UNIVERSITY *of* PENNSYLVANIA
LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

VOL. 173 MAY 2025 NO. 6

ARTICLE

SUPER-DICTA

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A weird thing happens when a conscientious, rational judge lacks certainty and has the humility to know it: she will often decide cases for reasons that differ from the

DOI: https://doi.org/10.58112/uplr.173-6.1

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reasons in her opinions. To illustrate, suppose she thinks it's 50/50 whether Defendant's copying infringed or was fair use. She could rationally flip a coin. But if she does, and she finds for Defendant, it will not be because of fair use. Rather, it will be because she thought it was 50/50 whether the copying was fair use—and the coin landed tails.

Coin-flip cases are rare, but uncertainty is not. There are more sophisticated tools for responding rationally when the judge's doubts about what she ought to do are not in complete equipoise. And so, the point remains: when a judge is uncertain about what she ought to do and is rational in pursuit of that aim, the actual reason for her decision and the ratio decidendi will diverge. And unlike much of the literature arguing we cannot take opinions at face value, the phenomenon I describe arises from anti-cynical premises: a judge who aims at what is right.

I call the judge's actual reasoning "Super-Dicta." Super-Dicta is so-called because it is super important: it is directly necessary to the decision—and not just causally, but as part of a judge's rationale. But even though it is the decisive reasoning, it would appear to have the status of dicta: whether expressed, or not, Super-Dicta is not purely objective, limited to law or facts. It encompasses the judge's subjective reasoning based on her uncertainty. That is, it is reasoning that resolves a case that is hard for the judge, not just hard.

Should Super-Dicta appear in an opinion? That normative question is probably moot, at least if understood as one of substantive jurisprudence. While a coin flip may be rational, disclosing it is not. Accordingly, a judge responding rationally to uncertainty will not disclose that in her opinion. And if she tries, the resulting legal standard would turn on an odd consideration: facts about the judge, namely, that she is uncertain and the extent of her doubts. The result: judicial opinions—at least those by mere mortals—can be transparent or objective, but not both. So-called "hard case" doctrines must be revisited in this light.

Sepehr Shahshahani, Seana Shiffrin, Adam Slavny, Henry Smith, Aaron Tang, Murray Tipping, Nina Varsava, Jeremy Waldron, Bill Watson, Maggie Wittlin, and Benjamin Zipursky; and participants at the NYU Colloquium in Legal, Political, and Social Philosophy, the Philosophy & Private Law Discussion Group, Harvard Private Law Workshop, Boston College Law School Faculty Workshop, University of Girona Law School's Philosophy of Law Research Group, Fordham Law School Scholarship Retreat, Fordham Law School's SJD Workshop, Metropolitan Junior Scholars' Workshop, NYC IP & Philosophy Workshop, U.T.-Austin Department of Philosophy's Workshop on Completeness and Incompleteness, Columbia Law & Philosophy Workshop, and the Analytic Legal Philosophy Conference. I am greatly indebted to the Fordham Law Librarians, especially Gail McDonald and Jamie Taylor. For excellent research assistance, I thank my RAs, especially Jasmine Boyer, Erin Bronner, Kate Bundy, Kevin Burns, Sydney Crute, Eliza Duberstein, Sydney Fox, Lexi Hottenrott, Raymond Kim, Nick Manzella, Sol Murgui Orsucci, and Lyvia Yan; and for their care and attention, my editors at Penn. I have aimed at what is correct; if mistaken, the error is mine.

Table of Rulings

INTRODUCTION

Not all of a judge's reasons can appear in her opinion. Or at least, not all her reasons can appear if she is both honest with herself and aims to do the right thing in deciding cases.

My claim is not cynical. The judge I am concerned with is a conscientious one, who aims to do whatever it is that she ought to do. The lack of transparency in her opinions does not follow from her being an activist, a renegade, or a partisan hack. And it does not depend on holding a view that a judge ought to do anything other than "call balls and strikes."[1]

The lack of transparency stems from the simple fact that our judge is not Herculean, and she has the humility to know it.[2]

Judges—those who are not Herculean, at least—sometimes have what is called normative uncertainty.[3] A judge has normative uncertainty when, despite knowing all the relevant facts, laws, and adjudicative theories (and any other consideration relevant to judging), she remains uncertain about what she ought to do.[4] For example, she thinks originalism is right but has some doubts; or she's a card-carrying pluralist but isn't always sure how the different values trade off.

I have previously argued that the judge's normative uncertainty creates a problem: what ought a judge (rationally) do when she is uncertain about what, all things considered, she ought (judicially) do? I have argued that this problem is very hard, and that the obvious solution—that she should just follow her preferred jurisprudence, or theory about what a judge ought (judicially) do all-things-considered—is a nonstarter.[5] Sometimes, a judge ought not (rationally) follow her preferred jurisprudence; sometimes, she should do what a different jurisprudence says instead.[6]

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1 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States).

2 *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975) (introducing superhuman judge Hercules).

3 Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. 739, 740-42 (2023); TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES 124 (2000); *see also infra* Part VI (disambiguating uses of "normative uncertainty").

4 Cox, *supra* note 3, at 740-42.

5 *Id.* at 776-87; *see infra* Section I.B (explaining that the obvious solution violates dominance and fails to account for the cost of error). I make no assumptions about the form or content of jurisprudences (e.g., about the relevance of moral criteria to judging or "whether there even is a domain of *legal* obligations independent of *moral* obligations"). Cox, *supra* note 3, at 742-43; *infra* Section I.A.

6 Cox, *supra* note 3, at 776-87; *see infra* Section I.B.

So, if not the obvious solution, then what? Unfortunately, I'm not sure. The problem remains incredibly difficult.[7]

But happily, this Article is not about that problem. This Article is about some further mischief that normative uncertainty creates for common law systems. And we can see it without yet knowing how to solve the initial problem.

The mischief is this: when a judge is uncertain, the actual reasons she makes her decision are often not the same as the reasons she gives for it. To illustrate, suppose that, despite knowing all of the relevant facts, she thinks it's 50/50 whether she ought to find that Defendant's copying infringed or she ought to find it was fair use.[8] She could rationally flip a coin. But if she does and finds for Defendant on grounds of fair use, it will not be because she thought Defendant's copying was fair, but because she thought it was 50/50 and the coin landed tails.

Coin flip cases are rare, but uncertainty is not. There are more sophisticated ways of dealing with it.[9] And so the point remains: where a judge does what she ought (rationally) do given her uncertainty about what she ought (judicially) do, the actual reasons she makes her decision are often not the same as the legal reasons she gives.

I call the judge's actual reasons "Super-Dicta." This Article identifies this phenomenon of Super-Dicta and makes a first attempt at describing its contours.

Super-Dicta is so-called because, like dicta, it is not binding. That flows from its nature: Super-Dicta is not purely objective, limited to law or facts, but encompasses the judge's subjective reasoning based on her uncertainty.

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7 To wit, an argument in favor of one of the leading solutions for the analogous (and arguably easier) moral problem was recently undermined by one of its (former) proponents. Johan E. Gustafsson, *Second Thoughts About My Favourite Theory*, 103 PAC. PHIL. Q. 448, 451-52 (2022).

8 There is a difference between equipoise in one's credences about what one ought to do, and equipoise in one's credences about the facts. The burden of proof governs the latter, creating a default rule that eliminates the possibility of a coin toss. For example, if the factfinder's beliefs about the facts are in equipoise, then the defendant wins. The same is not true for equipoise with respect to jurisprudences. *See infra* Parts I, VI. *Cf., e.g.*, James D. Nelson & Micah Schwartzman, *Second-Order Decisions in Rights Conflicts*, 109 VA. L. REV. 1095, 1134-35 (2023) (discussing benefits of a hedging strategy when a judge "assigns relatively similar credence values to alternative rules"); Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. CRIM. L. & CRIMINOLOGY 1, 3-6 (2015) (arguing moral elements in criminal law should not be subject to the same standard of proof as factual elements). *But cf. e.g.*, Gary Lawson, EVIDENCE OF THE LAW (Chicago 2017) (arguing law is subject to proof but demurring on appropriate structure).

9 *See infra* Section III.A (discussing Maximization Approach); Section III.D (discussing Conflict Avoidance); *see also, e.g.*, WILLIAM MACASKILL, KRISTER BYKVIST & TOBY ORD, MORAL UNCERTAINTY 39–56 (2020) (defending maximizing expected choiceworthiness); Christian Tarsney, *Moral Uncertainty for Deontologists*, 21 ETHICAL THEORY & MORAL PRAC. 505, 505-19 (2018) (proposing "stochastic dominance reasoning"); LOCKHART, *supra* note 3, at 22-49, 74-91 (introducing maximizing expected rightness).

Meanwhile, unlike dicta, and more like a holding, Super-Dicta is super important: it is directly necessary to the decision—and not just causally, but as part of a judge's *rationale* for reaching the outcome she does.[10]

The discovery of this phenomenon raises an obvious normative question: Should Super-Dicta appear in opinions?

Conventional wisdom might seem to counsel against expressing Super-Dicta. The "rhetoric of certainty" has been defended on prudential grounds: by writing opinions as though there were no doubt, judges help maintain the myth that the law is certain.[11] Admitting uncertainty risks undermining the court's authority.[12] The thought of flipping a coin might seem laughable.[13] And other methods for dealing with hard cases have come under similar fire.[14] What is more, admitting uncertainty might be tantamount to dereliction of the judicial role as a tie-breaker.[15]

On the other hand, transparency is experiencing a renaissance. Although it has long been observed that judges might be less than forthright,[16] there is renewed concern that if a judge fails to articulate her reasons, they must be illicit.[17] Debates over the shadow docket and stealth overruling, in particular, have served as a lightning rod for this flavor of criticism.[18] Meanwhile, a

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10 *See infra* Part III.

11 *See* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988) ("[T]he pretense of certitude and neutrality may strengthen the political position of the courts in our society, and maybe that is a good thing—or maybe not."); Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010-12 (2002) (recognizing that Supreme Court opinions avoid acknowledging indeterminacy and read as if there were only one correct outcome). These authors were largely concerned with indeterminacy, though it is not clear they distinguish it from normative uncertainty. For a discussion of this common confusion, see *infra* Part VI.

12 *See* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1020-21 (2008) (summarizing literature).

13 Nelson & Schwartzman, *supra* note 8, at 1135 ("Chance is offensive because it does not track reasons, and there will always (or almost always) be reasons that demand some decision-making process that is responsive to them."). *But see* Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023, 1042 (1996) (arguing that admitting uncertainty can increase an opinion's persuasiveness).

14 Nelson & Schwartzman, *supra* note 8, at 1024-36 (discussing the limitations of various "second-order rules" for dealing with hard cases).

15 Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1711 (2010).

16 Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653 (1932); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 155-56 (1994); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1381-94 (1995).

17 *See, e.g.*, Schwartzman, *supra* note 12, at 1007-08 (recognizing that "stronger forms of actual publicity" for judicial opinions are possible and yet not undertaken).

18 *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 9-10 (2015) (discussing the mystery of the Supreme Court and consequent questions relating to the consistency and transparency of its processes); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 40-53 (2010) (considering the merits of "stealth overruling" by the Supreme Court); Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1072-77 (2022) (summarizing criticisms of shadow-docket rulings);

growing body of literature suggests that there may be epistemic value in judicial candor about the difficulty of cases: it signals what parts of the law are settled and which remain open, aiding future judges in correctly reading precedents and developing the law moving forward.[19]

But these substantive normative debates may not matter. For whatever your views on the normative question, it turns out that transparency about Super-Dicta is likely self-defeating.

And so, when a judge acts rationally in the face of normative uncertainty, her reasons for the decision are almost certainly *not* the reasons stated in whatever opinion is part of that ruling. In most cases, attempting to express Super-Dicta in an opinion will be irrational, because doing so ensures that the judge fails to do whatever it is she ought (judicially) to do.[20] Return to the coin flip: the judge might not know whether she should find Defendant's copying was infringing or fair use. But just because she doesn't know the right answer doesn't mean there aren't *wrong* answers. And on *any* view in which she has credence, she ought not say it's a coin toss.

This example is obviously simplistic, but the same insight applies with other approaches to normative uncertainty.[21] As will be developed further, an opinion disclosing Super-Dicta is usually irrational or inaccurate, making disclosure self-defeating.[22] And so, the point remains: a judge acting *rationally* usually *cannot* include her full reasoning even though it directly affects the decision.

This claim is not substantively normative. I do not argue that Super-Dicta *should not* appear in an opinion, but that it usually *cannot* appear in an opinion provided the judge responds rationally to her normative uncertainty. And so at first blush, Super-*Dicta* might seem a misnomer.

But even were the judge to succeed in rationally including an explanation of her normative uncertainty and resolution thereof, it would seem she cannot do so without distorting the law. Were she to express her uncertainty and resolution thereof, the judge would create a new standard, one that directly invokes facts about the judge—namely, the fact that, at the time of the

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Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893, 919-44 (2023) (describing and criticizing the "immigration shadow docket").

19 James A. Macleod, *Reporting Certainty*, 2019 BYU L. REV. 473, 483 (2019) (arguing that "certainty rhetoric" has "*epistemic* utility, that is, [an] ability to facilitate not just efficient management, but also more rational and reliable belief formation, thereby increasing the judiciary's tendency to arrive at legal and factual truths and ferret out and discard falsehood"); *cf.* Schwartzman, *supra* note 12, at 1008-12 (suggesting that transparency helps improve the quality of future judicial decisionmaking).

20 *See infra* Part IV.

21 *See infra* Part IV, Section VI.B.

22 *See infra* Part IV.

decision, she had doubts.[23] And so, transparency comes at the cost of introducing judge-relative, time-indexed reasons to the legal standard.

In other words, when a judge responds rationally to normative uncertainty, her judicial opinions can be transparent or objective—but not both.

In this way, Super-Dicta, when spoken, may be truly Janus-faced.[24] On the one hand, a rule that makes relevant the hardness of the case *for the judge* might seem broadly applicable, not limited to its context. On the other, Super-Dicta may be necessarily self-limiting—dependent as it is on the particular informational situation in which the original judge found herself—and so, even if expressed, more akin to remarks made in passing than a holding, despite its dispositive effect. Like *obiter dicta*, Super-Dicta is simultaneously hard to cabin and self-limiting. Hence, the name.

Is Super-Dicta a bad thing? In some ways, that's a bit like asking whether it's bad that two plus two equals four. It's just an analytic fact. But analytic facts have implications.[25]

For starters, some have doubted the existence of normative uncertainty on the grounds that there is little empirical evidence of it.[26] But the phenomenon of Super-Dicta shows that this lack of evidence is to be expected. That is, we should expect opinions to appear certain, even when judges are not.[27] And so, the "arrogance" of opinions should not be treated as evidence that judges lack normative uncertainty or fail to respond to it rationally. A rational, epistemically humble judge will issue arrogant opinions.[28]

The existence of Super-Dicta should also inform how we evaluate phenomena like the shadow docket, stealth overrulings, and obstructing precedent.[29] These debates often proceed on the assumption that judges are

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23 *See infra* Sections V.A–V.B. *Cf. generally* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021) (discussing how collapsing equity into law distorts the legal standard).

24 KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 69-71 (Steve Sheppard ed., Oxford Univ. Press 2008) (1930) (noting that precedents have not one value, but two).

25 Thus, my use of "mischief" above was not in the legal sense invoked by the "mischief rule" of a problem or evil to be solved. I mean it in the colloquial sense of an enticing wrinkle that subverts expectations.

26 Cox, *supra* note 3, at 766-68; *cf.* MacLeod, *supra* note 19, at 480, 519-20 ("The data confirm and add precision to the view that . . . certainty rhetoric is surprisingly pervasive in legal discourse."); Samaha, *supra* note 15, at 1711 (noting that certainty in decisionmaking is a "longstanding if not unbroken" practice).

27 *See infra* Part IV.

28 *See infra* Part IV.

29 *See* Baude, *supra* note 18, at 9-10 (noting that "procedural regularity" in the Supreme Court, with consistency and transparency in its processes, "begets substantive legitimacy"). *See generally* Friedman, *supra* note 18 (considering the merits of stealth overrulings); Bill Watson, *Obstructing Precedent*, 119 NW. U. L. REV. 259 (2024).

behaving badly, or at least, sloppily.[30] And reform proposals are developed in that light.

But unlike much of the literature on transparency, Super-Dicta results from *anti-cynical* premises.[31] Our judge aims at what is right; it's just that she's not Herculean and responds rationally to that fact. And we should expect, in some ways, that she is least transparent precisely when she departs from her usual mode of proceeding.[32] For when she departs from her usual mode of proceeding is when her uncertainty has bite, and the rational and judicial oughts most clearly diverge.[33]

Of course, because we don't get to see her true reasons, we can't tell if, when she departs from what we think she ought (judicially) do—or from what we anticipate *she* thinks she ought to do—she does so because she is aiming at what is right, or for some other reason. I do not deny that judges sometimes behave badly. My point is only that reforms that assume cynicism, or sloppiness, miss an important reality: the lack of transparency or consistency they seek to address will *also* be present in the case of judges who aim at what is right.

This reality counsels caution in considering reforms. Proposals that assume only cynicism, far from enabling judges to aim at what is right, may hamper them. For example, although reputation may have important constraining effects, it may also have a distorting effect on judges' ability to respond rationally in hard cases.[34] For when a judge is acting in a hard case *as she should*, a lack of transparency and deviation from her usual jurisprudence may be unavoidable. The danger that reforms undermine her ability to act as she should—by pressuring her to be more transparent or consistent than she

30 STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 14-15 (2023) (relating a lack of transparency in shadow-docket decisions to fear of public backlash over perceived political partisanship); Friedman, *supra* note 18, at 41 (presenting stealth overruling as a means by which the Supreme Court "avoids engendering negative publicity and possible backlash"); Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("[T]his Court's shadow-docket decisionmaking . . . becomes more unreasoned, inconsistent, and impossible to defend."); *cf.* Baude, *supra* note 18, at 18 ("The need for improvement is not urgent, but it is nagging.").

31 *See infra* Section I.A.; *see also* Cox, *supra* note 3, at 746.

32 *See infra* Part IV; *see also infra* Part VII.

33 *See infra* Part III; *see, e.g.*, Cox, *supra* note 3, at 791-810 (offering decision-theoretic reconstruction along these lines of Brown v. Bd. of Educ., 347 U.S. 483 (1954)); *see also* DAVID A. STRAUSS, THE LIVING CONSTITUTION 78-80 (2010) (discussing *Brown* and how, though *Brown* is obviously correct, the Justices deciding the case were initially uncertain how to proceed).

34 *See, e.g.,* Baude, supra note 18, at 17-18; Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 831-32 (2023); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 628-31 (2000); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L REV. 133, 140 (1990); RICHARD A. POSNER, OVERCOMING LAW 117–19 (1995); Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 33, 42-43 (1994).

ought (rationally) be—is particularly pressing in debates over the shadow docket, when normative uncertainty is likely at its peak given the temporal constraints and lack of full merits briefing.[35]

And there are of course implications for automated adjudication and legal AI data selection, structure, and training.[36]

I won't go into these implications in what follows. We have far too much work to do to get the phenomenon on the table. But part of that work will have the happy side benefit of elucidating some confusion within the recent debate on hard cases and second-order decision procedures in adjudication—and when we might have reason to be skeptical of them.[37] Doing so will also help clarify the relationship between normative uncertainty, which is fundamentally perspectival, and indeterminacy, which is not.[38]

And so, if you find yourself asking questions like, "Isn't this pluralism?" or "What about minimalism?," my response is a resounding: Yes, good question. It is the one I want you to ask. The register in which such language or methods are being used—as rational solutions to normative uncertainty or as jurisprudential methods for eliminating indeterminateness or addressing incompleteness—matters.[39]

This Article proceeds as follows: Part I recaps the problem of normative uncertainty in judicial decisionmaking. Part II updates the picture to account for the key feature of common-law adjudication that gives rise to the problem: judges must not only make decisions, but explain them—and those explanations have consequences. This groundwork will enable us to see the Super-Dicta phenomenon, introduced in Part III, and to understand its significance.

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35 *Cf.* Baude, *supra* note 18, at 15-16, 18 (recognizing constraints on judicial decisionmaking but suggesting "some critical analysis is [nevertheless] warranted"). Professor Baude suggests "the Court could do more to reassure us" that "the orders decisions are [not] thoughtless or the result of unjustified inconsistency." *Id.* at 18. My point is that, often, they can't. *See infra* Parts IV–V. This may in turn have important consequences for institutional design and the importance of judicial character. *Cf.* Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2004-05).

36 Courtney M. Cox, *Non-Herculean Data: A Philosophical Intervention in a Technical Debate about Judicial Opinions as Data Sources*, PROC. 20TH INT'L CONF. ON A.I. & L. (forthcoming June 2025).

37 *See* Charles L. Barzun & Michael D. Gilbert, *Conflict Avoidance in Constitutional Law*, 107 VA. L. REV. 1, 3 (2021) (proposing that "courts should decide hard cases against the party who could have more easily avoided the constitutional conflict" (emphasis omitted)); Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1849-50 (2021) (discussing an interpretive approach by which courts may decide hard cases); Nelson & Schwartzman, *supra* note 8, at 1133–34 (considering different "hedging strategies" available for deciding hard cases).

38 *See infra* Part VI.

39 *See infra* Parts VI and VII; *see also* Cox, *supra* note 3, at 809-10.

Parts IV and V turn to the difficulty of transparently expressing Super-Dicta in an opinion. Part IV shows how expressing Super-Dicta is likely self-defeating. It is not merely that a judge *should not*, but that she often *cannot*, *consistent* with her aim of doing what she ought (judicially) to do, be fully transparent about her reasoning if she is honest with herself. Part V shows how, if she is transparent, that transparency comes at the cost of making the legal standard turn on facts about the judge. Part VI brings these arguments together, first by illustrating the difference between normative uncertainty and other ways in which cases are hard; and then by showing how the limits of transparent *opinions* may themselves cause transparency to be self-defeating. But as Part VII suggests in closing, although Super-Dicta likely will not appear in opinions, we might still be able to see Super-Dicta if we read between the lines.

I. THE UNCERTAIN JUDGE

My aim in this paper is to address one implication of normative uncertainty in judicial decisionmaking for common-law adjudication. And so, I'll begin with a brief refresher of the problem.[40] I'll sketch it here in broad strokes and refine it later.

Here and throughout, I use the term "jurisprudence" to refer to an all-things-considered theory about what a judge ought (judicially) to do.[41] An all-things-considered theory means just that: a jurisprudence is a theory about what a judge ought (judicially) to do in light of all relevant legal, moral, political, prudential, practical, or other considerations, whatever those may be.[42] A jurisprudence is thus not necessarily a mere interpretative theory or theory of legal reasoning—though a given jurisprudence might be.[43]

As before, I take no sides in these debates about which jurisprudence(s) are correct or even plausible.[44] And, critically, the conclusions that will follow about Super-Dicta generally do not depend on taking sides in those substantive debates.

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40 For a detailed introduction and defense of the problem's existence, see generally Cox, *supra* note 3. Professor Ted Lockhart also discussed normative uncertainty as applied to *Roe v. Wade*, 410 U.S. 113 (1973), but glossed over difficulties unique to the judicial context, including "deep disputes about the end and method of judging." *Id.* at 790 n.169 (discussing LOCKHART, *supra* note 3, at 124–42). I borrow liberally from my earlier framing of the problem in Cox, *supra* note 3, with minimal quoting to ensure readability.

41 Cox, *supra* note 3, at 742-44, 760-61 (introducing and defining the term).

42 *Id.* at 760-61.

43 *Id.*; *cf.* SCOTT J. SHAPIRO, LEGALITY 248, 280-81 (2011) (arguing against conflating a theory of "legal reasoning" with a theory of "judicial decisionmaking").

44 *Infra*, Section I.A; Cox, *supra* note 3, at 742-44, 760-61.

A. *The Problem*

Suppose that you are a judge deciding a case. It is a very difficult case, and you are not entirely sure what to do. You have encountered hard cases before, but you have enough experience to know that cases can be hard for different reasons. Sometimes, you are uncertain because you do not know the relevant facts. Sometimes, you are uncertain because you do not know what consequences are likely to follow from a particular decision—how your decision in this case will bind your hands in future ones, how later judges will come to apply the rule that you state, how the rule that you state affects future actors operating in the shadow of the law. For instance, will you open the floodgates? A perennial worry.

Cases are often hard for many reasons all at once. But suppose this case doesn't have any of the above features. You know all the relevant facts. Your clerks have exhausted their legal research, and you know the relevant laws, statutes, and precedents. You don't have a crystal ball, but you're fairly certain what the consequences of your choice will be. And you know what all the relevant theories of adjudication say you should do in light of the facts, the laws, and whatever other considerations are deemed relevant. You know the different views about whether gaps can appear and how you ought to exercise your discretion if they do.

Even so, you have doubts. Your textualist colleagues are smart. Or you're not sure which version of purposivism really has it right.

Maybe this is a case that is "hard," or might be "hard," depending on the correct view of judging—on the correct jurisprudence. That is, there is indeterminacy or vagueness, or some other sense in which the case is "hard" (and not just for you).[45] Maybe you're not entirely sure which jurisprudence is right about whether such hardness is possible—or what you should do in the face of it. For example, you're not entirely sure about the scope of discretion you have in this case, or your options for exercising it.

To be sure, you might not admit these doubts to anyone. But you have them. Usually, they don't have bite: the approaches to judging you find most plausible—what I call "jurisprudences"—tend to agree about what you should do, and so you can safely ignore your doubts.[46] But this time, the jurisprudences that you think are most likely to be correct point in different directions.

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45 I will return to the difference between normative uncertainty and these other ways in which a case might be "objectively" hard in Part VI.

46 Cox, *supra* note 3, at 741-44, 760-62.

You want to do whatever it is that you ought (judicially) to do. You just don't know for certain what that is. And so, the question arises, what should you do now?

This, in a nutshell, is the problem of normative uncertainty in judicial decisionmaking. The problem follows from three basic assumptions:[47]

1. Judicial decisions can be coherently criticized—that is, we speak coherently when we suggest that a judge should have decided otherwise than she did—such that we may speak of what a judge ought to do in deciding a case.

2. A conscientious judge aims to do what she ought to in deciding a case.

3. Judges behave (or ought to behave) rationally.

Given these assumptions, there arises the question of what the judge ought *rationally* to do when she's uncertain of what she ought *judicially* to do.

These assumptions are intended to be as minimal as possible. They do not depend on what you think grounds the judicial ought, or what you think about its nature or content. That is, these assumptions do not depend on your views about what judges ought to do, or whether the judge is (or is not) making normative judgment calls or has discretion, or what cabins that discretion (if anything).[48]

You think the judge "should just call balls and strikes"? Great, you have a fairly strong view about both the existence of the judicial ought—that there is such a thing as what the judge ought to do—as well as its content ("call balls and strikes").[49]

You think law "runs out" and judges make judgment calls—that they have true discretion? Great. But so long as you don't think the judge's discretion is entirely without limits—that she may do the worst, most awfully cruel thing she can cook up just because she can—you have a view.[50]

In other words, the problem exists on all but the most extreme views about what a judge ought to do—those extreme views that deny there is ever a basis for criticizing what a judge has done, for claiming that she ought to have done otherwise than she did.

The problem can be easy to miss for a few reasons. For one, it looks like—and often accompanies—ways in which cases might be thought to be

47 These assumptions are taken, near verbatim, from Cox, *supra* note 3, at 741.

48 *Id.* at 742-44.

49 *Id.*

50 *Id.*

"objectively" hard, like indeterminacy. I will return to this difference in Part VI, once we have the problem and its implications more clearly in view.

The problem of normative uncertainty can also be easy to miss because judges generally don't admit to it, and though the logical space is already there, we usually think of judges as building approaches over time rather than being uncertain between different logically available approaches and all that that entails. I have defended the existence of the problem against these charges elsewhere, and so won't repeat that here.[51] Instead, I take the problem's existence as a starting point.

B. *The Solution (Or Not)*

The problem is also easy to miss because the solution might seem obvious: pick your favorite approach—your favorite jurisprudence—and just do whatever that approach says. But the obvious solution fails.[52] It makes two basic mistakes.[53]

First, "the obvious solution ignores relevant information"—namely, that your evidence does not permit you to believe your "favored jurisprudence is definitely correct."[54] Rather, your "evidence suggests that a different jurisprudence may be correct instead."[55] This is something you should consider in your deliberations, and the obvious solution ignores it.[56]

But ignoring your uncertainty is a problem. In some cases, ignoring it unnecessarily risks your objective of doing that which you ought, judicially, to do. For instance, suppose you are a judge deciding Case I.[57] You are uncertain whether to apply Jurisprudence 1 or Jurisprudence 2. Jurisprudence 1 is your favored jurisprudence—you think it's 80% likely to be correct, but that there's a 20% chance Jurisprudence 2 is correct instead. According to Jurisprudence 1, you may choose either Option A or Option B; they are in complete equipoise. According to Jurisprudence 2, Option A is certainly right, and Option B is certainly wrong.

If the obvious solution is correct, you would be rational to choose either option. According to the obvious solution, you would be rational to choose Option B.[58]

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51 *See generally id.* For discussion of the moral analog, see generally LOCKHART, *supra* note 3; MACASKILL ET AL., *supra* note 9.

52 Cox, *supra* note 3, at 745, 777, 783.

53 *Id.*

54 *Id.* at 745.

55 *Id.*

56 *Id.*

57 *See id.* at 778 (exhibiting Case I).

58 *Id.* at 777-80.

Case I

	Jurisprudence 1 ***Fit-Based***	**Jurisprudence 2** ***Fit + Moral Criteria***
Option A	Right	Right
Option B	Right	Wrong

But choosing Option B is not rational given your uncertainty and what the two jurisprudences say about your choice set. Choosing Option B would unnecessarily risk doing that which you ought not (judicially) to do. You would be taking on a 20% chance of doing the wrong thing with no attendant benefit. But choosing Option A—which is equally good by the lights of your favored jurisprudence, Jurisprudence 1—ensures you do what is right, because it is also permissible under Jurisprudence 2. In other words, Option A dominates, given your uncertainty. And so, the obvious solution violates dominance.[59]

But there is another reason—in addition to violating dominance—that it is a mistake to ignore the chance you are mistaken: you will miss that you can be more or less grievously mistaken.[60]

This point relates to the obvious solution's second mistake: "the obvious solution relies on a false assumption," namely, that all the jurisprudences in which you have some level of credence agree about the stakes in all cases.[61] But that is precisely what jurisprudences disagree about: jurisprudences disagree about what matters and in what way. And so, it is a mistake to assume they will agree about the stakes—about "the badness of getting it wrong or the importance of getting it right"—in all cases.[62]

For example, suppose you are a judge deciding Case II.[63] As with Case I, you are uncertain as between Jurisprudence 1 and Jurisprudence 2. And your credences remain the same: Jurisprudence 1 is your favored jurisprudence—you think it's 80% likely to be correct, but that there's a 20% chance Jurisprudence 2 is correct.

This time, however, the two jurisprudences disagree not only about what you ought to do, but also the stakes. According to Jurisprudence 1, you ought to choose Option B, but choosing Option A would constitute only a very

59 Cox, *supra* note 3, at 776-79, 779 n.140; MACASKILL ET AL., supra note 9, at 40-41.
60 Cox, *supra* note 3, at 782-85.
61 *Id.* at 745.
62 *Id.* at 782 (internal quotation marks omitted).
63 *Id.* at 783-84 (exhibiting Case II and Case III*).

slight mistake. But according to Jurisprudence 2, Option B is not only wrong, it is *egregiously* wrong.[64]

Case II

	Jurisprudence 1 ***Fit-Based***	**Jurisprudence 2** ***Fit + Moral Criteria***
Option A	Slightly Wrong	Right
Option B	Right	Extremely Really Super Very Wrong

If the obvious solution were correct, you would be rational to choose Option B, without even considering that you believe there is a 20% chance of doing an egregious wrong. This is implausible. Even if your credences and the stakes are such that you should still choose Option B, it is nonetheless a *relevant* consideration that you think there is a significant chance of doing something egregiously wrong by so doing.[65]

The obvious solution ignores both these important pieces of information: your favored jurisprudence might be wrong, and the jurisprudences you see as alternatives may have different views about the stakes in a given case. "In other areas of decision theory, these would be relevant considerations. Indeed, it would be irrational to ignore them."[66]

I have argued that the same is true in judicial decisionmaking.[67] That is, the judge ought not (rationally) just follow whatever theory of the judicial ought she believes most likely to be correct (her favored "jurisprudence"). For in some cases, what the judge ought (rationally) to do given her uncertainty is *not* what her favored jurisprudence says she ought (judicially)

64 *Id.*

65 *Id.* at 783-85. This point is true of both nonconsequentialist and consequentialist approaches, so long as you think—or at least have some doubt about whether—deontic theories can take there to be a difference in the importance of adhering to various rules or in the egregiousness of rule violations, such that the stakes are higher in some cases than in others. *See generally* Thomas Hurka, *More Seriously Wrong, More Importantly Right*, 5 J. AM. PHIL. ASS'N 41 (2019); Christian Tarsney, *Moral Uncertainty for Deontologists*, 21 ETHICAL THEORY & MORAL PRAC. 505 (2018); *see also generally* Ralph Wedgewood, *Decision-Theoretic Virtue Ethics*, *in* ENGAGING RAZ: THEMES IN NORMATIVE PHILOSOPHY 71 (Andrei Marmor, Kimberley Brownlee, & David Enoch, eds., 2025) (developing scalar framework for virtue ethics).

66 Cox, *supra* note 3, at 745-46 (footnote omitted).

67 *Id.* at 746.

to do. Sometimes—when the stakes and her credences warrant it—she ought (rationally) to follow a different jurisprudence instead.[68]

But if the obvious solution is a nonstarter, what might a solution to the problem look like? I'm afraid it's not clear. The problem is terribly difficult to solve.[69]

* * *

So that, in a nutshell, is the problem of normative uncertainty in judicial decisionmaking. This Article is not about that problem or its solution—about what a judge ought (rationally) to do when she is uncertain what she ought (judicially) to do. Rather, this Article is about a further difficulty that normative uncertainty creates for common-law adjudication.

II. THE JUDGE'S CHOICE

Normative uncertainty gives rise to Super-Dicta because of an important feature of the common-law system: judges don't merely decide cases; they must explain their decisions. And those explanations have consequences: they give rise to legal reasons that, in later cases, litigants will leverage and judges will respond to.

My explanation in Part I glossed over this important feature. There, I explained the problem of normative uncertainty with a simple example: a judge deciding a "case" and choosing between two options, A and B.[70] That worked well enough for showing the existence of normative uncertainty and the failure of the obvious solution. But to see Super-Dicta, we need to refine our understanding of the choice about which our judge is uncertain so that it includes these important features of the common-law system. That is the work of Part II.

In Section A, I'm going to define terms that will allow us to make the necessary conceptual distinctions in framing the judge's choice within a common-law system. In Section B, I will explain why the relevant choice set will be anchored by "decisions," as defined in Section A. In Section C, I will

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68 *See, e.g.*, *id.* at 791-96 (illustrating this phenomenon through Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

69 For an explanation why, see Cox, *supra* note 3, at 745-46; *see also* MACASKILL ET AL., *supra* note 9, at 58 n.2 (noting Parfit and Broome's doubts about whether the problem could be solved); Gustafsson, *supra* note 7, at 451-52 (raising objections against an approach previously defended in Johan E. Gustafsson & Olle Torpman, *In Defence of My Favourite Theory*, 95 PAC. PHIL. Q. 159 (2014), as well as several approaches advocated in MACASKILL ET AL., *supra* note 9).

70 My model in *The Uncertain Judge* was slightly more refined, but just barely. *See* Cox, *supra* note 3, at 747-48 & n.33 (treating the decision and the expression of the decision in an opinion as coextensive).

address why the judge's choice about decisions must be treated as a course of action, called "rulings," that combine decision-opinion pairings. Using this framing, we can model the judge's normative uncertainty as uncertainty about which ruling to issue, given her uncertainty about which jurisprudence is the correct account of what she ought (judicially) to do.

A. *Defining Decisions*

I want to make a distinction between a court's *decision* and an *opinion* explaining the basis for that decision. These terms, and others like "ruling," are often used interchangeably. But I will use these terms in a specific way in order to make an important distinction between what is decided, the expression of that decision (including the reasons for it), and that combined choice.[71]

1. Decisions

Courts sometimes decide issues they raise *sua sponte*—like about jurisdiction. But usually, decisions are issued in response to motions: a party's request for the court to do something.

In law school classrooms, we often treat that "something" as being a decision on a particular legal issue that is relevant to one of the party's claims. True, parties do ask courts to resolve legal issues one way or another, and some litigation—namely, impact litigation—aims at such resolution for its own sake. But such requests are almost always couched in a request for some relief (dismissal, judgment) or action (compelling disclosures, excluding

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71 Of course, there is a question about the extent to which these—the decision and the expression of that decision (including reasons given)—merge, even if they are conceptually separate. But to ask that question, we need to distinguish the two concepts.

Considerable work has been done to model judicial decisionmaking using economic game theory, an approach known as the "case-space approach." *See* Charles M. Cameron & Lewis A. Kornhauser, *What Courts Do . . . and How to Model It* (June 2, 2017) (unpublished manuscript), https://ssrn.com/abstract=2979391 (describing approach and summarizing developments); *see also generally* Lewis Kornhauser, *Modeling Collegial Courts I: Path Dependence*, 12 INT'L REV. L. & ECON. 169 (1992) (introducing method); Lewis Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 J. L., ECON. & ORG. 441 (1992) (same); Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 J. LEGAL STUD. 133 (2022) (applying case-space approach to hard cases).

That literature has not yet—to my knowledge—addressed the opinion itself as a formal object within the model. *See* Cameron & Lewis, *What Courts Do*, *supra*, at *16. The approach also largely focuses on positive theory; for example, the emphasis is often on *actual* judicial preferences and not what judicial preferences *should* be. *E.g.*, Charles M. Cameron & Lewis A. Kornhauser, *What Do Judges Want?*, 15 ASIAN J.L. & ECON. 167, 168 (2023). For these reasons, and because I wish here to remain agnostic about jurisprudential debates that would inform the translation of what I do into that model (including how opinions relate to what those models term "rules," "dispositions," and "doctrine"), I do not follow their terminology. But I hope to turn to such translation in future work.

evidence) to which the moving party believes it is legally entitled or which the court has discretion to award, or both.[72]

This feature of the system is important. While a request for relief almost always *turns* on the resolution of a particular legal issue or issues—impact litigators leverage this fact—it is the request for relief that calls the court to act. The resolution of the legal issue is only a means to that end. Even in appellate litigation, where the entire proceedings are premised around the appellant's raising of certain, usually enumerated, issues, the appellant does so in service of seeking relief: it is not merely that the trial court erred, but that such error warrants *reversing or reopening* the trial court's judgment.

Recognizing this context sets up the distinction I want to make between decisions and opinions. A "decision," as I will use the term, is the court's determination of whether to grant the moving party's request.

Sometimes, a court's decision resolves the case, resulting in a judgment in favor of one party or the other on the various claims (or causes of action) involved in the suit. The judgment usually includes who wins which claim and provides any appropriate remedies. Other times, a court's decision simply allows the case (or part of the case) to proceed (e.g., where the judge denies a motion to dismiss). In still others, the decision does not concern *whether* a case (or part of a case) may proceed, but *how* and *when*. For example, where a court grants a motion *in limine*, it excludes evidence or arguments from being presented at trial.

The key point—the reason I articulate these nuances—is to emphasize that by "decision," I mean the answer to such requests stripped down to the barest elements: Does the case or claim get dismissed? Does the plaintiff's request for damages and injunctive relief get granted?

The most basic—and easily recognized—decision in this sense is the judgment. But I use "decision" and not "judgment" because most opinions are *not* issued in the context of entering a judgment. Most opinions are issued in response to a motion at some intermediate stage, after which the parties settle or the case proceeds.[73] And so, I include the above nuance to be clear that I am addressing not just case-ending judgments, but also other decisions made along the way which are often issued as "orders."

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72 Common examples include motions to dismiss, for preliminary injunctions, to compel, for summary judgment, *in limine* (i.e., to exclude evidence or arguments), for judgments as a matter of law, for fees, for new trial, and for remittitur.

73 *See, e.g.*, Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, JUDICATURE, Winter 2017, at 26, 34 ("In almost all cases, disputes are now resolved without resorting to trial . . . .") (capitalization altered).

2. Opinions

When announcing a decision, common-law courts of record generally issue *opinions*. Opinions usually summarize the relevant facts and law, and then explain how the law applies to those facts. In other words, opinions are essentially a statement of reasons—the rationale—for the judge's decision.[74] "Opinion," as I will use the term, refers to this statement of reasons.

Opinions can take many forms, and different jurisprudences—different theories about what the judge ought (judicially) to do—offer competing accounts about how a judge should approach opinions and what should be included.[75] For example, there is a lively debate, both in scholarship and on social media, about whether opinions should be witty and engaging or direct if dull.[76] Although ostensibly about style, this debate reflects deeper differences in perspective on the many roles that opinions play in a common-law system.[77] Those roles range from justifying the decision to the parties, to offering guidance going forward, to enabling review, and to ensuring like cases are treated alike.[78] Different jurisprudences may take different positions on which roles an opinion should play and the relative importance of those roles.[79]

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74 Because opinions are expressive in this way—they communicate the rationale for the decision—one might think that the line between decisions and opinions is the line between what the court "does" and what the court "says." But this characterization would be misleading. What is said in the opinion also does something: in a precedential system, what the opinion says creates new rules and standards that are, in some sense, binding on future courts. This feature also forms a crucial difference between the judge's choice and that facing merely moral agents: a merely moral agent generally does not bind others by his choice of action, let alone the reasons he offers for it. *See infra* Section II.C. And it is part of what leads to the trade-off between transparency and objectivity in judicial opinions. *See infra* Part V.

75 Jurisprudences can be broader than particular theories of interpretation, like textualism, or schools of thought. Recall that I make no assumptions about the form or content of jurisprudences, except that there is such a thing. *See supra* Section I.A; *see also* Cox, *supra* note 3, at 742.

76 *See* Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 118-20 (2021) (summarizing debate).

77 *See id.* ("The stylistic choices that judges make in writing their opinions can serve to undermine or, alternatively, support these norms [that opinions serve]."); *see also* Gewirtz, *supra* note 13, at 1038-43 (emphasizing the importance of rhetoric to opinions' persuasive function of convincing readers "that the judge has done the right thing").

78 *See, e.g.*, Varsava, *supra* note 76, at 118 ("Although appellate judicial opinions arguably have many purposes, on my view, the two main ones are to provide (1) explanations and justifications for decisions; and (2) instruction and guidance about legal rights and duties."); Gewirtz, *supra* note 13, at 1039 (describing opinions' three main functions as providing guidance, promoting transparency, and persuading the public that the case result is correct).

79 For discussion, see generally Varsava, *supra* note 76. An important point on which jurisprudences differ is the extent of transparency that is appropriate. *See id.* at 143 (suggesting that judges resist including personal reasons in opinions "even if the inclusion of such reasons might in some sense increase the transparency and candor of opinions—unless, that is, they can also explain how those personal reasons are legally relevant and should be brought to bear in subsequent cases");

To the extent possible, I will not take sides in these debates. I will use "opinion" to refer to the statement of reasons given by the judge that accompanies and purports to explain a decision, whatever form it takes.

I will also use "opinion" to refer to a choice *not* to issue such a statement. Although common-law courts usually issue opinions, sometimes they do not.[80] Other times, they might designate an opinion as "non-precedential," ostensibly placing it outside the precedential system.[81] These are exceptions to the court's otherwise precedential authority (and have been challenged as such).[82] And so the absence of an opinion reflects a judge's *choice* about what opinion to issue—specifically, a choice that the appropriate opinion is none at all.[83]

Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2306-07 (2017) ("[J]udges would ideally make transparent the full chains of reasoning (not including considerations put aside as legally and morally irrelevant) by which they move from legal premises to legal conclusions."); Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 297 (1990) ("Perhaps judges should be candid but not introspective."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737-38 (1987) ("In my view, the case for candor in the crafting of judicial opinions and in other judicial acts draws special strength from the nature of the judicial process."); *see also supra* notes 11–19 and accompanying text.

80 *See, e.g.*, FED. R. APP. P. 36(a) (describing summary affirmance).

81 *E.g.*, Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535 (2020) (describing the increase in "unpublished decisions" that are "not precedential and make no law"); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1167-78 (1978) ("One of the most significant of these efforts has been the attempt to reduce time spent on preparing opinions by limiting the number of decisions that are published and by limiting or forbidding the citation of unpublished opinions.").

82 *See, e.g.*, FED. R. APP. P. 36(a)(2) ("The clerk must prepare, sign, and enter the judgment . . . if a judgment is rendered without an opinion, as the court instructs."); Furman v. United States, 720 F.2d 263, 264-65 (2d Cir. 1983) ("There is no requirement in law that a federal appellate court's decision be accompanied by a written opinion."); Matusick v. Erie Cnty. Water Auth., 757 F.3d 31, 61 (2d Cir. 2014) (describing a non-precedential summary order as insufficient to render a rule "clearly established"); Baker v. Latham Sparrowbush Assocs., 72 F.3d 246, 254 (2d Cir. 1995) ("The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal.").

83 My focus here thus remains on judicial decisionmaking in common-law courts of record. Some courts in a common-law system are not courts of record: they apply precedents but do not create them. *See, e.g.*, R.I. GEN. LAWS § 33-22-19.1 (2007) (recognizing that probate court proceedings are recorded only at the request of a party or the presiding judge). What I have to say may or may not apply to decisionmaking in courts that are not courts of record for similar reasons that what I have to say may or may not apply to civil-law jurisdictions.

The question of record is distinct from the format in which opinions are delivered. Opinions are often written, and I will assume as much in what follows. Not much turns on that assumption. I make it only to avoid difficulties raised by oral opinions that appear in hearing transcripts, the bounds of which may be unclear and the weight of which—including whether they have any—may be disputed. I suspect that what I have to say can likely be extended to such cases with appropriate modifications.

3. The Relationship between Decisions and Opinions

I make this basic distinction between decisions and opinions because I want to emphasize the distinction between the decision—the determination of a particular request—and the explanation of that decision (if any). Having made this distinction, I want to say something briefly about how they relate to each other.

First, decisions and opinions are not usually co-extensive. They are separate entities that do not completely merge.

Courts often make this distinction explicit by issuing both an "Opinion and Order," where the order is entered on the docket separately, or, if on the same entry, as a separate PDF. And where a decision resolves a case, the court will often enter a judgment separately from the opinion that entails the judgment.[84]

Of course, courts do not always create this express separation.[85] And this practice can create interpretative questions about what the decision is.[86] But even where there is not an express separation between the decision and the opinion, it remains rare for them to entirely coincide as a conceptual matter.

Second, even though decisions and opinions are not co-extensive, they are not independent. The opinion articulates the basis for the decision. Or, put differently, the decision follows from the reasoning stated in the opinion. At least, that's the basic picture of what opinions do, in the general case.

This lack of independence exists even on cynical or realist views about partisan or renegade judges: the decision and the opinion are still related; they just differ in the order of logic. On the basic picture, the opinion explains how the decision was reached. On the cynical or renegade picture, either the decision was reached, and the opinion reflects a rationale that was constructed to support it; or else the decision follows from the opinion the judge wanted to write because of the effect that that opinion would have in future cases. But the fundamental point—that the decision and the opinion bear some relation to each other of an explanatory or justificatory sort—remains.

B. *Selecting a Focus*

When a judge is uncertain about what she ought (judicially) to do, what choice does she have to make? We now have the tools to start answering this question. Instead of deciding a "case," our judge will decide whether to grant

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84 FED. R. CIV. P. 58; FED. R. APP. P. 36(a).

85 *See, e.g.*, Comm'r v. Est. of Bedford, 325 U.S. 283, 285-88 (1945) (addressing uncertainty regarding whether an opinion constituted the "judgment" given apparent delay in issuing mandate).

86 Or as importantly, *when* the decision is entered, as triggers various deadlines for appeal or relief. *Id.*

(or deny) a litigant's request, be it in the form of a motion or appeal. That is, I will assume our judge moves decision by decision, as I have defined "decision," in addressing her normative uncertainty.

We could have chosen a different "scope of choice." We could, for example, treat issues (or sub-issues) as independent and take them one at a time.[87] That is, we could choose a *narrow* scope of choice. Or we could, like those who argue a judge ought to have some consistency in their personal approach (or like judges who want to get appointed in the first place), treat the main question as which jurisprudence (or jurisprudential school) to adopt at the outset.[88] That is, we could choose a *broad* scope of choice.

The difficulty with the narrow, sub-issue approach is that the choice of which sub-issue(s) to address, and in which order, is often path-dependent, especially given the need to provide reasons for each step that, if not cohering, must at the least not conflict.[89]

The difficulty with the broad, career-long jurisprudence approach is twofold. Either such a choice will not resolve all the issues to come.[90] Or else, it is too informationally demanding: does anyone have a fully complete jurisprudence worked out, let alone a sense of which will be better, or more just, over the long-term? Not to mention, someone at the start of their career?

Working decision by decision avoids both sets of difficulties. Unlike the narrow view, this decision-based approach reflects the interdependence of the sub-issues. And it does so without the unwieldy demandingness of the broad, career-long approach to scope of choice.

The decision-based approach has the further advantage of following the way lawyers naturally talk about a judge's actions. It is a common refrain that judges should only "decide the case before them." And the law of the case doctrine reflects this granularity to particular motions and appeals—treating intermediate decisions on motions and appeals as precedential within the context of a litigation that may or may not include multiple decisions.[91]

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87 *Cf.* LOCKHART, *supra* note 3, at 133-40 (theorizing the conception of justice in *Roe v. Wade* as a set of outcomes based on four distinct questions).

88 Re, *supra* note 34, at 829-33.

89 *See generally* Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1 (2010).

90 To wit, count the varieties of originalism and textualism. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354-56 (2015) (discussing versions of originalism); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 306 (2009) (observing that Justice Scalia "grossly understate[d] the level of disagreement among originalists"); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279-90 (2020) (dividing textualism into two broad categories); William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1692 (2023) ("Textualism, once a seemingly simple, unified, straightforward theory, is now complex and multivocal, even convoluted.").

91 *See* Edward H. Cooper, *Law of the Case,* 18B Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. JURIS. § 4478 (3d ed. 2025); *cf.* Rutledge, *supra* note 89, at 3 (describing how decisional sequencing can determine how many precedents are created).

Finally, the decision-based approach also allows for relatively easy expansion to cases where the scope of choice includes not just potential rulings, but also actions like referring the parties to mediation. Though such choices are available regardless of whether a decision is pending before the court, and so in some sense the judge is continuously choosing to refer or not to refer, it's far simpler to couch the choice in the context of making choices about what ruling to issue (and whether to issue one or to attempt to avoid issuing one). And so, the decision-based approach can accommodate this wrinkle more directly than either the narrow issue-based approach or the broad, career-long approach to scope of choice.

I won't defend this initial choice more here. We need somewhere to start. I hope I have sufficiently motivated that it's at least as plausible as any other starting point.[92]

C. *In Making a Decision, What Must a Judge Decide?*

The choice of the middle approach—about "decisions," on the basic picture—is still too rough a model for the work we need to do. We need to refine it further.

As discussed above, an important feature of the common law system is that judges generally must issue opinions with their decisions.[93] That is, a judge must determine not only what the appropriate decision is—who prevails on what claim, who gets what relief—but also what to put in an opinion that accompanies the decision and explains the rationale for it.[94]

Accordingly, for every "decision," there are effectively two choices: one about the decision and one about the opinion—a choice about who wins what and a choice about why. The need for two choices appears most plainly on multimember courts, where judges frequently disagree in separate opinions about which of multiple reasons best supports the court's decision.[95]

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92 The scope of choice may itself be a question of jurisprudence in addition to one of rationality. And there may be uncertainty about the correct scope. These possibilities may raise exceptional difficulties. But if we don't cut off the heads of the hydra, we will never get anywhere. And so, I defer these questions to another day. *Cf.* JOHN BROOME, WEIGHING LIVES 81 (2004) (making similar assumptions "so as not to have too many difficulties to deal with at once").

93 There are some exceptions. *See supra* notes 80–82 and accompanying text.

Judges in many civil systems must also issue an opinion showing their reasoning. *See, e.g.*, Zivilprozessordnung [Code of Civil Procedure], § 313 (Ger.); Art. 111, para. 6 COSTITUZIONE (It.); Code civil [Civil Code] art. 455 (Fr.); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 163-64 (Arg.). Given differences in the effect of those opinions, I leave extension to civil law systems for another day.

94 She might decide to put nothing in the opinion. *See supra* subsection II.A.2.

95 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (providing five concurring opinions for one judgment); *see also* RICHARD KLUGER, SIMPLE JUSTICE 682 (rev. & expanded ed.

Part I glossed over this feature, speaking in terms of "options."[96] That worked to show the initial problem. But to see Super-Dicta, the separation between the two is important.

Even so, while the decision and the opinion are separate, they are not *independent* either.[97] Rather, the opinion must relate to the decision in important ways, specifically, the opinion must explain the decision and (at least purport to) justify or explain the reasons for it. Indeed, there may be times when the overlap is so near that it is difficult to separate the line between the two.

Unfortunately, there has been relatively little work on normative uncertainty in the context of courses of action. There are numerous reasons for this neglect. The main one is likely that most of the literature focuses on moral decisions, which differ from judicial decisions in at least two key respects: First, unlike judges, merely moral agents are generally not called upon to give *reasons* for their moral decisions. And second, merely moral agents are generally not *bound* by their past moral decisions, let alone any reasons they happen to give.[98]

But even where the moral literature does address courses of action in the context of normative uncertainty, the flavor of it is slightly different: the interest is to avoid diachronic inconsistency of a sort that either *seems* irrational or, more significantly, exposes the moral agent to adverse kinds of manipulation, like various kinds of money pumps.[99] These kinds of concerns—about diachronic consistency—also matter to judges and courts. But when the problem arises in the moral case, it is not usually because of a need to explain the reasons for one's decision and the resultant commitment that such explanation can have.

In any event, such separation—between the choice of action and the rationale for it—is not entirely possible for the judge. The common-law judge

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2004) (discussing how Justice Warren stressed that the *Brown v. Board of Education* decision should be unanimous as "[a] sharply divided court, no matter which way it leaned, was an indecisive one").

The distinction also generates a paradox for multi-member courts. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 10-12 (1993) (introducing the "doctrinal paradox"). I save this complication for future work. Many judges toil alone—for example, on the district court and the emergency docket—and the paradox does not arise if members of a panel agree.

96 I previously handled this complication by treating the two choices together, taking the decision to be co-extensive with the opinion. Cox, *supra* note 3, 747-48 & n.33. As in Part I, that simplified choice set was adequate to show the initial problem.

97 *See supra* subsection II.A.3.

98 Even where past moral decisions are binding—like the choice to make a promise—moral agents are not usually bound by the reasons given for making such a choice.

99 *E.g.*, Gustafsson & Torpman, *supra* note 69, 160-69.

must always choose an opinion to accompany her decision.[100] And opinions and decisions cannot be combined at random: the opinion must, in some way, explain or justify the decision, and that explanation itself can alter—even slightly—the decision (e.g., by affecting the amount or scope of remedies). Accordingly, there is almost always a need to treat the judge's choice as being about some course of action taken holistically.

And so, I will build on my previous approach.[101] I will no longer treat the decision and the opinion as coextensive. Instead, I will treat the judge's choice set as being amongst courses of actions—call them "rulings"—that combine a decision with an opinion. Given this choice set, a "jurisprudence" might be understood, more narrowly but more precisely, as a theory about what ruling a judge ought (judicially) to issue, all things considered—that is, given all the relevant considerations, be they legal, moral, political, prudential, or otherwise.[102]

This need to treat holistically what a judge must decide—the decision and the reasons given for it—will turn out to have an important implication.

III. SUPER-DICTA

We are now ready to see the mischief. Here it is: when a judge has normative uncertainty and responds to it rationally, her reasons for the decision are often *not* the reasons stated in whatever opinion is part of that ruling. To be clear, this claim is not a cynical one: it does not depend on the judge choosing which decision to make based on improper reasons and then writing an opinion to match. The claim follows directly where a judge (1) aims to do what she ought (judicially) to do, and (2) is rational in that pursuit.

I call this phenomenon—the judge's *actual* reasoning for her ruling, for deciding as she does in light of her normative uncertainty—"Super-Dicta." First, I will illustrate why and how Super-Dicta occurs. Then, I'm going to explain why I call it "Super-Dicta." I will then distinguish Super-Dicta from related phenomenon, and illustrate its significance.

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100 The judge's choice of which opinion to issue includes the null opinion—i.e., no opinion. *See supra* subsection II.A.2.

101 *See generally* Cox, *supra* note 3; *see also supra* note 96.

102 We thus leave for another day the difficulty presented by jurisprudences that take a different scope of choice, either always or as applied to particular situations. *See supra* Section II.B; *see also supra* note 92. Jurisprudences also need not be either determinate or complete, possibilities I return to in Part VI. As stated in Part III, however, I will assume they are complete for purposes of illustration.

A. *Discovering Super-Dicta*

Let's suppose our judge, call her Judge Aidos, is deciding the Greatest Copyright Case Ever.[103] The Greatest Copyright Case Ever concerns the copyrightability and fair use of important aspects of computer software.[104]

Both Plaintiff and Defendant are software developers. Plaintiff's product was popular, and many users had spent time learning its command hierarchy (e.g., "Copy," "Print," "Quit"). Defendant copied Plaintiff's command hierarchy, but not the rest of its software, to help users switch to Defendant's product. Without Plaintiff's command hierarchy, users would need to learn a whole new command hierarchy (e.g., "Duplicate," "Paper," "Exit") to use Defendant's product. Few users would make the switch.

Plaintiff sued Defendant for copyright infringement. Defendant conceded that it copied. But Defendant argued that the material copied was not copyrightable, and that even if it were, Defendant's copying was fair use (and so not infringing).[105] Plaintiff prevailed in the district court: the district court found that the software's command hierarchy was copyrightable, and that Defendant's use was not fair use.

Suppose that Defendant appeals the judgment, raising two issues: (1) the copied software was not copyrightable; and (2) their copying was fair use (and so not infringing).

As in any appeal on our model that addresses a single cause of action—here, copyright infringement—the reviewing court is essentially being asked to make one of three decisions:

1. Affirm the judgment.
2. Reverse the judgment.
3. Vacate the judgment and remand for further proceedings.

In addition to the decision, Judge Aidos will need to issue an opinion explaining the reasons why she made that decision.[106] That answer will depend on how the court resolves the two issues raised by Defendant. The

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103 I first used this case in Cox, *supra* note 3, at 803-06. As with my exposition of the problem and its solution in Part I, I borrow freely from my earlier use, with minimal quotes for readability and clarity of exposition.

104 This is a not-so-thinly veiled gloss on *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1996) and *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

105 *Google*, 141 S. Ct. at 1197. Some copying, like for criticism or comment, is considered "fair use" and so not infringing. 17 U.S.C. § 107. The fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Google*, 141 S. Ct. at 1196 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

106 *But see* FED. R. APP. P. 36(a) (recognizing the court may instruct entry of judgment "without an opinion").

decision and the opinion are not independent. Nor, in this case, are the two issues: depending on how a given issue is resolved, it may moot the other. For example, if the software is not copyrightable, then the question of fair use is moot; similarly, if the copying was fair use, then the question of copyrightability is moot. By contrast, if the software is found copyrightable, then the court must also address fair use.

The Greatest Copyright Case Ever nicely illustrates why I treat opinions holistically, distinguish opinions from decisions, and construct the choice set in terms of rulings (decision/opinion pairings). I treat opinions holistically, not issue-by-issue, because, as here, issues are often not independent. I distinguish opinions from decisions because, as here, there may be multiple opinions that could lead to the same decision (i.e., affirm, reverse, remand). And I construct choice sets in terms of rulings (decision/opinion pairings) rather than in terms of either decisions or opinions because, while there may be multiple opinions that could support the same decision, the two are not independent—you cannot pair just any opinion with any decision.

I want to introduce one simplification into our telling of the Greatest Copyright Case Ever: we'll ignore the third possible decision, of vacating and remanding. The possible opinions supporting remand are numerous: one (or both) standards could be clarified, in a variety of ways, that warrant sending the case back to the district court (and possibly a jury) for a do-over.[107] To simplify our discussion, I will assume that the third option of remanding is a nonstarter.

So, there are two possible decisions—one to affirm the judgment (in favor of Plaintiff) and the other to reverse it (in favor of Defendant). But the question for the judge, as always, is not just *what* to decide, but *why*.

Given the two issues, and how they interact, there are roughly three options for the *why*—for reasons supporting either decision. One supports the decision affirming the judgment in favor of Plaintiff:

1. This type of software is copyrightable, and Defendant's copying was not fair use.

The other two would require reversing the judgment in favor of Defendant:

2. This type of software is not copyrightable.

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107 *E.g.*, Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1348 (Fed. Cir. 2014) (finding software copyrightable and remanding for trial on fair use). The Federal Circuit would later find Google's copying was not fair use as a matter of law. Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1186 (Fed. Cir. 2018) (reversing district court's denial of Oracle's post-verdict motion for judgment as a matter of law).

3. Defendant's copying was fair use as a matter of law (and so not infringing).

These three options for an opinion are obviously skeletal. A judge deciding the Greatest Copyright Case Ever would need to fill in the details. For example, with respect to options (1) and (2): How do you delineate "this type of software"? And with respect to options (1) and (3): why is this copying so clearly fair use—or so clearly not fair use—that judgment as a matter of law is appropriate?[108]

There are many reasons why a judge might favor one of these three higher-order opinions, not to mention questions about how to fill in the details on these sub-issues and others. Different theories of adjudication will find some of these reasons relevant and reject others: copyright is governed by a statute, and so views on statutory interpretation are clearly implicated. But the statute is also minimal—at least on fair use—and so questions will arise about the appropriate way to engage in common-law reasoning, especially in the shadow of a statutory regime. The case is about software, and so views about tech exceptionalism will be in play. The list goes on.[109]

We need a way to simplify. Tempting as it is to nerd out over cool cases, this Article is not about any one case in particular. And one's views on various sub-issues—in this case, and in others—are also not always independent. So, how do we capture this complexity while remaining focused?

I'm going to make two simplifying assumptions. First, I'm going to treat the available opinions as being these three skeletal options. That will keep the problem more manageable and save time in exposition. It means that the judge's choice set contains only three credible options—three Rulings—that combine the above decisions with opinions explaining and justifying them. They are:

A. Decide to affirm the judgment (in favor of Plaintiff) *for the reason that* this type of software is copyrightable, and Defendant's copying was not fair use.

B. Decide to reverse the judgment (in favor of Defendant) *for the reason that* this type of software is not copyrightable.

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108 When *Google v. Oracle* was decided, it was an open question whether fair use was committed to the jury under the Seventh Amendment. *Google,* 141 S. Ct. at 1199-1200. The Court has now clarified that fair use is not so committed. *Id.* However, fair use remains a mixed question of law and fact, and so may turn on factual findings. *Id.*

109 Cox, *supra* note 3, at 758, 809-10.

C. Decide to reverse the judgment (in favor of Defendant) *for the reason that* Defendant's copying was fair use as a matter of law (and so not infringing).

I use the phrase "for the reason that" to delineate between the decision and the opinion.

Second, I'm going to model the judge's normative uncertainty as uncertainty between competing jurisprudences.[110] Recall that jurisprudences are simply theories of what a judge ought (judicially) to do, all things considered.[111] This is not the only way to understand a judge's normative uncertainty; for example, I could have modelled the judge's uncertainty as brute uncertainty between options, rather than as uncertainty about the options because of uncertainty about the jurisprudences.[112] But it is generally accepted that judges should exhibit at least some *minimal* consistency across cases, and jurisprudences provide the simplest way to show this consistency and the trade-offs that result.[113]

We can further simplify our discussion by making two additional assumptions about the competing jurisprudences. First, I will assume that each jurisprudence is complete. That is, each jurisprudence provides guidance in every case, even if that guidance is "do whatever" (i.e., full discretion).[114] Second, I will assume that the jurisprudences are mutually exclusive. That is, they diverge about how to address some case, even if not this one.

These two assumptions then allow us to model a judge's *credence* that a given jurisprudence (J_i) is correct as the probability (p_i), from her perspective, that it is correct. In doing so, we borrow tools from a field called formal epistemology.[115] I will use a judge's *epistemic* credences—that is, what a judge

110 *Id.* at 762.

111 *See supra* Section I.A. The phrase "all things considered" is a philosophical term of art. *See, e.g.*, Ruth Chang, *'All Things Considered'*, 18 PHIL. PERSPS. 1 (2004) (theorizing "*all things considered*" judgments—"that is, [judgments that] tak[e] into account *all* the things that matter").

112 *See* MACASKILL ET AL., *supra* note 9, at 44-48 (discussing "My Favorite Option"). The modeling would be similar: credences would be split across states where an option is correct rather than states where a given jurisprudence is correct. For example, for a choice set with two options, there would be only two states, one where Option 1 is correct and one where Option 2 is correct. But note that treating uncertainty as brute uncertainty between options obscures that the judge's uncertainty about the options reflects deeper uncertainty about the reasons why a given option might be correct.

113 For further discussion, see Cox, *supra* note 3, at 760-62.

114 I will return to these concepts in Part VI.

115 There is disagreement about whether credences are appropriately modeled as probabilities, or if credences are relevant to practical action. Such debates needn't detain us. I have argued elsewhere that doubts are relevant to the judge's decision, *see generally* Cox, *supra* note 3, and my purpose here is to illustrate the implications of taking that doubt into account. If probabilistic credences are not the appropriate way to model those doubts, an alternative account could be

should believe the probabilities are rather than whatever she *actually* believes the probabilities are. For example, a judge's epistemic credences about jurisprudences will be consistent with her credences about how particular cases should be resolved, about how they can be made consistent with past cases, about whether past cases were wrongly decided, about what should be done about that (if anything), and so forth. A judge's actual credences almost certainly diverge from her epistemic credences—a large part of reflecting and thinking and experience is attempting to render them consistent!—and future work will need to address that. But today, we're not focused on solutions to normative uncertainty, only a specific further implication of that problem, and so we'll set aside this one complicating factor for now.[116]

For the moment, I'm going to assume that Judge Aidos is uncertain as between only three jurisprudences, each of which ranks one of the three rulings identified above in terms of "degrees of judicial rightness." Degrees of judicial rightness are not some weird metaphysical entities. They just reflect a cardinal ranking—that is, roughly, a ranking that tells you the relative difference in value between the items ranked. So, to say that Rulings A, B, and C have 0, 5, and 10 degrees of judicial rightness, respectively, conveys two types of information: It ranks the rulings, with Ruling C being the best and Ruling A being the worst. And it conveys information about the difference between the options, like that the difference between Ruling A and Ruling B is half that of the difference between Ruling A and Ruling C.[117]

Putting this all together, and assuming her credences are split between these three jurisprudences as indicated by the assigned probabilities (p_i), we can construct Judge Aidos's decision matrix:

pursued. I suspect the results would be similar, even if not coextensive. But it is work left to another day.

116 *See* Cox, *supra* note 3, at 779 n.141. I also do not mean to suggest we can know credences precisely. But one can estimate: it's not unusual to say that you think it's more than 50% likely that something is true, but say, less than 80% likely. And even these ballpark credences can yield more information than we might have had previously. For discussion, see *id*. For application, see *id*. at 800 n.197; and LOCKHART, *supra* note 3, at 59-67 & 189 n.10.

117 For more detailed discussion, see Cox, *supra* note 3, at 799-800.

Greatest Copyright Case Ever: Scenario I

	Jurisprudence 1 (p_1 = .7)	Jurisprudence 2 (p_2 = .2)	Jurisprudence 3 (p_3 = .1)
Ruling A	0	0	10
Ruling B	10	5	0
Ruling C	8	10	5

Recall that our judge has only one aim: to do whatever it is she ought (judicially) to do. Recall further that we have assumed she is rational. So, let's suppose that she responds rationally to her normative uncertainty.

What is the rational response? As noted earlier, I don't know. But that's fine. My purpose today isn't to figure that out, but to show a phenomenon that occurs when the judge does respond rationally to her normative uncertainty. And so, we can use a "toy theory." A toy theory is just a placeholder that we can use to illustrate the implications of various other moves.[118] A toy theory probably has weaknesses, and those can be instructive,[119] but we're not worried about evaluating them or fixing them for now.

For sake of argument, let's assume that the rational thing to do is to maximize the expectation of judicial rightness.[120] Call this toy theory the "Maximization Approach."

As a place to begin, the Maximization Approach serves our purposes well. It has the benefits of being familiar, thanks to the Hand Formula.[121] It is similar to a common way of handling empirical uncertainty.[122] It applies to more scenarios than the coin flip from the introduction.[123] And it avoids the downfalls of the obvious solution by considering both the likelihood that

118 This is a common philosophical method. *See, e.g.*, Cox, *supra* note 3, at 791-97 (using a toy theory to illustrate both the difficulty of finding a solution to the problem of normative uncertainty in judicial decisionmaking and the potential that such a solution might hold). Some commentators have mistakenly read that piece as endorsing the toy theory as a solution. It may turn out to be the solution I endorse, but I haven't yet and am not yet convinced that it is our best option.

119 *See infra* note 208 and accompanying text; *see also infra* Section VI.B; Cox, *supra* note 3, at 800-01.

120 Cox, *supra* note 3, at 790.

121 Or at least its traditional interpretation. *Id.* at 790 n.171; United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.).

122 *See* MACASKILL ET AL., *supra* note 9, at 47-50 (discussing "expected choiceworthiness" as an analog to expected utility theory).

123 *See supra* notes 8–9 and accompanying text.

other jurisprudences are correct and what those other jurisprudences say about the stakes.[124]

I do not mean to suggest that the Maximization Approach is perfect—far from it. But we'll use it for now for the sake of argument, and we'll get to take a different toy theory for a spin momentarily.[125] So if you hate Maximization, no problem—sit tight, skip the equations, and come along for the ride.

On the Maximization Approach:

> Where a judge is uncertain of the degrees of judicial rightness of some of the alternative judicial acts under consideration, a choice of action is rational if and only if the action's expected judicial rightness (EJR) is at least as great as that of any other alternative.[126]

The expected judicial rightness (EJR) of a given choice (e.g., Ruling A) is calculated by multiplying what the judge believes is the probability that a given jurisprudence is correct ($p_1, \ldots, p_n$) times the degree of judicial rightness that each jurisprudence assigns to that choice ($j_{1,A}, \ldots, j_{n,A}$):

$$EJR_A = (p_1 * j_{1,A}) + (p_2 * j_{2,A}) + \ldots + (p_n * j_{n,A})$$

Judge Aidos runs the math. Ruling C maximizes expected judicial rightness.[127] And so that is what she does: she decides to reverse the judgment in favor of Defendant and writes an opinion explaining that Defendant's copying was fair use as a matter of law, and so not infringing.

So far, so good.

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124 *See supra* Section I.B (explaining downfalls of obvious solution); *see also* Cox, *supra* note 3, at 787-802 (discussing and applying the Maximization Approach).

125 *See infra* Section III.D.

126 Cox, *supra* note 3, at 790. I adapted this principle from Lockhart's PR4. *See* LOCKHART, *supra* note 3, at 82. I use a different scope of choice from Lockhart, among other differences.

127 Ruling A's expected judicial rightness is:

$$\begin{aligned} EJR_A &= (p_1 * j_{1,A}) + (p_2 * j_{2,A}) + (p_3 * j_{3,A}) \\ &= (.7 * 0) + (.2 * 0) + (.1 * 10) \\ &= 1 \end{aligned}$$

Ruling B's expected rightness is:

$$\begin{aligned} EJR_B &= (p_1 * j_{1,B}) + (p_2 * j_{2,B}) + (p_3 * j_{3,B}) \\ &= (.7 * 10) + (.2 * 5) + (.1 * 0) \\ &= 8 \end{aligned}$$

And Ruling C's expected judicial rightness is:

$$\begin{aligned} EJR_C &= (p_1 * j_{1,C}) + (p_2 * j_{2,C}) + (p_3 * j_{3,C}) \\ &= (.7 * 8) + (.2 * 10) + (.1 * 5) \\ &= 8.1 \end{aligned}$$

Here's the punchline: The reason Judge Aidos chooses Ruling C—the reason she decides to reverse the judgment in favor of Defendant—is that this is the best way to ensure that she does what she ought (judicially) to do. That is, Judge Aidos chooses Ruling C because it maximizes expected judicial rightness.

But that reason—maximizing expected judicial rightness—is not the reason that she gives for her decision to reverse the judgment. It is not the *ratio decidendi*.

The reason that she gives—the *ratio decidendi*—is that Defendant's copying is fair use as a matter of law. The two are not the same.

B. *Holdings, Dicta, & Super-Dicta*

In the above example, Judge Aidos chose to issue Ruling C, a decision to reverse the judgment "for the reason that" Defendant's copying was fair use as a matter of law. But her actual reason for reversing in Defendant's favor was not fair use. Rather, she chose Ruling C because she wasn't sure what she ought (judicially) to do and, given her credences, Ruling C would maximize expected judicial rightness.

I call her actual reasoning "Super-Dicta."

Super-Dicta shares with dicta its status and potential for mischief: Super-Dicta, like ordinary dicta, is not binding on future judges. As noted, that is obvious here where the Super-Dicta is hidden, and I'll develop the claim further in what follows.

But there is also an important difference: Unlike ordinary dicta, and more like a holding, Super-Dicta is *directly necessary* to the outcome of the case. We can see this most clearly in cases where, as here, a judge ought (rationally) to depart from her favored jurisprudence: Super-Dicta is not merely part of the judge's reasoning process as she deliberates about what to do. Rather, Super-Dicta is *dispositive* of the outcome of the case. It is super important.

So, Super-Dicta—the reasons a judge has in light of her credences and whatever the appropriate solution method is—are a necessary part of the judge's *rationale*—the judge's reasons—for reaching the decision that she does. But they are (often) not the reasons given. And they are not binding on future courts.

There are many questions to ask about Super-Dicta. The first two go to what is significant about Super-Dicta. First, how does it differ from other hidden reasons? Second, why should we care about it? I will address these questions in the remainder of Part III.

Assuming we should care about it, the next natural question is: Should it remain hidden? This question relates to important substantive normative

debates—legal, moral, political, prudential, etc.—about the dictates of the judicial ought. But I do not answer it.

Instead, I will make two further claims about Super-Dicta:

1. Super-Dicta will almost certainly remain hidden, because expressing it is likely to be self-defeating as either irrational or else inaccurate.[128]

2. Supposing Super-Dicta could rationally be disclosed without sacrificing accuracy, it would appear to create a legal standard that turns on an odd sort of consideration: facts about the judge.[129]

Both are rather profound. As to the first, it suggests that there is a critical component of a judge's reasoning that we may never get to see—one whose existence and visibility depends *neither* on cynicism *nor* on substantive normative views about what the judge ought (judicially) to do. As to the second, the limits and reach of Super-Dicta when it is spoken are counterintuitive: depending on the method, it would seem to give rise to a legal standard that simultaneously admits of abuse while being self-limiting as to the specific dispute (and not even the facts). To put it in Llewellynian terms, "each precedent has not one value, but two,"[130] and when Super-Dicta is expressed, the distance between them is perhaps greatest.

But first, I want to clarify what Super-Dicta is, what it is not, and why it matters.

C. *What Super-Dicta Is Not*

The cynics in the audience by now may think: Big deal. We have long known that opinions are less than fully honest, that judges do not always give their true reasons for a decision in the opinion that accompanies it.[131] Some judges are uncaffeinated and cranky, unaware that their mood has distorted their perception of the reasons.[132] Some are partisan hacks, who decide cases

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128 *See infra* Part IV.

129 *See infra* Part V.

130 LLEWELLYN, *supra* note 24, at 71.

131 Altman, *supra* note 79, at 296 ("Are opinions honest or accurate accounts of judges' reasons for decision? Many scholars doubt that judges are both honest and accurate, though they dispute whether judges are lying or misled."); Varsava, *supra* note 76, at 171; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 519 (1986); *see also* Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1819 (2007).

132 *See, e.g.*, Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROCS. NAT'L ACAD. SCIS. 6889, 6890 (2011) (suggesting increased time from parole judge's last meal break corresponds with less favorable outcomes for those seeking parole); Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J.: APPLIED ECON. 171,

based on their political beliefs and write an opinion to match.[133] Some are renegades, who cannot quite swallow the implications of the law and so decide according to their conscience and write an opinion suggesting that the law was always on their side—rightfully or wrongfully, depending on your view of the judicial ought.[134] Members of a multi-member court rarely explain why they make the horse-trades they do.

I do not deny that these phenomena are real. There are many reasons why, and ways in which, opinions do not reflect the full story of why the decision is what it is.

But there is something meaningfully different about Super-Dicta.

It is not cynical. Rather, it falls directly out of a judge trying to do whatever it is she ought (judicially) to do.

It is not a psychological or sociological cause like hunger or subconscious bias, external to the judge's reasoning, that affects the judge's reasoning process. Rather, it is part of the judge's practical deliberations.

And it does not depend on subscribing to a jurisprudence that says what a judge ought (judicially) to do is to decide based on ideological or extra-legal moral considerations—or the view that there is no distinction between legal and extra-legal considerations. The phenomenon would still occur for a judge who thought that they ought only "call balls and strikes" and was just uncertain about what that required of them in a particular case.

All that matters is that a judge aims to do whatever it is she ought (judicially) to do, that she be uncertain about what that is, and that she is rational in her pursuit of that aim. In other words, a judge who aims to do what she ought (judicially) to do cannot escape it, so long as she is not Herculean.

D. *When Super-Dicta Matters*

Very well, sometimes the *ratio decidendi* is not the real reason for the ruling. And it's interesting that this arises not for cynical reasons, but because a judge aims to do what she ought to do and is just uncertain about what that

200-01 (2018) (finding unexpected home football team losses corresponded with harsher judicial decisions, particularly for Black defendants). *But see* Keren Weinshall-Margela & John Shapard, *Overlooked Factors in the Analysis of Parole Decisions*, 108 PROCS. NAT'L ACAD. SCIS. E833, E833 (2011) (questioning whether Danziger et al.'s results reflected strategic case scheduling, not judicial hanger).

133 A common complaint. *E.g.*, Robert Reich, *There Is No Doubt Anymore: The US Supreme Court Is Run by Partisan Hacks*, GUARDIAN (Dec. 3, 2021, 6:33 PM), https://www.theguardian.com/commentisfree/2021/dec/03/no-doubt-us-supreme-court-partisan-hacks [https://perma.cc/AU4U-XEE8].

134 Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 798-800 (1996). *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

is. But does Super-Dicta really matter? Afterall, how often does a judge have normative uncertainty? And how often does her uncertainty have bite?

Given the complexity of all the things that go into judging cases—that might affect what a correct jurisprudence is—it would seem that normative uncertainty should be pervasive.[135] But this doesn't mean that Super-Dicta always matters.

For starters, one of the great mysteries of the legal system is how pervasive agreement is, even between those who have radically different views.[136] Even if this convergence is overstated—there is great convergence on outcomes and less convergence on reasons[137]—an experienced jurist will likely have developed views, and the jurisprudences in which she has credence will likely converge on reasons in a wide swath of cases.[138] So even if our judge doesn't know what she ought (judicially) to do in *every* case, there will be *many* cases in which she *does* know what she ought (judicially) to do: the jurisprudences in which she has credence agree.

For another, Super-Dicta probably won't bother you if you had thought the solution to normative uncertainty was the obvious one—just follow that jurisprudence in which you have the most credence. Who cares that the judge's "real" reason is that she thought the ruling was *most likely* what she ought (judicially) to do? Surely this much is implicit in every opinion by a conscientious judge: the reasons given are the ones she thinks are likely the right reasons. And if you thought she believed the *ratio* was *definitely* right rather than *probably* right, so much the fool for you for thinking she never had doubts.

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135 For example, a growing literature has been reflecting on the practical relevance of general jurisprudence. Michelle Madden Dempsey, *Why We Are All Jurisprudes (or, at Least, Should Be)*, 66 J. LEG. EDUC. 29, 31-33 (2016); *cf.* Jeffrey A. Pojanowski, *Reevaluating Legal Theory*, 130 YALE L.J. 1458, 1464, 1487-88 (2021) (suggesting that "competing views" about the scope of general jurisprudence are not "trivial labeling dispute[s]" but reflect "competing ways of thinking about society").

136 *See* Bill Watson, *Explaining Legal Agreement*, 14 JURIS. 221, 225-37 (2023) (describing evidence of pervasive legal agreement); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1227 (2009)("[T]here is *massive* and *pervasive* agreement about the law throughout the system."); *see also* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 427-30 (1985) (pointing out that even for the most contested questions of constitutional adjudication there is broad agreement about the "enormous number" of wrong answers); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 790-91, 794-95, 823-24 (2009) (discussing the impact of conformity on voting outcomes in the Supreme Court and federal courts of appeal).

137 *See* Angie Gou, Ellena Erskine & James Romoser, *Stat Pack for the Supreme Court's 2021-22 Term*, SCOTUSBLOG 3, 14-15 (July 1, 2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/8FT8-7S5W] (showing a gap between unanimous judgments and unanimous opinions in Supreme Court).

138 *See* Cox, *supra* note 3, at 766 (noting that normative uncertainty "will likely only become apparent in a smaller number of cases" to those with developed views and preferred jurisprudential methods).

But the obvious solution is wrong.[139] A judge ought not (rationally) just follow her preferred jurisprudence. In some cases, she ought (rationally) follow a different jurisprudence instead. And it stands to reason that these cases are likely to be important ones, where the stakes are high.[140] Easy and unimportant cases settle. Given the likely significance of such cases, wouldn't you want to know that she's diverging and why? Wouldn't you want to be able to check her reasoning?

But rather than tell you that Super-Dicta is important, allow me to show you what you're missing.

To illustrate, let's consider a different approach that Judge Aidos might have taken. After all, you may have qualms about the Maximization Approach. I do too: I was just using it for illustration,[141] and its difficulties are well-known.[142]

So here, I'll develop another toy theory from the growing literature on second-order decision procedures in hard cases.[143] Again, this is just a toy. My aim is not to argue that one or the other toy theory is better, but to make concrete what is at stake with Super-Dicta.

1. An Alternative: Conflict Avoidance

The view I'm going to borrow draws its inspiration from the least-cost avoider principle in tort law. There are two variations of the approach. One, the "conflict-avoidance principle," developed by Professor Charles Barzun and Professor Michael Gilbert, says that "courts should decide hard cases against the party who could have more easily avoided the . . . conflict in the first place."[144] The second, "harm-avoider constitutionalism," proposed by

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139 *See* Cox, *supra* note 3, at 745-46 (arguing that because (1) judges may not be certain their preferred jurisprudence is correct and (2) different jurisprudences may disagree on the costs of errors in a given case, that sometimes a rational judicial decision is different from the decision suggested by the preferred jurisprudence); *supra* Section I.B.

140 *See, e.g.*, *id.* at 791-96 (offering analysis of Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

141 *Cf.* Nelson & Schwartzman, *supra* note 8, at 1105, 1133 (suggesting that my prior work proposes using the toy theory as a strategy for decisionmaking under uncertainty).

142 Lockhart, *supra* note 3, at 184 n.11 ("Decision theorists have discussed at great length whether expected utility theory is an adequate normative account of decision-making under risk."); Cox, *supra* note 3, at 800-02 (noting difficulties raised by intertheoretic comparison, including that jurisprudences might not admit of degrees or that a jurisprudence with an expansive range might "outrank" other jurisprudences at both ends of the spectrum); *see also* Gustafsson & Torpman, *supra* note 69, at 160-65 (discussing "several fatal drawbacks" to intertheoretic comparison). *See generally* MACASKILL ET AL., *supra* note 9 (exploring these problems at greater depth).

143 *See infra* subsection III.D.1; *see also generally* Nelson & Schwartzman, *supra* note 8 (surveying literature); Evan D. Bernick, Hedging Constitutional Bets (2021) (unpublished manuscript), https://ssrn.com/abstract=3783472 (on file with author) (adapting MacAskill et al.'s Borda voting framework to constitutional decisionmaking).

144 Barzun & Gilbert, *supra* note 37, at 3 (emphasis removed).

Professor Aaron Tang, says that in hard cases, courts should (and do) decide cases "based on a raw, second-order consideration: which group, if the Court rules against it, would be better able to avoid the harm it would suffer?"[145]

I can't borrow these directly "off the shelf" without some modification. And my use of them is not entirely faithful to their genesis. For one, both were addressed to hard cases in constitutional law, not copyright or adjudication writ large.[146] And for another, the proposals seem to offer solutions of a different type, namely second-order *jurisprudential* decision procedures rather than *rational* decision procedures.[147] But our work has been discussed together and our concerns are certainly related, so co-opting them in this way will provide some scaffolding for these debates moving forward.[148]

"Conflict Avoidance," as I'll call this mash-up approach, involves three steps plus a step zero:

0. Determine whether a case is "hard."[149]

1. If hard, "identify the particularized interests" of each real party in interest "that the other party's actions frustrated or threatened to frustrate."[150]

2. Figure out "how costly it would have been . . . to secure those interests" without resorting to legal conflict.[151]

3. "[R]ule against the party that could have secured its interests more easily."[152]

Suppose that Judge Aidos is convinced that Conflict Avoidance is the best way to resolve her normative uncertainty. She believes it is rational to avoid hard cases because they "impose[] serious costs" on the law and legal system

145 Tang, *supra* note 37, at 1849-50 (footnote omitted).

146 *See generally* Barzun & Gilbert, *supra* note 37, at 2 ("hard constitutional cases"); Tang, *supra* note 37, at 1849 ("difficult questions of constitutional law").

147 *See* Barzun & Gilbert, *supra* note 37, at 13 ("The upshot of our translation project is *a doctrinal test*." (emphasis added)); Tang, *supra* note 37, 1849-50, 1893-94 (arguing that harm-avoider constitutionalism "belongs on the list" of "interpretive approaches" alongside originalism, common law constitutionalism, and others). On the importance of this distinction, *see infra* Part VI.

148 *See* Nelson & Schwartzman, *supra* note 8, at 1098, 1133-34 (relating the conflict-avoidance principle, harm-avoider approach, and the maximize expected judicial rightness approach).

149 *See* Barzun & Gilbert, *supra* note 37, at 9 (determining a case is hard would "trigger[] the conflict-avoidance principle"); Tang, *supra* note 37, at 1886 (discussing how to identify "the 'hard' cases that would benefit from harm-avoider constitutionalism").

150 Barzun & Gilbert, *supra* note 37, at 13, 26; Tang, *supra* note 37, at 1888-89 (describing the Supreme Court's focus on analyzing the harm to those threatened by a particular law).

151 Barzun & Gilbert, *supra* note 37, at 13, 26; Tang, *supra* note 37, at 1890-92 (contemplating how best to identify the costs of a particular decision).

152 Barzun & Gilbert, *supra* note 37, at 13; *see also id.* at 30-31.

that make it harder to achieve what is judicially right.[153] And Conflict Avoidance avoids such cases by discouraging parties from forcing the legal confrontation.

And so, Judge Aidos applies Conflict Avoidance in deciding the Greatest Copyright Case Ever.

Judge Aidos begins with Step 0: determine whether this case is "hard." Barzun and Gilbert do not offer a method for identifying hard cases since their aim is to offer a decision procedure once you're deciding one.[154] Tang similarly defers, suggesting his approach "can function in the presence of pluralistic approaches to this threshold question."[155] But let's suppose that Judge Aidos determines the threshold is met because, unlike in most cases, her two favored jurisprudences, Jurisprudence 1 and Jurisprudence 2, disagree about what to do.[156]

Judge Aidos turns to Step 1, identifying each real party-in-interest's "particularized interest" that was "frustrated" (or threatened) by the other party's actions.[157] In other words: what was each party trying to do when the conflict arose?[158]

She concludes that Plaintiff was trying to monetize its software's command hierarchy (e.g., "Copy," "Print," "Quit") that was a primary driver of its software's market dominance, and to leverage that command hierarchy to maintain market dominance.[159]

She determines that Defendant was trying to sell its own software that competes with Plaintiff's. Defendant copied Plaintiff's command hierarchy, but not the rest of Plaintiff's software, to reduce "switching costs" for customers. If Defendant couldn't use Plaintiff's command hierarchy, then customers would be unlikely to "switch" to Defendant's program because they would need to learn an entirely new command hierarchy to be able to use it (e.g., "Duplicate," "Paper," "Exit").

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153 *Id.*

154 *Id.* at 10 (noting that the kind of case they have in mind is one that, according to "*whatever criteria the [decisionmaker] thinks proper* produces a hard case, leaving the [decisionmaker] in a position of uncertainty").

155 Tang, *supra* note 37, at 1886-88. Tang seems to blend indeterminacy and uncertainty. *Id.* But the reason for a case's difficulty affects both the nature of a given second-order decision procedure (rational or jurisprudential) and so, too, its justification. *See infra* Section VI.

156 *See supra* text accompanying note 46.

157 Barzun & Gilbert, *supra* note 37, at 13, 26.

158 *Id.* at 14.

159 *Cf.* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 810 (1st Cir. 1995), *aff'd*, 516 U.S. 233 (1996) (noting the utility of a familiar command hierarchy); Google, LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1191-94 (2021) (describing benefits of deploying a common command structure).

Conflict Avoidance also looks "beyond" the litigants to "the real party in interest,"[160] which here almost certainly includes the customers and potential customers of Plaintiff's and Defendant's products. Their interest is in using the best software available, be it Plaintiff's or Defendant's (or someone else's!).

Judge Aidos next turns to Step 2, analyzing how hard it would be for each party to achieve its ends without resort to the actions that generated the legal conflict.[161] This is the core of Barzun and Gilbert's approach to hard cases, according to which hard cases are better avoided than resolved.

Plaintiff had several alternatives to suing for infringement. Plaintiff could have offered a reasonable license, rather than refusing to license or insisting on onerous terms. Plaintiff could have charged a higher fee to offset any loss from more flexible licensing terms. And Plaintiff could have maintained market dominance by developing a better product—that is, by building a better "printer" than by controlling the command "Print."

Defendant could have avoided the conflict by paying for a license or developing a new command hierarchy. But both options were cost prohibitive. The terms of Plaintiff's license were so restrictive that Defendant could not use the command hierarchy in its open-source business model.[162] And even if it developed a better command hierarchy, Defendant would be unlikely to attract customers, since they had already invested significant time and energy in learning Plaintiff's.[163]

And the customers, who want to use the best software available, could only have used Defendant's software if they learned a new command hierarchy. But learning a new command hierarchy is costly, which creates a barrier to entry for competitors. And that in turn means that the market will be less competitive, and so customers will have fewer good options for software.

Finally, Judge Aidos turns to Step 3: compare the costs and "rule against" whomever "could have secured its interests more easily."[164] Let's suppose, for sake of argument, that Defendant's costs are higher than Plaintiff's, and that the real parties in interest, the customers, have higher costs still because of the uncertainty the legal conflict between Plaintiff and Defendant generates.

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160 Barzun & Gilbert, *supra* note 37, at 33.

161 Nelson & Schwartzman, *supra* note 8, at 1107 n.34 ("Roughly stated, the question is: 'How hard would it have been to get what you wanted without disturbing the other party?'" (quoting Barzun & Gilbert, *supra* note 37, at 26)).

162 Oracle's licensing terms precluded Google's strategy of developing an open-source platform. *See Google, LLC*, 141 S. Ct. at 1191-94 (describing how the licensing terms offered "would have undermined that free and open business model").

163 Don't believe me? Then why are you using a QWERTY keyboard?

164 Barzun & Gilbert, *supra* note 37, at 13.

Accordingly, Judge Aidos concludes that she should rule against Plaintiff, and in a manner that best secures the interests of the customers.

Critically, Judge Aidos does not reach this conclusion because she thinks this is how she ought (judicially) to resolve the Greatest Copyright Case Ever. Nor does she do so because she thinks costs for Defendant or customers should be decreased. Rather, she is uncertain about how she ought (judicially) resolve the Greatest Copyright Case Ever and, according to Conflict Avoidance, the rational thing to do given her uncertainty is to disincentivize parties from creating such awfully difficult cases in the first place. Plaintiff was best positioned to avoid the conflict, and so Judge Aidos concludes that she ought (rationally) to resolve the case by ruling against Plaintiff.

If you're gritting your teeth that *this misses the point* of the legal system, don't worry. We'll get there.[165] But first, I have some other fish to fry.

2. The Significance of Silent Super-Dicta

Applying Conflict Avoidance, Judge Aidos concludes that she ought (rationally) rule against Plaintiff, and in a manner that best secures the interests of the customers. But what does this mean in terms of Ruling?

As before, Judge Aidos' choice set is between three Rulings, repeated here for easy reference:

A. Decide to affirm the judgment (in favor of Plaintiff) *for the reason that* this type of software is copyrightable, and Defendant's copying was not fair use.

B. Decide to reverse the judgment (in favor of Defendant) *for the reason that* this type of software is not copyrightable.

C. Decide to reverse the judgment (in favor of Defendant) *for the reason that* Defendant's copying was fair use as a matter of law (and so not infringing).

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165 *See infra* Part VI; *see also, e.g.*, Nelson & Schwartzman, *supra* note 8, at 1112-14 ("Rather than see legal conflicts as pathological, we might instead understand them as opportunities for the development and improvement of social norms."); *cf.* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1217 (2010) ("[T]his sort of induced moral deliberation is important for our moral health and for an active, engaged democratic citizenry."); Rebecca Stone, *Rights, Remedies, and Normative Uncertainty About Justice*, LEGAL THEORY, doi: 10.1017/S1352325225000060 (Published Online Mar. 11, 2025), at *1 (arguing that remedial law should be used to facilitate deliberation between the parties about what justice requires); Aditi Bagchi, *Private Law and Public Discourse*, 65 ARIZ. L. REV. 541 (2023) (arguing that private law disputes form a critical part of reaching consensus on moral and political norms).

Ruling A is clearly out, as supporting the Plaintiff. But assuming Judge Aidos' choice set remains so limited, how would Conflict Avoidance help her resolve her uncertainty as between Ruling B and Ruling C?

It would seem in the spirit of Conflict Avoidance to select the ruling that (1) most disincentivizes the least-cost avoider from creating the conflict in the first place, or (2) best protects the parties facing the highest conflict-related costs.[166] Here, the same ruling both creates the greatest disincentive for Plaintiff and best protects the parties with the highest costs, namely the consumers. That ruling is Ruling B:

> B. Decide to reverse the judgment (in favor of Defendant) *for the reason that* this type of software is not copyrightable.

As it happens, this is the ruling that many scholars and much of the industry favored as a jurisprudential matter: it would at last resolve the copyright question, forestalling repeated legal conflicts of exactly this sort that had already reached the Supreme Court twice.[167] But these features also make Ruling B an attractive choice under Conflict Avoidance. Such a ruling would send a clear message to the least-cost avoider: force a legal fire, and you might get burned.[168]

And so, having applied Conflict Avoidance to deciding in the face of normative uncertainty, Judge Aidos issues Ruling B.

As before, we can see the first payoff:

The reason Judge Aidos chooses Ruling B—the reason she decides to reverse the judgment in favor of Defendant—is that this is the most rational thing to do in light of her uncertainty about what she ought (judicially) to do. That is, Judge Aidos chooses Ruling B because she determines the case is sufficiently "hard," and, by penalizing the least-cost avoider, it will minimize the recurrence of hard cases that impose costs on the system. And that, according to Conflict Avoidance, is what a judge ought (rationally) to do when she is uncertain about what she ought (judicially) to do.[169]

But that reason—protecting the system from hard cases—is not the reason she gives for her decision to reverse the judgment. It is not the *ratio decidendi*.

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166 *Cf.* Nelson & Schwartzman, *supra* note 8, at 1105-06 ("[T]he conflict-avoidance principle tells them to assign liability to whichever party could have avoided the conflict at the least cost."); Tang, *supra* note 37, at 1885 ("[T]he losing side in a Supreme Court case could have acted differently to avoid the Court's intervention in the first place.").

167 *See* Cox, *supra* note 3, at 804 ("After nearly thirty years of litigation between these two cases, everyone was hoping for some clarity, especially on the copyrightability question.").

168 Yes, yes, contrary to the whole point of intellectual property litigation on some views. Don't worry, we'll get there. *Infra* text accompanying notes 205–208 and 238–247; *see* Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (discussing the importance of resolving difficult copyright cases through litigation).

169 Barzun & Gilbert, *supra* note 37, at 22.

The reason that she gives—the *ratio decidendi*—is that this type of software is not copyrightable. The two are not the same.

Here's the rub, if it's not plain already: how Judge Aidos proceeds in the face of normative uncertainty—her reason for issuing the ruling that she does—directly affects the outcome of the case.

If she responds to her uncertainty by using the Maximization Approach, she will issue Ruling C.

By contrast, if she responds to her uncertainty by applying Conflict Avoidance, she will issue Ruling B.

I hope this puts a fine point on what is hidden when an opinion does not disclose the Super-Dicta. This problem is not avoided by claiming that one or the other approach is the rational way to respond to normative uncertainty. The judge may have got that wrong—she may have made a mistake in her reasoning.[170] But you will not know that if you do not see it. And you will not be able to point to her error.

IV. How Transparency Is Likely Self-Defeating

I think it would be enough of a payoff that in many cases when the judge is uncertain about what she ought do, Super-Dicta could occur and be hidden: that, as a direct result of aiming at whatever it is she ought to do—and not for cynical or renegade reasons—a judge could decide a case for reasons that do not appear in the opinion.

But what if she tried? Could a judge include an explanation of her full reasons in her opinion? Should she?

There are many reasons for expressing uncertainty and for refraining from doing so. The benefits of transparency on the basic picture would seem to count in favor; concerns about clear rules and judicial authority count against.[171] But these considerations (and others) are typically considerations of jurisprudence: considerations of what a judge ought (judicially) to do when issuing an opinion. And while these are important questions, my focus here is not about what a judge ought (judicially) to do. That is, I am not here concerned with the legal, moral, political, prudential, or other reasons of substantive normativity that inform the debates over whether a judge should express her uncertainty.

For, as it turns out, there is a different reason we might not see Super-Dicta: it will almost always be *self-defeating* for a judge to transparently

170 *Cf.* Nelson & Schwartzman, *supra* note 8, at 1098-99 (noting that there are many second-order decision procedures and that "[s]electing among [them] requires justification.").

171 *See supra* notes 11–19 and accompanying text; *see also* sources cited *supra* note 79.

explain her normative uncertainty and resolution thereof. And it appears that this may be so regardless of your jurisprudential view.

This result is significant in itself. Although my discussion here falls far short of offering proof that this will occur in every case, or on every toy theory, it suggests that the substantive normative debate about whether a judge should express her doubts—and in particular, her reasoning in light of them—may be moot. More work is needed to definitively render that verdict, but I will do something to gesture at the limitations and reasons to think it can be shown.

The result is also significant for another reason. Doubters of normative uncertainty commonly object: if the judge has doubts, why does she never admit them?[172] But as this argument shows, the "arrogance" or "certitude" of opinions is not a reason to doubt the existence of normative uncertainty on the part of judges. To the contrary, Super-Dicta helps explain why arrogant opinions are to be expected.

The argument proceeds in two parts: First, I show that Super-Dicta will only be rational to express on certain kinds of jurisprudences—ones that take some dictates of the judicial ought to be more important than others. Second, I turn to such jurisprudences—those that admit of degrees—and argue that admitting of uncertainty will almost always be either irrational or inaccurate.

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172 *See* Cox, *supra* note 3, at 766-68. She actually does sometimes admit them, in private papers, anecdotes, and the like—including in some blockbuster cases of the last century—but rarely in opinions, consistent with the result here. *Compare, e.g.*, Benjamin N. Cardozo, *The Paradoxes of Legal Science*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 252 (Margaret E. Hall, ed. Matthew Bender & Co., Inc. 1947 (1967 Reprint)) ("I cannot span the tiniest stream in a region unexplored by judges or lawgivers before me, and go to rest in the secure belief that the span is wisely laid."), MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 293-306, 545 n.26 (2004) (discussing what unpublished drafts and papers revealed about the Justices deciding Brown v. Bd. of Educ., 347 U.S. 483 (1954)), Transcript of Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392, at *39:18-19 (Roberts, C.J.) ("I've actually never quite understood how you evaluate that."), *and* Russell F. Canan, *Rough Justice*, *in* TOUGH CASES: JUDGES TELL THE STORIES OF SOME OF THE HARDEST DECISIONS THEY'VE EVER MADE 37-56 (Russell F. Canan, Gregory E. Mize & Frederick H. Weisberg eds., 2018) (recounting uncertainty about what to do when he feared a jury would convict an innocent man), *with* MacLeod, *supra* note 19, at 505-06 (finding an average of "2.43 [assertions of uncertainty] per 10,000 words" in judicial opinions and noting that "the relative infrequency of [assertions of uncertainty] shows that legal rhetoric is heavily skewed toward assertions of certainty . . . ."). *See also* Gewirtz, *supra* note 13, at 1042-43 (discussing examples where admissions of uncertainty made judicial opinions more persuasive). It is not clear that the admissions of uncertainty studied by MacLeod are admissions of *normative* uncertainty; MacLeod's project is on representations of uncertainty (and certainty) in judicial opinions, not an analysis of the *type* of uncertainty expressed. *Cf.* MacLeod, *supra* note 19, at 480 (focusing on "certainty rhetoric"). But it is a very useful starting point.

I use "rational" in as thin a sense as possible, consistent with my earlier assumptions: a judge ought not (rationally) to act so as to undermine her (sole) aim of doing whatever it is that she ought (judicially) to do.[173]

A. *When Expressing Super-Dicta Ensures Failure*

The first step in my argument is to show that Super-Dicta will only be rational to express on certain kinds of jurisprudences—namely, ones that offer more information about the relative importance of different options within the choice set than "permissible" or "not."

Let's return to the Greatest Copyright Case example: two issues (copyrightability and fair use) that result in three possible rulings, one in favor of Plaintiff and two in favor of Defendant.

A. Decide to affirm the judgment (in favor of Plaintiff) *for the reason that* this type of software is copyrightable, and Defendant's copying was not fair use.

B. Decide to reverse the judgment (in favor of Defendant) *for the reason that* this type of software is not copyrightable.

C. Decide to reverse the judgment (in favor of Defendant) *for the reason that* Defendant's copying was fair use as a matter of law (and so not infringing).

Once again, suppose our judge is uncertain about which of three jurisprudences is correct. But these jurisprudences—and her credences in them—differ from before.

Jurisprudence 1 and Jurisprudence 2 are fairly close cousins, agreeing in a large swath of cases. The judge believes that it is most likely the case—say, a 75% chance—that one of these two jurisprudences is correct. And she estimates that to the extent they differ, Jurisprudence 1 is more likely correct than Jurisprudence 2 (p_1 = 45%, and p_2 = 30%).

The judge also believes there is a 25% chance another jurisprudence, Jurisprudence 3, is correct instead (i.e., p_3 = 25%). Jurisprudence 3 also isn't too far off, and often agrees with Jurisprudence 1's recommendation in cases where Jurisprudence 1 and Jurisprudence 2 diverge. Usually, the judge's uncertainty lacks bite: she often rules consistently with Jurisprudence 1.

Unfortunately, the Greatest Copyright Case Ever is very difficult. That is part of the case's greatness. Tweak the facts slightly, and Jurisprudence 2 would agree with Jurisprudence 1 that the code is not copyrightable. But the case that came to the court is not that case.

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173 *See supra* Section I.A.

Instead, the case that came to court is one in which Jurisprudence 1 diverges from both Jurisprudence 2 and Jurisprudence 3, as depicted in Scenario II. Note that these jurisprudences do not rank the options within the choice set; according to the jurisprudences, some are permissible, others are not. The judge's credences are given as probabilities that each jurisprudence is correct.

Greatest Copyright Case Ever: Scenario II

	Jurisprudence 1 ($p_1 = .45$)	**Jurisprudence 2** ($p_2 = .30$)	**Jurisprudence 3** ($p_3 = .25$)
Ruling A	Wrong	Wrong	Wrong
Ruling B	Permissible	Wrong	Wrong
Ruling C	Wrong	Permissible	Permissible

This is a case where the judge's normative uncertainty—and her resolution of it—might cause her to deviate from her favorite jurisprudence. On most toy theories, the judge ought (rationally) to issue Ruling C. This is because, by issuing Ruling C, the judge maximizes the chance that she does what she ought (judicially) to do. Were she to follow the recommendation of her usual preferred jurisprudence, Jurisprudence 1, and issue Ruling B, she would be doing that which she deems *more likely* to be judicially wrong. Her evidence suggests that Ruling B has only a 45% chance of being right, but a 55% chance of being wrong. Ruling C is the reverse: it is more likely to be permissible.

The judge resolves that, given her credences, she ought (rationally) to depart from the recommendations of Jurisprudence 1 and issue Ruling C. But she wants to be transparent about this. She wants to explain her normative uncertainty and how she resolved it. So, instead of the standard Ruling C opinion, she considers issuing something like Ruling C* instead:

Ruling C*

Decide to reverse the judgment (in favor of Defendant) *for the reasons that*

> It is more likely the case than not that C: Defendant's copying is fair use as a matter of law.
>
> Therefore, the Court finds that Defendant's copying is fair use as a matter of law and the decision of the district court is reversed in favor of Defendant.

One difficulty should be immediately apparent: the opinion in Ruling C* does something *different*—sets down a different rule—from the one in Ruling C. Unlike Ruling C, Ruling C* makes its determination turn on whether it is *more likely* that, on these facts, Defendant's copying is fair use as a matter of law, and not whether, on these facts, Defendant's copying *is* fair use as a matter of law. In this sense, Ruling C* lowers the bar. I will return to this difficulty in Part V.

For now, though, what it means is that Ruling C* is yet another option in the choice set. And we can ask: should the judge issue Ruling C* instead of Ruling C?

As a jurisprudential matter, the answer would seem to be no. Ruling C* is wrong according to all three jurisprudences. According to Jurisprudence 1, it is *not* the case that Defendant's copying might be fair use, let alone "more likely" that it is. And according to Jurisprudences 2 and 3, it is not just that it is *more likely* that Defendant's copying is fair use as a matter of law. It *is* the case that Defendant's copying is fair use as a matter of law. Afterall, that is the point of finding fair use *as a matter of law*.

Very well, you might think, Ruling C* is not what the judge ought (judicially) to do. But in issuing Ruling C*, wouldn't she at least be doing what she ought (rationally) to do, given that she does not know what she ought (judicially) to do?

Again, the answer is no. The judge may be uncertain about what she ought (judicially) to do. But all the jurisprudences agree that Ruling C* is not it. And so, were she to issue Ruling C*, she would act irrationally because she would ensure that she fails in her aim to do whatever it is that she ought (judicially) to do.

Greatest Copyright Case Ever: Scenario II (with Ruling C*)

	Jurisprudence 1 (p_1 = .45)	Jurisprudence 2 (p_2 = .30)	Jurisprudence 3 (p_3 = .25)
Ruling A	Wrong	Wrong	Wrong
Ruling B	Permissible	Wrong	Wrong
Ruling C	Wrong	Permissible	Permissible
Ruling C*	Wrong	Wrong	Wrong

This result generalizes. So long as the jurisprudences themselves do not hedge their own conclusions—making what the judge ought (judicially) to do turn on whether it is likely that the judge ought (judicially) to do it—then including Super-Dicta that references the judge's subjective credences will be inaccurate by the lights of those jurisprudences.[174] Whether it will be rational to issue opinions with such inaccuracies anyways will depend on how those jurisprudences treat such rulings. But if the jurisprudences make no distinction between the relative seriousness of error, and simply label such rulings wrong, it will be irrational to express Super-Dicta. Expressing Super-Dicta under these conditions ensures the judge fails in her aim of doing whatever it is she ought (judicially) to do.

B. *When Expressing Super-Dicta Is Either Irrational or Inaccurate*

The simple example just discussed dealt with jurisprudences that were fairly simplistic in their treatment of judicial rightness. But we might sensibly ask if, on any of the jurisprudences, it would be worse to issue Ruling C* rather than some other ruling that would also be impermissible. Is one more importantly wrong? Or are they much of a muchness? For example, according to Jurisprudence 1, the judge ought issue Ruling B. But if the judge is not going to issue Ruling B, would it be better to issue Ruling A, C, or C*? Are any of these better than the others? Are any of these worse? If so, how much worse?

Questions like these motivate in favor of using rankings, and in particular, cardinal rankings—rankings that provide a sense for not only whether one

174 If it sounds like jurisprudences that hedge are incoherent, I'm inclined to agree. *See* Cox, *supra* note 3, at 769-75 (explaining skepticism).

option is worse than another, but by how much.[175] To the extent such information is available, it can change what it is rational to do.

So let's examine a more nuanced example. In Scenario II*, the jurisprudences assign degrees of judicial rightness to the options within the choice set. As before, these are just cardinal rankings.[176] And as before, let's assume that they exhibit co-cardinality and otherwise satisfy the axioms of expected utility theory so that we can use our toy solution, the Maximization Approach.[177]

As above, I have used highlighting to divide this table into the "certain" rulings (A, B, and C) and "uncertain" rulings (C*). I have also left open for now the degrees of judicial rightness assigned to uncertain rulings, using variables instead (j_{i,C^*}).

Greatest Copyright Case Ever: Scenario II*

	Jurisprudence 1 (p_1 = .45)	Jurisprudence 2 (p_2 = .30)	Jurisprudence 3 (p_3 = .25)
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	8	10	10
Ruling C*	j_{1,C^*}, where < 10	j_{2,C^*}, where < 10	j_{3,C^*}, where < 10

Focus first on the "certain" Rulings—those with opinions that do not reference the judge's normative uncertainty or resolution thereof. Here, Jurisprudence 1 recommends Ruling B over both Ruling A and Ruling C. But as between Ruling A and Ruling C, Ruling A is worse: it would be a bigger mistake to find this type of software copyrightable (Ruling A) than to find the copying here to be fair use (Ruling C). The latter is a narrower ruling.

Jurisprudence 2 and Jurisprudence 3 both recommend Ruling C. Jurisprudence 2 distinguishes between Ruling B and Ruling C: both are less

175 *See* Cox, *supra* note 3, at 800 ("Numbers may be selected to represent these judgments; the exact numbers used matter little, provided they preserve these judgements about the relative differences between options.").

176 *See supra* note 117 and accompanying text.

177 These are strong assumptions, especially in the context of intertheoretic comparison. For discussion, see Cox, *supra* 3, at 800-02 (noting some of the difficulties with intertheoretic comparison, including that there are "many reasons to doubt" whether co-cardinality is possible).

favored, but Ruling B would be better than Ruling A. Jurisprudence 3 views Ruling A and Ruling B as equally bad.

The judge calculates the expected judicial rightness. As between the "certain" opinions—Rulings A, B, and C—the judge ought (rationally) issue Ruling C because Ruling C maximizes expected judicial rightness.[178]

So far, so good.

Now turn to the "uncertain" opinions. Here again, none of the jurisprudences in which the judge has credence recommend Ruling C*. Jurisprudence 1 still ranks Ruling B the highest; similarly, Jurisprudence 2 and Jurisprudence 3 rank Ruling C the highest. At most, Ruling C* is a second- or third-best option, open to criticism from the lights of those jurisprudences. This is reflected by the upper limit placed on the degrees of judicial rightness assigned to it by each jurisprudence.

But although not ranked first, would Ruling C* be the rational choice given the judge's uncertainty? It depends on which jurisprudences the judge thinks might be right—and what those jurisprudences say is the cost of admitting uncertainty. That is, the answer will depend on the values of j_{1,C^*}, j_{2,C^*}, and so forth.

My primary aim in this work is not about what makes for a plausible jurisprudence.[179] And so I have used variables to denote the degrees of judicial rightness assigned to Ruling C*—with an upper limit to reflect that the jurisprudences rank a different ruling first. I will observe only that, on these credences, it is a relatively narrow range in which Ruling C* would maximize

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178 Ruling A's expected judicial rightness is:

$$\begin{aligned} EJR_A &= (p_1 * j_{1,A}) + (p_2 * j_{2,A}) + (p_3 * j_{3,A}) \\ &= (.45 * 0) + (.30 * 0) + (.25 * 0) \\ &= 0 \end{aligned}$$

Ruling B's expected rightness is:

$$\begin{aligned} EJR_B &= (p_1 * j_{1,B}) + (p_2 * j_{2,B}) + (p_3 * j_{3,B}) \\ &= (.45 * 10) + (.30 * 5) + (.25 * 0) \\ &= 6 \end{aligned}$$

And Ruling C's expected judicial rightness is:

$$\begin{aligned} EJR_C &= (p_1 * j_{1,C}) + (p_2 * j_{2,C}) + (p_3 * j_{3,C}) \\ &= (.45 * 8) + (.30 * 10) + (.25 * 10) \\ &= 9.1 \end{aligned}$$

179 Though I do have views. *Cf.* Cox, *supra* note 3, at 769-71 (arguing that hedging jurisprudences are incoherent because they sometimes suggest "you ought not do what you ought to do").

expected judicial rightness given how the jurisprudences rank the other options within the choice set.[180]

But let's suppose, for sake of argument, that Ruling C* *would* be the rational thing to do given the judge's uncertainty: that given the judge's credences, and how the candidate jurisprudences rank Ruling C* relative to the alternatives, Ruling C* maximizes expected judicial rightness. And so, the judge issues Ruling C*:

Ruling C*

Decide to reverse the judgment (in favor of Defendant) *for the reasons that*

> It is more likely the case than not that C: Defendant's copying is fair use as a matter of law.
>
> Therefore, the Court finds that Defendant's copying is fair use as a matter of law and the decision of the district court is reversed in favor of Defendant.

180 Some basic math will show that it is a relatively narrow range given these credences and the ranking of the other options. For example, if either Jurisprudence 1 or Jurisprudence 2 assigns 7 degrees (or less) to Ruling C*, then Ruling C* will not maximize expected judicial rightness as compared with Ruling C. Again, Ruling C's expected judicial rightness is:

$$\begin{aligned} EJR_C &= (p_1 * j_{1,C}) + (p_2 * j_{2,C}) + (p_3 * j_{3,C}) \\ &= (.45 * 8) + (.30 * 10) + (.25 * 10) \\ &= 9.1 \end{aligned}$$

And if Jurisprudence 1 assigns 7 degrees to Ruling C*, then Ruling C*'s expected judicial rightness would be:

$$\begin{aligned} EJR_{C^*} &= (p_1 * j_{1,C^*}) + (p_2 * j_{2,C^*}) + (p_3 * j_{3,C^*}) \\ &< (.45 * 7) + (.30 * 10) + (.25 * 10) \\ &< 8.65 < EJR_C \end{aligned}$$

And if Jurisprudence 2 assigns 7 degrees to Ruling C*, then Ruling C*'s expected judicial rightness would be:

$$\begin{aligned} EJR_{C^*} &= (p_1 * j_{1,C^*}) + (p_2 * j_{2,C^*}) + (p_3 * j_{3,C^*}) \\ &< (.45 * 10) + (.30 * 7) + (.25 * 10) \\ &< 9.1 < EJR_C \end{aligned}$$

Recall that, on any jurisprudence (i), Ruling C*'s degrees of judicial rightness (j_{i,C^*}) is always less than 10 ($j_{i,C^*} < 10$).

Ruling C* does something different to Ruling C, but you might think it is at least more transparent about why the judge decided to reverse. And from the perspective of Jurisprudence 1, it's perhaps better to say that it is only "more likely" the case that the copying is fair use as a matter of law than that it *is* fair use as a matter of law.

But Ruling C* leaves something unsaid. The judge resolved her uncertainty by applying the Maximization Approach. That is, she concluded that ruling on fair use maximized expected judicial rightness. And *that* determination is the reason for deciding in Defendant's favor on fair use grounds rather than copyrightability. Ruling C* does not explain either that this was done, or why a fair use finding maximizes expected judicial rightness. As we have seen, a different toy theory might have led to a different result.[181]

Perhaps our judge can do better. Consider the opinion in Ruling D. It is not a pretty opinion—the writing is clunky, dense, and repetitive. These stylistic considerations are virtuous or vicious depending on your view about what the judge ought (judicially) to do—your jurisprudence.[182] But it will serve our purposes. Here it is:

181 *See supra* Section III.D (applying Conflict Avoidance).

182 Varsava, *supra* note 76, at 155-62 (arguing that opinions should avoid "personal expression").

Ruling D

Decide to reverse in favor of the defendant *for the reasons that*

1. I believe there is a 45% chance that Jurisprudence 1 is correct, a 30% chance that Jurisprudence 2 is correct, and a 25% chance that Jurisprudence 3 is correct.
2. Those jurisprudences evaluate the rulings within the choice set as follows:

	Jurisprudence 1 (p_1 = .45)	**Jurisprudence 2** (p_2 = .30)	**Jurisprudence 3** (p_3 = .25)
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	8	10	10

3. Those jurisprudences exhibit co-cardinality and otherwise satisfy the axioms necessary for expected utility.
4. Given my credences and this assessment of the different jurisprudences, expected judicial rightness will be maximized by **reversing in favor of Defendant on the grounds that Defendant's copying is fair use as a matter of law.**
5. Therefore, the trial court's judgment is reversed in favor of the Defendant on the grounds that Defendant's copying is fair use as a matter of law.

On its face, Ruling D appears to be what our judge was after: It is an opinion that gives her full reasons for the decision to reverse in favor of Defendant on grounds of fair use. It is transparent about her normative uncertainty and her resolution thereof.

But there is a difficulty. Either Ruling D is not what the judge ought (rationally) to do, or else, it is inaccurate.

Recall that on the Maximization Approach, a judge ought (rationally) issue a ruling if, and only if, that ruling's expected judicial rightness is at least as great as that of any other alternative—if it maximizes expected judicial

rightness in light of her credences and what the various jurisprudences say about that ruling's degree of judicial rightness.[183] That is, the judge's choice set is really given by Scenario II* (with Ruling D) and the degrees of judicial rightness assigned to Ruling D by each of the three jurisprudences must be within the narrow band described above.[184]

Greatest Copyright Case Ever: Scenario II* (with Ruling D)

	Jurisprudence 1 (p_1 = .45)	Jurisprudence 2 (p_2 = .30)	Jurisprudence 3 (p_3 = .25)
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	8	10	10
Ruling C*	j_{1,C^*}, where < 10	j_{2,C^*}, where < 10	j_{3,C^*}, where < 10
Ruling D	$j_{1,D}$, where < 10	$j_{2,D}$, where < 10	$j_{3,D}$, where < 10

If Ruling D does not maximize expected judicial rightness, then the judge ought not (rationally) to issue Ruling D. But if Ruling D *does* maximize expected judicial rightness, then Ruling D contains an important inaccuracy. Ruling D is written as though *Ruling C* maximizes expected judicial rightness (Paragraph 4) and omits Ruling D from the choice set (Paragraph 2). In this way, it gives the pretense of being Ruling C, but perhaps a more honest version of Ruling C that explains why it was chosen. But it is not Ruling C. It is really a distinct ruling, Ruling D.

This inaccuracy is not poor editing on my part. I wanted to illustrate the difficulty of including the actual reasoning—the Super-Dicta—that leads to the ruling, because including it is not as straightforward as might seem.

Let's try to correct these mistakes in Ruling E. Ruling E corrects the inaccuracies by including itself in the choice set. And Ruling E adjusts Paragraph 4 to make express that what maximizes expected judicial rightness is choosing Ruling E. But I have also done so in a skeletal way. I have used a variable ($j_{i,E}$) to denote the degrees of judicial rightness assigned to Ruling E

183 *See supra* notes 125–127 and accompanying text.

184 *See supra* note 180 and accompanying text.

by each of the three candidate jurisprudences. And I have adjusted Paragraph 4 to refer directly to Ruling E. Here is that draft of Ruling E:

Ruling E

Decide to reverse in favor of the defendant *for the reasons that*

1. I believe there is a 45% chance that Jurisprudence 1 is correct, a 30% chance that Jurisprudence 2 is correct, and a 25% chance that Jurisprudence 3 is correct.
2. Those jurisprudences evaluate the rulings within the choice set as follows:

	Jurisprudence 1 ($p_1 = .45$)	**Jurisprudence 2** ($p_2 = .30$)	**Jurisprudence 3** ($p_3 = .25$)
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	8	10	10
Ruling E	$j_{1,E}$, where < 10	$j_{2,E}$, where < 10	$j_{3,E}$, where < 10

3. Those jurisprudences exhibit co-cardinality and otherwise satisfy the axioms necessary for expected utility.
4. Given my credences and this assessment of the different jurisprudences, expected judicial rightness will be maximized by **Ruling E.**
5. Therefore, the trial court's judgment is reversed in favor of the Defendant on the grounds that Defendant's copying is fair use as a matter of law **because doing so maximizes expected judicial rightness**.

There are a number of things to say about this opinion, but the key one is this:

What the judge was trying to do was find a way to express that she decided in favor of Defendant on grounds of fair use because that is what, given her

normative uncertainty, maximizes expected judicial rightness. In other words, she was looking for a way to issue Ruling C while being transparent about her full reasoning—that is, about her uncertainty and her resolution thereof. As these rulings demonstrate, this is difficult to do.

This is because it turns out that so expressing makes for a distinct ruling (Ruling D). And that ruling will either be irrational to issue, or else it will be inaccurate: she will only (rationally) issue it if *that* ruling—Ruling D and *not* Ruling C—maximizes expected judicial rightness. But then Ruling D would be inaccurate, because it says that Ruling C maximizes expected judicial rightness, when—if rationally issued—Ruling D is the one that maximizes expected judicial rightness.

But if Ruling D is rendered transparent as in Ruling E, then it is no longer (just) an explanation of why the judge rules on grounds of fair use, but of why the judge is explaining her normative uncertainty and resolution thereof. That is, it is not an explanation of why *deciding "for reasons of" fair use* maximizes expected judicial rightness, but of why *deciding "for reasons of" maximizing expected judicial rightness* maximizes expected judicial rightness.

Perhaps there is some way to revise it, so that the judge might rationally issue a ruling on fair use that is both transparent and accurate. But there is another difficulty with Ruling E, to which I turn next.

V. The Transparency/Objectivity Trade-off

Suppose, *dubitante*, that Judge Aidos could thread the needle and create a transparent ruling that would not be self-defeating as either irrational or inaccurate. This transparency will come at a cost, for it will offer as a justification an odd sort of consideration: facts about the judge.

My argument proceeds in three parts. First, I argue that expressing Super-Dicta changes what the opinion *does*. And the more transparent the opinion, the greater the change is likely to be: a new rule is potentially in play. This downstream effect is not something over which the judge has control, try as she might. Second, I show how that potentially new rule is distortive in a rather particular way: it turns on facts about the judge. Third, I show that this distortion is self-limiting in one way, but far-reaching in another.

These are interesting results. But I do not claim, on this basis, that a judge ought not (judicially) to be transparent. My point is that there *is* a trade-off, not how it should be resolved. Opinions can be transparent, or objective, but not both. And this trade-off entails that transparency about normative

uncertainty is self-limiting in one way yet expansive in another, much like the precedential value of the most *obiter* of *dicta*.[185]

A. *How Expressing Super-Dicta Can Change the Law*

On the basic picture, the decision and opinion create limits on—and opportunities for—how future cases can be resolved. The judge deciding the original case only has so much control over this. She can choose her words carefully, but it is up to future courts to decide how to apply them. Future litigants also play a role in this process, marshalling arguments that connect the original case to other cases, to stretch or constrict the precedent to meet their own objectives. Some more complicated jurisprudences that collapse (or deny) the distinction between law and morality may result in more complicated views about how opinions *actually* impact—or should impact—the "law" or inform future judges' obligations, but even those proposals don't deny that judges take seriously the legal materials before them as in some way informing what they do.[186] And what may really matter for how and whether two opinions do something different is not so much the *theory* of precedent but the *practice*.[187] And good theory will need to account for that.

In any event, these jurisprudential and practical considerations really go to the extent of impact and whether such impact is misguided. They do not go to whether there is some distortion to begin with. So to see what I mean about the effect of expressing uncertainty, consider the possible rulings from the perspective of future courts and litigants.

Begin with Ruling C, which—absent consideration of opinions that express Super-Dicta—was the one our judge concluded she ought (rationally) to do after applying the Maximization Approach. Ruling C is a traditional ruling, which does not express any uncertainty. I presented it in skeletal form above:

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185 LLEWELLYN, *supra* note 24, at 69 (explaining how the "loose view" of precedent "carries over often into dicta, and even into dicta which are grandly obiter").

186 Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1191-92 (2015) (arguing judges "have reasons to be morally obtuse about [their] moral obligations"); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1310-11, 1317 (2014) (emphasizing that "the examples do not involve changing the moral profile by changing the content of the law, but, rather, changing the content of the law by changing the moral profile" and identifying "aspects of fairness and democracy [that] explain the careful attention given to past courts' explanations of their decisions").

187 LLEWELLYN, *supra* note 24, at 71 ("People . . . who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion . . . simply do not know our system of precedent in which they live."); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man . . . .").

C. Decide to reverse the judgment (in favor of Defendant) *for the reason that* Defendant's copying was fair use as a matter of law (and so not infringing).

Fleshed out, this opinion would explain why Defendant's copying was fair use as a matter of law. In particular, the opinion would need to analyze how the four fair use factors apply to the facts.[188]

A future court deciding a similar case would be bound by this analysis. For example, if the opinion in the Greatest Copyright Case Ever said that the nature of the copyrighted work being software counts strongly in favor of a fair use finding, then future courts addressing fair use in software cases will need to include that in their analysis, whether by applying it or distinguishing it.[189]

What of Ruling C*? Recall that Ruling C* was as follows:[190]

Ruling C*

Decide to reverse the judgment (in favor of Defendant) *for the reasons that*

> It is more likely the case than not that C: Defendant's copying is fair use as a matter of law.
>
> Therefore, the Court finds that Defendant's copying is fair use as a matter of law and the decision of the district court is reversed in favor of Defendant.

What is a future court to do with this decision?

First, one might ask: how should we understand "likely" (or similar ascriptions of doubt) when we see them in opinions? This question turns out to be critical, and we will return to it soon.[191]

Next, one might wonder what it even means to say that "[i]t is more likely the case than not that Defendant's copying is fair use as a matter of law." Does this mean that something about how the factors applied in this case was unclear? And what does it mean for the next case? If something about how

188 17 U.S.C. § 107 (noting that the factors to be considered "shall include—(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work").

189 *Cf.* LLEWELLYN, supra note 24, at 69 (describing "Janus-faced" nature of precedent).

190 *Supra* Part IV.

191 *See infra* Part VI.

the factors apply in the next case is unclear—whatever "unclear" means—but they likely point in favor of fair use, does that now make it fair use *as a matter of law*?

My point is that a new rule seems to be on the table. One criticism of the actual decision in *Google v. Oracle*,[192] on which this example is based, is that it decided fair use as a matter of law when it has traditionally been understood as a question of fact for the jury.[193] Ruling C* would seem to take it a step further than Ruling C does: Ruling C allows for finding of fair use as a matter of law when a four-factor analysis shows the copying definitively constitutes fair use. By contrast, a future court could interpret Ruling C* to find fair use as a matter of law where it's only *likely* the copying is fair use as a matter of law.[194]

Even in its simplicity, the inclusion of Super-Dicta in Ruling C* means it is no longer the rule set down in Ruling C, but something different.

Might a judge try to cabin it by adding language saying that only the second paragraph of Ruling C* is the holding, and that the language about likelihood is non-binding dicta, limited to this case and not to be cited or used in future cases? To which I say: Good luck. See *Bush v. Gore*, unpublished decisions, and "I know it when I see it."[195]

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192 141 S. Ct. 1183 (2021).

193 *See, e.g.*, Zahr K. Said, *Jury-Related Errors in Copyright*, 98 IND. L.J. 749, 757 (2023) ("[T]he jury was thrust into recent controversy by litigation that concluded with the Supreme Court's holding [in *Google v. Oracle*] that there is no Seventh Amendment right to a jury trial on fair use."); Ned Snow, *Who Decides Fair Use—Judge Or Jury?*, 94 WASH. L. REV. 275, 276-77 (2019) (criticizing this transfer from jury to judge as a departure from "over two centuries" of "well-settled practice").

194 Those in favor of strong fair use rights might not see this as a bad outcome! *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051, 1055 (2016). *Cf.* LAWSON, *supra* note 8, at 120-23 (suggesting use of burdens of proof as decision procedure for resolving disputes "without actually finding law").

195 On *Bush v. Gore*: *Compare* Bush v. Gore, 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."), *with, e.g.*, Moore v. Harper, 600 U.S. 1, 35-36 (2023) (characterizing *Bush v. Gore* as addressing "the outer bounds of state court review" in elections); Stewart v. Blackwell, 444 F.3d 843, 859-60 & nn. 8-9 (6th Cir. 2006) ("The facts change, but the principles and the fundamental nature of the right to vote remain the same."), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007); *see also* Michael T. Morley, Bush v. Gore's *Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229 (2020) (surveying cases citing *Bush v. Gore*). Scholars disagree about *Bush v. Gore*'s impact. *See id.* at 231-32 (summarizing literature). But the point remains: disagreement suggests mixed success at limiting. And any luck may be running out. *See* Richard L. Hasen, *Bush v. Gore's Ironic Legacy*, 53 FLA. ST. L. REV. (forthcoming 2025) (manuscript at 3) (on file with author) ("It turned out the ticket was good for a different train [for challenging state court review of elections].").

On unpublished decisions: *Compare, e.g.*, FED. CIR. R. 32.1(d) ("The court may refer to a nonprecedential or unpublished disposition . . . but will not give one of its own nonprecedential decisions the effect of binding precedent."), *with, e.g.*, *In re* Juniper Networks, Inc., 14 F.4th 1313, 1319 (Fed. Cir. 2021) (citing relevant unpublished decisions justifying why it found the district court erred in relying on a principle the unpublished cases had rejected). *See also* Sepehr Shahshahani,

B. *The Loss of Objectivity*

So, when a judge is transparent about their uncertainty—even minimally as in Ruling C*—the opinion does something different relative to a non-transparent decision. The reach of this distortion—how much of a distortion it creates and whether it can be cabined—would seem to turn on your jurisprudential views about what the downstream effect of rulings *should* be, and also on luck, about what downstream lawyers and jurists take the effect to be. In Part VI, I will return to an important downstream question this raises. But first, I want to make a further observation about transparent rulings.

I noted above that one might ask: how should we understand "likely" (or similar ascriptions of doubt) when we see them in opinions?[196] In the case of Ruling C*, we know what "likely" means: it means "likely" from the perspective of the judge given her uncertainty.

But—and this is an important "but"—we only know this because we are behind the scenes. We do not know it from the opinion. And Ruling C* not only leaves *that* unsaid, but *also* the reasons for her assessment about likeliness, namely, the application of the Maximization Approach to a particular set of credences.

As observed earlier,[197] a judge could be more transparent. Rulings D and E provided examples (even if self-defeating ones). Supposing she successfully revised them to thread the self-defeating needle, or else just issued them by mistake: what would a future court do with *those*?

Ruling E is convoluted, so focus on Ruling D. Ruling D is inaccurate (or irrational), but it is at least clear as to the basic standard: Defendant's copying is fair use as a matter of law *when such a finding maximizes expected judicial rightness*. And such a finding maximizes expected judicial rightness given the credences in the jurisprudences identified.

When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law, 110 CORNELL L. REV. (forthcoming 2025) ("[T]he idea that unpublished opinions are not really precedent becomes difficult to sustain as their number increases.").

On "I know it when I see it": *Compare* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . But I know it when I see it, and the motion picture involved in this case is not that."), *with, e.g.*, United States v. Klaw, 350 F.2d 155, 168 (2d Cir. 1965) ("[A]lthough it may be indefinable, 'I know it when I see it.'"); *see also* Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023, 1025 n.7 (1996) (noting Justice Stewart came to regret his statement in *Jacobellis*).

196 *See supra* Section V.A.; *see also infra* Section V.C. For discussion about why it matters, see *infra* Part VI, and for implications, see *infra* Part VII.

197 *Supra* Section IV.B.

Here is the observation I want to make: Such an opinion is weird, and not just because it engages in expected value calculus.[198] Ruling D is weird because it articulates a standard that turn on facts *about the judge*.

Specifically, Ruling D has made the judge's credences relevant. These are agent-relative, time-indexed reasons. The reasons are agent-relative in the sense that they are only reasons for the judge: they turn on the judge's credences—the judge's beliefs and doubts. And they are time-indexed: these are the judge's credences at the time the decision is rendered. Once a decision is rendered, this will change the space of plausible jurisprudences; and as other decisions by other courts are rendered, the space similarly changes. A judge's credences as to which jurisprudence is correct should be sensitive to these changes.

These are bizarre considerations for an opinion to turn on. Recall that on the basic picture, the maxim that like cases be treated alike would seem to require that opinions give (or aim to give) *objective* reasons.[199] That is, opinions aim to give reasons that are independent of the judge's identity, such that they may be applied to like cases going forward, irrespective of the judge presiding over those cases or the time at which the case is decided.[200] These agent-relative, time-indexed reasons do not fit this mold. They would seem to make the law directly depend on the kinds of considerations that the basic picture eschews.

If you think a judge would never use the Maximization Approach, perhaps considering a more traditional example might be helpful.

Earlier, we considered a different toy theory, Conflict Avoidance.[201] We have not yet considered what a transparent opinion might look like in that context. Recall, we only considered a choice set that included Rulings A, B, and C. And, applying Conflict Avoidance, Judge Aidos issued Ruling B.

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198 Which is, perhaps, not so weird as some suppose, at least in a rudimentary way and with a little rhetorical finesse. *See, e.g.*, R.I. Hosp. Tr. Nat'l Bank v. Zapata Corp., 848 F.2d 291, 295 (1st Cir. 1988) (Breyer, J.) (applying the Hand Formula to affirm a jury verdict).

199 *See supra* subsection II.A.2.

200 This claim is readily confused with another, that a judge's identity might affect their ability to perceive relevant reasons—for example, that Justice Ginsburg, because of her identity, was more capable than her male colleagues of understanding why the strip search of a young teenage girl would have been particularly harmful. Varsava, *supra* note 76, at 117. But a judge's ability to perceive reasons is about *epistemic access*, not the objectivity of the reasons. *Id.* ("Justice Ginsburg never suggested that her personal experience, or ability to identify or empathize with [the teenage girl], *justified* the conclusion she reached. Instead, her experience and identity help explain why she interpreted the facts as she did and also why someone without her experience might interpret them differently and, indeed, mistakenly."). That said, some differences in epistemic access to objective reasons may affect whether those reasons are appropriate bases for making decisions (though not whether such reasons are objective in the judge-independent sense).

201 *See supra* Section III.D.

But what if she had been transparent? Indeed, the proponents of Conflict Avoidance have characterized themselves as offering a doctrinal test, and so I suspect they would likely disagree that Conflict Avoidance points to Ruling B. I imagine they would argue instead that it points to some other ruling, Ruling F, that is express about the work in play.[202]

Here is a terribly stylized version.[203] Please forgive Judge Aidos' lack of finesse.[204]

Ruling F

Decide to reverse in favor of the defendant *for the reasons that*

1. I believe there is a 45% chance that Jurisprudence 1 is correct, a 30% chance that Jurisprudence 2 is correct, and a 25% chance that Jurisprudence 3 is correct.
2. Jurisprudence 1 and Jurisprudence 2 usually agree in their recommendation, such that I normally am at least 75% sure about what I ought (judicially) do.
3. But here, Jurisprudence 1 and Jurisprudence 2 diverge. **Ergo, this case is hard.** (Step 0)
4. In hard cases, we apply Conflict Avoidance.
5. First, we identify the particularized interests of each real party in interest that are frustrated by the other party's actions (Step 1):
    a. Plaintiff has an interest in monetizing its software's command hierarchy, the primary driver of its software's market dominance.
    b. Defendant is trying to reduce "switching costs" for customers.

202 *See, e.g.*, Barzun & Gilbert, *supra* note 37, at 46 ("We have translated least cost avoidance in private law to a principle for resolving hard constitutional cases, and we have operationalized the principle with a doctrinal test."); Tang, *supra* note 37, at 1859-78, 1885 (arguing that the harm-avoidance principle already appears in constitutional law, as a descriptive matter, and noting a preference for transparency about uncertainty).

203 Paragraph 6 of Ruling F even quotes directly from Barzun & Gilbert, *supra* note 37, at 26.

204 Her lack of finesse is decidedly not a problem on some views of what makes for a good judicial opinion. In fact, it might be a virtue. *See* Varsava, *supra* note 76, at 158 ("I suspect that opinions that succeed on narrative or aesthetic grounds are more likely to be deceptive, unfair, or disrespectful . . . .").

c. Software customers have an interest in making use of the best software available, be it Plaintiff's or Defendant's.

6. Second, we ask "how costly it would have been for a reasonable person, in each party's position, to secure those interests without making the specific demand . . . that produced the legal conflict" (Step 2):

Party	Alternative	Cost
Plaintiff	Offer flexible license to command hierarchy and compete on the merits	Possible to offset by higher license price
Defendant	Pay for inflexible license OR develop new command hierarchy	Expensive, and license incompatible with business model
Customers	Learn new command hierarchy	Costly in time and money

7. Comparing the costs, we find that Plaintiff could have secured its interests more easily without resort to conflict, and that customers are least able to avoid harm resulting from the conflict. (Step 3)

8. Therefore, the trial court's judgment is reversed in favor of the Defendant on the grounds that this type of software is not copyrightable **because this is a hard case from the perspective of the judge and so ruling best incentivizes least-cost conflict avoiders like Plaintiff from creating such hard cases in the first place**.

What to say about Ruling F? The first is this: Ruling F, like Rulings D and E, distorts the doctrine.[205] While there is a debate over how much

205 *See supra* Sections IV.B, V.A.

methodology is binding on courts going forward,[206] this particular opinion opens up a new move for future litigants, namely, to argue that hard cases should be resolved against the least-cost avoider.[207] And this new conflict-avoidance *doctrine* is a true distortion of copyright law: as the Supreme Court has held, litigation of hard copyright cases "should be encouraged" because "it is peculiarly important the boundaries of copyright law be demarcated as clearly as possible."[208]

But this is not the only or even the most important distortion. Like Rulings D and E, Ruling F articulates a standard that turns on facts *about the judge*.

This is the transparency/objectivity trade-off. When a judge responds to her normative uncertainty, opinions can be transparent, or objective, but not both.

C. *The Reach and Limits of Transparency*

When a judge is transparent about her response to normative uncertainty, her opinions introduce standards that turn on facts about the judge. This judge-relativity—as a matter of legal reasoning and not just realist fact—is odd. It is the kind of consideration that the basic picture eschews. That said, I do not claim that this oddness means judges ought not (judicially) be transparent about Super-Dicta. Whether judge ought (judicially) be transparent about Super-Dicta is a question of jurisprudence, a topic on which I am here agnostic. I only note its oddness and the fact of the trade-off. So much the worse for the basic picture, you might think. Or so much the worse for transparency, on the other.[209]

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206 *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as 'Law' and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1902 (2011) ("[S]tatutory interpretation's most fundamental jurisprudential question—whether statutory interpretation methodology is 'law,' individual judicial philosophy, or something in between—remains entirely unresolved.").

207 *Cf.* Tang, *supra* note 37, at 1859-78 (arguing that Supreme Court precedent does just that for hard cases, as a positive matter).

208 Fogerty v. Fantasy, Inc., 501 U.S. 517, 527 (1994). I told you we'd get here! But also, this particular point is not an indictment of Professors Barzun, Gilbert, and Tang's theories, which were not developed for hard copyright cases.

209 Whether you think this presents a dilemma may reveal something about your thoughts on public reason, and whether it requires offering only "public justification" or also explanation. *Cf., e.g.*, John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 786 (1997) ("Public reasoning aims for public justification. . . . Public justification is not simply valid reasoning, but argument addressed to others . . . ."); *id.* at 768-69 ("This ideal is realized . . . whenever judges . . . *act from and follow* the idea of public reason and *explain* to other citizens their reasons . . . ." (emphasis added)); Schwartzman, *supra* note 12, at 1008-09 (arguing that judges must explain their reasons so their reasoning can be subject to scrutiny); Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735, 1741 (1995) ("What is critical is that [participants in law] agree on how a case must come out and on a low-level *justification*." (emphasis added)).

But there is a further observation, about this trade-off, to be made. Super-Dicta, when spoken, has the potential to be truly Janus-faced.[210] That is, the difference between the maximum and minimum value of an opinion appears at its peak.[211]

Begin with the maximum. I argued above that the transparent opinion sets down a new standard. This standard—whether you believe it to be set down or merely available to be applied—looks strikingly broad. The transparent standard says to consider a judge's uncertainty—the hardness of the case *for the judge*. But if many cases are like this, the rule might seem broadly applicable—and not limited to its original context.

Experience suggests that, where expressed, what looks like Super-Dicta may have this effect. Consider:

> Having reviewed with care the facts and law in this case, this Court adopts the wisdom of Justice Stewart, who, addressing the definition of racism might have put it this way: "I shall not today attempt further to define the kinds of material I understand to be embraced within the shorthand description of racism, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, *and the behavior involved in this case is not that*."
>
> Like Justice Stewart, this Court can truly say of racism: "I know it when I see it." This Court did not see it in this case.[212]

I do not claim that either Justice Stewart's original concurrence (about hard-core pornography) or this statement from a more recent district court opinion (about racism) is transparent Super-Dicta. But supposing it is, it underscores an important point about the transparency/objectivity trade-off. Far from "disciplin[ing] the judge's deliberative process," as one might suppose, transparency can actually threaten to undermine such discipline.[213]

But while this might threaten to throw things open wide, the narrow view of precedent might save the day. And here, the minimum value of the precedent appears truly minimum.

For starters, one judge's credences may differ from another, and so the applicability of that aspect of the reasoning is unlikely to be directly applicable to future cases. For example, Ruling F's determination that *this*

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210 LLEWELLYN, *supra* note 24, at 69.

211 *See id.* (emphasizing the two values of precedent).

212 Aboeid v. Saudi Arabian Airlines Corp., 959 F. Supp. 2d 300, 311 (E.D.N.Y. 2013) (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). Justice Stewart's famous quip, "I know it when I see it," was made with respect to hard-core pornography. *Jacobellis*, 378 U.S. at 197.

213 Gewirtz, *supra* note 13, at 1039; *see also* MacLeod, *supra* note 19, at 519-20 (suggesting that rhetorical certainty norms may have disciplining effect on both deliberations and scope of rulings); *cf.* Altman, *supra* note 79 (suggesting that a lack of judicial introspection—self-transparency—may have desirable disciplining effects).

command hierarchy is not copyrightable depends on facts about the judge—namely her credences—which may not be true of future cases and future judges.[214] Without guidance as to *why* this type of software is not copyrightable—independent of it merely presenting a hard case—the ruling is necessarily self-limiting to the specific case.

But the value of the case can be eroded further still. Super-Dicta is, after all, agent-relative, time-indexed reasoning specific to the judge *at the time she decides the case*. And such reasoning is fleeting in a particular kind of way: once the case is decided, the decision is no longer in doubt. The decision thus changes the space of plausible jurisprudences—and so too, perhaps, the judge's credences. And as I've suggested elsewhere, the appropriate rational response may vary with context and the amount of information available to the judge, further limiting Super-Dicta's reach even as a methodological matter.[215]

And so perhaps Super-Dicta is—or should be—treated more like remarks made in passing, about how the judge is thinking about the big picture. But if that's the case, then even when expressed, Super-Dicta really is Super-*Dicta*: lacking even in persuasive authority, despite being directly necessary to the outcome. If that is right, then there is an important question to be asked of "hard case" doctrines.

VI. NORMATIVE UNCERTAINTY AND "HARD" CASES

I turn now to the relationship between normative uncertainty, Super-Dicta, and hard cases. We now have the resources to answer a question that may have been gnawing at many readers, about existing methods for dealing with cases that are in some sense "objectively" hard. Answering it will also help clear up some confusions within the debates about hard cases. My goal is to enable us to ask new questions about old approaches, and to treat Super-Dicta appropriately when it appears.

A. *Different Types of Hardness Call for Different Responses*

Some might wonder about an opinion that says, roughly: "This case is hard. The underlying legal materials are inconclusive. In hard cases, we apply Conflict Avoidance . . . ." Such an opinion seems both transparent and

214 Or even this judge, in future cases.

215 Cox, *supra* note 3, at 802, 809-10; *cf. id.* at 761 (recognizing that what a judge ought (judicially) to do may also vary by context); *see also* LOCKHART, *supra* note 3, at 24-26 (explaining the informational requirements of a utility-maximization approach to decision making); MACASKILL ET AL., *supra* note 9, at 105-11 (describing approaches for different information environments).

objective: It is transparent that the case is hard and that Conflict Avoidance is applied to resolve that hardness. And it does not seem to make the legal standard turn on facts about the judge: the standard appears to turn on whether the case is hard from an "objective" perspective.

The problem with such an opinion is that it rests on a muddling of two distinctions: The first distinction is between normative uncertainty and other ways in which cases are hard. The second distinction is between rational approaches to normative uncertainty, on the one hand, and multi-order jurisprudential approaches to hard cases, on the other.

Conflict Avoidance—as I have defined it—is a theory about what the judge ought (rationally) do when uncertain about what she ought (judicially) do. That is, Conflict Avoidance is *not* part of a jurisprudence—it is not a theory about what a judge ought (judicially) do. There may be legal, moral, political, prudential, or other substantive reasons to use a second-order decision procedure like Conflict Avoidance, but that is not this. Conflict Avoidance is instead a *rational* solution to uncertainty about which jurisprudence—about which account of the legal, moral, political, prudential, etc. all-things-considered judicial ought—is correct.

This is the context in which Super-Dicta arises. And because the problem is fundamentally perspectival—about what the judge should do from *her* perspective—including the Super-Dicta in the opinion makes the legal standard turn on facts about the judge.

But I make no claim about whether a judge ought (judicially) to apply a second-order decision procedure to resolve hard cases, or whether, if she does, she could include *that* in the opinion without making the standard turn on facts about the judge. Explaining why requires getting straight about the ways in which cases are hard.

What makes a case hard? One reason a case might be hard is normative uncertainty: the judge is uncertain about which jurisprudence she should follow, and those in which she has some credence point in different directions.[216] But cases can be hard in other ways too. The law might be indeterminate; the stakes high; the facts heart-wrenching.[217] There can be vagueness, and parity, and incompleteness.[218] Sometimes, it is not clear what the source of the hardness is. There is even disagreement about how to

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216 *See supra* Section I.A. Recall, the use of "jurisprudence" is a modeling choice. That is, you could say instead that the judge is uncertain about what the relevant considerations are (e.g., legal, moral, political, etc.) and how they inform what it is she ought (judicially) to do.

217 *See, e.g.*, Tang, *supra* note 37, at 1886-87 (discussing indeterminacy of "first-order modes of constitutional argument"); Shahshahani, *supra* note 71, at 134 (analyzing "[t]hree senses of 'hard'": "special hardship," "importance," and "difficulty or closeness").

218 *See, e.g.*, Ruth Chang, *Hard Choices*, 3 J. AM. PHIL. ASS'N 1, 10 (2017) (analyzing "what *makes* a choice hard").

understand these and other types of hardness—and whether they exist! Unsurprisingly, where you find these other types of hardness, you are likely to find normative uncertainty, too, about the best way to deal with the hardness.[219]

The type of hardness is relevant to the solutions to it. For example, Tang seems to be primarily concerned with the indeterminateness of legal materials.[220] The first-order legal materials—like "text, structure, history, and precedent"—have run out, leaving open several ways for the judge to resolve the case.[221] In such cases, one might leave it to the judge's total discretion which way to solve the case. But on Tang's view, the judge ought not just pick between the options.[222] Rather, the judge ought use Conflict Avoidance as a second-order decision procedure to choose among them.[223] To avoid confusion with the toy theory developed above,[224] I will call this second-order decision procedure "Harm Avoidance."

Harm Avoidance, unlike Conflict Avoidance, is part of a jurisprudential view: it is a view about what the judge ought (judicially) do, namely, apply Harm Avoidance when the first-order legal materials are indeterminate. To see the difference, compare a jurisprudence that grants the judge total discretion once the first-order legal methods are indeterminate and two jurisprudences that apply Harm Avoidance to break the ties:

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219 Sometimes when the phrase "normative uncertainty" is used in the literature, it might refer to these other types of hardness. *See* Cox, *supra* note 3, at 756 n.72 ("Legal scholars even use the term 'normative uncertainty' to refer to many of these problems, from legal indeterminacy, uncertainty about the law's efficacy, and/or uncertainty about what a given law's objectives should be . . . to conflict-of-law situations, especially in international law." (citations omitted)); *e.g.*, Rebecca Crootof & BJ Ard, *Structuring Techlaw*, 34 HARV. J.L. & TECH. 347, 352, 356, 366-79 (2021). Further complicating matters, individual participants in the legal system may themselves experience normative uncertainty—uncertainty about what they ought to do, including as a result of uncertainty about what the norms of justice require—and, on some views, the legal system is a way of resolving disputes that arise against this backdrop. *See generally* Stone, *supra* note 165.

220 He might also be concerned with normative uncertainty. He writes that "the 'hard' cases that would benefit from harm-avoider constitutionalism" are those where "the Constitution does not speak with great clarity, leaving open the possibility of multiple understandings depending on one's preferred interpretative theory." Tang, *supra* note 37, at 1886.

221 *Id.* at 1886-87.

222 *Id.* at 1893-901 (making the normative case).

223 *Id.* at 1886-93. Tang calls his approach "harm-avoider constitutionalism." *Id.* at 1901.

224 *See supra* subsection III.D.1.

Understanding Transparent and Non-Transparent Harm Avoidance

	Indeterminate (but complete) Jurisprudence	Determinate Harm Avoidance	
		Non-Transparent Harm Avoidance	Transparent Harm Avoidance
Ruling 1	Wrong	Wrong	Wrong
Ruling 2	Permissible	Wrong	Wrong
Ruling 3	Permissible	Permissible	Wrong
Ruling 4	Wrong	Wrong	Permissible

This table illustrates two properties a jurisprudence might have: determinacy and completeness. As I use the terms, a jurisprudence is "indeterminate" where it does not provide a determinate (or "best") answer to what the judge ought (judicially) to do; a "determinate" jurisprudence does.[225] I will explain momentarily what I mean by "complete" in "indeterminate (but complete)." But I first want to address two differences between the Indeterminate Jurisprudence and the two versions of Harm Avoidance.

225 My use of the term "indeterminate" follows the capacious way we often use this term in law, to include cases of equipoise where there is no "best answer"—that is, cases where multiple permissible options are available to the judge. And we might describe a jurisprudence as more or less (in)determinate depending on the range of cases it treats this way. This usage is inspired by a common contrast between Hart and Dworkin. *See* H.L.A. HART, THE CONCEPT OF LAW 128-29, 252-53 (2nd ed. 1994); Ronald Dworkin, *Model of Rules I*, 35 U. CHI. L. REV. 14, 37 (1967). Although Hart used "indeterminacy" to sometimes mean what I call "incompleteness," *e.g.*, *id.* at 128-29, 252-53, his use has come to be associated with the view that where the law is indeterminate, the judge has *discretion* to choose among permissible options, such that there is no (single) determinate answer to what the judge ought (judicially) to do. *See* Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 481-82 (1998); *see also* Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1599-1600 (1998) (summarizing literature); *cf.* SHAPIRO, *supra* 43, at 280-81 (arguing that this is a false choice).

Two points of clarification are worth noting. First, this reading is not entirely fair to Hart; his claim was not about the judicial ought (as I use the term), which he allowed might be governed by other considerations once the law "ran out." *See* Shapiro, *On Hart's*, *supra*, at 482 (explaining it "is not an issue on which Hart took a stand"). Second, my capacious use of "indeterminate" to include discretion to choose between multiple *permissible* options (or options that sit in equipoise) differs from a narrower use elsewhere in the related philosophical literature. *See, e.g.*, John Broome, *Is Incommensurability Vagueness?*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 67 (Ruth Chang, ed., 1997); JOSEPH RAZ, THE MORALITY OF FREEDOM 328-35 (1986).

First, according to the Indeterminate Jurisprudence, the first-order legal methods do not resolve the case, and since the judge has total discretion in such cases, the judge may elect which of multiple rulings to issue. By contrast, the two versions of Harm Avoidance are determinate: they *resolve* the indeterminacy left by the first-order considerations, leaving only one permissible option for the judge to take.

Understood in this way, Harm Avoidance is a question of jurisprudence—what the judge ought (judicially) to do. It is *not* a rational approach to resolving uncertainty as between jurisprudences. That both Transparent and Non-Transparent Harm Avoidance are multi-order does not turn either into a rational solution to normative uncertainty. Jurisprudences can be multi-order: it just means that what a judge ought (judicially) do is to follow some first-order procedure, and if that doesn't resolve what they ought to do, then they ought (judicially) follow some second-order procedure, and if *that* doesn't resolve what they ought to do, then they ought (judicially) follow some third-order procedure, and so forth.[226] Harm Avoidance says to use a tie-breaker; the Indeterminate Jurisprudence does not.[227]

Of course, the judge might be uncertain about the threshold question, of when the first-order considerations are indeterminate; or any other number of questions, like what higher-order decision procedure to apply. That would be normative uncertainty between different versions of Harm Avoidance.[228]

The second difference has to do with the recommended ruling. Note that Harm Avoidance alone does not resolve which ruling the judge ought (judicially) issue. There is a further question of whether the judge ought (judicially) be transparent that the first-order legal considerations are indeterminate, and about how she has resolved that indeterminacy.[229] But if the judge ought (judicially) be transparent—if Transparent Harm Avoidance is correct—then Harm Avoidance doesn't provide a "tie-breaker" between Rulings 2 and 3, but recommends some different ruling, Ruling 4. Ruling 4 will be like Ruling 3 in that the same party will win. But Ruling 4's opinion will be different: it will apply Harm Avoidance as a doctrinal test that resolves the relevant differences between Rulings 2 and 3.[230]

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226 *Cf.* Samaha, *supra* note 15, at 1711-17 (partially defending an understanding of "interpretive method (or its exhaustion) as generating a tiebreaking decision structure").

227 *Cf. id*.

228 *Cf.* Cox, *supra* note 3, at 755-66 (explaining how to model normative uncertainty); Tang, *supra* note 37, at 1887-88 (asserting that Harm Avoidance "can function in the presence of pluralistic approaches to [the] threshold question").

229 Tang prefers transparency, but ultimately leaves this question open. Tang, *supra* note 37, at 1887; *see also* sources cited *supra* notes 10–19, 79, and accompanying text; *cf.* Samaha, *supra* note 15, at 1711 (suggesting a "tradition of certitude and decisiveness" is defensible despite legal indeterminacy).

230 Both differences underscore a critical point about jurisprudences and the all-things-considered judicial ought: A jurisprudence is not merely an interpretative theory, if you think what

I now want to return to the "but complete" rider in an "indeterminate *but complete* jurisprudence."

Sometimes jurisprudences are indeterminate because there are multiple permissible options, and there is no reason to choose one over another. But we know they are in complete equipoise: Judge Aidos could decide either way. There is *true* discretion, of the broadest sort. Law, morality, and whatever other higher-order decision procedures a judge ought (judicially) follow have failed to break the tie. And so, some higher-order decision procedure—one that a judge ought (judicially) follow—cannot close the gap, or else the jurisprudence would not be indeterminate.[231] To be sure, these cases may still *feel* hard for a variety of reasons, including that we may doubt whether the options truly are in equipoise—i.e., whether the Indeterminate-but-Complete Jurisprudence is correct.[232] But they are not hard by the lights of the Indeterminate-but-Complete Jurisprudence; you just need to pick.[233]

But a jurisprudence can also be indeterminate because it is *incomplete*: the jurisprudence does not provide an answer as to how a given option within the choice set compares to the other options. For example, there are multiple options which are neither better nor worse than the others, nor equally good.[234]

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a judge ought (judicially) do is to apply one's interpretative theory plus some sort of tie-breaker. Similarly, a jurisprudence is not merely an interpretative theory if you think that the judge ought (or ought not) be transparent about their higher-order (doctrinal, judicial, moral, etc.) reasoning when first-order reasons run out. A jurisprudence is, after all, a theory about what a judge ought (judicially) to do, and interpretative theories only theorize one aspect of the judge's choice. *Supra* Part I.

This is also why I don't need to take sides in the debates about whether the central ought is a moral or legal ought, or even whether there is such a thing as a "legal" ought distinct from the "moral" ought. *See, e.g.*, Hershovitz, *supra* note 186, at 1190-92 (2015) (arguing against legal ought); Liam Murphy, *Better To See Law This Way*, 83 N.Y.U. L. REV. 1088, 1104 (2008) (noting that the judicial ought "can be expressed without making use of the idea of the law in force prior to the decision").

231 That is, jurisprudences may have second-order procedures for when first-order considerations run out; third-order procedures for when second-order considerations run out; and so forth. For an indeterminate jurisprudence, these higher-order decision procedures will eventually run out; otherwise, the jurisprudence would not be indeterminate.

232 Chrisoula Andreou, *Incommensurability and Hardness*, 181 PHIL. STUD. 3253, 3257-65 (2024) (arguing something is left behind in both types of cases, leaving a "sense of loss").

233 Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RSCH. 757, 768-73 (1977); Chang, *supra* note 218, at 9.

234 My use of "incomplete" is again capacious: I use it to describe a situation where the jurisprudence does not provide an answer for how to treat or rank an option, in contrast to a jurisprudence finding multiple options to be in equipoise or permissible (or ranking them). For present purposes, I am less interested in a taxonomy than this particular contrast, and how it can help us distinguish between the rational ought and jurisprudences. As will be explained momentarily, there are deep disagreements about what kinds of incompleteness are possible and why. There is also variation in the terminology used to describe such cases and in the use of the term "incomplete." RAZ, *supra* note 225, at 329-30 (using "incommensurability"); *see also*

Types of Jurisprudences

	Indeterminate-but-Complete Jurisprudence	Incomplete Jurisprudence
Ruling 1	Wrong	Wrong
Ruling 2	Permissible	??
Ruling 3	Permissible	??

There are two general buckets into which incompleteness falls.

Sometimes the incompleteness is epistemic: one option is better than the other, or else they are equal, and we just can't know which. But if that's the case, the incompleteness is illusory: it's not that the jurisprudence is actually incomplete; it's that we don't know the missing information about how the options compare. Accordingly, we can model this as uncertainty between competing jurisprudences, two of which are determinate (Jurisprudences 1 and 2) and one of which is indeterminate (Jurisprudence 3), but all of which are complete.

Epistemic Incompleteness

	Incomplete Jurisprudence
Ruling 1	Wrong
Ruling 2	??
Ruling 3	??

Complete Jur. 1 (p_1)	Complete Jur. 2 ($p_2 = 1 - p_1 - p_3$)	Complete Jur. 3 ($p_3 = 1 - p_1 - p_2$)
Wrong	Wrong	Wrong
Permissible	Wrong	Permissible
Wrong	Permissible	Permissible

The second bucket takes there to be something "deeper" about the incompleteness—the incompleteness is ontological rather than merely epistemic. It is not merely that we can't *know* which option is better and which worse (or which permissible and which wrong), or that they are in equipoise.

Kornhauser, *supra* note 225, at 1605 & n.17 (noting use of "incomparability" and "incommensurability"); Broome, *supra* note 225 (using "indeterminacy"); *cf. supra* note 225.

It is that there are multiple options which are neither better nor worse than the others, nor equally good.

There are difficult philosophical debates about what is going on in such cases, and whether such cases truly exist.[235]

Happily, we don't need to dive into what ontological incompleteness is, or why or whether it exists, to see the point I want to make about the distinction between the rational ought and jurisprudences.

From the perspective of the judge, if the jurisprudence's incompleteness is ontological, then we have at least a few options.

We could treat this just as we would *epistemic* incompleteness, since in many ways the practical question is the same: what should the judge do, given she doesn't know what she ought to do?

We could treat this as a case where there is true discretion for the judge to decide between rulings.[236]

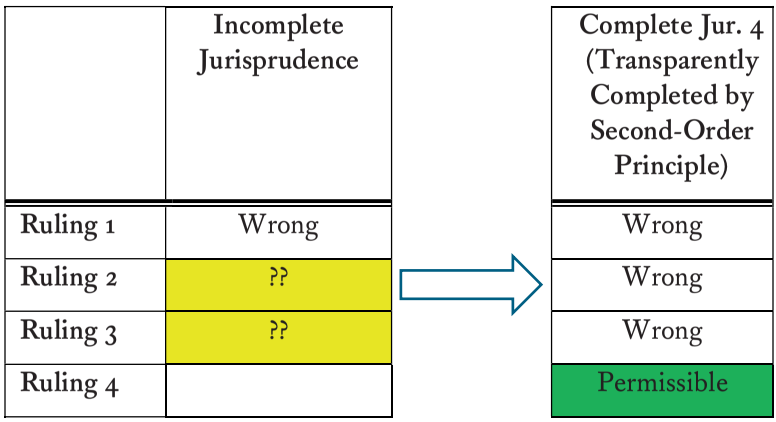
Or, following Barzun, Gilbert, and Tang, we could develop a second-order decision procedure about how a judge ought (judicially) resolve such incompleteness.[237] This is a jurisprudential move that *completes* the jurisprudence, generating Jurisprudence 4 and, if such completion is to be transparent, recommends some other Ruling than that offered by the Incomplete Jurisprudence and *changes the status* for Rulings 2 and 3.

235 *See, e.g.*, Chang, *supra* note 218, at 10-11 (surveying and rejecting various accounts in favor of parity view); Joseph Raz, *Incommensurability and Agency*, *in* INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON 112-13 (Ruth Chang ed., 1997) (arguing for the existence of "widespread, significant value incommensurabilities"). For example, Nelson and Schwartzman think that their existence is controversial. Nelson & Schwartzman, *supra* note 8, at 1104.

236 *E.g.*, Chang, *supra* note 218, at 20 ("When our given reasons are on a par, as they are in hard choices, we have the normative power to create will-based reasons for ourselves to choose one alternative over the other. It is not facts beyond our agency that determine whether we should lead this kind of life rather than that, but *us*."). The difference between picking and choosing does not matter for the basic point being made here about rational solutions to normative uncertainty and dealing with cases that are hard in other ways. But the difference likely matters in other contexts, about the appropriate way of dealing with cases that are hard for reasons other than the judge's normative uncertainty. *Id.* at 19-20.

237 Barzun & Gilbert, *supra* note 37; Tang, *supra* note 37.

Completing an Incomplete Jurisprudence—Transparently!



	Incomplete Jurisprudence		Complete Jur. 4 (Transparently Completed by Second-Order Principle)
Ruling 1	Wrong		Wrong
Ruling 2	??		Wrong
Ruling 3	??		Wrong
Ruling 4			Permissible

Suffice to say that I agree that Jurisprudence 4 is suspect if the incompleteness is merely epistemic.[238] A full explanation of why is work for another day. But here's one difficulty: in becoming *part* of the doctrine—when Conflict Avoidance becomes Harm Avoidance—it no longer functions as a method for rationally addressing uncertainty about jurisprudences. This phenomenon is similar to the way in which equitable doctrines, in becoming law, no longer serve their equitable function.[239]

I also have my doubts about Conflict Avoidance as a theory about what the judge ought (rationally) do in the face of normative uncertainty, though for different reasons than other commentators. That commentary largely evaluates Conflict Avoidance from the perspective of jurisprudence—that is, as though it were Harm Avoidance.[240] But if Conflict Avoidance is offered as a theory about what the judge ought (rationally) do, different criteria apply.[241]

But that, too, is work for another day. As I said at the start, this Article is not about *that* problem, about what a judge ought (rationally) do when they

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238 I do not here take a position on whether Jurisprudence 4 is a plausible way to deal with ontological incompleteness. For a critique along that line, *see generally* Nelson & Schwartzman, *supra* note 13 (suggesting other approaches may be superior).

239 *See* Smith, *supra* note 23, at 1130-31 (discussing how common law fraud grew out of applications of equitable fraud).

240 For criticisms of Conflict Avoidance, see Nelson & Schwartzman, *supra* note 8, at 1111-36 (critiquing and surveying alternatives).

241 Cox, *supra* note 3, at 755. These observations may also provide a lens for revisiting debates about interpretative methodology given other types of uncertainty, judicial abilities, and rational limitations. *See generally, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006) (arguing judicial limitations counsel in favor of "formalism in legal interpretation"); Solum, *supra* note 35 (arguing that problems identified by Adrian Vermeule and Cass Sunstein are better addressed by focusing on judicial character).

are uncertain about what they ought (judicially) do. That said, you may have noticed that I had to repeatedly signpost for my copyright colleagues that Conflict Avoidance is in direct tension with how copyright cases ought (judicially) be decided. It may be the case that the judicial ought constrains, in important ways, the rational ought.[242]

I hope this discussion has at least helped clarify the terms of the debate. There is an important distinction to be made between claiming that a judge ought (rationally) apply Conflict Avoidance as she chooses between options about which she is uncertain, and claiming that a judge ought (judicially) apply Conflict Avoidance in cases of normative uncertainty or in cases that are hard for other reasons. I claim Super-Dicta appears in the first context. I make no claim about the second.

But observe: the register in which such language or methods are being used—as rational solutions to normative uncertainty or as jurisprudential methods for eliminating indeterminateness or addressing incompleteness—affects how we should evaluate them. It affects their suitability to the problem at hand. And in the case of expressed Super-Dicta, it affects the reach of such rulings.

I may not have offered answers about what the judge ought do in hard cases of any stripe. But I hope this discussion will enable us to ask better questions, and to offer better solutions to rational and jurisprudential problems alike.

B. *How the Limits of Transparency Might Render Transparency Self-Defeating*

We now return to what is rational and what is significant about what Super-Dicta obscures. We also will see how the two arguments may, in some cases, be linked: how the transparency/objectivity trade-off may itself affect whether transparency is self-defeating.

Return to the toy theory of Conflict Avoidance, and its jurisprudential analog, Harm Avoidance. As noted, transparent Harm Avoidance is almost certainly a nonstarter for copyright cases as a matter of what the judge ought (judicially) do: Ruling F, by introducing it as doctrine, violates Supreme Court precedent in *Fogerty v. Fantasy, Inc.*[243]

But assuming Conflict Avoidance works as a theory about what the judge ought (rationally) do, could the transparent Ruling F be what Judge Aidos ought (rationally) do?[244] No, for the same reason that Rulings C* and D would

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242 This is why, even if it was intended as a view about what one ought (rationally) do in the face of normative uncertainty, it was still rather unfair of me to port it over to a copyright case! What is rational to do in the face of normative uncertainty may vary by context.

243 510 U.S. 517, 527 (1994); *see supra* Section V.B.

244 *See supra* Section V.B (Ruling F).

not have been rational: Judge Aidos might be unsure about what she ought (judicially) to do, but she is certain she ought not (judicially) issue Ruling F.[245] All the jurisprudences in which she has credence agree that Ruling F not only gets copyright theory wrong; it violates Supreme Court precedent.[246]

And to the extent that Conflict Avoidance allows some tradeoffs—some resort to a "wrong" option as a second-best option that is somehow less "wrong" than another, as the Maximization Approach does—Ruling F still fails. By failing to issue a clear rule, it does nothing for the "real" parties in interest, like the consumers. As noted above, Ruling F is necessarily self-limiting because it turns on the judge's credences.[247] How close do future cases need to be to the Greatest Copyright Case Ever to trigger the conflict avoidance doctrine espoused in Ruling F? Or will they be more straightforwardly resolved on copyrightability or fair use grounds? Can the consumers invest in learning the next command hierarchy secure in the knowledge that their options for programs remain open, or not?

And so, if Judge Aidos responds to her normative uncertainty by applying Conflict Avoidance, she cannot express the real reason for her decision—the Super-Dicta—without distorting the doctrine or else behaving irrationally by her own lights. And so, assuming she behaves rationally by her own lights, we don't get to see it.

* * *

What is obscured is important. In many cases, and on many views about what is rational, we don't get to see the judge's real reasons assuming she is uncertain and behaves rationally by her own lights. And because we don't get to see it, we can't evaluate whether she did what she ought (rationally) do. We can't provide her guidance to help her improve. We can't course correct.

At least, we can't if the opinion is the only source we have. This has implications for how we should think about extra-judicial writings and other activities.[248] And it has implications for developing legal AI.[249]

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245 *See supra* Part IV.

246 *Fogerty*, 510 U.S. at 527.

247 *See supra* Section V.C; *see also* Section V.B.

248 *See* Deborah Goldberg, *How Much Speech for Judges?*, 28 JUST. SYS. J. 335, 335 (2007) ("Current case law does not fully answer the question [of how much speech judges should have] and, thus, leaves open the debate about how much judicial speech is required as a matter of law and desirable as a matter of policy.").

249 *See generally* Cox, *supra* note 36 (arguing that Super-Dicta may place data-driven legal AI at risk of both underestimating the amount of uncertainty in the legal system and misinterpreting the law).

But there is a bigger implication. Because we usually don't get to see Super-Dicta, we can't tell if, when she departs from what we think she ought (judicially) do, she does so because she is acting rationally in aiming at what is right, or for some other reason.

This is what is at stake. And we got here from anti-cynical premises.

VII. READING BETWEEN THE LINES

I have argued that when a judge has normative uncertainty and responds to it rationally, there will be times when her reasoning cannot appear in her opinion even though it directly affects the outcome. And if she succeeds at such transparency, it is likely at the cost of making the relevant legal standard dependent on judge-relative, time-indexed reasons. My claim is not cynical and does not depend on jurisprudential views which permit a judge to decide a case and write an opinion to match, concealing their true rationale. Rather, it follows from the simple fact that the judge is not Herculean, and she has the humility to know it. I have called this phenomenon "Super-Dicta" because, though dispositive of the outcome (and so super important), Super-Dicta, like ordinary dicta, is generally not binding on future courts.

Often, Super-Dicta is not binding because it does not appear in the opinion—at least, not if the judge acts rationally. In some information environments, attempting to express Super-Dicta in an opinion will be irrational, for it will ensure the judge fails in her aim to do as she ought (judicially) to do.[250] In other information environments, the inclusion of Super-Dicta in an opinion will either be irrational or else inaccurate.[251]

But even were the judge to succeed in rationally including an explanation of her normative uncertainty and resolution thereof, it would seem she cannot do so without distorting the law. Were she to express her uncertainty and how she resolved it, the judge would create a new standard, one that directly invokes facts about the judge—namely, the fact that, at the time of the decision, she had doubts.[252] And so, such transparency comes at the cost of introducing agent-relative, time-indexed reasons to the legal standard.[253] In this way, Super-Dicta may be necessarily self-limiting—dependent as it is on the particular informational situation in which the original judge found herself—and so best treated as remarks made in passing despite its dispositive effect.[254]

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250 *See supra* Section IV.A and Section V.B.

251 *See supra* Section IV.B.

252 *See supra* Section V.A.

253 *See supra* Section V.B.

254 *See supra* Section V.C.

But although Super-Dicta likely will not appear in an opinion, does this mean we can't ever detect it? In closing, I offer an example and a parting question.

Let's return to the Greatest Copyright Case Ever. There was an interesting feature of all the jurisprudences under discussion: they all supported deciding in favor of Defendant, albeit on different grounds.

Suppose that is the case here: Judge Aidos is uncertain as between two types of jurisprudences. According to some, the software at issue is not copyrightable, but if copyrightable, the copying was not fair use. According to others, the software is copyrightable, but Defendant's copying is fair use. This meant that the judge's choice was, effectively, between Ruling B (not copyrightable) and Ruling C (fair use as a matter of law). And the challenge was how to issue an opinion that explained the way she arrived at her choice, given her uncertainty.

But what if there were another way through? Might the judge reason as in Ruling BC, since she is *certain* about her decision to reverse in favor of Defendant, even as she is uncertain of the grounds?

Ruling BC

Decide to reverse the judgment (in favor of Defendant) *for the reasons that*

> It might be the case that B: this type of software is not copyrightable.
>
> Or it might be the case that C: Defendant's copying is fair use.
>
> But whichever is true, the decision of the district court should be reversed in favor of Defendant.

There is, of course, a difficulty with Ruling BC. Both Ruling B and Ruling C make law—they may make different law, but they still make law.[255] By contrast, Ruling BC does not make much of any law: Defendant will prevail on similar facts in future cases. But it is not clear the reason why they

255 By "make law," I here use the locution common to express how the application of law to a particular set of facts "makes" law. I do not mean to take sides in a debate about whether this is "making" or "discovering" or what-have-you. The point remains whatever locution is used.

should: Ruling BC leaves undecided whether Defendant prevails because this type of software is not copyrightable, or because such copying would not be fair use.

There are those who would criticize such a ruling as being not what the judge ought (judicially) do, much as they criticized the actual rulings in the actual cases on which the Greatest Copyright Case Ever is based. Ruling BC leaves open the critical question of whether command interfaces like this are copyrightable, leaving programmers at risk of litigation that may take decades to resolve.[256]

Very well, you might think, the judge has not done what she ought (judicially) to do. But didn't she do what she ought (rationally) to do, given that she did not know what she ought (judicially) to do?

Not quite. By now, we know that the answer to that question—about whether the judge ought (rationally) to issue Ruling BC—depends on what the jurisprudences say about Ruling BC.

If the jurisprudences are simple, offering only "permissible" or "wrong," the judge likely ought not (rationally) to issue Ruling BC. Ruling BC is likely wrong according to both jurisprudences because, by their lights, it contains inaccuracies.

However, if the jurisprudences offer a ranking, then Ruling BC might be a next best option. And if a next best option jurisprudentially, it may turn out to be the best option rationally.

But I now want to make room for one more possibility: a ruling that does not contain an opinion. This is an option under certain circumstances, more commonly when the judgment below is affirmed than for decisions to reverse.[257] But since we are nearly at the end, let us avoid reconstructing the example and assume it is an option here under Made-up Rule of Appellate Procedure 36. The Silent Ruling would then read:

Silent Ruling

The judgment is reversed (in favor of Defendant). MRAP 36.

How would the jurisprudences rank the Silent Ruling compared to Ruling BC? Presumably, these jurisprudences would rank it higher. The

256 *Lotus* took 6 years to resolve; *Google* 11 years. At time of writing, 34.90958904109589 years and counting have elapsed since Lotus was filed in July 1990, and the issue remains unresolved, even after the Supreme Court's April 2021 decision in *Google* (31 years after Lotus's filing). *See supra* note 104. Post-*Google*, the copyrightability issue continues to be litigated.

257 *E.g.*, FED. R. APP. P. 36.

Silent Ruling does not say anything viewed as inaccurate according to those jurisprudences. And there is no loss in guidance. The Silent Ruling, like Ruling BC, provides that defendants will prevail on similar facts in future cases, though it remains undecided whether that is because this type of software is not copyrightable or because the copying is fair use.

And if the jurisprudences rank the Silent Ruling more favorably than Ruling BC, the Silent Ruling is likely to outrank Ruling BC rationally as well.

What does this mean? I posit that when no opinion is issued, it may not be for jurisprudential reasons, but for rational ones. That is, if we read between the lines, we might find Super-Dicta. What had looked like a judge behaving badly was just an uncertain judge behaving rationally in aiming at what is right.[258]

And so here is my parting question: Is the same sometimes true of other maneuvers made by judges, frequently characterized as pragmatic or pluralist or minimalist? Or derided as illicit, like shadow dockets, stealth overrulings, and blocking precedent?[259] There are many criticisms of these practices. But those criticisms often function at the level of jurisprudence. It may be that, reading between the lines, Super-Dicta is at work.

This possibility has important implications for how these practices are used and interpreted, when and whether they are justified, and what we can glean from them about the judges' views. It also counsels caution in considering reforms.[260] For it may be that such practices are justified as a matter of rationality. And their use reflects an uncertain judge aiming at what is right.

I do not claim this is always the case. Judges behave poorly, to be sure. And these practices have been abused. My point is only that assuming cynicism or sloppiness misses an important reality: Super-Dicta is almost always hidden, and so a judge behaving badly and a judge behaving rationally might look the same.

But it has been enough work to get Super-Dicta on the table. Beyond raising this possibility, I leave its forensics and implications for another day.

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258 *See supra* notes 29–35 and accompanying text.

259 *See supra* notes 17–18, 29–30, and accompanying text.

260 *See supra* notes 17–18, 29–30, and accompanying text.