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MADISON LECTURE

JUDGING UNDER THE CONSTITUTION: DICTA ABOUT DICTA

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~ For Susana ~

In the New York University School of Law's annual James Madison Lecture, Judge Pierre N. Leval discusses the increasing failure of courts to distinguish between dictum and holding. Although not opposed to the use of dictum to clarify complicated subject matter and provide guidance to future courts, Judge Leval argues that (1) in promulgating binding law through dictum in the guise of holding, a court exceeds the Constitution's limitations on the judiciary's power to make law; (2) in accepting a prior court's dictum as binding law, a subsequent court fails to discharge its constitutional obligation to confront and decide the question before it; and (3) in making law through dictum, a court risks establishing ill-considered precedent. Judge Leval further argues that the Supreme Court's new command in Saucier v. Katz *that, before dismissing a constitutional tort suit by reason of good faith immunity, a court must first declare in dictum whether the alleged conduct violates the Constitution, is particularly ill-advised.*

> *A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word "hold."*
>
> —Henry J. Friendly, *United States v. Rubin*[1]

It is an overwhelming honor to be invited by this great school to deliver the James Madison Lecture. I am enormously grateful to Dean Revesz and Professor Dorsen. I am grateful to all of you who

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[1] 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring).

have come, including so many colleagues, clerks, family, and dear friends.[2]

I
THESIS

I am going to talk to you about something trivial. In the quaint language of eighteenth-century England, when judges elevated their status and authority by conducting their business in Latin, it was known as "obiter dictum"—in the plural, "dicta." This referred to a judge's insignificant aside remark—something to be treated lightly, or frankly, ignored. Cardozo in his time expressed amazement that judges, of all people, might "put their faith in dicta."[3]

Why would I talk about something so insignificant? The problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded. Although I think most agree in the abstract with the proposition that dictum does not establish binding law, this rule is now honored in the breach with alarming frequency. Today more and more, dicta flex muscle to which, I submit, they are not entitled by constitutional right.

We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding—in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess. Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided.

A. Two Examples

Consider two representative recent instances exemplifying two facets of the problem.

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[2] I am grateful to many who have generously offered me advice, guidance, encouragement, and in some cases stimulating disagreement. These include Professors Akhil Reed Amar, Ronald Dworkin, William W. Fisher III, Frank M. Tuerkheimer, and John Fabian Witt; my colleagues, Michael Boudin, Guido Calabresi, and Jon O. Newman; my clerks, Ben Allee, Peter Bibring, David Bitkower, Stephen Fuzesi, Michael Gerber, Janna Hansen, Jenny Huang, Allon Kedem, Daniel Kirschner, Lisa Marshall, Jedediah Purdy, and Thomas Saunders; and my wonderful secretary Joanne Falletta.

[3] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 29 (1921).

1. Barapind v. Enomoto[4]

Recently, one of the circuit courts of appeals convened en banc to review an order to extradite a Sikh militant to India to answer murder charges.[5] In an earlier extradition case involving an Irishman, Quinn, a panel of the same circuit, in dictum, had expressed views on one issue while deciding the case on a different basis.[6] The lower court judge in the Sikh's case disagreed with the *Quinn* panel's dictum and declined to follow it, as dictum is not binding.[7] The court of appeals chastised the judge for failing to follow its earlier dictum. "The [lower] court operated under a mistaken understanding of what constitutes circuit law. . . . [O]ur articulation [in *Quinn*] . . . became law of the circuit, regardless of whether it was in some technical sense 'necessary'[8] to our disposition of the case. The [lower court was] . . . required to follow [it]."[9]

According to this view, a court has the power to make binding law, at least on an issue argued by the parties, simply by announcing a rule, irrespective of whether the rule plays any functional role in the court's decision of the case—a very considerable power, and without constitutional justification.

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[4] 400 F.3d 744 (9th Cir. 2005) (en banc).

[5] *Id.* at 746–48.

[6] *See* Quinn v. Robinson, 783 F.2d 776, 810–14 (9th Cir. 1986). The *Quinn* opinion rejected Quinn's defense to extradition because he had failed to show the existence of an "uprising." The court also digressed in a lengthy discussion of when criminal conduct can be deemed "incidental" to an uprising, which discussion had no effect on the court's decision and was therefore dictum.

[7] *In re* Extradition of Singh, 170 F. Supp. 2d 982, 998 (E.D. Cal. 2001) ("The portion of *Quinn* that addresses the 'incidental to' prong is dicta and is only persuasive, non-binding authority.").

[8] Had the *Quinn* court's discussion of the meaning of "incidental" supported its judgment, this position would have been reasonable, even if the discussion was not strictly "necessary" to the *Quinn* decision. However, the *Quinn* court's articulation of the meaning of "incidental" was not only not "necessary" to its disposition; in fact, it played no role whatsoever in supporting the decision. Quinn would have defeated extradition if he had shown that his crime was "incidental" to an "uprising" and therefore a "political offense." As noted, the court ruled against him on the ground that there was no uprising. The court's additional discussion of the meaning of "incidental" did not give additional support for the judgment. To the contrary, this discussion supported Quinn, expressing the view that, had there been an uprising, his crime would have been "incidental" to it. The district judge in *Barapind* was correct in regarding this discussion as dictum and therefore not binding law.

[9] *Barapind*, 400 F.3d at 750–51 (citations omitted).

2. Myers v. Loudoun County Public Schools[10]

Also recently, another circuit decided (or should I say, "failed to decide") a constitutional challenge to the Pledge of Allegiance.[11] The plaintiff Myers, the father of a child in public school, contended that school recitation of the Pledge of Allegiance, with its invocation of God, violates the Establishment of Religion Clause of the First Amendment.[12] The Supreme Court had considered a similar attack just the previous term in *Elk Grove v. Newdow*.[13] In *Newdow*, the Supreme Court had dodged the divisive issue and dismissed the suit on the ground that the plaintiff, the divorced noncustodial parent of the affected schoolchild, lacked standing to challenge the practice.[14]

Notwithstanding that the Supreme Court had expressly left open the constitutional question, the majority of the circuit panel in *Myers* reasoned that it was compelled by prior Supreme Court opinions to uphold the Pledge—not by Supreme Court *holdings*, but by Supreme Court *dicta*.[15] One judge even made clear that, were it not for the binding force of the dicta, the judge would find the question very difficult because the Supreme Court's *holdings* were in conflict.[16]

I express no views about the merits of that case. My point is simply that the court had a duty to decide the case in accordance with law. If established law governed the question, the court was bound to follow the established precedent. If the established law was inconclusive, the court was obligated in the discharge of its constitutional duties to adjudicate the question—to wrestle with the issue and reach its own conclusion. It did neither.

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[10] 418 F.3d 395 (4th Cir. 2005).

[11] *Id.*

[12] *Id.* at 397.

[13] Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).

[14] *Id.* at 17–18.

[15] The three-judge panel issued three opinions. The lead opinion gave its own reasons for its decision, explaining that "[t]he history of our nation, coupled with repeated dicta from the Court respecting the constitutionality of the Pledge guides our exercise of that legal judgment in this case." *Myers*, 418 F.3d at 402. While the second opinion said that it joined the first in part, it explicitly disclaimed reliance on the historical analysis of the first opinion and explained its conclusion by reference to Supreme Court dicta to the effect that the Pledge does not violate the Establishment Clause and that its recitation is not a religious activity. *Id.* at 409 (Duncan, J., concurring) (citing dicta in *Newdow*, 542 U.S. at 5–6). The third opinion made clear it believed the plaintiff's attack on the Pledge was foreclosed by Supreme Court dicta. *See id.* at 410 (Motz, J., concurring) (acknowledging dicta and denying that court "need . . . search further than these assurances to resolve the issue before us").

[16] *See id.* at 409–11 (Motz, J., concurring) ("[W]ithout the Court's explicit guidance, this could be an extremely close case, requiring navigation through the Supreme Court's complicated Establishment Clause jurisprudence.").

B. *Not Opposed to Dicta*

It is difficult to make the point I advocate without being misunderstood as opposing the use of dictum. Let me make as clear as I can that I do not in the least oppose the careful use of dictum in judicial opinions. To the contrary, I believe that dicta often serve extremely valuable purposes. They can help clarify a complicated subject. They can assist future courts to reach sensible, well-reasoned results. They can help lawyers and society to predict the future course of the court's rulings. They can guide future courts to adopt fair and efficient procedures. What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.[17]

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[17] Several colleagues have been kind enough to offer me comments and critiques. My immensely admired colleagues, Judge Jon O. Newman, who serves as mentor to every judge of the Second Circuit, and Chief Judge Michael Boudin of the First Circuit, as fine a judge as can be found in the federal courts, both emphasized that dictum can often serve a valuable purpose. Judge Boudin stressed that dictum can serve as a useful limitation, narrowing the perceived breadth of a holding to avoid future overexpansion:

> Take as an example a court's statement, that facts *A* plus *B* plus *C* make out a claim (the holding) but, if *D* were present (which it is not), there would be no claim (the dictum). It seems to me that the dictum could be described favorably as *narrowing* the holding (*i.e.*, a claim is *A* plus *B* plus *C* minus *D*).

Memorandum from Michael Boudin to author (May 30, 2006) (on file with author).

I agree completely with Judge Boudin, and never intended to suggest the contrary. In holding that *A* plus *B* plus *C* makes out a claim, the court recognizes that the presence of *D* should change the result. It is highly desirable for the court to say so, lest future courts, facing the circumstance where *A*, *B*, *C*, and *D* are present, read the prior precedent too broadly, concluding that the presence of *A*, *B*, and *C* makes out the claim, regardless of *D*. My concern is the following. The court's perception that the presence of *D* would change the result may turn out to be oversimplified. When faced with a concrete dispute, the court may recognize important distinctions between *D* and *D'*. Perhaps the court will conclude that the result should change not in the presence of *D*, but rather in the presence of *D'*, something slightly different from the *D* it envisioned at the time of the earlier opinion.

I applaud the court's undertaking in dictum to warn that the presence of *D* is *likely* to change the result. But, in recognition of the heightened likelihood of mistakes when we speculate on hypothetical cases not before us, the court should make clear that this aspect of its discussion is dictum. It should not write in a manner that freezes the law with respect to facts the court has not yet confronted.

In a similar vein, Judge Newman commented:

> I wonder whether you ought at least to reckon with, if not agree with, the proposition that there is sometimes legitimacy for an appellate court to exercise supervisory authority over a group of trial courts by announcing procedural rules that are admittedly broader than necessary to decide the case at hand. An appellate court sees recurring procedural problems arising from several trial courts and has a perspective broader (not necessarily better) than any one district court.
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> . . . In *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981), an issue concerned the trial judge's handling of a note from the jury. At Judge Henry Friendly's urging (practically insistence), I wrote a lot of dicta setting forth a preferred procedure for dealing with jury notes. I suppose we could have just decided whether what happened in the pending case required a new trial or not and awaited the rule-makers to make "law." But this is not an area likely

> to engage the attention of rule-makers, and I think it was a good idea for us to give gratuitous advice to the district judges. Many have told me that they welcomed it. Of course, the rule-makers are free to come along at any time and supply traditional "law" if they don't like the panel's dicta. . . . [I]s that always bad? I suppose you might say that it isn't necessarily bad, but we should more candidly label our gratuitous advice dicta. But we really want the trial judges to [do what we advise]. Will they do so if we call it dicta?

Memorandum from Jon O. Newman to author (May 30, 2006) (on file with author).

1 remember well the issuance of Judge Newman's extraordinarily fine and thoughtful opinion in *Ronder*. I was a district judge and frequently needed to deal with notes from the jury. *Ronder* was immensely helpful. It was probably the first occasion on which a court had reflected carefully, in unhurried fashion, on the desirable procedures for handling a jury note. When district courts receive jury notes during deliberations, the atmosphere is generally tense, and the focus falls inevitably on providing the jury with rapid answers to its questions. District judges in these circumstances have little opportunity for unhurried reflection on the niceties of the procedures for the handling of the note.

Judge Newman's opinion was, without question, extraordinarily useful. Judge Newman had years of experience as a district judge. He is, furthermore, a person of exceptional intelligence who is prepared to give painstaking attention to the devilishly important, minute details of procedure. The procedures he promulgated in *Ronder* were admirable. I followed them rigorously for years thereafter and never found cause for complaint.

Nonetheless, I have some quarrels with the *Ronder* opinion. In his memo to me quoted above, Judge Newman says, "I wrote a lot of dicta setting forth a preferred procedure." *Id.* He describes the opinion as giving "advice" to district judges. But nothing in the *Ronder* opinion suggested that the discussion was dicta, or that it set forth "advice" regarding a "preferred" procedure, as opposed to a requirement. When I followed the *Ronder* procedure during the next decade, it never occurred to me that a deviation from *Ronder* would be viewed as anything but error. And on a few occasions when district judges failed to follow *Ronder* scrupulously, the court of appeals viewed these deviations as "error" because they failed to conform to the *Ronder* opinion, although perhaps harmless error. *See, e.g.*, United States v. Leung, 40 F.3d 577, 584 (2d Cir. 1994); United States v. Ruggiero, 928 F.2d 1289, 1300 (2d Cir. 1991); United States v. Blackmon, 839 F.2d 900, 915 (2d Cir. 1988); United States v. Johnpoll, 739 F.2d 702, 710–11 (2d Cir. 1984).

My quarrel with *Ronder* has two aspects. First, to the extent that the procedures dictated went beyond the holding of the case, I question whether the court of appeals possessed constitutional authority to establish a code of procedure binding on district courts—whether this was an exercise of the "judicial" power conferred by Article III. The fact that the subject was procedure, rather than substantive law, and that Congress rarely concerns itself with procedural rules, does not give the court authority to exercise legislative power.

But, more importantly, by declaring apparently binding rules, rather than recommending procedures in self-avowed, nonbinding dictum, the court seems to have defeated part of its purpose. The purpose should have been to encourage district judges, when dealing with jury notes, to reflect carefully on the best way of handling them. By couching its opinion in the form of promulgated rules, rather than as dicta recommending desirable procedures, the court likely squelched, rather than encouraged, future constructive thought. District judges (at least this one) regarded themselves as bound to follow *Ronder*'s prescription scrupulously. Had I encountered a situation in which I believed it preferable for good reasons to deviate from *Ronder* (I never did), I doubt I would have had the courage to risk reversal and having to retry the case for violation of what the court of appeals seemed to regard as binding rules. If Judge Newman were writing the *Ronder* opinion today and I were a member of his panel, I would applaud the procedures the opinion recommends but would urge that they be described as a nonbinding recommendation in dictum.

C. So What?

You might well ask, "So what? Are you wasting our time, Judge Leval, carping about technicalities? What does it matter whether a proposition becomes established as law when it is first uttered in a court's dictum, or later when it is uttered as a holding justifying the court's ruling?"

The distinction is not a mere technicality. It is by no means inevitable that rules initially expressed in gratuitous, nonbinding dictum would be ultimately adopted when it came time for the court to decide the issue. An important aspect of my point is that courts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases. The practices I discuss impair the quality and reliability of our performance. Giving dictum the force of law increases the likelihood that the law we produce will be bad law.[18]

My criticism is directed no less against myself than others. Insufficient attention to the distinction between holding and dictum and to the importance of the distinction has become endemic. This comes perhaps in part from a gradual change in the self-image of courts. Once, the perception of the judicial function was relatively modest—to settle disputes under an existing body of rules; judges were not seen as *making law* through their opinions, but rather as *finding* the common law, which existed already, waiting only to be discovered.[19]

Judge Newman's memo to me argues, "But we really want the trial judges to [do what we advise]. Will they do so if we call it dicta?" Memorandum from Jon O. Newman, *supra*. With all respect, I do not think this is a valid concern. Labeling a recommendation of procedure as dictum does not prevent the court from urging that it be followed. I believe there is little likelihood that district courts would disregard procedures recommended by the court of appeals or the Supreme Court simply because the recommendation was correctly identified as dictum. The more worrisome problem is that judges are too quick to treat the dicta of higher courts as binding law, not that they are too reluctant to follow them.

[18] In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Supreme Court wrote:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Id. at 399–400.

[19] *See, e.g.*, Willis v. Baddeley, (1892) 2 Eng. Rep. 324, 326 (Q.B.D.) ("There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been

Gradually, first with the advent of stare decisis, and with the central role courts have increasingly played in resolving important social questions, we have come to see ourselves as something considerably grander—as lawgivers, teachers, fonts of wisdom, even keepers of the national conscience. This change of image has helped transform dicta from trivia into a force. The second aspect of the problem—the acceptance of prior dictum as if it were binding law—results in some part from time pressures on an overworked judiciary, the ever-increasing length of judicial opinions, and the precision-guided weaponry of computer research—all of which contribute to our taking previously uttered statements out of context, without a careful reading to ascertain the role they played in the opinion.

D. Definition

I should pause to make sure we are on the same page as to the meaning of "dictum." A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner. If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum. The dictum consists essentially of a comment on how the court would decide some other, different case, and has no effect on its decision of the case before it.[20] If the court's function is to decide the case in accordance with the rules of law, explaining what are the rules

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authoritatively laid down that such law is applicable."); R.W.M. DIAS, JURISPRUDENCE 151 (5th ed. 1985) ("The orthodox Blackstonian view . . . is that judges do not make law, but only declare what has always been the law."); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1330 (1986) ("The Court's lawmaking [during most of the period prior to the Civil War] reflected its natural law perspective: it was not legislating; it was merely discovering true answers to unclear problems before it.").

20 When confronted with a precedent they consider wrong, or undesirable, courts sometimes advance narrow definitions of holding, which permit them to characterize the earlier precedent as dictum and circumvent it. Thus, courts have sometimes asserted that a holding consists of nothing more than the facts of the case, together with the result. Such a "holding" might be, for example, that where a plaintiff sued for breach of contract and the facts were *X*, *Y*, and *Z*, judgment was for the defendant. Under this approach, the court's reasoning is not considered part of the holding; it is treated as superfluous dictum. A fascinating article by Professor Michael Dorf recounts how the Supreme Court has repeatedly used this device to escape earlier precedents with which it has disagreed. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2009–24 (1994). Professor Dorf convincingly demonstrates that this device denudes judicial decisions of all useful content. *See id.* at 2035–40. No two cases ever have exactly the same facts. It is only by reference to the court's reasoning that one can determine whether the factual differences between the earlier case and the later one should change the result or be disregarded as immaterial.

that govern the decision, and explaining the interaction between those rules and the facts of the case, the utterance of such dictum is superfluous to the court's performance of its function.

To identify dictum, it is useful to turn the questioned proposition around to assert its opposite, or to assert whatever alternative proposition the court rejected in its favor. If the insertion of the rejected proposition into the court's reasoning, in place of the one adopted, would not require a change in either the court's judgment or the reasoning that supports it, then the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment.

I illustrate by reference to a hypothetical card game, with rules not yet clearly understood. Let's call it "Poker." The plaintiff has three Jacks; the defendant holds a pair of Queens. Each claims to have the winning hand. The court rules for three Jacks. In explanation, the court writes, "When held in equal numbers, Queens beat Jacks. But three-of-a-kind always beats a pair." The statement that Queens beat Jacks is superfluous to the court's reasoning, which explained the grant of judgment to the plaintiff by reason of the plaintiff's having three-of-a-kind. Were the statement turned around to state the opposite—that Jacks beat Queens—the court's grant of judgment in favor of the three Jacks, on the ground that three-of-a-kind beats a pair, would nonetheless stand unaltered. The statement of priorities between Jacks and Queens played no role in its award of judgment in favor of the three-Jack hand and was accordingly dictum.

To say that a court's statement is a dictum is to say that the statement is not the holding. Holding and dictum are generally thought of as mutually exclusive categories. However, it is not always immediately apparent at a glance whether a pronouncement of law is holding or dictum. One cannot tell by reading the statement in isolation, without reference to the overall discussion. The distinction requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment. A dictum is not converted into holding by forceful utterance, or by preceding it with the words "We hold that . . . ."[21] Judge Friendly cautioned, "A judge's power to bind

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In short, this formulation is nothing more than a cynical, rhetorical device for overruling, or escaping, the precedent of a prior opinion without forthrightly acknowledging doing so.

[21] Nor can the classification of a pronouncement of law be determined based on whether a subsequent court has described it as holding or dictum. The words, "In *Smith v. Jones*, the court held . . ." are often written without the slightest attention to whether the proposition was a holding or dictum. Frequently, it means no more than "the court wrote . . . ." And a subsequent court's description of an earlier proposition as dictum is

is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"[22]

I do not mean to imply that in all cases it is easy, or even possible, to reach a confident conclusion whether a statement should be considered dictum or holding. At times a proposition advanced by the court will support the court's decision to grant judgment to the plaintiff or defendant, but indirectly or remotely. There is no line demarcating a clear boundary between holding and dictum. What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum.[23]

Nonetheless, to say that the distinction between holding and dictum is sometimes murky does not mean that it is always murky. In many instances there can be no doubt that the proposition in question played no role in the court's justification of its judgment. Court opinions today are crammed full of such superfluous declarations of law. The remarks in this lecture are directed primarily to these vast deposits of dictum in contemporary jurisprudence.

E. Why Does This Matter?

Why do we care whether a rule announced by a court is dictum? The distinction between holding and dictum was always important to the common law tradition of fidelity to prior holdings. It took on a heightened importance with the adoption of the prudential rule known by the Latin phrase "stare decisis" (meaning "to remain decided"). This rule requires that once a court has decided a case based on a proposition of law, the court must thereafter adhere to that proposition of law, deciding like cases in like manner (unless it takes the rare step of disavowing and overruling the proposition).

Stare decisis inevitably results in courts having some lawmaking power. If the court is obliged to adhere to its prior decisions, every

often attributable to a motivation to diminish the status of the prior pronouncement, rather than to a reasoned justification.

[22] United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring).

[23] As to utterances falling within this zone, it is unclear to what degree a future court should consider itself bound by them. When the statement forms a part of the line of reasoning supporting the judgment, but a remote or tangential part, subsequent rulings are less clearly bound to adhere to it than to a statement that lies at the core of the court's reasoning. The same may be true when the court relies on two or more lines of reasoning to support judgment, so that the judgment would be the same regardless of the second line of reasoning. Courts often give less careful attention to propositions uttered in support of unnecessary alternative holdings. Conversely, the closer an assertion comes to the court's justification for its ruling, the less easily it may be avoided, even if it can, with arguable justification, be considered dictum.

decision becomes a part of binding law. But it was not the purpose of stare decisis to *increase* court power. To the contrary, the rule was intended as a limitation on the courts. It was designed to keep courts principled and consistent—to prevent courts from acting arbitrarily or capriciously, deciding the same facts one way in Jones's case and another way in Smith's case. The idea behind it was that courts would better perform their assigned function of deciding cases if compelled to decide them consistently.

Stare decisis requires a court to adhere only to its decisions—its holdings—not to any utterance the court may make. It thus becomes of great importance to distinguish between a court's *holdings*, which become binding law for the future, and its *dicta*, which at least in theory do not.

F. Questions

I pose two questions. First: Is judicial lawmaking through dictum consistent with the powers and duties of courts prescribed by the Constitution? Second: Is the treatment of dictum as established, binding law consistent with common sense and sound judicial practice? I believe the answer to both questions is "No."

II
THE CONSTITUTION

What does the Constitution have to say that bears on making law by dictum? It does not address the subject directly. Nonetheless, the Constitution's message is forceful, if oblique and terse. The only role granted to the federal courts in Article III was to exercise "the judicial power" in "Cases" and "Controversies."[24] What does this mean? The constitutional function of the courts is to adjudicate—to decide cases. The Constitution does not explicitly grant to courts the power to make law. The power to make law generally is encompassed in the words, "All legislative powers," and was vested by Article I, Section 1, in the Congress.[25]

Needless to say, courts do legitimately make law under the Constitution. But they do so not because the Constitution conferred lawmaking power on them. It didn't. They do so only because the rule of stare decisis evolved to require that courts judge consistently. Given that the court's sole constitutional authority is to decide cases, what should we make of the constitutional legitimacy of lawmaking through proclamation of dicta? It is simply without justification.

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[24] U.S. CONST. art. III, § 1.

[25] *Id.* art. I, § 1.

Courts make law only as a consequence of the performance of their constitutional duty to decide cases. They have no constitutional authority to establish law otherwise.

What if we in the Second Circuit, without any filed dispute between parties, were to publish a tract entitled *In re Securities Litigation*, in which we promulgated a compendium of rules to govern securities cases? I think all would agree that we lack constitutional authority to establish binding law in this fashion.

Then what if, when a securities dispute comes before us, after giving judgment on the disputed issue, we go on to say, "Having focused our attention on the subject of securities litigation, we will go beyond the particular issue in dispute and proclaim a set of rules to be followed." Is this meaningfully different from the previous example?

The ordinary instance of courts making law through dictum is less blatant—better disguised, more interwoven with the issues in dispute—but essentially not different. It is beyond our authority.

III
PRACTICAL CONSIDERATIONS OF STRUCTURAL LIMITATIONS

I turn now to practical considerations, which reinforce the wisdom of this constitutional structure. How well do courts do their job when dictum is treated as holding? In their structure and manner of operation, courts are poorly equipped to promulgate law, and even more poorly equipped to do so in dictum. When they make law in dictum, the likelihood is high that it will be bad law.[26]

A. Structure of Courts As Lawmakers

Brandeis observed that "[c]ourts are ill-equipped to make the investigations which should precede" legislation.[27] Think what a lawmaking body should do before promulgating laws. By their structure and manner of operation, courts lack the ability to perform those tasks. If we were designing an ideal body to promulgate laws for society, it would not look at all like a federal court.

The ideal lawmaking body would be designed to undertake a broad, integrated study of the area requiring attention. It would issue public notices so that affected persons could make submissions and

[26] I will not discuss in this lecture the problems for democratic governance that arise if judges, appointed for life, exercise the power to make law simply by writing it into their decisions, regardless of whether the newly declared rule plays a role in the decision of the case.

[27] Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting).

participate in hearings. It would seek advice from experts. It would employ a staff to make a detailed, independent study. It would deliberate and wait as long as it considered useful before promulgating a new rule.

A court functions very differently. It focuses on whatever fragmentary portion of an area of law the case of the moment happens to place before it. Usually, the only input the court receives is from the litigants.[28] The court is barred from researching the facts privately on its own.[29] It rarely employs neutral experts.[30] It works with a tiny staff, whose attention is spread over the multitude of cases and areas on which the court will need to rule. And the court is under pressure to make its adjudication promptly after the submission of the case.

The poor design of courts for the task of lawmaking suggests that lawmaking by courts is best limited to where the lawmaking inescapably results from the court's performance of its duty to decide the case. This is never true when law is made by dictum, which is always—by definition—superfluous to the court's performance of its job.

B. Structure with Regard to Dictum

However poorly courts are designed for lawmaking generally, their structural limitations particularly disfavor lawmaking through dictum. Why? A number of reasons:

1. Absence of Briefing and Adversity

Our readiness to trust a court's rulings of law depends on the assumption that the adverse parties will each vigorously assert the best defense of its positions. The court reaches its decision only after confronting conflicting arguments powerfully advanced by both sides. When, however, the court asserts rules outside the scope of its judgment, that salutary adversity is often absent. In many instances the court will have no briefing whatsoever on the issue, because the par-

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[28] In limited circumstances, courts also receive briefing from amici. *See* FED. R. APP. P. 29.

[29] The court may call its own witness to the stand. *See* FED. R. EVID. 614(a)–(b). But the court is not at liberty to do private fact research to discover who has knowledge of the facts and what they know.

[30] The court may appoint an expert pursuant to Rule 706 of the Federal Rules of Evidence or its inherent authority. *See Ex Parte* Peterson, 253 U.S. 300, 312 (1920) (Brandeis, J.) (upholding decision of Judge Augustus Hand to appoint auditor because "[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties"). However, this power is exercised infrequently. *See* JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 7–23 (1993).

ties usually have no interest in a question whose resolution will not affect the result of their case.

2. Concreteness

Conditions that best favor lawmaking by courts are those where the dispute is framed by concrete facts. Two of the most difficult challenges in lawmaking are understanding the facts that call for regulation and understanding what effect the imposition of any rule will have on those facts. When the assertion of a proposition of law determines a case's outcome, the court necessarily sees how that proposition functions in at least one factual context, at least with respect to the immediate result.

In contrast, when a court asserts a rule of law in dictum, the court will often not have before it any facts affected by that rule. In addition, the lack of concrete facts increases the likelihood that readers will misunderstand the scope of the rule the court had in mind.

3. The Lack of Appeal

Another weakness of law made through dicta is that there is no available correction mechanism. No appeal may be taken from the assertion of an erroneous legal rule in dictum. Frequently, what's more, no party has a motive to try to get the bad proposition corrected. No party will even ask the court to reconsider its unfortunate dicta.

4. Insufficient Judicial Scrutiny

My experience as a judge has shown me that assertions made in dictum are less likely to receive careful scrutiny, both in the writing chambers and in the concurring chambers. When a panel of judges confers on a case, the judges generally focus on the outcome and on the reasoning upon which the outcome depends. Judges work under great time pressure. When the concurring chambers receive the writing judge's draft for their review, they are likely to look primarily at whether the opinion fulfills their expectations as to the judgment and the reasoning given in support. There is a high likelihood that peripheral observations, alternative explanations, and dicta will receive scant attention.

Of cardinal importance to this point is Leval's rule of restaurant selection: *If a restaurant's location assures that customers will come whether the food is good or bad, it will be bad.* This is a corollary of a broader rule: *Stuff you get for free ain't worth more than you paid for it.* The rule applies loosely to dicta.

When a court justifies a judgment in favor of the plaintiff or the defendant, the court necessarily confronts the cautionary realization that the rule relied upon determines the outcome of the litigation. The court metaphorically "pays the price" of the rule it has declared. When a rule is uttered in dictum, the court pays no price; the statement comes free, as it has no consequence for the case. In my experience, when courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged. They are far more likely in these circumstances to fashion defective rules, and to assert misguided propositions, which have not been fully thought through.

I cannot tell you how many times I have read briefs asserting an improbable proposition of law and citing a case as authority. The proposition sounds so dubious that I immediately look it up to see if the cited court can really have made this ruling. So often I find the proposition is indeed there, but was uttered in dictum—where the court paid no price, and consequently paid little attention.

IV
WHERE DICTA ARE FOUND

We will now explore briefly where abuses of dictum are commonly found—and why.

A. Question Beyond the Case

Among the most common manifestations of disguised dictum occurs where the court ventures beyond the issue in controversy to declare the solution to a further problem—one that will arise in another case, or in a later phase of the same case.

Why do we judges do this? Don't we have enough work deciding the controversies before us? The reasons are numerous and grow in part out of our human frailties. (1) At times our exuberance for a point of view gets out of hand. (2) At times we may devise a strategic gambit in ideological warfare. We may reach beyond the case in order to preempt colleagues who might later decide a further issue in a manner not to our liking. (3) You will surely be amazed at the further suggestion that judges may at times be prey to vanity. Like professors, we have not been encouraged to view ourselves modestly. (We judges at least are reversed from time to time.) A judge tends to think, "I've looked at this stuff closely and I understand it. It will come out better if I cover these questions now, rather than leaving them to whatever (perhaps less thoughtful) judge comes along next." (4) We are tempted also by the seductive lure of establishing the landmark precedent, which, like the great opinions of Hand and

Friendly, will be repeatedly cited as the authoritative guidepost for the area. We think the further we venture in the opinion, the more likely it is to achieve landmark status. We fail to recognize how likely we are to make mistakes when addressing issues beyond the scope of the decision.

Let's look at an illustrative instance. A banner event in the annals of disguised dictum was one of the Supreme Court's first examinations of the antidiscrimination legislation known as Title VII—*McDonnell Douglas Corp. v. Green.*[31] The plaintiff alleged that the company's refusal to hire him was the result of race discrimination, but the district court dismissed the claim on the ground that the EEOC had not found reasonable cause supporting the allegation.[32] The district court's dismissal depended both on the conclusion that the EEOC had not found reasonable cause and that such a finding was a prerequisite to suit.[33] The Supreme Court found there was no such prerequisite. It was therefore necessary to vacate the judgment of dismissal and remand for trial.[34]

That should have been the end of the case. The Court might have simply waited to review subsequent litigation emerging under Title VII, affirming good decisions and reversing bad ones. It might, in other words, have behaved as a court. Instead it undertook, gratuitously, in legislative fashion, and in dictum, to declare new standards to govern Title VII litigation.[35] The Court concocted a three-stage construct, worthy of Rube Goldberg. It starts with a unique minimalist prima facie case, which can be satisfied without any evidence of discrimination.[36] The plaintiff's satisfaction of this minimalist prima facie standard gives rise to a first burden shift—a temporary presump-

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[31] 411 U.S. 792 (1973).

[32] *Id.* at 797.

[33] *Id.* at 798–800.

[34] *Id.* (agreeing with court of appeals that "absence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII and that the District Judge erred" and "[a]ccordingly . . . remand[ing] the case for trial of respondent's claim of racial discrimination consistent with the views set forth below"). The Supreme Court's decision included another issue as well, which is of no consequence for this discussion. *Id.* at 799–800.

[35] *Id.* at 800–06.

[36] *Id.* at 802–03; Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); *see also* Fisher v. Vassar Coll., 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc). A plaintiff may establish the minimalist prima facie case by showing membership in a protected class, qualification for the job, an adverse employment action, and a preference given to a person not of the preferred class. *See* Farias v. Instructional Sys., Inc., 259 F.3d 91, 98 (2d Cir. 2001); *Fisher*, 114 F.3d at 1335. Unlike other areas of the law, under this framework, the prima facie case is a minimal requirement, which is met without evidence sufficient to establish the essential element of discriminatory motivation. *See Fisher*, 114 F.3d at 1337.

tion in favor of the plaintiff.[37] The defendant's presentation of an explanation for its action then gives rise to a second burden shift—dissipating the initial temporary presumption.[38] Thereafter the plaintiff must satisfy a conventional prima facie standard of proof, offering evidence sufficient to support a finding of discrimination.[39] This construct has confused—nay bewildered—lawyers, judges, juries, and everyone who has tried to deal with it (including the Supreme Court) for now over thirty years.[40] Wouldn't the law have developed more sensibly had the Supreme Court simply decided cases as they arose?[41]

B. The Counterfactual Hypothesis

Another version is the contrary-to-fact hypothetical. While explaining a ruling in favor of the winner, courts often add that *if the facts had been otherwise*, the court would have ruled the other way. At times, judges seem to be motivated by an emotional need to demonstrate that they are not biased against such claims; had the facts only been slightly different, the ruling would have been for the adversary. This is a dangerous practice, which can easily engender bad law.

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[37] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981); *Fisher*, 114 F.3d at 1335.

[38] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993); *Burdine*, 450 U.S. at 255; *Fisher*, 114 F.3d at 1335–36. To shift the burden back to the plaintiff, the defendant must "come[ ] forward with a non-discriminatory reason for the action complained of," failing which, judgment will be awarded to the plaintiff. *Fisher*, 114 F.3d at 1335.

[39] *See Hicks*, 509 U.S. at 507; *Fisher*, 114 F.3d at 1336. Once the defendant articulates its non-discriminatory reason, all presumptions drop away. "The question becomes the same question asked in any other civil case: Has the plaintiff shown, by a preponderance of the evidence, that the defendant is liable for the alleged conduct?" *Id.*; *see Reeves*, 530 U.S. at 142; James v. N.Y. Racing Ass'n, 233 F.3d 149, 153–54 (2d Cir. 2000).

[40] *See, e.g.*, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713–14 (1983).

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.

Id.; *see also* Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004) ("Explaining [the burden shifting framework] to the jury in the charge, we believe, is more likely to confuse rather than enlighten the members of the jury.").

[41] "The purpose of the *McDonnell Douglas* framework is to force the defendant to give an explanation for its conduct, in order to prevent employers from simply remaining silent while the plaintiff founders on the difficulty of proving discriminatory intent." *Fisher*, 114 F.3d at 1335. This elaborate, confusing construct, which the Supreme Court devised in dictum, could have been completely avoided had the Court simply specified, in an appropriate case, that a plaintiff is entitled to discovery of the defendant's purported reason for the adverse employment action before having to defend against a motion for summary judgment. In the end, the *McDonnell Douglas* construct, with all its complications, accomplishes nothing more than forcing the defendant to give a reason for its adverse action before the plaintiff must defend against such a motion.

An interesting example is *Sony Corp. of America v. Universal City Studios, Inc.*[42] In determining whether the emerging technology for videotaping television transmissions should be considered a contributory infringement of copyrighted programs, the Supreme Court considered whether fair use would protect a family's recording of a program, so as to permit the family to watch it at a more convenient hour.[43] Emphasizing that such copying would be done without commercial exploitation, the Court concluded it would not be considered infringing.[44] It added unnecessarily that "every *commercial* use of copyrighted material is presumptively an unfair exploitation of the [copyright] privilege."[45]

This last observation was pure dictum and involved all of dictum's weaknesses. It sounded good, but it seriously misunderstood the law. The vast majority of publications are commercial. Whether commercial copying of copyrighted material infringes or is a fair use depends on context. Newspapers, book reviews, biographies, histories—they are all published commercially for profit. They regularly quote from protected material in such manner that the quoting work does not compete in the original work's market and receives fair use protection.

This unfortunate dictum in *Sony*—stated as if the Supreme Court were proclaiming a rule of law—introduced confusion which plagued the understanding of copyright doctrine for ten years, until the Court finally mopped up the mess in *Campbell v. Acuff-Rose Music, Inc.*[46]

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[42] 464 U.S. 417 (1984).

[43] *See id.* at 443–55.

[44] *See id.* at 451.

[45] *Id.* (emphasis added) ("Thus, although every commercial use of a copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.").

[46] 510 U.S. 569, 583–85 (1994).

> Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of [the fair use statute], including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country.

Id. at 584 (internal quotation marks omitted); *see also* Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19–21 (1994) (describing confusion that arose from inconsistent application of *Sony* rule and suggesting that *Campbell* had "fixed the rudder and restored the compass bearing"); Pierre N. Leval, *Fair Use Rescued*, 44 UCLA L. REV. 1449, 1454–56, 1460–66 (1997) [hereinafter Leval, *Fair Use Rescued*] (same).

Without doubt, in some circumstances there can be good reason for suggesting the limitations of the rule that compels the particular judgment—to lessen the risk that the holding will be read too broadly. While the practice is surely useful, it carries the risks I have described of inadequate consideration. The court should make clear that its specification of the limits of the doctrine is dictum, and thus open for rethinking.[47]

C. Erudite Opinions and Gratuitous Statement of Standards

Another pernicious stimulus for making law through dictum lies in the desire of us judges to appear erudite and to demonstrate our subservience to law by copious recitation of legal rules. Rather than focus simply on the identification of what is in dispute and the explanation of our decision, buttressed by citation of supporting authority, we engage in unnecessary, discursive, scholarly discussions of doctrine; we gratuitously recite standards of law that are not in dispute and have no effect on the judgment.

As a tiny, but recurring example, for every issue considered in courts of appeals, we pronounce ritualistically that our review is "de novo," or "for abuse of discretion," even where it makes no difference in the case because we conclude there was no error of any sort. It is the fashion in appellate decisions today to proclaim the standard that governs the type of questions, even when the particular standard announced will have no bearing on the resolution of the dispute. Characteristically, a statement of a standard will be lifted without examination from a prior opinion. We think this practice is harmless. After all, we are doing nothing more than correctly stating a rule of law.

If these superfluous pronouncements were indeed always correct, there would be no problem. Unfortunately, however, law is endlessly complex and subtle. You surely recall Seneca's undying maxim, "*Contextum omnia est.*" (How's that for a judge's erudition? If you do not recall it, that is because I made it up. Whatever Seneca may have said, as the context changes, the meaning changes.) When we thoughtlessly copy a statement of law from a prior opinion in a manner that determines nothing in the case before us, we risk misunderstanding the context and getting it wrong, introducing confusion and error.

Particularly to be feared is the scholarly, treatise-type opinion, which for no good reason lectures on the nature and origins of the doctrine, making pronouncements that have no consequence for the

[47] *See supra* note 17 and accompanying text.

dispute. Although the court generally believes it is correctly explaining non-controversial matters, the practice is risky.[48]

D. Other Non-Dispositive Determinations

The dangers of dictum uttered without "paying the price" are also present in two other common circumstances: first, when an appellate court asserts that a ruling below was error, but goes on to affirm because the error was harmless; and second, when the court asserts there was no error as to some of the claims on appeal, but ultimately goes on to reverse on another basis. None of the original assertions affects the judgment. They come for free. Because they have no consequences for the judgment, such pronouncements are often glibly uttered, without careful scrutiny, and are therefore often mistaken.

Courts should recognize these types of statements as dictum and so label them. Indeed in some cases, unless the court is confident that what was done below was error, it might in some circumstances be best to hedge the assertion of error, or omit it.

V
ACCEPTANCE OF DICTA

I have discussed problems a court creates by generating disguised dictum. However grievous the errors a court commits when it writes

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[48] For example, in both *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), and *Sony*, 464 U.S. 417, the Court indulged in lengthy expositions of the history and nature of fair use doctrine. In both cases the Court characterized fair use as an "equitable rule of reason." *Sony*, 464 U.S. at 448 & n.31; *Harper & Row*, 471 U.S. at 550 n.3 (quoting *Sony*, 464 U.S. at 448). That characterization, drawn from the House of Representatives Report on the 1976 Copyright Act, was dictum—it had no bearing on either decision. It was also probably incorrect. As the leading scholar of fair use has demonstrated, fair use was not a product of the equity courts. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 4–5 (2d ed. 1995).

The error has caused substantial misunderstanding of fair use doctrine. The Supreme Court probably meant no more than that fair use depends on many factors and is not easily defined with precision. Calling it "equitable," however, implied that it is affected by the traditional range of equity factors. These factors have no proper role in what is really a question about the nature and limits of the author's copyright. When a commentator quotes from a prior work in a transformative manner and context, so that the secondary work does not offer itself as a market substitute for the prior work, the copyright of the quoted author should not stand in the way of the distribution of the quoting work. The copyright law creates property rights in authors, which are intended to enrich society's opportunity to obtain the benefit of the publication of instructive, culturally enriching works. The question whether there is infringement should turn on the scope of the copyright in relation to the allegedly infringing material, and not on whether the primary author, and the quoting author, have behaved nicely in their business dealings. The Supreme Court's dicta unnecessarily and erroneously characterizing fair use as an "equitable doctrine" has caused considerable confusion. *See* Leval, *Fair Use Rescued*, *supra* note 46, at 1456–58.

dictum disguised as holding, those errors would be neutralized if the next court would recognize the prior dictum as nonbinding and go on to grapple with and decide the issue. In this regard, however, we have been woefully inadequate. As a general proposition, if it is set down in black and white in a prior court opinion, we treat it as a holding—even to the point of using the words, "We *held* in such and such case." Unless a court disagrees with the earlier statement and is eager to reject it, the court often does not make the effort to determine whether the proposition was in fact a holding. So, as Frankfurter put it, with "progressive distortion," "a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision."[49]

Why do subsequent courts accept earlier dicta as holding? Once again, we are human. Part of being human is to be pleased when an exceedingly demanding job is made a little easier. Cardozo observed, "Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully."[50] Determining whether a statement of law is holding or dictum can be a time-consuming task. You must read the full opinion, understand what were the facts, what question was in dispute, how the court resolved it, and what role the proposition played in justifying the judgment. Far easier to have the magic carpet of computer research whisk you straight to the pertinent sentence of the prior opinion and to write, "In such and such case, the court held . . . ." We do it unaware. I am sure I have done this a thousand times.

A second foible which encourages the practice is a lower court's worry that a higher court may react harshly if its pronouncement is rejected as dictum. Remember in *Barapind v. Enomoto*,[51] the Sikh extradition case, the scolding the circuit court gave the lower court when it properly declined to follow a circuit dictum it believed was wrong.[52]

The Supreme Court's decision in *Boykin v. Alabama*[53] demonstrates the mess that can result from failure to identify the holding of a meandering opinion which makes assertions on questions not before the court. In *Boykin*, the defendant, who had been sentenced to death in the Alabama courts based on his plea of guilty to charges of robbery, appealed, contending that his plea was void because he

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[49] United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting), *overruled by* Chimel v. California, 395 U.S. 752, 760 (1969).

[50] CARDOZO, *supra* note 3, at 29.

[51] 400 F.3d 744 (9th Cir. 2005) (en banc).

[52] *See supra* Part I.A.1.

[53] 395 U.S. 238 (1969).

lacked the requisite state of mind to enter a guilty plea.[54] At the taking of the plea, the trial judge had "asked no questions of petitioner concerning his plea, and petitioner did not address the court."[55] The issue before the Court was whether the sufficiency of the defendant's mental state must be demonstrated at the time of the taking of the guilty plea, as the defendant argued and the Supreme Court held, or could be demonstrated in an after-the-fact hearing, as the State and the dissenters argued. In an opinion written by Justice Douglas, the Supreme Court set aside the conviction.[56]

As the Supreme Court explained in a later case,[57] the requirement that a plea of guilty must be intelligent and voluntary had long been recognized. The new element added in *Boykin* was the requirement that this state of mind be established in the record at the taking of the plea. From a reading of the majority opinion, however, it is nearly impossible to discern what question was in dispute and what was the holding. Much of the majority opinion is dedicated to a confusing discussion of the mental state required to support a plea and the importance of the rights a defendant surrenders by pleading guilty.

At least twice the opinion refers to the traditional requirement that the plea be entered intelligently and voluntarily.[58] In the middle of the opinion, however, the Court turns to the importance of three constitutional rights the defendant would have enjoyed at trial had he not pleaded guilty. The Court stated:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.[59]

Although the dispute before the Supreme Court did not involve specification of the mental state a defendant must possess in order to enter a valid plea of guilty or the points that must be covered in the allocution,[60] the quoted paragraph seems to imply that the plea pro-

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[54] *Id.* at 239–41.

[55] *Id.* at 239.

[56] *Id.* at 244.

[57] Brady v. United States, 397 U.S. 742 (1970).

[58] *Boykin*, 395 U.S. at 242, 244.

[59] *Id.* at 243 (citations omitted).

[60] Boykin's brief to the Supreme Court, while arguing that the record did not demonstrate that his plea was knowing and voluntary, never suggests that the trial court was required to establish the waiver of particular trial rights. Brief for the Petitioner at 25–31, *Boykin*, 395 U.S. 238 (No. 642), 1968 WL 129462, at *25–31.

ceeding must include a showing that the defendant "waived" the three trial rights mentioned.[61] As the issue in dispute implicated only the *timing* of inquiry into the defendant's mental state and not the *elements* of the required mental state, the dissenting opinion does not even mention the seeming suggestion that the plea proceeding must include mention of those three rights.

The majority presumably did not intend to lay down a new constitutional rule on the required mental state; if it had, the sudden requirement that the defendant understand the trial rights regarding jury, confrontation, and self-incrimination, over and above the traditional requirement that the plea be intelligent and voluntary, would have been extremely odd and arbitrary. At trial a defendant exercises numerous constitutional rights. These include the due process rights to the presumption of innocence,[62] need for proof beyond a reasonable doubt,[63] right to present a defense,[64] and the right to testify,[65] as well as Sixth Amendment rights to a speedy and public trial,[66] compulsory process,[67] notice of the charges,[68] and assistance of counsel.[69] While the trial rights mentioned in *Boykin* regarding jury, confrontation, and self-incrimination are undoubtedly important, they are no more important than several of the other constitutional trial rights. The *Boykin* opinion offered no explanation for requiring mention of those particular rights in preference to others.[70]

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[61] Such a reading is at odds with other passages in *Boykin* that seem to require only that the plea be intelligent and voluntary, without any mention of particular rights. It also is in tension with footnote seven of the *Boykin* opinion, in which the Court quoted with apparent approval a state court description of what a guilty plea allocution should include, which did not include any mention of the rights of confrontation and against self-incrimination. *See Boykin*, 395 U.S. at 244 n.7 (quoting Commonwealth *ex rel.* West v. Rundle, 237 A.2d 196, 197–98 (Pa. 1968)).

[62] *See* Estelle v. Williams, 425 U.S. 501, 503 (1976).

[63] *In re* Winship, 397 U.S. 358, 364 (1970).

[64] Washington v. Texas, 388 U.S. 14, 19 (1967).

[65] *See* Rock v. Arkansas, 483 U.S. 44, 49 (1987).

[66] U.S. CONST. amend. VI.

[67] *See Washington*, 388 U.S. at 18.

[68] *See, e.g.*, *In re* Ruffalo, 390 U.S. 544, 550–51 (1968).

[69] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[70] The *Boykin* opinion no doubt singled out those three rights because, two months earlier, the Court had stated in *McCarthy v. United States*, 394 U.S. 459 (1969), with respect to guilty pleas governed by Rule 11 of the Federal Rules of Criminal Procedure, that "[a] defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers," *id.* at 466. However, the *McCarthy* Court was simply giving examples of rights waived by a guilty plea; it did not suggest that a guilty plea must include the waiver of those particular rights. In *McCarthy* itself, the Court reversed a judgment of conviction pursuant to a guilty plea because the district court had failed to address the defendant personally as required by Rule 11. *Id.* at 464, 471–72. As in *Boykin*, the question of whether specific rights had to be waived in a guilty plea was not before the

The *Boykin* majority probably had no intention to alter the understanding of the state of mind necessary to enter a guilty plea. But the meandering opinion, which at times seems to assert new rules on the subject, together with the failure of subsequent readers to focus on what was at issue in the case, has left a wake of confusion. While the courts of appeals and the Supreme Court have not read *Boykin* as mandating that the plea procedure demonstrate waiver of the specific rights mentioned in *Boykin*,[71] Congress amended the Federal Rules of Criminal Procedure in 1975 in the belief that *Boykin* required a court to establish a defendant's understanding of particular trial rights at a guilty plea colloquy.[72] Numerous states have followed suit, requiring

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Court. At the time of the *McCarthy* decision, Rule 11 did not require mention of the three rights identified by the Court. *See McCarthy*, 394 U.S. at 462; FED. R. CRIM. P. 11, 18 U.S.C. app. § IV (1970) (indicating that rule last amended on February 28, 1966). Nonetheless, there is no indication that the *McCarthy* Court considered that version of Rule 11 to be constitutionally unsound.

[71] *See, e.g.*, Brady v. United States, 397 U.S. 742, 756 (1970); Hanson v. Phillips, 442 F.3d 789, 798 (2d Cir. 2006) (citing *Boykin* for proposition that guilty plea must be intelligent and voluntary and noting that *Boykin* does not impose "any particular interrogatory 'catechism'" on state courts); United States v. Stewart, 977 F.2d 81, 85 (3d Cir. 1992) ("[A] defendant has the burden of persuasion to establish that a plea was neither intelligent nor voluntary. However, the failure to specifically articulate the *Boykin* rights does not carry the day for the defendant if the circumstances otherwise establish the plea was constitutionally acceptable."); United States v. Simmons, 961 F.2d 183, 187 (11th Cir. 1992) ("[A] trial court may sufficiently apprise a defendant of the consequences of his plea without obtaining express waivers of his right to confront adverse witnesses and his right against compulsory self-incrimination."); United States v. Henry, 933 F.2d 553, 559–60 (7th Cir. 1991) (holding that defendant's two prior guilty pleas in state court were valid under *Boykin* despite fact that neither guilty plea colloquy affirmatively disclosed that defendant waived his privilege against self-incrimination); Fontaine v. United States, 526 F.2d 514, 516 (6th Cir. 1975) ("*Boykin* does not require separate enumeration of each right waived and separate waivers as to each."); Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974) ("[W]e hold that *Boykin* does not require specific articulation of the . . . three rights [mentioned in *Boykin*] in a state proceeding."); Todd v. Lockhart, 490 F.2d 626, 628 & n.1 (8th Cir. 1974) ("*Boykin* does not require the express articulation and waiver of the[ ] three rights at the time the plea is entered."); McChesney v. Henderson, 482 F.2d 1101, 1106 (5th Cir. 1973) ("[T]here is no express requirement that specific articulation of the three constitutional rights [mentioned in *Boykin*] be given to the accused at the time of the acceptance of a plea of guilty, but it is necessary that the record show that the guilty plea was intelligently and voluntarily made."); Stinson v. Turner, 473 F.2d 913, 916 (10th Cir. 1973).

> We feel that *Boykin* imposed only that requirement of an affirmative record showing of a voluntary and intelligent plea. The remainder of the opinion does expressly discuss the three enumerated constitutional rights. We feel, however, that these rights were set out to demonstrate the gravity of the trial court's responsibility, but that no procedural requirement was imposed that they be enumerated. The main purpose is to make sure the accused has full understanding of what the plea connotes and of its consequence.

Stinson, 473 F.2d at 915 (internal quotation marks and alterations omitted).

[72] When *Boykin* was decided, Rule 11 required a federal judge to establish that a "plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." *Brady*, 397 U.S. at 744 n.3. In 1974, the Supreme Court approved a new version

their courts to establish a defendant's understanding of the rights mentioned in *Boykin* before accepting a guilty plea. In short, the *Boykin* dictum has generated tremendous confusion and misunderstanding as to what is constitutionally required at a guilty plea proceeding.

As another less consequential example, I sat on a panel recently which considered the sufficiency of a pleading of a stockholder's derivative action. Back in 1978, a panel of our court said in dictum that this particular issue of sufficiency was reviewed for "abuse of discretion."[73] Thereafter, several panels repeated the phrase in dictum, sometimes incorrectly adding, "We have repeatedly held . . . ."[74] The proposition is surely wrong. It cannot be a matter of a district judge's discretion whether a complaint is legally sufficient to state a claim.[75] Thoughtless repetition should not convert a dictum into law, but it manages to do so.

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of Rule 11 and sent that proposed version to Congress. The Rule 11 colloquy requirements suggested by the Supreme Court required that a judge establish the defendant's understanding of the right to trial, but did *not* require that there be any mention of the right to confront witnesses or the privilege against self-incrimination. The Supreme Court's proposed Rule 11(c) stated:

> The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
> (1) the nature of the charge to which the plea is offered; and
> (2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and
> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271, 275 (1974). However, the language finally adopted by Congress, in conformity with the recommendations of the House of Representatives Judiciary Committee, required a federal judge accepting a guilty plea to establish that the defendant understands not only his right to plead not guilty, his right to be tried by a jury, and his right to assistance of counsel, but also the right to confront witnesses and the privilege against self-incrimination. *See* FED. R. CRIM. P. 11(c)(3). The Judiciary Committee explained that "it believed that the warnings given to the defendant ought to include those that *Boykin v. Alabama*, 395 U.S. 238 (1969), said were constitutionally required." H.R. REP. NO. 94-247, at 7 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 674, 679; *see also* United States v. Henry, 713 F. Supp. 1182, 1185–87 (N.D. Ill. 1989) (discussing meaning of *Boykin* and its effect on requirements of Rule 11).

[73] Elfenbein v. Gulf & W. Indus., Inc., 590 F.2d 445, 451 (2d Cir. 1978).

[74] *See, e.g.*, Kaster v. Modification Sys., Inc., 731 F.2d 1014, 1018 (2d Cir. 1984); Lewis v. Graves, 701 F.2d 245, 248 (2d Cir. 1983).

[75] *See* Scalisi v. Fund Asset Mgmt., L.P., 380 F.3d 133, 137 n.6 (2d Cir. 2004) (suggesting that review should be de novo).

VI
SUPREME COURT DICTA

What about Supreme Court dicta? Some who would agree with my point as applied to the inferior courts would assert that things are different when it comes to the Supreme Court. It is sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling.[76] Various reasons are given: Great respect is owed to the Supreme Court; it always sits en banc, assuring that all of its Justices have participated in whatever it decides; its small docket means it will not likely hear enough cases to cover any area of law by its holdings.[77]

I certainly agree that great respect is owed to the Supreme Court. It is indisputably supreme among courts. By the same token, however, it is but a court. It may make law only in the ways in which a court may make law. Its constitutional function is to adjudicate. Its holdings are without doubt the law of the land. Its dicta? Anything the Supreme Court says should be considered with care; nonetheless, there is a significant difference between statements about the law, which courts should consider with care and respect, and utterances which have the force of binding law. The Supreme Court's dicta are not law. The issues so addressed remain unadjudicated. When an inferior court has such an issue before it, it may not treat the Supreme Court's dictum as dispositive. It must adjudicate.[78]

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[76] *See, e.g.*, McCoy v. M.I.T., 950 F.2d 13, 19 (1st Cir. 1991) (finding itself "both unable . . . and unwilling" to ignore "considered" Supreme Court dictum); Faheem-El v. Klincar, 841 F.2d 712, 731 (7th Cir. 1988) (Easterbrook, J., concurring) (finding Supreme Court discussion—"wise or not"—to be authoritative); *see also* Dorf, *supra* note 20, at 2026 & nn.106–07 (listing examples of cases on both sides of debate).

[77] *See, e.g.*, Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (en banc) (Rymer, J., dissenting in part).

> It is one thing for a court of last resort to announce that whatever it says in a published opinion is binding, for a court of last resort regularly sits en banc, has ultimate responsibility for the efficient administration of justice within its province, and may not have enough cases to flesh out the rule being articulated.

Id. at 759.

[78] Congress is also entitled to respect. If all the members of the Congress were to subscribe to a resolution, not following the procedures necessary to enact statutory law, the resolution would not be law because it was not promulgated in the manner in which Congress is permitted to make law. The same should be true when the Supreme Court or any other court makes pronouncements in a manner that is not within its constitutional power to make law.

If the lower courts treat the Supreme Court's dicta as binding law, as in the Pledge of Allegiance case mentioned above, *supra* Part I.A.2, the functioning of our legal system is undermined. Under the design of the system, the lower courts are expected to grapple with the issues that arise in their cases. The Supreme Court, with the issues illuminated by the efforts of the lower courts, reviews their efforts and renders the ultimate determinative judgment. If, however, the lower courts, instead of making their own effort to decide the

I am not counseling disrespect for a higher court, least of all the Supreme Court. I am saying only that a lower court has a constitutional responsibility to decide the case in accordance with law. Dictum is not law. The court must decide a previously undecided question.

VII
GOOD FAITH IMMUNITY

I conclude with a puzzling misadventure in constitutional dictum, commanded by the Supreme Court—the *Saucier* rule in claims of constitutional tort.[79] The background is as follows: When a plaintiff sues a government officer—let's say a police officer—for damages, alleging a constitutional tort, the defendant officer is entitled to have the case dismissed if, at the time of his conduct, there was no clear authority that his conduct violated the Constitution. This is a rule of "good faith immunity," which deems it unfair to hold the officer liable for doing what he reasonably perceived to be his job.[80]

We dismiss a large number of these cases, probably the great majority, at the outset because it is immediately apparent that there are no rulings establishing the unconstitutionality of the officer's conduct.

Then, a few years ago, the Supreme Court conceived a new and mischievous rule: Before granting the officer's motion to dismiss for good faith immunity, the trial court must *first* decide whether the officer's alleged conduct, assuming that it happened, violated a constitutional right—a question, mind you, which will have no impact on the adjudication of the case.[81] In other words, before dismissing the case

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issues, have merely regurgitated the Supreme Court's dicta, the Supreme Court receives no benefit from lower court consideration. The judicial system is impaired.

[79] Saucier v. Katz, 533 U.S. 194 (2001).

[80] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("If the law at [the time the action occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

[81] *Saucier*, 533 U.S. at 194 (2001).

> In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense *must* be considered in proper sequence. . . . A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This *must* be the initial inquiry.

Id. at 200–01 (emphasis added).

Before *Saucier*, the Supreme Court had expressed a preference that lower courts address the constitutional question, but had not mandated that they do so in all circumstances. In *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court stated that the court of appeals should not have granted qualified immunity without first considering whether plaintiff had

on the ground of good faith immunity, the court must first either gratuitously declare a new constitutional right in dictum or decide that the claimed right does not exist.[82]

What is more, on appeal from the dismissal, before affirming an obviously correct dismissal for good faith immunity, the appellate

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alleged the violation of a constitutional right, and explained that first addressing the existence of the right was the "desirabl[e]" approach. *Id.* at 232–33. Then, in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court noted:

> [T]he *better* approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. *Normally*, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.

Id. at 841 n.5 (emphasis added).

The *Sacramento* Court clearly did not intend to lay down a hard and fast rule for all cases; however, in *Conn v. Gabbert*, 526 U.S. 286 (1999), and *Wilson v. Layne*, 526 U.S. 603 (1999), the Court moved to mandatory language: A court "*must* first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn*, 526 U.S. at 290 (emphasis added); *Wilson*, 526 U.S. at 609 (quoting *Conn*, 526 U.S. at 290). Then, in *Saucier*, the Court made clear that it was imposing such a requirement. It should be noted, however, that in *Saucier* itself the Court did not follow its own requirement. The Supreme Court has apparently given itself an exemption: In *Saucier*, and then again in *Brosseau v. Haughen*, 543 U.S. 194 (2004), the Court granted qualified immunity on the ground that the right in question was not clearly established, and did not consider whether the plaintiff had alleged the violation of a constitutional right. *Saucier*, 533 U.S. at 207–08; *Brosseau*, 543 U.S. at 198–99.

Despite the seemingly absolute nature of the *Saucier* pronouncement, various courts have concluded, in holding or dictum, that *Saucier* was not meant to apply in all circumstances. *See, e.g.*, Vives v. City of New York, 405 F.3d 115, 118 n.7 (2d Cir. 2004) ("We do not reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the [constitutional question] either in the District Court or on appeal."); Ehrlich v. Town of Glastonbury, 348 F.3d 48, 60 (2d Cir. 2003) ("[W]e believe we are more faithful to the underlying aim of *Saucier* by declining to make a constitutional determination at the first stage of the inquiry—where that determination, based on an interpretation of ambiguous state law, is provisional only and subject to reversal as a result of subsequent state court rulings—than by following the *Saucier* sequence."); Santana v. Calderon, 342 F.3d 18, 29–30 (1st Cir. 2003) ("The property right at the core of the federal constitutional allegation is dependent on an unresolved issue of Commonwealth constitutional law that can only be resolved definitively by the Puerto Rico Supreme Court. Thus, the sequential rule of *Saucier* may not contemplate a situation such as this."); Dirrane v. Brookline Police Dep't, 315 F.3d 65, 69–70 (1st Cir. 2002) (stating in dictum that *Saucier* requires "an uncomfortable exercise where, as here, the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed" and that "[i]t may be that *Saucier* was not strictly intended to cover [this type of] case").

[82] Judge Calabresi has forcefully made the point that when a court dismisses by reason of good faith immunity, its pronouncement that the alleged right exists is dictum. *See* Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring) ("[*A*]*ll* statements about constitutional rights made in the *Sacramento* framework (i.e., where qualified immunity exists notwithstanding the violation of a right since the right was not clearly established at the time the conduct allegedly occurred), are dicta . . . .").

court must similarly pass in dictum on the theoretical question whether the constitutional right exists.

This rule involves so many and such serious problems that I am not sure where to begin. For generations, the Supreme Court has wisely cautioned against unnecessary constitutional rulings. It is a long-honored principle that a court should decide a constitutional question only when there is no other basis for resolving the dispute.[83] Yet in this context, the Supreme Court now *requires* that courts glibly announce new constitutional rights in dictum that will have no effect whatsoever on the case.[84]

The practice will inevitably produce bad constitutional law. Why so? Let us look at how the issue arises in a characteristic case.

The defendant moves at the outset for dismissal by reason of good faith immunity: "Judge, my client is entitled to have this case dismissed because, at the time of the events, he had no warning from court decisions that his conduct was unconstitutional. This is all spelled out in my brief."

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[83] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring); *see also* Tory v. Cochran, 544 U.S. 734, 740 (2005) (Thomas, J., dissenting) ("As a prudential matter, the better course is to avoid passing unnecessarily on the constitutional question."); Christopher v. Harbury, 536 U.S. 403, 417 (2002) ("[T]he need to resolve . . . constitutional issues ought to be avoided where possible . . . ."). As Judge Sutton has pointed out, the only other context in which a federal court *must* address a constitutional question, notwithstanding that the case could be decided on nonconstitutional grounds, is the requirement under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), that a court address Article III standing before reaching the merits of a case, *id.* at 94–95. Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). In the *Steel Co.* context, that is because, unless Article III standing is satisfied, the court has no power to rule on the other issues in the case. No such reason is present in the *Saucier* context.

[84] *See Brosseau*, 543 U.S. at 201 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring) (expressing concern that *Saucier* rule "rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court"); *County of Sacramento*, 523 U.S. at 859 (Stevens, J., concurring) (arguing that court should address constitutional question when answer is clear, but that "[w]hen, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions"); *id.* at 858–59 (Breyer, J., concurring) (arguing that in qualified immunity cases courts should not be required to address "constitutional issues that are either difficult or poorly presented"); *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first."); *see also Lyons*, 417 F.3d at 582–83 (Sutton, J., concurring) (arguing that in some circumstances *Saucier* rule is "difficult to justify" and that Supreme Court should "permit lower courts to make reasoned departures" from that rule); Horne v. Coughlin, 191 F.3d 244, 246 (2d Cir. 1999) ("[T]here are powerful arguments against reaching out in dictum to establish new constitutional rights in circumstances where the reasoning plays no role whatsoever in the disposition of the action.").

"I've looked at the cases," the judge responds, "and you're right. Still today there are no such rulings. But the Supreme Court requires that before I grant you dismissal, I must determine, as an abstract question, whether the alleged right exists. Your papers have not said much about that. May I ask you to brief that issue more extensively."

"Judge," the attorney answers, "my client couldn't care less what you decide on that point. He has no interest in it. I can't charge for writing a brief the client has no interest in. He is entitled to the dismissal no matter what you conclude about the theoretical existence of the right."

"I know," says the judge, "but counselor, have a heart. The Supreme Court says I have to do this. Give me a break. I need briefing from both sides."

"Whatever!" responds the lawyer. "I have a great idea. If it will help your Honor out, we'll concede unconstitutionality. We really don't care."

Of course my dialogue is caricature. But the fact is, in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case.[85] The court's conclusion on this question will come at no price.[86]

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[85] *See Horne*, 191 F.3d at 247. For example, in *Vives*, 405 F.3d 115, plaintiff claimed that his arrest for aggravated harassment under New York law violated his First and Fourth Amendment rights, and that the arresting officers were not entitled to qualified immunity because they had fair notice that the New York aggravated harassment statute would be declared unconstitutional. *Id.* at 116. Before the district court, the officers argued only that they did not have fair notice regarding the statute's alleged unconstitutionality, and took no position on whether the statute was constitutional. After the district court held that defendants were not entitled to qualified immunity, the officers appealed and once again only argued the notice question. The Second Circuit concluded that the officers did not have fair notice of the statute's alleged unconstitutionality and granted qualified immunity. *Id.* at 118. The court did not address whether the statute was actually constitutional, explaining that "[w]e do not reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the constitutionality of [the state law] either in the District Court or on appeal." *Id.* at 118 n.7.

[86] In support of this doctrine, the Supreme Court has asserted that the two questions are inescapably interwoven. According to the Court, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232. By the Court's reasoning, a judge deciding whether a right was clearly established will necessarily first have to decide whether the right exists.

I believe this is quite mistaken. It is often immediately apparent that the claimed right was not clearly established at the time of the defendant's conduct, while it may be very difficult to determine whether the claimed right should be found to exist. Moreover, in some instances a court concludes that a right was not clearly established, but that whether the right exists in a particular context requires further fact-finding. *See, e.g.*, Kalka v. Hawk, 215 F.3d 90, 97 (D.C. Cir. 2000) ("Whether [defendant's] humanism is a religion

A further problem lies in the fact, as we discussed before, that there is no appeal from the trial court's declaration in dictum that the officer's conduct violated the Constitution—nor from the appeals court's dictum.[87]

One Supreme Court justice proposed to cure this latter problem by permitting the defendant to petition for Supreme Court review of the declaration of a right in dictum.[88] That cure is seriously deficient. Even if the defendant officer could appeal from the dictum, in many cases he would not do so. He has won the case. Unless he has an interest in freedom to continue the conduct, he does not care. People do not appeal from abstract statements they don't care about.

What is more, even if the defendant did care and did appeal, at this point the plaintiff would likely have no interest in the appeal. If the plaintiff sees he will be unable to convince the court that the right was established at the time, he knows the dismissal will be affirmed. He knows he will get nothing out of persuading the higher court that the right now exists.

Saucier is a blueprint for the creation of bad constitutional law.[89]

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under the First Amendment could not be decided in the abstract."); Mollica v. Volker, 229 F.3d 366, 372–73 (2d Cir. 2000) (concluding that unconstitutionality of checkpoint was not clearly established but that determination whether checkpoint was constitutional would require fuller record). It is difficult to believe that "the Supreme Court intended that trial courts would direct parties to participate in additional unnecessary evidence-gathering proceedings in which the parties had no practical interest—solely to enable the court to utter advisory dicta on constitutionality." *Mollica*, 229 F.3d at 373.

[87] *See Horne*, 191 F.3d at 247–48.

> If those governmental actors defer to the courts' declarations and modify their procedures accordingly, new constitutional rights will have effectively been established by the dicta of [the] lower court without the defendants having the right to appellate review. . . . [O]fficials may be placed in the untenable position of complying with the lower court's advisory dictum without opportunity to seek appellate review, or appearing to defy the lower court's assertion and thus exposing themselves to a risk of punitive damages.

Id.; *see also Lyons*, 417 F.3d at 582 (Sutton, J., concurring) ("By multiplying constitutional holdings that are not subject to review in the normal course, a rigid application of the two-step inquiry may do as much to unsettle the law as to settle it.").

[88] *See* Bunting v. Mellen, 541 U.S. 1019, 1023, 1025 (2004) (Scalia, J., dissenting from denial of certiorari).

[89] The *Saucier* rule also increases the workload of an already overburdened judiciary. *See* Brosseau v. Haughen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) ("[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review."); Hudson v. Hall, 231 F.3d 1289, 1295 n.5 (11th Cir. 2000) (declining, pre-*Saucier*, to consider whether constitutional right existed, when right was not clearly established and existence of right turned on question of state law that would require certification to Georgia Supreme Court, "an exercise in futility and a waste of the time and resources of both this Court and the Georgia Supreme Court"). As Judge Sutton observes, "the point is not to *maximize* the number of constitutional rulings, but to *optimize* constitutional rulings, as traded off against essential administrative values, such as the accurate, efficient and timely

Why has the Supreme Court commanded this bizarre practice? The best justification is that the rule is intended to prevent continually repeated unconstitutional conduct from successfully evading judicial review through repeated dismissals for immunity.[90]

The problem of illegal conduct repeatedly escaping judicial review is not imaginary. But it is present in only a very narrow class of cases. Those are the cases where (1) the conduct was not a one-time event, but is likely to be repeated, and (2) it is likely to evade judicial review through repeated dismissals for good faith immunity.

In many cases, one or both of these conditions is not present. Often the challenged conduct was a one-time event—not a matter of policy, and not likely to be repeated. When the conduct is likely to be repeated, it is often not likely to repeatedly escape review. This is because in many types of litigation, especially the types that occur when the conduct is a matter of continuing policy, good faith immunity does not apply. It does not apply, for example, where an injunction is sought to prevent repetition of the conduct,[91] nor where the

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resolution of cases in the federal courts." *Lyons*, 417 F.3d at 583 (Sutton, J., concurring). It is for this very reason that appellate panels are permitted, at their discretion, to decide cases by summary order, rather than by opinion. Just as a panel has the discretion not to issue a published opinion in a case, it should have the discretion not to reach the constitutional question when it already has concluded that the right in question was not clearly established. *See id.* at 582–83.

[90] In *Saucier*, the Court stated:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Saucier v. Katz, 533 U.S. 194, 201 (2001); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.").

The Court has also suggested that by deciding the constitutional question first, a court "spare[s] a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting *Siegert*, 500 U.S. at 232). In fact, in many cases, as in my imaginary dialogue above, the defendant has no interest in unnecessarily briefing the constitutional question. *Saucier* does not "spare" a defendant unwarranted demands; it *creates* unwarranted demands.

[91] *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 n.34 (1982) (noting qualified immunity may not be applicable to injunctions); Charles W. v. Maul, 214 F.3d 350, 360 (2d Cir. 2000) (finding that qualified immunity is not defense against injunctions).

suit is against a municipality based on municipal policy.[92] It also does not apply where suppression of evidence is sought. When such proceedings can be anticipated, there is no reasonable likelihood that the conduct will continue without judicial scrutiny.[93]

The Supreme Court's remedy, with its toxic side effect, is prescribed far too broadly—for cases where there is no disease.[94] At the very least, this risky, unreliable declaration of constitutional rights in dictum should be reserved for the class of cases where a pattern of repetition, escaping review, is likely.

Even in that narrow class of cases, there is a better solution. If the conduct is egregious, or has already escaped review and is probably unconstitutional, the court would warn of the probable unconstitutionality—without taking a definitive position. Government officials who persist in the conduct after receipt of such a warning (at least in an opinion of the Supreme Court or a court of appeals) are either acting in bad faith disregard of the court's warning or taking a calculated risk that their conduct will ultimately be vindicated. They should not be entitled to rely on good faith immunity.[95] In the next case, immunity would be denied, and the court would adjudicate the question of constitutional right—as holding—after proper litigation by parties who had an interest in the outcome.[96]

CONCLUSION

If any of what I have said makes sense, what course does this suggest for professors, students, practitioners, and judges?

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[92] *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (holding that "the municipality may not assert the good faith of its officers or agents as a defense to liability" if there is municipal policy or custom).

[93] *See, e.g.*, African Trade & Info. Ctr. Inc. v. Abromaitis, 294 F.3d 355, 359–60 (2d Cir. 2002) (declining, pre-*Saucier*, to reach existence of constitutional right in qualified immunity case where "the merits of this issue are scarcely mentioned in the briefs on appeal, let alone adequately briefed" and noting that existence of constitutional right might be addressed on remand in that very case, as plaintiff was also seeking injunctive relief); Koch v. Town of Brattleboro, 287 F.3d 162, 166 (2d Cir. 2002) (refraining from deciding constitutional question that was not unique to § 1983 cases and likely to be litigated during motion to suppress in criminal trial).

[94] For more examples of types of cases where the *Saucier* requirement does not make sense, see *Lyons*, 417 F.3d at 582 (Sutton, J., concurring).

[95] *See* Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring) ("By providing that the first statement about a given right will usually be in dicta that is explicit enough to put state actors on notice, *Sacramento* creates a situation in which the next time that particular right is alleged, qualified immunity will not be a defense.").

[96] The Court may be ready to rethink the *Saucier* rule. In his recent concurrence in *Brosseau*, Justice Breyer, together with Justice Ginsburg and Justice Scalia, called upon the court to reconsider *Saucier*. *Brosseau*, 543 U.S. at 201–02 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring).

To professors I would say: You have a responsibility to make sure your students understand and are alert to the distinction between holding and dictum—and its importance. It is not something to be discussed only in a brief, first-year intro-to-law lecture. Students who graduate without a grasp of it are not well trained for the profession.

To students and practitioners I would say that, in arguing to courts, you will need to be keenly aware what is holding and what is dictum. It is often the best way to undermine unfavorable language in a prior opinion. By the same token, it can alert you that your argument is built on a house of cards.

To myself and other judges I would say three things: First, dictum can serve useful purposes. We have no need to purge dictum from our opinions and we shouldn't be embarrassed by its presence. We must only remember that it is not law. To avoid trespassing beyond the territory confided to us by the Constitution, to avoid creating law in circumstances likely to produce bad law, and to avoid creating confusion, we should not disguise dictum, but should forthrightly label it as what it is. Second, rather than reciting rules of law, which are not in dispute in the case, we should focus sharply on exactly what is in dispute and set forth rules in our opinions only as rulings on the disputed questions. Third, before relying on a formulation of law in a prior opinion, we must determine whether it was holding or dictum. We must make that inquiry even when the prior court was the Supreme Court. If a rule was declared only in dictum, the question remains undecided, and we have a constitutional duty to make our own determination of the answer. Unless we do, we have not done our job.