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## The Flubs that Bind: Stare Decisis and the Problem of Indeliberate Doctrinal Misstatements in Appellate Opinions

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# THE FLUBS THAT BIND: STARE DECISIS AND THE PROBLEM OF INDELIBERATE DOCTRINAL MISSTATEMENTS IN APPELLATE OPINIONS

Richard Luedeman\*

## ABSTRACT

*Speak to enough lawyers (especially litigators) about their experiences grappling with binding appellate case law in their jurisdictions, and a significant number of them will complain about statements in appellate case law that patently contradict prior precedent, incorrectly articulate legal standards, or otherwise mangle the doctrine in an area. The image of courts as deliberative doctrine-producing machines ignores the reality that certain statements in judicial opinions might not have been carefully, deliberately constructed. Often, the result is harmless. But in some instances, doubt about the deliberateness of dubious doctrinal statements in judicial opinions can become an unavoidable problem for litigants and judges in future cases. Conventional lawyering tools—distinguishing cases factually or characterizing statements as dicta—are ill-suited to address language in judicial opinions that sets out generalizable doctrine (rather than fact-bound conclusions about a particular case) that is central to the court’s analysis and yet difficult or impossible to square with logic or with preexisting statements of the same doctrine.*

*The uncomfortable truth is that judges with enormous dockets can make drafting mistakes in articulating doctrine—not merely judicial “error” in the sense of issuing a decision that would be reversed—and can even do so in crucial portions of their opinions. It is, of course, usually impossible to know for sure whether some or all of those seeming misstatements were secretly deliberate. To be sure, it is an appellate court’s prerogative to state the law in the manner of its choosing. But it is also eminently reasonable to presume, absent evidence to the contrary, that judges usually do not intend to create doctrinal contradictions within their jurisdictions without explanation. This Article explores the circumstances under which the best explanation for an apparent misstatement of doctrine is simply that it was uttered indeliberately as a result of insufficiently careful drafting.*

*This Article then addresses whether indeliberate doctrinal misstatements in appellate precedent should enjoy the stare decisis effect that*

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appellate decisions typically receive. A wide range of considerations—normative, pragmatic, and ethical—are relevant to that question. Top of mind among those considerations is recent criticism of *stare decisis*, including from members of the Supreme Court, based purely on disagreement with the conclusions the precedent reached.

Next, in lieu of focusing on my own view of how best to balance the competing considerations, I explore empirically whether American lawyers as a whole have developed norms in this domain. Conventional wisdom might be that, absent the ability to distinguish a case or characterize a statement as *dicta*, the statements of appellate courts are strictly binding within their jurisdictions—and, at a minimum, that lawyers must bring all relevant binding appellate court doctrine to the attention of the judges deciding their cases. Based on my empirical research, however, the true picture is more complicated. This Article presents results from a nationwide study of practicing lawyers, showing that a substantial minority of lawyers feel no ethical obligation to raise an appellate court's patently mistaken statements of doctrine, even when not *dicta*, and an even larger percentage of lawyers feel that lower courts should not follow such doctrinal misstatements. More broadly, it finds little consensus on these issues; in many portions of the study, the lawyers' responses did not differ significantly from a 50/50 split. That is, despite all the norms that are supposedly instilled in the legal profession, lawyers often show no significant tendency one way or the other on these questions—either to follow appellate doctrinal misstatements or to disregard them. That result is consequential not merely because lawyers' presentation of issues to their clients and to courts shapes outcomes, but also because nearly all American judges were formerly practicing lawyers themselves.

Finally, I briefly reflect on why, in light of the study's results and the normative, pragmatic, and ethical considerations discussed, lawyers and judges should become more comfortable identifying and disregarding doctrinal misstatements and legal educators should prepare their students to confront them.

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## I. INTRODUCTION

**S**PEAK to enough lawyers (especially litigators) about their experiences grappling with binding appellate case law in their jurisdictions, and a significant number of them will complain about statements in appellate case law that patently contradict prior precedent, incorrectly articulate legal standards, or otherwise mangle the doctrine in an area. The image of courts as deliberative doctrine-producing machines ignores the reality that certain statements in judicial opinions might not have been carefully, deliberately constructed. Often, the result is harmless. But in some instances, doubt about the deliberateness of dubious doctrinal statements in judicial opinions can become an unavoidable problem for litigants and judges in future cases. Conventional lawyering tools—distinguishing cases factually or characterizing statements as dicta—are ill-suited to address language in judicial opinions that sets out generalizable doctrine (rather than fact-bound conclusions about a particular case) that is central to the court’s analysis and yet difficult or impos-

sible to square with logic or with preexisting statements of the same doctrine.

The uncomfortable truth is that judges with enormous dockets can make drafting mistakes in articulating doctrine—not merely judicial “error” in the sense of issuing a decision that would be reversed—and can even do so in crucial portions of their opinions. It is, of course, usually impossible to know for sure whether some or all of those seeming misstatements were secretly deliberate. To be sure, it is an appellate court’s prerogative to state the law in the manner of its choosing. But it is also eminently reasonable to presume, absent evidence to the contrary, that judges usually do not intend to create doctrinal contradictions within their jurisdictions without explanation. Part II of this Article explores the circumstances under which the best explanation for an apparent misstatement of doctrine is simply that it was uttered indeliberately as a result of insufficiently careful drafting.

Part III then addresses whether indeliberate doctrinal misstatements in appellate precedent should enjoy the *stare decisis* effect that appellate decisions typically receive. A wide range of considerations—normative, pragmatic, and ethical—are relevant to that question. Top of mind among those considerations is recent criticism of *stare decisis*, including from members of the Supreme Court, based purely on disagreement with the conclusions the precedent reached.<sup>1</sup>

In Part IV, in lieu of focusing on my own view of how best to balance the competing considerations, I explore empirically whether American lawyers as a whole have developed norms in this domain. Conventional wisdom might be that, absent the ability to distinguish a case or characterize a statement as *dicta*, the statements of appellate courts are strictly binding within their jurisdictions—and, at a minimum, that lawyers must bring all relevant binding appellate court doctrine to the attention of the judges deciding their cases. Based on my empirical research, however, the true picture is more complicated. This Article presents results from a nationwide study of practicing lawyers, showing that a substantial minority of lawyers feel no ethical obligation to raise an appellate court’s patently mistaken statements of doctrine, even when not *dicta*, and an even larger percentage of lawyers feel that lower courts should not follow such doctrinal misstatements. More broadly, it finds little consensus on these issues; in many portions of the study, the lawyers’ responses did not differ significantly from a 50/50 split. That is, despite all the norms that are supposedly instilled in the legal profession, lawyers often show no significant tendency one way or the other on these questions—either to follow appellate doctrinal misstatements or to disregard them. That result is conse-

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1. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (“*Stare decisis* . . . does not compel unending adherence to *Roe*’s abuse of judicial authority.”); *id.* at 2316 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

quential not merely because lawyers' presentation of issues to their clients and to courts shapes outcomes but also because nearly all American judges were formerly practicing lawyers themselves.

Part V briefly reflects on why, in light of the study's results and the considerations set out in Part III, lawyers and judges should become more comfortable identifying and disregarding doctrinal misstatements and legal educators should prepare their students to confront them. Finally, Part VI provides a short conclusion, and Part VII presents the survey questions used in the study.

## II. THE PHENOMENON OF INDELIBERATE DOCTRINAL MISSTATEMENTS IN APPELLATE OPINIONS

### A. DOUBTING THE DELIBERATENESS OF CERTAIN JUDICIAL STATEMENTS

The image of courts as deliberative doctrine-producing machines ignores the reality that certain statements in judicial opinions might not have been carefully, deliberately constructed. Often, the result is harmless. But in some instances, doubt about the deliberateness of dubious doctrinal statements in judicial opinions can become an unavoidable problem for litigants and judges in future cases.

Recent scholarship on “judicial mistakes” has begun to study ways in which judges can depart from prior authority by applying it in an obviously improper manner or simply disregarding it altogether. Scholars have documented, for example: the tendency of federal district judges to rely on standards articulated by peer courts even when those standards are a poor fit for the facts of the case at bar;<sup>2</sup> the tendency of judges at all levels to rely on precedents that applied a different level of deference than should be applied in the case at bar;<sup>3</sup> the failure of federal district judges to apply binding precedent and up-to-date rules with respect to the civil discovery process;<sup>4</sup> and the “doctrinal confusion” that exists in the specific realm of the state action doctrine.<sup>5</sup>

It is, of course, usually impossible to know for sure whether some or all of those departures were secretly deliberate—i.e., whether the judge(s) involved might be making deliberate decisions to defy rules or precedents without articulating principled reasons for doing so. Fortunately, when dealing with judicial opinions from non-binding courts, litigants in future cases can simply implore their judges to disagree with the prior opinion's holding. Likewise, when dealing with fact-bound holdings from prior

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2. See Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1665–70 (2020).

3. See Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 645–46 (2015).

4. See Diego A. Zambrano, *Judicial Mistakes in Discovery*, 113 NW. U. L. REV. 197, 198–200 (2018).

5. See Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 576–78 (2016).

opinions—as opposed to generalizable statements of doctrine—litigants and future judges can often attempt to distinguish the precedent factually.

But appellate courts issue oodles of general doctrinal statements that are binding on a great many future cases. And uncertainty about the deliberateness of those statements can arise when the statements appear incoherent or inconsistent with the courts' own prior holdings—i.e., appear to be accidental misstatements of doctrine. No one doubts that an appellate court typically has the power to (a) extend or subtly modify precedent to create new doctrine, (b) deliberately repudiate its own precedent (despite sometimes tying its own hands somewhat with respect to direct repudiation of precedent),<sup>6</sup> or (c) deliberately articulate “insincere” reasons for shifting doctrine<sup>7</sup> or perhaps no reasons at all.<sup>8</sup> But why rule out the alternative explanation that the judge(s) merely issued an opinion that indeliberately contains the seemingly contradictory language? Judges and their law clerks are human, and various circumstances outside their control—such as poor briefing by litigants<sup>9</sup> and pressures to clear cases from crowded dockets<sup>10</sup>—make perfect opinion writing impossible.<sup>11</sup>

Indeed, the sheer volume of decision-making in appellate courts is reason to expect, at a minimum, typographical and transcription errors to arise on occasion. The Fifth Circuit, for example, resolved 1,206 appeals, 718 of them on the merits, in the twelve-month period ending June 30, 2022—more than 23 dispositions per week per panel, or nearly 8 dispositions per week per judge.<sup>12</sup> In terms of written opinions, the U.S. Courts of Appeals as a whole issued an average of 135 opinions per active judge during that same one-year period.<sup>13</sup> While on average, only 41 of those

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6. See Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1357–58 (2020).

7. See, e.g., Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1101 (2010) (“Although most legal scholars insist that it is an inherent requirement of the judicial function to give candid reasons, more recently, some writers have urged that judges may sometimes be justified in misrepresenting their reasons.” (citation omitted)).

8. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010) (discussing the phenomenon of “stealth” or “sub silentio” overruling of precedent).

9. See Zambrano, *supra* note 4, at 200 (citing Masur & Oullette, *supra* note 3, at 666).

10. See, e.g., Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 439 (2020).

11. This Article does not theorize how appellate courts *should* articulate the legal doctrines they apply, though “minimalist” approaches to opinion-writing would likely decrease the risk of doctrinal misstatements. See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 9–10 (1999); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1255 (2006) (“[C]ourts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases.”).

12. *U.S. Courts of Appeals—Federal Court Management Statistics—Profiles*, U.S. COURTS (June 30, 2022), [https://www.uscourts.gov/sites/default/files/fcms\\_na\\_appprofile0630.2022\\_0.pdf](https://www.uscourts.gov/sites/default/files/fcms_na_appprofile0630.2022_0.pdf) [<https://perma.cc/R8HE-7ZKN>].

13. *Id.*

135 opinions were “signed”<sup>14</sup>—still a large amount on a per-judge basis—lower federal courts seldom feel “at liberty . . . to disregard [or] contradict a [circuit] ruling squarely on point merely because it was rendered in a[n unsigned] order.”<sup>15</sup> State appellate courts, too, have heavy dockets. The Georgia Court of Appeals, for example, decided 1,522 cases on the merits in 2020, or roughly 100 merits decisions per each of the 15 judges in a single year.<sup>16</sup>

But the statistical likelihood of mistakes is just a starting point. How, with respect to any *particular* doctrinal statement, would someone arrive at the conclusion that the statement was likely an indeliberate misstatement? The next Section tackles that question.

## B. IDENTIFYING INSTANCES OF INDELIBERATE DOCTRINAL MISSTATEMENTS

As discussed above, it will seldom be possible to determine conclusively that a misstatement of doctrine in an opinion was indeliberate. Lawyers, after all, cannot read minds, and judges have no incentive to openly admit past mistakes. It is always theoretically possible that a judge had hidden motives for muddying an analysis. But, proceeding from the eminently reasonable premise that judges usually do not intend to create doctrinal contradictions within their jurisdiction without explanation, lawyers are not entirely powerless to identify doctrinal misstatements and gather evidence of their existence.

There are at least three ways to cast significant doubt on the deliberateness of a doctrinal statement, all of which involve documenting a direct and unexplained contradiction between the preexisting legal principles the court purports to apply and the court’s actual analysis: without explanation, the statement either (1) contradicts other aspects of the same appellate opinion; (2) contradicts prior appellate precedent from the same court; or (3) contradicts an applicable statutory or regulatory provision that has unquestioned validity.<sup>17</sup> Examples of each are documented below.

### 1. *Intra-Opinion Contradictions*

Sometimes, appellate opinions contain what appear very likely to be internal self-contradictions about the doctrine they are setting out that cannot be written off as mere dicta. And since the contradiction exists

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14. *Id.*

15. *Abrue v. United States*, No. 16CV5052, 2020 WL 4570338, at \*4 (S.D.N.Y. Aug. 7, 2020) (citing multiple cases stating similar views).

16. See *Appellate Court Caseloads Data Table*, CT. STATS. PROJECT, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-third-row/appeals> [<https://perma.cc/5FXN-B4TL>]; *Current Judges*, CT. OF APPEALS OF GA., <https://www.gaappeals.us/biographies> [<https://perma.cc/MGJ2-V7U9>].

17. As additional evidence, lawyers can sometimes access the briefing that was before the court to see whether the parties presented the preexisting doctrine to the court properly (or at all).



within a *single opinion*, there is no clear rule for how lower courts are to choose between the two contradictory commands.

*United States v. Dunn* is a prominent example of such seemingly contradictory commands.<sup>18</sup> *Dunn* set the standard for determining whether an area of land surrounding a home is part of the “curtilage” protected by the Fourth Amendment.<sup>19</sup> *Dunn* instructed courts to consider four factors, including “the nature of the uses to which the area is put.”<sup>20</sup> But in applying that standard to its facts involving a barn near a farmhouse, *Dunn* emphasized that “law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home.”<sup>21</sup> So what is the *Dunn* standard: look to the nature of the uses to which the area is actually put, as the Court’s statement of the factors would suggest, or look to the objectively reasonable perception of the uses to which the area is put, as the Court’s *application* of the factors would suggest? Those two standards could lead to differing results: Imagine a homeowner who privately uses an outbuilding, such as a shed, for highly intimate activities but leaves no external markers of that activity for an outside observer. Or, conversely, imagine an outbuilding that is in fact used for illegal, nondomestic activities but has no external markers of that activity.

That distinction was not purely academic; it caused considerable confusion within lower courts. A Second Circuit panel, for example, opted to follow *Dunn*’s statement of the factors (“actual use”), rather than *Dunn*’s analysis of “objective data,” but stopped short of characterizing the “objective data” analysis as dicta.<sup>22</sup> Indeed, how could the *Reilly* court possibly have dismissed as “dicta” the *Dunn* Court’s fact-specific analysis of the issue, which is paradigmatically the opposite of dicta? In contrast, other circuits hewed to the Court’s “objective data” analysis, holding that “officers must have ‘objective data’ about the use of the area prior to entry.”<sup>23</sup> The two approaches are not compatible and thus, in all likelihood, the Supreme Court meant to adopt one or the other. But it failed to do so effectively because of how the *Dunn* opinion was worded. Might the Court have deliberately muddied the waters to cause doctrinal instability in the lower courts? Yes, of course, but why favor such an explanation over the simpler explanation that a portion of the opinion was drafted with insufficiently careful language?

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18. *United States v. Dunn*, 480 U.S. 294, 296 (1987).

19. *Id.* at 301–02.

20. *Id.* at 301.

21. *Id.* at 302.

22. *United States v. Reilly*, 76 F.3d 1271, 1278–79 (2d Cir. 1996) (citing *Dunn*, 480 U.S. at 302, 305).

23. *United States v. Johnson*, 256 F.3d 895, 903 (9th Cir. 2001) (en banc) (collecting cases) (“Prior to beginning their search, the officers possessed no objective data that the mushroom shed was not used for intimate activities associated with the home. . . . We have never held that an officer lacking any prior objective knowledge of the use of an outbuilding may approach it free of Fourth Amendment constraints.”).

Similarly, an appellate opinion can articulate standards in a broad or imprecise manner that forecloses arguments that, elsewhere, the opinion seems designed to preserve. One such example comes from the Third Circuit's jurisprudence regarding the legal standard for violating a pretrial detainee's constitutional rights. In *Kost v. Kozakiewicz*, the court acknowledged that "[p]retrial detainees are not within the ambit of the Eighth Amendment" and "are entitled to at least as much protection as convicted prisoners, so the protections of the Eighth Amendment would seem to establish a floor of sorts."<sup>24</sup> Since the *Kost* detainees argued their case under Eighth Amendment standards, the court left open what the more forgiving standard under the Due Process Clause would be.<sup>25</sup> But elsewhere in the opinion, the court stated that the Eighth Amendment's standard "would also apply to appellants as pretrial detainees" and that "a Due Process Clause violation based on the government's duty to provide pretrial detainees with appropriate medical care . . . requires 'acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.'"<sup>26</sup> For many years thereafter, *Kost* confused lower courts that held pretrial detainees to the strict deliberate indifference standard.<sup>27</sup>

In addition, as noted in some of the examples below, inter-opinion or statute-opinion contradictions can simultaneously create intra-opinion contradictions—namely if the inter-opinion or statute-opinion contradiction is apparent on the face of the current opinion itself.

## 2. *Inter-Opinion Contradictions*

An appellate opinion can also cause confusion by contradicting earlier binding precedent on which it purports to rely. To be sure, appellate courts often have the prerogative to revisit and modify standards from their precedents—indeed, that is often how the law develops over time. But what about when the modification appears not to have been deliberate but instead to have been based on a misunderstanding or misquotation of the earlier precedent? Should lower courts follow the change, or should they conclude that the change must have been indeliberate and therefore should not override earlier precedent?

Such inter-opinion contradictions can manifest in unexplained misinterpretations of earlier precedents' substance. In *Gordy v. Burns*, the Fifth Circuit held that "the state-law tort of malicious prosecution and the elements of the constitutional tort of 'Fourth Amendment malicious prosecution' are coextensive," so that "a plaintiff in a § 1983 malicious prosecution action need establish only the elements of common-law malicious

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24. *Kost v. Kozakiewicz*, 1 F.3d 176, 188 & n.10 (3d Cir. 1993).

25. *See id.* at n.10.

26. *Id.* at 185, 188 (quoting *Boring v. Kozakiewicz*, 833 F.2d 468, 471 (3d Cir. 1987)).

27. *See, e.g.,* *Hubbard v. Taylor*, No. Civ. A. 00-531-SLR, 2003 WL 1697537, at \*3 (D. Del. Mar. 28, 2003), *vacated and remanded*, 399 F.3d 150 (3d Cir. 2005).

prosecution.”<sup>28</sup> In support of that holding, *Gordy* cited *Evans v. Ball*<sup>29</sup> and *Kerr v. Lyford*.<sup>30</sup> But *Evans* held only that “[a] plaintiff attempting to state a claim under 42 U.S.C. § 1983 for prosecution unsupported by probable cause must establish, as with a common[-]law malicious prosecution claim, that the prosecution terminated in his favor”<sup>31</sup>—not that all the elements were coextensive. Similarly, *Kerr*, another case involving a § 1983 claim for malicious prosecution, simply listed all the elements of common-law malicious prosecution before holding that the plaintiffs failed to establish the necessary element of an absence of probable cause for the prosecution.<sup>32</sup> Moreover, *Kerr* relied on a line of precedent tracing back to *Brown v. United States*, a case holding that causes of action under the Federal Tort Claims Act—not § 1983—are governed by “the tort law of the state where the federal agent acted.”<sup>33</sup> Was it within the *Gordy* court’s authority to significantly expand the holdings it was citing to create a strict “coextensiveness” rule? Arguably, yes. But *Gordy* gives little indication that the opinion’s authors were *intending* to do so; it seems at least as likely that the authors accidentally overread the earlier precedents.

State appellate courts, too, can commit similar errors. In *Hughes v. Mahaney & Higgins*, the Texas Supreme Court held that “when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted.”<sup>34</sup> Requiring otherwise, the court reasoned, could “force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case.”<sup>35</sup> Six years later, in *Murphy v. Campbell*, the Texas Supreme Court decided another case involving the statute of limitations for malpractice actions—this time against an accounting firm for advice rendered in connection with a Tax Court proceeding—and declined to apply the rule from *Hughes* to toll the limitations period during the pendency of the Tax Court proceeding.<sup>36</sup> In its reasoning, the *Murphy* court incorrectly suggested that the *Hughes* tolling rule was motivated in part by the concern that a client pursuing both the malpractice claim and the underlying litigation would have no choice but to “obtain other counsel.”<sup>37</sup> Worse still, in responding to the dissenters’ arguments, the *Murphy* court stated that *Hughes* was “ex-

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28. *Gordy v. Burns*, 294 F.3d 722, 725–26 (2002) (quoting *Piazza v. Mayne*, 217 F.3d 239, 245 (5th Cir. 2000)).

29. *See id.* at 725 (citing *Evans v. Ball*, 168 F.3d 856, 862 n.9 (5th Cir. 1999)).

30. *See id.* at 725 (citing *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999)).

31. *Evans*, 168 F.3d at 862.

32. *See Kerr*, 171 F.3d at 340.

33. *Brown v. United States*, 653 F.2d 196, 198 (5th Cir. 1981).

34. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

35. *Id.* at 156.

36. *See Murphy v. Campbell*, 964 S.W.2d 265, 272 (Tex. 1997).

37. *See id.* (“That consideration, coupled with the necessity of taking inconsistent positions, persuaded us to adopt a tolling rule in *Hughes*.”).

pressly limited to claims against a lawyer arising out of litigation where the party must not only assert inconsistent positions but must also obtain new counsel.”<sup>38</sup> In fact, *Hughes* contained no such limitation. Yet again, predictably, the contradiction misled lower courts.<sup>39</sup>

In addition, inter-opinion contradictions can result from seemingly tiny modifications to wording. For example, the Third Circuit caused confusion surrounding its qualified immunity jurisprudence with a small transcription error. Previous Third Circuit cases articulated the familiar standard that government officials are entitled to qualified immunity if “reasonable officials in the defendants’ position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful.”<sup>40</sup> But in *Abdul-Akbar v. Watson*, the Third Circuit unsuccessfully attempted to articulate the inverse of that rule—it ended up not only misquoting a precedent but also changing its underlying logic. The court stated that “qualified immunity does *not* apply if ‘reasonable officials in the defendants’ position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be *unlawful*.”<sup>41</sup> In effect, the existing rule meant that defendants were entitled to qualified immunity if *some* reasonable officials would believe their conduct to be lawful. Under *Abdul-Akbar*’s articulation, in contrast, those defendants receive immunity only if *all* reasonable officials believe their conduct to be lawful. Understandably, lower courts repeated the *Abdul-Akbar* articulation for several years.<sup>42</sup>

### 3. Statute–Opinion Contradictions

A third, somewhat different phenomenon is appellate case law that contradicts a statute’s plain text without providing a satisfying explanation. Courts do, of course, have the authority to interpret statutes in surprising or radical ways. But given the separation-of-powers concerns at play, a judicial opinion’s conflict with clear statutory commands creates an even greater need for explanation: to assure readers both that the contradiction was deliberate and also that the contradiction was justified. Such assurances are not always provided, and their absence leaves lawyers and their clients wondering whether to follow the statute’s plain text.

In some instances, it seems highly likely that a court has misinterpreted a statutory provision by mistakenly applying precedent from a *different legal context*. One example involves Rule 401 of the Idaho Rules of Evi-

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38. *Id.* at 273.

39. *See Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 905 (Tex. App.—Beaumont 1999) (wrongly holding that the Texas Supreme Court “has subsequently narrowed the tolling provision to situations where the client is continuing to use the same lawyer in the pending litigation”), *rev’d*, 41 S.W.3d 118 (Tex. 2001).

40. *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989).

41. *Abdul-Akbar v. Watson*, 4 F.3d 195, 202 (3d Cir. 1993) (misquoting *Good*, 891 F.2d at 1092) (emphasis added).

42. *See, e.g., Urbanski v. Horn*, No. Civ. A. 97-4647, 1998 WL 661531, at \*10 (E.D. Pa. Sept. 25, 1998); *Kim v. Gant*, No. 95-2905, 1995 WL 508208, at \*4 (E.D. Pa. Aug. 22, 1995).

dence.<sup>43</sup> Much like its federal analogue, Rule 401 sets a very low bar for “relevant” evidence: evidence is relevant if it has “any tendency to make a fact more or less probable,” provided that “the fact is of consequence in determining the action.”<sup>44</sup> A separate provision, Rule 404(b), sets out the limited exceptions under which evidence of a criminal defendant’s prior bad acts can be admitted.<sup>45</sup> Interpreting Rule 404(b), the Idaho Supreme Court held in 2007 that a court considering whether to admit evidence of prior bad acts “must determine that the evidence is relevant to a material and disputed issue concerning the crime charged.”<sup>46</sup> In two cases soon thereafter, *State v. Stevens*<sup>47</sup> and *State v. Shackelford*,<sup>48</sup> the same court quoted the prior case’s language—“a material and disputed issue”—when applying Rule 401’s basic relevance standard, thereby suggesting that Rule 401 contained a “disputed issue” requirement.<sup>49</sup> It was not until 2020 that the Idaho Supreme Court finally clarified the issue and acknowledged that *Stevens* and *Shackelford* had “mistakenly grafted” the Rule 404(b) “‘disputed issue’ requirement” onto Rule 401 analysis.<sup>50</sup>

Another source of potential doctrinal misstatements is when a court, by all appearances, is simply unaware of a statutory provision that conflicts with its holding. For example, in *Ferrari v. Ford Motor Co.*, the Sixth Circuit rejected an employee’s claim that his employer violated the Americans with Disabilities Act (ADA) by taking adverse action against him based on the *perception* that he was disabled by opioid use (a “regarded as” theory of disability).<sup>51</sup> The court quoted and relied on precedent from 2008 that held, “Individuals may be regarded as disabled when [an employer] mistakenly believes that [an employee] has a physical impairment that substantially limits one or more major life activities.”<sup>52</sup> The court then rejected the claim because the employee did “not specify which ‘major life activity’ [his employer] believed was limited by his opioid use.”<sup>53</sup> But as the Sixth Circuit eventually recognized more than three years later, *Ferrari* made a serious error by completely ignoring a crucial amendment that Congress had made to the ADA in 2008, which went into effect in January 2009, long before the 2013 events underlying the *Ferrari* employee’s complaint.<sup>54</sup> The amendment, codified at 42

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43. IDAHO R. EVID. 401.

44. *Id.*

45. *See id.* 404(b).

46. *State v. Field*, 165 P.3d 273, 283 (Idaho 2007) (emphasis added).

47. *State v. Stevens*, 191 P.3d 217 (Idaho 2008).

48. *State v. Shackelford*, 247 P.3d 582 (Idaho 2010).

49. *Id.* at 591; *Stevens*, 191 P.3d at 221. As noted above, these two cases also present an intra-opinion contradiction, insofar as they cite Rule 401 correctly but simultaneously articulate doctrine that is inconsistent with Rule 401’s standard.

50. *State v. Garcia*, 462 P.3d 1125, 1135 n.3 (Idaho 2020).

51. *See Ferrari v. Ford Motor Co.*, 826 F.3d 885, 892–94 (6th Cir. 2016).

52. *Id.* at 893 (quoting *Daugherty v. Sajar Plastics, Inc.*, 544 F.3d 696, 704 (6th Cir. 2008)).

53. *Id.*

54. *See Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 319 (6th Cir. 2019) (acknowledging the “regrettabl[e]” error in *Ferrari*).

U.S.C. § 12102(3)(A), explicitly stated that a “regarded as” theory of disability is actionable for *any* form of perceived impairment, “whether or not the impairment limits or is perceived to limit a major life activity.”<sup>55</sup>

In other cases, a court might contradict the plain text of a statute in a seemingly deliberate fashion but without offering much explanation for taking such drastic action. For instance, in *Veldran v. Dejoy*, the Second Circuit made the same mistake as the Sixth Circuit in *Ferrari* but did so despite quoting the ADA’s 2008 amendment that the *Ferrari* court altogether ignored.<sup>56</sup> After quoting the correct ADA language from § 12102(3)(A), the court quoted stale language from a 2005 precedent and ultimately rejected the employee’s claim because he “d[id] not state what major life activity his employers believed was substantially limited by [his] injury.”<sup>57</sup>

Another example involves one of Title VII’s less-known provisions, 42 U.S.C. § 2000e-2(l), which explicitly prohibits using different cutoff scores between sexes on employment tests.<sup>58</sup> The statutory language is explicit and unqualified:

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.<sup>59</sup>

Yet, in *Bauer v. Lynch*, the Fourth Circuit held that “an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences.”<sup>60</sup> Of course, one could imagine paths of legal reasoning that would at least arguably justify a radical interpretation of § 2000e-2(l). But *Bauer* says almost nothing about § 2000e-2(l) and its specific prohibition beyond a citation and short excerpt of the language.<sup>61</sup> Instead, *Bauer* focuses on Title VII’s general prohibition of sex discrimination and reasons that sex-differentiated employment test cutoffs do not necessarily impose unequal “burdens” on men and women.<sup>62</sup> That reasoning might well be a valid interpretation of Title VII’s *general* prohibition, but it is as if the *Bauer* court forgot about the more specific command of § 2000e-2(l), which explicitly prohibits “different cutoff scores” regardless of the “bur-

55. 42 U.S.C. § 12102(3)(A) (2008).

56. See *Veldran v. Dejoy*, 839 Fed. App’x 577, 579–80 & n.2 (2d Cir. 2020) (summary order). While summary orders are not strictly binding on future Second Circuit panels, they are often treated as binding by district courts.

57. *Id.* at 580. In addition to creating a statute–opinion contradiction, *Veldran* also creates an intra-opinion contradiction because it quotes the very statutory language it simultaneously contradicts.

58. 42 U.S.C. § 2000e-2(l).

59. *Id.*

60. *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016).

61. *Id.* at 347 (“[P]roscription against sex discrimination also extends to the use of ‘different cutoff scores for . . . employment related tests.’” (quoting § 2000e(2)(l))).

62. *Id.* at 349–51.

dens” that are imposed.<sup>63</sup> If the *Bauer* court deliberately wanted to write § 2000e-2(l) out of Title VII, at least in part, you would expect the court to have done so expressly and with thorough reasoning. Instead, employment lawyers are left to guess whether and to what degree § 2000e-2(l) must be complied with.

### III. INDELIBERATENESS AND STARE DECISIS

The possibility of indeliberate misstatements of doctrine in binding case law implicates an important question about stare decisis: if and when such a misstatement exists in a binding opinion, does the misstatement itself become binding doctrine? Normative, pragmatic, and ethical considerations shed light on that question, though they do not all necessarily suggest the same answer.

#### A. NORMATIVE CONSIDERATIONS

First, the normative bottom line: stare decisis is not an inexorable command, and the apparent indeliberateness of a judicial statement is arguably as good a reason as any to disregard it. Over the past two decades, legal scholars have debated the circumstances under which courts should deliberately depart from the principle of horizontal stare decisis: i.e., when a court should contradict its prior holdings or those of a coordinate court.<sup>64</sup> Prior to her appointment to the bench, for example, Amy Coney Barrett articulated a vision of a “weak presumption” of horizontal stare decisis, arguing that overruling precedent is an “inevitable byproduct of pluralism.”<sup>65</sup> At bottom, advocates of weaker forms of horizontal stare decisis rely on the notion that there are objectively discernible legal rules—such as the plain text of a statute or the original public meaning of a constitutional provision—against which a judge can cast a prior judicial opinion as “demonstrably erroneous,” as opposed to being merely a prior opinion that “made a different discretionary choice” than the current judge would make.<sup>66</sup> Critics of that view, however, see all or nearly all

63. 42 U.S.C. § 2000e-2(l).

64. See generally Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 908–10 (2021); Randy J. Kozel, *Stare Decisis as Authority and Aspiration*, 96 NOTRE DAME L. REV. 1971 (2021); William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313 (2020); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712–13 (2013) [hereinafter Barrett, *Precedent and Jurisprudential Disagreement*]; Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL’Y 977 (2008); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1174 (2006); Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 178–79 (2006); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1–3 (2001).

65. Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 64, at 1712.

66. Nelson, *supra* note 64, at 6–7; see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (“[A]ny substantive due process decision is ‘demonstrably erroneous’ . . . .” (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424

legal rules as indeterminate and open to interpretation and therefore see all precedent as an exercise of discretion. In that world, judges who break from horizontal stare decisis are merely substituting their discretionary judgment for that of their predecessors.<sup>67</sup>

What about “vertical” stare decisis or “a court’s obligation to follow the precedent of a superior court”?<sup>68</sup> Some lesser deviations from vertical decisis do occur and are largely tolerated. To the extent that a superior court’s precedent permits multiple interpretations, i.e., is ambiguous, lower courts are sometimes comfortable “narrowing” the precedent without declaring it erroneous.<sup>69</sup> And lower court judges tend to resist, often subconsciously, top-down changes to the law that impose unfamiliar or complex standards on them.<sup>70</sup> But even advocates of weak horizontal stare decisis typically view vertical stare decisis as “an inflexible rule” that cannot be violated merely because a lower court deems a superior court’s precedents to be wrongly decided.<sup>71</sup>

The highly successful conservative legal movement, while focusing its attention on horizontal stare decisis—especially the Supreme Court’s flexibility to depart from its precedent—has leveled criticisms at strict adherence to precedent that could apply to vertical stare decisis as well.<sup>72</sup> If appellate precedent can contain truly and objectively “demonstrable” legal errors, why should lower court judges be obligated to replicate those same “demonstrable” errors in the cases before them? Surely *any* judge has the acumen and should have the authority to identify and depart from obvious legal errors.

The answer, of course, may be that many so-called “demonstrable” legal errors are not *actually* identifiable using clearcut, objective criteria, and therefore departing from those errors is still a discretionary judgment we want to place in the hands of only certain judges within our hierarchical court system.<sup>73</sup> Perhaps that is why members of the conservative legal movement are, despite their criticisms of strict adherence to precedent, comfortable calling *vertical* stare decisis “an inflexible rule.”<sup>74</sup>

At the same time, the concept of “demonstrable” legal error is not entirely misguided; it has simply been applied far too broadly by the con-

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(2020) (Thomas, J., concurring in judgment)); *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (“[T]he Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.”).

67. See Nelson, *supra* note 64, at 79; see also Re, *supra* note 64, at 917 (“One might imagine that almost all seriously disputed cases involve construction.”).

68. Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 64, at 1712.

69. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 924–26 (2016).

70. See Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 902–04, 922 (2015).

71. Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 64, at 1712.

72. See *supra* notes 64–66 and accompanying text.

73. See *supra* notes 64–66.

74. Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 64, at 1712.



servative legal movement. One can reject full-throated rebukes of stare decisis while still occasionally identifying statements in precedent that are *truly* “demonstrably erroneous.” A “plain text” reading of the words “due process” and similarly broad phrases in the Constitution might not be as objective as some have argued.<sup>75</sup> But a side-by-side comparison of a court’s articulation of a standard in Case A against the court’s articulation of the same standard in Case B might be a sufficiently objective basis to disregard one of those articulations. While one could imagine a legal system with a rigid norm of absolute adherence to all statements in precedent, that is not the system we have—especially in the current climate brought about by the conservative legal movement.

In light of that reality, it is hardly radical to suggest that even vertical stare decisis should yield to common sense on occasion. Doctrinal misstatement from appellate courts not only pose ethical quandaries for lawyers and decision-making challenges for lower courts; *all* forms of doctrinal uncertainty, of course, also make it harder for citizens to order their affairs premised on predictable legal outcomes. Moreover, at a minimum, doctrinal misstatements in appellate case law could—without any *true* jurisprudential disagreement existing—muddy the water enough to fuel arguments that certain rights were not “clearly established” and thus not a basis for holding government officials accountable,<sup>76</sup> or that the law’s commands were not clear enough to place parties on fair notice that their conduct was illegal.<sup>77</sup>

Perhaps, then, even in the realm of vertical stare decisis, statements of legal doctrine in appellate precedents can be *so* demonstrably erroneous that lower courts should not follow them. Indeed, “demonstrably erroneous” is probably not a strong enough term for the phenomenon I explore in this Article, insofar as scholars have used the term “demonstrably erroneous” in debates about originalism and other matters about which reasonable people can disagree. After all, an “erroneous” decision in a legal context can mean simply that a higher court later disagreed with the decision.<sup>78</sup> Mere disagreement is not the phenomenon I am referring to. Rather, this Article addresses situations in which an appellate court purports to apply a statute or precedent, but closer examination of that statute or precedent reveals a facial contradiction in the present court’s analysis that was very likely indeliberate. (That is why I refer principally to “misstatements,” rather than to the much broader term “errors.”)

Further, in both horizontal and vertical applications, stare decisis per-

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75. See *supra* notes 66–67 and accompanying text.

76. See generally *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (holding that qualified immunity shields government officials from civil liability unless “clearly established” law prohibited their conduct).

77. See generally *United States v. Lanier*, 520 U.S. 259, 267 (1997) (holding that part of the “fair warning” requirement for a criminal law is “whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal”).

78. See *Nelson*, *supra* note 64, at 6–7.

mits exceptions for statements deemed dicta.<sup>79</sup> While this Article is not about the notoriously slippery holding/dicta distinction, that distinction is a crucial part of the way lawyers understand stare decisis.<sup>80</sup> Judges and lawyers routinely engage in the game of explaining away inconvenient statements in binding precedent as mere dicta.<sup>81</sup> Separating doctrinal misstatements from valid statements of doctrine differs from the conventional account of how one separates dicta from holding. The conventional account is that courts should follow all statements within appellate opinions that are deemed “holdings,” and “holdings” are anything “necessary” to the appellate court’s decision.<sup>82</sup> As the examples set out above in Section II.B show, a statement of doctrine can be pivotal to a court’s decision yet still be an apparent misstatement.

But on a deeper level, some of the same reasons courts are not bound by “dicta” show why, similarly, they should not be bound by indeliberate doctrinal misstatements. As scholars have observed, the conventional account of the holding/dicta distinction oversimplifies how courts treat precedent.<sup>83</sup> “Even if a doctrinal framework or sweeping rationale is characterized as necessary to the decision that contains it,” writes Randy Kozel, “there remains the question of whether the proposition should bind future courts. The answer to that question is exogenous to the holding–dicta distinction. It requires an appeal to something deeper.”<sup>84</sup> And even a broad conception of “controlling” precedent is “compatible with the view that some judicial propositions are unworthy of deference.”<sup>85</sup>

The first and most obvious reason not to follow doctrinal misstatements is that, even more so than dicta, they lack indicia of having been adopted deliberately by the appellate courts that wrote them. In the holding/dicta context, courts deciding whether to defer to a prior opinion’s statements often look to “indicia of deliberation” to distinguish between “deliberate and offhand language.”<sup>86</sup> Doctrinal misstatements present an extreme version of seemingly indeliberate language. In the absence of a clear indication otherwise, we should presume that an appellate court does not intend to modify standards from the way they are currently articulated in prior case law or statute. While it is true that courts sometimes deliberately modify precedent *sub silentio*,<sup>87</sup> the strong presumption is that they do not.<sup>88</sup>

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79. See Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 182 (2014).

80. See, e.g., *id.*; Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1552–54, 1556 (2020); Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 671–72 (2017).

81. See, e.g., Tyler, *supra* note 80, at 1552–53 (2020).

82. See *id.* at 1552 (“In most jurisdictions, a court’s prior statement of law is a holding only if it was necessary for the outcome of the prior case.”).

83. See, e.g., Kozel, *supra* note 79, at 183.

84. *Id.* at 202.

85. *Id.* at 200.

86. *Id.*

87. See Friedman, *supra* note 8, at 3, 6–8, 14.

88. See, e.g., *Koch v. Christie’s Int’l PLC*, 699 F.3d 141, 149 (2d Cir. 2012) (“There is a presumption that the Supreme Court does not overrule itself *sub silentio*.”); *State v. She-*

Second, a key potential benefit of a broader conception of “controlling” case law is weakened when doctrinal misstatements are involved. A broader conception of controlling case law, under which even “unnecessary” statements are treated as law, could potentially promote predictability and uniformity in the legal system. In theory, the law is more predictable and uniform if lower courts know that they must follow everything a higher court has said, even if the higher court’s statements are unwise or poorly conceived.<sup>89</sup> But that benefit fades if the higher court’s statement is poorly conceived not because it was offhand dicta but rather because of a *direct contradiction* of prior statements from an equally authoritative source (either the same higher court or a statute). If that happens, then the question becomes not simply whether to defer greatly to statements in precedent but whether to defer greatly to statements in one precedent while disregarding statements in another precedent.

Third, the holding/dicta distinction also provides a reason not to fear debates over doctrinal misstatements. Yes, it is possible that lawyers might over-diagnose doctrinal misstatements and thereby seek to evade precedent that should be followed. But such a risk is hardly unique to the question of whether a court’s statement is or is not a doctrinal misstatement. Lawyers are quite accustomed to debating whether a court’s statements are “holdings” or “dicta.” Despite being a critical distinction—since dicta can be ignored<sup>90</sup>—the distinction is “highly contestable” and “malleable.”<sup>91</sup> No bright line separates dicta from holding.<sup>92</sup> And yet the legal profession has long tolerated lawyers’ wide-ranging freedom to argue about what is dicta and what is not.

#### B. PRAGMATIC CONSIDERATIONS

Then come the many pragmatic considerations that could complicate an open, honest discussion of stare decisis in this domain. First, one would expect lawyers to be reluctant to characterize a judicial statement of doctrine as an outright mistake, no matter how apparent the mistake is, for fear of offending judges. Similarly, some judges might hesitate to characterize the writings of past and present colleagues as documents with human mistakes. Perhaps it is better, then, to proceed as if the misstatement is a legitimate statement of doctrine but somehow navigate around it? The challenge, however, is that the usual tools for achieving that out-

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gog, 633 S.W.3d 362, 366 n.2 (Mo. 2021) (en banc) (“Generally, this Court presumes, absent a contrary showing, that an opinion of this Court has not been overruled *sub silentio*.”); *Campbell v. State*, 288 So. 3d 739, 743 (Fla. Dist. Ct. App. 2019) (“The Florida Supreme Court has made clear that it ‘does not intentionally overrule itself *sub silentio*.’” (quoting *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002))).

89. See Kozel, *supra* note 79, at 205; Tyler, *supra* note 80, at 1575.

90. See, e.g., Kozel, *supra* note 79, at 182 (“[T]he Supreme Court recently reaffirmed that dicta from its prior opinions may be freely disregarded.”).

91. Tyler, *supra* note 80, at 1552–53; accord Kozel, *supra* note 79, at 183 (discussing “the ambiguity that resides within the terms ‘holding’ and ‘dicta,’ terms that create far greater potential for mischief than illumination”).

92. See Michaels, *supra* note 80, at 661.

come—either factually distinguishing the holding or characterizing it as non-holding, i.e., dicta—are not available when the statement is an articulation of general doctrine (rather than a fact-bound conclusion)<sup>93</sup> and is too central to the court’s reasoning to be disregarded as mere dicta. At that point, the options are to (a) acknowledge that a mistake was probably made, (b) pretend the statement does not exist (an ethically dubious move for lawyers),<sup>94</sup> or (c) characterize the statement as a sub silentio overruling of earlier authority—an accusation that could be as uncomfortable to make as an accusation of a human mistake.

In some instances, an appellate court’s own internal rules can provide a path to avoid confronting doctrinal misstatements—namely, by favoring the earliest of multiple precedents if a conflict exists<sup>95</sup>—but the reality is rarely so clear-cut. For one, all future panels of an appellate court have the power to adhere to the later of two conflicting precedents, both as a practical matter and, in some jurisdictions, as a matter of explicit policy.<sup>96</sup> The First Circuit, for example, may depart from its own precedents without convening en banc or identifying intervening Supreme Court case law if “authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.”<sup>97</sup> Further complicating the inquiry, in states with multiple geographic appellate divisions, a lower court will always feel pressure to follow later precedent from its geographic division, no matter how clearly it contradicts earlier precedent from other divisions.<sup>98</sup> And even clear-cut

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93. This Article is not about the all-too-common phenomenon of appellate courts reaching or affirming highly questionable, fact-specific conclusions in individual cases without misstating any generalizable legal principles. Such errors, though hugely consequential to individual litigants, are not as problematic for the development of doctrine as an appellate court’s statements and elaborations of legal standards can be.

94. See *infra* Section III.C.

95. See, e.g., *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (“[A]s to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions. Most of the other circuits agree and follow the earlier of conflicting panel opinions.” (citation omitted)); *People v. Young*, 538 N.W.2d 456, 461 (Mich. Ct. App. 1995) (holding that when two panel decisions from the Court of Appeals conflict, future panels should follow the earlier of the two conflicting decisions).

96. See generally *Dickman*, *supra* note 6.

97. *United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018) (quoting *Williams v. Ashland Eng’g Co.*, 45 F.3d 588, 592 (1st Cir. 1995)); see also, e.g., *Graham v. Cont. Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000) (“When faced with conflicting precedents we are free to choose which line of cases to follow . . .”); *T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006) (“In this instance, however, it is not clear which opinion should be considered the ‘earliest’ for that purpose.”).

98. *D’Alessandro v. Carro*, 992 N.Y.S.2d 520, 523 (N.Y. App. Div. 2014) (holding that a lower court “shall follow a decision made by the Appellate Division of another department, unless his own Appellate Division or the Court of Appeals holds otherwise” (quoting *U.S. Gypsum Co. v. Riley-Stoker Corp.*, 174 N.Y.S.2d 18, 21 (N.Y. App. Div. 1958)); *People v. Perry*, No. F079881, 2022 WL 1789909, at \*8 (Cal. Ct. App. June 2, 2022) (“Courts exercising inferior jurisdiction can and must make a choice between the conflicting decisions, but [a]s a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so.” (citations and quotation marks omitted)).

rules for resolving inter-opinion conflicts do not resolve inconsistencies within a single opinion or between an opinion and a statute or regulation that it purports to construe.

In sum, while pragmatic considerations might discourage lawyers and judges from confronting doctrinal misstatements head-on, there are also practical limitations on their ability to avoid the confrontation in many instances.

### C. ETHICAL CONSIDERATIONS

Doctrinal misstatements will have stare decisis effect only if future courts discover them, and many courts rely heavily on parties to brief complex issues. In many instances, of course, it might be of *benefit* to a litigant to raise the issue. But what is a lawyer's ethical obligation when encountering a likely doctrinal misstatement that would be *harmful* to raise? The orthodoxy that many law students hear ("Yes, you must disclose adverse controlling authority to a tribunal.") does not fully answer the question.

Whether lawyers must raise doctrinal misstatements they discover in appellate case law is merely one manifestation of a broader longstanding debate over the scope of a lawyer's ethical obligation to disclose adverse authority to a tribunal. Unfortunately, the drafters of ethical rules in most jurisdictions have not provided clear guidance to resolve that debate. As scholars have noted, the strong default norm within the legal profession is zealous advocacy on behalf of clients, which means that lawyers tend to give countervailing ethical rules, such as the duty of candor codified in Rule 3.3 of the American Bar Association's (ABA) Model Rules of Professional Conduct, as narrow a reading as possible.<sup>99</sup> Rule 3.3(a)(2) requires lawyers to "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"<sup>100</sup>—language far narrower than prior standards and other proposals that the ABA considered.<sup>101</sup> What does it mean for an authority to be "directly

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99. See Frances C. DeLaurentis, *When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal*, 7 DREXEL L. REV. 1, 14 (2015) ("The organized bar emphasizes the lawyer's duty of zealous advocacy to her client . . ."); Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821, 827–28 (1982) ("Apparently, many lawyers think that an advocate should cite only favorable authority. If this concept of advocacy as to matters of law is widely shared, most lawyers cite adverse authority only when there is no practical way to avoid doing so." (citation omitted)).

100. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 1983).

101. See DeLaurentis, *supra* note 99, at 9–14, 28; Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59, 61, 66–74 (1997); Daisy Hurst Floyd, *Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035, 1038–44 (1995); Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 835–38 (1982).

adverse”?<sup>102</sup> If a statement of law can be dismissed as dicta or a case can be factually distinguished, is it directly adverse? And what does “authority in the controlling jurisdiction” mean? Does it mean *any* authority, as long as it comes from a court with the power to issue binding decisions, or does it mean only the specific authorities that have the effect of binding the decision-maker in the case at bar? If the latter, a lawyer could potentially maintain a good faith view that a doctrinal misstatement in an appellate opinion is not truly binding law. The Model Rules themselves provide no clear answer to those questions.

For the risk-averse lawyer who fears the possibility of running afoul of ethical and procedural rules, a smattering of case law suggests that doctrinal misstatements and similar gray areas *do* fall within the requirement of disclosure under Rule 3.3(a)(2). First, some courts have rejected the notion that “directly adverse” authority “in the controlling jurisdiction” is limited to *controlling authority*. The Court of Appeals of Alaska, after recounting the history of Model Rule 3.3(a), held that the analogous Alaska Professional Conduct Rule 3.3(a) imposed an “obligation to disclose legal authorities that the court should, in fairness, consider when making its decision,” even when “one could reasonably argue that [they do] not control the case at hand.”<sup>103</sup> And a federal appellate court, albeit in the context of sanctions under Rule 11 of the Federal Rules of Civil Procedure, admonished a lawyer for the “unprofessional” failure to cite “potentially dispositive authorit[y],” even though there were arguments as to why the authority was not actually controlling.<sup>104</sup> “Counsel is certainly under obligation to cite adverse cases which are *ostensibly* controlling,” the court said, “and then may argue their merits or inapplicability.”<sup>105</sup> Further, the Supreme Court of Delaware recently adopted the “ostensibly controlling” standard in its interpretation of Rule 3.3(a) of the Delaware Lawyers’ Rules of Professional Conduct.<sup>106</sup>

Relatedly, courts have reprimanded lawyers for incomplete or decontextualized citation of appellate authority within their jurisdiction. A federal district court in Pennsylvania ordered a lawyer to complete continuing legal education on ethics after the lawyer “cited the portion of [a Pennsylvania Supreme Court] opinion that was helpful to his position, but failed to cite the actual holding of the case, which rendered his argument entirely untenable.”<sup>107</sup> Similarly, the Wisconsin Court of Appeals

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102. DeLaurentis, *supra* note 99, at 12–13 (“[W]hile Rule 3.3(a)(2) requires that directly adverse authority be cited, the term ‘directly adverse authority’ is never defined. Instead, lawyers must look to ABA Committee Opinions, opinions that historically suggest a meaning beyond the parameters of the language of the rule.” (citation omitted)); Deering, *supra* note 101, at 75 (“Determining whether a case is directly adverse to your client’s position, however, can be an elusive endeavor.”).

103. Tyler v. State, 47 P.3d 1095, 1104–06, 1107–08 (Alaska Ct. App. 2001).

104. Mannheim Video, Inc. v. Cnty. of Cook, 884 F.2d 1043, 1047 (7th Cir. 1989).

105. *Id.* (emphasis added).

106. Williams v. Toll Bros. Builders, 257 A.3d 1022 (Del. 2021).

107. Arch Ins. Co. v. Carol & Dave’s Roadhouse, Inc., No. 2:11-CV-801, 2013 WL 1900953, at \*4 (W.D. Pa. May 7, 2013), *aff’d*, 567 F. App’x 131 (3d Cir. 2014).

admonished a lawyer for relying on a Wisconsin Supreme Court precedent without also citing a later precedent that “necessarily plays a part in any discussion” of the earlier precedent.<sup>108</sup>

But, understandably, some lawyers remain on the fence in the absence of clearer ethics rules, especially since courts have had “inconsistent response[s]” to failures to cite potentially controlling case law.<sup>109</sup> To be sure, merely raising a doctrinal misstatement does not mean that a court will follow it, and it is usually considered a good thing for courts to have more information, not less, when deciding issues.<sup>110</sup> Raising negative authority can also be strategic when a strong rebuttal exists.<sup>111</sup> But raising an unfavorable doctrinal misstatement poses a risk to one’s client: namely, a risk that the court will unwisely follow the doctrinal misstatement rather than what the law truly should be—an outcome that, even if overturned on appeal, could be extremely costly.

Moreover, bringing appellate doctrinal misstatements to a court’s attention might often fail to solve the fundamental problem created by such misstatements. Even if ethics rules unambiguously imposed an absolute duty on lawyers to bring potential appellate doctrinal misstatements to a court’s attention, in effect, those rules would merely remove the difficult question—whether to regard the doctrinal misstatement as true “law”—from lawyers’ hands and place it entirely in judges’ hands. That movement could be beneficial, at least insofar as judges are impartial evaluators of the question. But it would not make the question any easier. And the results of the empirical study in Part IV suggest that a great many judges, most of whom were formerly practicing lawyers, are likely themselves unsure of how to answer the question.

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While I myself could attempt to balance all the above considerations and propose a specific normative vision for how to respond to indeliberate appellate doctrinal mistakes, far more important is how lawyers as a professional group tend to balance them in reality. Part IV presents an initial attempt to begin answering that question through empirical study.

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108. *City of Shullsburg v. Monahan*, 582 N.W.2d 505 (Ct. App. Wis. 1998).

109. DeLaurentis, *supra* note 99, at 17 (discussing cases in which courts tolerated failure to cite potentially controlling case law).

110. See, e.g., Deering, *supra* note 101, at 89–90 (“[T]he duty to disclose adverse authority seems to be a reasonable means of ensuring that, at a minimum, an unjust decision is not handed down by a misinformed court.”).

111. See Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 383 (2008) (“[T]he general rule favoring disclosure applies where the advocate has a competent and effective refutation for the information; when such a refutation is not available or is weak, the advocate may be better off not disclosing.”).

#### IV. EMPIRICAL STUDY OF LAWYER RESPONSES TO INDELIBERATE APPELLATE DOCTRINAL MISSTATEMENTS

Does the legal profession have a norm for how to treat the kinds of indeliberate appellate doctrinal misstatements discussed in Part II? Conventional wisdom might be that, absent the ability to distinguish a case or characterize a statement as dicta, the statements of appellate courts are strictly binding within their jurisdictions—and, at a minimum, that lawyers must bring all relevant binding appellate court doctrine to the attention of the judges deciding their case. Based on my study's results, however, the true picture is more complicated.

To arrive at that answer, I conducted a nationwide study of practicing lawyers' responses to fictional scenarios that were closely modeled on the real cases described in Part II. As detailed below, a very large percentage of lawyers, when asked to inhabit a neutral role, felt that lower courts should not follow such doctrinal misstatements. A smaller but still substantial proportion of lawyers, when inhabiting the role of an advocate, felt no ethical obligation to raise an appellate court's patently mistaken statements of doctrine. More broadly, the results revealed little consensus on these issues; on many portions of the study, the lawyers' responses did not differ significantly from a 50/50 split. Despite all the norms that are supposedly instilled in the legal profession, lawyers often show no significant tendency one way or the other on these questions—either to follow appellate doctrinal misstatements or to disregard them. That result is consequential not merely because lawyers' presentation of issues to their clients and to courts shapes outcomes but also because nearly all American judges were formerly practicing lawyers themselves.

##### A. THE STUDY POPULATION

After the University of Connecticut's institutional review board approved the study, a total of 106 lawyer respondents were recruited from clinical and adjunct faculties at American law schools.<sup>112</sup> A substantial

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112. A total of 6,000 recruitment emails were sent to addresses from 86 schools: University of Akron School of Law, Albany Law School, American University Washington College of Law, University of Baltimore School of Law, Boston College Law School, Boston University School of Law, Brooklyn Law School, University at Buffalo School of Law, Capital University Law School, Cardozo School of Law, Columbia Law School, University of Connecticut School of Law, Cornell Law School, CUNY School of Law, DePaul University College of Law, University of Detroit Mercy School of Law, University of the District of Columbia David A. Clarke School of Law, Duke University School of Law, Duquesne University School of Law, Emory University School of Law, Fordham University School of Law, Antonin Scalia Law School, George Washington University Law School, Georgia State University College of Law, Harvard Law School, University of Hawai'i at Mānoa William S. Richardson School of Law, Maurice A. Deane School of Law at Hofstra University, Howard University School of Law, University of Illinois Chicago School of Law, University of Illinois College of Law, University of Iowa College of Law, University of Kansas School of Law, Loyola University Chicago School of Law, University of Maine School of Law, University of Maryland Francis King Carey School of Law, Massachusetts School of Law, University of Miami School of Law, University of Michigan Law School,



portion of recruitment emails were returned as unreceived due to either spam filters or outdated addresses. Study responses were logged between May 11, 2022, and August 16, 2022.

Most respondents (86%) had practiced law for more than ten years, while 7% had practiced for five to ten years and 7% had practiced for one to five years. A plurality of respondents (49%) described their practice as focused on civil litigation; 12% focused on criminal litigation; 18% focused on transactions; 6% focused on regulatory or compliance practice; 4% focused on intellectual property; 6% were generalists or had multiple specialties; and 5% focused on other specialties not listed. A plurality of respondents (33%) worked at small or midsize private firms; 25% worked at large private firms; 21% worked in public interest; 11% worked in government; 9% worked in-house; and 1% worked in other settings not listed. The most common jurisdictions in which respondents predominantly practiced law were New York (18%), Pennsylvania (13%), Connecticut (12%), Massachusetts (9%), North Carolina (6%), Illinois (5%), and the District of Columbia (4%); seventeen additional jurisdictions had at least one respondent.

In line with national statistics for lawyers,<sup>113</sup> 59% of respondents identified as male, while 41% identified as female or another gender. Like national lawyer demographics,<sup>114</sup> 80% of respondents identified as White, while 9% identified as Asian, 3% identified as Black, 3% identified as Hispanic or Latinx, and 5% identified as belonging to another group.

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Michigan State University College of Law, University of Minnesota Law School, Mitchell Hamline School of Law, New England Law Boston, University of New Hampshire Franklin Pierce School of Law, University of North Carolina School of Law, Northeastern University School of Law, Nova Southeastern University Shepard Broad College of Law, NYU School of Law, Ohio State University Moritz College of Law, University of Oklahoma College of Law, University of Oregon School of Law, Elisabeth Haub School of Law at Pace University, University of Pennsylvania Carey Law School, Penn State Dickinson Law, Penn State Law, University of Pittsburgh School of Law, Quinnipiac University School of Law, Roger Williams University School of Law, Rutgers Law School, Seattle University School of Law, Seton Hall University School of Law, St. John's University School of Law, University of St. Thomas School of Law, St. Thomas University College of Law, Stanford Law School, Syracuse University College of Law, University of Tennessee College of Law, Touro Law Center, University of Washington School of Law, University of California Berkeley School of Law, University of California Hastings College of the Law, UCLA School of Law, USC Gould School of Law, University of Utah S.J. Quinney College of Law, University of Virginia School of Law, Vanderbilt University Law School, Villanova University Charles Widger School of Law, Wake Forest University School of Law, Washington and Lee University School of Law, Wayne State University Law School, Western New England University School of Law, Widener University Delaware Law School, Willamette University College of Law, William & Mary Law School, University of Wisconsin Law School, Yale Law School.

113. *ABA Profile of the Legal Profession*, ABA 12 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [<https://perma.cc/LY7M-5NR3>] (“[T]he percentage of female lawyers . . . grew to 37% in 2021.”).

114. *Id.* at 13 (“In 2021, 85% of all lawyers were non-Hispanic [W]hites . . .”).

## B. THE STUDY PROTOCOL

Lawyers who responded to the recruitment emails were assured that their responses would be logged anonymously to ensure that respondents felt no pressure to provide more socially acceptable responses. They were then directed to a disclosure page and asked to affirm that they had practiced law for at least one year. At that point, they completed the demographic questionnaire and proceeded to the study questions.

The study comprised six question sets (labeled with Roman numerals) presented in a randomized order.<sup>115</sup> Each set began with a short description of situations based on real cases<sup>116</sup> and involved dilemmas described in this Article: namely, whether a trial court should follow an appellate opinion that contradicted—seemingly mistakenly—itsself or a prior binding authority (statute or precedent). Some of the question sets presented multiple variations on the question, depending on the degree to which the opinion and surrounding circumstances appeared to reflect the authors' awareness of the contradiction: different versions modified whether the parties raised the earlier precedent, whether the authors of the later opinion cited the earlier precedent, and whether they discussed or quoted the earlier precedent. All question sets also ended with an ethics question, asking not whether the trial court should follow the later, contradictory opinion, but whether the lawyer was ethically obligated to report the opinion even though it would be unfavorable to their client and unlikely to come to the court's attention otherwise. The prompts for all the question sets are reproduced in the Appendix.<sup>117</sup>

Each question required a yes-or-no answer but presented a narrative box in which respondents could explain or qualify their answer. For the non-ethics question, although the wording differed from context to context, the basic choice was the same: should a trial court follow the later holding—thereby reaching a particular outcome in the case before the trial court—or should the trial court instead effectively ignore the later holding and reach a different outcome, given that the later holding appears to be an indeliberate misstatement (rather than a deliberate overruling/departure)? For the ethics questions, respondents assumed the role of advocate, and the choice was always identical: report the unfavorable aspect of the appellate court's conflicting holdings, or don't report it, always under the assumption that the unfavorable aspect would not other-

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115. To keep the study a manageable length, each respondent was randomized to receive four of the six question sets.

116. Specifically, Question Set I was based on *United States v. Dunn*, 480 U.S. 294, 299–305 (1987); Question Set II on *Kost v. Kozakiewicz*, 1 F.3d 176, 187–88, n.10 (3d Cir. 1993), and related precedents; Question Set III on *Abdul-Akbar v. Watson*, 4 F.3d 195, 202 (3d Cir. 1993) and *Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989); Question Set IV on *Murphy v. Campbell*, 964 S.W.2d 265, 272–73 (Tex. 1997) and *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157–58 (Tex. 1991); Question Set V on *Bauer v. Lynch*, 812 F.3d 340, 350–51 (4th Cir. 2016) and 42 U.S.C. § 2000e–2(a), (l); and Question Set VI on *Gordy v. Burns*, 294 F.3d 722, 725–26 (5th Cir. 2002) and *Price v. Roark*, 256 F.3d 364, 370 (5th Cir. 2001).

117. *Infra* Part VII.

wise come to light—thus, that there could be a strategic reason to conceal it.

Respondents were asked to make several assumptions to isolate the dilemma of interest. First, the cases occurred in a fictional jurisdiction, so respondents would not use background knowledge to resolve the contradiction. Second, respondents were told that, in this fictional jurisdiction, the appellate court generally follows the latter of two precedents that conflict. Third, respondents were told that the relevant portions of the appellate decisions were influential to the court's decision and therefore holdings, rather than dicta that could be disregarded. Fourth, all the scenarios presented the trial court with questions that could be resolved as a matter of law based solely on the precedents due to stipulations or the absence of genuine factual disputes. And fifth, respondents were told that no additional case law in the jurisdiction had addressed the same issues.

### C. RESULTS

#### 1. *A 50/50 Split on How to Handle an Intra-Opinion Contradiction*

Respondents were almost evenly split on which aspect of an internally self-contradictory opinion to follow regarding the reasonableness of a police search (Question Set I). Slightly more than half (53%; 95%-confidence interval (CI) of 41%–65%) would follow the portion of the opinion that articulated a legal standard: “The standard under the Fictionland Constitution for the reasonableness of a police search is purely objective and does not take account of government officials’ knowledge or intentions.” In contrast, almost half of respondents (47%; CI 35%–59%) would follow a later portion of the same opinion that seemed to contradict the stated standard by deeming a particular police search unreasonable under the Fictionland Constitution due, in substantial part, to a finding that police officers conducted the search in bad faith.

In one sense, that result is unsurprising. Because both portions of legal reasoning came from the same opinion and respondents were instructed not to treat either portion as dicta, there was no simple tiebreaker principle on which respondents could rely. In that way, this first question set fundamentally differed from the remaining question sets, which involved two separate authorities arising at different points in time and the general rule of following the latter of two authorities.

On the other hand, it is surprising to have seen virtually no tendency to favor one response. Despite the instruction regarding dicta, one might have expected a substantial number of respondents to resist treating the naked statement of the legal standard—i.e., that the standard is “purely objective”—as a true holding of the case. Under one view, true holdings can arise only from the way a court analyzes the specific facts before it.<sup>118</sup>

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118. See, e.g., Michaels, *supra* note 80, at 667 (“[A]s the statements become more narrowly tailored to the facts before the court . . . they approach the status of binding holding.”).

One respondent, for instance, explained their response by saying that “the actual decision is what’s controlling . . . regardless of what the opinion says about states of mind generally.” Similarly, another respondent said that “the actual application of the standard . . . is the part of the [a]ppellate [c]ourt decision that is most clearly the holding.” Another said that, although the opinion was “unclear,” the court ultimately “found that the officer’s bad faith led to a search being unreasonable.” And in the words of one respondent, “[a]ppellate courts are so sloppy in their decisions that it’s tough to know exactly what is meant by” the legal standard articulated in the earlier portion of the opinion.

It seems, however, that a countervailing group of respondents felt exactly the opposite: namely, that the naked statement of a legal standard was more controlling than the way the court applied the standard. For example, one respondent explained that the articulated standard still controls because the appellate court “is presumed to have been applying its own test” (even though it actually applied something different). Another respondent deemed it “irrelevant” that the appellate court had “misapplied the standard,” and another said similarly that the “fact that the [a]ppellate [c]ourt then failed to apply th[e] standard in its own case is not a good reason for the trial court to do the same.” One respondent even characterized as “dicta” the latter portion of the opinion that analyzed the police officers’ bad faith.

Two other groups of respondents tried not to pick sides, in a few ways. First, eight respondents, regardless of their answers to the yes-or-no question, explained in their narratives that the entirety of the opinion should, in effect, be disregarded because of its internal self-contradiction. Second, another nine respondents made valiant efforts to reconcile the two portions of the opinion by arguing, for example, that “bad faith” could, in theory, have nothing to do with the officers’ state of mind.

To some extent, it is familiar and untroubling that lawyers would take a diversity of approaches to the notoriously slippery question of deciding what portions of an appellate opinion are “controlling” or “holdings.” To be sure, the law is often flexible and open to interpretation. But if that flexibility results from sloppiness in a binding judicial opinion, it would behoove the legal profession to have agreed-upon norms for resolving the conflict,<sup>119</sup> until a later appellate opinion can clean up the mess definitively. The results of Question Set I show that no such agreement exists at present.

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119. *See infra* Part V.

2. *On Inter-Opinion and Statute-Opinion Contradictions, Some Tendencies to Follow or Not Follow Later, Contradictory Opinions—but Mostly a Surprising Lack of Such Tendencies*

Notably, respondents did not achieve a strong consensus on the questions that asked them to choose whether to follow a later opinion that contradicted earlier authority. The percentage of lawyer respondents who would follow the later, contradictory opinion varied from scenario to scenario, between 25% and 79%. Half of the non-ethics questions (five out of ten) showed no statistically significant difference between the results and a 50/50 tossup—i.e., no evidence that respondents tended toward one answer over the other. That surprising result was true of:

- The question about whether to dismiss a pretrial detainee's constitutional claims based on an opinion that contradicts a precedent it cites but does not quote or discuss (II.c)—52% followed the later, contradictory opinion (CI 40%–64%);
- The question about whether to grant summary judgment to the defendant in a discrimination claim based on an opinion that contradicts a statute it cites but does not quote or discuss (V.c)—39% followed the later, contradictory opinion (CI 34%–62%);
- The question about whether to grant summary judgment to the defendant in a discrimination claim based on an opinion that contradicts a statute it never cites (V.a)—39% followed the later, contradictory opinion (CI 26%–52%);
- The question about whether to grant summary judgment to the plaintiff in a constitutional tort claim based on an opinion that overstates the holding of a precedent it cites but does not quote or discuss (VI.a)—61% followed the later, contradictory opinion (CI 49%–73%); and
- The question about whether to grant summary judgment to the plaintiff in a constitutional tort claim based on an opinion that overstates the holding of a precedent it quotes (VI.b)—60% followed the later, contradictory opinion (CI 48%–71%).

It is certainly possible that a larger sample size of lawyer respondents would cause the proportions to differ in a statistically significant way from a 50/50 split. Failing to reject the null hypothesis based on the current sample size is not the same as proving the null hypothesis. But the existing confidence intervals show that it is highly unlikely that respondents would ever reach a consensus—the most extreme confidence interval tops out at 73%.

In contrast, respondents did show a statistically significant tendency to follow the later, contradictory opinion in three scenarios:

- Denying qualified immunity based on an opinion that misstates the holding from a precedent it cites but does not quote or discuss (III.a)—79% followed the later, contradictory opinion (CI 68%–89%);

- Denying qualified immunity based on an opinion that misstates the holding from a precedent it quotes (III.b)—77% followed the later, contradictory opinion (CI 67%–88%); and
- Granting summary judgment to the defendant in a legal malpractice suit based on an opinion that misstates the holding from a precedent it discusses (IV.a)—79% followed the later, contradictory opinion (CI 68%–89%).

(Again, however, a *tendency* to favor a particular response, even if statistically significant, does not make a consensus.)

Conversely, respondents showed a statistically significant tendency *not* to follow the later, contradictory opinion in three scenarios:

- Declining to dismiss a pretrial detainee’s constitutional claims based on an opinion that contradicts a precedent it never cites (II.a)—37% followed the later, contradictory opinion (CI 26%–49%);
- Declining to dismiss a pretrial detainee’s constitutional claims based on an opinion that contradicts a precedent the parties never raised (II.b)—27% followed the later, contradictory opinion (CI 16%–37%); and
- Declining to grant summary judgment to the defendant on a discrimination claim based on an opinion that contradicts a statute the parties never raised (V.b)—25% followed the later, contradictory opinion (CI 14%–36%).

### 3. *Within-Question-Set Differences That Reveal the Role of Perceived Intent in Driving Lawyers’ Decisions Whether to Follow a Later, Contradictory Opinion*

Within-question-set differences revealed an evident and commonsense pattern, not all components of which were statistically significant, among the two question sets that presented three variations on the same fact pattern (Question Sets II and V). Namely, the likelihood that respondents would follow a later, contradictory opinion declined as it became less apparent that the court that authored the opinion was aware of its inconsistency with earlier authority (such that the court could be perceived as having intended to depart from the earlier authority):

- Most likely to follow in scenario one: the later opinion cited the earlier authority it contradicted (52% for II.c and 48% for V.c);
- Less likely to follow in scenario two: the later opinion did not cite the earlier authority it contradicted (37% for II.a and 39% for V.a); and
- Even less likely to follow in scenario three: the earlier authority was not even raised by the parties in the later case (27% for II.b and 25% for V.b).

Two components of that pattern were statistically significant. Respondents were statistically significantly more likely to follow:

- An opinion that contradicts a precedent it cites but does not quote or discuss (II.c), as compared to the same opinion contradicting a prece-

dent the parties never raised (II.b)—52% in comparison to 27% ( $p = 0.003$ ); and

- An opinion that contradicts a statute it cites but does not quote or discuss (V.c). as compared to the same opinion contradicting a statute the parties never raised (V.b)—48% in comparison to 25% ( $p = 0.01$ ).

Individual respondents' explanations for their answers shed further light on that three-step pattern. In Question Set II, sixteen respondents followed the later, contradictory opinion in all circumstances. Eight additional respondents followed the later opinion in the first two scenarios but not the third. One such respondent, for example, followed the later opinion in scenario II.c because, by citing the earlier precedent, the opinion "suggest[ed] that the [court] was aware of and intentionally departing from the holding in Precedent A." The same respondent also followed the later opinion in II.a, the scenario in which the opinion did not cite the earlier precedent. However, the respondent expressed reservation because "it appears the [a]ppellate [c]ourt may have made a mistake in Precedent B." Finally, that same respondent opted *not* to follow the later opinion in II.b, the scenario in which the parties to the later opinion never even raised the earlier precedent, and the respondent stated that the later opinion was "a mistake." Ten additional respondents followed the later opinion in only the first scenario in which the later opinion cited the earlier precedent that it contradicted. One such respondent explained that in the first scenario, "[a]ppellate [c]ourt's position is now clear," and another respondent said that "citing the inconsistency suggests the [a]ppellate [c]ourt intentionally overruled the prior holding." Five other respondents offered nearly identical explanations for following the later opinion in only the first scenario.

In Question Set V, a very similar pattern occurred. Thirteen respondents followed the statute-contradicting opinion in all circumstances. Seven additional respondents followed the opinion as long as the parties to the opinion at least raised the contradictory statute. Seven other respondents followed the opinion only if the opinion itself cited the statute it contradicted. Their explanations closely resembled the explanations given for Question Set II.

#### 4. *Other Comparisons That Are Harder to Explain*

Aside from the cross-question differences that were deliberately tested, one could theorize additional reasons why certain questions elicited a significant tendency in favor of following the later, contradictory opinion while other questions elicited the opposite tendency or no significant tendency at all. Such possible reasons include disfavor toward certain legal doctrines (like qualified immunity) or discomfort with certain procedural outcomes (like summary judgment). But, bracketing the possible hidden motives for respondents' decisions, their narrative responses to the open-ended "why?" questions go some distance toward explaining the differences. Especially illuminating are comparisons between the rationale that

respondents gave for following some later contradictory opinions and the rationale that the same respondents gave for not following different such opinions.

One puzzling comparison is why respondents showed a tendency to follow the later opinion in III.a—in which an opinion misstates the holding from a precedent it cites but does not quote or discuss—but not a tendency to follow the later opinion in II.c, which is likewise an opinion that contradicts a precedent it cites but does not quote or discuss. A possible explanation is that following the later opinion in III.a would result in denying qualified immunity—i.e., allowing the case to proceed to later stages—whereas following the later opinion in II.c would result in dismissing the complaint. Indeed, that explanation is borne out in the explanations given by eight respondents who followed the later opinion in III.a but not in II.c. One respondent said that, because of the “lack of clarity” in II.c, the issue “should be resolved at summary judgment, not [motion to dismiss].” Another said of II.c that the judge should decline to dismiss the complaint and “use this opportunity to address the break between Precedents A and B.” Similarly, one respondent thought the court should “allow the detainee to argue under both” standards for II.c. One respondent opined that the judge in II.c “should err on the side of preserving the defendant’s rights until the question can be settled.” (Amusingly, one respondent said of a different question set that he “do[es]n’t believe in summary judgments.”) Those explanations reflect that even where the parties’ stipulations, together with the appellate court’s rule for resolving conflicts between decisions, would allow a court to rule summarily in theory, the inconsistency in the case law led some respondents to disfavor summary rejections of plaintiffs’ claims.

Distaste for summary adjudication, however, cannot be the sole explanation for cross-question differences, as nearly identical proportions of respondents followed the later opinion in III.b to deny qualified immunity, as did in IV.a to bar a plaintiff’s legal malpractice claim. Perhaps respondents, being lawyers, had a bias against legal malpractice claims. Or perhaps the added clarity of having the later opinion *explicitly discuss* the precedent that it contradicted—as was true of both III.b and IV.a—erased respondents’ discomfort with summary adjudication. Interestingly, the consistency in responses to III.b (in which following the later opinion would result in a conventionally “liberal” outcome) and IV.a (a conventionally “conservative” outcome) weighs against a theory that ideological orientation drove cross-question differences.

##### 5. *A Stronger Tendency, but Still No Consensus, on Questions Regarding the Ethical Duty to Raise Precedent*

As for ethics questions, in all six scenarios, respondents showed a statistically significant tendency to at least raise the unfavorable aspects of the law with the court before which they were currently litigating. That result held up even in the scenarios where respondents did *not* tend to



think that the later, contradictory opinion should be followed (I, II, V, VI). That is, even if respondents did not think an opinion should control, they still tended to feel obligated to report it.

Again, though, the ethical questions still fell short of reaching consensus. The percentage of respondents who would report the unfavorable law varied from scenario to scenario, between 68% and 85%. On the question that came closest to consensus (Question II.d), the ten respondents who broke from the pack offered a variety of explanations. Five respondents explicitly invoked the adversary model of adjudication (e.g., “The adversarial process should resolve this”; “Not my job to bring harmful case law to the court’s attention”; “Opposing counsel’s job, not mine”; “Opposing counsel have to have something to do”). Three respondents, resisting the hypothetical, felt that there must be some way to distinguish the precedents or understand them as harmless to their client’s case. Two respondents felt bound only to raise the later opinion, on the theory that it implicitly overruled the earlier precedent.

Consistent with expectation, two ethics questions—I.b and VI.c—elicited the lowest percentage of respondents (68% for I.b and 69% for VI.c) who felt a duty to report an unfavorable holding. Both percentages were statistically significantly lower than the high percentage elicited by Question II.d (85%) ( $p = 0.02$ ). For I.b, the reason for the difference is intuitive and reflected in the explanations given by the nine respondents who answered I.b differently than they answered II.d. In I.b, the conflict was between two inconsistent holdings within a single opinion, and those respondents felt that any citation to the opinion—even a citation that concealed the unfavorable holding—satisfied their ethical duty to raise controlling precedent. For VI.c, the key difference was subtler but was noted by several respondents. In the VI.c scenario, one could argue that the later opinion, despite misinterpreting the scope of the earlier precedent’s holding, nonetheless arrived at an outcome that could be reconciled with the earlier precedent’s outcome. And for that reason, one might argue that there is no ethical duty to raise both precedents in that scenario.

#### D. LIMITATIONS OF THE STUDY

Like any empirical study, this study had limitations. First, although the demographics of the respondents were approximately in line with national demographics for lawyers,<sup>120</sup> the recruitment method—emails sent to publicly listed adjunct and clinical faculty at law schools—might have yielded a sample of respondents whose approaches to legal issues are not representative of lawyers nationwide. Academically oriented lawyers, especially those inclined to respond to a recruitment email, are possibly more flexible in their views regarding precedent. But the eligibility requirement of actual practice experience, and the fact that most adjunct

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120. See *supra* notes 113–114 and accompanying text.

and clinical faculty engage actively in practice, would likely mitigate that bias.

Second, while the sample size was large enough to yield several statistically significant results and demonstrate a lack of consensus on many questions, a larger study with more statistical power would always be preferable. Given the number of recruitment obstacles—such as out-of-date email addresses, aggressive spam filters, and the significant investment of effort that prospective respondents were asked to make—recruitment for a very large study would have required significantly more time and resources.

Third, creating a study of manageable length was made challenging by the complex nature of some of the scenarios presented to respondents. It was impractical to present respondents with entire judicial opinions; simplified summaries were necessary. And for that reason, several respondents expressed frustration or uncertainty arising from the lack of fuller context for the questions they were asked to answer. It is therefore possible that some of those respondents might respond to scenarios differently in the real world when reviewing the complete text of judicial opinions that appear to contradict one another.

Finally, as referenced earlier, presenting these issues to respondents in the form of concrete scenarios means that certain factual details of each scenario might push respondents in a particular direction. Different scenarios might elicit different responses. But by using several scenarios, the study as a whole is likely more generalizable than the results from any single scenario in isolation.

## V. IMPLICATIONS AND RECOMMENDATIONS

### A. IMPLICATIONS OF THE STUDY'S KEY FINDINGS

The empirical study showed that lawyers do indeed feel the competing pull of the several normative, pragmatic, and ethical considerations described in Part III. The results—especially the lack of consensus—suggest that progress should be made towards a stronger, more consistent system of norms regarding the proper response to apparently indeliberate misstatements of doctrine in appellate opinions.

To recap, the high-level takeaways of the empirical study are fairly simple. A large proportion of lawyers feel comfortable with the idea of a trial court disregarding a doctrinal misstatement even when it comes from an appellate court with the authority to bind lower courts.<sup>121</sup> And a substantial minority of lawyers feel ethically comfortable even with making the decision themselves to disregard the misstatement by not raising it with the court.<sup>122</sup> In addition, lawyers feel most comfortable disregarding a particular doctrinal statement when circumstances most strongly suggest that the appellate court issued the statement without an awareness of the

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121. *See supra* Sections IV.C.1–2.

122. *See supra* Section IV.C.5.

contradiction it was creating, such as when the parties in the prior suit failed to raise the contradictory precedent.<sup>123</sup> Indeed, the pattern of study results discussed in Section IV.C.3, whereby respondents became less comfortable following a doctrinal misstatement as it became less probable that the court was aware that it was effecting a doctrinal change, reflects that many lawyers have internalized the notion that only *deliberate* statements in appellate case law are controlling. That instinct is understandable given the possibility that a court might engage in “stealth” or sub silentio modification of precedent.<sup>124</sup>

Perhaps above all, though, the results suggest that disregarding apparent doctrinal misstatements in appellate case law is hardly as radical or norm-defying as one might initially think. In many situations, approximately half of lawyers will in fact think that disregarding the misstatement is the proper response. But neither is there a consensus.<sup>125</sup> The near-50/50 splits on most portions of the empirical study suggest that lawyers as a group do not currently have a strong preference one way or the other—at least when it is unclear whether the appellate court was aware of the contradiction it was creating. In many situations, approximately half of lawyers will think disregarding the misstatement is the proper response.

That lack of consensus is concerning in its potential to create disparate outcomes across the legal system—that is, to create a system in which only *some* lawyers and trial judges feel liberated to depart from an appellate court’s doctrinal misstatements in litigating and adjudicating the cases before them. While nonuniformity in lawyering and judging norms is inevitable, we can certainly aspire to minimize it. That then raises the question of which type of uniformity is preferable: a system in which most lawyers always raise—and most trial judges adhere strictly to—an appellate court’s most recent statements, no matter how apparently indeliberate and mistaken they are? Or a system in which most lawyers and trial judges feel liberated to disregard an appellate court’s seemingly indeliberate misstatements?

In the absence of an existing consensus, it seems that the stricter adherents to appellate courts’ doctrinal statements, not the looser adherents, should change their viewpoint. It would be anomalous for lawyers and judges to defer unquestioningly to doctrinal misstatements at the same time as they freely debate the definition of “dicta,” embrace the possibility of overruling so-called “demonstrably erroneous” precedents, and take narrow views of what constitutes “controlling” precedent for ethical purposes. As with all such debates, any given lawyer might adopt a view that is ultimately rejected by a court, and any given trial judge might adopt a view that is ultimately rejected by a higher court. But as long as lawyers and judges are approaching these questions cautiously and in

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123. See *supra* Section IV.C.3.

124. See Friedman, *supra* note 8, at 3–4.

125. See *supra* Sections IV.C.1–2.

good faith,<sup>126</sup> they will solve more problems than they will create. And the party that should rightly prevail will prevail more often than not at the trial level without having to endure the costs and delay of appeal.

#### B. A NOTE REGARDING LEGAL EDUCATION

As the lack of consensus among lawyers who were once law students makes clear, the existence of doctrinal misstatements in appellate case law poses challenges for legal educators. I do not doubt that many, if not most, teachers of professional ethics explore the ethical quandaries inherent in ABA Model Rule 3.3(a) with their law students. In addition, many, if not most, doctrinal classes likely include substantial discussion of how appellate case law can contain puzzling intra-opinion and inter-opinion contradictions. But the results of this study show that students have not internalized a consistent message of how to approach those ethical quandaries and doctrinal contradictions presented by appellate case law.

Further, when students ultimately become practicing lawyers, they do not have the luxury of merely discussing these issues as academic puzzles; they must make decisions about how to proceed. Students will need to be able to distinguish between an appellate court's deliberate modification of an existing standard and an appellate court's unintended misstatement of an existing standard while also being able to decide whether to raise the latter scenario when litigating active cases. As Frances DeLaurentis has noted, traditional lecture classes are not an ideal venue for practicing such decision-making.<sup>127</sup>

Clinics and legal writing classes, because they force students to use specific words to apply the law to specific fact patterns, are a more natural home for that practice. But conventional models of legal writing, such as "IRAC" and "CREAC,"<sup>128</sup> can lead students on a hunt for the most favorable quotation that they can extract as a "rule" from a judicial opinion, without regard to whether the quotation is dicta, a doctrinal misstatement, or otherwise decontextualized.<sup>129</sup> That shortcoming can result not

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126. That is, in line with the norm implicit within the pattern of study responses, lawyers should not ignore indicia of deliberateness. They should look for when an apparent doctrinal misstatement is accompanied by signals—such as the presentation of issues in briefing, or citations or quotations of precedent within the opinion itself—suggesting that the authors of the opinion might well have, without explicitly saying so, made a deliberate decision to break from or modify precedent sub silentio.

127. DeLaurentis, *supra* note 99, at 5–6.

128. As readers likely know, these acronyms stand for "Issue-Rule-Application-Conclusion" and "Conclusion-Rule-Explanation-Application-Conclusion" and are commonly taught to law students as the core schema for legal analysis.

129. For a classic rebuke of that approach to quotation, see E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 V.A. L. REV. 285, 295 (1953) ("Sentences out of context rarely mean what they seem to say, and nobody in the whole world knows that better than the appellate judge. . . . [A]n unexplained quoted extract is of no use to him; at least it ought not to be. . . . Decision by epigram is one of the worst of our judicial evils. . . . [Judges] ought not to do it, and counsel ought not to help them do it."). See also Legal Writing Institute, *The Value of IRAC*, 10 THE SECOND DRAFT (Nov. 1995) (collecting essays with a variety of views on the benefits and drawbacks of "IRAC" and similar models).

only in ethically questionable writing but also in inaccurate legal advice to clients and undesirable outcomes in court. Imagine, for example, a young lawyer who relies heavily on an out-of-context quotation from an appellate case—making it the basis of either advice to a client or arguments to a court—only to later have a court dismiss the quotation as an apparent doctrinal misstatement. Or, conversely, imagine a young lawyer who feels completely defeated upon finding an unusual, unfavorable statement of a legal standard in an isolated appellate case, despite having ample cause to dismiss the statement as a doctrinal misstatement that should not bind.

That is not to say that lawyers should never quote an appellate court's statement of a standard; often, doing so is called for. Rather, the point is merely that students need to understand that judicial opinions, even when issued from appellate courts with the power to bind lower courts, have not only the potential to contain dicta—a concept that, on its own, is quite challenging for students to grasp at first—but also the potential to contain outright mistakes of articulation that cannot simply be labeled as dicta. Thus, the hunt-and-quote approach to extracting legal standards from case law will frequently be much too simplistic. As legal educators, it is our responsibility to convey that reality to students and prepare them to handle it.

## VI. CONCLUSION

To what extent do the precise words of appellate opinions bind later judges? That longstanding question in American legal discourse contains many facets and caveats. This Article has sought to shed light on one specific facet: namely, words that purport to be and ordinarily would be doctrinal holdings but that, when considered alongside prior statements of doctrine, suggest the court indeliberately misstated the law. Boiled down to its essence, this Article's message is that, while a surprisingly large proportion of lawyers are currently unsure how to respond to such misstatements, the way forward is actually quite uncontroversial once the broader context is appreciated. Lawyers, judges, and legal educators alike should not shy away from confronting the reality that even appellate courts sometimes misstate the law—and not only in the form of dicta.

## VII. APPENDIX

### *Question Set I*

*Part 1 of Precedent A* (decided by Appellate Court in 2021), citing no earlier precedent, states that “the standard under the Fictionland Constitution for the reasonableness of a police search is purely objective and does not take account of government officials’ knowledge or intentions.” Later, in *Part 2* of the same opinion, Appellate Court deems a police search unreasonable under the Fictionland Constitution due, in substantial part, to a finding that police officers acted in bad faith in conducting the search. Neither part of the opinion was dicta—that is, the question of

the search's reasonableness was clearly pivotal to the outcome of the case. Precedent A is the only recent opinion on this issue in this fictional jurisdiction.

In an ongoing case in Trial Court, which is bound to follow Appellate Court's precedent, a plaintiff is suing a police officer for an allegedly unreasonable search prohibited by the Fictionland Constitution. The facts are entirely undisputed and amenable to summary judgment, with one exception: a genuine dispute still exists regarding the officer's state of mind during the search. The police officer has moved for summary judgment.

I.a. Should Trial Court deny summary judgment on the ground that the officer's disputed state of mind is material to the plaintiff's claim?

- Yes, deny summary judgment on that ground
- No, that is not a proper ground on which to deny summary judgment in this scenario

*Why?*

I.b. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring both *Parts 1 and 2* of *Precedent A* to Trial Court's attention, even if (a) one of those parts were very harmful to your client's case and (b) you were confident that the harmful part wouldn't come to Trial Court's attention unless you raise it?

- Yes
- No

*Why?*

### ***Question Set II***

*Precedent A* (decided by Appellate Court in 2020) states that “the Fourteenth Amendment's protections, not the Eighth Amendment's, apply to pretrial detainees, i.e., those who have not yet been convicted of a crime.” The statement was not dicta—that is, it clearly appears to have influenced Appellate Court's resolution of the case.

*Precedent B* (decided by the same Appellate Court in 2021), without explaining its reasoning and without citing *Precedent A*, applies the Eighth Amendment's “deliberate indifference” standard to a pretrial detainee.

Under Appellate Court's rules, a later precedent is generally controlling when in conflict with an earlier precedent. Precedents A and B are the only recent opinions on this issue in this fictional jurisdiction.

In an ongoing case in Trial Court, which is bound to follow Appellate Court's precedent, a pretrial detainee concedes that his constitutional claims against the government would fail if a “deliberate indifference” standard were applied. The government has moved to dismiss the pretrial detainee's claims because of that concession.

II.a. Should the judge in Trial Court—based solely on that concession and the authority of *Precedent B*—dismiss the pretrial detainee’s claims?

- Yes, should dismiss the pretrial detainee’s claims
- No, shouldn’t dismiss the pretrial detainee’s claims

*Why?*

II.b. What would your answer be if your review of *Precedent B*’s procedural history reveals that the parties in *Precedent B* never brought *Precedent A* to Appellate Court’s attention?

- Yes, should dismiss the pretrial detainee’s claims
- No, shouldn’t dismiss the pretrial detainee’s claims

*Why?*

II.c. What would your answer be if *Precedent B*, while still not explaining its reasoning for departing from *Precedent A*’s statement, had cited *Precedent A*?

- Yes, should dismiss the pretrial detainee’s claims
- No, shouldn’t dismiss the pretrial detainee’s claims

*Why?*

II.d. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring all the above precedents to Trial Court’s attention, even if (a) one of the precedents were very harmful to your client’s case and (b) you were confident that the harmful precedent wouldn’t come to Trial Court’s attention unless you raise it?

- Yes
- No

*Why?*

### ***Question Set III***

*Precedent A* (decided by Appellate Court in 2020) states that government official defendants are “entitled to qualified immunity if reasonable officials in the defendants’ position at the relevant time could have believed that their conduct was lawful.” In other words, qualified immunity is granted as long as *any* reasonable official could find the conduct lawful. The statement was not dicta—that is, it clearly appears to have influenced Appellate Court’s resolution of the case.

*Precedent B* (decided by the same Appellate Court in 2021) states, citing solely *Precedent A* without quoting it verbatim, that government official defendants are “*not* entitled to qualified immunity if reasonable officials in the defendants’ position at the relevant time could have believed that their conduct was *unlawful*.” (underlining added by me) In effect, the new articulation of the standard would mean that qualified immunity is granted only if *all* reasonable officials would find the conduct lawful. The statement was not dicta—that is, it clearly appears to have influenced Appellate Court’s resolution of the case—but nowhere in *Pre-*

*cedent B* did Appellate Court state that it was modifying the qualified immunity standard.

Under Appellate Court's rules, a later precedent is generally controlling when in conflict with an earlier precedent. Precedents A and B are the only recent opinions on this issue in this fictional jurisdiction.

In an ongoing case in Trial Court, which is bound to follow Appellate Court's precedent, the parties stipulate that reasonable officials in Mr. Government Defendant's position at the time of Mr. Government Defendant's conduct could differ in their beliefs as to whether Mr. Government Defendant's conduct was lawful. Mr. Government Defendant has asserted a qualified immunity defense.

III.a. Should the judge in Trial Court grant or deny qualified immunity to Mr. Government Defendant?

- Grant qualified immunity
- Deny qualified immunity

Why?

III.b. What would you answer be if *Precedent B* had quoted the standard from *Precedent A* verbatim before going on to articulate the standard differently?

- Grant qualified immunity
- Deny qualified immunity

Why?

III.c. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring all the above precedents to Trial Court's attention, even if (a) one of the precedents were very harmful to your client's case and (b) you were confident that the harmful precedent wouldn't come to Trial Court's attention unless you raise it?

- Yes
- No

Why?

#### ***Question Set IV***

*Precedent A* (decided by Appellate Court in 2020) states that "the statute of limitations to sue one's lawyer for malpractice for deficient performance in a lawsuit is tolled until said lawsuit is resolved and all appeals are exhausted, given the potential for plaintiffs to be forced to take inconsistent positions as between their malpractice suit and the ongoing underlying suit." Later in the opinion, Appellate Court explicitly rejects the argument that tolling shouldn't apply if the defendant could show this particular plaintiff had the means to avoid taking inconsistent positions. That explicit rejection was not dicta—that is, it clearly appears to have influenced Appellate Court's resolution of the case.

*Precedent B* (decided by the same Appellate Court in 2021) declines to apply *Precedent A*'s tolling rule to a plaintiff pursuing malpractice claims



against a former lawyer. It finds that the two-year statute of limitations began to run as soon as the lawyer's deficient performance was rendered in 2014, not when the underlying suit in which the lawyer rendered deficient performance was finally resolved in 2017. Without calling *Precedent A*'s reasoning into question, *Precedent B* explains that "*Precedent A*'s holding was limited to situations in which the client could not pursue malpractice claims without being forced to take inconsistent positions as between their malpractice suit and the ongoing underlying suit," and concludes that there is no genuine dispute that the plaintiff in *Precedent B* could have avoided taking inconsistent positions.

Under Appellate Court's rules, a later precedent is generally controlling when in conflict with an earlier precedent. Precedents A and B are the only recent opinions on this issue in this fictional jurisdiction.

In an ongoing case in Trial Court, which is bound to follow Appellate Court's precedent, a plaintiff pursuing malpractice claims against a former lawyer is in the same position as the *Precedent B* plaintiff: namely, the plaintiff's claims are time-barred unless *Precedent A*'s tolling rule applies, and all parties agree that the plaintiff would have been able to avoid taking inconsistent positions even if the plaintiff had brought a malpractice suit while the plaintiff's underlying suit was still pending. The defendant has moved for summary judgment based on the time bar.

IV.a. Should the judge in Trial Court grant the defendant's summary judgment motion?

- Yes, grant summary judgment to the defendant
  - No, deny summary judgment
- Why?

IV.b. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring all the above precedents to Trial Court's attention, even if (a) one of the precedents were very harmful to your client's case and (b) you were confident that the harmful precedent wouldn't come to Trial Court's attention unless you raise it?

- Yes
  - No
- Why?

### *Question Set V*

*Statute A* (enacted in 2018) broadly prohibits employers from discriminating on the basis of protected classes in hiring and promotion decisions. A more specific sub-provision within the same statute, *Provision A1*, explicitly prohibits employers from "adjusting the scores of, using different cutoff scores for, or otherwise altering the results of, employment-related tests on the basis of sex." *Statute A* and *Provision A1* are both undisputedly constitutional.

*Precedent A* (decided by Appellate Court in 2021), without citing *Provision A1*, concludes that an employer did not violate *Statute A* by using a physical fitness “employment-related test” that had different, more demanding cutoffs for scores of male-identifying job applicants than for scores of female-identifying job applicants. *Precedent A* is the only recent opinion on this issue in this fictional jurisdiction.

In an ongoing case in Trial Court, which is bound to follow Appellate Court’s precedent, a plaintiff argues that an “employment-related test” violates *Provision A1* because it uses different, more demanding physical fitness score cutoffs for male-identifying job applicants than for female-identifying applicants. No facts are disputed, and the defendant has moved for summary judgment on the theory that *Precedent A* permits such differential cutoffs.

V.a. Should the judge in Trial Court grant the defendant’s summary judgment motion?

- Yes, grant summary judgment to the defendant
  - No, deny summary judgment
- Why?

V.b. What would your answer be if your review of *Precedent A*’s procedural history reveals that the parties in *Precedent A* never raised the issue of *Provision A1*?

- Yes, grant summary judgment to the defendant
  - No, deny summary judgment
- Why?

V.c. What would your answer be if *Precedent A* had cited *Provision A1* but without explaining why *Provision A1* did not prohibit cutoffs that differ based on applicants’ sex?

- Yes, grant summary judgment to the defendant
  - No, deny summary judgment
- Why?

V.d. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring *Precedent A* to Trial Court’s attention, even if (a) it were very harmful to your client’s case and (b) you were confident that it wouldn’t come to Trial Court’s attention unless you raise it?

- Yes
  - No
- Why?

V.e. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring *Provision A1* to Trial Court’s attention, even if (a) it were very harmful to your client’s case and (b) you

were confident that it wouldn't come to Trial Court's attention unless you raise it?

- Yes
  - No
- Why?

### ***Question Set VI***

*Precedent A* (decided by Appellate Court in 2020) states, "A wide range of federal causes of action, such as the Federal Tort Claims Act, have elements that are coextensive with the elements of the equivalent tort under the law of the state in which the federal court sits. But federal constitutional torts, unlike certain federal statutory torts, do not necessarily import the exact same elements as equivalent state torts." The statement was not dicta—that is, it clearly appears to have influenced Appellate Court's resolution of the case.

*Precedent B* (decided by the same Appellate Court in 2021) states, citing solely the above portion of *Precedent A* without quoting it verbatim, that "precedent requires us to treat a constitutional malicious prosecution claim under the Fourth Amendment as coextensive with a malicious prosecution claim under state law." The statement was not dicta—that is, it clearly appears to have influenced Appellate Court's resolution of the case.

Under Appellate Court's rules, a later precedent is generally controlling when in conflict with an earlier precedent. Precedents A and B are the only recent opinions on this issue in this fictional jurisdiction.

In an ongoing case in Trial Court, which is bound to follow Appellate Court's precedent, the plaintiff has moved for summary judgment on a constitutional tort that is equivalent to the state tort of malicious prosecution. The parties have stipulated that the plaintiff has met the elements of a malicious prosecution claim under state law.

VI.a. Should the judge in Trial Court—based solely on that stipulation and the authority of *Precedent B*—grant summary judgment for the plaintiff on the constitutional tort?

- Yes, grant summary judgment for the plaintiff
  - No, deny summary judgment
- Why?

VI.b. What would your answer be if *Precedent B*, while still not explaining more fully the reasoning for its holding, had quoted the passage from *Precedent A* verbatim before going on to articulate its own holding?

- Yes, grant summary judgment for the plaintiff
  - No, deny summary judgment
- Why?

VI.c. Regardless of your answers to the previous questions, would you feel ethically bound as a lawyer to bring all the above precedents to Trial

Court's attention, even if (a) one of the precedents were very harmful to your client's case and (b) you were confident that the harmful precedent wouldn't come to Trial Court's attention unless you raise it?

- Yes
  - No
- Why?*

