2023

The Uncertain Judge

Courtney M. Cox

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The intellectually honest judge faces a very serious problem about which little has been said. It is this: What should a judge do when she knows all the relevant facts, laws, and theories of adjudication, but still remains uncertain about what she ought to do? Such occasions will arise, for whatever her preferred theory about how she ought to decide a given case—what I will call her preferred "jurisprudence"— she may harbor lingering doubts that a competing jurisprudence is correct instead. And sometimes, these competing jurisprudences provide conflicting guidance. When that happens, what should she do?

Drawing on emerging debates in moral theory, I call this problem the problem of "normative uncertainty." It is often overlooked because the common answer is that the judge should just swallow her doubts and do what she thinks is right. But that obvious solution turns out to be wrong. Sometimes, she should not follow her preferred jurisprudence, but do what a different jurisprudence suggests instead.

Developing a full solution will be difficult, and I do not attempt one here. Instead, I sketch a solution based on the familiar example of expected utility and use it to illustrate why developing a solution to normative uncertainty is considerably more difficult than developing solutions to other kinds of uncertainty. By the end, I hope to have convinced you only that there is a problem and that it is hard. But even without a solution, just seeing the problem will change how you think about judging.

> *I've actually never quite understood how you evaluate that.*
> – Chief Justice John Roberts
> on what makes a decision "wrongly decided"[1]

INTRODUCTION

Judges are not herculean. They are sometimes uncertain, not just as to the facts or laws or content of various doctrinal or adjudicative theories, but about which theory is right and how to decide cases in light of it. Even Justice Antonin Scalia thought he might, "in a crunch[,] . . . prove a faint-hearted originalist."[2] Often these doubts do not affect the outcome—there is surprisingly pervasive agreement about the law. But sometimes they have bite and point in different directions. What should a conscientious judge, acting in good faith and aiming to do what is right, do then?

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[1]   Transcript of Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392, at *39:18–19.

[2]   Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) [hereinafter Scalia, *Originalism*].

Drawing from emerging debates in moral theory, I call this problem the problem of "normative uncertainty."[3] In this Article, I explain the problem, distinguish it from related problems, and show why the problem is both deeply practical and difficult to solve. I do not attempt to solve it, for reasons that will become clear. Setting the terms of the debate—and establishing that there is one to be had—will prove difficult enough. By the end, I hope only to have convinced you that there is a problem and that it is hard. These goals may sound modest, but if I succeed, it will change how you think about judging.

In brief, the problem follows from three assumptions: First, judicial decisions *can* be coherently criticized—that is, we speak coherently when we suggest that a judge should have decided otherwise than she did—such that we may speak of what a judge ought to do in deciding a case. Second, a conscientious judge aims to do what she ought to do in deciding a case. And third, judges behave (or ought to behave) rationally. As I will show, together these assumptions mean that there is both a *judicial* ought— what the judge ought to do according to a particular "jurisprudence" or theory about how a judge ought, all things considered, decide a case—and a *rational* ought—what the judge ought do given her beliefs about which jurisprudence(s) might be correct and her aim of doing that which she ought (judicially) to do.[4]

Where a judge is certain about what she ought (judicially) to do in deciding a particular case, there is no problem. And this may well be so in the mine-run of cases, as there is widespread agreement about judicial outcomes.[5] But when she is uncertain about what, all things considered, she ought (judicially) to do, and when those jurisprudences in which she has credence point in different

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[3]   *See* TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES 143–68 (2000); WILLIAM MACASKILL, KRISTER BYKVIST & TOBY ORD, MORAL UNCERTAINTY 39–56 (2020). Legal scholarship has occasionally used the term "normative uncertainty" in other ways, for example, to refer to indeterminacy or conflict of laws. *See infra* note 72. Those usages address different issues from normative uncertainty as I use the term. *See infra* text accompanying notes 4–15; Part I.B; *see also infra* Part III.B.

[4]   Some believe there is a similar distinction between the *moral* ought and the *rational* ought. *See, e.g.*, Andrew Sepielli, *What to Do When You Don't Know What to Do When You Don't Know What to Do . . .*, 48 NOÛS 521, 538 (2014) [hereinafter Sepielli, *What to Do II*]; LOCKHART, *supra* note 3, at 44–46.

[5]   *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1227 (2009) [hereinafter Leiter, *Explaining Theoretical Disagreement*] (observing that there is "*massive* and *pervasive*" agreement about what the law dictates in particular cases (emphasis in original)); *see also* sources cited *infra* note 110.

directions, there is a question about what she ought *rationally* do given her aim of doing what is judicially right.

I want to pause here for a moment to distinguish related debates, and so dispel a potential confusion about what I mean by "doing what is judicially right" and about jurisprudences (as I use the term). I use "judicially right" and "judicial ought" to refer only to whatever it is a judge ought to do—or is permitted to do—all things considered (recall our first assumption that there is such a thing). And a "jurisprudence," as I use the term, is simply a theory about whatever it is a judge ought to do.

I don't make many assumptions about jurisprudences except this one: one or more of the many conceptually possible jurisprudences is correct. This assumption is a strong one, but it reflects our practices: when we disagree about what a judge ought to have done—about which critiques are "correct" or "appropriate," be those critiques doctrinal, moral, or something else—we disagree about which jurisprudence is correct. And when we debate whether a particular line of critique is "on the table" or "off the wall," as the saying goes, we disagree about which jurisprudences are even plausible candidates for being correct.[6] So long as we think we are doing something more than merely cheering from the sidelines, our criticisms presuppose that there is a judicial "ought" in some meaningful sense—that there not only is a jurisprudence but also that it has a claim to being correct.[7]

Beyond that, I make few assumptions about the judicial "ought."[8] For example, I don't take sides about what the correct jurisprudence is. The work of figuring out what jurisprudence is correct—or even just the minimum conditions for one being a plausible candidate—is done by others elsewhere, like in the vast literature on statutory and constitutional interpretation,[9] or on whether a judge should behave differently on a multimember

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[6]   For example, a jurisprudence would not be a plausible candidate for being the correct jurisprudence if it said that a judge ought to have upheld the school segregation found unlawful in *Brown*; such a jurisprudence, though conceptually possible, would simply be a nonstarter. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 12–13, 78–80 (2010) [hereinafter STRAUSS, LIVING CONSTITUTION].

[7]   Or appropriate, or true. I mean only to suggest that there is a judicial "ought" and that it has bite, however you cash that out.

[8]   I do make some modeling choices about jurisprudences, such as modeling jurisprudences as complete, stable theories. This choice is not meant to exclude the possibility that which jurisprudence(s) is correct (or appropriate, or true) is in some deep sense contingent on choices made in actual cases. *See infra* Part I.B; *see also infra* note 99.

[9]   *See, e.g.*, sources cited *infra* notes 89–90.

court,[10] and even in the new and growing literature on second-order methods for deciding hard cases.[11]

Equally importantly, I do not take sides on what *form* the correct jurisprudence takes. This will become important later. For example, I do not take sides in the Hart-Dworkin debate that dominated twentieth-century legal philosophy, about the relevance of moral criteria to judging, or on the possibility of legal indeterminacy and judicial discretion.[12] Nor do I take sides in that debate's twenty-first-century spin-off about whether there even is a domain of *legal* obligations independent of *moral* obligations.[13] I don't take sides in disputes between practitioners and academics: You might eschew theories altogether and think judges are right when they reason backwards from "situation sense" to rules.[14] You might think judges are just practical problem solvers who should work to encourage settlement.[15] You might think

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[10] *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 30–33 (1993).

[11] *See, e.g.*, James D. Nelson & Micah Schwartzman, *Second Order Decisions in Rights Conflicts*, 109 VA. L. REV. (forthcoming 2023); sources cited *infra* note 69. There remains some confusion about the relationship of those debates about hard cases to the problem presented here. Specifically, it is not clear whether proposed solutions are defended on the basis of jurisprudence, or as rational solutions to normative uncertainty. The distinction matters, as will be discussed below. *See infra* Parts II.B, III.B.

[12] *See generally* H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter Dworkin, *Model of Rules*]; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998); John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199 (2001); Leiter, *Explaining Theoretical Disagreement*, *supra* note 5. *See also* RONALD DWORKIN, LAW'S EMPIRE 225–75 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; JOSEPH RAZ, THE AUTHORITY OF LAW 37–52 (1979). There are also differing views about what the debate is about, whether it is over, and whether it matters. *See generally* Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22 (2007) [hereinafter Shapiro, *"Hart-Dworkin" Debate*]; Brian Leiter, *Beyond the Hart / Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 1 (2003); LIAM MURPHY, WHAT MAKES LAW 73–108 (2014).

[13] *See* Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1173–74 (2015); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1306–24 (2014) [hereinafter Greenberg, *Moral Impact*]; *cf.* LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 24–26 (2008).

[14] *Cf.* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1756–57 (1995); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60–61, 127, 205–07 (1960). I refer to the normative view. But your sociological views may inform your normative views. *See, e.g.*, Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354–55, 410–12, 414–22 (2016) (examining whether professional judgment or "situation sense" protects impartial legal decisionmaking from bias).

[15] You might also think an important function of judging is not just to settle disputes between parties, but theoretical disagreements, *e.g.*, Shapiro, *"Hart-Dworkin" Debate*,

judges should just "call balls and strikes."[16] So long as you think you speak truthfully or correctly or appropriately when you complain about what a judge does—that you do more than merely shout "boo!"—I'm talking to you.

I do not take sides in these debates because the problem I describe floats on top of them. Whatever you think are plausible answers to the question "what should a judge do in this case, all things considered"—whatever your views on the plausible candidates for the correct jurisprudence and all that that entails—my question is the same: What should a judge *rationally* do when she has doubts about which, if any, of those plausible candidate jurisprudences is correct when she aims to do what is right?

So that is the problem. And at this point you may be starting to think that this is not a real problem, or a new problem, for any number of reasons. You might, like Justice Scalia, think that cases where you doubt your preferred jurisprudence are unlikely to arise: he could not "imagine . . . upholding a statute that imposes . . . flogging," "[b]ut then" he could not "imagine such a case's arising either."[17] Or you might think that your preferred jurisprudence already has a view about how to handle such uncertainty when it arises.[18] I will return to these objections in Part II, and responding to them will teach us something else about judging and the limits on plausible jurisprudences.

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supra note 12, at 43 n.59 (attributing this point to Les Green), or moral and political disputes writ large as part of a system designed for doing so, *e.g.*, *id.* at 45–49; ALEXANDER & SHERWIN, *supra* note 13, at 9–18; *infra* note 68 and accompanying text; *cf.* Rebecca Stone, Normative Uncertainty, Normative Powers, and Limits on Freedom of Contract, at *48 (Apr. 2021) (on file with author).

16 Those who hold this view often think my work is not relevant to them, because they think judges do not make "normative" or "moral" judgments. But in fact, they have a very strong view about the judicial "ought": the judge *ought* just "call balls and strikes." Unless it is fully fleshed out what calling balls and strikes entails—and both scholarship and anecdotal evidence suggest it is not—judges experience normative uncertainty. *Compare Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Judge, D.C. Circuit Court of Appeals) ("I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat."), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2316–17 (2022) (Roberts, C.J., concurring):

> Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks.

17 Scalia, *Originalism*, *supra* note 2, at 864; *infra* Part II.A.
18 *Infra* Part II.B; *supra* note 12.

But supposing for now that I'm right that there is a problem, you might think that the solution is obvious: the judge should just swallow her doubts and follow that jurisprudence which she thinks is most likely correct. And this brings us to the Article's second point: this obvious solution is a nonstarter.

The obvious solution is a nonstarter because it makes two mistakes.

First, the obvious solution ignores relevant information, namely, that the judge's evidence does not permit her to believe her favored jurisprudence is definitely correct. Rather, her evidence suggests that a different jurisprudence may be correct instead. For example, Justice Scalia's settled view that flogging couldn't be constitutional is evidence that "pure originalis[m]" is not correct.[19] And Professor David Strauss's view that he still has more papers to write—that there can still be hard cases even for common law constitutionalists—is evidence that he has varying levels of credence in competing *versions* of his theory, and that work remains to determine which of those versions are right and which are wrong.[20]

Second, the obvious solution relies on a false assumption, namely, that the jurisprudences in which the judge has some level of credence agree about the cost of error in all cases. But a key point of disagreement among jurisprudences is about the cost of error—about the badness of "getting it wrong" or the importance of "getting it right" in particular cases. For example, a jurisprudence that took formalist legal "fit" to be the only relevant criteria might take there to be only a small cost of error in deciding between two close-fitting options. By contrast, a jurisprudence that heavily weighs considerations of substantive justice independent of formalist fit might find there to be a very large cost of error owing to great differences along that dimension.

Once we recognize that another jurisprudence might be correct, we can take into account the likelihood that each jurisprudence is correct and what each jurisprudence suggests is the cost of error—the cost of going against its recommendation—in a particular case. In other areas of decision theory, these would be

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19   Scalia, *Originalism*, *supra* note 2, at 864.

20   Email from David Strauss, Professor, Univ. Chi. L. Sch., to Courtney Cox, Professor, Fordham Univ. Sch. of L. (Jan. 23, 2023) (on file with author); *see also* Scalia, *Originalism, supra* note 2, at 864 (stating that "the real dispute" is "between . . . adherents of *the same [ ] approaches*" (emphasis in original)).

relevant considerations.[21] Indeed, it would be irrational to ignore them. My claim is that the same is true in judicial decision-making. The result is that, sometimes, the rational thing to do is *not* what our favorite jurisprudence suggests. For example, sometimes our favorite jurisprudence will suggest that the cost of error is low, but a less-favored jurisprudence we find plausible will suggest that the cost of error is very high. When this happens, a judge may be rational to do what her less-favored jurisprudence recommends, because that may be the best way to minimize the cost of getting it wrong.

So much for the obvious solution. But if not the obvious one, then which?

I do not propose or defend a solution in this Article, nor could I hope to. Normative uncertainty is not like empirical uncertainty. With empirical uncertainty, one can at least compare the goodness or badness of different consequences using the same scale.[22] With normative uncertainty, you can't take that same scale for granted: you are comparing the cost of error as measured by different jurisprudences.[23] This is the problem of intertheoretic comparison, and it is sufficiently difficult that some moral philosophers believe that no solution can be found.[24] The leading solutions proposed in the moral philosophy literature have required book-length treatment to explain and defend.[25] All this, and the moral case is considerably easier than the legal one. A merely moral actor, who aims to do what is right, does not generally create binding precedent for how they ought to act in the future, let alone establish a rule of action for others.[26]

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[21] *See, e.g.*, David Hamer, *Presumptions, Standards and Burdens: Managing the Cost of Error*, 13 LAW PROBABILITY & RISK 221, 225, 239 (2014).

[22] *Cf. infra* Part III.A.2.

[23] *See id.*

[24] For example, Professor John Broome has described the problem as "devastating." MACASKILL, BYKVIST & ORD, *supra* note 3, at 58 n.2; *see also infra* note 201.

[25] *See generally* LOCKHART, *supra* note 3; MACASKILL, BYKVIST & ORD, *supra* note 3.

[26] I use "binding" in a thin sense. There are competing views about what "law" is and what it means for a judge to be "bound" by it—a point about which our judge may be uncertain. *See, e.g.*, KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 69–76 (1930) [hereinafter LLEWELLYN, BRAMBLE BUSH]; Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 381–82, 388–91 (2007); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CON. L. 155, 186–95 (2006); *cf.* Jeremy Waldron, *Is Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 141–44 (2002) (summarizing related dispute). The moral case also has scope-of decision problems, LOCKHART, *supra* note 3, at 143–68, but they are more pressing in judging, *infra* note 80.

We should not expect we can straightforwardly adapt the proposed solutions in the moral case to the problem as it arises in judicial decision-making. But this does not mean the project is lost. The literature is young—the major modern contributions are nearly all from this millennium, and most are from the last ten years.[27] New proposals will be forthcoming. Moreover, we are lawyers: We are used to developing heuristics to make decisions in the face of uncertainty. Once we see the problem, I think we will have much to offer the efforts at solving it.[28]

To describe this problem and the difficulties of solving it in as clear a manner as possible, I make some significant simplifying assumptions, noted in text and footnotes throughout.[29] For example, as noted above, I assume that judicial decisions *can* be coherently criticized[30]—that we can speak in terms of "judicially right" and "judicially wrong" acts—while endeavoring to remain as neutral as possible about why (and whether) the criticism is coherent.[31] This neutrality might not be maintained in developing a solution, and abandoning it may affect the appropriate modeling of the problem.

Similarly, I take the scope of decision to be the "judicial act," understood as the decision embodied in an opinion handed down.[32] It thus includes not just the disposition (which party wins what), but also the reasons given—that is, those decisions made about issues along the way (including which issues and in which

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27 *See generally, e.g.*, Christian Tarsney, *Moral Uncertainty for Deontologists*, 21 ETHICAL THEORY & MORAL PRAC. 505 (2018); Sepielli, *What to Do II*, *supra* note 4; Andrew Sepielli, *Normative Uncertainty for Non-Cognitivists*, 160 PHIL. STUD. 191 (2012); Jacob Ross, *Rejecting Ethical Deflationism*, 116 ETHICS 742 (2006); *see also* sources cited *supra* note 3 and *infra* notes 201, 204. *But see* Elizabeth Harman, *The Irrelevance of Moral Uncertainty*, 10 OXFORD STUD. IN METAETHICS 53 (2015); Brian Weatherson, *Running Risks Morally*, 167 PHIL. STUD. 141 (2014).

28 The problem of normative uncertainty in judging has gone largely unrecognized. Some moral philosophers have attempted legal applications of their theories. *E.g.*, LOCKHART, *supra* note 3, at 124–42. Others use, as examples, classic moral problems facing judges. *E.g.*, MACASKILL, BYKVIST & ORD, *supra* note 3, at 65–67. These accounts gloss over difficulties unique to the legal context. *Infra* Parts I.B, II.A, III.B. A recent working paper discusses the possibility of hedging certain kinds of choices in constitutional interpretation. *See* Evan D. Bernick, Constitutional Hedging, at 11–15 (2021) (on file with author).

29 *E.g.*, *infra* note 141 (discussing choice of credences).

30 *See, e.g.*, STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 78 ("Anyone who doubts that *Brown* is lawful is a fringe player, at best.").

31 *Supra* text accompanying notes 12–15; *infra* Part I.B.

32 *Infra* Part I.B.

order).[33] But this might not be the right focus. Given legal norms of consistency over time, the scope of decision should perhaps be broader, encompassing a larger course of judicial acts; or perhaps more granular, focused on particular legal issues and rules.[34] The choice of scope is a difficult problem unto itself—one you won't care about until you see the initial problem—and so for now I've chosen the simplest scope possible for ease of exposition.[35]

With these simplifications in hand, I will adapt a proposed solution from the literature in moral philosophy and apply it to *Brown v. Board of Education*.[36] The solution is based on expected utility theory, which I've chosen because it is a familiar way of dealing with empirical uncertainty.[37] I show how a judge deciding *Brown* may have rationally departed from their preferred jurisprudence, without abandoning it entirely, to arrive at the result achieved there. Indeed, this is one of the enduring puzzles and miracles of *Brown*: the Court spoke with a unanimous voice despite deep disagreement over how to reconcile their decision with then-extant jurisprudences.[38] Recognizing normative uncertainty—allowing room for judges to be jurisprudentially humble—sheds new light on how such breakthroughs might be achieved.

Despite this success, I do not argue that a solution based on expected utility is the answer. The problems with expected utility theory are well known, even in the case of empirical uncertainty.[39] And these difficulties are compounded in the case of normative uncertainty.[40] I use the expected utility approach not to suggest a path forward, but to illustrate the difficulty of the work ahead.

This may all sound too complicated to be worth the candle. In arguing that there is a problem and that the solution is not obvious, I do not disagree that a judge facing normative uncertainty

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[33]   The decision may or may not be coextensive with the expression of that decision in the opinion. There is a question, which I explore in works in progress, of whether judges should publicly *express*, in written opinions or elsewhere, their uncertainty. *See* Courtney M. Cox, Super-Dicta [hereinafter Cox, Super-Dicta] (unpublished manuscript) (on file with author); *infra* note 108.

[34]   *Cf.* LOCKHART, *supra* note 3, at 143–68 (discussing "courses of action").

[35]   *Id.* For example, one might expect that the choice of scope raises similar paradoxes to collegial courts. *E.g.*, Kornhauser & Sager, *supra* note 10.

[36]   347 U.S. 483 (1955).

[37]   *Cf.* United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.) (introducing a negligence standard, often interpreted as expected utility); *infra* note 171.

[38]   *See* STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 78–80; *infra* Part III.A.1.

[39]   *See* LOCKHART, *supra* note 3, at 184 n.11; *infra* Part III.A.2.

[40]   *See infra* Part III.A.2.

ought muddle through. The judge cannot avoid making a decision.[41] But we can do better than to advise the judge, somewhat unhelpfully, to do the best she can: we can think critically about how to cope with this particular breed of uncertainty. More strongly, I suggest that we *ought* to think critically about how to cope with this particular breed of uncertainty, because though the solutions to it are neither obvious nor simple, progress can be made.

But most importantly, even just seeing the problem should change how we think about judging. Specifically, we can evaluate opinions, judges, and their approaches at two levels: at the level of jurisprudence—what they ought, judicially, to have done—and at the level of rationality—what, given normative uncertainty, was rational for them to have done. Critiques appropriate at one level may not be appropriate at the other and vice versa because jurisprudence and rationality are different benchmarks.

This two-level framework has gone unappreciated, but it has a number of important implications. To illustrate just one, I consider how a judge facing normative uncertainty might have decided *Google LLC v. Oracle America, Inc.*,[42] arguably the most important intellectual property case in recent memory.[43] After nearly thirty years of litigation, everyone was hoping the Supreme Court would clarify the copyrightability of certain types of software; instead, in an opinion by Justice Stephen Breyer, the Court avoided the issue and relied on a notoriously murky standard to resolve the case.[44]

Critiques of the decision echo standard complaints about Justice Breyer's approach: that he favored murky standards over clear rules more than is jurisprudentially appropriate,[45] even if we are uncertain about the clear rule that he should have used and so might not have ruled any differently ourselves. The two-level framework provides a coherent way to express this ambivalence: we can consistently maintain that the Court did not do what it ought (judicially) to have done, but that the Court did what it ought (rationally) to have done given its normative uncertainty. Importantly, these two critiques are against different

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41   Avoiding a decision by, for example, deferring to Congress, is itself a decision. Different adjudicative theories provide different guidance about when to defer.

42   141 S. Ct. 1183 (2021).

43   *Id.*; *see infra* Part III.B.

44   *See infra* Part III.B.

45   *Id.*

benchmarks—jurisprudence and practical rationality—and so going forward, we need to be clear as to which critique we're making.

The significance of this observation runs deeper still. The same thing that is true of *Google* is also true of the theoretical debates I side-step here.[46] Once you see the problem of normative uncertainty, you will have a new lens for revisiting those older debates.

And I believe we should revisit them: the two-level framework opens up conceptual space that was not there before. To take one example, consider the tension between formalism and pragmatism that has dominated much of twentieth-century legal debates on theory. Roughly speaking, formalists decry pragmatists as lawless; pragmatists see formalists as naïve or worse, using the veneer of logical consistency to mask policy-based decisions.[47] This is a crude description, but the point is that the debate has long been characterized as an either-or.

Recognizing the problem of normative uncertainty opens the space for "yes, and": perhaps formalist theories are the most plausible theories at the jurisprudential level, while pragmatism is the best rational response when uncertain about which jurisprudence is correct. That is, once you see the problem of normative uncertainty, you can see the conceptual possibility that formalism and pragmatism are not competing answers to the same question, but complementary answers to different questions. And the same may be true of other existing "legal" canons, with implications for their authority.[48]

I do not defend these positions here, though I consider them elsewhere.[49] I identify them only to illustrate how much work there is to be done once you see the problem, and that the work is not limited to trying to solve the problem.

But before you can consider those possibilities, you need to first appreciate the problem. And that is the goal of this Article. Part I introduces an easy case illustrating the problem of normative uncertainty. Part II responds to three sources of skepticism about the existence and significance of the problem. Part III

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[46]   *See supra* notes 12–15 and accompanying text.

[47]   *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 513–14, 538–39 (1988); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 112 (2010); RICHARD A. POSNER, REFLECTIONS ON JUDGING 351–58 (2013).

[48]   These difficulties are the subjects of works-in-progress. *See, e.g.*, Cox, Super-Dicta, *supra* note 33; Courtney M. Cox, Automating the Uncertain Judge (unpublished manuscript) (on file with author).

[49]   *Id.*

sketches an alternative to the obvious solution based on expected utility and applies it to *Brown* and *Google*. The alternative's flaws illustrate the difficulty of the work ahead; its successes, the significance of that work. This is not a hedge. I think lawyers may have better solutions once they see the problem.

I. THE PROBLEM OF JURISPRUDENTIAL UNCERTAINTY

In Part I, I introduce the problem of normative uncertainty in judicial decision-making. First, I use a simple example from moral philosophy to illustrate what normative uncertainty is, as distinct from other kinds of uncertainty.[50] I then show how something similar applies to judicial decision-making.[51]

A. Empirical and Normative Uncertainty in Moral Decision-Making

Begin with an example from practical philosophy about what to do when we are unsure of what morality requires.[52] Suppose some evildoer asks me about a friend's secret so they can use it to harm them. I cannot avoid answering, and so I have, roughly speaking, three options: I could disclose the information, I could lie, or I could merely mislead.[53] It is common in such scenarios to be unsure of what morality requires.

One reason I may be uncertain is that I am uncertain about the relevant facts. That is, I know what morality requires in various situations, but I am uncertain about what situation I am in. For example, I may be certain that I am morally required to refrain from disclosing the information because otherwise my friend will die. I am also certain that I must not lie, unless I cannot prevent disclosure (and my friend's death) except by lying. My problem is that I do not know if I can successfully prevent disclosure without lying. Here is my decision matrix:

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[50] *Infra* Part I.A.

[51] *Infra* Part I.B.

[52] The following choice set is drawn from Immanuel Kant's infamous murderer-at-the-door hypothetical, though I do not follow his analysis and he did not offer it as an example of moral decision-making under conditions of uncertainty. *See* Immanuel Kant, *On a Supposed Right to Lie from Philanthropy*, *in* PRACTICAL PHILOSOPHY 611 (Mary J. Gregor, trans. & ed., 1996).

[53] *See* JENNIFER MATHER SAUL, LYING, MISLEADING, & WHAT IS SAID: AN EXPLORATION IN PHILOSOPHY OF LANGUAGE AND IN ETHICS 1–3 (2012) (discussing the distinction between lying and misleading).

EXAMPLE 1: PROTECTING SECRETS – EMPIRICAL UNCERTAINTY

	Possibility 1 Only Lying Works	Possibility 2 Misleading Works
A: Disclose	Friend Dies	Friend Dies
B: Lie	Friend Lives	Friend Lives
C: Merely Mislead	Friend Dies	Friend Lives

My uncertainty in Example 1 is a kind of *empirical* uncertainty. I am uncertain about what will happen if I do a particular act. And so I do not know what to do. A common answer to this problem is that I should do whatever, based on my evidence, looks like the right thing to do. For example, if it appears more likely that only lying will work, then I ought to lie so as to prevent harm to my friend. There is a long and developed debate about what one should do in the face of this kind of uncertainty—expected utility theory developed in part as a solution—and whether such uncertainty shows that the central moral "ought" is always evidence-relative, or agent-relative, in some meaningful sense.[54]

This Article is not about that kind of uncertainty, uncertainty about the relevant facts. It is about a different type of uncertainty, uncertainty about what the relevant action-guiding norms require given the facts.[55]

To illustrate, suppose I am certain about the relevant facts but am uncertain about whether, given those facts, I am permitted to lie.[56] That is, I *know* that, while lying is slightly easier, both lying and merely misleading are equally likely to protect my friend. But I have some doubts about what this means I am morally permitted to do: I believe it would be wrong for me to disclose the information. I believe it would be morally permissible to lie under the circumstances, though I am not entirely sure.[57] And I am absolutely sure that it would be morally permissible to merely

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[54] *See, e.g.*, Krister Bykvist, *How to Do Wrong Knowingly and Get Away with It*, *in* NEITHER/NOR: PHILOSOPHICAL PAPERS DEDICATED TO ERIK CARLSON ON THE OCCASION OF HIS FIFTIETH BIRTHDAY 31, 33 (Rysiek Sliwinski & Frans Svensson eds., 2011); Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection*, 101 ETHICS 461, 462–63 (1991); *see also* THOMAS NAGEL, MORTAL QUESTIONS 132–34 (1991) (discussing the agent-centered character of certain sources of value); BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 101–13 (1981).

[55] I use "facts" here and throughout to mean *nonnormative* facts, though such facts may have normative implications.

[56] The example's structure is drawn from LOCKHART, *supra* note 3, at 4.

[57] *See generally* Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297 (2022) [hereinafter Cox, *Legitimizing Lies*]. *See also* SAUL, *supra* note 53, at 1–3.

mislead. Again, I am aware of all the morally relevant facts: Lying is easier than merely misleading; both are equally likely to protect my friend. My uncertainty is only about what, in light of those facts, is the moral thing to do.

If I aim to do what is moral, which action should I choose?

EXAMPLE 2: PROTECTING SECRETS – NORMATIVE UNCERTAINTY

	Possibility 1 Lying is Morally Permissible	Possibility 2 Lying is Morally Wrong
A: Disclose	Wrong	Wrong
B: Lie	Permissible	Wrong
C: Merely Mislead	Permissible	Permissible

Such choice sets are common,[58] and, as moral theorists have observed, the "intuitively obvious answer" when faced with them is to choose *C*.[59] By choosing *C*, I ensure that I do what is morally right. By contrast, *B* involves "moral risk": there is a chance that by doing *B*, I do what is morally wrong.[60] "If my sole purpose is to do what is right, it makes no sense to accept an avoidable moral risk."[61] Because *C* is an available option that avoids this moral risk, without any real measurable downside, I should do *C*.[62] That is, in my example, I should merely mislead the questioner about my friend's secret, not lie about it, even though I believe that it is morally permissible for me to lie under the circumstances.

This conclusion, that I ought to merely mislead—to take Option *C*—is not about what it is *moral* to do.[63] Rather, my conclusion, that I ought *C*, is a conclusion about what I ought *rationally* do given my beliefs about what it is moral to do. This can be seen by considering Option *B*: I think that *B* (lying) is most likely a morally permissible choice. My conclusion that I ought not *B* (lie), given the availability of Option *C* (merely mislead), is not a conclusion that it would be *morally* wrong to do *B*. Rather, my

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58 MACASKILL, BYKVIST & ORD, *supra* note 3, at 15–18 (collecting examples).

59 LOCKHART, *supra* note 3, at 4; *see also* MACASKILL, BYKVIST & ORD, *supra* note 3, at 40–41 (noting this choice is required by dominance).

60 LOCKHART, *supra* note 3, at 4.

61 *Id.*

62 *Id.*

63 The reason that I should not conclude that doing *B* is *morally* wrong given my uncertainty is discussed in Part II.B. *See also* LOCKHART, *supra* note 3, at 4 ("It follows that what is reasonable for me to do is not the same as what is morally right for me to do.").

conclusion is that, given my aim to do what is *morally* right, it would be *irrational* to do *B*. The verdict is still out on whether *B* is morally right—I believe *B* is very likely morally right, but I am not 100% sure.

Why might I be uncertain about *B* but not *C*? One common reason is that I am uncertain about the reasons why the options are right or wrong. For instance, I might be torn between two different theories about what makes an act morally right or wrong.

EXAMPLE 2A: PROTECTING SECRETS: UNCERTAINTY CONCERNING MORAL THEORIES

	Possibility 1 Moral Theory 1 is correct	Possibility 2 Moral Theory 2 is correct
A: Disclose	Wrong	Wrong
B: Lie	Permissible	Wrong
C: Merely Mislead	Permissible	Permissible

These theories agree that *C* is morally permitted, even though they disagree about the reasons why, and so I am certain *that C* is morally permissible even though I am uncertain about why this is so. But the theories diverge in their treatment of *B*. The theory in which I place the most credence—the one that I believe is most likely correct—considers *B* to be morally permissible. Hence, I believe that *B* is morally permissible, but I lack complete confidence in this judgment.[64]

This simple example shows that there is a gap between my beliefs about what morality demands, and what it is rational for me to do in light of those beliefs. In other words, my evidence about which moral theory is correct is insufficient to be certain, in all cases, which action(s) is moral to take. When I decide what to do, I do so under conditions of uncertainty. Rationality requires me to take that uncertainty into account, given my aim of doing what is morally right.[65]

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[64] This is common with respect to lying, and protective lies are a classic example. *See generally* SAUL, *supra* note 53; Cox, *Legitimizing Lies*, *supra* note 57; *cf.* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 153 (2014) (suggesting that certain protective lies are permissible but denying that they are lies "at least for moral and legal purposes").

[65] LOCKHART, *supra* note 3, at 4–6. *But see* Weatherson, *supra* note 27, at 149–50 (discussing an example of welfare maximization under conditions of uncertainty).

B.   Normative Uncertainty in Judicial Decision-Making

A similar difficulty arises for judges in determining what they ought to do when deciding a case. Moral philosophers working on moral uncertainty have recognized this possibility, at least in theory.[66] But the legal version of the problem is much deeper than moral philosophers commonly suppose. None of the attempts by moral philosophers take seriously the complexity or demands of legal reasoning from the internal point of view. A conscientious judge is not making a one-off moral decision on particular issues. Rather, a judge is bound by decisions that were made before, and a judge's decisions—and the reasons she gives for them—will similarly bind the outcome of future cases.[67]

Further complicating matters is the extent to which lawyers are already versed in what might look like "normative" uncertainty. A core function of judging is to resolve uncertainty about norms, like about which set of laws govern; within that set, which rules apply; and how those rules apply to a given set of facts.[68] And there are competing theories of adjudication and doctrines for handling hard issues and hard cases, like equity, constitutional avoidance, or deference.[69] In a way, uncertainty about

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[66]   LOCKHART, *supra* note 3, at 133–40 (offering an issue-by-issue account of *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022)); MACASKILL, BYKVIST & ORD, *supra* note 3, at 65–67 (discussing moral decisions about trying a wrongly accused man when a mob demands blood).

[67]   I use "bound" in its thinnest sense. As noted above in note 26, there are competing views about what "law" is and what it means for a judge to be "bound" by it—points about which our judge may herself be uncertain. *See also, e.g.*, LLEWELLYN, BRAMBLE BUSH, *supra* note 26, at 69–76; ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 206–09 (2012). For similar reasons, a judge's belief that she is bound may require self-deception. And of course, there are empirical questions about how judges actually *do* behave, whatever their beliefs about how they *ought* to behave. *See generally* Donald R. Songer, Martha Humphries Ginn & Tammy A. Sarver, *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137 (2003).

[68]   Arguably, substantive private law helps resolve normative uncertainty in the context of moral and social norms. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 301–02 (2020); Tom Dougherty, *Moral Indeterminacy, Normative Powers and Convention*, 29 RATIO 448, 454–55 (2016) (discussing conventions as a mechanism to remove moral indeterminacy).

[69]   *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (constitutional avoidance); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (deciding issues to avoid review); Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1055 (2021) (equity); *see also* Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation* 51 J. LEGAL STUD. 133 (2022) (examining how courts deal with cases that raise special hardships when an otherwise sound legal rule would apply); Sunstein, *supra* note 14, at 1735–36 (arguing that judges converge on incompletely theorized agreements for particular outcomes in order to produce agreement). There has

norms is to a lawyer what uncertainty about facts is to a moral agent.[70] Some even take the settling of other kinds of normative uncertainty—like moral uncertainty—to be a core function of the legal system, and so of judging.[71] These features of legal reasoning make normative uncertainty—in the sense in which I use the term—more difficult to model and to solve for a judge.[72]

Even so, we can get a simplified version of the problem off the ground by making a few simplifying assumptions and by starting with a familiar case.

Suppose you are a Justice deciding a blockbuster copyright case about software. Happily, you are a whiz with computers, so we needn't get into the technical details.[73] The case presents two issues: (1) whether the type of computer software at issue is copyrightable; and (2) whether, if copyrightable, copying the software is nevertheless fair use because it is necessary to create an entirely new computer program with commands familiar to the user ("Copy," "Print," or "Quit").

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also been renewed interest in the nature of hard cases, *see generally, e.g.*, Ruth Chang, *Hard Choices*, 3 J. AM. PHIL. ASS'N 1 (2017); Shahshahani, *supra*, and in second-order methods for deciding hard cases, *see, e.g.*, Nelson & Schwartzman, *supra* note 11; Charles L. Barzun & Michael D. Gilbert, *Conflict Avoidance in Constitutional Law*, 107 VA. L. REV. 1, 12–31 (2021); Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847 (2021); Bernick, *supra* note 28, at 15–30; *cf.* Felipe Jiménez, *A Formalist Theory of Contract Law Adjudication*, 2020 UTAH L. REV. 1121, 1142–48, 1152, 1157–59. *See also generally* Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. (forthcoming 2023).

[70]   *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.").

[71]   *E.g.*, Shapiro, *"Hart-Dworkin" Debate*, *supra* note 12, at 43 n.59; Stone, *supra* note 15.

[72]   Legal scholars even use the term "normative uncertainty" to refer to many of these problems, from legal indeterminacy, uncertainty about law's efficacy, and/or uncertainty about what a given law's objectives should be, *e.g.*, Rebecca Crootof & BJ Ard, *Structuring Techlaw*, 34 HARV. J.L. & TECH. 347, 356, 364–79 (2021); Caroline Henckels, *Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference*, 45 FED. L. REV. 181, 182, 184 (2017), to conflict-of-law situations, especially in international law, *e.g.*, Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMPAR. L.Q. 51, 62 n.61 (2006). Those discussions usually focus on how our all-things-considered jurisprudences should handle uncertainty. They are not about "normative uncertainty" as I use the term—about what a judge should rationally do when she is uncertain about which all-things-considered jurisprudence to follow. Though it may turn out that aspects of those discussions are related. *Cf. infra* Part III.B. My usage follows the philosophical literature.

[73]   If you were not a whiz, then there would also be an added complication from a kind of empirical or descriptive uncertainty. This kind of uncertainty can arise even where there is a fixed record of factual findings as occurs for courts of review. *See generally* Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2 (2010).

For simplicity, we'll assume you only have three choices of judicial act, setting down one of three opinions *A*, *B*, or *C*:

    A. Rule that the software is copyrightable and defendant's copying was not fair use, issuing a judgment for plaintiff.

    B. Rule that this type of software is not copyrightable, mooting the fair use question and issuing a judgment for defendant.

    C. Rule that defendant's copying is fair use as a matter of law, avoiding the copyrightability question and issuing judgment for defendant.[74]

This is, of course, a gross simplification of the judicial act. For any of these rulings, you would need to make decisions about how to reach them. For example, if you find for the defendant on copyrightability (Opinion *B*), you will need to make choices about how to delineate this type of software, and the reasons why this type, unlike other types, is not copyrightable.[75]

This choice set also grossly simplifies the options available to you, both doctrinally and practically. For example, instead of choosing any of the three options above, you might instead correct one of the relevant standards (i.e., copyrightability or fair use) and then remand for further proceedings. And in the real world, this choice is not yours alone: as a Justice, you would be deciding the case as a member of the Court, and so you would need to decide not only which ruling would be appropriate, but also how to vote in light of your views on the appropriate rulings and the appropriate approach to court deliberations.[76]

In addition to simplifying your choice set, we also need to simplify some basic tenets of legal reasoning. The substantive legal issues are difficult: a case like this has been to the Supreme Court

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[74] If a defendant's copying is fair use, then the copying of an otherwise protected work is not an infringement and there is no liability. 17 U.S.C. § 107.

[75] The question implicates at least five circuit splits. *See* Brief of 65 Intellectual Property Scholars as Amici Curiae in Support of Petitioner, *Google*, No. 18-956, at *8–19; Shubha Ghosh, *Ain't It Just Software?*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND ARTIFICIAL INTELLIGENCE (Ryan Abbott ed., 2022).

[76] *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1643–45 (2003) (discussing importance of collegiality to group reasoning on circuit courts); *see also* Kornhauser & Sager, *supra* note 10, at 11–17 (describing doctrinal paradox and impact of multimember courts' voting procedures on judicial decisions).

twice already, and the Court was divided both times.[77] Deep disagreements about textualism and purposivism are implicated by the copyrightability question, including how to apply those methodologies.[78] Fair use, though codified,[79] remains a judge-made standard, and so views about the proper interpretation and application of precedent will be at play.[80] The structure of the case, with the possibility of mooting or avoiding issues, raises questions of judicial minimalism and incrementalism. The case involves technology, raising questions about judicial method as applied to such cases (including whether such cases should be treated differently).[81] And there are important policy considerations, which on at least some views of adjudication are relevant to the exercise of discretion (if any) left by underdetermined legal rules: a large chorus of amici argues that the fate of software innovation itself is on the line.[82] There are also institutional concerns in the real world where you would not be deciding the case alone: to what extent should you consider disagreement with your colleagues or otherwise make compromises to achieve, if not the best ruling, the

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[77] *See generally* Lotus Dev. Corp. v. Borland Int'l, 516 U.S. 233 (1996); *Google*, 141 S. Ct. 1183.

[78] *Compare Google*, 141 S. Ct. at 1197–99 (Breyer, J.), *with id.* at 1212–14 (Thomas, J., dissenting). *See also* Devlin Hartline & Adam Mossoff, Google v. Oracle*: A Copyrightability Decision Masquerading as Fair Use*, WASH. LEGAL FOUND. (May 7, 2021), https://perma.cc/27GC-LCSU.

[79] 17 U.S.C. § 107.

[80] As one example of the uncertainty, the Justices ordered supplemental briefing on the appropriate standard of review for fair use. Google LLC v. Oracle America, Inc., 140 S. Ct. 2737 (2020) (mem.); *see also* Pamela Samuelson & Clark D. Asay, *Saving Software's Fair Use Future*, 31 HARV. J.L. & TECH. 535 (2018); Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1556–65 (2020) (discussing different views of stare decisis).

[81] *See generally* Samuelson & Asay, *supra* note 80; Crootof & Ard, *supra* note 72; Lee, *supra* note 73; *cf. generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach* 113 HARV. L. REV. 501 (1999); Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155, 1183–85 (2002).

[82] *See, e.g.*, Brief of 72 Intellectual Property Scholars as Amici Curiae in Support of Petitioner, *Google*, No. 18-956, Dkt. No. BL-127, at *1–3; Brief for International Business Machines Corp. and Red Hat, Inc. as Amici Curiae Supporting Petitioner, *Google*, No. 18-956, Dkt. No. BL-161, at *13–18; Brief of Microsoft Corporation as Amicus Curiae in Support of Petitioner, *Google*, No. 18-956, Dkt. No. BL-131, at *7–12; Amicus Curiae Brief of Developers Alliance in Support of Petitioner, *Google*, No. 18-956, Dkt. No. BL-108, at *15–18. *But see* Brief of Amici Curiae Copyright Thought Leaders in Support of Respondent, *Google*, No. 18-956, Dkt. No. BL-187, at *5–6, *8–9.

next best?[83] These are only a few of the many things a judge must consider.

It is doubtful that even the best judge (or anyone, really) has a fully worked-out view about how, all things considered, to decide cases that is completely worked out across the possible range of cases—that is, about when to rely on text or overturn precedent, what discretion is available and how to exercise it, or any of the many, many factors that go into judging.

But she must have at least an inchoate one.[84] And there are limits on the shape it can take: It must accommodate decisions thought beyond dispute, like the decision in *Brown*.[85] And though not undisputed, it seems at least plausible that judges and justices ought to apply consistent approaches—that judges ought exhibit some minimal theoretical coherence.[86] We criticize judges

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[83] *See, e.g.*, William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 323–328 (2018); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1649–51 (2003); Kornhauser & Sager, *supra* note 10, at 11–17 (discussing doctrinal paradoxes on collegial courts). Similar difficulties arise for judges deciding in the shadow of a reviewing court. *Cf.* James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 LAW & SOC. REV. 565 (2001).

[84] MURPHY, *supra* note 12, at 8 ("A judge's theory of adjudication may be sketchy and perhaps only implicitly believed, but she must have one. Decisions about people's legal situations obviously cannot be made without having views about which considerations it is appropriate to take into account.").

[85] *See* STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 78; Nomination of Amy Coney Barrett to the U.S. Supreme Court: Questions for the Record 161 (Oct. 16, 2020), https://perma.cc/73HW-JMJX.

[86] *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959):

> [W]hether you are tolerant . . . of the *ad hoc* in politics . . . are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.

See also Baude & Doerfler, *supra* note 83, at 337–38 (defending the assumption that judges have somewhat coherent methodologies). *Cf. generally* Richard Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824 (2023) (discussing relationship between personal consistency and rule-of-law values). Although I endeavor to remain neutral as to the extent of consistency required, my model aims to accommodate both ends of the spectrum, from minimalists about consistency and coherence to proponents of "coherence theory." For a recent account and defense of coherence theory in legal reasoning, see AMALIA AMAYA, THE TAPESTRY OF REASON: AN INQUIRY INTO THE NATURE OF COHERENCE AND ITS ROLE IN LEGAL ARGUMENT 11–73, 471–557 (2015) (summarizing coherence theory as developed by MacCormick, Peczenik, and Dworkin; and developing and defending a coherence theory of legal reasoning); *see also* Amalia Amaya, *Formal Models of Coherence and Legal Epistemology*, 15 A.I. & L. 429, 437–42 (2007) (modeling legal coherentism using belief revision formalisms).

not only for bad decisions, but also for deciding cases inconsistently with their approaches in past cases—for behaving lawlessly.[87] This suggests that a judge's approach ought have at least some minimal theoretical coherence and not be totally ad hoc, or else they would cease to be doing law.

But how to model this? To leverage the philosophical work that has come before, I will refer to a judge's (or Justice's) "jurisprudence." A jurisprudence is a theory or approach to deciding cases.[88] A given jurisprudence may include, for example, theories and beliefs about constitutional interpretation and construction;[89] the appropriate method of statutory construction;[90] the importance and application of stare decisis;[91] the scope of and limits

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[87]   *See, e.g.*, Re, *supra* note 86, at 852, 854–55 (collecting examples and discussing appropriateness of criticisms leveled at jurists for personal inconsistency); RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 25 (2018); Donald L. Doernberg, *Juridical Chameleons in the "New* Erie*" Canal*, 1990 UTAH L. REV. 759, 782–95 (1990) (criticizing Justices Brennan, Powell, Scalia, and Stevens for inconsistency); *see also, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now.' . . . It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards." (alteration in original) (citation omitted)).

[88]   I use "jurisprudences" instead of "normative theories of adjudication" both for simplicity and to avoid any confusion arising from narrow uses of "adjudication."

[89]   *Compare, e.g.*, Scalia, *Originalism*, *supra* note 2, at 852–64; William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U.L. REV. 1455, 1458 (2019), *with* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–79 (1996) [hereinafter Strauss, *Common Law*]; *see also, e.g.*, Solum, *supra* note 26, at 186–95 (advancing a neoformalist theory of constitutional precedent).

[90]   *Compare, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–37 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 126 (2001) (arguing that textualism is "not as inflexible, literal, and insensitive to nuance and context as some of its critics have suggested"), *with, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1370–80 (1994); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482–97 (1987); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1664–66 (1990); Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 134–41 (2020); James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346 (2019). There are of course different versions of these views. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279–90 (2020).

[91]   *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008) (Breyer, J.) ("Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same."); *see generally* Tyler, *supra* note 80.

on judicial discretion;[92] the relevance of political, moral, or prudential considerations;[93] methods for resolving legal uncertainty generated by conflicts of law, indeterminacy, or changed circumstances;[94] appropriate aims in judging; and, as relevant, the nature of law itself.[95] And although our example focuses on the Supreme Court, jurisprudences are not so restricted: there are questions about what a judge ought to do who sits on trial courts or local courts, where considerations of expediency—and the availability of higher-order review—may affect how a judge ought proceed.[96]

In short, a jurisprudence is a theory about what the judge ought do all things considered, and reflects views about which trade-offs are more or less optimal, about which actions are forbidden, permissible, or required.

I do not, at least at the outset, take a view on what form a plausible jurisprudence must take. Theoretically at least, without wading into long-standing debates, a jurisprudence can take many forms: for example, some jurisprudences mandate that a judge take a particular action, while others provide true discretion.[97] And different jurisprudences could provide varying levels of discretion, both with respect to the range of cases where discretion is permitted and the scope of that discretion in such cases (e.g., totally open or cabined by relevant legal or extralegal principles governing discretion's exercise). Indeed, a judge may be uncertain about the limits on plausible jurisprudences.

In real life, a judge's views evolve over time. In this sense, most judges think in terms of *incomplete* jurisprudences: their preferred jurisprudences fail to provide a resolution in every case, and so their jurisprudences evolve as they encounter new cases. I

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92 *See generally* HART, *supra* note 12; Dworkin, *Model of Rules*, *supra* note 12, at 32–40; Osborn v. Bank of U.S., 22 U.S. 738, 866 (1824) ("Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law.").

93 *See, e.g.*, Kahan et al., *supra* note 14 (evaluating institutional effects on ideological voting); *supra* notes 12–15.

94 *E.g.*, Crootof & Ard, *supra* note 72, at 387–416.

95 *See generally, e.g.*, HART, *supra* note 12; Dworkin, *Model of Rules*, *supra* note 12; Greenberg, *Moral Impact*, *supra* note 13; *see also supra* notes 12–15 and accompanying text.

96 *See, e.g.*, Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure,* 92 N.Y.U. L. REV. 767, 780–81, 787, 844 (2017) (discussing case-specific procedure and how the manner in which procedure is created may influence public perceptions of judicial correctness); *see also, e.g.*, R.I. Gen. L. § 33-22-19.1 (recognizing that probate court proceedings are recorded only at the request of a party or the presiding judge).

97 *Supra* notes 12–15 and accompanying text.

am going to model this as uncertainty between complete jurisprudences. That is, I will assume that these jurisprudential theories are stable, comprehensive theories. They are stable because they are *complete*—that is, the theories provide guidance on how to proceed in every conceivable case.[98] And so, on my model, a judge who has an incomplete jurisprudence is modeled as being uncertain between different complete jurisprudences that provide (sometimes competing) resolutions in cases not covered by the incomplete jurisprudence. In a similar way, this modeling choice does not exclude the possibility of indeterminacy.[99]

I make this modeling choice because jurisprudences, even incomplete ones, are not infinitely malleable. There are constraints provided by the requirement of theoretical coherence, like internal consistency, that force difficult trade-offs when selecting between theories, with some accommodating some cases better than others, and vice versa. Not knowing which trade-off to make is part of what generates the normative uncertainty. Indeed, this is where even Justice Scalia identified there would likely be room for doubt.[100]

Having laid this groundwork, let's return to our major copyright case about software. Recall that in our simplified version of the case, there are only three choices of judicial act, setting down one of three opinions *A*, *B*, or *C*:

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[98]   These assumptions also mean that each school of jurisprudence (e.g., originalism) will have many versions. *Infra* text accompanying notes 114–117. The assumption is also consistent with views that eschew abstract theories in favor of judicial minimalism. *E.g.*, Sunstein, *supra* note 14, at 1760, 1771–72. On my model, such views are the equivalent of saying that the only (or most) plausible jurisprudences are the ones in which judges act so as to reach the appropriate minimalist agreement. You might also think they are mischaracterized, *infra* Part III.B, though it is not clear their proponents would agree, *e.g.*, Sunstein, *supra* note 14, at 1757–60, 1767–70.

[99]   A complete jurisprudence can recommend multiple outcomes for a particular case, and so afford discretion. But the exercise of discretion will affect the appropriate recommendation in subsequent cases. This might similarly be modelled as a collection of competing jurisprudences, all of which agree on the availability of discretion in Case 1 but which differ in their recommendations for subsequent cases. The choice the judge makes in Case 1 will eliminate some of these competing jurisprudences from being plausible candidates for correct (or appropriate, or true) jurisprudences.

[100]   *See* Scalia, *Originalism, supra* note 2, at 864.

    A. Rule that the software is copyrightable and defendant's copying was not fair use, issuing a judgment for plaintiff.

    B. Rule that this type of software is not copyrightable, mooting the fair use question and issuing a judgment for defendant.

    C. Rule that defendant's copying is fair use as a matter of law, avoiding the copyrightability question and issuing judgment for defendant.[101]

And now suppose further there are only two candidate jurisprudences that you find plausible.

According to the first, you may choose either Opinion *B* or Opinion *C*.[102] This could be because, all things considered, the two opinions are in equipoise. Or it could be because, according to this jurisprudence, one is not required to select the opinion that, all things considered, would be optimal, within certain bounds and so long as the right party wins. You have genuine discretion and your views about what cabins discretion leaves the options open. I'll call this the "Boudin Jurisprudence," in homage to Judge Michael Boudin's concurrence in a similar case.[103]

According to the second, which I'll call the "Breyer Jurisprudence" (another homage[104]), you may only choose Opinion *C*.[105] On this approach, you attempt to make the narrowest ruling possible. Since fair use is a context-based standard, and you believe it applies here, it is the most straightforward way to make minimal law in a very difficult case. In particular, it allows you to avoid the many contentious substantive issues on copyrightability that you would need to resolve in choosing Opinion *A* or *B*.

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[101] *Supra* text accompanying notes 74–76.

[102] *Cf.* Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 821–22 (1st Cir. 1995) (Boudin, J., concurring), *aff'd by an equally divided court*, 516 U.S. 233 (1996).

[103] *Id.* at 819. In *Lotus*, the First Circuit was called upon to decide whether the software command hierarchy of Lotus 1-2-3 was copyrightable and, if so, whether Borland's copying constituted fair use. *See id.* at 809. Judge Boudin joined the majority opinion, finding the relevant software not copyrightable. *See id.* at 819, 822. He also wrote a concurrence explaining that the case could be decided on fair use grounds instead. *See id.* at 821–22. A widely respected jurist, Judge Boudin was appointed to the U.S. Court of Appeals for the First Circuit in 1992. *Michael Boudin*, U.S. CT. OF APPEALS FOR THE FIRST CIRCUIT, https://perma.cc/9NTH-XA7G.

[104] Justice Stephen Breyer penned the majority in *Google*, which revisited—in the context of API declaring code—the issues the Court had left unresolved in *Lotus*. *See Google*, 141 S. Ct. at 1200–09.

[105] *Cf. id.*, 141 S. Ct. at 1197 (Breyer, J.).

You most strongly believe in Boudin's Jurisprudence, but you think there is a small chance Breyer's Jurisprudence is the correct theory. How ought you decide?

EXAMPLE 3: SOFTWARE INTERFACE COPYRIGHT CASE
(SIMPLIFIED)

	Boudin Jurisprudence	Breyer Jurisprudence
A: Copyrightable, Not Fair Use	Wrong	Wrong
B: Not Copyrightable	Permissible	Wrong
C: Fair Use as a Matter of Law	Permissible	Permissible

This stylized hypothetical of *Lotus Development Corp. v. Borland International, Inc.*[106] and *Google* is analogous to the moral hypothetical with which we began. As with moral action choice *C*, you are certain that Opinion *C* is permissible, though you harbor some uncertainty as to why. You believe that Opinion *B* is probably also permissible, but the strength of your belief—your credence—is weaker. This is an act, like lying in the moral case, where the different theories in which you believe point in different directions. How should you decide?

Conventional wisdom suggests that, for example, if you are Judge Boudin, you should take whichever action Boudin's Jurisprudence recommends, since this is the theory you have determined to be most likely correct. That is, conventional wisdom suggests you are free to choose between Opinions *B* and *C*.

But it is not obvious that this is the rational way to proceed if your aim is to do that what which you ought to do.[107] Even if you ultimately choose to rule as in Opinion *C*, it should not be because you think Boudin's Jurisprudence is most likely the correct theory.[108] Rather, if you aim to do what is judicially right, and

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[106] 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided court*, 516 U.S. 233 (1996).

[107] Recall that we had assumed that a conscientious judge aims to do what she ought to do in deciding a case. *Supra* Introduction.

[108] This presents a difficulty in the legal case that is not present in the moral case: Opinions are not just acts; they include statements of the reasons for those acts. These statements of reasons, in turn, generally reflect parts of one (or more) jurisprudential theories. This raises questions about the proper scope of decision (opinion or something else), and whether the expressed reasons are ever the *actual* reasons (in the colloquial sense)

you can only set one opinion down as law,[109] you should choose Opinion *C* for the same reasons that in the moral example you should choose Option *C*: although you think the Boudin Jurisprudence is most likely correct, you are not certain and so choosing Opinion *B* involves "judicial risk." But this risk can be avoided by choosing Opinion *C*. Although either might be judicially right, the rational choice—if your aim is to do that which is judicially right—is to choose Opinion *C*, not *B*.

This, roughly, is the problem of normative uncertainty in judicial decision-making. The problem is about how to decide a case when there is uncertainty about how one ought to decide a case, not because of any uncertainty about the relevant descriptive facts, but because one is uncertain about what to do in light of them, all things considered. This was an easy case because the jurisprudence you believed most likely to be true, Boudin's Jurisprudence, recommended an action about which you were certain. Accordingly, rationality and your favored jurisprudence both recommended the same course of action.

Further examination will reveal that not all cases are so easily decided; the action it is rational to take, in light of normative uncertainty, might *not* be the action recommended by the jurisprudence in which you most strongly believe.

II. REJECTING THREE VERSIONS OF "MY FAVORITE JURISPRUDENCE" SKEPTICISM

At this point, you might have a nagging feeling that what I just said couldn't be right. One of the most important early lessons for law students is how pervasive legal uncertainty is and how much of a judge's work is to resolve it. Legal scholars and judges spend their lives grappling with how to do this work and how to do it better. The problem of normative uncertainty might

that the judge decided the case as she did. *See* Cox, Super-Dicta, *supra* note 33; *supra* text accompanying notes 32–35; *see also* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO L.J. 1, 84 (1979) (discussing the Court's efforts to "speak with one voice in the segregation cases"); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 306 (2004) (discussing how Jackson's law clerk counseled him against "candidly admitt[ing] his difficulty in legally justifying a judicial ban on school segregation" in deciding *Brown*).

[109] In real life, one could sign onto both a majority and concurrence, or include both lines of reasoning in a single opinion. This is an important feature in considering judicial acts. Normative uncertainty may turn out to justify them, *infra* Part III.B, but a fuller exploration of *courses* of judicial action must be left for future work, *cf.* LOCKHART, *supra* note 3, at 143–68.

thus seem trivial: it is just the everyday question, present in almost every case, about what the law is and its justification. For reasons that will soon become clear, I will call this line of skepticism, about whether the problem of normative uncertainty exists or is meaningful, "My Favorite Jurisprudence" Skepticism.

"My Favorite Jurisprudence" skeptics raise three related, but distinct, objections, and may not be entirely clear which they mean to offer. This Part explains why all three skepticisms are mistaken.

A. As Against Empirical Skepticism

The first objection raised by a My Favorite Jurisprudence skeptic is that he knows how to adjudicate a case: he has a preferred jurisprudential method, which he will follow. For example, he might believe in common law constitutionalism and has rejected originalism as a nonstarter. Or perhaps he believes the opposite. Either way, he believes that he lacks normative uncertainty because he is not uncertain about which jurisprudence he ought to follow. This is an *empirical* skepticism of normative uncertainty; according to it, normative uncertainty is theoretically possible, but, as a contingent matter, does not obtain.

This kind of reaction is to be expected. As has been repeatedly observed, "there is *massive* and *pervasive* agreement about the law throughout the system."[110] For those who have very developed views—leading constitutional law scholars, for instance—their uncertainty will likely only become apparent in a smaller number of cases, as different versions of a particular theory tend to exhibit greater agreement about case outcomes. The reaction may also be

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[110] Leiter, *Explaining Theoretical Disagreement, supra* note 5, at 1226–27 & n.54–55 (2009) (emphasis in original) (collecting data); *see also* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 427–30 (1985); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 790–91, 794–95, 823 (2009); *Unanimity*, SCOTUSBLOG (July 7, 2020), https://perma.cc/QMD9-RPMJ (showing that, in the terms between October Term 2008 and October Term 2019, the percentage of cases decided 9–0 ranged from 36% to 66%). *But see* Angie Gou, Ellena Erskine & James Romoser, *Stat Pack for the Supreme Court's 2021–22 Term*, SCOTUSBLOG 3 (July 1, 2022), https://perma.cc/8FT8-7S5W (identifying as a key finding the "[d]ecline of unanimity," noting that in October Term 2021 "[o]nly 29% of cases were decided unanimously, the lowest rate of unanimity in the two decades that we have been tracking the statistic"). The SCOTUSblog measure cited is for decisions that are unanimous in the *judgment*. The percentage of cases over this period in which the Justices agreed fully (all joined the Court's opinion in full, with none writing separately) ranged from 13% to 38% from October Term 2008 to October Term 2021. *See Unanimity*, *supra*, at 19; Gou, Erskine & Romoser, *supra*, at 14.

a professional hazard: the nature of judging is to work to *make decisions*, and so sometimes we confuse being decided with being certain that we decided right.[111]

But, if pressed, most empirical skeptics will admit to at least some ambiguity within their preferred jurisprudence. Even after settling, at a high level, which the favorite jurisprudence is—which school of jurisprudences is appropriate—there remains uncertainty about which *version* of the theory to follow.[112] This is particularly true in light of ambiguities inherent to law: the preferred jurisprudence may display open texture in its recommendations, with different versions of the jurisprudence providing different views about how to resolve that open texture. Indeed, the skeptic may have just gotten confused: he knows his preferred jurisprudence is not yet a *complete* jurisprudence (a strong assumption we had made for ease of illustration) and had not fully appreciated that we model this incompleteness as uncertainty across multiple versions.

For example, this skeptic may have insisted that, while he believed his choices were between Jurisprudence *A* and Jurisprudence *B*, the difficult case shows that a hybrid or pluralist theory, Jurisprudence *A-B*, is correct instead, and so he is not uncertain. Or take a skeptic who is a card-carrying textualist: he had thought his choices were between Jurisprudence *T1* ("Ordinary Meaning Textualism") and Jurisprudence *T2* ("Term of Art Textualism"), but the difficult case shows that a refinement of his preferred jurisprudence, *T1*, is in order, resulting in Jurisprudence *T1**. According to him, the difficult case shows that *T1** is correct instead, and so he is not uncertain.[113]

But I model adapting or refining a jurisprudence as deciding between different versions of that jurisprudence.[114] As discussed earlier, versions are highly specified, comprehensive views about

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[111] This may be related to hindsight bias. *See* Lioba Werth, Fritz Strack & Jens Förster, *Certainty and Uncertainty: The Two Faces of the Hindsight Bias*, 87 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 323, 326–28 (2002).

[112] *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354-56 (2015) (discussing versions of originalism); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 306 (2009) (observing that Justice Scalia "grossly understate[d] the level of disagreement among originalists").

[113] I thank Kevin Tobia for suggesting I also include a refinement example, in addition to the hybrid example, and in particular for proposing this textualism example. *See* William Eskridge Jr., Brian Slocum, & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. (forthcoming 2023), available at https://ssrn.com/abstract=4305017 (identifying and discussing "twelve choices in modern textualist interpretation").

[114] *Supra* note 98 and accompanying text.

what to do that share essential features with other versions within their school (i.e., the essential features of a less-specified jurisprudence for which the school is named). These versions are highly "fragile" in the sense that a slight alteration results in a distinct version.[115]

And so the skeptic who said he believed his choices were between Jurisprudences *A* and *B*, but then discovered Jurisprudence *A-B*, and then in the next case discovers Jurisprudence *A-B-C*, can be modeled as having been uncertain between versions, *A-A-A*, *B-B-B*, *A-B-A*, *A-B-B*, *A-B-C*, and so forth. And the textualist skeptic can be modeled as having been uncertain between versions *T1**, *T1***, *T1****, and so forth. That is, in refining a jurisprudence, a judge might believe himself to be creating something new, but the conceptual space already existed.

But jurisprudences are not infinitely malleable—Jurisprudence *A-B-C* or *T1**** may be lawless!—and so I talk of adjudication between versions of jurisprudences, rather than creation, adaptation, or refinement of jurisprudences.[116] This makes the uncertainty a little easier to see: a case will almost certainly arise where the empirical skeptic is uncertain of which trade-off he ought to make to preserve consistency, and so too whether he made the right one in the past.[117]

And so some empirical skeptics will turn out not to be skeptics at all: they admit—upon recognizing these ambiguities—that despite their well-developed views, some unresolved normative uncertainty remains. They had simply overlooked it.

Other skeptics will resist. They will take a similar approach to versions of a jurisprudence as to classes of jurisprudences: the appropriate approach is to adjudicate between the versions and then, having selected the best version, to apply that version to the legal problem at hand and follow its recommendations. Such a skeptic insists that he knows what he ought to do, which is to follow the best version of his favorite jurisprudence. As explained next, this new line of skeptical resistance takes two forms: a theoretical skepticism, and a practical skepticism about the importance and difficulty of the problem.

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[115] *Cf.* DAVID LEWIS, *Causation in* 2 PHILOSOPHICAL PAPERS 159, 196–99 (David Lewis ed., 1987) (applying the notion of "fragility" to events, as opposed to theories).

[116] *See supra* notes 84–100 and accompanying text.

[117] *See* Scalia, *Originalism, supra* note 2, at 864; *supra* note 112; *see also* Transcript of Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392, at *39:18–19 (Roberts, C.J.) (expressing uncertainty about how to evaluate whether a case has been "wrongly decided").

B.   As Against Theoretical Skepticism

The next strategy pursued by the skeptic is to insist that, despite his uncertainty, there is no puzzle: the conscientious judge ought to do whatever she believes is the right thing to do. This skepticism takes multiple forms, and someone offering it might be unclear which he offers: (1) the judge ought as a legal matter ("ought *judicially*") do whatever she believes, given her evidence, is the jurisprudentially right thing to do (theoretical skepticism); or (2) the judge ought *rationally* follow the recommendations of her preferred version of her preferred jurisprudence (pragmatic skepticism). I here address the former; I turn in Part II.C to the latter.

The theoretical skeptic essentially objects that this is just how legal reasoning works. The skeptic applies his favorite jurisprudence. If he discovers his favored jurisprudence is incomplete—if he discovers he was uncertain as to which version is correct—he takes a similar approach to versions of theories as to classes of theories: adjudicate between the versions and, once having selected the best version, apply that version to the legal problem at hand. The question of what he ought to do when he doesn't know what he ought to do is simply the question: What ought he to do? And the answer is: engage in some legal reasoning to figure it out.

Indeed, the theoretical skeptic might argue that his favorite jurisprudence *already* says what to do in cases of normative uncertainty.[118] And so, when uncertain about what the law requires, he should just apply one of the many legal doctrines and approaches designed to handle just such a problem. He should decide on the narrowest ground possible; he should avoid the constitutional question; he should defer to Congress or the executive; he should rule, but in an unpublished opinion. There is no problem of normative uncertainty distinct from the everyday question of what the opinion ought to be: judges can and should just reason through using the legal tools developed to handle uncertainty. To suggest otherwise risks an incoherency, that a court both should and should not have done what it did.[119]

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[118]   *See supra* notes 68–70 and accompanying text. This differs from the moral case. Many moral theories have views for coping with *empirical* uncertainty—uncertainty about what the facts are. But uncertainty about value or the appropriate theory of the good does not usually appear in a first-order theory.

[119]   *Cf.* Wechsler, *supra* note 86, at 11.

This line of skepticism contains a key insight—that we should be skeptical of *jurisprudences* that involve certain kinds of judicial hedging—but it does not make the problem of normative uncertainty disappear. I begin with a clarification, explain an obvious flaw, turn to the key insight, and then address why theoretical skepticism ultimately fails in a world where judges are only human and can make mistakes.

The clarification: The legal canons cited—and many others not listed—are not a solution to the problem to the extent that they are legal or jurisprudential doctrines. That is, on our simple model, they are already taken into account in the jurisprudences about which the judge is uncertain. After all, there may be uncertainty as to when and how to invoke these legal practices for handling uncertainty. I will return to the possibility that they have been mischaracterized in Part III.[120]

An obvious flaw: It *cannot* be the case that what a judge ought judicially do is whatever a judge believes he ought judicially do, for this would render the judge infallible. And judges are obviously not infallible.[121] A judge—before *Brown*—might have sincerely believed that "separate but equal" was consistent with the Fourteenth Amendment, and that upholding racist practices on the basis of "separate but equal" is judicially right. Such a judge would have been mistaken, no matter how strongly he believed this or how well-supported it appeared based on his evidence.[122] But if, as a matter of judicial rightness, the judge is right whenever he does what he believes is right, then there is no room to criticize his decisions: a judge could do nothing other than what

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[120] If they have been mischaracterized—and if offered as a solution to normative uncertainty—then the solution to normative uncertainty is *not* follow "My Favorite Jurisprudence," but *avoid* or *minimize* or something similar. And it has serious implications for the legal authority of such doctrines, *see* Cox, Super-Dicta, *supra* note 48, and the criteria by which we evaluate them, *infra* Part III.B.

[121] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that race-based segregation laws were constitutional), *overruled by Brown*, 347 U.S. 483; Korematsu v. United States, 323 U.S. 214 (1944) (holding that executive order interning U.S. citizens of Japanese descent was constitutional), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Buck v. Bell, 274 U.S. 200 (1927) (holding that statute permitting compulsory sterilization was constitutional); *see also* Massachusetts v. United States, 333 U.S. 611, 639–40 (1948) (Jackson, J., dissenting) (noting "personal humiliation involved in admitting that [he] do[es] not always understand [this Court's] opinions"). *Cf.* LOCKHART, *supra* note 3, at 44–46.

[122] STRAUSS, LIVING CONSTITUTION*, supra* note 6, at 78 ("Anyone who doubts that *Brown* is lawful is a fringe player, at best."); *supra* note 121 (collecting cases now considered abhorrent). Explaining how is work for another day. *See supra* notes 5–16 and accompanying text.

is judicially right so long as he believes he is doing what is judicially right.

The theoretical skepticism is not totally off base, however, and so we turn to the key insight: There is reason to think that a *jurisprudence* which required hedging would be incoherent. Such a jurisprudence would seem to suggest that, in some cases, you ought not do what you ought to do. Any decision rule other than My Favorite Jurisprudence (i.e., do what the jurisprudence says you ought to do) seems to generate this incoherency.

To illustrate, begin with the following case:

CASE I

	Jurisprudence 1	Jurisprudence 2
Option A: Remand	Permissible	Permissible
Option B: Reverse	Permissible	Wrong

There are two options for resolving it: remand the case or reverse it. According to Jurisprudence 1, it would be judicially permissible to either reverse in favor of plaintiff or remand for further proceedings (i.e., both options are permissible); according to Jurisprudence 2, it would be judicially permissible to remand, but not to reverse.

Our judge believes that Jurisprudence 1 is almost certainly correct, say at least 90% sure, but harbors some doubt that Jurisprudence 2 may be the correct jurisprudential theory instead. Her decision matrix is depicted in Scenario I.

SCENARIO I: JUDGE BELIEVES JURISPRUDENCE 1 IS ALMOST CERTAINLY CORRECT.[123]

	Possibility 1 $(.90 \leq p < 1)$ Jurisprudence 1	Possibility 2 $(0 < p \leq .10)$ Jurisprudence 2
Option A: Remand	Permissible	Permissible
Option B: Reverse	Permissible	Wrong

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[123] Following formal epistemology, I use probabilities $(0 \leq p \leq 1)$ to represent the level of credence a judge has that a given jurisprudence is correct. *Infra* note 141.

Our judge knows all the relevant descriptive and empirical facts. That is, she knows all the relevant facts about what happened, about the record, about what precedent there is and what it says, and about the consequences of each option.[124] But our judge has normative uncertainty: despite knowing all the relevant descriptive and empirical facts, she is uncertain about *how* she ought to decide because she is uncertain which jurisprudence is correct and they point in different directions. According to Jurisprudence 1, she may either reverse or remand. But according to Jurisprudence 2, she may only remand. As a result, she believes, but is not sure, that she may do either (i.e., both options are likely judicially permissible). But she is certain that she may remand (i.e., remanding is definitely permissible).

What ought the judge do, given that the judge has some uncertainty about what she ought to do? The My Favorite theoretical skeptic has an insight that there is something about the framing of this question that is incoherent. Professor Brian Weatherson's "Might Argument" helps show what it is.[125]

The basic structure takes three premises: one about an act that is certainly right, one about an act that is possibly right, and one concerning the appropriate course of action when uncertain about how to decide (a "decision rule"). The conclusion is a recommendation about what the judge ought to do when one option is definitely right and the other is probably right, but might be wrong (hence "Might Argument"). For example, from the perspective of the judge who believes Jurisprudence 1 is almost certainly correct:

1. It is definitely true that remanding is permissible.

2. It is likely true that reversing is permissible.

3. It is definitely true that, when uncertain about what is the right thing to do, the judge ought *[decision rule]*.

4. The judge ought *[conclusion]*.

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[124] For simplicity, I exclude the possibility of *empirical* uncertainty, though normative uncertainty interacts with empirical uncertainty in interesting ways. *Cf.* Aditi Bagchi, *Managing Moral Risk: The Case of Contract*, 111 COLUM. L. REV. 1878, 1925–30 (2011) (discussing use of contract to manage "moral risk").

[125] The following Might Arguments are adapted from Weatherson, *supra* note 27, at 145 (developing the Might Argument in the moral context).

When we ask about what the judge should do given normative uncertainty, we are asking what the missing decision rule should be. According to the My Favorite skeptic, the appropriate decision rule is "do what the jurisprudence in which you place the strongest credence says to do." In Scenario I, that means the conclusion of the Might Argument would be that the judge ought *either* remand or reverse. The conclusion will always be that the judge ought do what the favored theory recommends—that is, whatever (1) and (2) say the judge ought to do. Here, the judge may either remand or reverse, even though she believes reversing might be wrong.[126]

As Weatherson observes, there is an essential intuition driving the question about normative uncertainty, namely, that uncertainty sometimes requires doing something *other than* what one believes is right or permitted. For example, the judge might believe she should be cautious in the following way by adopting the decision rule "Caution":

> *Caution.* If a judge has a choice between two options, and one might be wrong, while the other is definitely permissible, then it is wrong to choose the first option.[127]

But if Caution is true—and the judge is certain of its truth—then this would generate an incoherency. Using Caution as the decision rule in the Might Argument, and assuming epistemic closure,[128] the judge would seem to believe:

1. It is definitely true that remanding is permissible.

2. It is likely true that reversing is permissible.

3. It is definitely true that, when uncertain about the right thing to do, the judge ought *not choose an option that might be wrong if another option is definitely permissible.*

4. The judge ought *remand, not reverse.*

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[126] If you suspect there's some impermissible bootstrapping going on here about the permissibility of reversing—from (2)'s "likely" permissible to (4)'s seemingly "definitely" permissible—I'm inclined to agree. But I want to focus on the key insight of the theoretic objection, which turns on applying a different decision rule.

[127] This is an adaptation of Weatherson's "ProbWrong" principle. Weatherson, *supra* note 27, at 146 ("If an agent has a choice between two options, and one might be wrong, while the other is definitely permissible, then it is wrong to choose the first option.").

[128] Steven Luper, *Epistemic Closure*, *in* Edward N. Zalta (ed.), STAN. ENCYCLOPEDIA PHIL. (Summer 2020 ed.), https://perma.cc/4KSB-JZS6.

The problem is that (2) cannot be true if (3) and (4) are true: it cannot be the case both that reversing is *likely* permissible (Line 2) and that reversing is *definitely not* permissible (Line 4).[129]

In other words: the theoretical skeptic's key insight is that we should be skeptical of principles like Caution—of hedging as a purely *legal* or *jurisprudential* doctrine.[130] Such principles cause the judge to have incoherent beliefs.

So, that is the key insight. But this does not show that normative uncertainty is incoherent. For it is also not the case that the judge definitely ought to do whatever she believes, given her evidence, is likely the right thing to do. That results in the judge being infallible. And even on an internalist view of judicial rightness—a view according to which judicial rightness is what the fully informed ideal herculean judge would do—our ordinary human judges are fallible and can make mistakes.[131]

The way out of the incoherency—without concluding that judges are infallible—is to recognize that there are two senses of the word "ought." One sense is the "judicial ought"—what a given

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[129] This argument can be leveled against similar decision rules proposed in the literature, like moral safety arguments with respect to abortion. It also raises difficult questions about the nature, coherence, and authority of certain legal doctrines purporting to deal with uncertainty. *See infra* Part III.B; Cox, Super-Dicta, *supra* note 33; *cf.* Wechsler, *supra* note 86, at 11.

[130] *See* LOCKHART, *supra* note 3, at 44–46, 74–78; Weatherson, *supra* note 27, at 144–47. I here part ways with some of the literature on second-order methods for deciding hard cases, depending on how those theories are to be understood: I disagree with them to the extent that they propose *jurisprudential* solutions for addressing normative uncertainty, but I am open to them as ways to think about *rational* solutions to the problem. *See supra* note 69 (collecting literature on second-order methods for deciding hard cases). They also seem to address other ways in which cases are hard for a judge, in addition to a judge's normative uncertainty, but those difficulties are not my concern here (though there may—understandably!—be uncertainty about how to decide such cases). For additional reasons that cases may be "hard," see Chang, *supra* note 69 (arguing hard cases occur when options exhibit parity), and Shahshahani, *supra* note 69 (considering different meanings for "hard cases").

[131] *See, e.g.*, *supra* note 121 (examples of fallibility); DWORKIN, LAW'S EMPIRE, *supra* note 12, at 138–54 (discussing how the ideal Herculean judge would adjudicate from a law as integrity perspective). Appeal to an internalist account of moral rightness does not solve the puzzle in the moral case either. *See* LOCKHART, *supra* note 3, at 76 ("If one violates the true subjective ethical theory as a result of not knowing that it is the true theory, then . . . one acts wrongly."); Weatherson, *supra* note 27, at 156:

> [A]ny philosophical theory whatsoever is going to have to say something about how to judge agents who ascribe some credence to a rival theory. . . . Once you're in the business of theorising at all, you're going to impose an external standard on an agent, one that an agent may, in good faith and something like good conscience, sincerely reject.

jurisprudence recommends the judge ought to do. And the other is a "*rational* ought": what a judge ought rationally do given her uncertainty and her aim to do what she ought (judicially) do.[132] Revising the above to distinguish between these two senses of "ought"—between these two senses of right, wrong, and permissible—eliminates the incoherency:

1. It is definitely true that remanding is (judicially) permissible.

2. It is likely true that reversing is (judicially) permissible.

3. It is definitely true that, when uncertain about the (judicially) right thing to do, the judge ought (rationally) *not choose an option that might be (judicially) wrong if another option is definitely (judicially) permissible.*

4. The judge ought (rationally) *remand, not reverse.*

Lines (2), (3), and (4) can all be true, even where the decision rule is something like Caution. This is because it is a contingent matter whether what a judge ought rationally do is what a judge ought judicially do. If a judge aims to do what is judicially right, and a judge *knows* that she ought (judicially) reverse, then it is also the case that the judge ought (rationally) reverse. But if a judge does not know whether she ought (judicially) to reverse or remand, then it may not be the case that the judge ought (rationally) do what her preferred jurisprudence says she ought (judicially) do.

That is, the question of what a judge ought to do when a judge is uncertain about what a judge ought (judicially) do is not a question of jurisprudence, but of *rationality* given the judge's own limitations. Framed this way, the question is coherent. And it poses a deeply *practical* problem.

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[132] Weatherson argues against drawing this distinction in moral theory, but his argument does not succeed in the judicial case. His main argument is that, in the moral case, making this distinction and aiming at what is moral (whatever that is) would fetishize morality. Weatherson, *supra* note 27, at 151–52. It is not a similar failure for a judge to aim at what she ought (judicially) do. In any event, I have assumed that the judge's sole aim is to do what is judicially right, broadly construed. *Supra* note 4 and accompanying text; *see also* LOCKHART, *supra* note 3, at 134, 141 (arguing in favor of a similar distinction in the judicial case).

C.   As Against the "Obvious" Solution

The final sort of "My Favorite" Skepticism is a pragmatic skepticism. It cedes the existence of the problem but denies that it is significant or difficult to solve. That is, this skeptic acknowledges that normative uncertainty is theoretically possible, and in fact exists. But the pragmatic skeptic denies that the problem is anything special. The most straightforward approach to coping with normative uncertainty, they suggest, is to simply follow the recommendations of whichever jurisprudence one finds most plausible.[133] Call this approach the "My Favorite Jurisprudence Solution," or for short, the "obvious solution."[134] For example, Judge Boudin would simply apply the Boudin Jurisprudence, Justice Breyer would apply the Breyer Jurisprudence, and Justice Scalia—known by even nonlawyers for the strength of his belief in his originalist approach—would apply the Scalia Jurisprudence, without consideration to what the other approaches would require.[135]

The pragmatic skepticism is distinct from the theoretical skepticism. By endorsing My Favorite Jurisprudence as the solution to normative uncertainty, the pragmatic skeptic does not claim that a judge ought *judicially* apply the theory or methods she believes to be the correct ones. Rather, the pragmatic skeptic claims that when a judge is uncertain about what she ought *judicially* do, she ought *rationally* apply that jurisprudence she believes most likely to be judicially right. That is, under the obvious solution, although it is not the case that a judge ought *judicially* follow her preferred jurisprudence, it is the case that a judge ought *rationally* follow her preferred jurisprudence.

My Favorite Jurisprudence as an approach to coping with normative uncertainty is also distinct from the empirical version

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[133] *See* LOCKHART, *supra* note 3, at 42 (noting that the approach is commonly assumed); Edward J. Gracely, *On the Noncomparability of Judgments Made by Different Ethical Theories*, 27 METAPHILOSOPHY 327 (1996) (noting that the problem of normative uncertainty in moral decisionmaking has received inadequate consideration but defending the my-favorite-theory approach in light of difficulties of intertheoretic comparison).

This application of "My Favorite Jurisprudence" could be with or without refinements to the favored jurisprudence. *See supra* text accompanying notes 114–117.

[134] *See* Johan E. Gustafsson & Olle Torpman, *In Defence of My Favorite Theory*, 95 PAC. PHIL. Q. 159, 159 n.3 (2014) (citing LOCKHART, *supra* note 3, at 42) (attributing the label "my favorite theory" to Lockhart); *see also infra* note 207 (discussing the relationship between the "obvious solution" and the theory defended by Gustafsson and Torpman).

[135] Some jurisprudences may counsel that one ought to consider what the other approaches would require. This raises an issue of coherency and the correct characterization of aspects of a jurisprudence. *Supra* Part II.B; *infra* Part III.B.

of My Favorite Skepticism.[136] Unlike the empirical skeptic, the pragmatic skeptic accepts the problem's existence, but has already taken sides as to the solution: he recognizes the judge might harbor uncertainty about which jurisprudence is the correct one (i.e., he recognizes that there *is* normative uncertainty), but he denies that there is anything special about the problem or solution to it. Rather, he claims the judge should, as a rational matter, simply select and apply that jurisprudence which the judge finds most plausible.

Many philosophers assume that the obvious solution is correct,[137] as do, I suspect, many lawyers and legal experts.[138] But few have considered the problem, let alone launched a sustained defense. One reason may be that they have not recognized there is a problem of normative uncertainty as distinct from the first-order question; but, as has been argued, skepticism about the problem's existence should be rejected. Another may be that alternatives simply appear too difficult: Does one really expect a judge to engage in expected utility analysis or a complex ranked-choice voting scheme like that proposed by various moral philosophers?[139]

Unfortunately—particularly given the difficulty of developing feasible alternatives—My Favorite Jurisprudence is not a plausible solution to the question of what one ought rationally do in the face of normative uncertainty. My Favorite Jurisprudence commits two basic mistakes: It ignores relevant information when it fails to account for the strength of the judge's beliefs, or credences, in various jurisprudences. And it ignores relevant considerations when it fails to account for what the different jurisprudences say about how wrong the wrong option would be (the cost of error).

These two shortcomings can be illustrated through a series of simple examples. Suppose, for simplicity, a judge believes that one of two jurisprudential methods for deciding is correct: Jurisprudence 1 or Jurisprudence 2. Under Jurisprudence 1, the only relevant considerations for the judge are source-based rules; there are no merits-based criteria, and the judge does not have any obligation other than to adjudicate based on the source-based

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[136] *Supra* Part II.A.

[137] LOCKHART, *supra* note 3, at 42 (noting that "philosophers often employ [My Favorite Theory] when they apply moral theories to specific moral problems").

[138] *Cf.* Wechsler, *supra* note 86, at 7, 11; Scalia, *Originalism*, *supra* note 2.

[139] *See, e.g.*, *infra* Part III.A; MACASKILL, BYKVIST & ORD, *supra* note 3, at 72–75.

rules. Under Jurisprudence 2, however, the judge is obligated to consider moral criteria, such as whether a particular judicial act is morally repugnant. The judge is obligated, in particular, to strike a balance between the fit of a judicial act with source-based rules (especially precedent) and avoiding morally repugnant judicial acts.

Consider a series of cases of the following sort:

> There are two possible judicial acts, *A* and *B*. *A* and *B* exhibit the same legal "fit" with source-based rules like precedent. *A* is superior to *B* on moral grounds as being more "just."

Because Jurisprudence 1 does not consider the moral difference between the two acts to be relevant to what the judge ought (judicially) do, both acts *A* and *B* are judicially permissible under Jurisprudence 1. Under Jurisprudence 2, however, the moral difference is relevant, and the judge ought (judicially) do *A*, not *B*.

CASE I

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

Suppose that the judge believes that Jurisprudence 1 is most likely correct but harbors some doubts that Jurisprudence 2 might be correct instead (Scenario I, *infra*). If My Favorite Jurisprudence is the correct solution, then the judge is *rationally* permitted to do either *A* or *B*. But this is implausible: she knows that while Jurisprudence 1 (judicially) permits both options, Jurisprudence 2 provides that she ought (judicially) to do *A*. Were she to choose *B*, she would risk judicial wrong that she could easily avoid by choosing *A*. Because our judge aims at doing what is judicially right, she ought rationally to do *A* because *A* ensures that she will achieve her aim whereas *B* does not.

Yet this is not the result suggested by My Favorite Jurisprudence. My Favorite Jurisprudence says that, because Jurisprudence 1 permits both options, and the judge's *sole* aim is to do what is judicially right, the judge would be rational to do *either A* or *B*. And My Favorite Jurisprudence maintains this, even though

Option *A* ensures she will achieve her aim, while Option *B* does not.[140]

My Favorite Jurisprudence yields this implausible result because it ignores relevant information: it fails to account for the strength of the judge's credence in the preferred jurisprudence as contrasted with others. To wit, My Favorite Jurisprudence says a judge may rationally do either *A* or *B* regardless of whether the judge is extremely confident in the truth of Jurisprudence 1 (e.g., $p \geq .9$) or the judge merely believes Jurisprudence 1 is only slightly more likely than not (e.g., $p = .51$). Put another way: My Favorite Jurisprudence maintains that a judge may rationally choose Option *B* even though she believes there is close to a 50% chance that she (judicially) ought not choose *B* and believes there is a 0% chance that she would make a similar mistake by choosing Option *A*.[141]

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[140] In other words, My Favorite Jurisprudence violates dominance. *See* MACASKILL, BYKVIST & ORD, *supra* note 3, at 40–41 (making a similar argument against My Favorite Theory).

[141] Following formal epistemology, I use probabilities to represent the strength of a judge's belief that a given theory is true ($0 \leq p \leq 1$). For example, if a judge is extremely confident that something is true—say, at least 90% sure—we can represent this as $p \geq .9$. I use "credence" to refer to the strength of a judge's belief in a particular theory, and "credences" to refer to the full set of a judge's beliefs and their strengths.

In doing so, I do not suggest that we can know such credences precisely. But we can estimate: Suppose Diomedes thinks that it's more likely than not that originalism is true but is not entirely certain. This belief can be used to estimate a range. He thinks the odds that originalism is true is at least 55%, but maybe not more than 85% ($.55 \leq p \leq .85$). We can use these ranges, combined with the views about what the theory implies, to make comparisons about the likelihood, from the judge's point of view, that choosing a given action will be judicially right. For example, if there is an opinion that only originalism permits, then given Diomedes' credences and from his point of view, there is at least a 55% chance it is actually permitted and at most an 85% chance. This may not be helpful in all cases, but it may be in some. At the least, it provides more information than we had before. For further examples, see LOCKHART, *supra* note 3, at 59–67 & 189 n.10.

Future work on normative uncertainty in judicial decision-making will need to defend these and other choices, like whether we should use actual credences (i.e., the actual strengths of my belief) or epistemic credences (i.e., what the strength of my beliefs should be), how epistemic credences are determined, and whether credences are properly treated as probabilities at all. *See* MACASKILL, BYKVIST & ORD, *supra* note 3, at 3–4. *See also generally* Andrew Sepielli, *How Moral Uncertaintism Can Be Both True and Interesting*, *in* 7 OXFORD STUDIES IN NORMATIVE ETHICS 98 (2017).

Finally, in focusing on credences in particular jurisprudences, I do not mean to diminish the importance of a judge's beliefs about the outcomes in particular cases. For example, a judge may be uncertain which jurisprudence is correct but may be completely certain ($p = 1$) that *Brown* was correctly decided. A judge's credences in particular outcomes should be consistent with their credences in different jurisprudences—a judge who is certain of *Brown* should have zero credence in jurisprudences that do not accommodate it—though of course, a judge's actual credences may not match their epistemic credences! I

SCENARIO I: JUDGE DECIDING CASE I, BELIEVES
JURISPRUDENCE 1 IS MOST LIKELY CORRECT.

	Possibility 1 ($p \geq .51$) Jurisprudence 1 Fit-Based	Possibility 2 ($p \leq .49$) Jurisprudence 2 Fit + Moral Criteria
Option A	Right	Right
Option B	Right	Wrong

It might be objected that Scenario I reveals that Jurisprudence 1 ought to include moral considerations when options are in equipoise as to legal fit, or that the virtuous judge may pursue aims other than judicial rightness when both acts are judicially permissible. Both are already covered by our assumptions: Because we have assumed complete, stable jurisprudences, updating the preferred jurisprudence here is akin to changing credences (or resolving preexisting uncertainty) as among versions.[142] For the same reason—because we have assumed complete jurisprudences—the extent to which other, nonjudicial aims can be considered in adjudication has already been taken into account.[143] So, My Favorite Jurisprudence produces a counterintuitive result in Scenario I, at least given our working assumptions.

But the problem persists, even where there is no sure right answer. For example, consider Case II, another two-option decision for which three different jurisprudences provide different recommendations. According to Jurisprudence 1, the judge ought (judicially) do *B* because it has better fit. But according to Jurisprudence 2 and Jurisprudence 3, the judge ought (judicially) do *A* given the trade-off between moral considerations and fit.

here ignore this particular potential mismatch between credences in jurisprudences and case outcomes; it is a complication for another day.

[142] *Supra* text accompanying notes 114–117.

[143] This modeling choice allows us to remain agnostic about various debates in jurisprudence regarding permissible aims in adjudication—debates about which a judge may be uncertain. *See supra* notes 12–16 and accompanying text; *see also supra* note 93 and accompanying text.

CASE II

	Jurisprudence 1 Fit-Based	Jurisprudence 2 Fit + Moral Criteria	Jurisprudence 3 Only Moral Criteria
Option A	Wrong	Right	Right
Option B	Right	Wrong	Wrong

Now consider a judge deciding Case II who believes most strongly in Jurisprudence 1, followed by Jurisprudence 2 and then Jurisprudence 3 (Scenario II). Again, My Favorite Jurisprudence is the view that what the judge ought (rationally) do in the face of this uncertainty is to follow the theory in which she has the greatest credence, Jurisprudence 1, and to do what it says, Option *B*. But this again is implausible: as reflected by her credences, the judge's evidence suggests that doing *B* only has a 45% chance of being judicially right, but a 55% chance of being judicially wrong. In other words, My Favorite Jurisprudence recommends that, in Scenario II, the judge ought rationally to do that act which, given the judge's credences, is *more likely* to be judicially wrong than right.

SCENARIO II: JUDGE DECIDING CASE II, BELIEVES
JURISPRUDENCE 1 IS MOST LIKELY CORRECT.

	Possibility 1 ($p = .45$) Jurisprudence 1 Fit-Based	Possibility 2 ($p = .30$) Jurisprudence 2 Fit + Moral Criteria	Possibility 3 ($p = .25$) Jurisprudence 3 Only Moral Criteria
Option A	Wrong	Right	Right
Option B	Right	Wrong	Wrong

As Scenarios I and II show, My Favorite Jurisprudence fails to take into account relevant information, namely, the evidence

the judge has about which jurisprudence is the best to follow.[144] But this is not the only problem with the obvious solution.[145]

My Favorite Jurisprudence also fails to take into account the potential cost of error. But jurisprudences often differ about the cost of error in a given case—about the badness of "getting it wrong" or the importance of "getting it right." That is, on some views, judicial rightness and wrongness admits of *degrees*: for example, a wrong judicial act could be minimally wrong or really wrong or even exceptionally wrong. The way we criticize court decisions more or less vehemently would seem to confirm this is true on at least a few plausible jurisprudences.[146] But My Favorite Jurisprudence fails to take these variations into account.[147]

For example, consider a series of cases in which the jurisprudences (Jurisprudence 1*, Jurisprudence 2* . . .) allow for *degrees* of rightness. Case I* and Case II* are like Cases I and II respectively, except that the jurisprudences in question admit of degrees and the moral considerations are such that, if moral considerations are relevant, Option B is *extremely* wrong.

CASE I*

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

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144 Specifically, the judge's evidence does not justify her being certain about which theory is the best, as reflected in her credences.

145 For example, individuation of theories can also lead to the difficulties in Case II and Scenario II. *See* MACASKILL, BYKVIST & ORD, *supra* note 3, at 40–44. These and other issues lead to further complications in the legal case that we have assumed away by focusing on the opinion as the relevant judicial act.

146 *See, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 528 (2015) (noting that *Lochner* "is one of only a few cases that constitute our 'anti-canon,' universally reviled by the legal community as the 'worst of the worst'"); Roy E. Brownell II, *The Coexistence of* United States v. Curtiss-Wright *and* Youngstown Sheet & Tube v. Sawyer *in National Security Jurisprudence*, 16 J.L. & POL. 1, 43 n.167 (2000) (discussing minor criticisms of *Youngstown*).

147 *Cf.* MACASKILL, BYKVIST & ORD, *supra* note 3, at 45 (discussing this problem as applied to My Favorite Theory).

CASE II*

	Jurisprudence 1* Fit-Based	Jurisprudence 2* Fit + Moral Criteria	Jurisprudence 3* Only Moral Criteria
Option A	*Slightly* Wrong	Right	Right
Option B	Right	*Extremely* Wrong	*Extremely* Wrong

Assuming that the judges have similar credences in these jurisprudences as in the earlier scenarios, the problem with My Favorite Jurisprudence becomes even more apparent. My Favorite Jurisprudence is the view that the judge ought (rationally) to follow his preferred jurisprudence despite his uncertainty. And so, according to My Favorite Jurisprudence, the judge in Scenario I* may (rationally) do *B*, even though doing *B* risks an *extremely* wrong judicial act whereas doing *A* would ensure that she does what is judicially right. And, according to My Favorite Jurisprudence, the judge in Scenario II* ought (rationally) do *B*, even though she believes that doing *B* is *more likely than not* to be *extremely* wrong, while doing *A* would, at worst, be only *slightly* wrong. At least in these cases, My Favorite Jurisprudence is a nonstarter.

SCENARIO I*: JUDGE DECIDING CASE I*, BELIEVES JURISPRUDENCE 1* IS MOST LIKELY CORRECT.

	Possibility 1 ($p = .51$) Jurisprudence 1* Fit-Based	Possibility 2 ($p = .49$) Jurisprudence 2* Fit + Moral Criteria
Option A	Right	Right
Option B	Right	*Extremely* Wrong

SCENARIO II*: JUDGE DECIDING CASE II*, BELIEVES
JURISPRUDENCE 1* IS MOST LIKELY CORRECT.

	Possibility 1 (p = .45) Jurispru-dence 1* Fit-Based	Possibility 2 (p = .30) Jurispru-dence 2* Fit + Moral Criteria	Possibility 3 (p = .25) Jurispru-dence 3* Only Moral Criteria
Option A	*Slightly* Wrong	Right	Right
Option B	Right	*Extremely* Wrong	*Extremely* Wrong

My Favorite Jurisprudence produces an obviously wrong re-
sult in both these cases. But for some, that might seem to turn on
the credences at play—the strengths of the judge's beliefs in the
candidate jurisprudences. For judges who have well-developed ju-
risprudences, My Favorite Jurisprudence will lead to problems
less frequently, especially where the uncertainty is as between a
jurisprudence's versions and where those versions exhibit wide-
spread agreement.

But the problem is not so easily cabined, at least not without
further inquiry. For where jurisprudences admit of degrees and
the stakes are high, My Favorite Jurisprudence will be inade-
quate so long as there is some normative uncertainty. To that end,
consider Case III*. Case III* is a variation on Cases I* and II*
where only two jurisprudences are at play.

CASE III*

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

In Case III*, Jurisprudence 1* requires the judge do *B*, but
the stakes are low—doing *A* would be only slightly wrong. Under
Jurisprudence 2*, which takes moral criteria into account, the
judge ought do *A*, and the stakes are high—doing *B* would be *ex-
tremely really super very* wrong. So, this is a similar choice set as
Case II*, but with only two jurisprudences.

Now consider a judge deciding Case III* (Scenario III*). Our judge is reasonably sure that Jurisprudence 1* is the correct theory. Under My Favorite Jurisprudence, the judge ought to do *B* because that is what her preferred theory, Jurisprudence 1*, indicates. And the judge should do so, even though Jurisprudence 1* indicates that doing *A* would be only slightly wrong while Jurisprudence 2* indicates that doing *B* would be *extremely really super very* wrong.

SCENARIO III*: JUDGE DECIDING CASE III*, IS REASONABLY
CERTAIN JURISPRUDENCE 1* IS CORRECT

	Possibility 1 (*p* = .90) Jurisprudence 1* Fit-Based	Possibility 2 (*p* = .10) Jurisprudence 2* Fit + Moral Criteria
Option A	*Slightly* Wrong	Right
Option B	Right	*Extremely Really Super Very* Wrong

My Favorite Jurisprudence's treatment of this case is implausible, even where the judge's credences are high: in Case III*, the judge risks a very great judicial wrong by doing *B*, and only a slight judicial wrong by doing *A*. Even if these differences are not enough, in this particular case and given these particular credences, to tip the balance, they remain *relevant* considerations in deliberating about what the judge ought to do in the face of her normative uncertainty. My Favorite Jurisprudence should be rejected because it fails to consider that the candidate jurisprudences might differ as to the magnitude of the potential judicial wrong. As a result, it fails to adequately respond to situations in which the preferred jurisprudence indicates only a small difference between the options but the less preferred jurisprudences indicate a very grave difference between the available judicial acts, as in Case III*. Tweak the credences just a little, or the degrees of judicial rightness, and what the judge ought (rationally) do might change—*except* on My Favorite Jurisprudence.

Case III* appears similar to the case that the Justices of the Warren Court faced in *Brown*, when they voted to strike down "separate but equal" as unconstitutional.[148] The Justices

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[148] 347 U.S. at 495.

struggled because it seemed that prevailing theories about legal fit required applying the doctrine under *Plessy v. Ferguson*.[149] But they recognized that, from a moral point of view, such an outcome would be egregiously unjust. Scholars have attempted to reconcile the legal reasons for the case since, but the Justices at the time worried that making the right decision, striking down separate but equal, would be lawless.[150]

The Justices' worries suggest that their preferred jurisprudences—and the My Favorite Jurisprudence Solution—would have called for allowing continued segregation in public schools under *Plessy*'s doctrine of "separate but equal."[151] And so, an alternative approach to normative uncertainty shows why the decision should perhaps be applauded as a rational attempt to maximize the likelihood of getting it right: under alternative approaches to normative uncertainty, the Justices could have rationally departed from their preferred jurisprudences' dictates in light of their doubts and what competing jurisprudences would have said about the stakes.[152]

I will return to an analysis of *Brown* in Part III. But before I do, there is one final objection the defenders of My Favorite Jurisprudence usually raise.

Although My Favorite Jurisprudence is implausible for the reasons shown, its defenders often argue that to do otherwise—to take normative uncertainty seriously—would lead to infinite regress.[153] As will be seen next, it is difficult to develop a better alternative to the obvious solution. Accordingly, a judge might encounter uncertainty about the best way to determine what she ought rationally do given she is uncertain about what she ought judicially do. So, it could be claimed, we have merely replaced one difficult problem and sort of uncertainty with another. And if the reasoning to this point has been correct, then this rational normative uncertainty—uncertainty about how to cope rationally

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[149] 163 U.S. 537 (1896); *see* KLARMAN, *supra* note 108, at 302–05; STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 77–79.

[150] *See* KLARMAN, *supra* note 108, at 302–05; STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 77–79.

[151] *See* STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 79 ("A big part of the worry about *Brown* was that it had to overrule (in fact, even if not technically) a Supreme Court precedent [*Plessy*].").

[152] *See infra* Part III.A. I do not argue that the Justices of the Warren Court *actually* used this method, but instead that the method could justify their decisions without requiring the Justices to abandon or alter the prevailing theories.

[153] *See* LOCKHART, *supra* note 3, at 37 (responding to the objection from infinite regress); MACASKILL, BYKVIST & ORD, *supra* note 3, at 30–33 (same).

with jurisprudential normative uncertainty—should likewise be taken into account. This will lead to regress: there is likely uncertainty at multiple levels, and the judge who takes normative uncertainty seriously will be left with layers of uncertainty instead of a solution or guidance. "The best way to escape this jungle, one might argue, is not to enter it in the first place."[154]

But this concern about infinite regress is something of a cop-out, at least at this stage before serious attempts at a solution have been undertaken.[155] As others have observed, "[t]his infinite regress problem is not peculiar" to normative uncertainty, but "crops up" elsewhere, like in debates over the "[maximize-expected-utility] approach to ordinary decision-making under risk."[156] Considering—and improving—methods for decision-making under ordinary uncertainty has generally been considered worthwhile.[157] Why should this be any less the case when the object at hand is judicial decision-making under normative uncertainty? To do otherwise is to refuse even attempting to improve the ability of our judges to aim at what is just.

This is *not* to suggest that a perfect algorithm can be obtained; only that improving our models and heuristics is possible.[158] Nor is it to suggest that a complicated theory is needed in every decision.[159] But improving our approach is a worthwhile endeavor. The stakes in court are high. And because My Favorite Jurisprudence is a nonstarter, we must search for another solution.

III. Toward a New Framework

By now, I hope I have convinced you that normative uncertainty is a problem and that the obvious solution—that the judge should just follow her preferred jurisprudence—is a nonstarter. Assuming I have succeeded, there remains the question of what a

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[154] LOCKHART, *supra* note 3, at 37.

[155] *Supra* notes 3, 27 (summarizing literature).

[156] LOCKHART, *supra* note 3, at 37; *see also id.* at 184 n.11.

[157] *See, e.g.*, Andrew Sepielli, *What to Do When You Don't Know What to Do*, *in* 4 OXFORD STUDIES IN METAETHICS 5, 5 (Russ Shafer-Landau ed., 2009) [hereinafter Sepielli, *What to Do I*] (noting that much has been written on coping with nonnormative uncertainty).

[158] *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.) (introducing the "Hand Formula"); Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1326, 1329–30 (2016) (developing an evidentiary heuristic).

[159] *See supra* Part II.A (noting that normative uncertainty about the correct theory or version thereof may not always result in uncertainty about which judicial act is right given widespread agreement about how many cases turn out).

rational judge should do about it now that the obvious solution is off the table. Unfortunately, the problem of normative uncertainty is sufficiently difficult that a complete answer is beyond the scope of this work. This Part aims to illustrate some of those difficulties and to suggest that progress is still possible and worthy of further study anyways. Among other things, I will explain how even just seeing the problem should change how you think about judging.

Part III.A considers an alternative, Maximizing Expected Judicial Rightness, which was chosen because it is likely to seem familiar.[160] I apply it to *Brown* to show the potential of developing a solution. But despite this success, I do not defend this alternative. Instead, I use its flaws to illustrate the difficulty of the work ahead.

Part III.B shows how, even without a solution, we may already reap benefits from recognizing and clearly defining the problem of normative uncertainty. I use an application of Maximizing Expected Judicial Rightness to *Google* to illustrate how the distinction between the judicial ought and the rational ought allows us to coherently maintain that the Court both did and did not do what it ought to have done. The implication is that we must be careful about how we characterize various doctrines—as part of a jurisprudence or as a rational solution to the problem of normative uncertainty—because different criteria of evaluation will apply.

A.   An Alternative: Maximizing Expected Judicial Rightness

My Favorite Jurisprudence fails, in part, because it ignores information that a judge has about the likelihood that she ought to do a particular act. Specifically, My Favorite Jurisprudence ignores both the judge's credences in different jurisprudences, and the relative rightness or wrongness that those jurisprudences attach to particular judicial acts (i.e., the "cost" of error). A familiar alternative takes both into account. When a judge is uncertain about what she ought to do, and her aim is to do that which she ought to do, it would seem rational to aim to maximize the chance that what she does *is* that which she ought to do. That is, an

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[160] *E.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.).

alternative to following the dictates of the preferred theory is to attempt to maximize expected judicial rightness.[161]

Professor Ted Lockhart has developed such a theory for coping with normative uncertainty.[162] Although the theory is not without criticism,[163] it is as promising a place as any to begin,[164] if for no other reason than that it is familiar.

Begin with the assumption that all plausible jurisprudences admit of degrees: a particular judicial act can be more or less right, and more or less wrong.[165] Assume also that different jurisprudences measure judicial rightness on the same scale.[166] It is important to emphasize that, despite the use of the word "rightness," making these assumptions does not mean that "legal fit" is prioritized over other values, like substantive justice or consistency or comity. All it means is that the plausible candidates for the correct jurisprudence provide an all-things-considered ranking of the potential judicial acts with some sense of the importance of doing one over the other.[167] While this necessarily excludes jurisprudences that do not generate such a ranking (a problem returned to below), I remain neutral on the various values that combine to form that ranking.

With these assumptions, a particular judicial act's "expected judicial rightness" (EJR) can be calculated by multiplying the probability[168] that a given jurisprudence is correct ($p_1, p_2, \ldots, p_n$) times the degree of judicial rightness for that option under each jurisprudence (e.g., for option A: $j_{1,A}, j_{2,A}, \ldots, j_{n,A}$). For example,

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[161] This appears to be similar to Lockhart's "expected degree of justice," though he does not explain the term. LOCKHART, *supra* note 3, at 133–34.

[162] *See generally* LOCKHART, *supra* note 3.

[163] *See, e.g.*, Andrew Sepielli, Book Review, 116 ETHICS 600, 602–05 (2006) (reviewing TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES (2000)).

[164] *See also* MACASKILL, BYKVIST & ORD, *supra* note 3, at 47–56 (defending a theory according to which one should, in the face of moral uncertainty, maximize the "expected choiceworthiness" of one's actions, at least where information conditions so permit).

[165] This seems at least superficially plausible: a mistake in a case about patent procedure, easily fixed by regulation, would seem less seriously wrong than a mistake interpreting fundamental rights that can only be fixed through constitutional amendment. *Supra* note 146 and accompanying text; *see also* Thomas Hurka, *More Seriously Wrong, More Importantly Right*, 5 J. AM. PHIL. ASS'N 41, 42–43 (2019). But if the assumption does not hold, moral philosophers have developed alternatives that might similarly be adapted to the judicial context. *See, e.g.*, LOCKHART, *supra* note 3, at 26, 62; MACASKILL, BYKVIST & ORD, *supra* note 3 at 81–90.

[166] That is, the jurisprudences exhibit co-cardinality. *See infra* Part III.A.2.

[167] *Infra* Part III.A.2.

[168] I model credences as probabilities, as in formal epistemology. *Supra* note 141.

the expected judicial rightness of Option *A* (EJR$_A$) would be:

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

If one's sole aim is to do that which is judicially right, then (on this view) the rational thing to do is maximize expected judicial rightness. That is, in the first instance, apply the following principle:

> Where a judge is uncertain of the degrees of judicial rightness of some of the alternative judicial acts under consideration, a choice of action is rational if and only if the action's expected judicial rightness (EJR) is at least as great as that of any other alternative.[169]

There may not always be enough information to determine which alternative(s) have the maximum degree of expected judicial rightness, but we do not need to get into such complications just yet.[170] I will refer to this approach as "Maximizing Expected Judicial Rightness."

I must emphasize that I use Maximizing Expected Judicial Rightness as a *starting point only*. While it lacks My Favorite Jurisprudence's key shortcomings, I do not suggest that it is *the* solution and I do not defend it. As will be discussed, Maximizing Expected Judicial Rightness encounters serious difficulties.

Rather, my aim is to illustrate the possibilities that alternatives to My Favorite Jurisprudence might have to offer. As importantly, I want to illustrate the difficulties that are peculiar to normative uncertainty as contrasted with empirical uncertainty. That is, I aim to show both the potential and the difficulty of the work ahead. This alternative solution serves both purposes well and has the added benefit of being familiar.[171]

The remainder of Part III.A divides into two subsections. The first provides an illustration of how Maximizing Expected

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[169] I have adapted this principle from Lockhart's PR4. *See* LOCKHART, *supra* note 3, at 82. Lockhart also adapted and applied his principles to *Roe v. Wade*, 410 U.S. 113 (1973), but his analysis failed to account for deep disputes about the end and method of judging, and his issue-by-issue approach does not demand consistency of judges even within an opinion. *See id.* at 124–42.

[170] *See id.* at 95 (developing principles for addressing low-information situations in case of moral uncertainty).

[171] Most lawyers have at least a rough understanding of expected utility theory thanks to the Hand Formula, which has traditionally been interpreted as a cost-benefit approach to negligence. *Carroll Towing*, 159 F.2d at 173 (1947) (Hand, J.); *see* Emad Atiq, Risk Aggregation and the Hand Formula, at *3–4 (Feb. 2023) (on file with author) (disputing the traditional interpretation).

Judicial Rightness might be applied to *Brown*. The second uses the example to explain the unique difficulties presented by normative uncertainty as contrasted with empirical uncertainty.

1. An illustration: *Brown*.

Brown involved a challenge to racial segregation of public elementary schools. Such segregation was permitted under *Plessy*, the infamous case creating the doctrine of "separate but equal."[172] The plaintiffs argued that the segregated facilities were inherently unequal, and thus in violation of the Equal Protection Clause of the Fourteenth Amendment.[173] The Court eventually sided with the plaintiffs, abandoning *Plessy*'s doctrine of "separate but equal."[174]

Although there remains little uncertainty that Brown is both just and legally correct, there remains uncertainty—or at least disagreement—about the legal reasons for that result.[175] The consensus about *Brown*'s disposition is likely strengthened by broad agreement that the outcome, striking down the doctrine of "separate but equal" in education, was the only morally justifiable one. But the lack of consensus about the appropriate way to reach that result reflects the difficulty that the *Brown* Court faced: to reach it, they would need to overturn the decision in *Plessy* that the Fourteenth Amendment did not prohibit segregation if the separate accommodations were equal.[176] These features make *Brown* a good case for illustrating how Maximizing Expected Judicial Rightness might be applied to resolve a judge's normative uncertainty: there is normative jurisprudential uncertainty, but it is

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[172] 163 U.S. at 550–51 (rejecting a constitutional challenge to a law requiring segregated railway cars).

[173] The plaintiffs could have challenged the segregation as being unequal—that is, as unconstitutional not because of the fact of the segregation, but because the educational opportunities and facilities provided did not satisfy the "separate but equal" doctrine laid down in *Plessy*. The plaintiffs, however, elected to pursue a facial challenge to the separate but equal doctrine.

[174] *See Brown*, 347 U.S. at 495.

[175] *See, e.g.*, STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 78.

[176] *See id.* at 79 (noting that *Brown* "had to overrule (in fact, even if not technically)" the decision in *Plessy*). *Plessy* had justified its doctrine in part based on an appeal to practices in public education. *See Plessy*, 163 U.S. at 544:

> The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

not complicated by moral uncertainty or present-day divided political opinions.[177]

For purposes of this illustration, I assume that a hypothetical judge, Hector, is uncertain about which of three jurisprudences applies: Common Law Constitutionalism, Originalism, or Natural Law. Hector more or less believes that Common Law Constitutionalism is correct, but he harbors some doubt about whether Originalism might actually be correct instead and even greater doubt about whether, in cases such as these, Natural Law provides overriding considerations. For simplicity, I define these jurisprudences as follows:

> *Common Law Constitutionalism*: When interpreting the Constitution, follow the common law method under which case law evolves. Factors counting in favor of overturning or abandoning previous decisions include: that the prior rule has been shown unworkable in practice; that changed circumstances have made the rule unjust; and that the rule has been eroded through subsequent precedent finding the rule inapplicable or making exceptions.

> *Originalism*: When interpreting the Constitution, look first to the drafters' original understanding of the language being construed. Previous rulings should rarely be overturned or abandoned, and only if inconsistent with these original understandings.

> *Natural Law*: Where a previous decision is immoral, such that it does not comport with natural justice, it must be overturned or abandoned.

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[177] Even the Justices of the *Brown* Court generally thought that the opposite result would be morally dubious. *See* KLARMAN, *supra* note 108, at 293–306 (recounting how the firmness of the Court's moral convictions made it a difficult case); *see also id.* at 305, 545 n.26 ("Decision of these cases would be simple if our personal opinion that school segregation is morally, economically or politically indefensible made it legally so." (quoting Justice Robert Jackson's unpublished draft concurring opinion in *Brown*)); Strauss, *Common Law*, *supra* note 89, at 902.

Compare this to a case like *Roe*, which presents politically divisive issues about which some believe there is moral uncertainty. *See* Mary Ziegler, *The Jurisprudence of Uncertainty: Knowledge, Science, and Abortion*, 2018 WIS. L. REV. 317, 319–35 (2018). Such uncertainty creates additional incoherencies in the legal doctrine that are difficult to model, complications best left to future work. *Compare id.* at 334–353 (tracing the Court's inconsistent treatment of different types of moral and scientific uncertainty), *with* LOCKHART, *supra* note 3, at 124–42 (discussing issue-by-issue application of his approach to *Roe*); *see also supra* note 169 (explaining limitations of Lockhart's analysis).

These definitions are intentionally stylized and limited to the approach these theories take towards precedent. Proponents of these theories (if pure natural law can be considered a theory) have developed more nuanced views, but this example has been simplified for ease of exposition.[178]

Hector's first step is to apply each jurisprudence to the issue at bar: Should the Court strike down the schools' segregation as unconstitutional under the Equal Protection Clause? That is, should the Court abandon *Plessy*?[179]

Hector concludes that Common Law Constitutionalism advises finding school segregation to be unconstitutional, abandoning *Plessy*. Several factors count in favor of doing so: In the time since *Plessy*, Hector's Court has considered and struck down as unequal a wide range of segregated facilities.[180] In fact, "it ha[s] been decades since the Court ha[s] actually found a system of segregation that . . . satisfie[s] the principle of separate but equal," and the options open to states or municipalities that wanted to segregate have become quite limited.[181] These developments suggest both that the principle of separate but equal has not only been shown unworkable, but has already begun to erode.

But applying Originalism, Hector finds the opposite result. Under Hector's Originalism, prior precedent like *Plessy* may only be avoided if it is inconsistent with the original understandings of the text under consideration. Hector reasons that the separate but equal doctrine established in *Plessy* is consistent with the original understandings of the Fourteenth Amendment. Strong historical evidence shows that the amendment's drafters did not intend for the Fourteenth Amendment to prohibit racial segregation.[182] Like the justices on the *Brown* Court, Hector recognizes that *Brown* is *not* consistent with the original understandings of

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[178] My apologies, especially to originalists who have worked to reconcile originalism with *Brown*. *See, e.g.*, Ronald Turner, *The Problematics of the Brown-Is-Originalist Project*, 23 J.L. & POL'Y 591, 620–46 (2015) (surveying and critiquing efforts to demonstrate that *Brown* can be squared with and justified by originalism); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 12–15 (1971); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 87–88 (2012); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); JACK M. BALKIN, LIVING ORIGINALISM (2011).

[179] Here, and throughout, I use "abandon" and "overturn" to mean "[overturn] in fact, even if not technically." *See* STRAUSS, LIVING CONSTITUTION, *supra* note 6. For a discussion, see *supra* note 176.

[180] *See* STRAUSS, LIVING CONSTITUTION, *supra* note 6, at 85–90.

[181] *See id.* at 90.

[182] *See, e.g.*, *id.* at 12–13.

the Fourteenth Amendment.[183] He concludes that Originalism requires following *Plessy*, finding segregation to be constitutional.

Finally, Hector considers whether this is a case where Natural Law ought prevail. Although, regrettably, it may not have been obvious to many of his contemporaries, we'll suppose Hector finds racial segregation to be inherently unjust. Moreover, we'll suppose that Hector finds segregation sufficiently unjust that Natural Law requires abandoning or overturning decisions that had allowed it.[184] For Hector, the verdict of Natural Law is clear: *Plessy* was so immoral that it does not comport with natural justice, and so must be abandoned or overruled.

Assume, as before, that judicial rightness admits of degrees, such that a given jurisprudence may take there to be different degrees of judicial rightness for each of the possible opinions. Suppose further that each of the stylized jurisprudences measures the judicial rightness of an opinion on the same cardinal scale.[185] Natural Law, for instance, considers there to be a great difference in the judicial rightness of the two opinions: abandoning *Plessy* is maximally judicially right and following *Plessy* is maximally judicially wrong. Common Law Constitutionalism and Originalism each consider there to be a significant difference between the options, but not as large as the difference assigned to the options by Natural Law. Common Law Constitutionalism recognizes the arguments on the other side and so, while *Plessy* should be abandoned, Common Law Constitutionalism assigns a smaller difference in judicial rightness between the options than Natural Law does. Similarly, Originalism recognizes the moderate originalist's arguments that there may be difficulty reconciling the original intentions with reality. Hector might estimate that the

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[183] KLARMAN, *supra* note 108, at 305 (summarizing Justice Robert H. Jackson's conclusions about the amendment's history).

[184] Unfortunately, this is also something about which the Justices may have been conflicted. Accordingly, the Justices of Hector's day may have been uncertain not only about whether Natural Law is the correct jurisprudence but also how it applies—that is, whether the moral offense in this case is severe enough that Natural Law requires overturning *Plessy*. In point of fact, this seems to have been likely: several members of the *Brown* Court were uncertain about whether considerations of natural justice could ever be trumping, though they had little doubt that if so, this would be such a case; others who might have had greater credence in Natural Law harbored sympathies for the segregationists and so were unsure if this was a case that Natural Law would have required overturning. *See id.* at 292–312. Our model would treat this as uncertainty between different versions of Natural Law. I ignore this complication in what follows for ease of exposition.

[185] These are strong assumptions that may or may not be justified. I make them for purposes of illustration and will return to them below in Part III.A.2.

jurisprudences assign each opinion the following degrees of judicial rightness:

BROWN

	Common Law Constitution-alism	Originalism	Natural Law
A: Abandon *Plessy*	8	3	10
B: Follow *Plessy*	2	6	0

Having determined what each jurisprudence says about his options, Hector must determine what he ought rationally do given his normative uncertainty. To do so, he needs to determine the credence he places in each of the three jurisprudences. He estimates that there is a 70% chance that Common Law Constitutionalism is right—he thinks it is probably right, but harbors significant doubt. Hector thinks there's maybe a 10% chance that Originalism is correct; he recognizes its appeal, but also that it is deeply flawed. But the major source of Hector's doubt of Common Law Constitutionalism is Natural Law—that substantive justice, and not merely procedural justice or the path of the law, can provide an overriding consideration. He guesses that there is a 20% chance of this being so. Here is his decision matrix:

HECTOR'S DECISION MATRIX

	Possibility 1 (p_1 = .7) Common Law Constitution-alism	Possibility 2 (p_2 = .1) Originalism	Possibility 3 (p_3 = .2) Natural Law
A: Abandon *Plessy*	8	3	10
B: Follow *Plessy*	2	6	0

Hector then calculates the expected judicial rightness of each option. To do so, Hector first multiplies the probability that a given jurisprudence is correct (p_1, p_2, p_3) and the degrees of

judicial rightness for that option under each jurisprudence (e.g., for Option A: $j_{1,A}$, $j_{2,A}$, $j_{3,A}$).

The expected judicial rightness of abandoning *Plessy* (Option A) is calculated as follows:

$$
\begin{aligned}
\text{EJR}_A &= (p_1 * j_{1,A}) + (p_2 * j_{2,A}) + (p_3 * j_{3,A}) \\
&= (.7 * 8) + (.1 * 3) + (.2 * 10) \\
&= 7.9
\end{aligned}
$$

The expected judicial rightness of following *Plessy* (Option B) is calculated as follows:

$$
\begin{aligned}
\text{EJR}_B &= (p_1 * j_{1,B}) + (p_2 * j_{2,B}) + (p_3 * j_{3,B}) \\
&= (.7 * 2) + (.1 * 6) + (.2 * 0) \\
&= 2
\end{aligned}
$$

Hector determines that abandoning *Plessy* has the greatest expected judicial rightness. Hector may be uncertain as to which jurisprudence is correct, and so as to which outcome is judicially right, but he has a reasoned guess as to which is more likely to be judicially right—and how much might be at stake by choosing the other. Hector votes to abandon *Plessy*.

One remarkable feature of *Brown* was its unanimity.[186] Historical reasons offer at least a partial explanation.[187] But the unanimity is particularly remarkable in light of normative uncertainty about how to reach the result. Application of Maximizing Expected Judicial Rightness might help explain this outcome. For Hector, his judgment accommodates his uncertainty, but is also what would be recommended by his preferred jurisprudence, Common Law Constitutionalism. Yet, this seems a plausible instance where Maximizing Expected Judicial Rightness might suggest divergence from a preferred jurisprudence if the preferred jurisprudence failed to recommend abandoning *Plessy*.

To illustrate, consider an originalist judge, Diomedes. Diomedes, like Hector, has normative uncertainty. He agrees with Hector about how the three jurisprudences assess judicial rightness in this case. But Diomedes disagrees with Hector about which jurisprudence is likely correct. Diomedes believes that, more likely than not, Originalism is correct, though he thinks there's a chance

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[186] KLARMAN, *supra* note 108, at 308 ("In the end, even the most conflicted justices voted to invalidate segregation.").

[187] *See generally* Hutchinson, *supra* note 108.

that the others might be correct instead. His decision matrix thus differs from Hector's only in the credences assigned to each jurisprudence:

DIOMEDES' DECISION MATRIX

	Possibility 1 (p_1 = .2) Common Law Constitutionalism	Possibility 2 (p_2 = .7) Originalism	Possibility 3 (p_3 = .1) Natural Law
A: Abandon *Plessy*	8	3	10
B: Follow *Plessy*	2	6	0

Like Hector, Diomedes calculates the expected judicial rightness of his two options: the expected judicial rightness of abandoning *Plessy* is 4.7, greater than the expected judicial rightness of following *Plessy*, which is 4.6.[188] Diomedes, by aiming to maximize expected judicial rightness, has succeeded in arriving at the judicially right result. He has done so against the recommendation of his preferred jurisprudence, but without having to alter his view about what that jurisprudence entails—or his views about which jurisprudence is correct—to match what he perceives to be the intuitive result.

This, I hope, counts as a success.

2. A difficulty: intertheoretic comparisons.

Maximizing Expected Judicial Rightness offers a better starting point than My Favorite Jurisprudence, but it is far from the final word. There is a vast literature on the limitations of expected

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[188] Using Diomedes' credences, the expected judicial rightness of abandoning *Plessy* (Option *A*) is calculated:

$$\text{EJR}_A = (p_1 * j_{1,A}) + (p_2 * j_{2,A}) + (p_3 * j_{3,A})$$
$$= (.2 * 8) + (.7 * 3) + (.1 * 10)$$
$$= 4.7$$

And the expected judicial rightness of following *Plessy* (Option *B*) is calculated:

$$\text{EJR}_B = (p_1 * j_{1,B}) + (p_2 * j_{2,B}) + (p_3 * j_{3,B})$$
$$= (.2 * 2) + (.7 * 6) + (.1 * 0)$$
$$= 4.6$$

utility theory as a method for coping with empirical uncertainty, raising doubts about its suitability as a general matter.[189] For example, there are concerns about how to measure utility (or value)—that is, roughly, concerns about where the numbers come from.[190] More significantly, there are deep concerns about whether such measurements satisfy the axioms of expected utility theory.[191] I already assumed one of the major ones—that jurisprudences are *complete*—but there is reason to doubt this assumption, especially in law, which is rife with indeterminacy.[192]

Normative uncertainty raises additional challenges.[193] The problem is not so much that the numbers are made up or that the jurisprudences fail to satisfy various axioms like completeness. But rather (or additionally), there are real concerns about whether the numbers can be compared across theories. This is the problem of "intertheoretic comparison." To illustrate the problem of intertheoretic comparison, I'll first explain how, though the numbers are made up, the numbers representing judicial rightness convey information. I'll then turn to the unique challenge of making intertheoretic comparisons.[194]

The numbers I assigned as degrees of judicial rightness were, indeed, made up. But they do not indicate some weird metaphysical property of the judicial act and they are not meaningless. Rather, the degrees represent a scale, or a ranking, much like a grading system. The degrees we use here indicate two types of

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[189] LOCKHART, *supra* note 3, at 184 n.11; MACASKILL, BYKVIST & ORD, *supra* note 3, at 50–56; *see also* JOHN BROOME, WEIGHING LIVES 80–86 (2004) [hereinafter BROOME, WEIGHING LIVES]; JOHN BROOME, WEIGHING GOODS: EQUALITY, UNCERTAINTY, AND TIME 121–50 (1991) [hereinafter BROOME, WEIGHING GOODS] (applying expected utility theory to "betterness" relations).

[190] *See generally* AMARTYA SEN, ON ECONOMIC INEQUALITY 6–23 (1973) (discussing the shortcomings of aggregating individual utilities when measuring economic inequality).

[191] BROOME, WEIGHING LIVES, *supra* note 189, at 80–86; BROOME, WEIGHING GOODS, *supra* note 189, at 136–39 (noting this is especially true for preference-based utility functions).

[192] *See supra* Part I.B; *see also* BROOME, WEIGHING GOODS, *supra* note 189, at 136–39 (explaining other major axioms); *cf.* Paul J.H. Schoemaker, *Subjective Expected Utility Theory Revisited: A Reductio Ad Absurdum Paradox*, 33 THEORY & DECISION 1 (1992). I also assumed that credences could be treated as precise probabilities, or at least precise ranges. *See supra* note 141; MACASKILL, BYKVIST & ORD, *supra* note 3, at 47 n.13 (noting possible adaptations if assumption is relaxed).

[193] MACASKILL, BYKVIST & ORD, *supra* note 3, at 57–62; LOCKHART, *supra* note 3, at 84.

[194] I do not address the difficulty of whether the judicial rightness function(s) satisfy the other axioms of expected utility theory. I agree they present problems, but I ignore them in the interest of focusing on the core problems at hand. *Cf.* BROOME, WEIGHING LIVES, *supra* note 189, at 81 (making similar assumptions "so as not to have too many difficulties to deal with at once").

ranking: an ordinal ranking (a simple ordering), and a cardinal ranking (an ordering that also offers some sense of the difference between options).

In an ordinal ranking, we have a simple ordering of the options. In ours, the greater the number, the higher it is ranked from the perspective of judicial rightness. That is, if Jurisprudence 1 assigns a higher number to the judicial rightness of Option A ($j_{1,A}$) than to Option B ($j_{1,B}$), then all this means is that, according to Jurisprudence 1, A is ranked higher than—and so ought to be chosen over—B. The actual numbers assigned do not matter so long as the order is preserved. Saying that Options A, B, and C have, respectively, 10, 8, and 4 degrees of rightness ($j_{1,A} = 10$, $j_{1,B} = 8$, and $j_{1,C} = 4$) conveys the same information as saying that Options A, B, and C have 5, 4, and 2 degrees, respectively ($j_{1,A} = 5$, $j_{1,B} = 4$, $j_{1,C} = 2$). Both sets just mean that, according to a given jurisprudence, A is preferred to B, and B to C.

The numbers assigned here also indicate a cardinal ranking. A cardinal ranking preserves the ratio of differences between items so ranked, much as temperature scales preserve the ratio of differences between temperatures. Again, the actual numbers assigned do not matter so long as the order and ratios are preserved. Saying that, according to Jurisprudence 1, Options A, B, and C have, respectively, 10, 8, and 4 degrees of rightness ($j_{1,A} = 10$, $j_{1,B} = 8$, and $j_{1,C} = 4$) conveys the same information as saying that Options A, B, and C have 5, 4, and 2 degrees, respectively ($j_{1,A} = 5$, $j_{1,B} = 4$, $j_{1,C} = 2$). Both sets of numbers convey that A is a better choice than B, and B a much better choice than C—specifically, that the difference in rightness between A and B is half that between B and C.

That jurisprudences could generate cardinal rankings of the judicial acts may seem counterintuitive, but it is actually quite plausible. So long as we can say that, according to Natural Law Theory, overturning *Plessy* is better than upholding it, we have an ordinal ranking. And if we can say that overturning *Plessy* and immediately providing a remedy is better than overturning *Plessy* but postponing the remedy (as actually happened[195]), but that overturning while postponing is still much *much* better than upholding *Plessy*, we have the beginnings of a cardinal ranking. As Professor Amartya Sen observed in confronting a similar issue in

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[195] *Brown*, 347 U.S. at 495–96.

On Economic Inequality, refusing to attempt these estimates displays a remarkable lack of creativity.[196]

So the numbers themselves are not a problem. They convey useful information. Provided that we can say, according to some jurisprudence, that *A* is better than *B*, and that *B* is better than *C*, we have an ordinal ranking. Provided, further, that we can say that according to some jurisprudence, *A* is better than *B*, and *B* is much better than *C*, then we have a cardinal ranking. Numbers may be selected to represent these judgments; the exact numbers used matter little, provided they preserve these judgements about the relative differences between options. Where we don't feel comfortable offering exactly scaled rankings—e.g., the judgment that the difference between *A* and *B* is only *half* that between *B* and *C*—estimates might still yield information.[197]

But this is where a real difficulty arises. Recall that the ranking of each opinion is done according to a given jurisprudence. And so when we compare the ranking of opinions across different jurisprudences, we need there to be a way to get these rankings on the same scale. That is, to make use of expected utility theory (i.e., expected judicial rightness), what is required is not merely that the rankings be cardinal, but that they exhibit what is called "co-cardinality." For example, when comparing a tradeoff between two policy choices and their effects on different people, it is

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[196] *See* SEN, *supra* note 190, at 14 (bemoaning "the widespread allergy to interpersonal comparisons among professional economists" and using similar reasoning to show how it might be done). That said, if it turns out jurisprudences only produce ordinal rankings, not cardinal rankings, this does not mean a retreat to My Favorite Theory. Rather, alternatives have been and are being developed for such situations. *See, e.g.*, MACASKILL, BYKVIST & ORD, *supra* note 3, at 57–58, 72–76. *See also generally* Tarsney, *supra* note 27.

[197] For an example of how estimated ranges can provide this sort of information, see LOCKHART, *supra* note 3, at 59–67 & 189 n.10. Of course, estimates may yield conflicting results. In our example, Common Law Constitutionalism takes the difference between abandoning *Plessy* and upholding *Plessy* to be *twice* what Originalism takes the difference to be. If this ratio were instead 1.5—as it would be if Originalism took the judicial rightness of upholding *Plessy* to be 7 instead of 6—Diomedes' calculations of EJR would be different: with these credences, the expected judicial rightness of abandoning *Plessy* would be 4.7, while the expected judicial rightness of following *Plessy* would be 5.3. It must be emphasized that this is *not* because the absolute value of the numbers changed (i.e., 6 to 7) but because those numbers altered the *ratio* of differences (i.e., the ratio of what Common Law Constitutionalism takes to be the difference between the options to what Originalism takes to be the difference between the options). The same conflicting result would occur if the original values were scaled up by, for example, a multiple of 3, such that instead of using (8, 2, 3, 6, 10, 0), you used (24, 6, 9, 18, 30, 0), and instead of changing the 6 to a 7, you changed the 18 to 21. For more discussion on cardinal rankings, see BROOME, WEIGHING LIVES, *supra* note 191, at 85 (explaining that the ratios of differences in a cardinal ranking are preserved by increasing linear transformations).

not enough that we have a cardinal ranking of how each option affects each individual (e.g., for Person 1, option *A* is better than *B*, and *B* is much better than *C*; and vice versa for Person 2). We need these rankings to be on the *same scale*—for them to exhibit co-cardinality—so that we can compare them.[198]

We assumed co-cardinality for purposes of illustration, but there are many reasons to doubt that this is possible. For one, although I argued that it is plausible for jurisprudences to admit of degrees, there may be plausible jurisprudences that don't. Some duty-based theories are generally believed to *not* admit of degrees: if an action is not permitted or required, then it is wrong simpliciter.[199] Indeed, whether one of these duty-based jurisprudences is correct is something about which our judge might reasonably be uncertain.

It is also not obvious that each jurisprudence would yield a ranking with the same range (i.e., the difference between the top and the bottom of the jurisprudence's scale). Attempts to reconcile these either permit the theory with the wider range to "outrank" the other at one or both ends of the spectrum, or else fail to adequately account for the full ranking of the theory with the wider range.[200] And so, if a judge is uncertain as between two jurisprudences with different ranges, it is not clear there is a rational way to compare what the jurisprudences advise the judge to do.

These are only a few of the difficulties that arise for intertheoretic comparison.[201] But these and other difficulties do not mean that the project of searching for a better way of coping with

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[198] *See* SEN, *supra* note 190, 12–13.

[199] Such theories, under which the rightness or wrongness of an action does not depend on its consequences, are often called "deontic" or "deontological" theories. For an overview, see Larry Alexander & Michael Moore, *Deontological Ethics*, *in* Edward N. Zalta (ed.), STAN. ENCYCLOPEDIA PHIL. (Winter 2021 ed.), https://perma.cc/8UAK-4PUQ. There are competing views on whether deontic theories admit of degrees. *See, e.g.*, Hurka, *supra* note 165, at 43; BARBARA H. FRIED, FACING UP TO SCARCITY: THE LOGIC AND LIMITS OF NONCONSEQUENTIALIST THOUGHT 15–16 (2020) (arguing that deontological theorists frequently operationalize core concepts in their moral theories with little difference from conventional cost-benefit analysis).

[200] *Cf.* Sepielli, *What to Do I*, *supra* note 157, at 22–26. Sepielli agrees that there are ways to compare degrees across theories, but he focuses on comparative practical judgments rather than comprehensive theories. *Id.* For reasons discussed above in Part I.B, theories are likely the appropriate object in the case of judges. Those reasons generally do not apply in the case of individual personal morality, and so this divergence may be appropriate (and the judicial case harder). Either way, it is a question for future work.

[201] For a more complete discussion, see MACASKILL, BYKVIST & ORD, *supra* note 3, at 57–149. *See also, e.g.,* Gracely, *supra* note 133; James L. Hudson, *Subjectivization in Ethics*, 26 AM. PHIL. Q. 221, 224 (1989); Ross, *supra* note 27, at 761–65; Gustafsson & Torpman, *supra* note 134, at 160–65.

normative uncertainty is lost. I began with a solution based on expected utility theory not because it is the most likely solution, but because, thanks to the Hand Formula, it is apt to be the most familiar to a legal audience. Other methods are being developed.[202] And the field is still young: in modern times, there are only two book-length treatments of the subject, both published since the turn of the millennium,[203] and most of the major articles were published in the last ten years.[204]

The most promising proposal to date, developed by moral philosophers William MacAskill, Krister Bykvist, and Toby Ord, combines the use of expected utility theory with round-robin rank-choice voting.[205] Expected utility theory is used where the degrees assigned by candidate theories exhibit co-cardinality. Otherwise, the ordinal rankings are used in a style of ranked voting called Borda Voting to determine which option is most likely to achieve the relevant aim.[206] The results yielded by Borda

Voting will be less fine-grained than Maximizing Expected Judicial Rightness, but it is likely better than giving up and resorting to My Favorite Jurisprudence.[207] Something similar may be sensible in the legal context, but further research is required given complications unique to the legal context.[208] And once lawyers see the problem, we may have our own solutions to offer.[209]

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[202] *See, e.g.*, Sepielli, *What to Do I*, *supra* note 157; *see also* Tarsney, *supra* note 27, at 505–20.

[203] MACASKILL, BYKVIST & ORD, *supra* note 3; LOCKHART, *supra* note 3.

[204] *See supra* note 27; Chelsea Rosenthal, *What Decision Theory Can't Tell Us About Moral Uncertainty*, 178 PHIL. STUD. 3085, 3086 n.1, 3102 (2021) (collecting literature and arguing that "decision theory can't provide us with answers to hard moral questions about how to morally approach moral uncertainty"); *see also, e.g.*, Alexander A. Guerrero, *Don't Know, Don't Kill: Moral Ignorance, Culpability, and Caution*, 136 PHIL. STUD. 59, 78–96 (2007) (defending moral safety principle in context of building on debate about culpability for moral ignorance).

[205] *See generally* MACASKILL, BYKVIST & ORD, *supra* note 3. MacAskill began developing this approach at Oxford in 2009 and 2010.

[206] *See id.* at 72–76.

[207] At least, it would be better than resorting to the obvious solution that I have been calling My Favorite Jurisprudence. Professors Johan Gustafsson and Olle Torpman propose and defend a more sophisticated version of what they call "My Favourite Theory." *See* Gustafsson & Torpman, *supra* note 134 at 169–70. Lacking the simplicity of the original, it can no longer be called "obvious," but it is designed to avoid problems of inconsistency over time and the difficulties of intertheoretic comparison. *See id.* at 160–69. Even so, their sophisticated theory still encounters serious defects. *See* MACASKILL, BYKVIST & ORD, *supra* note 3, at 40–47 (discussing "deeper" issues with the theory and observing that, in addition, it "no longer has the appeal of simplicity").

[208] *See supra* notes 66–100 and accompanying text; *infra* Part III.B; *cf.* Bernick, *supra* note 28, at 21–32.

[209] *Infra* text accompanying notes 210, 236–237.

B.   Two Modes of Legal Critique

Even if a solution remains a long way off, recognizing the problem has value now. It provides a new framework for evaluating opinions, judges, and their approaches. We can evaluate them at two levels: at the level of jurisprudence—what they ought, judicially, to have done—and at the level of rationality—what, given normative uncertainty, was rational for them to have done. Critiques appropriate at one level may not be appropriate at the other, and vice versa, because jurisprudence and rationality are different benchmarks.

What is more, further research may show that some supposed "legal canons" or approaches have been mischaracterized. I earlier assumed that all legal canons, approaches, moral considerations—anything that the judge might think relevant to what she ought to do and when to employ them—constituted part of her jurisprudence.[210] But some such techniques may actually be used at the rational level as a way to cope with normative uncertainty. If so, we should evaluate them in that light, as rational approaches to normative uncertainty, and not in the light of jurisprudence. Further research on the problem of normative uncertainty in judicial decision-making may thus not only illuminate the law, but also yield contributions to the ongoing moral debate.

To illustrate what I mean, return to our software copyright case of the century.[211] As is probably clear, it is a stylized version of the actual copyright case of the century, *Google v. Oracle*.[212] There were two issues: (1) whether the type of computer software at issue is copyrightable; and (2) whether, if copyrightable, copying the software is nevertheless fair use.[213] *Google* was not the first major case to present these two issues relating to software interfaces. An earlier case, *Lotus v. Borland*, also presented these issues and was granted certiorari, but the Court split on a 4–4 vote.[214]

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[210] *Supra* text accompanying notes 77–98, 118–120.

[211] *Supra* Part I.B.

[212] *See generally* Kevin J. Hickey, Cong. Rsch. Serv., LSB10597, *Google v. Oracle*: Supreme Court Rules for Google in Landmark Software Copyright Case (2021).

[213] *Google*, 141 S. Ct. at 1190. Technically, these cases concerned the command structures for computer software, *see infra* note 216. But those who understand computing likely already know that about these cases, and I don't want to distract those who don't with a phrase—"command structures"—that may seem unfamiliar.

[214] *See generally Lotus*, 516 U.S. 233 (1996).

The importance of these cases is hard to overstate. In layman terms, they concern whether software engineers need to pay for a license to use the names of core functions like "Print" and "Copy," or to organize those functions within the menus where they are standardly found (e.g., under "File" and "Edit," respectively).[215] These are the basic, functional building blocks that most programmers have grown accustomed to using across platforms.[216] And, if protected by copyright, licenses would be required for a long time—copyright lasts upwards of seventy years, far longer than the twenty-year limit on patent protection standardly given to inventions.[217] After nearly thirty years of litigation between these two cases, everyone was hoping for some clarity, especially on the copyrightability question.[218]

Such clarity was not forthcoming.[219] In April 2021, the Supreme Court found in favor of the defendant, Google, but avoided the copyrightability question.[220] Instead, the Court ruled that, even assuming arguendo the type of software at issue was copyrightable, Google's copying constituted fair use as a matter of law.[221]

Justice Breyer wrote the majority opinion; Justice Clarence Thomas, joined by Justice Samuel Alito, issued a dissent.[222] The

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[215] *Infra* note 216.

[216] I use these examples because most readers will be familiar with these commands in standard word-processing software, and with the importance of command structure (e.g., from struggling to find them or from coaching relatives on where to find them). The technical details are more complicated than this, and concern different functions. *See* Brief of 72 Intellectual Property Scholars as Amici Curiae in Support of Petitioner, *Google*, No. 18-956, Dkt. No. BL-127, at *2–5.

[217] Copyright protection generally extends for the life of the author plus seventy years, subject to exceptions for older works and anonymous, pseudonymous, and works made for hire, which have a term of ninety-five years from first publication or 120 years from creation (whichever expires first). 17 U.S.C. § 302. By contrast, patent protection only lasts twenty years. 35 U.S.C. § 154.

[218] *See* Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After* Google v. Oracle, 100 TEX. L. REV. 1, 2 (2021) (noting that all but three of the twenty-seven briefs filed in support of Google urged the Court to rule on copyrightability).

[219] *See, e.g.*, *id.*; David Newhoff, Google v. Oracle*: A Troubling Use of Fair Use*, ILLUSION OF MORE (Apr. 6, 2021), https://perma.cc/MAL6-UWDR (noting that the decision "falls short of providing the market certainty many in the software business were seeking"); *see also* Hartline & Mossoff, *supra* note 78 (accusing Justice Breyer of hostility toward the idea that code is copyrightable).

[220] *Google*, 141 S. Ct. at 1197.

[221] *Id.* at 1190.

[222] *Id.* (Breyer, J.); *id.* at 1210 (Thomas, J., dissenting).

majority opinion has received mixed reactions.[223] Though relieved that the Court sided with Google, several leading IP scholars worry that deciding on fair use grounds once again leaves potential defendants with "nothing more than 'the right to hire a lawyer.'"[224] Perhaps unsurprisingly given the opinion's author, the critical commentary reflects a common complaint about Justice Breyer's (actual) jurisprudence more generally, namely, that he favors context-specific totality-of-the-circumstances standards when clear rules are needed.[225] And worse, that he bends such standards to reach the result he wants.[226] This isn't to say that standards are never appropriate; only that, according to the critics, Justice Breyer uses them to avoid deciding on a rule more than is jurisprudentially appropriate.[227]

Though I thought that the Court should have ruled on copyrightability, I will admit to some ambivalence about the decision. On the one hand, I think that this type of software is plainly not copyrightable,[228] and I share concerns that, in avoiding difficult aspects of the copyrightability question, the Court distorts fair use doctrine more generally.[229] On the other hand, I appreciate that clearly delineating copyrightable software from uncopyrightable software is exceptionally difficult, and that the costs of

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[223] *E.g.*, *supra* note 219; Lemley & Samuelson, *supra* note 218, at 4 (characterizing *Google* as a "lost opportunity to recognize the important role that § 102(b) exclusions have played in previous software interface cases").

[224] Lemley & Samuelson, *supra* note 218, at 43 (quoting LAWRENCE LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY 187 (2004)); *see also* Brief Amici Curiae of 83 Computer Scientists in Support of Petitioner, *Google*, No. 18-956, Dkt. No. BL-26 ("Though better than nothing, a fair use standard creates uncertainty because it depends on fact-intensive, case-by-case determinations which can result, as this case demonstrates, in lengthy and expensive litigation."); *cf.* Newhoff, *supra* note 219 (warning future software plaintiffs that "when a Google-scale behemoth appropriates some amount of their code, they may be about a decade's worth of litigation away from finding out if there's a remedy").

[225] Russell Miller, *To Compare or Not to Compare? Reading Justice Breyer*, 11 J. COMP. L. 169, 172–73 (2016); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–79 (1989); *cf.* Lee, *supra* note 73, at 62–74 (discussing the cognitive burden for judges from the Supreme Court's "holistic" turn in patent cases).

[226] *Google*, 141 S. Ct. at 1214–15 (Thomas, J., dissenting).

[227] *See* Miller, *supra* note 225, at 172–73.

[228] There were two amicus briefs filed in support of Google by IP scholars at the merits stage, one on each issue; I joined the one on copyrightability. *See* Brief of 65 Intellectual Property Scholars as Amici Curiae in Support of Petitioner, *Google*, No. 18-956, Dkt. No. BL-26; *see also* Brief of Copyright Scholars as Amici Curiae in Support of the Petitioner, *Google*, No. 18-956, Dkt. No. BL-101.

[229] *See Google*, 141 S. Ct. at 1214–15 (Thomas, J., dissenting); Newhoff, *supra* note 219 ("[T]he Breyer opinion asks fair use to do something it is not meant to do.").

getting it wrong are likely very high.[230] Appeal to a standard may have been appropriate. I can't say that, had I been a judge and not an advocate on the sidelines, I would have decided differently.

How can I reconcile these two views? How can I believe that the Court both did and did not do the right thing? Am I just inconsistent? Wechsler might have thought so. He once observed that "[w]hatever" you think of the criteria by which we evaluate the Court's judgments, "surely you agree . . . that [Wechsler was] right to state the question [of criteria] as the same one for the Court and for its critics."[231] He explained:

> An attack upon a judgment involves an assertion that a court should have decided otherwise than as it did. Is it not clear that the validity of an assertion of this kind depends upon assigning reasons that should have prevailed with the tribunal; and that any other reasons are irrelevant?[232]

But if, as I have argued, there is both a judicial and a rational ought, we can sensibly maintain these two views. And we can even learn something from it.

To illustrate, consider again a highly simplified version of the case. We'll assume once again that you only have three choices of judicial act, setting down one of three opinions, *A*, *B*, or *C*:

A. Rule that the software is copyrightable and defendant's copying was not fair use, issuing a judgment for plaintiff.

B. Rule that this type of software is not copyrightable, mooting the fair use question and issuing a judgment for defendant.

C. Rule that defendant's copying is fair use as a matter of law, avoiding the copyrightability question and issuing judgment for defendant.

Of course, in the real case there are more options than these,[233] and this forms a focus of some of the actual criticisms of the actual outcomes. But we'll set those aside for illustration.

Let us also assume that there are three jurisprudences from which to choose, the Boudin Jurisprudence, the Breyer Jurisprudence, and the Thomas Jurisprudence. And we'll assume further that all three jurisprudences admit of degrees of judicial

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[230] *See supra* notes 77–82 and accompanying text.

[231] *See* Wechsler, *supra* note 86, at 11.

[232] *Id.*; *cf.* Part II.B.

[233] *Supra* Part I.B.

rightness, and that they exhibit co-cardinality and satisfy the other needed axioms for applying expected utility theory.[234]

Here is the decision matrix, showing how each of the jurisprudences ranks the three options:

EXAMPLE 3*: SOFTWARE INTERFACE COPYRIGHT CASE
(SIMPLIFIED): DEGREES OF RIGHTNESS

	Boudin Jurisprudence	Breyer Jurisprudence	Thomas Jurisprudence
A: Copyrightable, Not Fair Use	0	0	10
B: Not Copyrightable	10	5	0
C: Fair Use as a Matter of Law	8	10	5

That is, according to the Boudin Jurisprudence, the judge ought (judicially) to issue Opinion *B*, ruling that the type of software at issue is not copyrightable. But the difference between that option and the next best option, finding the copying fair use (Opinion *C*), is much smaller than the difference between deciding fair use and getting the wrong outcome on copyrightability (Opinion *A*).

According to the Breyer Jurisprudence, the judge ought (judicially) to issue Opinion *C*, ruling that the copying is fair use. Ruling that the software is not copyrightable is next best (Opinion *B*), and ruling that the software is copyrightable is worse still (Opinion *A*). The ranking is evenly spaced, reflecting that the difference between the top and bottom options (Opinion *C* and Opinion *A*) is twice that between the middle option and the others (i.e., between Opinions *C* and *B*, or between Opinions *B* and *A*).

Finally, according to the Thomas Jurisprudence, the judge ought (judicially) issue Opinion *A*, ruling that the software is copyrightable and that the copying is not fair use. Ruling that the copying is fair use (Opinion *C*) is worse, and ruling that the software is not copyrightable is worse still (Opinion *B*), again with an evenly spaced ranking.

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[234] *See supra* note 146 and accompanying text; *see also* Part III.A.2.

Now we can consider how a judge who shares my uncertainty about which jurisprudence is correct might think about the case.

Suppose you are Judge Boudin. Your credence in the Boudin Jurisprudence is fairly high, say 70% ($p_1 = .7$). But you are not entirely certain. You think that there is a 20% chance that the Breyer Jurisprudence is the better approach ($p_2 = .2$), and a smaller, say 10%, chance, that the Thomas Jurisprudence is right ($p_3 = .1$). What should you do?

EXAMPLE 3*: JUDGE BOUDIN'S CREDENCES (IMAGINED)

	Possibility 1 ($p_1 = .7$) Boudin Jurisprudence	Possibility 2 ($p_2 = .2$) Breyer Jurisprudence	Possibility 3 ($p_3 = .1$) Thomas Jurisprudence
A: Copyrightable, Not Fair Use	0	0	10
B: Not Copyrightable	10	5	0
C: Fair Use as a Matter of Law	8	10	5

If your sole aim is to do that which you ought judicially to do, then on at least one view of how to deal with normative uncertainty, you ought to maximize expected judicial rightness. To do this, as above, you first calculate the expected judicial rightness for each opinion by multiplying the likelihood a given jurisprudence is right by the judicial rightness that jurisprudence assigns to that opinion, and then summing the results across jurisprudences. The opinion with the highest expected judicial rightness is the one that will maximize expected judicial rightness.

For Judge Boudin, the expected judicial rightness of ruling that the software is not copyrightable (Opinion B) is 8.0:

$$\text{EJR}_\text{B} = (p_1 * j_{1,\text{B}}) + (p_2 * j_{2,\text{B}}) + (p_3 * j_{3,\text{B}})$$
$$= (.7 * 10) + (.2 * 5) + (.1 * 0)$$
$$= 8.0$$

But the expected judicial rightness of ruling that the copying was fair use (Opinion *C*) is greater at 8.1:

$$\text{EJR}_C = (p_1 * j_{1,C}) + (p_2 * j_{2,C}) + (p_3 * j_{3,C})$$
$$= (.7 * 8) + (.2 * 10) + (.1 * 5)$$
$$= 8.1$$

This means that, given Judge Boudin's credences and aim of doing that which he ought, judicially, to do, Judge Boudin ought (rationally) choose Opinion *C* and rule that the copying was fair use.[235]

Given his credences, ruling on fair use was the rational option. One can maintain this—that the decision in *Google* was rational given normative uncertainty—even as one criticizes the decision as reflecting the flaws of the Breyer Jurisprudence. Recognizing how normative uncertainty can cause the judicial and rational "oughts" to point in different directions allows us to consistently make these claims.

More importantly, recognizing these two "oughts" means that we need to be careful about our mode of critique and the criteria we are using. When evaluating an opinion or canon qua jurisprudence, we evaluate them as methods of legal reasoning and the usual claims about consistency and coherence—or cries of lawlessness—are appropriate. But if we evaluate them as methods for coping with normative uncertainty, then we need to evaluate them according to a different metric. We should evaluate them in the lights of practical rationality.[236]

This raises a question: which parts of legal reasoning—which aspects of decisions, which legal canons, which theories of adjudication—are matters of jurisprudence versus methods for coping with this kind of normative uncertainty? Now that we recognize the difference between the two levels, we may sensibly ask that question. And we may find it illuminates certain practices that are hard to square with the idea that there is a "right" outcome in the case, like Judge Boudin's decision in *Lotus* to write

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[235] Given Judge Boudin's credences, the expected judicial rightness of Opinion *A*, finding the software copyrightable and the copying not fair use, is much lower, at 1:

$$\text{EJR}_A = (p_1 * j_{1,A}) + (p_2 * j_{2,A}) + (p_3 * j_{3,A})$$
$$= (.7 * 0) + (.2 * 0) + (.1 * 10)$$
$$= 1$$

[236] *See generally* Sepielli, *What to Do II*, *supra* note 4 (providing an overview).

separately on fair use, even as he joined the unanimous ruling on copyrightability.[237]

Viewed in this light, it may turn out the judge already has the tools she needs for coping with normative uncertainty. We can evaluate them and sharpen them. And perhaps even lend them to the moral philosophers as they work out a similar problem facing individual moral agents.

CONCLUSION

Upon first learning of the problem of normative uncertainty that judges encounter in deciding cases, many are inclined to be skeptical of its actual or possible existence, or else assume that it is easily solved. I have argued that those skepticisms are ungrounded. Empirical skepticism is based on a confusion, and theoretical skepticism a fallacy. Pragmatic skepticism about the problem's importance and difficulty is based on the ignoring of relevant information about the likelihood that a jurisprudence is correct and a false assumption that jurisprudences always agree about the cost of error—the badness of getting it wrong or the importance of getting it right—in a given case.

Once we recognize the existence of the problem, and that the "obvious" solution is a nonstarter, we can attempt to do better. The attempt described and illustrated in Part III is only the beginning. There are difficulties that need to be resolved, and simplifying assumptions evaluated; for example, there remain questions about whether the appropriate focus is a single judicial act or a course of judicial action.

This Article does not suggest that judges should employ the machinery proposed in Part III, or that might be developed in subsequent work, in every decision. Frequently, judges will not need to: there is sufficient agreement across jurisprudences and across versions of a jurisprudence as to the right *outcome* in central cases, even if there is not agreement on the *reasons*. But hard cases are hard precisely because they tend to fall into this gap. It is in these cases that it is most important to remember that we are not Hercules, that we have not yet reached the ideal of reflective equilibrium and are unlikely to anytime soon. Therefore, we should do our best to increase the chances that we'll be right and develop better heuristics to this end. That effort begins with

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[237] *See Lotus*, 49 F.3d at 819 (Boudin, J., concurring).

critically reflecting on the best methods for deciding cases in the face of normative uncertainty.