusions are that who is appointed and when has a significant impact on the court. Controversially it is suggested that unless the appointment of a new President and other changes in composition affect the trend, there may be a decreasing role for a final appellate court.

FIGURE 1:
Richardson 1996-2000
Percent Opinions for Court of Total Judgments Issued

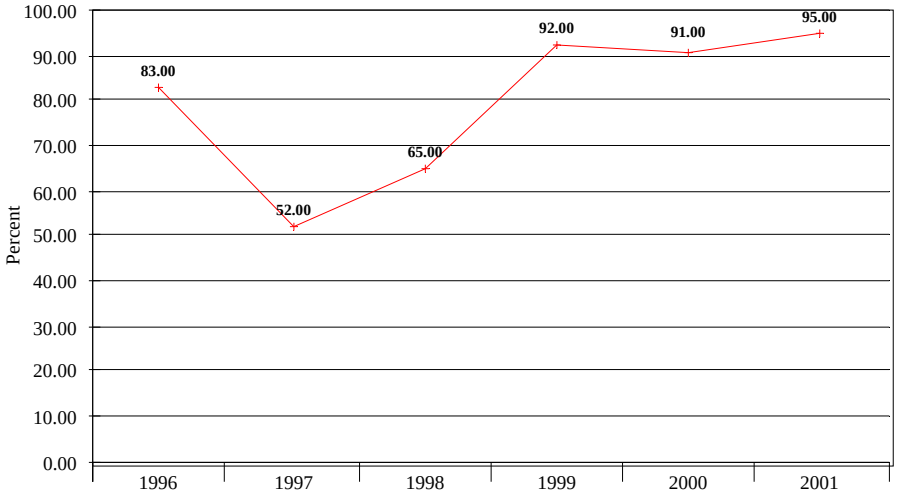

FIGURE 2:
Richardson 1996-2000 Percent of Cases in Which Dissents Generated

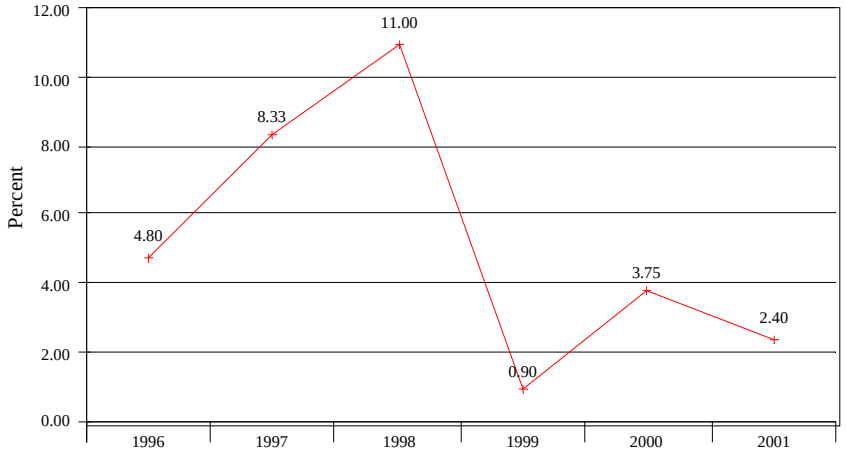

FIGURE 3:
Historic Rates: 1950-2000 Percent Opinions for Court of Total Judgments Issued

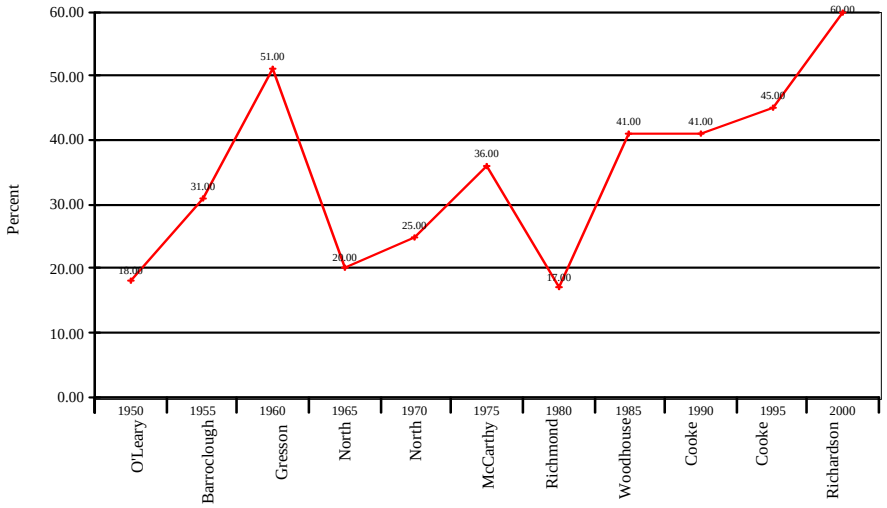

FIGURE 4:
Historic Rates 1950-2000 Percent of Cases in Which Dissents Generated