November 16th, from 4-7 pm
Lester Pollock Room, FH, 9th Floor

Colloquium in Legal, Political, and Social Philosophy

Conducted by
Jeremy Waldron and Liam Murphy

Speaker: **Courtney Cox, Fordham University**
Paper: **Super-Dicta**

Colloquium Website: http://www.law.nyu.edu/node/22315

Greetings,

Thank you so much for taking the time to read this. I've been thinking about this piece for quite some time and am very excited to workshop it. This current writing remains a relatively early-stage draft and does not yet reflect the full extent of my thoughts on the matter. Your comments will be especially helpful at this stage.

This piece is one of a constellation of pieces I'm working on that build on *The Uncertain Judge*, 90 U. CHI. L. REV. 739 (2023), which was published last spring. In addition to feedback on the arguments that follow, there are two things I'm always on the hunt for, both for this specific piece and for the larger project of which it is a part:

1. Examples of hard cases about which a judge might be uncertain, that are also relatively simple to explain/understand. IP offers up a lot of these, but it would be foolish to assume that these are easily accessible to non-IP audiences (or that the salience of them is immediately apparent). Examples from a variety of sources would be great, both in terms of substantive law (any of the private or public law fields, though I think private law examples are particularly important, since many people hear "hard case" and immediately jump to conlaw!), and procedural posture (appeals, but also district courts; decisions about settlement/referrals to mediation, etc.).

2. Those rare examples where a judge *expresses* their uncertainty. For example, Roberts in the *Dobbs* oral argument, and his concurrence, is a very rare example. I've found a couple others, but they seem difficult to locate—as far as I can tell they are relatively rare, though this may be a the-haystack-is-just-huge kind of problem.

I'm really looking forward to your feedback at this point in the writing process, and to discussing the project with you next week.

All the best,
CMC

Super-Dicta

Courtney M. Cox[*]

Abstract. I have previously argued that, given normative uncertainty, sometimes what a judge has reason to do (qua rationality) differs from what her favored jurisprudence says she has reason to do (reasons qua jurisprudence, or "legal reasons").

In a civil law system, where judges' opinions lack precedential authority, this may not cause a problem. But there is a difficulty for judges in a common law system, where a judicial opinion not only (1) sets down the (legal) reasons for a decision, but also (2) creates precedent that is binding moving forward. That is, the opinion itself both reflects the legal reasons for its result, and, in articulating those legal reasons, provides binding authority moving forward.

This separation—between the reasons a judge makes her decision and the *legal* reasons underlying and embodied in the opinion—creates a phenomenon I will call "Super-Dicta."

Super-Dicta stands in an important relation to holdings and (ordinary) dicta. Super-Dicta, like ordinary dicta, is not binding on future judges. That necessarily flows from its nature: Super-Dicta are the reasons a judge has based on her uncertainty about what (legal) reasons she has, which she should apply, and how to articulate them. But unlike ordinary dicta, and more like a holding, Super-Dicta is directly necessary to the outcome of the case—and not just causally necessary, but as a necessary part of the judge's *rationale* for reaching the outcome they do.

Super-Dicta

INTRODUCTION

Not all 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 what it is she ought to do. By "ought to do," I mean what she ought to do *jurisprudentially*—what she ought to do *qua judge*, not by some other benchmark.

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. It stems from the simple fact that she is not Herculean, and she has the humility to know it.

Judges—those who are not Herculean, at least—sometimes have what I call normative uncertainty. A judge has normative uncertainty when, despite knowing all the relevant facts, laws, and adjudicative theories (and any other consideration you deem relevant to judging), she remains uncertain about what to do.

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—do whatever your preferred jurisprudence, or theory about what a judge ought (judicially) do all-things-considered—is a nonstarter. Sometimes, what a judge ought (rationally) do and what her favored jurisprudence says she ought (judicially) do come apart.[1]

This Article is not about that problem. And in a civil law system, where judges' opinions lack precedential authority, there may be nothing further to say before turning to solve it: a judge's normative uncertainty may give rise to only this one problem.

But there is a further difficulty for judges in a common law system where judicial opinions not only (1) set down the reasons for a decision, but also (2) create precedent that is binding moving forward. That is, normative uncertainty creates further mischief where a judicial opinion itself both reflects the legal reasons for its result and, in articulating those legal reasons, provides binding authority.

I will call this mischief "Super-Dicta." It is a phenomenon that arises from a judge's normative uncertainty—and the separation that normative uncertainty entails between the reasons a judge makes her decision and the *jurisprudential* reasons underlying and embodied in the opinion. This Article is a first attempt at describing the mischief and its contours.

Super-Dicta stands in an important relation to holdings and (ordinary) dicta. Super-Dicta, like ordinary dicta, is not binding on future judges. That necessarily flows from its nature: Super-Dicta are the agent-relative reasons a judge has based on her uncertainty about what (jurisprudential) reasons she has, which she should apply, and how to articulate them. But unlike ordinary dicta, and more like a holding, Super-Dicta is directly necessary to the outcome of the case—and not just causally necessary, but as a necessary part of a judge's *rationale* for reaching the outcome she does.

The existence of the phenomenon raises two questions: Should Super-Dicta appear in opinions? And, prior to that question, can it?

Whatever your views on the normative question, it turns out that Super-Dicta is difficult to express in an opinion. I will argue that when a judge has normative uncertainty, and responds to it rationally, there will be circumstances in which her reasoning cannot appear in her opinion even though that reasoning directly affects the outcome. And if and where such transparency is possible, such transparency is likely to bring with it distorting effects.

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[1] Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. 739 (2023).

One upshot is that we should expect opinions to appear certain, even where judges are not. And so, the "arrogance" of opinions should not be treated as evidence that judges lack normative uncertainty or fail to respond rationally to it.

This Article proceeds in six parts. The first three lay the groundwork for what follows: Part I recaps the problem of normative uncertainty in judicial decisionmaking. Part II offers a basic picture of common law adjudication. And Part III refines the model in light of that basic picture. This groundwork will enable us to see the Super-Dicta phenomenon, introduced in Part IV, and to understand its significance.

Part V turns to the difficulty of transparently expressing Super-Dicta in an opinion. It is not merely that a judge *should not*, but that she often *cannot*, be fully transparent with you about her reasons if she is honest with herself. But as Part VI suggests in closing, we might still be able to see it 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.[2] I'll sketch it here in broad strokes, and refine it later.

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 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 this one doesn't have 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 about 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, and the laws, and whatever other consideration is deemed relevant. You know the different views about how you ought exercise your discretion, when gaps appear.

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[2] For a detailed introduction and defense of the problem's existence, see generally Cox, *supra* note 1.

Even so, you have doubts. Your textualist colleagues are smart. Or you're not sure which version of purposivism really has it right. Maybe you're not entirely sure which jurisprudence is right 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 in which you have the most credence—what I call "jurisprudences"—tend to agree about what you should do, and so you can safely ignore your worries. But this time the jurisprudences that you think are most likely to be correct point in different directions.

You want to do what is right. 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:[3]

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* do when she's uncertain of what she ought *judicially* 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 any).

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").

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.

In other words, the problem exists on all but the most extreme views about what it is a judge ought to do—those extreme views that deny there is ever such a thing or that there is ever a basis for criticizing what a judge has done.

The problem can 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

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[3] These are taken, near verbatim, from Cox, *supra* note 1, at 741.

logically available approaches and all that that entails. I have defended the existence of the problem against these charges elsewhere, and so won't do that here.[4] 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 is a nonstarter.

The obvious solution makes two mistakes.

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

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. You are uncertain as between two jurisprudences, Jurisprudence 1 and Jurisprudence 2, but 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 instead correct. According to Jurisprudence 1, you may choose either Option A or Option B; they are in complete equipoise. 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.

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) 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 the alternative. In other words, Option A

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[4] Cox, *supra* note 1. For discussion of the moral analog, see TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES 143–68 (2000); WILLIAM MACASKILL, KRISTER BYKVIST & TOBY ORD, MORAL UNCERTAINTY 40–41 (2020).

dominates, given your uncertainty. And so, the obvious solution violates dominance.[5]

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.

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. But jurisprudences disagree about the stakes—about what matters—and so there is no reason to think they will agree about the stakes, about the cost of getting it wrong or the importance of getting it right, in all cases.

For example, suppose you are a judge deciding Case II. As with Case I, you are uncertain as between two jurisprudences, Jurisprudence 1 and Jurisprudence 2, but 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 instead correct. According to Jurisprudence 1, you ought to choose Option B, but choosing Option A would constitute only a very slight mistake. But according to Jurisprudence 2, Option B is not only wrong, it is an especially *egregious* wrong.

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 is 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 do Option B, it is nonetheless a *relevant* consideration that you think there is a significant chance of doing something egregiously wrong by so doing.[6]

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 rational considerations. Indeed, it would be irrational to ignore them.

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[5] Cox, *supra* note 1, at 776–79; MacAskill, Bykvist & Ord, *supra* note 4, at 40–41.

[6] This point is as true of nonconsequentialist approaches as consequentialist ones, 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* 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).

I have argued that the same is true in judicial decisionmaking.[7] 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) do. Sometimes—when the stakes and her credences warrant it—she ought (rationally) follow a different jurisprudence instead.

But if the obvious solution is a nonstarter, what might a solution to the problem look like? I'm afraid I don't have one. The problem is terribly difficult to solve.[8] But in what follows, I'll use some "toy solutions" to illustrate a further difficulty that normative uncertainty creates for judicial decisionmaking in common law systems.

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So that, in a nutshell, is the problem of normative uncertainty in judicial decisionmaking. To see a difficulty it creates for common-law adjudication, we need a more specific model. But to do that, we first need to be clear about the basic picture of the common law system. It is to that basic picture that I turn next.

II. THE BASIC PICTURE

Before we can develop a more specific model, we need a basic picture of the role of opinions and precedential reasoning in our common law system. The story begins with an important distinction between a court's *decision* and an *opinion* explaining the basis for that decision.   I then describe the relationship between decisions and opinions, and how they are used in common law reasoning. This basic picture will enable us to see the Super-Dicta phenomenon I will later describe, and also to understand its significance.

In offering a basic picture, I do not mean to offer anything like a comprehensive view. In fact, I hope to avoid many of the debates that a more nuanced picture would implicate. What I have to say about Super-Dicta applies to most views (I think), except those that eschew anything that even remotely resembles the basic picture. Those who eschew the basic picture won't care about what I have to say anyways, except maybe as offering yet another reason to reject the basic picture.[9]

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[7] Cox, *supra* note 1.

[8] For an explanation why, see Cox, *supra* note 1, at 745–46. *See also* MACASKILL, BYKVIST & ORD, *supra* note 4, at 58 n.2 (noting Parfit and Broome's doubts about whether the problem could be solved).

[9] I also do not mean to offer a picture of judging in general, but of judging within a common law system. Normative uncertainty may have implications for civil law systems, where opinions have persuasive force but lack the same kind of binding authority. But those are not the focus of this Article.

A. Decisions and Opinions

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 because I want to make an important distinction between what is decided, the expression of that decision (including the reasons for it), and that combined choice.[10]

1. Decisions

Sometimes courts make decisions in response to issues that the court itself raises *sua sponte* (e.g., as to subject matter 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 evidence) to which the moving party believes it is legally entitled, or which the court has discretion to award, or both.[11]

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 the court is called to act upon. The resolution of the legal issue is only 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: to find not only 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 does not resolve the case, but allows it to proceed (e.g., where the judge denies a

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[10] 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.

[11] 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, for remittitur.

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, yes or no? Is the plaintiff's request for damages and injunctive relief granted? Yes, $20,000 is awarded to the plaintiff and the defendant is enjoined from doing X. Or no, the plaintiff is not entitled to relief.

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

2. Opinions

When announcing a decision, courts in a common-law court 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.[12]

Although common-law courts usually issue opinions, they sometimes do not. This possibility will play a role in the discussion that follows. That said, I am focused on judicial decisionmaking in common-law *courts of record*.[13] Some courts in a common law system are not courts of record: they apply precedents but do not create them.[14] What I have to say may not apply to decisionmaking in courts that are not courts of record for similar reasons that what I have to say may not apply to civil law jurisdictions. By contrast, when courts of record designate an opinion as "non-precedential" or decline to issue an opinion, these are exceptions to the court's otherwise precedential authority (and have been challenged as such).[15] What I have to say *does* apply

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[12] 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 would be misleading for reasons I will explain momentarily, in Part II.B.

[13] 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.

[14] *E.g.*, R.I. Gen. L. § 33-22-19.1 (recognizing that probate court proceedings are recorded only at the request of a party or the presiding judge).

[15] #cites-FRAP 36 due process challenges

to courts of record, including when they decline to issue opinions under Federal Rule of Appellate Procedure 36(a) or similar exception.

So, what do opinions look like? Different jurisprudences will take different views.[16] And so it is something about which our judge may be uncertain. Accordingly, I aim to remain as neutral as possible about this question.

That said, the opinion's role as a statement of reasons is a central feature of a common law system. And it is this feature that gives rise to the mischief. Accordingly, it may be helpful to have some broad contours about the role opinions are generally thought to play, to see the import of what is to come.

One of justice's central maxims is that like cases be treated alike. On the basic picture, opinions facilitate this process across both judges and time by creating a record of why a judge arrived at the decision they did. This record enables consistent treatment by providing guidance to future courts about how a given case was decided and what features of it affected the law's application. And the record ensures such adherence by requiring future judges who would depart from prior decisions to explain the difference.

The importance of this central maxim also gives shape to the kinds of reasons that are appropriate for the judge to use in reaching their decision. The reasons given are also usually objective, designed to ensure an objective standard. That is, the maxim that "like cases be treated alike" is usually thought to entail that it is the features of the case—and not of the presiding judge—that should determine the outcome. Obviously, this is not always true: judges disagree, judges have different strengths and weaknesses,[17] and it is a sociological fact that case outcomes can be affected by the judge's temperament (as every good litigator knows).[18] But this is the goal, and requiring a statement of reasons helps better ensure consistency between cases.

Opinions also help to promote that correct functioning and the appropriate use of reasons. By requiring judges to give their reasons for a decision, the common law arguably prevents the use of illicit reasons: Requiring a record provides a helpful internal check: If a reason is inappropriate to give in an opinion—like the judge's subjective impatience from lack of caffeine—then judges may guard against being influenced by such reasons.[19] Similarly, the record enables enforcement of right reasons through external checks: for lower court judges, the statement of reasons enables their work to be reviewed, such that use of illicit reasons can be monitored and curtailed.

There is another core function that opinions are often thought to serve, which is to communicate to the parties in a given case why the court has decided as it did. On this view, parties are entitled to know, and so courts must explain, why the exercise of state power in resolving their dispute or in

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[16] For discussion, see Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103 (2021).

[17] *Infra* note XX.

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[19] #cite—research on judicial temperament

punishing their behavior is not only appropriate but justified.[20] One reason parties are thought to have such an entitlement is its guidance feature: they need to know how to act in future so as to avoid sanction. But it has also been described as a matter of respect for the litigants, even if it is not required by due process in all cases.[21]

Opinions' core functions are commonly thought to entail two features that I wish to highlight. I have already noted one: Opinions give (or aim to give) objective reasons.[22] 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.[23]

Second, opinions should be transparent as to the judge's reasons in deciding a case.[24] This transparency is important to all the above functions: to both enabling and ensuring that like cases be treated alike; to facilitating review of what a court did; and to respecting the litigants that appear before the court.[25]

These two features, objectivity and transparency—or at least, the normative ideal they represent—will be relevant in understanding the significance of Super-Dicta. You might already doubt or disagree that they are desirable features. That is fine. I offer them only as a description of the basic picture.

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 any explanation of the basis for it. 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

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[20] Varsava identifies these as the two central features… Varsava, *supra* note 16, at 118–20. *See also* #cites.

[21] #cites – pending cases on FRAP 36(a)(2) and repeated rejection of same

[22] #cites.

[23] This claim is readily confused with another, that a judge's identity might affect their ability to see the reasons that there are—for example, Justice Ginsburg, because of her identity, was more capable than her male colleagues of empathizing with a young teenage girl and understanding why a strip search would have been particularly harmful. Varsava, *supra* note 16, at 117. But a judge's ability to see the reasons that are there is about *epistemic access*, not the objectivity of the reasons. *Id.* 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).

[24] #cites. Whether this ideal is in fact followed is a different matter. *See* Llewellyn; Frank, etc.

[25] *See* Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979) (advocating for greater judicial candor).

same entry, as a separate PDF or piece of paper. And where a decision resolves a case, the court will often enter a judgment separately from the opinion that entails the judgment.[26]

Of course, courts do not always create this express separation.[27] And this practice can create interpretative questions about what the decision is.[28] But even where there is not an express separation between the decision and the opinion, it remains the rare case where they 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, to put it 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.

And this lack of independence exists true 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. In one case, the standard case, the opinion explains how the decision was reached. In the other, 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.   Decisions, Opinions, Holdings, and Dicta

Decisions and opinions relate to two other key concepts, holdings and dicta, which concern how what a given judge has done affects the choice sets available in future to themselves and other judges.

On the basic picture, the decision and at least some of the reasons for it as articulated in the opinion are binding on future courts. This is the core feature of a precedential common law system. Without it, a system is not precedential.

A lot of work is being done by the concept of "binding." By "binding," I mean only that the opinion—or more precisely, the relevant bits of the opinion—create boundaries on the decisional space available to future courts by creating something that must either be (1) applied or (2) distinguished.[29]

What are the "relevant bits of the opinion"? There is considerable disagreement about this point, though most agree that there is *some* relevant bit of the opinion that must be respected—even if it is only the facts. And the choice to apply or distinguish a past opinion is itself a determination of which the relevant bits of a given opinion are.

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[26] Fed. R. Civ. P. 58.

[27] #cite - example

[28] *E.g.*, #cite. Or as importantly, *when* the decision is enacted, as triggers various deadlines for appeal or relief. #cite.

[29] #cites

But while there is disagreement about what the relevant bits are, there has evolved consensus about what to call them. In modern parlance, the relevant bits—the reasons that are binding—are called the "holding."

The other bits of the opinion, if any, are *not* binding on future courts, and are called "dicta." These statements in the opinion are generally *not* taken to be binding on future courts.[30]

The line between holding and dicta is traditionally understood as the line between that which is necessary to the decision—who wins, whether the motion is granted or denied—and that which is not.

There is, once again, a good deal of disagreement about what exactly is "necessary" in this sense, both at a general level and in particular cases. Skilled judges and lawyers inhabit this space and argue over precisely this point as it applies to particular cases.[31] But we can set these disagreements aside for our purposes.

The key point is that, in the general case, some subset of the reasons articulated in an opinion are "binding" on future courts (in the minimal sense above). We'll call this the "holding." And other statements in the opinion are not so binding ("dicta"). The line between them is one of necessity—where the holding is in some sense logically necessary to the decision, while dicta is not. But we needn't resolve today how to understand what makes some parts of the opinion "necessary" to the decision, and others not; only that there is such a distinction to be had, and that some portion of the reasons given are binding on future courts.

One final point: we can now see, if it wasn't apparent already, why the line between "decisions" and "opinions" is not the line between "what the court does" and "what the court says."[32] It is because what is *said* in the opinion also itself *does* something: in a precedential system, what the opinion says creates new rules and standards that are binding on future courts. This feature also forms a crucial difference between the choice set facing judges and those 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.

III. Refining the Model

We can now refine our model of normative uncertainty in judicial decisionmaking in light of the basic picture. We need such a statement because how the mischief manifests may depend, at least in part, on our modeling choices—on how we understand the problem and at what level we address it. In this Part, I'll discuss the choice of model and set out a simple one for our analysis. I'll then turn in the next Part to the implications of that simple model for the basic picture of common law adjudication.

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[30] That said, there is at least some anecdotal evidence that judges may not feel that way, and find that dicta often gets them into trouble in future cases. Personal communication with author (April 2023). I do not know how widespread this phenomenon is.

[31] #cites

[32] *Supra* text accompanying note XX.

A.   Initial Questions

The first major question is: what is the scope of choice? That is, what is the judge called upon to do—what are the set of choices from which she must choose?

The second major question is about how to understand—and so, to model—the judge's uncertainty about which choice to make. For example, empirical uncertainty is often modeled as uncertainty about "states" or "events," like whether the state of the world is such that it will rain.

For those who are visually inclined, these two features—the agent's choice set (determined by the scope of choice) and the states of the world about which the agent is uncertain—are usually used to create decision matrices like this one, which help map out the consequences of each option in the choice set depending on which state is the actual state of the world:

Decision Matrix Example

	State 1: Rain	State 2: No Rain
Option A: Go Sailing	Get wet	Have a pleasant sail
Option B: Stay Home	Stay dry	Miss a great day of sailing

In any event, these two modeling questions—about the scope of choice and about how to model the uncertainty—are both important. But the immediate one for our purposes is the first: what is the scope of choice? I will discuss the first in what follows, and how it relates to the basic picture.

As to the second, I'm going to continue with the modeling approach I adopted previously. That approach models the judge's normative uncertainty as uncertainty about which of numerous competing jurisprudences were correct (i.e., treating State 1 as "Jurisprudence 1 is correct," and so forth). I assumed that the competing candidate jurisprudences were complete (i.e., providing guidance for every conceivable case) and mutually exclusive. The correct jurisprudence affects the normative valence—the judicial rightness—of the options within the choice set.

I could have made a different modeling choice. 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.[33] But I made the modeling choice to use jurisprudences for two reasons: (1) it is generally accepted that judges should exhibit at least some *minimal* consistency across cases; and (2) complete jurisprudences provide the simplest way to model this, and the trade-offs that this fact

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[33] The modeling would be similar: for a choice set with two options, State 1 would be a state where one of the options is the correct one, while State 2 would be a state where the other option would be correct.

entails. I won't rehash these reasons in greater detail here, but refer the reader to my earlier discussion.[34]

B.   Scope of Choice: Narrow or Broad

What is the scope of choice? A judge might well laugh and ask: when? For there are many choices a judge must make, both within the context of a case and across her time on the bench.

For example, when teaching using the case method, we often frame the choice facing the judge as one of how to rule on the issue(s) presented by a particular motion or appeal. In turn, this choice may itself require many sub-choices on sub-issues, like about the standard of review, about how to construe various prior precedent, about which facts are relevant, and about how to address the sub-issues and in which order.[35]

A judge may have varying degrees of uncertainty with respect to each of these sub-issues. But her many choices—especially in the context of a single motion—are usually not independent the others. For example, the standard of review will affect which sub-issues are in play, and which are not.[36] And if she takes a textualist approach to the first issue, and then rejects that same approach within the same opinion, she had best have a reason why.[37] These choices are further complicated when the judge sits on a panel, such that these choices are not hers alone to make.[38]

In other circumstances, we might think of the judge as making a choice about what general approach to follow. For example, many judges—especially those appointed to higher courts at the time of such appointment—have developed views about which school of jurisprudences they think is correct. Indeed, in recent federal court appointments, especially to the U.S. Supreme Court, the vetting process emphasizes and tests for fidelity to such schools, like textualism or originalism, because it might be seen as predictive of how judges will rule in cases of interest.[39] And given the importance of consistency to the rule of law, some scholars have argued that judges ought (judicially) to develop an approach and be faithful to it. They argue that such consistency in approach is not merely politically savvy; it's jurisprudentially appropriate.[40]

Accordingly, a judge also likely faces a choice about what their approach is, either before appointment or, more likely, before a promotion. And they

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[34] Cox, *supra* note 1, at 760–62.

[35] #cites

[36] #cite example

[37] #cite-example—probably easiest to find by searching a dissent complaining about the majority being inconsistent.

[38] #cites-Kornhauser/Sager/collegial courts/voting paradoxes/strategic voting

[39] Nominees generally demur on questions about particular cases. Fidelity to an approach might be thought a good proxy: jurisprudences within the same school often converge on cases of interest. #cites

[40] *E.g.*, Richard Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824 (2023).

may experience varying degrees of uncertainty about which jurisprudence to adhere to.[41]

Given these different options for scope of choice, we too have a decision to make in our modeling about what the relevant scope of choice is. We could, for example, treat sub-issues as independent and take them one at a time, like the step-by-step approach taken in law school classrooms. That is, we could choose a *narrow* scope of choice.[42] 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 to adopt at the outset. 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.[43]

And the difficulty with the broad, career-long jurisprudence approach is twofold. Either such a choice will not resolve all the issues to come. To wit, count the varieties of originalism and textualism.[44] 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?

The scope of choice may itself be a question of rationality, one I will defer to another day. For now, I'm going to cut a middle approach, between these two extremes. On the basic picture, the critical choice generally proceeds on a decision-by-decision basis—where "decision" is as I described the term above.

The judge's choice may thus have several sub-issues (e.g., about the standard of review and the merits). And her choice set will reflect the possible—or more accurately, plausible—combinations of smaller choices on those sub-issues. Different jurisprudences will combine them in different ways; and some combinations may be ruled out altogether by all plausible jurisprudences.

This middle-ground choice of scope has several advantages. Unlike the narrow view, this decision-based approach reflects the interdependence of the sub-issues. And it does so without being so unwieldly as the broad, career-long approach to scope of choice.

The decision-centered scope of choice 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—treating intermediate decisions on motions as precedential within the context of a litigation that may or may not include multiple decisions.

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[41] Cf. Sutton practice

[42] *Cf.* Lockhart, *supra* note 4, at 133–40.

[43] *E.g.*, #cite

[44] #cites

Finally, the decision-centered scope of choice 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-by-decision basis can accommodate this wrinkle, in a way that the narrow sub-issue-by-sub-issue approach, and the broad school-of-jurisprudence approach, cannot.

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.

C.   In Issuing 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, as opposed to a civil law system, is that judges generally must issue opinions with their decisions.[45] 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.

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. Although the two are related, they can come apart. This need for the second choice—about the rationale to offer for the decision—appears most plainly on multimember courts, where judges frequently disagree in separate opinions about which of multiple reasons best supports the court's decision.[46]

The question then becomes, how to model this? I previously treated these two choices together, taking the decision to be co-extensive with the opinion.[47] That worked to show the initial problem. But for purposes of this discussion, the separation between the two is important.

Even so, while the decision and the opinion are separate, they are not *independent* either.[48] 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.

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[45] There are some exceptions…

[46] #cite examples

[47] Cox, *supra* note 1. I glossed over this difference in explaining the problem above. *Supra*, Part I.

[48] *Supra* XX

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: Merely moral agents are generally not called upon to give *reasons* for their moral decisions. And merely moral agents are generally not *bound* by either their past moral decisions, let alone any reasons they happen to give.[49]

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.[50] 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. And because the decision and the opinion are not entirely independent (e.g., the reasons articulated may alter—even slightly—the decision (as by affecting the amount or scope of remedies, for example)), there is almost always a need to treat the judge's decision as about some course of action taken holistically.

And so, I will build on my previous approach. 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.

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.

IV. SUPER-DICTA

After all this wind-up, what's the payoff? Here it is: When a judge has normative uncertainty, her reasons for the decision are *not* the reasons stated in whatever opinion is part of that ruling. To be clear, this payoff 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 payoff follows directly where a judge (1) aims to do what they ought (judicially) to do, and (2) is rational in that pursuit.

I call this phenomenon—the solution methods that *actually* comprise the reasons why the judge issued the ruling that she did—"Super-Dicta." First, I will explain with a little more detail why and how this payoff occurs. Then, I'm going to explain why I call it "Super-Dicta."

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[49] 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.

[50] *E.g.*, Johan E. Gustafsson & Olle Torpman, *In Defence of My Favorite Theory*, 95 PAC. PHIL. Q. 159, 160–69 (2014).

A.   Showing the Payoff

Let's return to our copyright case of the century. I first used this case in *The Uncertain Judge*.[51] It is a not-so-thinly veiled gloss on *Lotus v. Borland*[52] and *Google v. Oracle*,[53] which concern the copyrightability and fair use of certain important aspects of computer software.

Both plaintiff and defendant were software developers.   Plaintiff's product was popular, and many users had invested time in learning the command structure of Plaintiff's software so they could use it to build other things (e.g., "Copy," "Print," "Quit"). Defendant copied these aspects of Plaintiff's software to reduce "switching costs" for users—that is, to make it easier for users to make use of Defendant's software without needing to learn an entirely new command hierarchy (e.g., "Xerox," "Paper," "Exit"). Suffice to say that the functionality of such commands and how to access them is important to developers switching between the two products. No one wants to learn a whole new system.

Plaintiff sued Defendant for copyright infringement.   Defendant conceded that it copied Plaintiff's code. But Defendant argued that the material copied was not copyrightable subject matter, and that even if it was, Defendant's copying was fair use (and so not infringing).[54] Plaintiff prevailed in the lower court: the software at issue was found to be copyrightable, and Defendant's use was not fair.

Suppose that Defendant appeals the judgment entered against it, 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:[55]

1. Affirm the judgment.

2. Reverse the judgment.

3. Vacate the judgment and remand for further proceedings.

In addition to the decision, the court will need to issue an opinion explaining the reasons why it made the decision that it did.[56] And that answer will depend on how the court resolves the two issues raised by the defendant. The 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 as a matter of law, then the question of copyrightability is moot.   By contrast, if the

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[51] Cox, *supra* note 1, at 803–06.

[52] #cite

[53] #cite

[54] #cite [also insert brief fair use explainer]

[55] [sentence contrasting how I used it last time]

[56] But see FRAP 36(a).

software is found to be copyrightable, then the court will also need to address the question of fair use.

This lack of independence between the issues is part of why our model treats the decision (affirm, reverse, remand) as separate from the opinion (the reason why the decision is made). And the lack of independence between the decision and the opinion is why the model constructs the choice set in terms of Rulings (decision/opinion pairings) rather than in terms of either decisions or opinions.

I'm going to here introduce one simplification into our telling of the Greatest Copyright Case: we'll ignore the possibility of vacating and remanding, so that the judge is only choosing between affirming and reversing the judgment. This move is for ease of exposition. The possible opinions supporting a remand are rather large: one (or both) standards could be clarified, in a variety of ways, that warrant sending back to the district court (and possibly a jury) for a do-over.[57] 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.

The other two would lead to a decision to reverse the judgment in favor of Defendant:

2. This type of software is not copyrightable.

3. Defendant's copying was fair use as a matter of law (and so not infringing).[58]

These three options for an opinion are of course pretty skeletal. A judge deciding the Greatest Copyright Case 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?[59]

There are myriad reasons why a judge might favor one of these three higher-order opinions, not to mention questions about how to fill in the

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[57] *E.g.*, Oracle Am., Inc. v. Google, Inc., 750 F.3d 1339 (Fed. Cir. 2014) (reversing noncopyrightability finding 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 (Fed. Cir. 2018) (finding the district court should have granted Oracle's motion for judgment as a matter of law following jury verdict in favor of Google).

[58] [copyright explainer on AMOL point]

[59] [brief footnote about ambiguity here on what type of question fair use is]

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.[60]

We need a way to simplify. Tempting as it is to nerd out about the details of any particular case, this Article is not about any one 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—which 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.

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).[61]

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

Second, as noted above,[62] I'm going to continue my previous practice of modeling the judge's normative uncertainty as uncertainty between competing jurisprudences (J1, J2, J3…). Recall that jurisprudences are simply all-things-considered theories of what a judge ought to do—the all-things-considered *judicial* ought.[63]

We can further simplify our modeling of the judge's normative uncertainty and toy solutions to it by making two further 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).

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[60] *See* Cox, *supra* note 1, at 809–10.

[61] [copyright explainer on AMOL point]

[62] *Supra*, Part III.A.

[63] What about normative uncertainty? [x-ref to discussion of hedging jurisprudences]

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 the judge's *credences*—the strengths of the judge's belief that a given jurisprudence J_i is correct—as probabilities (p_i). In doing so, we borrow tools from formal epistemology. I will use a judge's *epistemic* credences—that is, the credences that a judge *should* have based on her evidence, rather than whatever credences she actually has. For example, a judge's epistemic credences about jurisprudences will be consistent with the strength of her credences about how particular cases should be resolved, about how they can be made consistent with how past cases were actually resolved, about which of those 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.

For the moment, I'm going to assume that Judge Clara 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. Recall that degrees of judicial rightness simply reflect a cardinal ranking—that is, roughly, a ranking which 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.

Putting this all together, we can construct her decision matrix thus:

Greatest Copyright Case

	Jurisprudence 1	Jurisprudence 2	Jurisprudence 3
Ruling A	0	0	10
Ruling B	10	5	0
Ruling C	8	10	5

And assuming her credences are split between these three jurisprudences as indicated, we can consider what she should do in Scenario I, thus:

Greatest Copyright Case: Scenario I

	Possibility 1 (p_1 = .7) Jurisprudence 1	Possibility 2 (p_2 = .2) Jurisprudence 2	Possibility 1 (p_3 = .1) Jurisprudence 3
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 assume she is rational. What ought she (rationally) do given her aim of doing whatever it is that she ought (judicially) to do?

As noted earlier, I don't have an answer to that question beyond saying that the obvious solution isn't it. That is, it is fair to say that even though Judge Clara's favorite jurisprudence—the one in which she has the highest credence—is Jurisprudence 1, she shouldn't just blindly follow its dictates and do whatever it says is the thing she ought to do. But I don't have a clear view of what the alternative is.

But my purpose today isn't to solve the answer to *that* question. So, we can use a "toy theory." Sometimes, in philosophy, we use toy theories to illustrate the implications of various other moves. I did this previously in *The Uncertain Judge*, 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.[64]

For sake of argument, let's once again follow an approach that maximizes the expectation of judicial rightness. As before, it has the benefits of being familiar, thanks to the Hand Formula. And it avoids the downfalls of the obvious solution. I do not mean to suggest that it is perfect—far from it. But it is a ready-made toy theory that we can use for sake of argument about something else.

On this 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

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[64] Cox, *supra* note 1, at 791–97. Some commentators have mistakenly read that piece as endorsing the toy theory as a solution. *E.g.*, #cite. It may turn out to be the solution I endorse, but I haven't yet and am not myself convinced that it is our best option.

judicial rightness (EJR) is at least as great as that of any other alternative.[65]

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 ($j_{1,A}, \ldots, j_{n,A}$):

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

Judge Clara runs the math.[66] Ruling C maximizes expected judicial rightness. And so that is what she does: she decides to reverse the judgement 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.

Here's the payoff: The reason Judge Clara 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 Clara 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 Clara chose to issue Ruling C—deciding to reverse the judgment "for the reason" that Defendant's copying was fair use as a matter of law—because she wasn't sure what she ought (judicially) to do and, given her credences, so ruling would maximize expected judicial rightness. That is, her ultimate reason for issuing Ruling C and deciding to reverse the judgment is that doing so maximizes expected judicial rightness.

I call this phenomenon, where it occurs, "Super-Dicta." I call it this because of how it stands in an important relation to holdings and (ordinary) dicta.

Recall that, on the basic picture, the line between a "holding" and "dicta" is the line between those reasons that are *necessary* to the decision and those that are not. For example, in Ruling C, the holding is that copying—on these facts, in these circumstances, for the reasons given—constitutes fair use. Dicta, by contrast, is anything else that is said, like about what other types of copying are likely to be found fair use under the standard, or statements speculating that the code might not be copyrightable subject matter anyways.

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[65] Cox, *supra* note 1, at 790. I adapted this principle from Lockhart's PR4. *See* LOCKHART, *supra* note 4, at 82. I use a different scope of choice from Lockhart, among other differences.

[66] [math in text or footnote?]

The "holding" and "dicta" also have different precedential effects on the basic picture: a holding binds future judges, while dicta does not. For example, if the judge deciding the Greatest Copyright Case Ever issues Ruling C, then a future court deciding a similar case would be bound by the finding that Defendant's copying was fair use. That is, the future court would need to find the copying in that future case to be fair, or else explain the relevant difference between that future case and the Greatest Copyright Case Ever. By contrast, that future court would not need to address what the Greatest Copyright Case Ever means for whether the material in the future case is copyrightable.[67]

Super-Dicta, like ordinary dicta, is reasoning that is not binding on future courts. This much might seem obvious, at least in Scenario I of the Greatest Copyright Case Ever: Ruling C never states the Super-Dicta anywhere, and so it would seem it could not be binding unless it could somehow be ascertained. "Super-Dicta" might thus also seem a misnomer: "dicta" is short for "obiter dicta," a Latin phrase meaning "something said in passing" and generally refers to unnecessary judicial *expression* appearing in an opinion.[68]

But as will be discussed in greater detail in Part V.C, there are interesting limits on its ability to bind. Super-Dicta will have difficulty binding future courts because Super-Dicta comprises a judge's agent-relative, *ex ante* reasons for ruling as she does based on her normative uncertainty about what jurisprudential reasons she has for that choice and her aim of doing whatever it is she ought (judicially) to do. Those reasons—here, that Ruling C maximizes expected judicial rightness given her *ex ante* credences and beliefs about what various jurisprudences prescribe—are *not* jurisprudential reasons for the decision. They are not law as applied to facts, or moral principles inherent in the law, or moral principles external to the law that are then used to fill the gaps, or whatever other consideration a given jurisprudence would say to apply.

Put another way: Suppose that, by issuing Ruling C and deciding to reverse, Judge Clara has succeeded in doing what she ought (judicially) to do. What makes Ruling C the right thing to do is *not* that Ruling C maximized expected judicial rightness as measured from her pre-decision viewpoint. No. What she does is what she ought (judicially) to have done because it is what she ought (judicially) to have done *according to whichever jurisprudence is correct*. That is, if she succeeds, she will have succeeded because Jurisprudence 2 is correct and for the reasons that, according to Jurisprudence 2, make Ruling C what she ought (judicially) to do.

So, Super-Dicta, like ordinary dicta, is not binding on future judges. As noted, that is obvious here, 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

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[67] Of course, the future court *could* find such dicta "persuasive"—or at least rhetorically useful. #cite

[68] *Dictum*, in BLACK'S LAW DICTIONARY (11th ed. 2019).

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.

To sum up: 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.

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 accompany it.[69] Some judges are uncaffeinated and cranky, unaware that their mood has distorted their perception of the reasons.[70] Some are partisan hacks, who decide cases based on their political beliefs and write an opinion to match.[71] 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.[72]

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 falls directly out of a judge trying to do whatever it is she ought (judicially) to do. It is not a psychological or sociological story about what *causes* a judge to act. 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, as is the case with some tellings of the partisan hacks and the renegades. 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. Or to put it differently, a judge who aims to do what she ought (judicially) to do cannot escape it, so long as she is not Herculean.

V. THE DIFFICULTIES OF EXPRESSING SUPER-DICTA

I think it would be enough of a payoff that in many cases when there is normative uncertainty, Super-Dicta could occur: that, as a direct result of

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[69] #cite-collect literature

[70]

[71] #cite

[72] #cite

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.[73] 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) do.

Instead, I turn to structural considerations about why it would be very *difficult* for a judge to transparently explain her normative uncertainty and resolution thereof, at least if she acts rationally. Although my discussion here falls far short of offering proof that this will occur in every case, it goes some way to explaining why 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.

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, 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.

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.

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[73] For discussion of reasons in favor, see *supra* Part II.2; Jamie Macleod, #cite (citing epistemic benefits of transparency about uncertainty); #cites-string. For discussion of reasons against, see, e.g., #cites.

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 (45%) is more likely correct than Jurisprudence 2 (30%).

The judge also believes there is a 25% chance another jurisprudence, Jurisprudence 3, is correct instead. 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 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, on which Jurisprudences 1 and 2 agree.

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: Scenario II

	Jurisprudence 1 ($p = .45$)	Jurisprudence 2 ($p = .30$)	Jurisprudence 3 ($p = .25$)
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) issue Ruling C. This is because, by issuing Ruling C, the judge maximizes the chance that what she does is 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 lower 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. I will return to this difficulty in Part V.C.[74]

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 a finding *as a matter of law*: no reasonable person could find otherwise.

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.

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[74] 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.

Greatest Copyright Case: Scenario II (with Ruling C')

	Jurisprudence 1 ($p = .45$)	Jurisprudence 2 ($p = .30$)	Jurisprudence 3 ($p = .25$)
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 findings of law themselves turn on the likelihood that such a finding is correct—then including Super-Dicta that references the judge's subjective credences will be inaccurate by the lights of those jurisprudences.[75] 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, whether 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, that provide a sense for not only whether one option is worse than another, but by how much. To the extent such information is available, it can change what it is rational to do.[76]

So let's consider a more nuanced example to consider whether our judge could issue a transparent ruling that explains why she selected Ruling C. In Scenario II*, the jurisprudences assign degrees of judicial rightness to the options within the choice set. These are just cardinal rankings.[77] Let's further assume that they exhibit co-cardinality and otherwise satisfy the

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[75] If it sounds like jurisprudences that hedge are incoherent, I'm inclined to agree. *See* Cox, *supra* note 1, Part II.B.

[76] *See* Cox, *supra* note 1, at #pin.

[77] *Supra* text accompanying notes XX.

axioms of expected utility theory so that we can use our toy solution, maximizing expected judicial rightness.[78]

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.

Greatest Copyright Case: Scenario III*

	Jurisprudence 1 ($p = .45$)	Jurisprudence 2 ($p = .30$)	Jurisprudence 3 ($p = .25$)
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	5	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 constitute 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 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.[79] So far, so good.

Now turn to the "uncertain" opinions. Here again, the judge ought not (judicially) issue Ruling C' according to any jurisprudence in which she has credence. 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 issuing Ruling C' be the rational choice given the judge's uncertainty? The answer will depend on how the candidate jurisprudences view the relative importance of issuing a decision on the merits versus admitting to uncertainty in the way that that opinion

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[78] These are strong assumptions, especially in the context of intertheoretic comparison. For discussion, see Cox, *supra* 1, at #pin.

[79] #insert math?

does, at the cost of some inaccuracy by the lights of the jurisprudence. 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.[80] And so I have used variables to denote the degrees of judicial rightness assigned—with an upper limit to reflect that the jurisprudences rank a different ruling first. I will observe only that it is a relatively narrow range in which Ruling C' would maximize expected judicial rightness on these credences and given how the jurisprudences rank the other options within the choice set.[81]

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 lower court is reversed in favor of Defendant.

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 note that Ruling C' leaves something unsaid. On *this* toy solution, the judge 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, of the certain opinions, the fair use finding maximizes expected judicial rightness. (It may help to consider whether Ruling C' would be transparent as to why the judge in Scenario I, *supra*, issued Ruling C.)

Perhaps our judge can do better. Consider the opinion in Ruling D. It is not a pretty opinion—the writing is clunky, and it's dense and repetitive.

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[80] At least here. I do have views on the first question. *Cf.* Cox, *supra* note 1, at #pin [II.B].

[81] 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 2 assigns 7 degrees to Ruling C', then Ruling C' will not maximize expected judicial rightness as compared with Ruling C'.

These stylistic considerations are virtuous or vicious depending on your view—your jurisprudence.[82] But it will serve our purposes. Here it is:

Ruling D

Decision: Reverse in favor of the defendant.
"for the reasons that"

1. My credences in the candidate jurisprudences are as follows:

    a. I have 45% credence that Jurisprudence 1 is correct.

    b. I have 30% credence that Jurisprudence 2 is correct.

    c. I have 25% credence that Jurisprudence 3 is correct.

2. Those jurisprudences evaluate the rulings within the choice set as follows:

	Possibility 1 ($p_1 = .45$) Jurisprudence 1	Possibility 2 ($p_2 = .30$) Jurisprudence 2	Possibility 3 ($p_3 = .25$) Jurisprudence 3
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	5	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 have what our judge was after: 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 toy solution, a judge ought (rationally) issue a ruling if, and only if, that ruling's expected judicial rightness is at least as great as that

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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.[83] That is, the judge's choice set is really given by Scenario III** and the degrees of judicial rightness assigned to Ruling D by each of the three jurisprudences must be within the narrow band described above.

Greatest Copyright Case: Scenario III**

	Jurisprudence 1 ($p = .45$)	Jurisprudence 2 ($p = .30$)	Jurisprudence 3 ($p = .25$)
Ruling A	0	0	0
Ruling B	10	5	0
Ruling C	5	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 (Line 4) and omits Ruling D from the choice set (Line 3). In this way, it gives the pretense of being Ruling C, but perhaps a more honest version of Ruling C that explains why Ruling C is chosen. But it is not Ruling C. It is really a distinct Ruling, Ruling D.

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 Line 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 by each of the three candidate jurisprudences. And I have adjusted Line 4 to refer directly to Ruling E.

Here is that draft of Ruling E:

Ruling E

Decision: Reverse in favor of the defendant. "for the reasons that" 1. My credences in the candidate jurisprudences are as follows: a. I have 45% credence that Jurisprudence 1 is correct. b. I have 30% credence that Jurisprudence 2 is correct. c. I have 25% credence that Jurisprudence 3 is correct.

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[83] *Supra* text accompanying notes XX.

2. Those jurisprudences evaluate the rulings within the choice set as follows:

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

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. That is, she was looking for a way to issue Ruling C while trying to be transparent 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 opinion 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 no longer is 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.

Perhaps, there is some way to revise it, so that the judge might rationally issue such a decision. But there is another difficulty with Ruling E, to which I turn next.

C.   When Expressing Super-Dicta Changes the Law

There is a further difficulty with expressing Super-Dicta in an opinion: expressing uncertainty and resolution thereof not only creates a distinct ruling, it arguably changes the holding for courts moving forward. I flagged this difficulty above and turn to it more fully now.[84] Afterall, just because a judge ought not (rationally) issue one of the uncertain decisions doesn't mean they wouldn't—a judge might attempt to act rationally and fall short, just as they might attempt to do whatever they ought (judicially) to do and fail in that aim.

On the basic picture, the decision and opinion create limits on 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 connects the original case to other cases, to stretch or constrict the precedent to meet their own objectives.

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 consistently concluded she ought (rationally) to do. Ruling C is a traditional ruling, which does not express any uncertainty. I presented it in skeletal form above:

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 original court would have needed to go through the four fair use factors and apply them to the facts, analyzing how, for example, the purpose and character of the use counts for or against a finding of fair use.[85]

A future court deciding a similar case would be bound by this analysis. For example, if the opinion in the Greatest Copyright Case 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.

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[84] *Supra* text accompanying notes XX.

[85] 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").

What of Ruling C'? Recall that Ruling C' was as follows:

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 lower court is reversed in favor of Defendant.

What is a future court to do with this decision? First, 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 was unclear? If something about how the factors apply in the new case is unclear, but they likely point in favor of fair use, does that make it fair use *as a matter of law*? One criticism of the actual decision in *Google v. Oracle*,[86] 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.[87] Ruling C' would seem to take it a step further by lowering the bar to a finding of fair use as a matter of law—a future court could interpret Ruling C' as lowering the standard for finding fair use as a matter of law from one according to which a reasonable person could not find otherwise to one where it's only that they likely could not find otherwise.

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.

Now consider Ruling D and Ruling E. What would a future court do with these? Ruling E is fairly 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.

But how far does this opinion reach? It may be transparent—more so in the case of Ruling E than Ruling D—but it has made the standard turn on facts *about the judge*. Specifically, it 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

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[87] *See, e.g.*, #cites.

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.[88] 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.[89] 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.

Happily, it would seem the agent-relative, time-indexed nature of the reasons is necessarily self-limiting: 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.

But perhaps they are self-limiting for another reason. These are, after all, agent-relative, time-indexed reasons specific to the judge at the time she decides the case. And so perhaps these reasons are—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.

VI. 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, Super-Dicta, like ordinary dicta, is generally not binding on future courts.

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[88] *Supra* Part II.A.2.

[89] This claim is readily confused with another, that a judge's identity might affect their ability to see the reasons that there are—for example, Justice Ginsburg, because of her identity, was more capable than her male colleagues of empathizing with a young teenage girl and understanding why a strip search would have been particularly harmful. Varsava, *supra* note 16, at 117. But a judge's ability to see the reasons that are there is about *epistemic access*, not the objectivity of the reasons. *Id.* 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).

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 the 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. In other information environments, the inclusion of Super-Dicta in an opinion will either be irrational or else inaccurate.

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 introducing some distortion to the rule she attempts to put down. Such transparency comes at the cost of introducing agent-relative, time-indexed reasons to the legal standard. 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.

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. 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: the judge 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. 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 lower 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.[90] 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 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 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.[91]

Very well, you might think, the judge has not done what they 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.[92] 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

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[90] By "make law," I hear 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.

[91] Lotus took 6 years; Google 11 years; with XX intervening cases in the 31 years from when Lotus was filed in July 1990 to the Supreme Court's April 2021 decision in Google, and XX cases since.

[92] *E.g.*, Fed. R. App. P. 36.

Silent Ruling does not commit the court to stating 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.

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.

And so here is my parting question: Is the same true of other maneuvers made by judges, frequently characterized as pragmatic or pluralist or minimalist? 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. And this will have 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.