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"CONFRONTING NORMATIVE UNCERTAINTY: DECIDING CASES WHEN YOU DON'T KNOW HOW TO DECIDE"

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Confronting Normative Uncertainty: Deciding Cases When You Don't Know How to Decide

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The intellectually honest and humble judge faces a very serious problem about which little has been said. It is this: how to decide what she ought to do when, despite knowing all the relevant facts, laws, and theories of adjudication about how she ought to decide, she remains uncertain.

Drawing from emerging debates in moral theory, I call this problem the problem of "normative uncertainty." In this Article, I explain the problem, distinguish it from related debates in the legal literature, and show that the obvious solution—engage in some legal reasoning to figure it out—is a nonstarter. Judges ought not simply muddle through, following whichever theory of adjudication they find most plausible. Sometimes, like in *Brown v. Board of Education* or *Google v. Oracle*, they ought not follow their preferred theory but do what another theory suggests instead.

Developing a full solution will be difficult. To show why, I sketch a solution and apply it to *Brown I*. I do not defend it. Instead, I use it to illustrate why developing a solution to normative uncertainty is considerably more difficult than developing solutions to other kinds of uncertainty. I then apply it to *Google* to show how, even without a solution, recognizing the problem changes how we evaluate judging. Specifically, we can consistently maintain both that a court erred legally, and that a court acted rationally given its uncertainty. Importantly, these two critiques are against different benchmarks—jurisprudence and practical rationality—and so going forward, we need to be clear which critique we are making.

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INTRODUCTION

The intellectually honest and humble judge faces a very serious problem about which little has been said. It is this: how to decide what she ought to do when, despite knowing all the relevant facts, laws, and theories of adjudication, she remains uncertain about what she ought to do. Drawing from related debates in moral theory, I call this "normative uncertainty."[1] In this Article, I explain this problem, distinguish it from related problems, and show why it poses a deep, practical problem that is difficult to solve.

In some ways, legal discourse frequently touches on what looks like normative uncertainty. Legal academics debate the appropriate methods for adjudication,[2] argue over which factors ought count in decisions (and for how much),[3] and teach students how to persuade judges that such legal uncertainty ought be resolved in one's favor. Much of jurisprudence is dedicated to the related problem of indeterminacy: what it means for the law to be indeterminate and what such indeterminacy means about a judge's discretion.[4] And recent scholarship examines the epistemic and normative implications of disagreement.[5] But much less is said about how the decision-maker—usually, a judge—ought resolve her own uncertainty when she is uncertain, not merely as to which decision to make, but as to how to make it.

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[1] TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES 143–68 (2000); WILLIAM MACASKILL, KRISTER BYKVIST, & TOBY ORD, MORAL UNCERTAINTY (2020).

[2] *E.g.*, Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988).

[3] *E.g.*, William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

[4] *E.g.*, KARL LLEWELLYN, THE BRAMBLE BUSH 76 (1930) ("[P]recedents *must* speak ambiguously until the court has made up its mind . . . ."); H.L.A. HART, THE CONCEPT OF LAW 252 (1994) (arguing that law is often indeterminate and discretion in such cases unavoidable). Legal scholarship uses the term "normative uncertainty" in a variety of ways. Some use the term "normative uncertainty" to refer either to this indeterminacy, or to value judgments about whether the laws are good ones. *E.g.*, Rebecca Crootof and BJ Ard, *Structuring TechLaw*, 34 HARV. J.L. & TECH. at *14, 24 (forthcoming 2021); Caroline Henckels, *Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference*, 45 FED. L. REV. 181 (2017). Others use the term to refer to conflict-of-laws situations, especially in international law. *E.g.*, Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 62 (2006). These examples concern uncertainty about what the law is and its justification (e.g., what the opinion should be), and the problem is how our all-things-considered theories of adjudication should handle them. They are not about "normative uncertainty" as I use the term—about what a judge should do when she is uncertain about which all-things-considered theory to follow (what I call "jurisprudences," *infra* Part I.B). *See infra* Part I.B, III.B.

[5] *E.g.*, Youngjae Lee, *Reasonable Doubt and Disagreement*, LEGAL THEORY (2018); William Baude & Ryan Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018).

This Article focuses on the problem faced by the judge. A conscientious judge acting in good faith believes herself bound by the law and tries to apply it as best she can.[6] There are a number of competing views about how a judge ought decide cases, and she likely has developed views on the subject. For example, in approaching constitutional law, she may believe in originalism or common-law constitutionalism;[7] in interpreting statutes, textualism or purposivism;[8] in contract cases, textualism or contextualism;[9] in criminal sentencing, retributivism or deterrence;[10] and in torts, she may take duty seriously or believe that duty is nothing but cover for policy-based reasoning (and have views about what that policy-based reasoning entails).[11] She may be more or less formalist, more or less pragmatic, or something in between.[12] She will have thought about these kinds of legal uncertainty, about how much discretion she has when the law is indeterminate, and about

[6] I use "bound" in its thinnest sense. There are competing views about what the "law" is and so what it means for the judge to be "bound" by it—a point about which our judge may herself be uncertain. *See, e.g.*, LLEWELLYN, *supra* note 4, 69–76; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, & the Future of Unenumerated Rights*, 9 U. PA. J. CON. L. 155 (2006); *see also* Jeremy Waldron, *Is Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 141–44 (2002) (summarizing related dispute).

[7] *Compare, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); 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, 877–78 (1996).

[8] *Compare, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994), *with, e.g.*, HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L. J. 1275 (2020); *see also infra* note 73.

[9] *E.g.*, Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 937 (2010).

[10] *E.g.*, MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 291–378 (2002).

[11] *Compare, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020), *with e.g.*, Rowland v. Christian, 69 Cal.2d 108 (1968); United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.) (introducing cost-benefit approach to negligence); OLIVER W. HOLMES, JR., THE COMMON LAW (1881); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 83, at 8, 15–18, 677–78 (1941); RICHARD A. POSNER, REFLECTIONS ON JUDGING 358–66 (2013); *see also* KAPLOW & SHAVELL, *supra* note 10, at 85–115.

[12] *See, e.g.*, Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEG 111, 112 (2010); POSNER, *supra* note 11, at 351–58; Benjamin C. Zipursky, *Legal Pragmatism and Legal Pragmaticism*, in PRAGMATISM, LAW AND LANGUAGE 237 (G. Hubbs & D. Lind eds., 2013).

how to exercise it.[13] She will have views about when, whether, and how moral, political, and institutional concerns should affect her decision.[14] But whatever the judge's preferred theory of adjudication about how she ought, all things considered, to decide—what I will call her preferred "jurisprudence"—she may harbor lingering doubts that a competing jurisprudence is correct instead, or doubts about which version of her preferred jurisprudence is right. Sometimes, these competing jurisprudences provide conflicting guidance.

This creates a problem: what should the judge do when she is uncertain, not as to the relevant facts, laws, and theories of adjudication, but about how she ought decide in light of them? That is, what should the judge do given her normative uncertainty?

In brief, this 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 that which 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 do according to a particular jurisprudence—and a *rational* ought—about what the judge ought do given her beliefs about which jurisprudence is correct and her aim of doing that which she ought (judicially) to do.[15]

Where a judge is certain about what she ought (judicially) 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.[16] But when she is uncertain about which jurisprudence is correct and those in which she has credence point in different directions, there is a question about what she ought rationally do given her aim of doing what is judicially right.

The seemingly obvious solution—follow that jurisprudence which the judge believes is mostly likely correct—is a nonstarter. This sort of solution makes two mistakes. First, it ignores relevant information, namely, that the

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[13] *See, e.g.*, HART, *supra* note 4, at 252 (1994); Scott J. Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469 (1998); Noel B. Reynolds, *Dworkin As Quixote*, 123 U. PA. L. REV. 574, 586–87 (1975) ("When we allow the judge discretion . . . we implicitly expect him to use his best judgment . . . .").

[14] *E.g.*, Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897); Shapiro, *supra* note 13; James Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Court of Appeals*, 35 LAW & SOC. REV. 565 (2001); Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 6–7 (1999).

[15] Some believe there to be a similar distinction between the *moral* ought and the *rational* ought, *e.g.*, Andrew Sepielli, *What to Do When You Don't Know What to Do When You Don't Know What to Do . . .* , 48 NOUS 521 (2014); LOCKHART, *supra* note 1, at 44–46; *see also infra* note 104.

[16] *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1222–23 (2009); *see also* sources cited *infra* note 87.

judge's evidence does not permit her to believe her "best" theory is correct. Rather, her evidence suggests that the other theories may be correct instead. Second, it relies on a false assumption, namely, that the jurisprudences in which she has some level of credence agree about the cost of error in all cases. But a key point of disagreement among jurisprudential theories 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 weighed 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 theory might be correct, we can take into account the likelihood that each theory is correct and what the theory suggests is the cost of error in a particular case. In other areas of decision theory, these would be relevant considerations.[17] Indeed, it would be irrational to ignore them. My claim is that the same is true in judicial decisionmaking. The result is that, sometimes, the rational thing to do is *not* what our favorite jurisprudential theory suggests. For example, sometimes our favorite theory will suggest that the cost of error is not so high, but another view we find plausible suggests the costs of error are *very* high. When this happens, a judge may be rational to do what her less-favored theory recommends.

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.[18] With normative uncertainty, you can't take that same scale for granted: you are comparing the cost of error as measured by different theories.[19] This is the problem of intertheoretic comparison, and it is sufficiently difficult that some moral philosophers believe no solution can be found.[20] The leading solutions proposed in the literature have required book-length treatment to explain and defend.[21] 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

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

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

[19] *See id.*

[20] For example, John Broome has described the problem as "devastating." *See* MACASKILL, BYKVIST & ORD, *supra* note 1, at 58 n.2 (quoting personal communications); *see also* sources cited *infra* note 166.

[21] *See* LOCKHART, *supra* note 1; MACASKILL, BYKVIST, & ORD, *supra* note 1.

precedent for how they ought act in future, let alone establish a rule of action for others.[22]

We should not expect we can straightforwardly adapt the proposed solutions in the moral case to the problem as it arises in judicial decisionmaking. 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 from this decade.[23] 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.

To describe this problem and the difficulties of solving it in as simple a manner as possible, I make some *significant* simplifying assumptions, noted in text and footnotes throughout. For example, I assume that judicial decisions *can* be coherently criticized[24]—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.[25] 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.[26] 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 order).[27] But this might not be the right focus. Given legal norms of consistency over time, the scope of decision should perhaps be

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[22] The moral case also has scope-of decision problems, *id.*, but they are more pressing in the judicial case given the precedential nature of judicial decisionmaking.

[23] *E.g.*, Christian Tarsney, *Moral Uncertainty for Deontologists*, 21 ETHICAL THEORY & MORAL PRAC. 505 (2018); Brian Weatherson, *Running Risks Morally*, 167 PHIL. STUDIES 141 (2014); Sepielli (2014), *supra* note 15; Andrew Sepielli, *Normative Uncertainty for Non-Cognitivists*, 160 PHIL. STUDIES 191 (2012); *see also supra* note 1.

[24] *E.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 78 (2010) ("Anyone who doubts that *Brown* is lawful is a fringe player, at best.").

[25] *Compare, e.g*, Calder v. Bull, 3 U.S. 386, 399 (1798) (Iredell, J. concurring) ("The Court cannot pronounce [a law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice."); HART, *supra* note 4, at 252; Shapiro, *supra* note 13, *with Calder*, 3 U.S. at 386 (Chase, J.); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). I bundle all such disputes into a judge's "jurisprudence" for ease of describing the problem, *infra* Part I.B.

[26] *Infra* Part I.B.

[27] The decision will usually, but not always, be coextensive with the expression of that decision in the opinion. There is a question, which I explore in a companion work-in-progress, of whether judges should publicly *express*, in written opinions or elsewhere, their uncertainty about their choice of judicial act. Courtney M. Cox, Super-Dicta; *infra* note 84. This raises further questions about whether the decision is properly modeled as limited to the decisions expressed in the opinion, or also includes choices about that expression. *See*, *e.g.*, Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO L.J. 1, 84 (1979) (exploring the Court's efforts to "speak with one voice in the segregation cases").

broader, encompassing a larger course of judicial acts; or perhaps more granular, focused on particular legal issues and rules. [28]

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*.[29] The solution is based on expected utility theory, which I've chosen because it is a familiar way of dealing with empirical uncertainty.[30] I show how a judge deciding *Brown I* 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 I*: the Court spoke with a unanimous voice despite deep disagreement over how to reconcile their decision with then-extant jurisprudences.[31]

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.[32] And these difficulties are compounded in the case of normative uncertainty.[33] I use these problems to illustrate the difficulty of the work ahead.

Even without a solution, we may already reap benefits from recognizing and clearly defining the problem of normative uncertainty. Specifically, doing so gives us a better framework for evaluating judicial decisions. As I noted above, there is both a *judicial* ought—what the judge ought do according to a particular jurisprudence—and a *rational* ought—about what the judge ought do given her beliefs about which jurisprudence is correct and her aim of doing that which she ought (judicially) to do.[34] Sometimes these point in different directions. I use the expected utility solution to show how that might have been the case for a judge deciding *Google v. Oracle*,[35] the copyright case of the century.[36] Many are conflicted about the outcome.[37] 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) have done in the face of normative uncertainty. Importantly, these two critiques are against different benchmarks—jurisprudence and practical rationality—and so going forward, we need to be clear as to which critique we are making.

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[28] *Cf.* LOCKHART, *supra* note 1, at 143–68 (discussing "courses of action" rather than "acts").

[29] 349 U.S. 294 (1955) (hereinafter Brown I).

[30] *Cf.* United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.) (introducing cost-benefit standard for negligence similar to expected utility).

[31] *See* STRAUSS, *supra* note 24, at 78; *infra* Part III.A.1.

[32] *See* LOCKHART, *supra* note 1, at 184 n.11; *see also infra* Part III.A.2..

[33] *See* LOCKHART, *supra* note 1, at 27; MACASKILL, BYKVIST & ORD, *supra* note 1, at 47–56; *infra* Part III.A.2.

[34] *See supra* note 15 and accompanying text; *infra* Part II.B.

[35] 141 S. Ct. 1183 (2021).

[36] *See* Mark A. Lemley & Pamela Samuelson, Interfaces and Interoperability After *Google v. Oracle* (July 2021) (on file with author); *see also infra* Part III.B.

[37] *See infra* Part III.B.

As one of the first passes at the problem of normative uncertainty faced by judicial decisionmakers,[38] I have only two goals. My first aim is to convince the legal audience that the problem exists—that there is a question, about what the judge ought to do when the judge does not know what the judge ought to do, and that that question does not collapse into the original question of what the judge ought to do *simpliciter*. My second aim is to demonstrate that the seemingly obvious solution—follow that jurisprudential theory, such as originalism or common-law constitutionalism, which one believes is mostly likely correct—is a nonstarter. Along the way, I make many simplifying assumptions in service of identifying the problem and showing that the solution is not obvious. By the end, I hope to have convinced you only that there is a problem and that it is hard.

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 ought muddle through. The judge cannot avoid making a decision.[39] 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* 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. What is more, it will give us a new lens for evaluating existing "legal" canons and have implications for their authority.[40]

The Article divides into three parts. 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 illustrates the difficulty of developing alternatives to the obvious solution. It offers a sketch of a more promising candidate, maximizing expected judicial rightness, and applies that solution to simplified versions of *Brown I* and *Google v. Oracle*. This solution is not without problems, but illustrates both the difficulty and the significance of the work ahead.

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[38] Some moral philosophers have attempted legal applications of their theories about dealing with normative uncertainty. *E.g.*, LOCKHART, *supra* note 1, at 124–42. Others use, as examples, classic moral problems facing judges. *E.g.*, MACASKILL, BYKVIST, & ORD, *supra* note 1, at 65. 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 *11–14 (2021) (on file with author).

[39] A decision to avoid making a decision as by, e.g., deferring to Congress, is itself a decision. Different adjudicative theories provide different guidance about when a judge ought defer.

[40] *See infra* Part III.B; Cox, *supra* note 27; Courtney M. Cox, Canons of Avoidance.

I. THE PROBLEM OF NORMATIVE UNCERTAINTY

In Part I, I introduce the problem of normative uncertainty in judicial decisionmaking. First, I use a simple example from moral philosophy to illustrate what normative uncertainty is, as distinct from other kinds of uncertainty.[41] I then show how something similar applies to judicial decisionmaking.[42]

A. Empirical and Normative Uncertainty in Moral Decisionmaking

Begin with an example from practical philosophy about what to do when we are unsure of what morality requires.[43] 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.[44] 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 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, 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:

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

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[41] *Infra* Part I.A.

[42] *Infra* Part I.B.

[43] 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 decisionmaking under conditions of uncertainty. *See* Immanuel Kant, *On a Supposed Right to Tell a Lie from Philanthropy* 611 (1797), *in* IMMANUEL KANT, PRACTICAL PHILOSOPHY (Mary J. Gregor, trans. & ed., 1996).

[44] On the distinction between lying and mere misleading as a linguistic matter, see JENNIFER SAUL, LYING, MISLEADING, & WHAT IS SAID 1–3 (2012).

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.[45]

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.

To illustrate, suppose I am certain about the relevant facts but am uncertain about whether, given those facts, I am permitted to lie.[46] 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.[47] And I am absolutely sure that it would be morally permissible to merely 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	Possibility 2
A – Disclose	Wrong	Wrong
B – Lie	Permissible	Wrong
C – Merely Mislead	Permissible	Permissible

Such choice sets are common,[48] and, as moral theorists have observed, the "intuitively obvious answer" when faced with them is to choose C.[49] 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. If "my purpose is to do what is right, it makes no sense to accept an avoidable moral risk."[50] Because C is an available option that avoids this

[45] *See, e.g.*, Krister Bykvist, *How to Do Wrong Knowingly and Get Away with It*, 58 UPPSALA PHIL. STUD. 31, 33 (2011); Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection*, 101 ETHICS 461, 462–63 (1991); *see also* THOMAS NAGEL, MORTAL QUESTIONS (1991); BERNARD WILLIAMS, MORAL LUCK (1981).

[46] The structure of the following example is drawn from LOCKHART, *supra* note 1, at 4.

[47] *See generally* Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. (forthcoming 2022); *see also* SAUL, *supra* note 44, at 1–3.

[48] LOCKHART, *supra* note 1, at 4; MACASKILL, BYKVIST & ORD, *supra* note 1, at 15 (collecting examples).

[49] *See* LOCKHART, *supra* note 1, at 4; *see also* MACASKILL, BYKVIST, & ORD, *supra* note 1, at 40–41 (noting this choice is required by dominance).

[50] LOCKHART, *supra* note 1, at 4

moral risk, without any real measurable downsides, I should do C.[51] 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 merely mislead—to take option C—is not about what it is *moral* to do.[52] 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 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 correct	Possibility 2 Moral Theory 2 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.[53]

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

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[51] *Id.*

[52] 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 1.

[53] This is common with respect to lying and protective lies are a classic example. *See* SAUL, *supra,* note 17; Cox, *supra* note 47; *cf.* SEANA SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 153 (2014) (suggesting certain protective lies are permissible but denying that they are lies because they "operate in suspended contexts").

requires me to take that uncertainty into account, given my aim of doing what is morally right.[54]

B. Normative Uncertainty in Judicial Decisionmaking

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.[55] 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.[56]

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.[57] And there are competing theories of adjudication and doctrines for handling hard issues and hard cases, like equity, constitutional avoidance, or deference.[58] In a way, uncertainty about norms is to a lawyer

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[54] LOCKHART, supra note 1, at 4–6; *infra* note 104; *but see* Weatherson, *supra* note 23, at 149–50.

[55] LOCKHART, *supra* note 1, at 133–40 (offering issue-by-issue decision-theoretic account of *Roe v. Wade*); MACASKILL, BYKVIST, & ORD, *supra* note 1, at 65–67 (using example of a judge making moral decisions about how to try a wrongly accused man when the mob demands blood).

[56] I continue to use "bound" in a thin sense, in light of disagreement about what "law" is and what it means for a judge to be "bound" by it. *Supra* note 6 and accompanying text. For a similar reason, the judge's belief that she is so bound may involve a measure of self-deception, but we are beginning with an idealized version.

[57] *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (AM. L. INST. 1971). Arguably, substantive private law is also part of how we resolve normative uncertainty in the context of moral and social norms. *See* GOLDBERG & ZIPURSKY, *supra* note 11, at 301–02; Tom Dougherty, *Moral Indeterminacy, Normative Powers and Convention*, 29 RATIO 448 (2016); Rebecca Stone, Normative Uncertainty, Normative Powers, and Limits on Freedom of Contract (April 2021) (on file with author).

[58] *See, e.g.*, Kermit Roosevelt II., *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 10 (2012) (noting "dizzying array of methodologies" in choice of law decisions); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. 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) ("[E]quity addresses a special class of problems—those of high complexity and uncertainty . . . ."); Sepehr Shahshahani, Hard Cases Make Bad Law? (2021) (on file with author).

what uncertainty about facts is to moral agent.[59] 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.

Even so, we can get a simplified version of the problem off the ground by making a few simplifying assumptions and 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.[60] 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," "Quit").[61]

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.

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.[62] These

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[59] *See* Holmes, *supra* note 14, at 457, 495 ("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 . . . ."); *see also, e.g.*, Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027, 1029 ("It is precisely the normative uncertainty of civil penalties that makes them useful as instruments of regulation.").

[60] 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) (discussing cognitive burden placed on judges by technology).

[61] *Cf.* Lotus v. Borland, 49 F.3d 807 (1st Cir. 1995), *aff'd by equally divided court*, 516 U.S. 233 (1996). Both issues need not be decided. 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.

[62] As Pamela Samuelson has argued, the question implicates at least five circuit splits. *See* Brief of 65 Intellectual Property Scholars as Amici Curiae in Support of Petitioner, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956),

options also grossly simplify even your high-level options. For example, you could correct either the copyrightability or fair use standards and 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.

To model your normative uncertainty about how to choose between these three opinions, 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 twice already, and the Court was divided both times.[63] Deep disagreements about textualism and purposivism are implicated by the copyrightability question, including how to apply those methodologies.[64] Fair use, though codified,[65] remains a judge-made standard, and so views about the proper interpretation and application of precedent will be at play.[66] 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).[67] 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.[68] There are also institutional concerns in the real world where

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at 12–19 (petition stage); *see also* Shubha Ghosh, *AIn't It Just Software?*, in Ryan Abbott, ed., RESEARCH HANDBOOK ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY (forthcoming).

[63] *See* Lotus v. Borland, 516 U.S. 233 (1996), *aff'g* 49 F.3d 807 (1st Cir. 1995); Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021).

[64] *Compare* Google, 141 S. Ct. at 1197–99 (Breyer, J.), *with id.* at 1212–14 (Thomas, J., dissenting). *See also* Adam Mossoff & Devin Hartline, Google v. Oracle: A Copyrightability Decision Masquerading as Fair Use, WASHINGTON LEGAL FOUNDATION (May 7, 2021), https://www.wlf.org/2021/05/07/wlf-legal-pulse/google-v-oracle-a-copyrightability-decision-masquerading-as-fair-use/.

[65] 17 U.S.C. § 107.

[66] 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 (2020) (discussing different views of stare decisis).

[67] *See generally, e.g.*, Samuelson & Asay, *supra* note 66; Crootof & Ard, supra note 4; Lee, *supra* note 60; *cf.* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL FORUM 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?*, BERKELEY TECH. L.J. 1155, 1183–85 (2002).

[68] *See, e.g.*, Brief of 72 Intellectual Property Scholars as Amici Curiae in Support of Petitioner at 1–4, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956); Brief for International Business Machines Corp. and Red Hat, Inc. as Amici Curiae Supporting Petitioner at 13–18, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956); Brief of Microsoft Corporation as Amicus Curiae in Support of Petitioner, Google LLC v. Oracle America, Inc. at 7–12, 141 S. Ct. 1183 (2021) (No. 18-956); Amicus Curiae Brief of Developers Alliance in

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 next-best?[69] 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 jurisprudence: a theory about how 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 we can pretend. The assumption that judges and justices apply, or at least ought to apply, consistent approaches—that judges ought exhibit some minimal theoretical coherence—is not undisputed, but is plausible.[70] We criticize judges not only for making bad decisions, but also for deciding cases inconsistently with their approaches in past cases—for behaving lawlessly.[71] This suggests that a judge's jurisprudence 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 (or justice's) "Jurisprudence." A judge's jurisprudence is a jurisprudential theory or approach to deciding cases. A given jurisprudence will include, for example, theories and beliefs about constitutional interpretation and construction;[72] the appropriate method of statutory construction;[73] the importance and application of stare decisis;[74] the

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Support of Petitioner, Google LLC v. Oracle America, Inc. at 15–18, 141 S. Ct. 1183 (2021) (No. 18-956); *but see* Brief of Amici Curiae Copyright Thought Leaders in Support of Respondent at 5–6, 8–9, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

[69] *See, e.g.*, Baude & Doerfler, *supra* note 5; Harry T. Edwards, *Collegiality and Judicial Decisionmaking*, 151 U. PA. L. REV. 1649–51 (2003).

[70] *See, e.g.*, Wechsler, *supra* note 6, at 7, 11; *see also* Baude & Doerfler, *supra* note 5, at 337–38 (making similar assumption).

[71] *E.g.*, RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS 25 (2018); Kimberly Wehle, *The Surprising Conservatism of Ruth Bader Ginsburg*, POLITICO (Sept. 20, 2020, 11:20 AM), https://www.politico.com/news/magazine/2020/09/20/ruth-bader-ginsburg-conservatism-418821; *see also* Donald L. Doernberg, *Juridical Chameleons in the New Erie Canal*, 1990 UTAH L. REV. 759, 782–93 (1990) (criticizing Justices Brennan, Powell, Scalia and Stevens for their inconsistent application of the *Erie* doctrine).

[72] *See supra* note 7; *see also, e.g.*, Solum, *supra* note 6.

[73] *Compare, e.g.*, SCALIA, *supra* note 8; Easterbrook, *supra* note 8; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), *with, e.g.*, HART & SACKS, *supra* note 8. There are of course different versions of these views, *see, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV, L. REV. 265 (2020); Krishnakumar, *supra* note 8, and other approaches to interpretation and construction, *see generally, e.g.*, William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Richard A. Posner, *What Has Pragmatism to Offer Law*, 63 S. CAL. L. REV. 1653 (1990); Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV.

scope of and limits on judicial discretion;[75] the relevance of political, moral, or prudential considerations; [76] methods for resolving legal uncertainty generated by conflicts of law, indeterminacy, or changed circumstances;[77] appropriate aims in judging, and, as relevant, the nature of law itself.[78] 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.

In real life, a judge's jurisprudence evolves over time. In this sense, most judges' existing jurisprudences are *incomplete*: without updating, they fail to provide a resolution in every case. I am going to set aside this complication for now. Instead, 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.[79]

I make this assumption 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.

Having laid this groundwork, let's return to our major copyright case about software. There are two candidate jurisprudences that you find plausible.

According to the first, the Boudin Jurisprudence, you may choose either Opinion B or Opinion C.[80] 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.

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109 (2020); James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. Rev. 346 (2019).

[74] *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 66 (analyzing practical implications of disagreement in holding/dicta distinction).

[75] *E.g.*, HART, *supra* note 4; Dworkin, *supra* note 25; Osborn v. Bank of U.S., 22 U.S. 738, 866 (1824).

[76] *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) ("[I]deological voting is more prevalent in cases . . . that are less likely to be reviewed . . . ."); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 323 (2012) (describing empathetic, legal and political perspectives).

[77] *E.g.*, Crootof & Ard, *supra* note 4, at *17–23.

[78] *See generally, e.g.*, HART, *supra* note 4; RONALD DWORKIN, LAW'S EMPIRE (1986); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014).

[79] These assumptions also mean that each "school" of jurisprudences (e.g., originalism) will have many versions. *Infra* note 90.

[80] *Cf.* Lotus, 49 F.3d at 821–22 (Boudin, J., concurring).

According to the second, the Breyer Jurisprudence, you may only choose Opinion C.[81] 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.

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 v. Borland*[82] and *Google v. Oracle*[83] 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 that Boudin's Jurisprudence recommends, since this is the theory you have determined to be most likely correct. Conventional wisdom suggests you are thus 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. 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.[84] Rather, something similar

[81] *Cf.* Google, 141 S. Ct. at 1197 (Breyer, J.).

[82] 49 F.3d 807 (1st Cir. 1995).

[83] 141 S. Ct. 1183 (2021).

[84] This presents a difficulty in the legal case that is not present in the moral case: Opinions are not just acts, but include statements of the reasons for those acts. That statement of reasons, in turn, generally reflects 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) that the judge decided the case as she did. *See* Cox, *supra* note 27; *supra* notes 26–28 and accompanying text; *see also* Dennis J. Hutchinson, *supra* note 27, at 84 (exploring the Court's efforts to "speak with one

to choosing between moral acts likely applies in choosing between "judicial acts."[85] While you are completely confident in the judicial rightness of Opinion C, you are less certain in the judicial rightness of Opinion B. If you aim to do what is judicially right, and you can only set one opinion down as law,[86] you should choose Opinion C for the same reasons that in the moral example I 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 decisionmaking. The problem is about how to decide a case when there is uncertainty about *how*—by what process or method—one is to decide a case, that is, when there is uncertainty about which jurisprudential theory is correct. This was an easy case because the theory you believed most likely to be true, Boudin's Jurisprudence, recommended an action about which you were certain. Accordingly, rationality and your favored theory 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 uncertainty, might *not* be the action recommended by the preferred theory.

II. REJECTING THREE VERSIONS OF "MY FAVORITE" SKEPTICISM

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

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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, E. Barrett Prettyman, counseled him against "candidly admitt[ing] his difficulty in legally justifying a judicial ban on school segregation" in deciding *Brown*).

[85] See LOCKHART, *supra* note 1; *see also supra* Part I.A.

[86] 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; Cox, *supra* note 27, but a fuller exploration of *courses* of judicial action must be left for future work, c*f.* LOCKHART, *supra* note 1, at 143–68.

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

A. As Against Empirical Skepticism

The first objection raised by a My Favorite Theory 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 theory 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."[87] 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 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.[88]

But if pressed, most empirical skeptics will admit to at least some ambiguity within their preferred theory. Even after settling which the favorite theory is—which "school" of theories is appropriate—there remains uncertainty about which *version* of the theory to follow.[89] This is particularly true in light of ambiguities inherent to law: The preferred theory may display open texture in its recommendations, with different versions of the theory providing views about how to resolve that open texture. Indeed, the skeptic

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[87] Leiter, *supra* note 16, at 1226–27 & n.54–55 (2009) (collecting data); *see also* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 429–30 (1995); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 790–91, 794–95, 801 n.4, 823 (2009); *Unanimity*, SCOTUSBLOG (July 7, 2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Unanimity-7.20.20.pdf (noting that 35 to 66 percent of decisions from 2008–2019 were decided 9-0, inclusive of decisions with separate opinions).

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

[89] *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" when he maintain[ed] that despite "some differences" "originalism 'by and large represents a coherent approach, or at least an agreed-upon point of departure'" (quoting Scalia, *supra* note 7, at 855)).

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.[90]

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.

Others will resist. They will take a similar approach to versions of a theory as to classes of theories: the appropriate approach is to adjudicate between the versions and, once having selected the best version, to apply that version to the legal problem at hand and follow its recommendations. He insists that he knows what he ought to do, which is to follow the best version of his favorite theory. 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.

B. As Against Theoretical Skepticism

The next strategy pursued by the skeptic is to insist that, despite their uncertainty, there is no puzzle: the conscientious judge ought to do whatever she believes, given her evidence, 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

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[90] For example, this skeptic may have insisted that, while he believed his choices were between Theory A and Theory B, the difficult case shows that a hybrid theory, Theory A-B, is correct instead, and so he is not uncertain.

But recall that I model adapting or refining a theory as adjudication between "versions" of a theory. *Supra* note 79 and accompanying text. As discussed earlier, "versions" of a theory are highly specified, comprehensive views about what to do that share essential features with other versions within its school (i.e., the essential features of a less-specified "theory" for which the school is named). These versions are highly "fragile" in the sense that a slight alteration to a version results in a *distinct* version of a theory. *Cf.* David Lewis, *Causation (with Postscripts)* 166, 199–98, *in* David Lewis, 2 PHILOSOPHICAL PAPERS (1986).

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

Because theories are not infinitely malleable—Theory A-B-C may be lawless!—I talk of adjudication between versions of theories, rather than creation, adaptation, or refinement of theories. This makes the uncertainty a little more clear: a case will almost certainly arise where he is uncertain of which trade-off he ought to make to preserve consistency, and whether he made the right one in the past.

recommendations of her preferred version of her preferred theory (pragmatic skepticism). I here address the former; I turn in Part II.C to the latter.

The theoretical skepticism 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.[91] 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.[92]

This line of skepticism contains a key insight—that we should be skeptical of certain kinds of 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 they are legal or jurisprudential doctrines.[93] That is, on our simple model, they are already taken into account in the jurisprudences about which the judge is uncertain. Afterall, there may be uncertainty as to when and how to invoke these legal practices for handling uncertainty.

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

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[91] *See supra* notes 12–14, 57–59 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.

[92] *Cf.* Wechsler, *supra* note 6, at 11.

[93] They may be mischaracterized. But if so—and if offered as a solution to normative uncertainty—then the solution to normative uncertainty is *not* follow "My Favorite Theory," but *avoid* or *minimize* or something similar. And it has serious implications for the legal authority of such doctrines, *see* Cox, *supra* note 40, and the criteria by which we evaluate them, *infra* Part III.B.

the judge infallible. And judges are obviously not infallible.[94] A judge—before *Brown I*[95]—might sincerely believe that "separate but equal" is consistent with the Fourteenth Amendment, and that upholding racist practices on the basis of "separate but equal" is judicially right. Such a judge is mistaken, no matter how strongly he believes this or how well-supported it appears based on his evidence.[96] 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 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 is 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 Theory (i.e., "do what the jurisprudence says you ought do") seems to generate this incoherency.

To illustrate, begin with the following case:

Case I

	Jurisprudence 1	Jurisprudence 2
Option A – Remand	Right	Right
Option B – Reverse	Right	Wrong

There are two options for resolving it: remand the case or reverse it. According to Jurisprudence 1, it would be judicially right 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 right 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.

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[94] *E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); Korematsu v. U.S., 323 U.S. 214 (1944); Buck v. Bell, 274 U.S. 200 (1927); *see also* Massachusetts v. U.S., 333 U.S. 611, 639–40 (1948) (Jackson, J., dissenting) (noting "personal humiliation involved in admitting I do not always understand [this Court's] opinions" and discussing whether "I should be consciously wrong today because I was unconsciously wrong yesterday").

[95] 347 U.S. 483 (1954).

[96] STRAUSS, *supra* note 24, at 78 ("Anyone who doubts that *Brown* is lawful is a fringe player, at best."); *supra* note 94. Explaining how this is so is a project for another day. *See supra* notes 24–25 and accompanying text.

Scenario I: Judge believes Jurisprudence 1 almost certainly correct.[97]

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

Our judge knows all the normatively relevant facts: facts about what happened, facts about the record, facts about what precedent there is and what it says, and facts about the consequences of each option.[98] But our judge has normative uncertainty: despite knowing all the normatively relevant facts, she is uncertain about *how* she ought decide—about which jurisprudential method is correct, about what she ought do in light of the record and precedent and any other feature deemed relevant by the jurisprudential method. And because these methods disagree about what judicial act she ought to do, she is uncertain about what she should do in the case at bar. Our judge is sure that remanding for further proceedings is judicially right, and believes, but is not certain, that reversing in favor of plaintiff is also judicially right.

What ought the judge do, given that the judge has some uncertainty about what she ought to do? The My Favorite Theorist has an insight that there is something about the framing of this question that is incoherent. Brian Weatherson's "Might Argument" helps show what it is.[99]

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:

1) It is definitely true that remanding for further proceedings is permissible.

2) It is likely that reversing in favor of plaintiff is permissible.

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[97] 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 111.

[98] For simplicity, I exclude the possibility of *empirical* uncertainty. Normative uncertainty interacts with empirical uncertainty in interesting ways, but that is not our project here. *Cf.* Aditi Bagchi, *Managing Moral Risk: The Case of Contract*, 111 COLUM. L. REV. 1878 (2011) (discussing use of contract to manage "moral risk" created by empirical uncertainty).

[99] The following Might Arguments are adapted from Weatherson, *supra* note 23, at 145 (developing the Might Argument in the moral context).

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]**.

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 Theorist, 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 reversing might be wrong.

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:

> *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.[100]

But if *Caution* is true, then this would generate an incoherency. Using Caution as the Decision Rule in the Might Argument, then the judge would seem to believe:

1) It is definitely true that remanding for further proceedings is permissible.

2) It is likely that reversing in favor of plaintiff 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 for further proceedings and ought not reverse in favor of plaintiff**.

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).[101]

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[100] Weatherson, *supra* note 23 at 146 ("ProbWrong").

[101] 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

The incoherence is avoided if the judge is never uncertain (such that *Caution* never applies) or if the Decision Rule is My Favorite Theory:

1) It is definitely true that remanding for further proceeding is permissible.

2) It is likely that reversing in favor of plaintiff is permissible.

3) It is definitely true that, when uncertain about the right thing to do, the judge ought **do what the jurisprudence in which you place the strongest credence says to do**.

4) The judge ought **remand for further proceeding or reverse in favor of plaintiff (i.e., both options are permissible)**.

That is, if a judge ought do what she believes she most likely ought do (i.e., what her preferred jurisprudence recommends) despite uncertainty about whether her preferred jurisprudence is correct, then there is no conflict: the judge is not forced to simultaneously believe that reversing is *likely* permissible and that it is absolutely certain that reversing is *not* permissible.

In other words: the key insight is that we should be skeptical of principles like Caution—of hedging as a purely *legal* or *jurisprudential* doctrine.[102] 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 ought do whatever she believes, given her evidence, is 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.[103]

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 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.[104] Revising the above to distinguish between these two senses

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doctrines purporting to deal with uncertainty. *See infra* Part III.B; Cox, *supra* note 40; Cox, *supra* note 27; *cf.* Wechsler, *supra* note 6, at 11 (demanding critics evaluate decisions by same criteria as judges).

[102] *See* LOCKHART, *supra* note 1, at 44–46, 75–76; Weatherson, *supra* note 23, at 146–47.

[103] *See, e.g.*, *supra* note 45 (examples of fallibility); Dworkin, *supra* note 45, at 132–159 (internalist picture). Appeal to an internalist account of moral rightness does not solve the puzzle in the moral case either. *See* LOCKHART, *supra* note 1, at 76.

[104] Weatherson's argument against drawing this distinction in moral theory does not succeed in the judicial case. His main argument is that, in the moral case, making this distinction would fetishize morality (e.g., by "car[ing] about welfare as

of "ought"—between these two senses of right, wrong, and permissible—eliminates the incoherency:

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

2) It is likely that reversing in favor of plaintiff 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 for further proceedings and ought (rationally) not reverse in favor of plaintiff**.

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) 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 perfect legal reasoning, but of rationality given the judge's own limitations. Framed this way, the question is coherent. And it poses a deeply *practical* problem.

C. As Against the "Obvious" Solution

The final sort of "My Favorite" Skepticism 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 this skeptic denies that the problem is anything special. The most straightforward approach to coping with normative uncertainty, they suggest, is to simply apply whichever theory one finds most plausible and to select whichever act is permitted or required by the preferred theory.[105] Call this approach the *My Favorite Theory Solution*. For example, Judge Boudin would simply apply the Boudin Jurisprudence, Justice Breyer

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such, and not about the things that make up welfare"). Weatherson, *supra* note 23, at 151. 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* notes 6, 15, and accompanying text.

[105] LOCKHART, *supra* note 1, at 42–43. Such application may occur either without refinements to the theory, or with refinements to the theory. *See supra* note 90.

would apply the Breyer Jurisprudence, and Justice Scalia—known by even non-lawyers for the strength of his belief in his originalist approach—would apply the Scalia Jurisprudence, without consideration to what the other approaches would require.[106]

The My Favorite Theory Solution is distinct from the theoretical skepticism. The My Favorite Theory Solution to normative uncertainty does not claim that a judge ought *judicially* apply the theory or methods she believed to be the correct ones. Rather, the My Favorite Theory Solution 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, the My Favorite Theory Solution claims that although it is not the case that a judge ought *judicially* do that which her preferred theory recommends, it is the case that a judge ought *rationally* do that which her preferred theory recommends.

My Favorite Theory as an approach to coping with normative uncertainty is also distinct from the empirical version of My Favorite Theory Skepticism.[107] 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 jurisprudential theory 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 theory which the judge finds most plausible.

Many philosophers assume that the My Favorite Theory Solution is correct,[108] as do, I suspect, many lawyers and legal experts.[109] 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?[110]

Unfortunately—particularly given the difficulty of developing feasible alternatives—the My Favorite Theory Approach is not a plausible solution to the question of what one ought rationally do in the face of normative uncertainty. My Favorite Theory commits two basic mistakes: My Favorite Theory ignores relevant information when it fails to account for the strength of the judge's beliefs, or credences, in various jurisprudences. And My Favorite Theory ignores relevant considerations when it fails to account for

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[106] Perhaps these jurisprudences include a belief 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.

[107] *Supra* Part II.A.

[108] LOCKHART, *supra* note 1, at 42–43.

[109] *Cf.* Wechsler, supra note 6, at 7, 11; Scalia, *supra* note 7.

[110] *See, e.g.*, *infra* Part III.A; MACASKILL, BYKVIST, & ORD, *supra* note 1, at 72.

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 and 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 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 small doubts that Jurisprudence 2 might be correct instead (*Scenario I*, *infra*). If the My Favorite Theory Solution is correct, then the judge is *rationally* permitted to do either A or B. But this is implausible: she knows that while Jurisprudence 1 (judicially) permits either A or B, Jurisprudence 2 provides that she ought (judicially) 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 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 Theory. My Favorite Theory says that, assuming the judge's *sole* aim is to do what is judicially right, the judge would be rational to do *either* A or B because Jurisprudence 1 permits *either* A or B.

My Favorite Theory 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 Theory 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., $p \geq .51$). Put another way: My Favorite Theory 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.[111]

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,

[111] 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, 90% sure—we can represent this as $p \geq .9$. I use the term "credence" to refer to the strength of a judge's belief in a particular theory, and "credences" to refer to the full set of the 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 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 will likely be helpful in some. At the least, it provides more information than we had before. For further examples, see LOCKHART, *supra* note 1, at 59–67 & 189 n.10.

Future work on the problem of normative uncertainty in judicial decisionmaking 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), and even whether credences are properly treated as probabilities at all. *See* MACASKILL, BYKVIST, & ORD, *supra* note 1, at 4; Andrew Sepielli, *How Moral Uncertaintism Can Be Both True and Interesting*, in 7 OXFORD STUDIES IN NORMATIVE ETHICS 98–116 (2017).

"updating" the preferred jurisprudence here is akin to changing credences (or resolving pre-existing uncertainty) as among versions.[112] For the same reason, the extent to which other, non-judicial aims can be considered in adjudication has already been taken into account.[113] So, My Favorite Theory 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. The combination of legal fit and moral considerations in Case II is such that, under Jurisprudence 1, the judge ought (judicially) do B, while under Jurisprudence 2 and Jurisprudence 3, the judge ought (judicially) do A.

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 Theory 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: the level of credence the judge has in a particular methodology reflects her evidence about whether the use of that methodology is likely to secure her aim of doing what which is judicially right. And so this means that 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 Theory recommends that, in Scenario II, the judge ought rationally 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 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

[112] *Supra* note 90.

[113] 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* note 76 and accompanying text.

As Scenarios I and II show, My Favorite Theory fails to take into account relevant information, namely, the evidence the judge has about which jurisprudence is the best to follow.[114] But this is not the only problem with the "obvious" solution.[115]

My Favorite Theory also fails to take into account the potential "cost" of error according to the relevant jurisprudence. 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.[116] And My Favorite Theory fails to take these variations into account.

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

*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 Theory as a solution to the problem of normative uncertainty becomes even more apparent. My Favorite Theory is the view that the judge ought (rationally) follow his

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

[115] Individuation of theories can also lead to the difficulties in Case II/Scenario II. *See* MACASKILL, BYKVIST, & ORD, *supra* note 1, at 40–44. These and other issues lead to further complications in the legal case which we have assumed away by focusing on the opinion as the relevant judicial act.

[116] *See, e.g.*, Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015) ("*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*).

preferred jurisprudence despite his uncertainty. And so, according to My Favorite Theory, the judge in Scenario I* may (rationally) do B, even though it risks an *extremely* wrong judicial act and doing A would ensure that she does what it is judicially right. And, according to My Favorite Theory, 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 Theory is a non-starter.

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	*Extremely* Wrong

Scenario II: Judge deciding Case II*, believes Jurisprudence 1* 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	*Slightly* Wrong	Right	Right
Option B	Right	*Extremely* Wrong	*Extremely* Wrong

My Favorite Theory produces an obviously wrong result in both these cases. But for some, that might seem to turn on the credences at play (which could be relatively low in the preferred theory) and the stakes (which are high). For judges who have well-developed jurisprudences, the My Favorite Theory Solution will lead to problems less frequently, especially where the uncertainty is as between a jurisprudence's versions and where those versions exhibit widespread agreement.

But the problem is not so easily cabined, at least not without further inquiry. For where jurisprudences admit of degrees, the stakes are high, and there is even some normative uncertainty, My Favorite Theory will be inadequate. 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 relatively 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 *extremely 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 Theory, the judge ought 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*, 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 Theory'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 do in the face of her normative uncertainty. My Favorite Theory should be rejected because it fails to consider that the candidate jurisprudences might differ as to the magnitude of the potential judicial wrong, and fails to adequately respond to situations in which the preferred theory indicates only a small difference in the degree of rightness for a particular set of judicial acts but the less preferred theories indicate a very grave difference in the degree of rightness between the available judicial acts, as in Case III*. Tweak the credences just a little, or the degrees, and what the judge ought do might change—*except* on My Favorite Theory.

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. The Justices struggled because it seemed that prevailing theories about legal fit required upholding *Plessy v. Ferguson.*[117] 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

[117] 163 U.S. 5357 (1896); *see, e.g.*, KLARMAN, *supra* note 27, at 302–05; STRAUSS, *supra* note 24, at 77–79.

decision, striking down separate-but-equal, would be lawless.[118] Their worries suggest that their preferred theories—and the My Favorite Theory Solution—would have called for upholding *Plessy*. 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.[119]

Although My Favorite Theory is implausible for the reasons shown, its defenders often argue that to do otherwise—to take normative uncertainty seriously—would lead to infinite regress.[120] It is difficult to develop a better alternative to My Favorite Theory. 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 with legal 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."[121]

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.[122] As others have observed, "[t]his infinite regress problem is not peculiar" to normative uncertainty, but "crops up" elsewhere, like in debates over the "[expected utility] approach to ordinary decisionmaking under risk."[123] Considering—and improving—methods for decision-making under ordinary uncertainty has generally been considered worthwhile.[124] 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.

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[118] *See*, KLARMAN, *supra* note 27, at 302–05; STRAUSS, *supra* note 24, at 77–79.

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

[120] *See* LOCKHART, supra note 1, at 37 (rejecting same); MACASKILL, BYKVIST, & ORD, *supra* note 1, at 30–33.

[121] LOCKHART, supra note 1, at 37.

[122] *Supra* notes 23 & 38 (summarizing literature).

[123] LOCKHART, *supra* note 1, at 37 & n.11.

[124] *See, e.g.*, Andrew Sepielli, *What to Do When You Don't Know What to Do 5*, *in* 4 OXFORD STUDIES IN METAETHICS 5, 5–28 (Russ Shafer-Landau ed., 2009) (noting that much has been written on coping with non-normative uncertainty).

This is *not* to suggest that a perfect algorithm can be obtained; only that improving our models and heuristics is possible.[125] Nor is it to suggest that a complicated theory is needed in every decision.[126] But improving our approach is a worthwhile endeavor. The stakes in court are high. And because My Favorite Theory is a nonstarter, we must search for another solution.

III. TOWARD A NEW FRAMEWORK

Having defended the existence of normative uncertainty, there remains the question of what a rational judge should do about it. The answer, unfortunately, is sufficiently difficult that a complete answer is beyond the scope of this work. This section aims to illustrate some of those difficulties and to suggest progress is still possible and worthy of further study anyways.

Part III.A considers an alternative, Maximizing Expected Judicial Rightness, which was chosen because it is likely to seem familiar.[127] I do not defend this alternative. Rather, I apply it to *Brown I* to illustrate both the potential and difficulties of developing a solution.

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 v. Oracle* to illustrate how the distinction between the judicial and rational oughts 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 Theory fails, in part, because it ignores information that a judge has about the likelihood that she ought do a particular act. Specifically, My Favorite Theory 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). An obvious 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

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[125] *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 heuristic using relevant and probative outcome information).

[126] *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).

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

which she ought to do. That is, an alternative to following the dictates of the preferred theory is to attempt to maximize "expected" judicial rightness.[128]

Ted Lockhart has developed such a theory for coping with normative uncertainty.[129] Although the theory is not without criticism,[130] it is as promising a place as any to begin.[131]

Begin with the assumption that, on all jurisprudences, judicial rightness admits of degrees: a particular judicial act can be more or less right, and more or less wrong.[132] Assume also that different jurisprudences measure judicial rightness on the same scale.[133] With these assumptions, a particular judicial act's expected "judicial rightness" can be calculated by multiplying the probability[134] that a given jurisprudence is correct (p_1, p_2, …, p_n) times the degrees of judicial rightness for that option under each jurisprudence (e.g., for option A: $j_{1,A}$, $j_{2,A}$, …, $j_{n,A}$):

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

If one's sole aim is to do that which is judicially right, then the rational thing to do is maximize EJR. 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 degree of judicial rightness is at least as great as that of any other alternative.[135]

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[128] This appears to be similar to Lockhart's "expected degree of justice," though he does not explain the term. LOCKHART, *supra* note 1, at 133–34.

[129] *See generally* LOCKHART, *supra* note 1.

[130] *See, e.g.*, Andrew Sepielli, Book Review, 116 ETHICS 601, 604 (2006).

[131] MACASKILL, BYKVIST, & ORD, *supra* note 1, at 47–56.

[132] 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 in a case interpreting fundamental rights that can only be fixed through the notoriously difficult process of constitutional amendment. *Supra* note 116 and accompanying text; *see also* Thomas Hurka, *More Seriously Wrong, More Importantly Right*, 5 J. AM. PHIL. ASS'N 41, 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 1, at 26, 62; MACASKILL, BYKVIST, & ORD, *supra* note 1, at 81–90.

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

[134] Recall that we model the judge's credences as probabilities, following formal epistemology. *Supra* note 111.

[135] LOCKHART, *supra* note 1, at 82 (adapted from PR4). Lockhart also adapted and applied his principles to *Roe v. Wade*, but analysis failed to account for deep disputes and normative uncertainty about the appropriate end and method of judging, and his issue-by-issue approach does not demand consistency of judges even within an opinion. *Id.* at 134–35.

There may not always be enough information to determine which alternative(s) have the maximum degree of expected rightness, but we do not need to get into such complications just yet.[136] I will refer to this approach as "Maximizing Expected Judicial Rightness."

I use Maximizing Expected Judicial Rightness as a starting point only. My aim is simply to *illustrate* the possibilities that alternatives to My Favorite Theory might have to offer. I also want to illustrate the difficulties that are peculiar to normative uncertainty as contrasted with empirical uncertainty.

I chose this starting point because it should seem familiar, not because I think it is the solution.[137] As will be discussed, it has flaws. That said, it lacks My Favorite Theory's key shortcomings: Maximizing Expected Judicial Rightness does not ignore evidence that total certainty in a given jurisprudence is unwarranted. It does not assume that the strength of one's belief in the preferred jurisprudence means one should always follow that jurisprudence. And it does not assume that each of the plausible jurisprudences attribute the same difference in value as between the available judicial acts. Even if it turns out to be inadequate, these features and its familiarity make it a good place to begin.

The remainder of Part III.A divides into two subsections. The first provides an illustration of how Maximizing Expected Judicial Rightness might be applied to *Brown I*. The second uses the example to explain the unique difficulties presented by normative uncertainty as contrasted with empirical uncertainty.

1. An Illustration: *Brown I*

Brown I involved a challenge to racial segregation of public elementary schools. Such segregation was permitted under *Plessy v. Ferguson*,[138] the infamous case creating the doctrine of "separate-but-equal."[139] The plaintiffs argued that the segregated facilities were inherently unequal, and thus in violation of the Equal Protection Clause of the Fourteenth Amendment.[140] The Court eventually sided with the plaintiffs, overturning *Plessy*.[141]

Although there remains little uncertainty that *Brown I* is both just and legally correct, there remains uncertainty—or at least disagreement—about

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

[137] Most lawyers have at least a rough understanding of expected utility theory thanks to the Hand Formula, a cost-benefit approach to negligence. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (Hand, J.).

[138] 163 U.S. 5357 (1896).

[139] *Id.*

[140] 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.

[141] *Brown I*, 347 U.S. 483 (1954).

the legal reasons for that result.[142] The consensus about *Brown I*'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 the *Brown I* 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. These features make *Brown I* a good case for illustrating how Maximizing Expected Judicial Rightness might be applied to resolve a judge's normative uncertainty: there is normative uncertainty, but it is not complicated by moral uncertainty or present-day divided political opinions.[143]

For purposes of this illustration, I assume that our 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 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 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.

[142] *See, e.g.*, STRAUSS, *supra* note 24, at 78.

[143] Even the justices of the Brown Court generally thought that the opposite result would be morally dubious. *See* KLARMAN, *supra* note 27, at 293–306 (recounting how the firmness of the Court's moral convictions made it a difficult case); *see also id.* ("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 Jackson)). *See also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 887 (1996).

Compare this to a case, like *Roe v. Wade*, 410 U.S. 113 (1973), which presents numerous issues that are politically divisive and about which there is great moral uncertainty (even if parties on both sides of the debate refuse to admit it). Such uncertainty creates additional incoherencies in the legal doctrine that are difficult to model, complications best left to future work. *Compare, e.g.*, Mary Ziegler, *The Jurisprudence of Uncertainty: Knowledge, Science, and Abortion*, 2018 WIS. L. REV. 317 (2018) (tracing the Court's inconsistent treatment of different types of moral and scientific uncertainty), *with* LOCKHART, supra note 1, at 124–42 (discussing issue-by-issue application of his approach to *Roe*); *see also supra* note 135 (explaining critical limitations of Lockhart's analysis of legal cases).

Originalism	When interpreting the Constitution, look first to the drafters' original understanding of the language being construed. Previous rulings should rarely be overturned, 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 overruled.

These definitions are intentionally stylized and limited to the approach these theories take towards overruling 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.[144]

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 overturn *Plessy*?

Hector concludes that Common Law Constitutionalism advises finding school segregation to be unconstitutional, overruling *Plessy*. Several factors count in favor of overturning: In the time since *Plessy*, Hector's Court has considered and struck down as unequal a wide range of segregated facilities.[145] In fact, "it had been decades since the Court had actually found a system of segregation that . . . satisfied the principle of separate but equal," and the options open to states or municipalities that wanted to segregate had become quite limited.[146] These developments suggested both that the principle of separate but equal had not only been shown unworkable, but had already begun to erode.

But applying Originalism, Hector finds the opposite result. Under Hector's Originalism, prior precedent like *Plessy* may only be overturned 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.[147] Like the justices on the *Brown* Court, Hector recognizes that *Brown I* is *not* consistent with the original understandings of

[144] My apologies, especially to originalists who have worked to reconcile originalism with *Brown*.

[145] *See* STRAUSS, *supra* note 24.

[146] *See id.* at 90.

[147] *See, e.g.*, *id.* at 12.

the Fourteenth Amendment.[148] He concludes that Originalism requires upholding *Plessy*, finding segregation to be constitutional.

Finally, Hector considers whether this is a case where Natural Law ought prevail. For sake of argument, we'll suppose Hector to have found racial segregation to be inherently unjust.[149] Moreover, we'll suppose that Hector found the segregation sufficiently unjust that Natural Law requires overturning decisions that had allowed it.[150] 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 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 of 1 to 10.[151] Natural Law, for instance, considers there to be a great difference in the judicial rightness of the two opinions: overruling *Plessy* is maximally judicially right and upholding *Plessy* is maximally judicially wrong. Common Law Constitutionalism and Originalism each consider there to be a significant difference between the options, but neither ruling is maximally judicially right or judicially wrong. Common Law Constitutionalism recognizes the arguments on the other side and so, while *Plessy* should be overruled, Common Law Constitutionalism assigns fewer degrees of judicial rightness to that option 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 jurisprudences assign each opinion the following degrees of judicial rightness:

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[148] KLARMAN, *supra* note 27, at 305 (summarizing Justice Jackson's conclusions about the amendment's history).

[149] This moral truth may be obvious to us today, but regrettably it was not obvious to many of Hector's contemporaries.

[150] Unfortunately, this is also something about which the justices may have been conflicted. Accordingly, the justices of Hector's day may have not only been uncertain 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 I* 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.

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

Brown I

	Common Law Constitutionalism	Originalism	Natural Law
A - Overrule *Plessy*	8	3	10
B - Uphold *Plessy*	2	7	1

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 Constitutionalism	Possibility 2 (p_2 = .1) Originalism	Possibility 3 (p_3 = .2) Natural Law
A - Overrule *Plessy*	8	3	10
B - Uphold *Plessy*	2	7	1

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) times 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 justice of overruling *Plessy* (Option A) is:

$$(p_1 * j_{1,A}) + (p_2 * j_{2,A}) + (p_3 * j_{3,A}) = (.7 * 8) + (.1 * 3) + (.2 * 10) = 7.9$$

The expected justice of upholding *Plessy* (Option B) is:

$$(p_1 * j_{1,B}) + (p_2 * j_{2,B}) + (p_3 * j_{3,B}) = (.7 * 2) + (.1 * 7) + (.2 * 1) = 2.3$$

Hector determines that overruling *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 overrule *Plessy*.

One remarkable feature of *Brown I* was its unanimity.[152] Historical reasons offer at least a partial explanation.[153] 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 overruling *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 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 = .15) Common Law Constitutionalism	Possibility 2 (p_2 = .65) Originalism	Possibility 3 (p_3 = .2) Natural Law
A - Overrule *Plessy*	8	3	10
B - Uphold *Plessy*	2	7	1

Like Hector, Diomedes calculates the expected judicial rightness of his two options: the expected judicial rightness of overturning *Plessy* is 5.15, greater than the expected judicial rightness of upholding *Plessy*, which is 5.05. 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 of Judicial Rightness

Maximizing Expected Judicial Rightness offers a better starting point than My Favorite Theory, but it is far from the final word. There is a vast literature on the limitations of expected utility theory as a method for coping with empirical uncertainty, raising doubts about its suitability as a general

[152] KLARMAN, *supra* note 27, at 292–312.
[153] *See generally* Hutchinson, *supra* note 27.

matter.[154] For example, there are concerns about how to measure utility (or value)—that is, roughly, concerns about where the numbers come from.[155] More significantly, there are deep concerns about whether such measurements satisfy the axioms of expected utility theory.[156] 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.[157]

Normative uncertainty raises additional challenges.[158] 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.[159]

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 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 the number attached to the judicial rightness of option A (j_A) is greater than the number attached to option B (j_B), then all this means is that A is ranked higher than—and so ought to be chosen over—B.

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[154] LOCKHART, *supra* note 1, at 184 n.11 (citing Peter J.H. Schoemaker, *Subjective Expected Utility Theory Revisited: A Reductio Ad Absurdum Paradox*, 33 THEORY & DECISION 1 (1992)); MACASKILL, BYKVIST, & ORD, *supra* note 1; *see also generally* JOHN BROOME, WEIGHING LIVES (2004); JOHN BROOME, WEIGHING GOODS (1991).

[155] *See generally* AMARTYA SEN, ON ECONOMIC INEQUALITY (1973).

[156] BROOME (2004), *supra* note 154, at 80–86; BROOME (1991), *supra* note 154, at 136–39 (noting this is especially true for preference-based utility functions).

[157] *See supra* Part I.B; *see also* BROOME (1991), *supra* note 154, at 136–39 (explaining other major axioms); *cf.* Schoemaker, *supra* note 154. I also assumed that credences could be treated as precise probabilities, or at least precise ranges. *See supra* note 111; MACASKILL, BYKVIST & ORD, *supra* note 1, at 47 n.13 (noting possible adaptations if assumption is relaxed).

[158] *See* MACASKILL, BYKVIST, & ORD, *supra* note 1, at 57; *see also generally* LOCKHART, *supra* note 1.

[159] 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 ignore them in the interest of focusing on the core problems at hand. *Cf.* BROOME (2004), *supra* at 154, at 81 (making similar assumptions "so as not to have too many difficulties to deal with at once").

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 ($j_A = 10$, $j_B = 8$, and $j_C = 4$) conveys the same information as saying that options A, B, and C have 5, 4, and 2 degrees, respectively ($j_A = 5$, $j_B = 4$, $j_C = 2$). All it is to say that, according to a given jurisprudential theory, 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 much so long as the order and ratios are preserved. Saying that options A, B, and C have, respectively, 10, 8, and 4 degrees of rightness ($j_A = 10$, $j_B = 8$, and $j_C = 4$) conveys the same information as saying that options A, B, and C have 5, 4, and 2 degrees, respectively ($j_A = 5$, $j_B = 4$, $j_C = 2$). 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[160]), but that overturning-while-postponing is still much much better than upholding *Plessy*, we have the beginnings of a cardinal ranking. As Amartya Sen observed in confronting a similar issue in *On Economic Inequality*, refusing to attempt these estimates displays a remarkable lack of creativity.[161]

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; which numbers are used matters little, provided they preserve this information. Where we don't feel comfortable offering exactly scaled rankings, estimates might still yield information.[162]

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

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[160] *Brown I*, 347 U.S. 483 (1954).

[161] *See* SEN, *supra* note 161, 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 1, at 57–58, 72–76; *see also* Tarsney, *supra* note 23, at 505–20.

[162] For an example of how estimated ranges can provide this sort of information, see LOCKHART, *supra* note 1, at 59–67 & 189 n.10.

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 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.[163]

We assumed co-cardinality for purposes of illustration, but there is reason to doubt that this is possible. Although I argued that it is plausible for jurisprudences to admit of degrees, there may be plausible jurisprudences that don't. For example, 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.[164] 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.[165] 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.

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[163] *See* SEN, *supra* note 161.

[164] Such theories, under which the rightness or wrongness of an action does not depend on the value of its consequences, are called "deontic" or "deontological" theories. For an overview, *see* Larry Alexander & Michael Moore, *Deontological Ethics*, in Edward N. Zalta, ed., THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2021 ed.), https://plato.stanford.edu/archives/sum2021/entries/ethics-deontological. As you should have come to expect by now, there are competing views on whether deontic theories admit of degrees. *See, e.g.*, Thomas Hurka, *supra* note 132, at 43 ("Because of the supervenience of moral properties, any act that is right or wrong has other properties that make it so. But if these properties admit of degrees, or if their tendencies to make acts right or wrong do, we can use this fact to define a derivative property of serious wrongness that likewise admits of degrees."); BARBARA FRIED, FACING UP TO SCARCITY: THE LOGIC AND LIMITS OF NONCONSEQUENTIALISM (2020) (arguing against nonconsequentialism on related grounds).

[165] *Cf.* Sepielli, *supra* note 124. Sepielli agrees that there are ways to compare degrees across theories, but focuses on comparative practical judgments rather than comprehensive theories in part to mitigate these difficulties. *Id.* For reasons discussed *supra* 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.

These are only a few of the difficulties that arise for intertheoretic comparison.[166] But these and other difficulties do not mean that the project of searching for a better way of coping with 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.[167] 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.[168] And most of the major articles were published in the last decade.[169]

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.[170] 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.[171] The results yielded by Borda Voting will be less fine-grained than Maximizing Expected Judicial Rightness, but it is better than giving up and resorting to My Favorite Theory.[172] Something similar may be sensible in the legal context, but further research is required given complications unique to the legal context.[173]

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, 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.

What is more, further research may show that some supposed "legal canons" or approaches have been mischaracterized. I earlier assumed that all

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[166] For a more complete discussion, see MACASKILL, BYKVIST, & ORD, *supra* note 1, at 57–149; *see also, e.g.*, Edward J. Gracely, *On the Noncompatibility of Judgments Made by Different Ethical Theories*, 27 METAPHILOSOPHY 327 (1996); James L. Hudson, *Subjectivization in Ethics*, 26 AM. PHIL. Q. 221 (1989); Jacob Ross, *Rejecting Ethical Deflationism*, 116 ETHICS 742 (2006); Johan E. Gustafsson & Olle Torpman, *In Defence of My Favorite Theory*, 95 PACIFIC PHIL. Q. 159 (2014).

[167] *See, e.g.*, Sepielli, *supra* note 124; *see also* Tarsney, *supra* note 23, at 505–20.

[168] *See generally* MACASKILL, BYKVIST, & ORD, *supra* note 1; LOCKHART, *supra* note 1.

[169] *See supra* note 23.

[170] *See generally* MACASKILL, BYKVIST, & ORD, *supra* note 1. MacAskill began developing this approach at Oxford in 2009–2010.

[171] *See id.*

[172] *See generally id.*

[173] *See supra* notes 55–80 and accompanying text; *infra* Part III.B; *cf.* Bernick, *supra* note 38, at *21–32.

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.[174] 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 decisionmaking 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.[175] As is probably clear, it is a stylized version of the actual copyright case of the century, *Google v. Oracle*.[176] 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.[177] *Google* was not the first major case to present these two issues relating to software interfaces. An earlier case, *Lotus v. Borland*,[178] also presented these issues and was granted certiorari, but the Court split on a 4-4 vote.[179] After nearly 30 years of litigation between these two cases, everyone was hoping for some clarity, especially on the copyrightability question.[180]

Such clarity was not forthcoming.[181] In April 2021, the Supreme Court found in favor of the defendant, Google, but avoided the copyrightability question.[182] 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.[183]

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[174] *Supra* text accompanying notes 8–14.

[175] *Supra* Part I.B.

[176] 141 S. Ct. 1183 (2021); *see* KEVIN J. HICKEY, CONG. RSCH. SERV., LSB10597, GOOGLE V. ORACLE: SUPREME COURT RULES FOR GOOGLE IN LANDMARK SOFTWARE COPYRIGHT CASE 1 (2021).

[177] Google, 141 S. Ct. 1183 (2021).

[178] 49 F.3d 807 (1st Cir. 1995) *aff'd by equally divided court*, 516 U.S. 233 (1996).

[179] *Id.*

[180] *See* Lemley & Samuelson, *supra* note 36 (noting that all but three briefs filed in support of Google urged the Court to rule on copyrightability).

[181] *See, e.g.*, Lemley & Samuelson, *supra* note 36; David Newhoff, Google v. Oracle: *A Troubling Use of Fair Use*, ILLUSION OF MORE (April 6, 2021), https://illusionofmore.com/google-v-oracle-a-troubling-use-of-fair-use/ (noting that the decision "falls short of providing the market certainty many in the software business were seeking in the briefs filed on behalf of Google"); *see also* Adam Mossoff & Devin Hartline, Google v. Oracle: *A Copyrightability Decision Masquerading as Fair Use*, WASHINGTON LEGAL FOUNDATION (May 7, 2021), https://www.wlf.org/2021/05/07/wlf-legal-pulse/google-v-oracle-a-copyrightability-decision-masquerading-as-fair-use/ (accusing Justice Breyer of hostility towards the idea that code is copyrightable).

[182] Google, 141 S. Ct. at 1197.

[183] *Id.* at 1190.

Justice Breyer wrote the majority opinion; Justice Thomas, joined by Justice Alito, issued a dissent.[184] The majority opinion has received mixed reaction.[185] 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.'"[186] Perhaps unsurprisingly given its 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" standard when a clear rule is needed.[187] And worse, he bends such standards to reach the result he wants.[188] 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.[189]

Though I thought the Court should have ruled on copyrightability, I will admit to some ambivalence about the decision. On the one hand, I think this type of software is plainly not copyrightable,[190] and I share concerns that, in avoiding difficult aspects of the copyrightability question, the Court distorts fair use doctrine more generally.[191] On the other hand, I appreciate that clearly delineating copyrightable software from uncopyrightable software is exceptionally difficult, and that the costs of getting it wrong are likely very high.[192] 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

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[184] *Id.* at 1190 (Breyer, J.); *id.* at 1210 (Thomas, J., dissenting).

[185] *E.g.*, *supra* note 181; personal communications.

[186] Lemley & Samuelson, *supra* note 36 (quoting LARRY LESSIG, FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY (2004)); *cf.* Newhoff, *supra* note 181 (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").

[187] 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 60, at 62–74 (discussing cognitive burden for judges from Supreme Court's "holistic" turn in patent cases).

[188] Google LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1214–15 (2021) (Thomas, J. dissenting).

[189] *See* Miller, *supra* note 187.

[190] 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 LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956); *see also* Brief of Copyright Scholars as Amici Curae in Support of the Petitioner, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

[191] *See* Google LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1214–15 (2021) (Thomas, J. dissenting); Newhoff, supra note 181 ("[T]he Breyer opinion asks fair use to do something it is not meant to do.").

[192] *See supra* note 63–68 and accompanying text.

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 [he was] right to state the question [of criteria] as the same one for the Court and for its critics."[193] 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?"[194]

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,[195] 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 rightness, and that they exhibit co-cardinality and satisfy the other needed axioms for applying expected utility theory.[196]

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

193 *See* Wechsler, *supra* note 6, at 11.
194 *Id.*; *cf.* Part II.B.
195 *Supra* Part I.B.
196 *See supra* note 116 and accompanying text; *see also* Part III.A.2.

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	7	5	0
C – Fair Use as a matter of law	5	10	5

That is, according to the Boudin Jurisprudence, the judge ought (judicially) rule that the type of software at issue is not copyrightable (Opinion B). 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) rule that the copying is fair use (Opinion C). Ruling that the software is copyrightable is next best (Opinion B), and ruling that the software is not copyrightable is worse still (Opinion A). The difference between the options is the same.

Finally, according to the Thomas Jurisprudence, the judge ought (judicially) rule that the software is copyrightable (Opinion A). Ruling that the copying is fair use (Opinion C) is worse, and ruling that the software is copyrightable is worse still (Opinion B), again with the difference between the options the same.

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 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	7	5	0
C – Fair Use as a matter of law	5	10	5

If your sole aim is to do that which you ought judicially do, then on at least one view of how to deal with normative uncertainty, you ought maximize expected judicial rightness. To do this, as above, you multiply the likelihood a given jurisprudence is right by the judicial rightness that jurisprudence assigns to a given opinion, and sum the results.

For Judge Boudin, the expected judicial rightness of ruling that the software is not copyrightable (Opinion B) is 5.9:

$$(p_1 * j_{1,B}) + (p_2 * j_{2,B}) + (p_3 * j_{3,B}) = (.7 * 7) + (.2 * 5) + (.1 * 0) = 5.9$$

But the expected judicial rightness of ruling on fair use (Opinion C) is greater at 6:

$$(p_1 * j_{1,C}) + (p_2 * j_{2,C}) + (p_3 * j_{3,C}) = (.7 * 5) + (.2 * 10) + (.1 * 5) = 6$$

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 on fair use.[197]

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

[197] 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.

evaluate them according to a different metric. We should evaluate them in the lights of practical rationality.[198]

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 v. Borland* to write separately on fair use, even as he joined the unanimous ruling on copyrightability.[199]

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. This Article has argued that those skepticisms are false. Empirical skepticism is based on a confusion, and theoretical skepticism a fallacy. Skepticism about the problem's importance and difficulty is based on the ignoring of relevant information about the likelihood that a jurisprudential theory is correct and a false assumption that jurisprudential theories assign the same cost to error in every 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 critically reflecting on the best methods for deciding cases in the face of normative uncertainty.

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[198] *See generally* Sepielli (2014), *supra* note 23 (providing overview).

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