WHEN REASONABLE MINDS DIFFER

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In this Article Professor Meyer examines legal indeterminacy in the contexts of Rule 11 and qualified immunity doctrine, two areas in which the law acknowledges its own indeterminacy. Drawing from both legal theory and legal practice, she finds that legal indeterminacy serves important purposes as a kind of legal practice, rather than as a description of legal practice. Indeterminacy preserves the legitimacy of the law, Professor Meyer concludes, because law is a practice in time. In the Rule 11 context, she argues, legal indeterminacy protects lawyers who make losing arguments about real harms and important values in order to preserve those arguments for possible future law. In the qualified immunity context recognizing legal indeterminacy protects government officials who, because of gaps or ambiguities in the law, have not had fair notice that their past actions violate the law. The different temporal focuses explain why indeterminacy looks somewhat different in the two contexts. Because Rule 11 protects the future of the law—the possibilities that have not yet been clarified—the doctrine tends to take a "radical" approach to indeterminacy. Since qualified immunity doctrine is concerned with the past aspect of law, it tends to be more positivist: law is what judges have said it is, and law is indeterminate where there are "legal gaps" and no court has articulated a rule. In some cases, Professor Meyer contends, such a positivist approach causes courts to lose sight of the fact that some law is not written because it has never needed to be but is taken for granted as an element of obvious, universal human norms.

INTRODUCTION

We fear judicial power. Judges, with little democratic control, decide the fate and fortune of citizens who come before them. So, for the longest time, legal scholarship has worked to justify the exercise of that power by seeking to understand and strengthen the constraining force of the law. Law, not judges, decides cases, jurisprudence declares.

To ensure that we have a rule of law, the traditional argument goes, law must be both knowable and known. There can be "no crime without law," and "ignorance of the law is no excuse."[1] For if we are

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[1] On the history and general application of these maxims, see Livingston Hall & Selig J. Seligman, Mistake of Law and *Mens Rea*, 8 U. Chi. L. Rev. 641, 643-46 (1941); Edwin R. Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75, 77-81 (1908); Paul

held responsible for following law that we cannot know, the Enlightenment ideal of self-government gives way to despotism. Legal indeterminacy leads to judicial (and executive) tyranny and the unpredictability of ex post facto laws, just as Cesare Beccaria[2] feared and Lewis Carroll's Queen of Hearts decreed.[3] If legal rules do not determine judicial decisions, then judges, police officers, and prison guards exert power over our liberty and property on the basis of contested political views or even whim.[4]

At the same time, we no longer believe the application of law is a matter of mechanical deduction from steady rules. What legal theorists now acknowledge with uneasiness, first-year law students with terror and confusion, and lawyers with prosaic calm is that there may not be a right answer to every legal question. Two reasonable minds, both analyzing the same set of legal materials, may differ as to their proper application.

The theoretical dangers of legal indeterminacy, and the practical reality of it, have spawned a prodigious literature in legal theory. The participants agree that radical uncertainty desperately undermines the legitimacy of law and legal institutions. The question is whether law is, indeed, so radically indeterminate.[5] On the one hand are those the-

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Matthews, Ignorance of the Law Is No Excuse?, 3 Legal Stud. 174, 174-75 (1983); Paul K. Ryu & Helen Silving, *Error Juris*: A Comparative Study, 24 U. Chi. L. Rev. 421, 423-39 (1957); Bruce R. Grace, Note, Ignorance of the Law as an Excuse, 86 Colum. L. Rev. 1392, 1393-96 (1986).

2 See Cesare Beccaria, On Crimes and Punishments 14-17 (Henry Paolucci trans., 1963).

3 See Lewis Carroll, Alice's Adventures in Wonderland 128 (Selwyn H. Goodacre ed., 1982) ("'Let the jury consider their verdict,' the King said, for about the twentieth time that day. 'No, no!' said the Queen. 'Sentence first—verdict afterwards.'"). The unpredictability of legal decisions is referred to as "causal indeterminacy." Jules L. Coleman & Brian Leiter, Determinacy, Objectivity, and Authority, 142 U. Pa. L. Rev. 549, 581 (1993).

4 It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted).

5 Ken Kress has distinguished between epistemological indeterminacy and metaphysical indeterminacy. The first assumes only that we cannot know the right answer; the latter assumes there is no right answer. According to Kress, only metaphysical indeterminacy undermines the justification of law; epistemological indeterminacy may undermine only its predictability. See Ken Kress, A Preface to Epistemological Indeterminacy, 85 Nw. U. L.

orists who assert that it is—that there is never an easy case because a valid legal argument can be constructed on either side of even the "clearest" application of law to facts.[6] On the other hand are those theorists who counter that the law is indeterminate only in a few hard cases, where there are legal gaps.[7]

Rev. 134, 138 (1990); cf. George H. Smith, Of the Certainty of the Law and the Uncertainty of Judicial Decisions, 23 Am. L. Rev. 699, 709-11 (1889) (arguing from natural law perspective that indeterminacy results from defects in judicial system rather than nature of law itself). This Article, which treats only how judicial decisions deal with indeterminacy, obviously does not consider metaphysical or ontological questions. Indeed, such questions are beyond our ken. See Robert Justin Lipkin, Indeterminacy, Justification and Truth in Constitutional Theory, 60 Fordham L. Rev. 595, 598 (1992) (arguing that epistemic indeterminacy is more relevant to law than metaphysical indeterminacy because it has stronger link to practical reasoning).

[6] See, e.g., Anthony D'Amato, Aspects of Deconstruction: The "Easy Case" of the Under-Aged President, 84 Nw. U. L. Rev. 250, 250-56 (1989) [hereinafter D'Amato, The "Easy Case"] (demonstrating uncertainty even in easy cases); Anthony D'Amato, Aspects of Deconstruction: The Failure of the Word "Bird," 84 Nw. U. L. Rev. 536, 540-41 (1990) [hereinafter D'Amato, Failure of the Word "Bird"] (same); Anthony D'Amato, Can Any Legal Theory Constrain Any Judicial Decision?, 43 U. Miami L. Rev. 513, 514 (1989) [hereinafter D'Amato, Any Legal Theory] (arguing "legal theory is inherently incapable of identifying which party should win in any given case"); Robert W. Gordon, Lawyers, Scholars, and the "Middle Ground," 91 Mich. L. Rev. 2075, 2090-93 (1993) (defending "critical method" of acknowledging indeterminacy in law); Allan C. Hutchinson, Democracy and Determinacy: An Essay on Legal Interpretation, 43 U. Miami L. Rev. 541, 543 (1989) (arguing law is "irredeemably indeterminate"); Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 21 (1984) ("legal doctrine may be sufficiently indeterminate that it could justify any outcome of a legal dispute," though social and political factors still constrain outcomes); Charles M. Yablon, The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation, 6 Cardozo L. Rev. 917, 920 (1985) (defending Critical Legal Studies view that legal doctrine can never compel results in concrete cases); see also James Boyle, The Anatomy of a Torts Class, 34 Am. U. L. Rev. 1003, 1004 (1985) ("[N]ot only did abstract rules fail to decide concrete cases, abstract knowledge failed to provide good teaching."); cf. Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373, 444 (1982) (approving of "multiplicity of readings that the law permits").

For a complete and insightful history of the indeterminacy debate from the Legal Realist period to the present, see John Hasnas, Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument, 45 Duke L.J. 84, 84-100 (1995).

[7] See, e.g., H.L.A. Hart, The Concept of Law 121-37 (1961) (discussing difference between familiar, unchallenged cases and ones that are not so axiomatic); Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life 34-37 (1991) (arguing that even "[t]he most precise of rules is potentially imprecise" in an unusual case); Coleman & Leiter, supra note 3, at 567 (explaining viewpoint that the richer the legal regime, the fewer legal gaps there will be); Kent Greenawalt, How Law Can Be Determinate, 38 UCLA L. Rev. 1, 2 (1990) (showing how often law yields determinate answers); Brian Langille, Revolution Without Foundation: The Grammar of Skepticism and Law, 33 McGill L.J. 451, 456-65 (1988) (critically outlining common indeterminacy arguments); Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 405-07 (1985) [hereinafter Schauer, Easy Cases] (arguing that specific wording of Constitution determines which case will be easy and which will be hard); Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462, 463 (1987) (argu-

At stake in the debate are central questions about the legitimacy of adjudication.[8] If law is radically indeterminate, then the reason-giving practices of lawyers and judges merely paper over the naked use or abuse of power by a group of unrepresentative elites. There are no legal justifications for the use of state coercion against losing litigants—only sharply contested political ones. The loser, at best, can predict the next exercise of power by analyzing political, sociological, or psychological causes of the decision.[9] Legal reasons neither explain nor justify legal results.[10] If, on the other hand, law is only modestly indeterminate, leeways in the law can be understood, at worst, as only small pockets of arbitrary use of law,[11] or at best, as opportunities for creative growth, public debate, and the exercise of judicial statesmanship.[12]

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ing "critical scholars have a long way to go in formulating indeterminacy as a workable proposition with real critical bite").

[8] Theorists on both sides of the debate worry less about the unpredictability of legal decisionmaking, as such. Though that may be of more concern to citizens and practitioners, and certainly has consequences for the *perceived* legitimacy of legal institutions, the theorists are willing to live with unpredictability as long as the ultimate answers can be justified by the law. As Coleman and Leiter point out, judicial decisions may be predictable using means other than legal doctrine. Hence, the debate goes primarily to the question of whether law or legal reasons determine or constrain judicial decisionmaking. See Coleman & Leiter, supra note 3, at 584-87 (arguing that lawyers and citizens may have workable "folk" theories enabling prediction of judicial outcomes, separate from doctrinal analysis).

However, notice is an essential part of the rule of law values that ground legal legitimacy. So, predictability may be a component of legal justification. See Peter H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures, 42 Duke L.J. 1, 4 (1992) (arguing that predictability about outcomes *is* major problem, generated not only by doctrinal uncertainties but also by overlapping jurisdiction of legal and regulatory institutions and proliferation of rules).

[9] See Coleman & Leiter, supra note 3, at 587-92 (politics, sociology, and psychology may allow prediction even if doctrine uncertain); Hasnas, supra note 6, at 86 (arguing that Critical Legal Studies scholars have failed to take lesson from indeterminacy debate that their focus now should be to adopt pragmatic empiricism of public choice theory in order to understand legal institutions and decisionmakers).

[10] Coleman and Leiter refer to this as the indeterminacy of reasons—legal reasons do not determine outcomes in particular cases. See Coleman & Leiter, supra note 3, at 559-64.

[11] See id. at 592 ("As long as we opt for a system of formal resolution, someone has to win and someone has to lose. . . . In the end, a decision for either the plaintiff or the defendant will be arbitrary, but it does not necessarily follow that the decision will be utterly unreasoned or unreasonable.").

[12] See Kress, supra note 5, at 147 ("[S]hould we celebrate the diversity resulting from, and the aesthetic and human elements remaining, when outcomes are not mechanically determinable from authoritative reasons, but require the exercise of discretion—in other words, good judgment?"); Christopher L. Kutz, Just Disagreement: Indeterminacy and Rationality in the Rule of Law, 103 Yale L.J. 997, 998 (1994) ("The experience of moral conflict is a sign of maturity, an awareness of the complexity and depth of the values which claim our attention."); Jeremy Waldron, Vagueness in Law and Language: Some Philo-

Theorists on both sides of this debate, however, agree that the appearance of indeterminacy undermines legal legitimacy.[13] Both sides assume that judges at least try to make law appear determinate in order to convince us that their opinions are justified. Judges cannot simply say to the litigants: "The law is unclear, so I'm ruling against the Republicans," or "The law is too complex, so I am going to split the difference."

Curiously, as the academic debate elevates to ever higher levels of abstraction, the theorists have yet to acknowledge a startling revolution—well-nigh blasphemy—among federal judges. In recent years, federal courts have repeatedly articulated new doctrines that confess the law to be breathtakingly indeterminate and uncertain. Examples abound. Rule 11 of the Federal Rules of Civil Procedure shelters attorneys from sanctions for wrong legal arguments so long as they are not so unreasonable as to be frivolous. Since 1989, under the "new rule" principles of *Teague v. Lane*,[14] federal courts on habeas corpus review may not remedy an error of a state court unless such errors are so unreasonably wrong as to contravene what was "dictated by precedent" at the time of the underlying conviction.[15] Since 1984, under the administrative deference principles of *Chevron v. NRDC*,[16] an administrative agency may enforce a rule that constitutes a permissibly "reasonable" interpretation of the source statute, even if the reviewing court believes the interpretation to be incorrect. Finally, since

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sophical Issues, 82 Cal. L. Rev. 509, 540 (1994) (noting that constitutional concepts may need to be contestable in order to spark debate and focus public attention on important issues: "We do not agree on many things in our society, but perhaps we can agree on this: that we are a better society for continuing to argue about certain issues than we would be if such arguments were artificially or stipulatively concluded.").

13 On the radical side, see, e.g., Hutchinson, supra note 6, at 543 ("[t]he indeterminacy critique is fatal to the legitimacy of the current adjudicative enterprise"); Singer, supra note 6, at 12 ("Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it."); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 824 (1983) ("[T]he rule of law requires that preexisting rules be followed. . . . If we truly allow all reasonable arguments to be made and possibly accepted, we abandon the notion of rule-following entirely, and with it we abandon the ideal of the rule of law."). On the moderate side, see, e.g., Coleman & Leiter, supra note 3, at 561-63 (noting indeterminacy creates problem of justification only in hard cases); Solum, supra note 7, at 480 (same). But see Cass R. Sunstein, Problems with Rules, 83 Cal. L. Rev. 955, 959, 1012-16 (1995) (adopting much more pragmatic and contextual approach to virtues and vices of rule-based decisionmaking).

14 489 U.S. 288 (1989) (plurality opinion) (holding federal courts may not apply new rules of constitutional law to state habeas petitioners unless new rule prohibits conduct from being criminalized or is "watershed" rule of criminal procedure).

15 Butler v. McKellar, 494 U.S. 407, 412, 415 (1990) (stating *Teague* bar applies to any rule not dictated by precedent).

16 467 U.S. 837 (1984).

1983, under the doctrine of qualified immunity, public officials are not liable for ordinary violations of the law but only for violations of law that was "clearly established" at the time they acted.[17]

If the theorists are right that indeterminacy is destabilizing, these areas of doctrine are dangerous in the extreme. A look at the law in such areas should show subversive effects on legal legitimacy or stability. Or perhaps it should at least show judges extremely reluctant to find indeterminacy. But, as we shall see, they are not.

This Article takes on the challenge of looking at legal indeterminacy in two of these contexts in which legal doctrine itself requires judges to decide whether the law in a particular area is determinate or indeterminate: Rule 11 of the Federal Rules of Civil Procedure and qualified immunity doctrine. Rule 11 authorizes courts to impose sanctions on attorneys and parties for making frivolous arguments or claims. Under Rule 11, a judge must decide whether a legal argument is "frivolous" (and sanctionable) or whether it is "wrong, but reasonable" (not sanctionable). If the argument is reasonable, yet wrong, the finding is an acknowledgement that the law is not clear—that reasonable minds could differ. Qualified immunity doctrine shields officials from personal liability for breaking the law so long as the law was not "clearly established" at the time of the violation. In granting or denying public officials qualified immunity from a lawsuit, a judge must decide whether a constitutional or statutory right is "clearly established." If it is not, again, the judge acknowledges that the law is indeterminate.

A look at these doctrinal areas reveals that acknowledgements of radical legal "indeterminacy" are not necessarily radically destabilizing or signs of the demise of the rule of law, as one might expect from reading the theoretical debate. Not only do judges readily acknowledge indeterminacy, but indeterminacy seems to mean different things in different legal contexts. Strangely enough, the same substantive area of law may be considered either determinate or indeterminate, depending on why one is asking. Rule 11 doctrine, as we will see, looks more like the legal landscape the "radical indeterminists" describe, whereas qualified immunity doctrine looks more like the legal landscape the "moderate indeterminists" describe.[18]

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[17] See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[18] Perhaps this is the time to anticipate an objection to this line of inquiry. A skeptical commentator would explain the different use of indeterminacy in the Rule 11 and qualified immunity contexts by saying simply that judges want to protect lawyers, with whom they feel an affinity, from liability, and that they are less concerned about the plight of other governmental actors. Hence, judges are more apt to find "clearly established" law in the context of qualified immunity than they are in the context of Rule 11. However, this skep-

How can it be that law sometimes looks determinate and other times does not? As this Article tries to show, once we see that law is a practice, we see too that it is a practice in time. The dispute about indeterminacy is in part a dispute over which temporal aspect courts should focus on in making their decisions. Seeing law as radically indeterminate stresses its future aspect; seeing it as moderately indeterminate stresses its past aspect. Rule 11 law stresses the future aspect of law, preserving the meritorious legal arguments of the future by not prohibiting attorneys from articulating them at the proper time. Qualified immunity doctrine, on the other hand, stresses the past—whether officials had notice of their responsibilities. The difference in temporal focus results in a difference in perceived determinacy.

We discover that judges tend to find law indeterminate in order to avoid sanctioning law articulators and thereby to foster legal evolution. Such indeterminacy, even radical indeterminacy, actually promotes legitimacy, if legitimacy is thought of as the concurrence of law and justification. When courts are concerned about fair notice, on the other hand, they tend to see law as determinate—positive-law-style black-letter rules with a few gaps where the courts have not yet spoken. Here, determinacy promotes predictability, another aspect of legitimacy.

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tical answer may be incompatible with other doctrinal areas in which governmental actors are given more leeway than (criminal defense) lawyers. See Kit Kinports, Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law, 33 Ariz. L. Rev. 115, 115-17 (1991) (comparing standards applied to public officials, defense attorneys, and state judges). (Or, I suppose, one could imagine a Dantesque ranking of judicial favorites: civil lawyers, governmental actors, criminal defense lawyers.)

I do not take the cynical approach in this Article, for a couple of reasons. First, my own experience leads me to believe that judges do try to decide cases on principle. Judicial laziness is more to be feared than judicial activism. Second, even granted that judges may harbor unconscious prejudices, see Charles R. Lawrence III, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 321-22 (1987) (arguing that racism may be unconscious), a kind of "principle of charity" (perhaps even professional obligation) requires an interpreter of legal texts (or any text, for that matter) to assume they make some kind of sense on their own terms, before resorting to causal explanations. Cf. Donald Davidson, Actions, Reasons, and Causes, in Essays on Actions and Events 3, 3-4 (1980) (articulating "principle of charity"); Clifford Geertz, Thick Description: Toward an Interpretive Theory of Culture, in The Interpretation of Cultures 3, 20 (1973) (arguing anthropologists should interpret meaning of culture before resorting to causal explanations); Hart, supra note 7, at 86-88 (theory of law should not ignore "internal" standpoint, from which law is understood as normative, in favor of exclusive concern with "external" standpoint, from which law is merely coercion). I suppose I am hopelessly old-fashioned. See J.M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 Yale L.J. 105, 129 (1993) (asserting "rational reconstruction" of doctrine is not the only valid approach to law, and "does not always accurately predict the behavior of legal officials, and it cannot tell us the practical effects of legal norms").

Hence, looking at legal indeterminacy in legal contexts suggests that the theorists have missed an important aspect of the question. They have not taken seriously enough the idea that law is a practice, not a thing. As a result, they fail to look at how indeterminacy plays itself out in legal contexts. Seen in context, indeterminacy is sometimes a way of preserving justification, not undermining it. It serves this role not at the cost of unleashing judges from the rules they serve, but as part of the very texture of the doctrine itself.

Not only can we illuminate theory by juxtaposing it with doctrine, but also we can enlighten doctrinal disputes by juxtaposing them with theory. The splits among the courts of appeals over how to articulate and apply Rule 11's "objective standard" are shown to be inevitable, since the future law that Rule 11 affects is never an object that stands still. Likewise, qualified immunity's circuit splits over levels of generality and overlapping sovereignties also are inevitable, given the past-focused perspective the cases take.

Although the sorts of disputes that arise are in some sense preordained by the approach to indeterminacy courts take, a few suggestions are still in order. Even though Rule 11 affects future law, the future is not a blank slate but is sketched out by the past. A litigant's arguments must have *some* bearing on recognizably worthy goals—goals that we can see the point of achieving. This sense of what is worthy of pursuit must come from the past. Even though qualified immunity looks to past law, it must not limit itself to past articulations of rules by judges but must recognize that there are more pervasive, widely shared, and readily available norms that help construct what "reasonable" officials ought to know.

Part I of this Article sketches the theoretical indeterminacy debate and describes its roots in Wittgensteinian philosophy. Parts II and III then consider indeterminacy in the context of Rule 11 of the Federal Rules of Civil Procedure and qualified immunity, respectively. Finally, Part IV explains the contrasting approaches the courts take to indeterminacy in the Rule 11 and qualified immunity contexts in terms of their temporal focus.

I
WITTGENSTEIN AND THE INDETERMINACY DEBATE

Much of the theoretical literature about legal indeterminacy traces to the philosophy of the later Ludwig Wittgenstein.[19] Those

[19] Most theorists cite a single work: Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans., 2d ed. 1958). The challenge to law that is represented by Wittgenstein's theories is concisely explained by Professor Radin as follows:

theorists who conclude that law is radically indeterminate believe Wittgenstein's philosophy warrants extreme skepticism about the legitimacy and determinacy of law.[20] They take his point that no rule specifies its own applications[21] to mean that no rule can determine or constrain legal decisionmaking.[22] The moderates rejoin by drawing on Wittgenstein's statements that the community's conformity in its way of life and use of everyday language provides the necessary agreement about context that makes legal language intelligible; thus, in most cases, law is determinate enough.[23] The radicals respond that

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> Wittgenstein in *Philosophical Investigations* is fairly read as rejecting the traditional [formalist] conception of rules in favor of a social practice conception in which agreement in responsive action is the primary mark of the existence of a rule. I also think Wittgenstein is fairly read as a rule-skeptic . . . . There is no way to tell deductively or analytically when a rule is being followed; there is no special state that describes the binding-ness of rules; and traditional formal realizability is not the right way to conceive of the nature of rules.
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> . . . .
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> The result of this skeptical deconstruction of the formalist notion of rules is that rule-following must be understood to be an essentially social phenomenon. Rule-following can only be understood to occur where there is reiterated human action both in responding to directives and in observing others respond.

Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 798-99 (1989) (footnotes omitted); see also Langille, supra note 7, at 459 ("References to Wittgenstein have become, as [James] Boyle observes, 'ubiquitous' and his work is referred to as 'basic.'").

20 See, e.g., D'Amato, Failure of the Word "Bird," supra note 6, at 536 n.2 (citing Wittgenstein for view that "words merely represent conventional recurring utterances with no failsafe intrinsic 'meaning'"); Tushnet, supra note 13, at 824 (concluding, after citing Wittgenstein, that "[i]f we accept substantive limitations on the rules that courts can adopt, we abandon the notion of rule-following as a neutral enterprise with no social content; yet if we truly allow all reasonable arguments to be made and possibly accepted, we abandon the notion of rule-following entirely, and with it we abandon the ideal of the rule of law"); see also James Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. Pa. L. Rev. 685, 708-13 (1985) (explaining that legal discourse is "slowly assimilating the post-Wittgensteinian view of language").

21 See Wittgenstein, supra note 19, ¶ 201.

22 This oft-cited interpretation of Wittgenstein hails from Saul A. Kripke, Wittgenstein on Rules and Private Language 17 (1982); see also, Charles M. Yablon, Law and Metaphysics, 96 Yale L.J. 613, 632-33 (1987) (reviewing Kripke's book).

23 See, e.g., Brian Bix, Questions in Legal Interpretation, in Law and Interpretation: Essays in Legal Philosophy 137, 149-50 (Andrei Marmor ed., 1995); Coleman & Leiter, supra note 3, at 571-72 (arguing that Wittgenstein's statements do "not . . . raise doubts about our ability to know the determinate meaning of a rule, but only about the source of that knowledge"); Greenawalt, supra note 7, at 86 ("No sensible understanding of the interpretive process undercuts the conclusion that many legal questions have determinate answers."); Kutz, supra note 12, at 1010-11 ("[W]e might more plausibly conclude from Wittgenstein's argument that normativity and rationality are *preserved*, not eliminated, through appeal to the shared, natural patterns of affect and reaction which Wittgenstein calls our 'form of life.'"); Schauer, Easy Cases, supra note 7, at 417-20 (arguing that while language cannot be divorced from its content, the system of rules through which it operates certainly enables people with shared context to understand each other); Solum, supra note 7, at 479-81 (arguing that rule-skepticism, while explaining the possibility that legal rules

the "conformity" we experience is not the conformity of the whole community to which the law applies, but merely the "expression of the interests of a judicial elite."[24]

Whether one reads Wittgenstein as a pragmatist,[25] a skeptic,[26] or a nonskeptic clearing away false philosophical problems,[27] it seems clear that to ask, as the indeterminacy theorists do, whether law is

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will change meaning if the social context changes, does not create degree of determinacy that has immediate, practical implications).

Moderate theorists also argue that the radicals are involved in a skeptic's paradox—their own criticism cannot be meaningful unless they assume that words have meaning. See Kress, supra note 5, at 136 (criticizing one radical's position as "skepticism about the efficacy of linguistic utterances"); Langille, supra note 7, at 474 ("Our strong critics undermine language and our knowledge of the world completely. . . . Yet they have no trouble writing lengthy essays explaining all of this to us."); Martha C. Nussbaum, Skepticism About Practical Reason in Literature and the Law, 107 Harv. L. Rev. 714, 736 (1994) (arguing skeptic cannot assert truth of his own thesis); Solum, supra note 7, at 478 (arguing that skeptic's paradox "costs the indeterminacy thesis its critical bite").

24 Kutz, supra note 12, at 1010. Tushnet argues:

> [A]lthough we can . . . use standard techniques of legal argument to draw from the decided cases the conclusion that the Constitution requires socialism, we know that no judge will in the near future draw that conclusion. But the failure to reach that result is not ensured because the practice of "following rules" or neutral application of the principles inherent in the decided cases precludes a judge from doing so. Rather, it is ensured because judges in contemporary America are selected in a way that keeps them from thinking that such arguments make sense.

Tushnet, supra note 13, at 823 (footnotes omitted).

25 See Radin, supra note 19, at 797 ("Wittgensteinian view of rules may be characterized as both a social and a practice conception."); see also Dennis M. Patterson, Law's Pragmatism: Law as Practice and Narrative, 76 Va. L. Rev. 937, 937-57 (1990) (outlining pragmatist theory of legal discourse based on Wittgenstein's claim that rule following is a practice).

26 See Saul A. Kripke, Wittgenstein on Rules and Private Language: An Elementary Exposition 142 (1982) (describing Wittgenstein's philosophical style as having "skeptical orientation"); D'Amato, Failure of the Word "Bird," supra note 6, at 536 n.2 ("Wittgenstein's teaching [is] that words merely represent conventional recurring utterances with no failsafe, intrinsic 'meaning.'").

27 See Brian Bix, Law, Language, and Legal Determinacy 180 (1993); see also Wittgenstein, supra note 19, ¶ 124 ("Philosophy may in no way interfere with the actual use of language; it can in the end only describe it."); Brian Bix, The Application (and Misapplication) of Wittgenstein's Rule-Following Considerations to Legal Theory, in Wittgenstein and Legal Theory 209, 210-17 (Dennis M. Patterson ed., 1992) (arguing skeptics are wrong to read Wittgenstein as espousing view that meaning is entirely up for grabs, but beyond answering radical skepticism, Wittgenstein's analysis says little about legal indeterminacy in hard cases); Langille, supra note 7, at 486-98 (arguing that skeptics misinterpret Wittgenstein's assertions that nothing grounds rule following except form of life by taking form of life to be same as social convention or majority agreement—Wittgenstein uses form of life to refer to deeper sense of human commonality (even biology) that makes language possible); Gene A. Smith, Wittgenstein and the Skeptical Fallacy, in Wittgenstein and Legal Theory, supra, at 157, 157 (arguing that while Wittgenstein's arguments have skeptical foundations, they show that skeptic's skepticism resulted from philosophical confusion).

indeterminate *on a global level* is to fall into one of the philosophical mistakes Wittgenstein tries to correct.

First, Wittgenstein's principal insight is that the meaning of words is neither an inherent property of platonic or "natural" concepts,[28] nor a matter of simple reference to things in the world,[29] nor a property of a speaker's intention or imagination,[30] but rather a matter of use, in a context, within a community's set of practices.[31] Legal language has the same feature: it lives in specific doctrinal contexts, not in theorists' minds. Hence, if you wish to know the definition of "strict scrutiny," you must read a lot of constitutional cases to see what courts do in the multidimensional context of specific facts. *Black's Law Dictionary* will give you a verbal formula or synonym, but it will not help you figure out how to give a statute "strict scrutiny."[32]

This Article makes a similar point about legal indeterminacy—its meaning in law is equally tied to its use in legal contexts. If you wish to know when law is indeterminate, the way to approach the answer is to look at cases in which courts say law is indeterminate and find out what effects such a pronouncement has.

One could object that theorists who argue over the extent of legal indeterminacy are not using "indeterminacy" in a legal or doctrinal sense, but in an everyday sense. By legal indeterminacy they simply mean that legal decisions are unpredictable. However, the theorists' concern about indeterminacy is not that lay people find law incomprehensible or indeterminate, but that legal materials, even when evaluated by legal experts, do not by themselves generate determinate answers to legal questions. It is therefore the justification and coherence of law in its own terms, not just the usefulness of legal institutions, that is at stake. If experts relying only on legal materials can

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28 See Wittgenstein, supra note 19, ¶¶ 65-75 (meaning of words is not matter of "seeing what is common" to all objects that share name).

29 See id. ¶¶ 28-35 (ostensive definition requires preexisting practice in order to make sense—it cannot itself ground meaning).

30 See id. ¶ 139 (meaning of words is not a mental picture); id. ¶¶ 141, 147, 151, 152-54, 180 (meaning of words is not a mental state); id. ¶ 156 (meaning of words is not a mental process); id. ¶ 230 (meaning of words is not an intimation).

31 See id. ¶ 43 ("For a *large* class of cases—though not for all—in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."); see also id. ¶¶ 224-42, 325-26 (rule following of any kind—including using language—requires "agreement in form of life").

32 See Bix, supra note 23, at 137-42. Bix points out that H.L.A. Hart, in Wittgensteinian fashion, tried to steer legal theorists away from determining the meaning of a legal term or concept by "trying to discover what thing in the world the term named" and to direct them instead to focus on "how the term is used within legal discourse." Id. at 138. He then applies this view to an analysis of the term "legislative intent," concluding there is no Platonic idea of "legislative intent" that applies across legal systems. Id. at 142-46.

reasonably disagree about their meaning or application, the argument goes, then law is not binding; it does not command; it is not Law.

Since the theorists' charge goes to the justification rather than the predictability of law,[33] legal doctrines which explicitly admit to legal indeterminacy take on a special significance. An admission by the law itself that it is indeterminate would seem to undermine its justification and its sense—much as the statement "I am lying" undermines its own sense. On the other hand, if law can tolerate such admissions of indeterminacy, perhaps the theorists are wrong about the need for certainty in the first place, or perhaps, as Wittgenstein might say, they have taken the meaning of indeterminacy out of context and created a philosophical problem where none should be.

A second philosophical mistake that Wittgenstein targets is the idea that language must be "exact" in order to have meaning. He points out that words are perfectly usable even when they do not have clear boundaries or necessary and sufficient definitions.[34] He then turns the challenge itself on its head—there is no essential definition of "exactitude" either.[35] Its meaning, too, depends upon use.[36]

Likewise, the posited ideal of legal certainty (perhaps as a syllogism of law and fact) is a theoretical construct divorced from the way lawyers in legal contexts discuss doctrine. Even if law is "indeterminate" from some ideal perspective, it may still give guidance and make sense. Indeed, indeterminacy itself is part of legal doctrine, and its meaning depends on how we understand and apply that doctrine.

Third, Wittgenstein cautions against extrapolating from the need for clarification in one instance to a global requirement of perfect clarity in all instances. The explanations we give to clear up uncertainty in certain contexts do not "point" to some ideal of perfect clarity, nor should that be our goal since it would result in an infinite regress of explanations of explanations.[37] Hence, a need for clarification in some doctrinal area does not signal a need for perfect certainty generally, nor does it indicate systemic failure.

In sum, if Wittgenstein is right about language, as both sides of the debate seem to concede, we should not invent or predefine some

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33 See supra note 8.

34 See Wittgenstein, supra note 19, ¶¶ 65-71.

35 See id. ¶¶ 88, 91.

36 See id.

37 See id. ¶ 86 ("Can we not now imagine further rules to explain *this* one?"); id. ¶ 87 ("[A]n explanation serves to remove or to avert a misunderstanding—one, that is, that would occur but for the explanation; not every one that I can imagine."); id. ¶ 91 ("[W]e eliminate misunderstandings by making our expressions more exact; but now it may look as if we were moving towards a particular state, a state of complete exactness; and as if this were the real goal of our investigation.").

concept of "indeterminacy" by which we then measure "law."[38] Rather, to understand legal indeterminacy, we should examine indeterminacy as it surfaces within the contexts of specific legal doctrines and practices.[39] As we shall see, when courts explicitly examine whether certain areas of law are "indeterminate," the point of doing

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[38] See, e.g., Coleman & Leiter, supra note 3, at 561-64 (presenting different definitions of epistemological determinacy); Kress, supra note 5, at 139 (same); Solum, supra note 7, at 473 (same).

Perhaps this point is not so new:

> This view of the law [as an expression of the will of the State, consisting of statutory enactments] . . . is expressly asserted by the eminent reformers to whom we owe the New York civil code §§ 2, 3; who thus demonstrate their incompetency for the tremendous task they have so confidently assumed, not only by the false definition, but by violating the obvious principle that definitions do not come within the province of the legislator, except so far as it may be necessary for him, like other people, to explain his own meaning. The principle is well illustrated by the story of the Roman emperor, who was reproved by a distinguished grammarian for the use of an incorrect term, but justified by one Capito, on the ground that the unlimited power and will of the sovereign itself made the term correct. "Capito is a liar, Caesar," was the reply; "you can make a Roman citizen, but you cannot make a Latin word." The truth expressed is that language, being of natural and spontaneous growth, is above and beyond the will of the sovereign; and the principle applies equally to the definition and meaning of proper terms, as to the use of improper ones.

Smith, supra note 5, at 702-03.

[39] When philosophers use a word—"knowledge", "being", "object", "I", "proposition", "name"—and try to grasp the *essence* of the thing, one must always ask oneself: is the word ever actually used in this way in the language-game which is its original home?—

> What *we* do is to bring words back from their metaphysical to their everyday use.

Wittgenstein, supra note 19, ¶ 116.

Other theorists have also suggested, though from a different perspective, that the dichotomy between determinists and indeterminists is a false one. Duncan Kennedy and Jack Balkin both emphasize the dialectical relationship the judge experiences between the law "out there" and the "way the judge wants to come out." Both theorists powerfully show that the judge's perspective on his normative goals is influenced by the law he perceives, just as the law he perceives is influenced by his normative goals. See Duncan Kennedy, Toward a Critical Phenomenology of Judging, in The Rule of Law: Ideal or Ideology 141, 166 (Allan C. Hutchinson & Patrick Monahan eds., 1987) ("The rule may at any given moment appear objective, but at the next moment it may appear manipulable. It is not, *as I apprehend it from within the practice of legal argument*, essentially one thing or the other."); Balkin, supra note 18, at 130 (legal understanding not objective or subjective, but consists of "hermeneutical toolbox").

Thomas Morawetz also has argued that the experience of judging requires constant interplay between one's own style of reasoning and justification and that of others within the same practice:

> Thinking of law as a deliberative practice allows us to reconceive the fluidity and the boundedness of law. The concept of law refers to several things. First, the law for each judge, and for each observer, consists of decisions and justificatory arguments that that judge regards as appropriate given her ways of reasoning and her sense of law's purposes. Second, the law may include the collection of decisions and justificatory strategies that are *mutually* regarded as

so and the nature of what counts as determinacy or indeterminacy differ. Indeed, it is a mistake to count "indeterminacy" as a global objection on the ground that it undermines the justification of law—in some legal contexts indeterminacy serves to preserve the capacity of law to fit its justifications.

II
RULE 11

A frivolous case is an easy case—reasonable minds will agree that it clearly does not state the law. Hence, when a judge awards sanctions against a party or an attorney for a frivolous legal claim, she is marking off nonlaw from law. On the other hand, if the judge declares a losing legal argument nonfrivolous, she is saying that the law is not clear—reasonable minds can differ. The question whether a legal claim is frivolous thus requires judges to decide whether the law in a particular area is determinate. If the indeterminacy theorists are right, one would expect judges to be reluctant to declare the law indeterminate, since to do so is tantamount to declaring the law illegitimate—both unpredictable (and therefore violative of fair notice) and lacking in normative force (because the doctrine alone does not dictate the result). As the discussion below demonstrates, however, judges are not shy about declaring the law to be indeterminate and are even hard pressed to find areas of agreement about which arguments are frivolous.

Although there are many doctrines that allow judges to impose sanctions on attorneys or parties who make frivolous legal arguments,[40] Federal Rule of Civil Procedure 11 is both the most common

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> legally relevant. Finally, the law *may* be said to refer to decisions apart from the justificatory arguments supporting them.
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> . . . I have argued that this [last] is not possible.

Thomas Morawetz, Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging, 141 U. Pa. L. Rev. 371, 455-56 (1992).

While I agree with many of the insights expressed in these works, my point here is a bit different. I argue that indeterminacy itself is a tool (a "game"?) within the practice of judging (and hence within the doctrine), not just a description of either law or (sometimes) the phenomenology of judging.

[40] The federal courts have inherent power to sanction attorneys who practice before them. See Hall v. Cole, 412 U.S. 1, 15 (1973). This power is limited, however, to sanctioning bad faith conduct. See, e.g., Chaves v. M/V Medina Star, 47 F.3d 153, 156 (5th Cir. 1995). Additionally, various federal statutes provide for attorney's fees in cases in which frivolous claims are filed. See 28 U.S.C. § 1447(c) (1994) (allowing fees for improper removal); id. § 1927 (1994) (allowing fees for "unreasonably and vexatiously" multiplying the proceedings); 33 U.S.C. § 926 (1994) (providing costs of groundless proceedings may be awarded in cases under Longshore and Harbor Workers' Compensation Act); 42 U.S.C. § 1988(b), (c) (1994) (allowing reasonable attorney and expert fees as part of costs); Fed.

basis of sanctions (in federal courts), and the tidiest for purposes of looking at legal determinacy. Since Rule 11 cases focus on the objective merit of the legal argument rather than the good faith of the attorney, making it sanctionable to submit a pleading not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law,"[41]

R. App. P. 38 (permitting sanctions, including single or double costs and "just damages," to appellee for frivolous appeal); see also Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417, 421 (1978) (holding that prevailing § 1983 plaintiff is awarded attorney's fees in all but special circumstances; prevailing defendant is awarded fees if plaintiff's claim is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); Nasatka v. Delta Scientific Corp., 58 F.3d 1578, 1582 (Fed. Cir. 1995) (construing Rule 38 to allow awarding attorney's fees where appeal is filed on moot issue and appellate court previously advised appellant of proper alternative course of action); Estate of Washington v. Secretary of Health & Human Servs., 53 F.3d 1173, 1176 (10th Cir. 1995) (holding § 1927 requires "recklessness or indifference"); Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1002-03 (5th Cir. 1995) (construing § 926 to grant power to award attorney's fees only to courts, not to Administrative Law Judges or Benefits Review Board); Jones v. Pittsburgh Nat'l Corp., 899 F.2d 1350, 1357 (3d Cir. 1990) (holding § 1927 requires bad faith).

[41] Fed. R. Civ. P. 11(b)(2). Before 1983, Rule 11 required an attorney to sign all pleadings, certifying that "he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." Fed R. Civ. P. 11 (1982) (repealed 1983). Very few courts sanctioned attorneys under this rule, since it required a finding of bad faith and since the only sanctions available were (1) striking the pleading and (2) subjecting the attorney to "appropriate disciplinary action." Id.

> In 1983, the Rule was amended to require attorneys to certify by their signature that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose.

Fed. R. Civ. P. 11 (1988) (effective 1983, repealed 1993). In addition to changing from a subjective to an objective standard of care, the Rule provided for monetary sanctions, previously unavailable, and required courts to impose sanctions once a violation was found.

In 1993, the Rule was again amended. While softened in some respects, such as making the imposition of sanctions discretionary rather than mandatory and allowing a party a chance to withdraw a pleading voluntarily without sanction, the objective standard was toughened. The previous version of Rule 11 allowed "good faith argument for the extension, modification, or reversal of existing law." The 1993 amendments require such arguments to be "nonfrivolous" as well. Fed. R. Civ. P. 11(b)(2) provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
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> . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .

The Advisory Committee Notes explain:

> Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are

they make a good study for the indeterminacy theorist.[42]

"nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

Fed. R. Civ. P. 11(b) advisory committee's note; see also Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1326-31 (2d Cir. 1995) (explaining and employing new amendments to Rule 11); William W Schwarzer, Rule 11: Entering a New Era, 28 Loy. L.A. L. Rev. 7, 12-32 (1994) (explaining 1993 amendments and their importance for application of Rule); Georgene M. Vairo, The New Rule 11: Past as Prologue?, 28 Loy. L.A. L. Rev. 39, 52-83 (1994) (same).

[42] I do not discuss cases imposing Rule 11 sanctions for ineptness in investigating factual questions or for ignoring prior orders of the court in the case at bar, as these cases do not require judges to decide whether the law is indeterminate.

I do look at "unpublished" cases available in computer research data banks as well as "published" cases. As some commentators have seen, the law one garners from "published" cases looks very different from the law in "unpublished" cases. Cf. Lawrence C. Marshall et al., Public Policy: The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943, 944 (1992) (commenting on difficulty in discerning application of Rule 11 sanctions because of possibility of different reporting frequencies for different types of cases). Indeed, the Magritte-like practice of declaring that "this decision is not a decision" is more than a little dubious, however efficient it may be. See Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc'y Rev. 1133 (1990) (arguing that published employment discrimination cases are significantly different from unpublished cases).

Ninth Circuit law on Rule 11 is a case in point. While most of the published opinions of the Ninth Circuit indicate great leniency in interpreting Rule 11, the unpublished opinions are much harsher. Compare Warren v. City of Carlsbad, 58 F.3d 439, 444-45 (9th Cir. 1995) (holding that plaintiff who had made out prima facie case of racial discrimination should not have been sanctioned), cert. denied, 116 S. Ct. 1261 (1996) and Larez v. Holcomb, 16 F.3d 1513, 1522 (9th Cir. 1994) (holding argument for jury trial of attorney's fees on Rule 11 issue not frivolous, even though no controlling authority cited, because it counts as good faith argument for extension of law) and Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, 873 F.2d 1327, 1329-30 (9th Cir. 1989) (reversing sanctions on grounds that third-party complaint not baseless, since interpleader allowed for someone who may be liable to plaintiff) and Ault v. Hustler Magazine, 860 F.2d 877, 883-84 (9th Cir. 1988) (reversing sanctions imposed after plaintiff's counsel failed to defend claims in complaint upon motion to dismiss because plaintiff could have made an argument for legal change, given "grievous assault" to plaintiff's dignity perpetrated by defendant), cert. denied, 489 U.S. 1080 (1989) and Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1343-45 (9th Cir. 1988) (reversing sanctions and finding plaintiff's claim that collective bargaining agreement should be interpreted differently than another with similar wording not frivolous but meritorious) and Hudson v. Moore Business Forms, Inc., 836 F.2d 1156, 1159-60 (9th Cir. 1987) (reversing sanctions; employer's argument that employee's behavior violated implied covenant of good faith and fair dealing nonfrivolous because law "still evolving") with Bellows v. Skinner, No. 94-36138, 1995 U.S. App. LEXIS 31571, at *1-*3 (9th Cir. Oct. 27, 1995) (unpublished opinion) (upholding sanctions; Bivens suit against FAA officials for suspending plaintiffs' FAA certificates frivolous because existing law clearly granted FAA right to do so and arguments for extension of law out of place in qualified

The hundreds of circuit court opinions in the Rule 11 context demonstrate that reasonable minds differ even over whether reasonable minds can differ. An early study by the Federal Judicial Center revealed that 292 judges, each of whom reviewed one of ten sample cases presenting Rule 11 fact situations, reached consensus on only one.[43] While this study was conducted only a year after the 1983 amendments to Rule 11 prescribed an "objective" inquiry into frivolousness, cases decided since then bear out the truth that judges do not agree about what is frivolous. Circuit courts overturn district courts' imposition of sanctions,[44] even on an abuse of discretion standard of review;[45] panels splinter over the question of fri-

immunity context) and Orlando v. Hotel Employees & Restaurant Employees Int'l Union Welfare Fund, No. 93-15715, 1995 U.S. App. LEXIS 1137, at *14-*16 (9th Cir. Jan. 11, 1995) (unpublished opinion) (upholding sanctions imposed for plaintiff's failure to discover ERISA preemption) and Mavity v. American Protectors Ins. Co., CA No. 92-15197, 1993 U.S. App. LEXIS 31074, at *8-*11 (9th Cir. Nov. 22, 1993) (unpublished opinion) (upholding sanctions; claim for ERISA benefits frivolous because plaintiffs failed to exhaust administrative remedies) and Pioneer Lumber Treating Inc. v. Cox, Nos. 92-15236, -15279, 1993 U.S. App. LEXIS 24725, at *7-*14 (9th Cir. Sept. 22, 1993) (unpublished opinion) (upholding sanctions, citing various defects in RICO and § 1985 claims in complaint, poor prefiling inquiry, and bad faith in filing bankruptcy petition) and Mafnas v. Commonwealth of N. Mariana Islands, No. 92-17008, 1993 U.S. App. LEXIS 21816, at *3-*5 (9th Cir. Aug. 20, 1993) (unpublished opinion) (upholding sanctions on grounds that alleged jurisdictional uncertainty did not excuse plaintiff for filing appeals in both old appellate division of District Court for Northern Mariana Islands and new Supreme Court of Commonwealth because law as to jurisdiction was clear).

[43] See Saul M. Kassin, An Empirical Study of Rule 11 Sanctions (Federal Judicial Ctr. 1985). The 292 federal judges responded to 10 case scenarios drawn from then-current cases. See id. at 17. Of the judges, 97.2% found a Rule 11 violation in a case in which a complaint charged a nationwide trademark infringement conspiracy when the plaintiff was aware of only one infringing product and had done no investigation into the scope of the infringement before filing. See id. at 17-23, 49-68. Of the other nine scenarios, the only other scenario in which the judges reached significant agreement (83.4%) on an issue of legal (rather than factual) frivolousness involved a tax protester case in which the plaintiffs protested a tax penalty assessed against them for failing to file a tax return on Fifth Amendment grounds. See id. One of five other hypothetical cases involving issues of legal frivolousness (in the areas of civil rights, securities, and voting rights) generated 75.9% agreement, while the rest of the cases of legal frivolousness generated only 65.6% agreement or less—little better than chance. See id. at 17, 49-68.

[44] See, e.g., *Warren*, 58 F.3d at 444-45; *Larez*, 16 F.3d at 1521-23; Townsend v. Holman Consulting Corp., 881 F.2d 788, 793-96 (9th Cir. 1989), vacated on reh'g by 914 F.2d 1136 (9th Cir. 1990) (en banc); *Jensen*, 873 F.2d at 1329-30; *Ault*, 860 F.2d at 883-84; Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1199-1202 (5th Cir. 1988); *Hudson*, 836 F.2d at 1156-62; Glaser v. Cincinnati Milacron, 808 F.2d 285, 288-91 (3d Cir. 1986); In re Yagman, 796 F.2d 1165, 1183-87 (9th Cir. 1986); Kamen v. AT&T, 791 F.2d 1006, 1007 (2d Cir. 1986); Zaldivar v. City of L.A., 780 F.2d 823, 830-35 (9th Cir. 1986); Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243, 253-54 (2d Cir. 1985); Goldman v. Belden, 754 F.2d 1059, 1072 (2d Cir. 1985).

[45] See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403-04 (1990) (settling circuit split regarding appropriate standard of review of Rule 11 sanctions in favor of abuse of discretion standard).

volity;[46] and circuit courts find sanctioned arguments to be winners,[47] and winning arguments sanctionable.[48] Commentators concur that the courts have not been able to delineate the boundaries of the law.[49] As Professor Levinson has written:

> Those who take seriously the notion of frivolousness must, in the absence of greater specification of formal standards, take with equal seriousness the existence of a coherent legal community with shared understandings of what counts as genuine legal argument. Whether

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[46] See, e.g., Garr v. U.S. Healthcare Inc., 22 F.3d 1274, 1281-83 (3d Cir. 1994); Alia v. Michigan Supreme Court, 906 F.2d 1100, 1102-03, 1108 (6th Cir. 1990); International Shipping Co. v. Hydra Offshore Inc., 875 F.2d 388, 392-95 (2d Cir.), cert. denied, 493 U.S. 1003 (1989); *Smith Int'l*, 844 F.2d at 1196-1202; Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085-86 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988).

[47] See, e.g., *Warren*, 58 F.3d at 444; Amaco Enters. v. Smolen, Nos. 93-16746 et al., 1995 U.S. App. LEXIS 20486, at *12 (9th Cir. July 17, 1995); Locomotor USA Inc. v. Korus Co., Nos. 93-56032, -56622, 1995 U.S. App. LEXIS 401, at *23-*24 (9th Cir. Jan. 6, 1995); In re Edmonds, 924 F.2d 176, 181-82 (10th Cir. 1991); Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1343-44 (9th Cir. 1988); Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 570 (9th Cir. 1988); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986) (agreeing with sanctioned argument, though controversy moot).

[48] Cf. Dilley v. United States, No. 93-4225, 1995 U.S. App. LEXIS 4480, at *5 (10th Cir. Mar. 6. 1995) (noting court was "tempted to affirm the award of sanctions" against frequent filer who continues to file losing actions against FAA, but remanding for reconsideration because he had "partially prevail[ed] on an appeal in the Ninth Circuit" and because Rule 11 sanctions now discretionary after 1993 amendments). Sanford Levinson reports that his favorite law-become-frivolity is,

> a Texas case in which an oil company argued that a statutory requirement of a bid for an oil lease was that the royalty offer be written as a percentage. The company therefore argued that its competitor, who had offered a royalty of .82165 had not complied with the statute, which purportedly required an offer of 82.165 percent. The Fifth Circuit pronounced this argument "quite incredible," and its opinion quoted from some children's arithmetic books on how to convert decimals into percentages and vice versa. But the most notable point is that the district judge below had apparently accepted this argument, and the Fifth Circuit had to reverse him.

Sanford Levinson, Frivolous Cases: Do Lawyers Really Know Anything at All?, 24 Osgoode Hall L.J. 353, 370-71 (1986) (footnotes omitted) (citing Oil & Gas Futures, Inc. v. Andrus, 610 F.2d 287, 288 (5th Cir. 1980)).

[49] See Levinson, supra note 48, at 370 (observing "'[f]rivolousness, like madness and obscenity, is more readily recognized than cogently defined'" (quoting Robert Hermann, Frivolous Criminal Appeals, 47 N.Y.U. L. Rev. 701, 705 (1972))); Melissa L. Nelken, Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions, 41 Hastings L.J. 383, 384 (1990) (noting "considerable conflict still exists"); William W Schwarzer, Commentaries: Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1015 (1988) ("In interpreting and applying Rule 11, the courts have become a veritable Tower of Babel."); Schwarzer, supra note 41, at 10 ("Though they had abundant opportunity, the courts never succeeded in articulating universally accepted and workable standards of sanctionable conduct and sanctionable content."). Similar comments appear in Thomas v. Capital Security Services Inc., 836 F.2d 866, 869-70 (5th Cir. 1988) (en banc) (establishing appropriate procedures and standards for imposition of sanctions under Rule 11 and noting Rule 11 "has generated extensive debate and controversy among legal scholars, jurists, and practitioners").

> such a community exists—and can impose what, borrowing from Professor Hart, one might call "rules of recognition" as to what constitutes plausible renderings of the law—is, of course, one of the important issues raised by the contemporary debate about legal nihilism . . . .[50]

The simple inability of courts to agree on the standard of frivolousness, however, is only one sign of the radical indeterminacy of Rule 11 jurisprudence. Even more revealing is the *approach* to frivolousness that courts are taking. Judges are reluctant to set clear boundaries stating which legal arguments are substantively frivolous. Instead, they prefer to focus attention on the way in which lawyers make their arguments—to ask whether they have done the necessary research, cited the relevant authorities, and presented a cogent, well-thought-out argument.[51] The very avoidance of substantive pronouncements of frivolousness suggests that courts agree with the radical indeterminists that law is so indeterminate that we cannot even say with certainty that an argument is beyond the pale. Is it true, then, that one can make an argument for anything?

This reluctance to say that an argument is frivolous has come with experience. When judges first began applying the objective standard of frivolousness, they tended to focus on the merits of the challenged legal argument rather than the adequacy of the lawyer's preparation or presentation. Now, most circuits emphasize practice.[52]

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[50] Levinson, supra note 48, at 371 (footnote omitted).

[51] Judge William W Schwarzer advocated just such an interpretation of Rule 11 in his article, Rule 11 Revisited, supra note 49. He recognized that courts were not applying the merits-based inquiry in a uniform way and suggested that they move to a standard emphasizing "prevailing professional practice":

> Shifting the focus of rule 11 enforcement from merits to process will not solve all problems. Redirecting it, however, from predicting what some future court might say about a claim or defense to scrutinizing what a lawyer actually did, should materially reduce subjectivity and inconsistency. Lawyers and judges may not invariably agree on what constitutes a reasonable inquiry under the circumstances, but it is reasonable to expect a greater consensus on that question than on whether a claim or defense is frivolous.

Id. at 1024-25; see also Nelken, supra note 49, at 408 (concluding that Rule 11 should be amended to clarify its focus on prefiling inquiry); David J. Webster, Rule 11: Has the Objective Standard Transgressed the Adversary System?, 38 Case W. Res. L. Rev. 279, 317 (1987) (proposing that Rule 11 be reamended so attorney's factual and legal inquiry continue to be judged objectively but that attorney's legal conclusion be judged against subjective good faith standard); Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 Harv. L. Rev. 630, 632 (1987) (suggesting that current interpretations of amended Rule's requirements conflict with liberal pleading regime of federal rules, and arguing that courts should read Rule 11 narrowly, consistent with its text and purposes and with realist jurisprudential roots of federal system).

[52] See Schwarzer, supra note 41, at 10 (commenting that underlying tension between conduct and content not yet resolved).

The case in which the difference between a merits-focus and a practice-focus comes out most sharply is the potentially meritorious argument poorly made. Circuits emphasizing merits would not award sanctions in such a case;[53] circuits emphasizing practice would.[54]

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[53] See, for example, from the Second Circuit, King Warehouse Distrib. v. Walker Mfg. Co., 61 F.3d 123, 131 (2d Cir. 1995) (requiring judge to ask whether it is "'patently clear that a claim has absolutely no chance of success'" (quoting Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993))). Ninth Circuit examples include: Roundtree v. United States, 40 F.3d 1036, 1040 (9th Cir. 1994) (affirming sanctions against attorney for suing FAA on argument derived from law review article when attorney had repeatedly sued (to no avail) on same theory in different jurisdictions with different plaintiffs in attempt to change law); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1361 (9th Cir. 1990) (en banc) (stating filing is frivolous if both baseless and made without reasonable inquiry). Cases from the Eleventh Circuit include Jones v. International Riding Helmets, Ltd., 49 F.3d 692, 695 (11th Cir. 1995) (stating court must determine whether claim is objectively frivolous *and*, only if so, whether lawyer made reasonable inquiry); Souran v. Travelers Ins. Co., 982 F.2d 1497, 1506 (11th Cir. 1993) (using "'no reasonable chance of success'" test); McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1563 (11th Cir. 1992) (requiring court, before imposing sanctions, to determine whether party's claims are objectively frivolous and, if they are, to determine whether signer of pleadings would have been aware had she or he made reasonable inquiry).

[54] See, e.g., Garr v. U.S. Healthcare Inc., 22 F.3d 1274, 1279 (3d Cir. 1994) ("'A shot in the dark is a sanctionable event, even if it somehow hits the mark.'" (quoting Vista Mfg., Inc. v. Trac-4 Inc., 131 F.R.D. 134, 138 (N.D. Ind. 1990))); White v. General Motors Corp., 908 F.2d 675, 680, 682 (10th Cir. 1990) ("[P]laintiffs may not shield their own incompetence by arguing that, while they failed to make a colorable argument, a competent attorney would have done so."), cert. denied, 498 U.S. 1069 (1991); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc) ("To say that Joyce & Kubasiak did not construct a plausible legal argument is not to say that the firm couldn't have . . . ."); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 752 (7th Cir. 1988) ("We must determine only whether the arguments actually advanced by counsel were reasonable and not whether reasonable arguments could have been advanced in support of counsel's position."); Cabell v. Petty, 810 F.2d 463, 466, 467-68 (4th Cir. 1987) (sanctioning plaintiff for pursuing claim in face of immunity defense without addressing defense, even though, as dissent points out, sound arguments existed for countering immunity).

Most circuits have not been presented with the hard case of a meritorious argument poorly made. However, the statements of Rule 11 doctrine in jurisdictions where this is the case tend to emphasize reasonable inquiry more than substantive frivolousness. See, e.g., Keaton v. Hubbard, No. 94-5076, 1995 U.S. App. LEXIS 9983, at *6-*7 (6th Cir. Apr. 27, 1995) (affirming sanctions imposed because counsel had done "no research" on dispositive res judicata issue); O'Ferral v. Trebol Motors Corp., 45 F.3d 561, 563-64 (1st Cir. 1995) (affirming sanctions against plaintiff where court found lack of reasonable inquiry); Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1314 (3d Cir. 1994) (holding Rule 11 "imposes an affirmative duty on the parties to conduct a reasonable inquiry into the applicable law and facts prior to filing. . . . An inquiry is considered reasonable under the circumstances if it provides the party with 'an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in law and fact'" (citation omitted)); FDIC v. Calhoun, 34 F.3d 1291, 1296-97 (5th Cir. 1994) (stressing reasonable inquiry); Silva v. Witschen, 19 F.3d 725, 729 (1st Cir. 1994) ("Rule 11 mandated sanctions for interposing a filing . . . under circumstances in which a competent attorney, on objectively reasonable inquiry, could not have believed that the filing was . . . warranted either by existing law or by a good-faith argument for the extension, modification or reversal of existing law."); LaSalle Nat'l Bank v. County of Dupage, 10 F.3d 1333, 1337-39 (7th

Representative of a "merits" analysis is *Kamen v. AT&T*,[55] in which the Second Circuit reversed an award of sanctions by the district court. The district court had dismissed Kamen's case against AT&T for lack of federal jurisdiction because he had failed to show that AT&T received federal financial assistance.[56] Kamen claimed that AT&T's participation in military development programs raised a reasonable inference that AT&T did receive such assistance.[57] The circuit panel held, with Judge Kearse in dissent, that Kamen was justified in so inferring, but not because his arguments before the district court had been well researched and well presented.[58] Instead, the panel did its own research to determine whether there was any good argument for Kamen's assertion. It noted that "had plaintiff's or any competent counsel looked to the reported opinion in *United States v. American Telephone & Telegraph Co.*, he would have found sufficient basis to support [the] allegation."[59] Judge Kearse dissented on the ground that the court should have looked at the plaintiff's prefiling inquiry, not the merits of the complaint.[60]

Cir. 1993) (examining reasonableness under circumstances); Brubaker v. Richmond, 943 F.2d 1363, 1376 (4th Cir. 1991) (holding that sanctions were unwarranted where plaintiff had conducted reasonable inquiry and was not objectively unreasonable in filing claim); In re Edmonds, 924 F.2d 176, 181 (10th Cir. 1991) (stressing reasonable inquiry); In re Kunstler, 914 F.2d 505, 517 (4th Cir. 1990) (noting Rule 11 standard asks whether "a reasonable attorney in like circumstances would believe his action to be factually and legally justified"), cert. denied, 499 U.S. 969 (1991); Century Prod. v. Sutter, 837 F.2d 247, 253 (6th Cir. 1988) (examining whether conduct was "reasonable under the circumstances"); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875-76 (5th Cir. 1988) (en banc) (stressing reasonable inquiry).

55 791 F.2d 1006 (2d Cir. 1986).

56 See id. at 1009.

57 See id. at 1010.

58 See id. at 1012-13.

59 Id. at 1012 (citation omitted).

60 See id. at 1014; see also Eastway Constr. Corp. v. City of N.Y., 762 F.2d 243 (2d Cir. 1985). *Eastway* established the test still used in the Second Circuit: Rule 11 is violated when "it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands." Id. at 254. Consonant with this merits-based approach, *Eastway* prescribed a de novo standard of review for questions of legal frivolousness, see id. at 252, which was later overruled by the Supreme Court in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403-04 (1990). See United States v. Carley, 783 F.2d 341, 344 (2d Cir.) (retaining *Eastway* test for substantive frivolousness), cert. denied, 476 U.S. 1142 (1986).

Though the Second Circuit still retains a "no chance of success" test for frivolousness, K.M.B. Warehouse Distribs. v. Walker Mfg. Co., 61 F.3d 123, 131 (2d Cir. 1995) (quoting Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993)), a few of its opinions have begun to concentrate more on the presentation or process of attorneys' arguments. See, e.g., International Shipping Co. v. Hydra Offshore Inc., 875 F.2d 388, 390 (2d Cir.) (upholding sanctions in part because plaintiff advanced tenuous legal argument in support of position only during sanctions proceedings, not during oral argument on motion to dismiss), cert. denied, 493 U.S. 1003 (1989).

The Seventh Circuit, in the meantime, had come to take a different approach to frivolousness. Though it, too, had started looking to the merits of a legal argument,[61] it soon began to look to the attorneys' preparation instead. The beginnings of this change in the Seventh Circuit came with *Szabo Food Service Inc. v. Canteen Corp.*[62] Szabo argued that it had a constitutional property interest in the renewal of its contract to provide food service to the Cook County Jail. The panel majority called this theory "wacky,"[63] since under existing case law the property interest depended on Szabo's contract, which gave no entitlement to renewal. Nonetheless, the panel examined plaintiff's arguments carefully:

> The Supreme Court has held, in cases Szabo-Digby does not cite, that the due process clause does not require states to follow their own procedures, if there is no underlying property interest. . . .
>
> If Szabo-Digby were trying to get the Supreme Court to reconsider *Olim* or *Bishop* we would not be keen to impose sanctions; a party is free to ask for reconsideration even when the court is unlikely to respond favorably. But this was not Szabo-Digby's strategy. . . .
>
> We have paid close attention to the argument in Szabo-Digby's brief not because Rule 11 requires scholarly exposition or exhaustive research—it does not—but because a court must take care not to penalize arguments for legal evolution. . . . When counsel represent that something cleanly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying to change the law; counsel either are trying to buffalo the court or have not done their homework. Either way, Rule 11 requires the court to impose a sanction.[64]

Judge Cudahy dissented in part, arguing that the panel should have used a more merits-based approach. He expressed concern that looking at the quality of legal argument and presentation rather than the reasonableness of the argument itself, as the majority seemed to do, would disadvantage a litigant "whose research (or resources) is

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[61] See Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177, 182 (7th Cir. 1985) ("[T]he fact that judges who have ruled on the merits of [the contested] pleading disagree provides significant evidence that the pleading was not frivolous or unreasonable."); Lepucki v. Van Wormer, 765 F.2d 86, 88 (7th Cir.) (affirming sanctions where contention "so absurd that it merits no response"), cert. denied, 474 U.S. 827 (1985); Nixon v. Phillipoff, 615 F. Supp. 890, 894 (N.D. Ind. 1985) (imposing sanctions where plaintiff's claim was "meritless and in bad faith"), aff'd, 787 F.2d 596 (7th Cir. 1986); Ring v. R.J. Reynolds Indus. Inc., 597 F. Supp. 1277, 1280 (N.D. Ill. 1984) (imposing sanctions where "plaintiff did not attempt to make a colorable argument that under the law these allegations state a claim," and did not make reasonable inquiry), aff'd, 804 F.2d 143 (7th Cir. 1986).

[62] 823 F.2d 1073 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988).

[63] Id. at 1080.

[64] Id. at 1081-82.

not unlimited or whose skills in argumentation fall short of the most finely honed."[65]

In *Mars Steel Corp. v. Continental Bank N.A.*,[66] the Seventh Circuit en banc agreed with *Szabo*'s majority that a practice-based approach was preferable, holding that the proper standard of review in Rule 11 cases should be an abuse of discretion standard.[67] Because Rule 11 "focuses on inputs rather than outputs, conduct rather than result,"[68] the appellate court should defer to the district court's decision whether or not an attorney conducted a reasonable prefiling inquiry.[69] An objectively frivolous legal position is only evidence that the signer did not do the necessary research.

In the case before it, the *Mars Steel* majority pointed out that the sanctioned law firm did not do "a smidgeon of research" before asking the district court to hold other parties in contempt.[70] Most interesting, however, was the comment that the attorneys' actions were sanctionable even if their motion *could have been justified*:

> To say that Joyce & Kubasiak did not construct a plausible legal argument is not to say that the firm couldn't have .... Because Rule 11 is addressed to conduct (the adequacy of the pre-filing investigation) rather than to results, a motion may be sanctionable even though something could have been said in its behalf.[71]

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[65] Id. at 1085 (Cudahy, J., dissenting). For other cases showing this transition from merits-based to practice-based analysis, see Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1067 (7th Cir. 1987) (holding that sanctions were warranted where complaint was deemed frivolous and had been filed without prior reasonable inquiry into law); Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987) (noting both that case was not colorable and that attorney, "a specialist in labor law," should have known that).

Judge Cudahy's concern is borne out by Brooks v. Allison Division of General Motors Corp., 874 F.2d 489, 490 (7th Cir. 1989) (holding pro se appeal was frivolous, but denying sanctions because defendant had failed to mitigate damages by filing full-fledged brief on merits of case). The court noted:

> Brooks, still pro se, appealed. His appeal brief neither cites any legal authorities nor specifies any error in the district court's decision. The argument section of the brief is a one-page narrative of the events leading up to Brooks's discharge by General Motors. There is no argument. So naked a submission is frivolous per se.

Id.

[66] 880 F.2d 928 (7th Cir. 1989) (en banc). Judges Flaum, Bauer, Wood, and Cudahy concurred separately, preferring a de novo standard of review. Id. at 940 (Flaum, J., concurring).

[67] See id. at 933.

[68] Id. at 932.

[69] See id. at 933.

[70] Id. at 937.

[71] Id. at 938. The practice-based approach of *Mars Steel* has been followed by LaSalle Nat'l Bank v. County of Dupage, 10 F.3d 1333, 1339 (7th Cir. 1993) (noting that "sanctions are not appropriate when the plaintiffs' pretrial inquiries into the factual and legal bases of the complaint are sufficient"); Rush v. McDonald's Corp., 760 F. Supp. 1349, 1365-66 (S.D.

The Supreme Court ultimately agreed with the Seventh Circuit's emphasis on attorney conduct in *Cooter & Gell v. Hartmarx Corp.*[72] There, the Court was persuaded to adopt an abuse of discretion standard for review of Rule 11 sanctions because determinations of frivolousness were not pure questions of law, but were mixed up with determinations of counsel's competence and cooperation:

> Rather than mandating an inquiry into purely legal questions, such as whether the attorney's legal argument was correct, the Rule requires a court to consider issues rooted in factual determinations. For example, to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs.[73]

Moreover, the Court worried that asking circuit courts to decide de novo whether or not legal arguments were themselves "frivolous" would "establish[ ] circuit law in 'a most peculiar, secondhanded fashion,'"[74] as circuit courts would not be deciding which legal theories were right and which were wrong, but which theories were tenable and which were untenable.

> As one court put it, the practice-based approach dictates that a signer making an inadequate inquiry into the sufficiency of the facts and law underlying a document will not be saved from a Rule 11 sanction by the stroke of luck that the document happened to be justified. . . . "A shot in the dark is a sanctionable event, even if it somehow hits the mark."[75]

Hence, a court need not say that an argument is substantively frivolous, just that the attorney did not research it or argue it well enough.

Ind. 1991) (using "reasonable inquiry" test), aff'd, 966 F.2d 1104 (7th Cir. 1992); see also supra note 54 and accompanying text.

72 496 U.S. 384 (1990).

73 Id. at 401-02.

74 Id. at 404 (quoting Pierce v. Underwood, 487 U.S. 552, 561 (1988)). At least one commentator has argued that the Court was "technically incorrect" to allow abuse of discretion review for questions of law. Vairo, supra note 41, at 73. However, she does not address the difference between practice- and merits-based approaches to sanctioning attorneys.

75 Garr v. U.S. Healthcare Inc., 22 F.3d 1274, 1279 (3d Cir. 1994) (quoting Vista Mfg., Inc. v. Trac-4 Inc., 131 F.R.D. 134, 138 (N.D. Ind. 1990)). Judge Roth dissented in *Garr*, on the ground that the merits of the complaint should rescue a defective prefiling investigation. See id. at 1281 (Roth, J., dissenting).

A. What Doctrine Tells Theory

Why have the courts shifted their focus from substance to practice? Was the shift ultimately a statement that the law is so indeterminate that no substantive pronouncements are possible?

The courts' disinclination to label an argument "frivolous" rather than just "wrong" stemmed from a concern not to block future assertions of that same argument in a better case. As both courts and commentators have pointed out, the courts do not want to chill vigorous advocacy, because if they do they risk unfairness to attorneys, and, more crucially, stunting the growth of the law.[76] Sometimes what seems an absurd argument in one case becomes a winning argument later. The emblematic example is *Brown v. Board of Education*,[77] in which the plaintiff succeeded in convincing the Supreme Court to overturn one of its precedents on point—and the decision to do so was unanimous.

The evolution of slippery slope arguments makes the same point. What seems so preposterous in one era as to be the unthinkable end of a slippery slope may become the law of another era. For example, consider this argument which Edward Levi finds in the successful Complainant's Brief in *Hammer v. Dagenhart*,[78] decided in 1918, in which the Court struck down the Child Labor Act as a violation of the Commerce Clause power: If Congress were allowed to ban the products of child labor, it might "prescribe a minimum wage scale and for-

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[76] See, e.g., Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989) (en banc) ("Sanctuary as a result of reasonable investigation ensures that counsel may take novel, innovative positions—that Rule 11 does not jeopardize aggressive advocacy or legal evolution."); Marshall et al., supra note 42, at 961-62 (reporting 19.3% of attorneys surveyed reported that they declined to present what they believed were meritorious claims because of Rule 11); Melissa L. Nelken, Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1339 (1986) (noting Rule 11 Advisory Committee's concern about potential chilling effects of sanctions); Webster, supra note 51, at 284-85 (stating that 1983 amendment provoked fear of stifling growth and innovation in law); Paul Kaufman, Note, A Prospective Cap on Rule 11 Sanctions, 56 Brook. L. Rev. 1275, 1277, 1280-81 (1991) (noting that Rule 11 is often criticized for its chilling effects, despite efforts by drafters to avoid hindering enthusiasm or creativity).

The 1993 amendments to Rule 11, which provide litigants a chance to withdraw arguments before suffering sanctions, were a response to concern that Rule 11 was "chilling" legal evolution. See Schwarzer, supra note 41, at 12-13 (noting that purpose of 1993 amendments was to remedy problems stemming from harsher 1983 amendments); Vairo, supra note 41, at 41 (arguing that 1993 amendments have alleviated some problems of 1983 Rule 11, which forced potential litigants to forgo litigation).

[77] 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)). The fluidity of legal interpretation is underscored by the fact that one respected commentator has argued that *Brown* was consistent with *Plessy* in principle. See Andrew Kull, The Color-Blind Constitution 151-63 (1992).

[78] 247 U.S. 251 (1918).

bid the product of a factory in interstate commerce unless such minimum rates are paid."[79] Levi recounts this argument from the *Hammer* Complainant's Brief and goes on to ask: "Indeed, many persons objected to the non-hiring of Negroes. Was Congress then to be permitted to ban the products of factories which refused to hire Negroes?"[80]

So, the trouble with labeling a legal proposition substantively frivolous is that, at another time, in another context, it may not be. When courts consider what arguments attorneys are allowed to make at the outset, there must be room for "any reasonable argument." From this vantage point, law seems radically indeterminate, precisely because the future seems radically indeterminate.

If courts take a merits-based approach to Rule 11, they make the mistake of saying that a particular legal argument is beyond the pale, beyond consideration, beyond discussion. This approach treats the law as a static "thing" rather than an open forum for dispute resolution. In the ethic of a forum for reasonable disagreement, it is wrong to silence anyone before he has had a chance to speak.[81] The proper response allows the argument to be made and then gives reasons for one's disagreement, reasons that are subject to challenge and that allow the conversation about the law to continue.

This "radical indeterminacy" is not destabilizing in the way that the theorists might predict. In the context of Rule 11 sanctions, a practice-based approach protects the litigants' reliance interests (which are the only reliance interests at stake)—they need not worry about being sanctioned merely because the judge disagrees with them on the merits.

Moreover, we should not be concerned that radical indeterminacy in this context will compromise the normative force of the law. Rule 11 governs only what arguments may be made, not what arguments will win. It looks, therefore, not to law's past so much as to law's possible future. Hence, radical indeterminacy in the context of Rule 11 does not undermine the logic and normative force of the law as applied *now* to the case at bar, but only questions whether that normative force will apply forever and in all circumstances. By leav-

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[79] Edward H. Levi, An Introduction to Legal Reasoning 86 (1949) (quoting Brief for Complainant, *Hammer* (No. 704)).

[80] Id. For other examples of the frivolous turned foundational, see Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331, 1331-32 (1995) (providing examples of early hopeless test cases that have subsequently become law); Webster, supra note 51, at 306 n.119 (questioning whether various landmark decisions would have been brought in Rule 11 climate).

[81] See generally Philippe Nonet, In the Matter of *Green v. Recht*, 75 Cal. L. Rev. 363, 367-69 (1987).

ing the judicial forum open for future legal evolution, the practice-based approach to Rule 11 preserves the ability of law to follow norms, even while it suggests that someday (if not now) the losers could conceivably be winners. Indeed, as Jules Lobel has put it, "[e]ven when prophetic litigation loses in court, it often functions, like important dissenting opinions, as an appeal to future generations."[82]

In sum, the theorists are wrong to think that radical indeterminacy is always destabilizing and illegitimate. In the context of Rule 11, courts have used indeterminacy as a tool to keep the legal forum open to future evolution.

B. What Theory Tells Doctrine

The courts' retreat to a practice-based approach to Rule 11, a retreat that makes law seem radically indeterminate, creates its own doctrinal dilemmas in at least four ways. First, the line between the substantively frivolous legal argument and the badly presented legal argument is not always clear. As the Seventh Circuit pointed out, "[a] lawyer who founds his suit on *Plessy v. Ferguson* has revealed all we need to know about the reasonableness of the pre-filing inquiry."[83]

Second, good presentation requires an ability to cull the controlling authority from the noncontrolling authority. Yet we can have disagreements even about whether a particular case is controlling. The District of Columbia Circuit's opinion in *Barth v. District of Columbia*[84] illustrates the difficulty. In *Barth*, the district court had sanctioned the defendant for failing to cite controlling authority concerning its Eleventh Amendment immunity.[85] Two members of the panel vacated the sanctions, reasoning that the Supreme Court cases not cited could have been reasonably distinguished, and therefore need not have been cited:

> Certainly one can imagine a brilliant brief tackling these issues, and one can readily concede that the papers actually filed by the District do not merit that accolade. Nonetheless, . . . plaintiffs' position requires a distinct—though surely not earthshaking—extension of the cases whose omission they now claim rendered the District's brief sanctionable.[86]

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[82] Lobel, supra note 80, at 1347.

[83] Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989) (en banc) (citations omitted); see also, Karonis Enters. Inc. v. Commercial Union Ins. Co., No. 94 C 1092, 1994 WL 722025, at *5-*9 (N.D. Ill. Dec. 29, 1994) (unpublished opinion) (noting that plaintiff's attorney misstated allegations in opponent's complaint, misstated relevant law about federal jurisdiction, and cited irrelevant cases and statutes).

[84] Nos. 92-7093 et al., 1993 U.S. App. LEXIS 33658 (D.C. Cir. Dec. 14, 1993).

[85] See id. at *3.

[86] Id. at *8.

Judge Henderson, in dissent on the sanctions issue, argued that the cases "on their face" appeared to be a barrier to the defendant's Eleventh Amendment defense: "If a party fails to bring to the trial court's attention authorities that appear to doom the success of the arguments advanced, sanctions are appropriate notwithstanding the party's belief that the cases are distinguishable."[87]

Third, a practice-based approach to Rule 11 disadvantages litigants who do not have the skills or resources of the best lawyers, especially nonlawyer litigants proceeding pro se.[88]

Finally, to try to eliminate any element of substance from Rule 11 determinations would be to determine the adequacy of an attorney's preparation by examining time sheets or numbers of electronic searches conducted. Such a standard, besides being easily manipulated, would not begin to address the central concerns of the Rule 11 drafters: the waste of court and litigant time and money due to silly lawsuits.[89] In sum, the practice-based approach does not eliminate the

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[87] Id. at *11-*12 (Henderson, J., dissenting). Compare International Shipping Co. v. Hydra Offshore, Inc., 875 F.2d 388, 391-92 (2d Cir. 1989) (sanctioning plaintiff for failing to address controlling authority), cert. denied, 493 U.S. 1003 (1989) with id. at 393 (Pratt, J., dissenting) (disagreeing with majority over whether statement in earlier case was holding or dicta). See also Fed. R. Civ. P. 11 advisory committee's note ("Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule."); Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1199-1202 (5th Cir. 1988) (reversing district court's imposition of sanctions on ground that case plaintiffs relied upon was not so clearly distinguishable as district court believed it to be); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538-39 (9th Cir. 1986) (reversing sanctions imposed for mischaracterizing precedent while noting difficulty of determining whether argument is in accord with controlling law or is argument for its extension).

[88] The Sixth Circuit has applied the same standard to pro se litigants that it applies to members of the bar. See Spurlock v. Demby, No. 92-3842, 1995 U.S. App. LEXIS 4321, at *6 (6th Cir. Mar. 2, 1995). Other courts have given more leeway to pro se litigants. See Banco de Ponce v. Buxbaum, No. 90 Civ. 6344, 1995 WL 92324, at *7 (S.D.N.Y. Mar. 7, 1995) (finding pro se litigant's Rule 11 "violations did not consist of a mistake of law excusable in a lay person"), aff'd, No. 95-7469, 1995 WL 762983 (2d Cir. Dec. 27, 1995); Anderson v. Butler, 886 F.2d 111, 114 (5th Cir. 1989) (noting pro se habeas litigants not usually sanctioned); Pouncy v. Murray, No. 93-7267, 1995 U.S. App. LEXIS 395, at *2 (4th Cir. Jan. 10, 1995) (following *Anderson*, 886 F.2d at 114); Vukadinovich v. McCarthy, 901 F.2d 1439, 1445 (7th Cir. 1990) (stating pro se status is mitigating factor), cert. denied, 498 U.S. 1050 (1991); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875-76 (5th Cir. 1988) (en banc) (holding pro se status is one factor to be considered in determining reasonableness of prefiling inquiry).

[89] As the Fourth Circuit noted:

> The number of hours allegedly spent by counsel in prefiling investigation does not dissuade us from affirming the district court's findings of Rule 11 violations. Given the adequate time to prepare and hours allegedly spent in preparation of the complaint, appellants have presented no excuse for the many clear factual errors in this pleading.

In re Kunstler, 914 F.2d 505, 516 (4th Cir. 1990), cert. denied, 499 U.S. 969 (1991).

need for courts to determine substantive issues (like which cases are on point), and it also has the difficulties of hampering pro se litigants and defining reasonable inquiry.

Looking at Rule 11 from the standpoint of the broader issues of indeterminacy, however, helps sort out these difficulties. Rule 11 is meant to protect courts and litigants from wasting time on "frivolous" arguments. What can frivolous mean? First, it is clear that because Rule 11 governs future legal arguments, frivolous in this context cannot refer to arguments not dictated by positive law, since positive law is the law of the past, the law that already has been stated by courts and legislatures. Arguments moving beyond the positive law are perfectly permissible, indeed, as the text of the Rule itself acknowledges, even necessary.[90]

Because nonfrivolous legal argumentation includes arguments about what the law should be, not just about what the law is, nonfrivolous arguments in the Rule 11 context are not just doctrine, and adequate legal investigation is not just time logged on LEXIS. The law of the future (what law "should be") is the underlying ethic of reasonableness that gives shape to both doctrine and practice. An argument is tenable, reasonable, and lawful so long as it consistently expresses something of worth—whether it be efficiency, plenty, consistency, reliance, fairness, kindness, dignity, conservation, responsibility, or ?. Sometimes the arguments that lead us furthest from positive law have their roots deepest in our past traditions and are the most "prophetic" of the future. Jules Lobel reminds us of the early (and unsuccessful) constitutional attacks on slavery and segregation, calls for women's suffrage, as well as more recent litigation to enjoin plant closings.[91]

Translated into the practice of common law, that means that a case is distinguishable if there is some differentiating fact that has some worth or importance for us that calls for a different result. Many commentators have, of course, called into question the existence of an "us" that shares enough of a sense of the good to ground this concep-

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On the other hand, some courts have looked to time spent to determine the reasonableness of the prefiling inquiry. See Smith v. Our Lady of the Lake Hosp., Inc., 960 F.2d 439, 442, 448 (5th Cir. 1992) (reversing sanctions and noting 200 hours of legal and factual investigation); Jensen Elec. v. Moore, Caldwell, Rowland & Dodd, 873 F.2d 1327, 1330 (9th Cir. 1989) (noting 11 hours of meeting with client indicates reasonable inquiry); Greenberg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987) (stating that 100 hours of legal research evidences complaint was not frivolous).

90 See Fed. R. Civ. P. 11(b)(2) (stating that reasonable inquiry exists when "the claims, defenses, and other legal contentions therein are warranted by existing law *or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law*" (emphasis added)).

91 See Lobel, supra note 80, at 1331-32, 1333-35.

tion of reasonableness. However, it is also clear that without some common ground, not only law, but language too would fail. Legal discussions, then, would not be pointless, but simply impossible. As long as there is something to say, there must be some shared meaning, however thin or superficial.

The courts, as the institutions for dispute resolution, provide the opportunity to search for that common ground, not only through "rational" argument, but also through storytelling. Advocates always seek to find the nerve of common experience and common value that translates their client's experience for others—to portray their clients as "reasonable," "likeable," and "good seeking." It simply is not a "reasonable" argument to say: "You should read the statute this way so my client can win."

One might analogize to the Equal Protection "rational basis" test.[92] This test requires that state legislation serve a legitimate public purpose other than benefiting a powerful legislator's "clients." The worth of the goal appealed to must be "universalizable"—a good that even the losers could acknowledge. Hence, the use of "rational" in this context may be likened to Kant's universalizable principles of reason.[93]

In the case of statutory interpretation, the argument for change may be one from the purpose or context of the statute, rather than its letter,[94] or one that challenges the reasonableness of a previous interpretation by looking at the "absurdity" of subsequent applications. Although the legal context requires that arguments take a certain form—analogy or disanalogy for common law argumentation; hermeneutic argument for statutory cases; structural, precedential, hermeneutic, or even moral argument for constitutional cases—it is the gut-level purpose of the argument that makes it frivolous or not.

Assuming the argument takes a legal form appropriate to the case, a form which itself stresses the importance of consistency, coherence, and integrity, objective reasonableness fades into a kind of good faith—are you arguing about something that really matters? Is there

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92 See Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (holding classification must "rationally further a legitimate state interest").

93 See Immanuel Kant, Foundations of the Metaphysics of Morals (passim) (1793); see also Cass R. Sunstein, The Partial Constitution 17 (1993) ("In American constitutional law, government must always have a reason for what it does. . . . The required reason must count as a public-regarding one. Government cannot appeal to private interest alone.").

94 See, e.g., United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."); Green v. Hocking, 9 F.3d 18, 22 (6th Cir. 1993) (looking to drafters' intent and not just text in interpreting Rule 11).

a real harm you want redressed, an important principle you care about vindicating, or are you just buying time, harassing your opponent, or enjoying the spectacle of a court proceeding?

The exceptions, as usual, test the rule. Courts have tended to shy away from a substantive frivolousness test in all but one sort of case. In tax protestor/debt evader cases, courts agree that the arguments are substantively frivolous even though they might be tenable in a different political and legal environment.[95] The dismissiveness and even rancor with which the courts throw tax protesters out of court may represent a judgment about motives rather than a judgment about arguments.[96]

Also illustrative are cases that refuse to sanction poorly made and unsupported arguments that nonetheless presuppose grave and unredressable injuries. In the Ninth Circuit's opinion in *Ault v. Hustler Magazine*,[97] the plaintiff, an antipornography activist, had been viciously lampooned in *Hustler Magazine* as "asshole of the month" in a mock interview characterizing her as a repressed, sex-starved housewife.[98] She sued for libel, false light, invasion of privacy, intentional infliction of emotional distress, interference with constitutional rights, and violation of obscenity statutes and sought to hold a local distributor jointly and severally liable.[99] The district court sanctioned her law-

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[95] See United States v. Carley, 783 F.2d 341, 344 (2d Cir.) (upholding sanctions for arguments that income tax is unconstitutional and wages are not income), cert. denied, 476 U.S. 1142 (1986); Lepucki v. Van Wormer, 765 F.2d 86, 88-89 (7th Cir.) (upholding sanctions for argument that federal reserve notes not legal tender), cert. denied, 474 U.S. 827 (1985); Stelly v. Commissioner, 761 F.2d 1113, 1115 (5th Cir.) (upholding sanctions for argument that wages are not gain under Sixteenth Amendment because compensation for labor is even exchange), cert. denied, 474 U.S. 851 (1985); Frost v. Commissioner, 624 F. Supp. 316, 317 (S.D. Miss. 1985) (upholding sanctions for argument that wages are not income); Nixon v. Phillipoff, 615 F. Supp. 890, 896 (N.D. Ind. 1985) (upholding sanctions for argument that federal reserve notes are not legal tender), aff'd, 787 F.2d 596 (7th Cir. 1986); see also Kassin, supra note 43, at 17 (noting only issue of legal frivolousness on which a high percentage—83.4%—of judges agreed sanctions were appropriate involved tax protesters).

These arguments are treated as substantively frivolous, even though in a different political or social environment, they might even be meritorious. See Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 608 (1869) (holding Congress had no power to make federal reserve notes legal tender for debts incurred in coin-backed currency); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553-54 (1870) (overruling *Hepburn*). The plaintiff's argument in *Stelly v. Commissioner*, for example, is straight out of Marx. One can also imagine *Hepburn* revivified if Congress attempted to satisfy the national debt by printing more dollars and causing wild inflation.

[96] See Bast v. Cohen, Dunn & Sinclair, 59 F.3d 492, 494, 496 (4th Cir. 1995) (awarding sanctions under Fed. R. Civ. P. 38 for frivolous appeal in lawsuit that "has all the markings of a vendetta").

[97] 860 F.2d 877 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

[98] See id. at 879.

[99] See id. at 879-80.

yer for the last three of these contentions when the plaintiff failed to defend them in her opposition to the defendant's motion to dismiss.[100] The Ninth Circuit reversed the sanctions: "That the law does not offer protection from such disgusting and distasteful abuse is not to say that arguments for [the law's] extension are wholly unreasonable."[101]

Finally, cases involving pro se litigants are instructive. Although Rule 11 indicates that parties must meet the same standard as lawyers for Rule 11 purposes,[102] pro se litigants still receive extra leeway.[103] Perhaps at least some of this leeway is due to lingering suspicions that beneath the ill-pled complaint lies a real harm in need of redress—hence, a "reasonable" argument. Until pro se litigants have violated direct orders of the court, most courts will refrain from sanctioning them.

From this perspective, perhaps the older pre-1983 good faith standard was the appropriate one for legal frivolousness under Rule 11—attorneys need only certify "to the best of [their] knowledge, informa-

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100 See id. at 883.

101 Id. at 884. Melissa Nelken refers to this as "arbitrary moralizing." Nelken, supra note 49, at 399 n.95; see also Ross v. City of Waukegan, 764 F. Supp. 1308, 1310 (N.D. Ill. 1991) (refusing to sanction plaintiff for procedural errors in suing city in case where plaintiff's relative drowned while city officials kept bystanders from rescuing him), vacated and remanded for clearer explanation of denial of sanctions, 5 F.3d 1084, 1085-86, 1090 (7th Cir. 1993).

Worth contrasting with this case is Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984), in which plaintiff's child was kidnapped and taken to Kenya by his natural father. Plaintiff in *Dore* sued the Department of State and Secretary of State for failing to enforce immigration laws, because the child was able to leave the country without a passport. See id. at 156. Because defendant had no "special relationship" with plaintiff, the common law (and therefore the Federal Tort Claims Act) provided no remedy. See id. at 158. Plaintiff was sanctioned for bringing the suit, despite the seriousness of her injury and the existence of good arguments for changing the law. See id.; see also DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 205-12 (1989) (rejecting claims, over dissent of three justices, that county social workers' interactions with abused child created "special relationship" and that failure to protect child from further abuse violated child's substantive due process rights).

102 Whoever signs the pleading, certifying that it is based on reasonable inquiry into law and fact, is liable for sanctions. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 124 (1989) (holding individual signor of documents solely liable for Rule 11 sanctions).

103 The 1993 amendments to Rule 11 note that monetary sanctions for legally frivolous claims are properly imposed solely on lawyers, not their clients. See Fed. R. Civ. P. 11(b)(2) advisory committee's note. Many courts adhere to the rule in Haines v. Kerner, 404 U.S. 519, 520 (1972), that courts are to liberally construe the pleadings of pro se litigants. See generally cases cited supra note 88.

For a more complete treatment of this issue, see Eric J.R. Nichols, Note, Preserving *Pro Se* Representation in an Age of Rule 11 Sanctions, 67 Tex. L. Rev. 351, 363 (1988) (arguing for more lenient treatment of pro se litigants).

tion and belief there is good ground to support" a case.[104] Because the understanding of law in Rule 11 cases must preserve the ability of doctrine to fit good sense not only now but also in the future, there is no stable set of "objectively frivolous" doctrine. Instead, law forums must leave room for attempts to redress new injuries and articulate important norms, even if they are not yet our law.

Of course, one of the reasons for moving from a "subjective standard" to an "objective standard" in the first place was our intuition that judges are better able to discern the "objectively frivolous" than the "bad faith," and our concomitant concern that a subjective standard would be applied inconsistently across judges. However, the limited evidence suggests the contrary is true. The 1985 study conducted by the Federal Judicial Center found that judges more often agreed about the difference between good faith and bad faith than they did about whether or not the legal positions asserted were "frivolous and without merit."[105] Although this result might surprise the drafters of the 1983 Rule, it is not surprising once one appreciates the courts' desire to protect the open texture of cases yet to come. The law of the future is no more objective than the character of litigants.

III
QUALIFIED IMMUNITY

Beginning in the nineteenth century, common law provided immunity to government officials sued in tort, even for constitutional violations.[106] The immunity was an outgrowth of sovereign immunity, though now granted to officials sued in their personal capacities for actions taken in the scope of their public duties.[107] The immunity

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104 Fed. R. Civ. P. 11 (1982) (repealed 1983). See generally supra note 40. This Article takes no position on the appropriate standard for sanctioning failures to undertake reasonable factual investigations.

105 See Kassin, supra note 43, at 17-23, 75-77.

106 See Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1781-85 (1991) (discussing historical trend leading to expansion of doctrines granting immunity to government officials).

107 See David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 2-56 (1972) (outlining history of immunity in United States, noting origins in English sovereign immunity concepts and subsequent doctrinal alterations); Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 19-39 (1963) (examining relationship of historical immunity concepts to current federal and state officer immunity standards); Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414-77 (1987) (discussing origins of immunity and various rationales behind its development into current doctrine).

served to ensure that the law would not punish public officials for making hard choices in the public interest.[108]

42 U.S.C. § 1983 allows citizens to sue state government actors for any violation of their civil rights.[109] The Supreme Court has read the common law immunities, with a twist, into the statutory cause of action. When sued for damages in their personal capacity,[110] officials

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[108] The rationale is usually put in terms of correcting overdeterrence created by tort law: Officials will recoil from performing necessary but controversial public duties if they fear damages liability. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (regarding presidential aides, "there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950))); Wood v. Strickland, 420 U.S. 308, 319-21 (1975) (explaining school board members' fear of reprisal for violating students' constitutional rights as rationale for qualified immunity). In Owen v. City of Independence, 445 U.S. 622 (1980), the Court refused to extend qualified immunity to municipalities because it reasoned that municipal employees would not be afraid of taking action if they would not be personally liable for damages. See id. at 655-56. The same is true for actions against officials in their official, rather than personal, capacity, since the official's employer will have to pay the damages. See Kentucky v. Graham, 473 U.S. 159, 165-67 (1985) (stating that "a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself").

Not only is the deterrence rationale rather behavioristic, assuming governmental officials will respond like rats to bait, but also it has the misfortune of provoking the criticism that there is little empirical support for the view that officials are overdeterred by tort law. See Sheldon H. Nahmod, Constitutional Wrongs Without Remedies: Executive Official Immunity, 62 Wash. U. L.Q. 221, 247-49 (1983) (noting that *Harlow* Court discussed no data showing that executive decisionmaking was adversely affected by cost-benefit analysis in qualified immunity test); cf. David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 47-53 (1989) (discussing incompatibility of subjective reasonableness standard and objective reliance on clearly established principles).

[109] Section 1983 creates a civil cause of action against state actors who subject "any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1994).

[110] Qualified immunity is not available in suits for injunctive relief, since injunctive relief (which is prospective only) prevents constitutional wrongs without creating the fear that officials will be deterred in new situations from exercising discretion for fear of suit. See Pulliam v. Allen, 466 U.S. 522, 541-42 (1984) (finding judicial immunity of state magistrate not bar to injunctive relief). However, the Court has suggested that state legislators also are immune from injunctive relief, since legislative immunity is grounded in part on the Speech and Debate Clause. See Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731-33 (1980) (finding Virginia Supreme Court immune from suit when acting in legislative capacity to promulgate laws prohibiting attorney advertising).

enjoy some level of immunity. Judges,[111] prosecutors,[112] legislators,[113] and the President of the United States[114] have absolute immunity from suit as long as they are acting in their official capacity. Executive officials, such as police officers,[115] school officials,[116] mental hospital administrators,[117] and prison officials,[118] are entitled to "qualified immunity" from suit, meaning they are immune if they do not violate clearly established law of which a reasonable public official would have known.[119] This standard, which the Court articulated in *Harlow*

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111 "[A judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation." Pierson v. Ray, 386 U.S. 547, 554 (1967); see also Mireles v. Waco, 502 U.S. 9, 13 (1991) (distinguishing absolute immunity available for acts in excess of jurisdiction from acts in absence of jurisdiction); Forrester v. White, 484 U.S. 219, 227-28 (1988) (limiting application of absolute immunity to judicial acts, not administrative acts); Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (providing absolute immunity for judge acting within jurisdiction).

112 See Burns v. Reed, 500 U.S. 478, 487-96 (1991) (establishing absolute immunity for conduct in hearing, but only qualified immunity for advice to police regarding investigation); Imbler v. Pachtman, 424 U.S. 409, 420 (1976) (describing prosecutorial immunity as quasi-judicial in nature).

113 See Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

114 See Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

115 See *Pierson*, 386 U.S. at 555-57.

116 See Wood v. Strickland, 420 U.S. 308, 318-22 (1975).

117 See O'Connor v. Donaldson, 422 U.S. 563, 566-67 (1975).

118 See Procunier v. Navarette, 434 U.S. 555, 561-62 (1978).

119 See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions" are entitled to qualified immunity from civil damages); *Pierson*, 386 U.S. at 557 (articulating previous standard that police officers are granted immunity when acting in good faith and with probable cause).

The Court has spoken both in terms of "clearly established law," see *Harlow*, 457 U.S. at 818, and in terms of whether the official acted "objectively reasonably," see *Wood*, 420 U.S. at 322. The Second Circuit operationalizes these different articulations by creating a three-factored inquiry: (1) is the right in question defined with "reasonable specificity?"; (2) does the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question?; and (3) under preexisting law, would a reasonable defendant official have understood that his or her acts were unlawful? See Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991).

By making qualified immunity turn on whether the officer's conduct was objectively reasonable, the Supreme Court hoped to allow government officials to avoid trial, since the trial court could decide the issue of whether the law was clearly established on a motion to dismiss or for summary judgment. Allegations of malice, by contrast, inevitably created issues of fact that would have to be decided by the jury. See *Harlow*, 457 U.S. at 818.

Under *Harlow*, even if an official violated clearly established law, he is still entitled to immunity if he can show "extraordinary circumstances" and can "prove that he neither knew nor should have known of the relevant legal standard." Id. at 819. In the Ninth Circuit, this standard is implemented by shifting burdens of proof: the plaintiff has the burden of proving clearly established law; the defendant has the burden of proving her actions were reasonable. See Maraziti v. First Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992) (reversing denial of motion for summary judgment because plaintiff failed to show that IRS agents violated "clearly established law" by seizing purchaser's funds and using

v. Fitzgerald,[120] differs from the common law immunity in one important respect: the bad or good faith of the officials is irrelevant to the inquiry.[121] Hence, qualified immunity determinations, like Rule 11 determinations, focus on the determinacy or indeterminacy of the law, not the defendants' states of mind. The "objectivity" of the inquiry is reinforced by the fact that decisions about whether or not law was clearly established for qualified immunity purposes are to be made by judges, not juries.[122]

Although the inquiry in both qualified immunity and Rule 11 cases assesses the clarity and determinacy of the law, the courts in the qualified immunity context have taken a very different approach to law and to indeterminacy than courts in the Rule 11 context. Because qualified immunity is designed to provide some protection from personal liability to public officials in carrying out their official duties, courts focus on the question of whether liability was predictable at the time the official acted. If not, the official should not have to choose between liability for failing to act and liability for acting.

Cases which include both Rule 11 and qualified immunity questions vividly illustrate how the same area of legal doctrine can be both determinate and indeterminate depending upon the point of calling it so. For example, it is almost impossible to find cases in which defendants (or their lawyers) are sanctioned for raising losing qualified immunity defenses, even though it would seem that if the law is "clearly established," it would be frivolous to argue otherwise.[123] Hence, a court can find an area of law "clearly established" for purposes of

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them to pay vendor's delinquent taxes). Few courts have applied this second prong. See Henk J. Brands, Note, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045, 1047 n.22 (1990) (citing cases demonstrating rare use and lack of development of test).

120 457 U.S. 800 (1982).

121 See *Pierson*, 386 U.S. at 555.

122 See *Harlow*, 457 U.S. at 818.

123 The only case I found that awarded sanctions for losing qualified immunity claims was Porter v. Board of Education, Nos. 92 C 533, 93 C 6464, 1995 U.S. Dist. LEXIS 1850 (N.D. Ill. Feb. 14, 1995) (awarding sanctions against pro se defendant who claimed qualified immunity); see also Taylor v. Kveton, 684 F. Supp. 179, 185 n.8 (N.D. Ill. 1988) (suggesting sanctions would be warranted, though plaintiff did not seek them). Although it seems that most of the time it does not occur to plaintiffs to ask for sanctions, see, e.g., Sexton v. Arkansas Supreme Court Comm. on Professional Conduct, 725 F. Supp. 1051, 1055 (W.D. Ark. 1989) (finding qualified immunity claim "wholly without merit" without mentioning sanctions), there are a few cases in which such motions were raised and subsequently denied, see, e.g., DiMarco v. Rome Hosp., 899 F. Supp. 91, 95-96 (N.D.N.Y. 1995) (denying sanctions even after defendants "vexed" trial court by reasserting losing qualified immunity claims in motion for reconsideration); Sisak v. Amtrak, No. 91 Civ. 1030, 1994 U.S. Dist. LEXIS 5019, at *22 (S.D.N.Y. Apr. 18, 1994) (denying plaintiffs sanctions and denying defendants qualified immunity); Barbosa v. Gaztambide, 776 F. Supp. 52, 61 (D.P.R. 1991) (denying sanctions where qualified immunity was previously denied on sum-

qualified immunity, even if there is room for reasonable argument for purposes of Rule 11. Moreover, when qualified immunity is granted, plaintiffs' attorneys need not be sanctioned for arguing that the law is "clearly established" even if the court finds it is not.[124]

The different meaning of "indeterminacy" in the two legal contexts stems from a difference in the goal the courts are trying to achieve. Because the focus in qualified immunity cases is fair notice to governmental officials, the courts take a much more positivist approach to doctrine than they do in Rule 11 cases. Judges do not see holdings as mutable, but as signposts that tell the officers what they may not do. Holdings must be clear, specific, and stable in order to do that job. This approach to doctrine generates some clear and predictable rules and a large area of "determinate" law. For example, prior cases "clearly establish" that indiscriminate strip searches of prison visitors[125] and persons arrested for misdemeanors[126] violate the Fourth Amendment, prisoners have a constitutional right to adequate protection from extreme cold,[127] interference with the transfer of a prisoner's legal papers is unconstitutional,[128] and making a material false statement in an affidavit in support of an arrest or search warrant is unconstitutional.[129]

If there is no precedent in the relevant jurisdiction that states, with the proper level of specificity, a rule outlawing the officer's act, then the official has immunity. The question is whether courts have elaborated the legal norm sufficiently to give the officers notice of how they must act. Some courts have even gone so far as to suggest that when a constitutional right requires a balancing of interests, the failure of officials to strike the right balance is almost always immu-

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mary judgment—sanctions denial is summary and whether plaintiffs argued that qualified immunity defense was unwarranted and sanctionable is unclear).

124 See Ireland v. Tunis, 893 F. Supp. 724, 730 (E.D. Mich. 1995) (granting qualified immunity but refusing to sanction plaintiff for arguing against it); Strong v. Board of Educ., 789 F. Supp. 99, 101-02 (E.D.N.Y. 1991) (same); Danese v. City of Roseville, 757 F. Supp. 827, 830 (E.D. Mich. 1991) (same); Shields v. Shetler, 120 F.R.D. 123, 128 (D. Colo. 1988) (same). But see Knipe v. Skinner, 19 F.3d 72, 76 (2d Cir. 1994) (upholding sanctions and reasoning that appellant "cannot credibly argue that appellees could reasonably have known in 1988 that their conduct violated clearly established constitutional rights" since rights alleged are not established at all).

125 See Daugherty v. Campbell, 935 F.2d 780, 786-87 (6th Cir. 1991), cert. denied, 502 U.S. 1060 (1992).

126 See Walsh v. Franco, 849 F.2d 66, 68-69 (2d Cir. 1988).

127 See Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991), cert. denied, 503 U.S. 966 (1992).

128 See Crawford-El v. Britton, 951 F.2d 1314, 1318 (D.C. Cir. 1991), cert. denied, 506 U.S. 818 (1992).

129 See Bruning v. Pixler, 949 F.2d 352, 357 (10th Cir. 1991), cert. denied, 504 U.S. 911 (1992).

nized, since a balancing test cannot be given a definitive black-letter rule formulation.[130]

Hence, the law in qualified immunity cases resembles the moderate indeterminist's world of settled law with a few legal gaps. Law means what judges have said; it is "propositional" and hornbook-like, not some unarticulated ratio decidendi. Law is positive law—the rules articulated and laid down by sovereigns charged with the duty of articulating law.[131] Indeed, buried in *Harlow v. Fitzgerald*'s requirement that courts determine the qualified immunity issue before trial is a shift of institutional role. Courts no longer leave it to juries to apply general standards. Instead, courts must themselves articulate more

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[130] See, e.g., Manzano v. South Dakota Dep't of Social Servs., 60 F.3d 505, 510 (8th Cir. 1995) (remarking balancing test for constitutional violations affecting family relationships rarely establishes clear law); DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995) (noting that balancing test for determining First Amendment rights of public employees rarely results in clearly established law); Buzek v. County of Saunders, 972 F.2d 992, 997 (8th Cir. 1992) (noting constitutional rule requiring balancing rarely results in clearly established law); Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) ("[A]llegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established.'"); Frazier v. Bailey, 957 F.2d 920, 931 (1st Cir. 1992) (noting "amorphous nature" of liberty interest in familial relationships must always be balanced against governmental interests, so it is "difficult, if not impossible" for officials to know when they have transgressed clearly established law); Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.) (noting that constitutional rule requiring balancing rarely results in clearly established law), cert. denied, 479 U.S. 848 (1986); see also Kinports, supra note 18, at 153-54.

But see Dahm v. Flynn, 60 F.3d 253, 258 (7th Cir. 1994) (denying qualified immunity in context requiring balancing, over dissent on this point by Judge Easterbrook); Norton v. Napper, No. 93-55325, 1994 U.S. App. LEXIS 32759, at *8 (9th Cir. Nov. 14, 1994) ("[F]luidity of the standard does not preclude a finding that the law was 'clearly established.'"); Williams v. Kentucky, 24 F.3d 1526, 1537 (6th Cir.) (denying qualified immunity in context requiring balancing), cert. denied, 115 S. Ct. 358 (1994); Roth v. Veteran's Admin., 856 F.2d 1401, 1408 (9th Cir. 1988) ("If we accepted defendants' argument . . . we essentially would be holding that public employees can never maintain [an] action alleging retaliation for exercise of their first amendment rights because adjudicating these claims requires particularized balancing.").

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> Positive law . . . assumes that, because the law does not exist as law before its creation, it is unknowable until announced by the lawgiver. Those subject to the law rely on the statement of the law to guide their actions. From this perspective, subjects need not only an authoritative lawgiver, but an *authoritative procedure for lawgiving*—a rule for recognizing which rules are law.
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> Consequently, adjudication is often pictured as the application of the "core" meaning of an authoritatively promulgated rule. Judges create new rules only in the shadowy crevices (penumbral interstices) of the existing rules. Because judges may disagree about what laws should be made in these peripheral cases, appellate review is necessary to provide a "last word"—an authoritative statement of the law.

Linda Meyer, "Nothing We Say Matters": *Teague* and New Rules, 61 U. Chi. L. Rev. 423, 461, 464 (1994) (footnote omitted).

specific applications of those standards.[132] Courts become more like legislatures.

In the Rule 11 context, by contrast, law looks almost radically indeterminate, and courts are very reluctant to sanction arguments as substantively legally frivolous (at least unless the litigant's motives are also suspect). Instead, courts prefer to look to whether the lawyers have "done their homework." Law in the Rule 11 context means something like good sense or reason—as long as a lawyer makes a distinction "with a difference," or argues for a change in the law that seems to serve goals we can understand as worthy, the argument is a legitimate one, potentially part of the law.[133] Law is fluid, contestable, radically indeterminate. It is more like the law of custom or common law reasoning, in which the reason is what is law, not the words judges use.[134]

The legal positivism that drives qualified immunity law generates a different set of doctrinal difficulties from those in Rule 11 cases, reinforcing the sense that these areas of the law handle and perceive indeterminacy differently.

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[132] See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that discovery should not be allowed until threshold question of immunity is resolved); Brands, supra note 119, at 1055-56 (addressing proper allocation of questions between judge and jury in qualified immunity cases); see also Hunter v. Bryant, 502 U.S. 224, 227-29 (1991) (criticizing Ninth Circuit for sending qualified immunity question to jury); Simkunas v. Tardi, 930 F.2d 1287, 1291 (7th Cir. 1991) (stating that question of whether qualified immunity attaches is for judge to decide and is subject to de novo review).

[133] Lawyers may even flat out and repeatedly argue for overruling a precedent. For example, during nearly every term in the late eighties, the Supreme Court heard a case in which one side argued for the overruling of Hans v. Louisiana, 134 U.S. 1 (1890), a case that required statutes to express clear congressional intent to depart from the Eleventh Amendment in allowing citizens to sue states in federal court under a particular statute. See, e.g., Dellmuth v. Muth, 491 U.S. 223 (1989); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987); Papasan v. Allain, 478 U.S. 265 (1986); Green v. Mansour, 474 U.S. 64 (1985); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

[134] In contrast to the positive law framework, common law does not hang on the exact words of an opinion. The words, even of a duly appointed Article III court, are not themselves law, even when promulgated in the official reports of opinions of the court. They may be dicta. Skillful judges and lawyers capture the reason and result of a series of opinions; that is, they view the cases as a coherent series, rather than as the disconnected and even contradictory pronouncements they may appear to be. Law, then, is not the will of earlier judges, nor the words on the pages of their opinions. Law, from the standpoint of the common law judge, is the coherence, sense, and significance of a set of human actions.

Meyer, supra note 131, at 465 (footnote omitted).

First, courts in qualified immunity cases have had difficulty finding the right level of generality at which law must be clear.[135] It is of course clear, for example, that officials may not violate citizens' First Amendment rights. What is not clear is whether censoring a prisoner's mail amounts to such a violation.[136]

Second, courts have differed over what source of authority will "clearly establish" law. Must the Supreme Court have spoken? The circuit court in one's own jurisdiction? In another jurisdiction? The state supreme court? The district court?[137]

Third, in law enforcement cases, courts have struggled with the question of whether an officer can be "reasonably unreasonable" in assessing probable cause or the necessity for application of force.[138] Both the probable cause standards and the excessive force standards refer to whether the officer's conduct was "reasonable" under the circumstances. If the search or force was unreasonable, it seems redundant then to ask the qualified immunity question whether the officer was reasonable in thinking his unreasonable conduct lawful.

These disputes in qualified immunity doctrine reflect the tensions between conceptions of law and indeterminacy. The level of generality problem, for example, poses a classic difficulty for positive law—how specifically must the rule be stated in order to give adequate notice in any particular situation and avoid ex post facto liability? The multiplicity of sovereigns problem is also a direct result of thinking of law as positive law. Finally, but less obviously, the "reasonable unreasonableness" dilemma created by the excessive force decisions reflects a tension between Law as Custom and Law as Positive Law.

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135 See Karen M. Blum, Qualified Immunity: A User's Manual, 26 Ind. L. Rev. 187, 199-205 (1993) (surveying various considerations and tests used by courts to determine whether a right is "clearly established").

136 See Procunier v. Navarette, 434 U.S. 555, 565 (1978) (holding that prison officials were entitled to qualified immunity because no clearly established law protected state prisoners' mail at time officials acted).

137 See Blum, supra note 135, at 203-05 (noting circuit conflict over relevance of extrajurisdictional authority in qualified immunity cases); Kinports, supra note 18, at 140-48 (same); Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 Ga. L. Rev. 597, 618-34 (1989) (same).

138 See Blum, supra note 135, at 218-22 (outlining circuit split); Kathryn R. Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force, 62 Temp. L. Rev. 61, 85 (1989) (examining qualified immunity defense in Fourth and Fourteenth Amendment claims against law enforcement officials).

A. *Levels of Generality*

Contrasting cases from the Sixth and Ninth Circuits illustrates the "levels of generality" dilemma.[139] In the Ninth Circuit case *Kelley v. Borg*,[140] an inmate brought a § 1983 action against prison guards on the ground that they failed to let him out of his cell when he complained of fumes generated by maintenance work. The inmate relied on *Estelle v. Gamble*,[141] which held that a prison guard's deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment and states a cause of action under § 1983.[142] The guards appealed from the district court's denial of qualified immunity, arguing that the district court had characterized the right at issue too generally.[143] According to the guards, instead of asking whether it was clearly established that prison officials must not be deliberately indifferent to serious medical needs of inmates, the district court should have asked whether the plaintiff had a clearly established right "after complaining about foul smells . . . for defendant correctional officers to immediately remove him from his cell in the Security Housing Unit during a lock down, when they first were required to at least inform their superior officer that they needed to remove an inmate."[144] The Ninth Circuit rejected this reformulation of the rule, stating that the Eighth Amendment right at stake had already been sufficiently particularized by the *Estelle* formula asking whether prison officials had behaved with deliberate indifference to serious medical needs.[145] "To hold that the magistrate judge should have defined the right at issue more narrowly, and included all the various facts that Appellants recited in their proposed definition," the panel reasoned, "would be to allow Appellants, and future defendants, to define away all potential claims."[146]

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139 For discussion of cases in other circuits, see Blum, supra note 135, at 199-202; Kinports, supra note 18, at 149-56.

140 60 F.3d 664 (9th Cir. 1995).

141 429 U.S. 97 (1976).

142 See id. at 104-05.

143 See *Kelley*, 60 F.3d at 666-67.

144 Id. at 667.

145 See id.

146 Id. The Ninth Circuit rejected another move to narrow the scope of "clearly established law," in Robins v. Meecham, 60 F.3d 1436 (9th Cir. 1995), a case in which a prisoner sued a guard who had injured him when firing birdshot at another inmate. See id. at 1438. The prisoner claimed that the guard's actions were malicious and sadistic for the very purpose of causing harm—the standard articulated in Wilson v. Seiter, 501 U.S. 294 (1991). See *Robins*, 60 F.3d at 1440. The guards asked for qualified immunity on the ground that it was not clearly established that the doctrine of transferred intent applied, since the plaintiff alleged the guard's malice was directed at another prisoner, not the plaintiff. See id. at

By contrast, the Sixth Circuit has held that the *Estelle* formula is not sufficiently specific. In *Rich v. City of Mayfield Heights*,[147] officers found plaintiff's decedent hanging from his jail cell door and did not immediately cut him down.[148] The panel decided that the officers did not have reasonable notice from the language of the *Estelle* decision that what they did violated the inmate's civil rights.[149]

1441. The panel concluded that the *Wilson* standard did not require malice toward a particular prisoner, so there was no need for the doctrine of transferred intent:

> This situation presents no new principles of which the officers could not have reasonably been aware regarding the constraints which the Eighth Amendment places on the actions of prison officials. The right of Robins to be free from harm caused by the malicious and sadistic actions of the correctional officers was clearly established at law.

Id. at 1442.

147 955 F.2d 1092 (6th Cir. 1992).

148 See id. at 1092.

149 See id. A different panel of the Sixth Circuit decided to the contrary in Heflin v. Stewart County, 958 F.2d 709 (6th Cir.), cert. denied, 506 U.S. 998 (1992), another case in which officers delayed in cutting down and attempting to resuscitate an inmate who had been hanged. The majority denied qualified immunity to the officers who had delayed cutting down the inmate. See id. at 717. Judge Kennedy, however, dissented on the ground that "the right of hanging victims displaying no vital signs to be immediately cut down and administered CPR by jail officials was [not] clearly established such that a reasonable official would have known of it." Id. at 719 (Kennedy, J., dissenting).

Another case illustrating the Sixth Circuit's insistence on a high level of specificity is Bills v. Aseltine, 52 F.3d 596 (6th Cir.), cert. denied, 116 S. Ct. 179 (1995). There, the plaintiff sued police officials who had brought a private security officer for General Motors (GM) to plaintiff's house when officials were implementing a search warrant. See id. at 599. The GM security officer accompanied officers during their search and took photographs of items that were not the subject of the search warrant, but that he suspected were stolen from GM. See id. In its decision, the Sixth Circuit mentioned a Second Circuit case, Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), cert. denied, 115 S. Ct. 1689 (1995), which denied qualified immunity to Secret Service agents who had allowed a camera crew from CBS's *Street Stories* to accompany them while executing a search warrant. See *Bills*, 52 F.3d at 602. In *Ayeni*, the Second Circuit framed the right at stake as follows:

> Agent Mottola correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press into a home to observe and report on their activities. He therefore argues that there was no clearly established rule prohibiting such an act. The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties . . . . Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.

Ayeni, 35 F.3d at 686. The Sixth Circuit disagreed with the level of generality at which the Second Circuit had articulated the right in question. The panel reasoned: "It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard." *Bills*, 52 F.3d at 602. Instead, the right at stake should have been characterized as the right not to have a private party who is not assisting police present during a search.

The problem in determining the proper level of generality at which to characterize a court's holding is a perpetual difficulty because case law is not a body of "rules." No court's statement of its own holding (or the holding of any other case) is authoritative. Cases may always be distinguished on their facts.[150] Indeed, John Austin, the father of legal positivism, suggested codifying the common law to rid it of this sort of uncertainty.[151]

From the perspective of legal indeterminacy, the levels of generality problem generates a paradox: if the rule is stated at too great a level of generality, the scope of its application to future cases is not clear enough to provide officials (or others) with guidance. Telling officials to give lawbreakers "due process" does not give much direction. On the other hand, if the rule is stated at too great a level of specificity, it has no relevance to future cases different on their facts, and the links between cases disappear.[152] Either way, law is "indeterminate," because the rule is either overinclusive or underinclusive and fails to guide application. The courts that insist on a more positivist approach to case law must struggle to find some "middling" level of

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See id. The court stated that "[t]he full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined." Id. at 603. This discussion is technically dicta. Although the panel said there was no clearly established rule concerning the presence of private parties during searches, in a prior appeal the court had already denied qualified immunity to the agent who invited the GM security officer, allowing the jury to decide whether the agent's conduct was reasonable. See Bills v. Aseltine, 958 F.2d 697, 705 (6th Cir. 1992). The agent was then exonerated by the jury. See *Bills*, 52 F.3d at 604. The issue on this second appeal was whether the district court had erred in granting qualified immunity to other officers who had assisted in the search and had failed to object to the GM officer's presence. See id. at 600. Since the jury found the inviting agent's conduct to be reasonable, the court decided that the other agents' derivative conduct was likewise reasonable. See id. at 604; see also Marsh v. Arn, 937 F.2d 1056, 1067-68 (6th Cir. 1991) (citation omitted):

> [W]hile a cause of action for failure to protect an inmate from attack by another inmate under a deliberate indifference standard of liability was established [at the time] . . . we find that the right of an inmate to be segregated due to the threats of a roommate had yet to be sufficiently defined in this circuit to be considered "clearly established."

150 See Steven J. Burton, An Introduction to Law and Legal Reasoning 36-37 (1985) (describing practice of disanalogizing); Levi, supra note 79, at 2-3 (same); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 577 (1987) (stating that "the relevance of an earlier precedent depends on how we characterize the facts arising in an earlier case"); A.W.B. Simpson, The *Ratio Decidendi* of a Case, 21 Mod. L. Rev. 155, 155-60 (1958) (examining question of whether rule of law judge uses as basis for her decision is binding, given possibility of distinguishing case on its facts).

151 See 2 John Austin, The Providence of Jurisprudence Determined 372-73 (London, Murray 1861).

152 See Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1107 (1990) (advocating intermediate level of generality in defining fundamental rights).

generality at which to state rules that makes them both general enough and specific enough to be useful.

B. Multiple Sovereigns

Positivist approaches to precedent also have to take into account which "sovereign" is setting out the rules, since a rule is binding only in the right jurisdiction. The Sixth and Ninth Circuits also take polar opposite approaches to the sovereigns problem.[153] The Ninth Circuit looks to "all available decisional law including decisions of [other courts] to determine whether the right was clearly established."[154] The Sixth Circuit, on the other hand, "places little or no value on the opinions of other circuits in determining whether a right is clearly established."[155]

For example, the Ninth Circuit held that a police officer should have known he violated the Due Process Clause when he left a woman passenger abandoned at 2:30 in the morning in a high crime district after arresting her driver.[156] After refusing several rides home from strangers, the woman finally accepted one, and was abducted and raped.[157] The Ninth Circuit relied on one analogous case from the Seventh Circuit in concluding the law was clearly established:

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153 For a detailed discussion of the positions of the other circuits on this question, see Blum, supra note 135, at 203-05; Fallon & Meltzer, supra note 106, at 1751 n.105; Kinports, supra note 18, at 140-48.

154 Schroeder v. Kaplan, No. 93-17123, 1995 WL 398878, at *1 (9th Cir. July 7, 1995) (quoting Doe v. Petaluma City Sch. Dist., 54 F.3d 1447, 1450 (9th Cir. 1995)).

155 Marsh v. Arn, 937 F.2d 1056, 1069 (6th Cir. 1991). In Black v. Parke, 4 F.3d 442 (6th Cir. 1993), the Sixth Circuit articulated a new standard:

> "[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."

Id. at 445 (quoting Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988)).

The Sixth Circuit has softened its approach in recent cases. See Rodgers v. Jabe, 43 F.3d 1082, 1086 (6th Cir. 1995) (noting that "law of the highest court in the state may also be considered" (citing Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988))); see also Daugherty v. Campbell, 935 F.2d 780, 785-87 (6th Cir. 1991) (relying on cases from Eighth, First, and Fifth Circuits to "clearly establish" right), cert. denied, 502 U.S. 1060 (1992).

156 See Wood v. Ostrander, 879 F.2d 583, 596 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990).

157 See id. at 586.

> There was no Supreme Court case, or case in this circuit, which was binding on this circuit when the events in this case occurred. Therefore, we begin with an analysis of whether it was likely, in September 1984, that our circuit would have come to the same result the Seventh Circuit did in *White*. . . .
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> . . . .
>
> Would we, in 1984, have followed the holding of *White*, and the logic of Judge Posner's comments in *Bowers* and *Jackson*? We believe most certainly we would have.[158]

By contrast, in *Hilliard v. City & County of Denver*,[159] the Tenth Circuit, taking the Sixth Circuit's more positivist approach on similar facts, held that two cases from other circuits[160] were not sufficient to establish the law clearly. In *Hilliard*, as in *Wood*, a police officer arrested the driver of a vehicle and impounded the vehicle, leaving the woman passenger alone in a high crime area. She unsuccessfully attempted to telephone for help from a nearby convenience store and returned to the vehicle, where she was robbed and sexually assaulted. The court reasoned: "[t]he existence of these two cases, however, does not 'clearly establish' that Ingraham's personal security guarantee is viable in a noncustodial setting."[161] For the court, *DeShaney v. Winnebago County Department of Social Services*[162] meant that there was "no constitutional duty on the part of state or local governments to rescue their citizens from invasion by private actors."[163]

The more positivist the approach a court takes to jurisdiction, then, the more indeterminate the law will seem. For the extreme positivist, even if eleven circuits have articulated a principle, the law in the twelfth remains doubtful, indeterminate, until that circuit court speaks to the issue. On the other hand, the less positivist the approach to jurisdiction, the more determinate the courts will find the law to be, as they may rely on principles articulated by sister jurisdictions.

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158 Id. at 593-94.

159 930 F.2d 1516 (10th Cir.), cert. denied, 502 U.S. 1013 (1991).

160 Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990); White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

161 *Hilliard*, 930 F.2d at 1520.

162 489 U.S. 189, 201 (1989) (holding state's failure to take child from abusive parent did not violate any constitutional right).

163 *Hilliard*, 930 F.2d at 1520. Ironically, here the more general characterization of the right redounds to the defendant's, not the plaintiff's, benefit. *DeShaney* may be easily distinguished where state actors have left a plaintiff more vulnerable to outside dangers. See Medina v. City & County of Denver, 960 F.2d 1493, 1497 n.5 (10th Cir. 1992) (stating that *DeShaney* does not apply when police alter status quo, in case where plaintiff bystander was struck by fleeing suspect chased by police).

C. *Reasonable Unreasonableness*

Another unsettled question is whether qualified immunity adds a second level of inquiry in excessive force cases. Again, the question bears on the relation between positivism and indeterminacy, because courts must decide between two definitions of reasonableness: is reasonableness "common sense," or is it what judges say it is? If one takes the positivist view, officials do not know what reasonableness is until the courts have said what it is. Hence, the law is indeterminate until articulated by the courts.

Before *Graham v. Connor*,[164] the circuit courts evaluated excessive force claims by a Fifth Amendment substantive due process standard, looking to four factors: (1) the need for force, (2) the relationship between that need and the amount of force used, (3) the extent of injury inflicted, and (4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.[165] *Graham* made clear that the proper standard for excessive force claims arising from arrests or investigatory stops was the Fourth Amendment standard, not the Fifth Amendment due process standard of "objective reasonableness"—the court must determine whether the force was reasonable "from the perspective of a reasonable officer on the scene."[166]

Like the Fourth Amendment reasonableness inquiry mandated by *Graham*, qualified immunity doctrine also requires a court to evaluate whether a reasonable officer would have thought her conduct unconstitutional. Hence, some circuits have held that in excessive force cases, the qualified immunity inquiry is redundant—if the force was "objectively" unreasonable, then there is no need to evaluate whether a reasonable officer would have thought it constitutional.[167] Other

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164 490 U.S. 386 (1989).

165 See Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.) (noting courts must look to such factors to determine if Constitution has been violated), cert. denied, 414 U.S. 1033 (1973).

166 *Graham*, 490 U.S. at 396. *Graham* suggests that courts determine reasonableness by considering the severity of the crime involved, the threat to the safety of the officers posed by the suspect, and any resistance to arrest. See id.

167 See, e.g., Wardlaw v. Pickett, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (noting scope of qualified immunity must be evaluated using same objective reasonableness criteria as in Fourth Amendment inquiry), cert. denied, 114 S. Ct. 2672 (1994); Hopkins v. Andaya, 958 F.2d 881, 885 n.3 (9th Cir. 1992) (stating that in Fourth Amendment unreasonable force cases, qualified immunity inquiry is same as reasonableness inquiry), cert. denied, 115 S. Ct. 1097 (1995); Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991) (noting in dicta that qualified immunity defense and excessive force inquiry are both governed by objective reasonableness standard); Hunter v. District of Columbia, 943 F.2d 69, 77 (D.C. Cir. 1991) (expressing in dicta "doubt whether a substantively distinct qualified immunity defense would be available to an officer acting after *Graham*"); Jackson v. Hoylman, 933 F.2d 401, 402-03 (6th Cir. 1991) (noting whether force was excessive turns on

circuits have held that the inquiries are different—whether the force was "objectively" unreasonable is one question, whether a reasonable officer would have known (from reading prior judicial opinions) that the force applied was unreasonable is another.[168]

The resolution of the circuit split depends on whether *Anderson v. Creighton*,[169] which held that the qualified immunity inquiry was not redundant in search and seizure cases, extends to excessive force cases as well.[170] For purposes of unreasonable searches and seizures, some circuits had taken the position that the Fourth Amendment reasonableness inquiry blended into the qualified immunity reasonableness inquiry; it was illogical to say that officers acted "reasonably unreasonably." The *Anderson* Court rejected this argument:

> The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable .... We have frequently

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whether actions were objectively reasonable under circumstances), cert. denied, 114 S. Ct. 2704 (1994); Street v. Parham, 929 F.2d 537, 540-41 & n.2 (10th Cir. 1991) (holding district court erred in instructing jury on both excessive force and qualified immunity, since "[t]his is one of the rare instances where the determination of liability and the availability of qualified immunity depend on the same findings").

168 See, e.g., Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994) (stating qualified immunity inquiry separate from excessive force inquiry and involves determining whether reasonable officer could have believed use of force was reasonable); Wright v. Whiddon, 951 F.2d 297, 300 (11th Cir. 1992) (looking to prior cases to determine whether courts had said force used in similar circumstances was reasonable); Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991) (noting primary question in qualified immunity claim is whether officer acted reasonably in eyes of reasonable police officer); see also Finnegan v. Fountain, 915 F.2d 817 (2d Cir. 1990). *Finnegan* held that the jury should not have decided the qualified immunity question, since "'juries are hardly suited to make decisions that require an analysis of legal concepts and . . . the application of highly generalized legal principles. Moreover, such an analysis would seem to invite each jury to speculate on the predictability of its own verdict.'" Id. at 821-22 (quoting Warren v. Dwyer, 906 F.2d 70, 77 (2d Cir.) (Winter, J., dissenting), cert. denied, 498 U.S. 967 (1990)); see also Brown v. Glossip, 878 F.2d 871, 873-74 (5th Cir. 1989) (stating qualified immunity is separate issue from excessive force); Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988) (noting qualified immunity turns on whether reasonable government official could have believed conduct was lawful, but excessive force is more subjective); Bates v. Jean, 745 F.2d 1146, 1151-52 (7th Cir. 1984) (using wholly objective standard for qualified immunity but reasonableness test to determine whether officer knew that conduct violated law).

The law in the Ninth Circuit is in some disarray. Compare *Thorsted*, 858 F.2d at 573-75 (treating qualified immunity as separate inquiry) with *Hopkins*, 958 F.2d at 884 n.3 (determining qualified immunity not separate inquiry) with Chew v. Gates, 27 F.3d 1432, 1447-49, 1460-61 (9th Cir. 1994) (finding qualified immunity sometimes separate inquiry, as where question in excessive force claim requires determination of whether use of police dog is reasonable force; but dissenting judge, Norris, argues no need to reduce level of generality further), cert. denied, 115 S. Ct. 1097 (1995).

169 483 U.S. 635 (1987).

170 See id. at 646 (declining to make exception to qualified immunity standard of reasonableness "in light of current American law" in search and seizure case).

> observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.[171]

The question is whether the qualified immunity inquiry can be separated from the Fourth Amendment inquiry in excessive force cases, as it is in search and seizure cases. In *Street v. Parham*,[172] an excessive force case, the Tenth Circuit distinguished the Supreme Court's reasoning in *Anderson*:

> We note that a case involving a claim of excessive force differs from claims based on violations of other fourth amendment rights. "In general, even though conduct is 'unreasonable' under the Fourth Amendment, because of 'the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment,' such conduct may nevertheless be objectively reasonable for purposes of qualified immunity. In insufficient warrant claims, for example, the Fourth Amendment inquiry asks whether probable cause existed for the magistrate to issue the warrant. But even if a court decides that there was no probable cause, in a close case it may have been objectively reasonable for a police officer to rely on the judgment of the magistrate and believe that probable cause existed." However, in excessive force cases, once a factfinder has determined that the force used was unnecessary under the circumstances, any question of objective reasonableness has also been foreclosed.[173]

By contrast, the Second Circuit found *Anderson* equally applicable to excessive force claims:

> Although it can be said that the right of an individual not to be subjected to excessive force is "clearly established" in the conventional sense, the Supreme Court in *Anderson v. Creighton* has cautioned against framing what is a "clearly established" right at this level of generality . . . .
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> In other words, to say that the use of constitutionally excessive force violates a clearly established right, according to the Supreme Court, begs the open question whether the particular degree of force under the particular circumstances was excessive. This is not to say that no act violates a clearly established right unless a factually identical action has been previously held unlawful. Rather, *Anderson* advises that a middle approach is to be taken: the facts

171 Id. at 643-44 (citation omitted).

172 929 F.2d 537 (10th Cir. 1991).

173 Id. at 541 n.2 (citations omitted) (quoting Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991) (quoting *Anderson*, 483 U.S. at 644)).

> and circumstances of each case must be examined to determine whether "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent." Accordingly, even if the jury finds Fountain to have used constitutionally excessive force, it is for the district court to determine whether the unlawfulness of his conduct should have been apparent to Fountain at the time.[174]

The difference between the circuit court opinions stems from two different meanings of "reasonableness."[175] The hypothetical reasonable person is always an invocation of a community standard, usually based in custom or community morality. "We all know" what is reasonable. It is therefore usually a jury question—appropriate for laypeople from the community to determine.[176] So, when the court invokes "reasonable" force, the inference is that the standard is one of which any officer ought to have notice just by being a member of the community.

However, the final arbiters of what is "reasonable" are the courts. They decide, ultimately, whether the officer's judgment was reasonable or not. From a positive-law standpoint, the officer does not have notice of what is reasonable unless the courts have articulated and

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[174] Finnegan v. Fountain, 915 F.2d 817, 823-24 (2d Cir. 1990) (citations omitted) (quoting *Anderson*, 483 U.S. at 639-40).

[175] The Second Circuit in *Finnegan* recognized that two different meanings of reasonableness were being used, though it arguably confused the issue more in trying to articulate them:

> While the Supreme Court has explicitly rejected the argument that a police officer may not act "reasonably unreasonably" in conducting a warrantless search of a home, it did not explain how the two standards of reasonableness under the claim and the defense differ from each other. In *Warren v. Dwyer*, we made such a distinction between the reasonableness inquiries underlying a Fourth Amendment claim for an arrest without probable cause and qualified immunity. We stated that the probable cause inquiry involved essentially an *ex post* inquiry, judging reasonableness from the "actual circumstances . . . found as a matter of fact," while the qualified immunity involved an *ex ante* inquiry, judging reasonableness "from any reasonable point of view, including even a factual misperception, the officer may reasonably have harbored at the time the events took place." It is questionable whether this same distinction holds up in the context of an excessive-force claim case, because the Supreme Court has made clear that the excessive-force inquiry is not made from an *ex post* perspective, but from the *ex ante* "perspective of a reasonable officer on the scene."

Id. at 824 n.11 (citations omitted) (quoting Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990)).

[176] See ACT UP!/PORTLAND v. Bagley, 988 F.2d 868, 877 (9th Cir. 1993) (Norris, J., dissenting) (noting "reasonableness is and always has been a jury question"); *Street*, 929 F.2d at 540-41 & 541 n.2 (holding district court erred in instructing jury on both excessive force and qualified immunity, since "[t]his is one of the rare instances where the determination of liability and the availability of qualified immunity depend on the same findings").

elaborated the "common sense" standard further. Hence, some courts take the view that unless a court has said an action is unreasonable, an officer has qualified immunity, regardless of how "unreasonable" the act seems to "common sense." Reasonableness, then, is a question of law to be decided by the judge.[177]

Soares v. Connecticut[178] illustrates the positive-law approach. The plaintiff claimed that the use of handcuffs constituted excessive force in the arrest of a commercial fisherman for submitting false reports to the DEP that he did not fish during 1989.[179] Instead of asking whether the handcuffs were reasonable, as required by the *Graham* standard, the court focused first on qualified immunity.[180] It characterized the right at stake specifically as "the right not to be handcuffed" and then determined that no cases clearly established such a right.[181]

Hence, if one takes the view that officers do not have adequate notice of what constitutes reasonable force until a court has articulated the standard in a particular factual setting, the law is indeterminate until a case articulates the standard at an appropriate level of generality, regardless of whether a "reasonable" officer would have thought the force excessive.

D. Predictability and Justification

The less positivistic approach, which allows plaintiffs to prove "clearly established" law from any available source and which requires defendants to conform to general standards even when not yet specified by the courts, makes it more difficult for officers to predict (by reading case law) which of their actions will lead to civil liability. Judge David A. Nelson puts the point persuasively, dissenting in *Daugherty v. Campbell*,[182] a Sixth Circuit case that relaxed the circuit's usual jurisdictional limitations on which courts might clearly establish law:

> I have little doubt that most legal scholars, if asked in January of 1988 to predict whether the Sixth Circuit would take the same view [as other circuits requiring reasonable suspicion for body cavity searches of prison visitors], would have answered in the affirmative. But ordinarily, at least, prison wardens are not legal scholars.

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177 Cf. *Finnegan*, 915 F.2d at 823-24 (stating it is for court to determine whether unlawfulness of conduct should have been apparent to officer).

178 8 F.3d 917 (2d Cir. 1993).

179 See id. at 919-20.

180 See id. at 920.

181 See id. at 922-23.

182 935 F.2d 780, 788 (6th Cir. 1991) (Nelson, J., dissenting), cert. denied, 502 U.S. 1060 (1992).

> Like many other officials charged with responsibility for the difficult nuts-and-bolts work of preserving domestic tranquility, prison wardens do not normally enjoy the advantages of a law school education and the leisure to ponder the advance sheets and speculate on how the law may or may not develop in the different circuits. As the Fifth Circuit put it in *Saldana v. Garza*, "[I]f we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. Certainly we cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law."[183]

Yet, even though a positivistic approach to qualified immunity may vindicate officers' reliance on case law, it generates some ironic paradoxes. First, courts in qualified immunity cases must articulate specifically what constitutes reasonable conduct, rather than leaving the question to the jury. Hence, courts act more "legislatively" than in other cases, making specific rules for executive officials to follow, rather than allowing the executive branch to work out its own protocols. Officials must become *more* well versed in judicial opinions, not less.

Second, the more courts look to case law for black-letter rules, ironically, the more likely courts will be to find the law "indeterminate," either because the previous statements of a rule were too general, or because they were too specific (the case at bar is distinguishable), or because the "rule" comes from the wrong jurisdiction. Going too far in turning cases into black-letter law can thus undermine all the guiding power of precedent.[184]

Third, courts approach the law as though it were "what judges say" instead of what is "right." Ironically, this has the destabilizing effect of a Hartian game of scorer's discretion:[185] it treats law as though courts are making up the rules as they go along, rather than following preexisting legal guidelines. As H.L.A. Hart points out, the problem here is assuming that because the courts have the final say, the law is nothing but what they say it is, and therefore is unpredictable and inscrutable.[186] The mistake is equating finality with unpre-

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183 Id. (footnote omitted) (citations omitted) (emphasis omitted) (quoting Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982), cert. denied, 460 U.S. 1012 (1983)).

184 See Meyer, supra note 131, at 423 ("Limited to its facts, a case will guide future cases only in the extraordinary event that history repeats itself.").

185 See Hart, supra note 7, at 138-44 (analogizing ambiguity in law to case of game ruled by discretion of official scorer).

186 See id.

dictability—assuming that the predictability of judges' decisions is only weakly linked to the community standards and constitutional provisions to which they refer in making their decisions.[187] Hence, such a view mistakenly assumes that an official's adherence to these community standards and constitutional provisions has little to do with whether a court will protect her from liability. An officer who makes a decision that runs counter to a judge's interpretation of the law in some prior decision in the bowels of Westlaw is out of luck—her best defense is not to act reasonably, but to read as many judicial opinions as possible in order to make sure she knows what judges think reasonableness is. Conversely, a positivistic approach to qualified immunity protects those officers fortunate enough to have made a mistake so egregious that it is also unusual. The practice in most circuits of making run-of-the-mill cases "unpublished" may also protect officers who make egregious, but ordinary, mistakes, as long as the precedential analogues are all unpublished. In short, although a positive-law approach to law is intended to be more legitimating, decisions that rest on narrow parsing of what judges say the law is rather than on community and constitutional standards sacrifice justification for (an odd kind of) predictability.[188]

This approach generated the fiction in *Rich v. City of Mayfield Heights*,[189] for example, that the officers who did not cut down the prisoner they found hanging from his jail cell door had not violated a clearly established rule.[190] It also has generated other holdings that defy, or outrage, common sense. In *Cameron v. Seitz*,[191] the panel held that a judge who retaliated against an employee for her engagement to another man was entitled to qualified immunity[192] because there was no clearly established right to free association for engaged, as opposed to married, people.[193] In *Soliday v. Miami*

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187 See id.

188 See Hilliard v. City & County of Denver, 930 F.2d 1516, 1516-18, 1521 (10th Cir.) (holding that police officers violated no constitutional right in leaving woman passenger stranded in high crime district after arresting driver and impounding car, but stating court is "appalled by the conduct of the defendants in this case"), cert. denied, 502 U.S. 1013 (1991).

189 955 F.2d 1092 (6th Cir. 1992).

190 See id. at 1096-98 (affirming district court's determination that officers' conduct was not contrary to established law).

191 38 F.3d 264 (6th Cir. 1994) (holding judge's actions entitled to qualified immunity on ground that constitutional right of marital association does not extend to engagement).

192 See id. at 276. The judge was not entitled to absolute immunity because his retaliatory activities were not taken in his role as judge.

193 See id. at 275-76. The court acknowledged that

> as unprofessional and reprehensible as Seitz's actions seem, "[a]s is always the case when a defense of immunity is upheld, some wrongs may go unredressed as a result of this holding." The public may take some consolation in the fact

County,[194] a physician asked for qualified immunity for having a man's body cremated before notifying his relatives.[195] The court held that he was entitled to qualified immunity because the property right in a relative's body was not clearly established at the time he acted.[196] In *Gargiul v. Tompkins*,[197] the court granted immunity because the Supreme Court had never held that the constitutional right to privacy includes the right to refuse an examination by a doctor of the opposite sex.[198] In *Pray v. City of Sandusky*,[199] police officers burst into the plaintiffs' house by mistake, forcing them to the floor and searching the premises.[200] The majority held the officers would be entitled to qualified immunity for acts they took while they were reasonably mistaken about the address, though not for force used after they should have realized their mistake.[201] Judge Batchelder went farther, invoking the most positivistic approach yet. In a concurring opinion, she argued that, because the police officers were following a department policy that "dictates that in every execution of a warrant the officers shall secure the premises by putting all occupants on the floor," the officers should be entitled to qualified immunity even if they used force after becoming aware of their mistake because "the policy does not distinguish between searches of the correct premises and searches of the wrong premises."[202]

> that other remedies for addressing Seitz's transgressions, such as disciplinary proceedings before the state supreme court, appear to have been invoked successfully.

Id. at 276 (citation omitted).

194 55 F.3d 1158 (6th Cir. 1995).

195 See id. at 1164. The doctor wanted the body cremated before being handled by hospital employees because the man had died of AIDS. See id. at 1162. The court's decision did not rest on this ground, however. See id. at 1164-65.

196 See id. at 1164.

197 790 F.2d 265 (2d Cir. 1986).

198 See id. at 273.

199 49 F.3d 1154 (6th Cir. 1995).

200 See id. at 1156-57.

201 See id. at 1159-61.

202 Id. at 1162 (Bachelder, J., concurring). Compare Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990), in which a female passenger was raped after state trooper left her alone at 2:30 a.m. in a high crime neighborhood without means to get home, see id. at 592-94. In declining the trooper's invitation to distinguish the case at bar from White v. Rochford, 592 F.2d 381 (7th Cir. 1979), in which the Seventh Circuit held that police officer's abandonment of three children on an eight-lane highway after arresting the driver was a constitutional violation, the Ninth Circuit stated:

> The immunity standard considers whether a reasonable law enforcement officer should view the *White* case as controlling. Given this element of reasonableness, the qualified immunity regime of clearly established law should not be held to allow section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law. *White* holds that a police officer may be liable under section 1983 when he abandons

The better approach to qualified immunity would acknowledge the extrajudicial source of commonsense values that guides the interpretation of constitutional principles, making some actions just seem obviously wrong, regardless of the accidental existence of a published decision arising from a similar set of facts.

McDonald v. Haskins[203] illustrates such an approach. In *McDonald*, the complaint alleged that the officer had held a gun to the head of a nine-year-old child and threatened to pull the trigger during a search of his house.[204] The complaint further alleged that the child was not resisting or even suspected of any crime.[205] The officer attempted to assert qualified immunity, arguing that no case had clearly established that it was "'an unconstitutional use of force for a police officer to point his gun at the head of a resident of an apartment ongoing [sic] a lawful search.'"[206] The court agreed that the right ought to be characterized with particularity, but after analyzing the relevant case law, backed away from a purely positive-law approach, saying "that no precisely analogous case exists does not defeat McDonald's claim. It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books."[207]

The Seventh Circuit's approach in *McDonald* acknowledges, sub rosa, that there are sources of constitutional norms besides judicial

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passengers of arrested drivers under circumstances which expose them to unreasonable danger. It defies common sense to find a meaningful legal distinction between the dangers facing children crossing a busy highway and a woman left alone to fend for herself at 2:30 a.m. in a high-crime area.

Wood, 879 F.3d at 593.

203 966 F.2d 292 (7th Cir. 1992).

204 See id. at 292.

205 See id.

206 Id. at 293 (alteration in original) (quoting Defendant's Brief at 9, *McDonald* (No. 91-2045)).

207 Id. at 295. Similarly, in Barnett v. Karpinos, 460 S.E.2d 208, 211-12 (N.C. Ct. App.), review denied, 463 S.E.2d 232 (N.C. 1995), a § 1983 suit based on execution of a warrant purporting to authorize searches of everyone found within a specified city block, the court held that the right against general searches is clearly established despite the fact that they happen so seldom that case law on the subject is virtually nonexistent. See also Pritchett v. Alford, 973 F.2d 307, 314 (4th Cir. 1992) ("'Clearly established' . . . includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked."); Backlund v. Barnhart, 778 F.2d 1386, 1390 (9th Cir. 1985) (holding case on point not always needed if officials' "conduct [is] so egregious that any reasonable person would have recognized a constitutional violation"); Stokes v. City of Chicago, 744 F. Supp. 183, 188 (N.D. Ill. 1990) (rejecting claim that officers entitled to qualified immunity for suborning perjury and reasoning that "[e]ven in the absence of judicial decision and specific statutory enactment, this right is clearly established, and any reasonable officer would know this").

opinions that make some actions "egregious." Whether that source is taken to be the general statement of the Constitution itself, or the taken-for-granted norms of the community that the Constitution governs, those norms are actually more accessible and provide better "notice" to police officers than an obscure judicial opinion. Courts that automatically equate positive-law gaps with uncertainty have missed the legal historian's truism: If a rule is not written down, not one, but two opposing inferences are possible—either it is not a rule, or it is so pervasively required and universally accepted that it goes without saying.[208] Even scholars who emphasize the rifts among the various norms of the communities that comprise our political state must acknowledge that there are some points of universal agreement—indeed, if there were none, we would have no basis for discussing our differences. It is this sense of past law—law which is so firmly a part of our collective consciousnesses that a breach "shocks our conscience" or is "obvious"—that officers must follow and must understand. Qualified immunity doctrine should protect those officers who exercise this kind of "common sense," guided by general constitutional principles, but it should not protect those who fail to exercise it, regardless of whether a prior case on point is to be found.

The positive-law objection is, of course, that § 1983 does not provide for general tort law liability, but only for liability for constitutional and statutory wrongs. Our Constitution and code are written documents, so certainly officers cannot generally be held liable for "unreasonable" conduct not proscribed there. Some positive-law limitations are necessary.[209] Courts should strike the balance by denying qualified immunity in cases that fall within the general constitutional or statutory prohibitions, as long as the officers' conduct is also unreasonable or "obviously" wrong.[210]

IV
PAST AND FUTURE

As we have seen, courts in the context of Rule 11 tend to take a more "common law" approach to law, equating law with the ratio

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208 See Marianne Constable, The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge 85 (1994) ("[E]arly codes are characterized by their 'omission of the obvious.'" (quoting David Daube, Lecture on Ancient Law (Berkeley, Cal., Sept. 8, 1984))).

209 See Siegert v. Gilley, 500 U.S. 226, 233-34 (1991) (holding defamation not constitutional tort).

210 Insofar as I suggested there were no difficulties with a positivist approach to qualified immunity doctrine in a previous article—well—I was wrong. Don't see Meyer, supra note 131, at 480-81. Live and learn.

decidendi of past cases and allowing attorneys great leeway in interpreting and analogizing. In qualified immunity doctrine, on the other hand, courts approach doctrine as positive law, holding officials accountable for knowing (and acting upon) what judges say. This distinction in approach is essentially a difference in temporal focus—in Rule 11 cases, judges worry more about stunting the growth of the law of the future, while in qualified immunity cases, judges worry more about whether past law gave officials adequate notice.[211]

This is not to say that Rule 11 does not also have to do with the past and qualified immunity the future: Rule 11 cases are concerned about giving attorneys fair notice and qualified immunity cases are concerned about shaping future official conduct. But Rule 11 doctrine focuses on the *law* of the future, not just action under the law, in a way that qualified immunity does not. Lawyers serve a unique role in our judicial system—they bring forward the people, the arguments, the nitty-gritty reality that keeps law on keel with justice. Without their creativity and voice, the law fails to respond to changing human needs or norms or harms. In this sense, lawyers are analogous to legislators, who have absolute immunity for arguments made in the context of legislative debate.[212] Rule 11 operates as a kind of "First Amendment" protection for legal evolution.[213]

In developing both doctrines, the courts struggle: in Rule 11 cases, they struggle to avoid stamping an argument substantively frivolous for all time; in qualified immunity cases, they struggle to sort past decisions into workable rules. A word about the past and future character of law, then, may not be amiss here.

We may approach law's future in two ways.[214] We may see it as unknown and unknowable—the tomorrow that never comes. Such an approach to the future leads us to see the legal future as radically indeterminate, completely unpredictable, a future in which any argu-

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211 Of course, one might argue that officials receive more-than-fair notice, since for the rest of us, law binds us even if not yet clearly established. We give officials extra leeway here, however, so they do not have a Hobson's choice of failing in their duties or incurring liability.

212 See Tenney v. Brandhove, 341 U.S. 367, 378-79 (1951) (holding state legislators immune from civil liability for actions taken within traditional legislative sphere of authority).

213 Indeed, commentators even speak about "chilling" innovative legal theories in the Rule 11 context, just as they speak of "chilling" speech. See, e.g., Vairo, supra note 41, at 51 ("Society cannot afford to chill the Thurgood Marshalls or the Julius Chambers or their hundreds of lesser-known, and sometimes concededly lesser-prepared, -organized, and -coherent comrades.").

214 I cannot say this account is faithful to Heidegger, but it certainly owes its genesis to his work. See Martin Heidegger, Being and Time 385-423 (John Macquarrie & Edward Robinson trans., 1962) (reflecting on temporal, finite nature of human understanding and existence).

ment could be made successfully. This future has nothing to say to us, provides us with no hints or guidance, and is, at bottom, irrelevant to law now.

Or, we may acknowledge that the law's future is bounded by law's past.[215] The future law is the law that we will come to see. Because our sight is limited by what we are able to pick out based on our past sightings, future law will necessarily have to do with us—our needs, our goals, our plans, our visions—all of which are limited, even nearsighted. In any case a judge decides, she must think about the future in this sense. She must try to articulate her decision with an eye to other cases she can imagine occurring, though her imagination is limited.

Rule 11 doctrine must likewise be limited by the judge's imagination. By leaving open the opportunity to argue for points of law that "matter" to human suffering or human nobility, we do not leave open an infinite future, a radical uncertainty. We leave open only the closed universe of what is within our past reach and experience—what counts already as a distinction "with a difference." The basis of a "good faith" standard is this: can we understand the plaintiff's complaint or the defendant's plea for unaccountability as growing out of genuine harms, important human projects, sincere senses of equity? Or, conversely, do the claims and defenses seem to be devices used solely to delay or harass? Clearly, the decision as to whether an actor is acting out of "good faith" requires the judge to decide whether something "important" is at stake in the litigation—and that is a judgment that depends on a shared sense of what is important in our world now.

Critics will no doubt argue that this standard opens the gates of judicial arbitrariness—judges will sanction based on their own "subjective" senses of what is "important," senses that may not be shared by those of different cultures, classes, or backgrounds. If such judgments are illegitimate, however, then so is all of case law, since cases are always analogized or distinguished on the basis of a decision about what is or is not important. Critics will rejoin that these decisions about "importance" must be left to democratic bodies, not elitist judges. There are two responses to this criticism. First, judges have been accused of sanctioning by fiat anyway, cloaking their judgments of importance by calling losing arguments "frivolous." Second, encouraging judges to draw the line of frivolousness in a more positive-law way would chill future legal argument and foreclose legal evolu-

215 "The authentic future is temporalized primarily by that temporality which makes up the meaning of anticipatory resoluteness; it thus reveals itself *as finite*." Id. at 378.

tion much more than will the occasional sanction by a small-minded judge. The gap between the law and the community's sense of justice will widen, not narrow. And, if judges begin reading past opinions and statutes in too crabbed a fashion, even new legislation will not solve the problem, since it too risks being read "too" narrowly.[216] Rule 11 doctrine must consider the legal future.

As with law's future, we may think of law's past in two ways. We may see the past law as consisting of static rules we created and control: rules already waiting in a closet or drawer to be found and used like a measuring stick on a piece of fabric. This is the past that positive law envisions. Indeterminacy here means that there is no measure available that fits the case—we have not yet "created" the proper rule.

Or, we may see law's past as enabling the present, more like a pair of binoculars that enhances and focuses one's inquiry, or a conceptual framework through which we are able to distinguish and discern objects as significant to us or for us. Despite our written, "founding" Constitution, we did not construct this past law out of whole cloth. In order to have understood what that document meant and said, we already had to have certain normative commitments.[217] We cannot understand the rights articulated in that document without

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216 The children's book *Amelia Bedelia* illustrates how "literal" meaning can defeat meaning. Peggy Parish, Amelia Bedelia (1992). Amelia, a housekeeper, is left alone in her employer's house with a note outlining her duties. She is told to "draw the drapes," so she sketches a nice picture of them. Id. at 25-27. She is told to "dress the chicken," so she puts a handsome green suit on the chicken. Id. at 42, 59. She is told to "dust the furniture," so she sprinkles dust all over the living room. Id. at 20-22. Needless to say, her employers are not pleased. See id. at 60; see also Francis Lieber, Legal and Political Hermeneutics 17-20 (2d ed. 1880) ("[H]uman speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words. However minutely we may define, somewhere we needs must trust at last to common sense and good faith.").

The literature advocating nonliteralist readings of statutes includes Guido Calabresi, A Common Law for the Age of Statutes 80-162 (1982); William N. Eskridge, Jr., Dynamic Statutory Interpretation 5-6 (1994); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 306, 317 (1989); Philip P. Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 Cal. L. Rev. 1137, 1174-1203 (1990); Heidi M. Hurd, Sovereignty in Silence, 99 Yale L.J. 945, 951 (1990); cf. Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353, 359 (1989) (providing critical discussion of theories of dynamic statutory interpretation).

217 The list of theorists who have argued that the Constitution must be interpreted in light of "natural law," tradition, or community morality and principle is a very long and familiar one. See, e.g., Ronald M. Dworkin, Law's Empire 355-99, 410-13 (1986); Ronald M. Dworkin, Taking Rights Seriously 131-49 (1977); Cass R. Sunstein, The Partial Constitution 93-122 (1993); Edward S. Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 149, 151-53 (1928); Robert M. Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 4-11 (1983); Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev.

reference to deeper, "understood," "taken-for-granted" notions.[218] In order to be intelligible, constitutional rules must fit with what we already know, who we already are. Hence, we must interpret them in light of the background, taken-for-granted norms that inform our inquiry and guide even our ability to pick out one rule or another as relevant to a dispute in the first place.

In the context of qualified immunity doctrine, we must be concerned with the issue of fair notice without throwing over the basic norms that are so taken for granted that they do not need articulation. They are the always already there benchmarks or intuitions that come before, evaluate, and enable us to express the rules we usually think of as official law. Holding officials to such basic norms does not deprive them of "fair notice"—quite the contrary. These basic norms are more available to us than any circuit or district court decision.

CONCLUSION

From the doomsaying of the theorists, one would expect that the law could never acknowledge its own indeterminacy without self-contradiction and a loss of legitimacy. However, a closer look at two of those areas in which legal doctrine explicitly acknowledges legal indeterminacy shows that it sometimes serves important purposes in the law and is itself a kind of legal practice, rather than a description of legal practice.[219]

843, 868-69 (1978); Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551, 563-72 (1985).

[218] Indeed, we understand everything on the basis of something we already know. See Stanley Fish, Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases, in Is There a Text in This Class? The Authority of Interpretive Communities 268, 268-92 (1980). The "norms" under which we live pervade our lives so completely that we overlook them, seeing only the cultural and individual differences that are so much more salient. We fail to notice that we refrain from sitting next to the only other person on an empty bus, that we recognize a pile of private papers by the keys left on top as a marker, or that we step into an elevator and turn to look at the door, rather than at our fellow passengers. It takes a sociologist or anthropologist to point these things out to us. See generally Erving Goffman, Behavior in Public Places: Notes on the Social Organization of Gatherings (1963).

[219] Because I recognize that indeterminacy itself is varied (intentionally) depending on the doctrinal context, I am not taking the position of a radical indeterminist. Hence, I am not (I take it) a target of Solum's criticism that:

> Some critical scholars suggest instead that the notion of adjudication as rule application should be replaced with "ad hoc, contextualized judgments." Expressed in traditional terms, the rule of law should be replaced by the anti-rule of pure equity. But this proposal faces a difficulty similar to that encountered by the radical notion of freedom: the implications of standardless adjudication for the transformation of society are ambiguous. Moreover, once it is conceded that the law is often practically determinate, the concomitant predict-

In the Rule 11 context, recognition of legal indeterminacy exonerates lawyers who make losing arguments about real harms and important values in order to preserve those arguments for a possible future law. In the qualified immunity context, recognition of legal indeterminacy protects officers from personal liability for missteps of which they did not have prior notice.

In these contexts, indeterminacy not only serves different purposes, but also takes on different characteristics. Indeterminacy in the Rule 11 context looks more like the radical indeterminacy postulated by deconstructionist or Marxist scholars—a good argument can be constructed for virtually any legal proposition. Indeterminacy in the qualified immunity context looks more like the moderate indeterminacy of positivist scholars—a few legal gaps. Hence, any attempt to characterize "legal indeterminacy" in general may create oversimplification and false philosophical problems.

The better explanation for the differing roles indeterminacy plays in Rule 11 and qualified immunity contexts may be a temporal one. Rule 11 must sanction frivolous, genuinely illegitimate arguments but protect the arguments of the future. If it declares a certain argument frivolous, no lawyer will make it until long past the day when it may become warranted. To preserve the future fit of law to its community norm or "right," the courts leave plenty of room in the legal garment to let out its seams. Because Rule 11 must thus protect the future of law, the possibilities that have not yet been clarified for us mortals, the doctrine tends to take a "radical" approach toward indeterminacy.

Qualified immunity, on the other hand, is concerned primarily with giving fair notice to officials of when they might be liable in damages for doing their duties. It thus takes the law in its past aspect, not its future one. Law is understood as positive law—what judges have said—not as general guidelines for future behavior. Indeterminacy, here, consists of the positivist's "legal gaps" where no court has articulated a rule. Indeed, some courts take this view to its limit, exonerating officers who commit "obvious" constitutional violations if there is no previous case on point.

The irony of the theorists' positions, then, is this: most see indeterminacy as an evil to be eliminated because it undermines "legitimacy." Yet the case law shows that it is indeterminacy that preserves the ability of courts to reach the right result, and determinacy that hinders them. If the law is understood as a practice *in time*, as com-

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> ability of many legal outcomes—providing individuals the ability to plan their conduct with some assurance about its legal consequences—surely has some importance.

Solum, supra note 7, at 501 (citations omitted).

mon law reasoning, this is no surprise. A judge completely constrained by the past positive law would be unable to analogize to the new situation before her and the positive law would no longer adhere, even loosely, to a community norm or common sense understanding of what is right in this new context.

The indeterminacy theorists, however, link legitimacy solely to the constraint of judicial power by rules. Regardless of whether, as an empirical matter, constraint is more important to the populace than right results, it is rather mysterious how positive-law rules can be a greater constraint on the untrustworthy judge than can the "common sense," the "obvious," or the "taken for granted" of a community norm. Like Wittgenstein's alter ego,[220] the theorists seem to make the mistake of thinking that complete certainty is the goal, and that anything less deserves either to be explained away or exposed and derided. Instead, certainty and uncertainty may simply serve their own purposes in their own corners of law.

These thoughts about indeterminacy, however, also help illuminate some of the conundrums within the doctrine of Rule 11 and qualified immunity. Given that Rule 11 affects the future presentation of legal arguments, courts cannot take a merits-based approach to sanctioning arguments. Even the modified practice-based view relies too much on substantive standards to be fully workable and disadvantages pro se litigants in the bargain. The better view of Rule 11 would preserve arguments made in good faith that are based on real human needs and goals—because someday we may figure out a way to vindicate those needs and goals. This more traditional approach to sanctioning attorneys explains why courts sanction tax protesters but not victims of libel, fraud, or violence for bringing frivolous claims.

Qualified immunity doctrine has vindicated the need to give officials notice of their liabilities by taking an extreme positivist stance toward law. The approach looks at law in its past aspect, not its future one. What some courts have missed, however, is the past law that is not written because it has never needed to be, but is "taken for granted." Officials have even better notice of those norms than of the judicial decisions they are held to have read. To be true to its purposes, qualified immunity doctrine should dispense with immunity for actions that violate such obvious, universal community norms, as long as they fall within the general dictates of the Constitution.

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220 Or former self. Wittgenstein writes his Philosophical Investigations, supra note 19, as a kind of ongoing dialogue between his new ideas and the very different views he took in his earlier Tractatus Logico-Philosophicus (D.F. Pears & B.F. McGuinness trans., 1961), first published in 1921.

In sum, the effort here has been to bring theory and practice together so that they illuminate and enrich each other. It is a first effort, a beginning only, risking oversimplification of both theory and doctrine, as does any attempt to articulate either. Life for us mortals requires taking responsibility for uncertainties beyond our control. Why should human law be any different?