Frivolous Cases: Do Lawyers Really Know Anything at All?

Sanford Levinson

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol24/iss2/4

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
Frivoulous Cases: Do Lawyers Really Know Anything at All?

Abstract
There has been much recent jurisprudential discussion of 'hard' and 'easy' cases in the law. This 'academic' debate has been complemented by the increasing willingness by judges to sanction lawyers for making frivolous legal arguments, which are prohibited by both United States and Canadian law. To identify the attributes of a frivolous case has proved no easy matter. A focus on the nature of frivolous cases, moreover, requires us to recognize how different the phenomenology of lawyering is from that of judging and the concomitant importance of integrating the practice of lawyering into our jurisprudence. This, in turn, necessitates that we move away from the almost exclusive concentration on the practice of judging.

This article is available in Osgoode Hall Law Journal: http://digitalcommons.osgoode.yorku.ca/ohlj/vol24/iss2/4
FRIVOLOUS CASES: DO LAWYERS REALLY KNOW ANYTHING AT ALL?

BY SANFORD LEVINSON*

There has been much recent jurisprudential discussion of 'hard' and 'easy' cases in the law. This 'academic' debate has been complemented by the increasing willingness by judges to sanction lawyers for making 'frivolous' legal arguments, which are prohibited by both United States and Canadian law. To identify the attributes of a frivolous case has proved no easy matter. A focus on the nature of frivolous cases, moreover, requires us to recognize how different the phenomenology of lawyering is from that of judging and the concomitant importance of integrating the practice of lawyering into our jurisprudence. This, in turn, necessitates that we move away from the almost exclusive concentration on the practice of judging.

I. INTRODUCTION

I assume that one of the reasons for your inviting me to present this lecture involves work that I have already done. It thus presumably will come as no surprise that my remarks relate to that body of work, in two different ways.

I have been attracted, perhaps like a moth to the flame, by problems arising from the lawyer's task of interpreting documents. In my case, I have tended to focus on the interpretive problems surrounding a particular document — the United States Constitution. As Professor Hirsch has said, "With a numinous document like the Constitution or the Bible, the principles and methods of correct interpretation are as important as they are problematical." What Hirsch evokes is the classic debate

* Professor of Law, University of Texas Law School. This article was originally delivered as the Eighth Annual 'Or 'Emet Lecture at the Osgoode Hall Law School on 3 April 1986. Although I have revised some of my remarks and expanded some of the footnotes, I have left the text substantially as delivered. I want to express my deep gratitude to the faculty of the School for inviting me and for responding to the ideas I am trying to develop. I am particularly grateful to Marc Gold, Allan Hutchinson, Leslie Green, and Peter Hogg.

As always, I am also grateful to several of my colleagues at the University of Texas Law School for their willingness to endure seemingly endless new drafts and formulations and other interruptions of their own work. Particular mention should be made of Mark Yudof, Douglas Laycock, William Powers, and Scot Powe; John Dzienkowski not only read the entire manuscript but also provided especially valuable counsel in regard to the problem of administrative non-acquiescence to judicial decisions. Professors Robert Post and Ted Schneyer also reviewed the manuscript and provided helpful advice. Finally, I received valuable reactions from John McArthur, immersed in the actual practice of law.

about hermeneutic ‘science’, which focuses on the search for specific methods that will guarantee ‘correct’ — or ‘truthful’ — interpretations of any document under inspection. Francis Lieber, who wrote the first English-language book on legal hermeneutics almost 150 years ago, defined hermeneutics as “[t]hat branch of science which establishes the principles and rules of interpretation and construction.” He was well aware that interpretation of texts would be necessary. “For the very reason that construction endeavours to arrive at conclusions beyond the absolute sense of the text, and that it is dangerous on this account, we must strive the more anxiously to find out safe rules, to guide us on the dangerous path.” The debate, of course, is concerned with the question whether “safe rules” can be developed and, if so, what their content might be. A vigorous debate is now taking place about the plausibility of asserting such rules. Some of us, who have expressed rather deep scepticism about the existence of safe rules, have even been denounced as ‘legal nihilists’, and the debate has recently moved from the sheer abstractions of literary theory and jurisprudence into consideration of the suitability of teaching such ‘nihilistic’ views to law students.

In this paper I shall indeed address the so-called indeterminacy of textual meaning. However, I am also interested in a distinctly separate problem, which I call the jurisprudence of lawyering. Although this interest grows out of my interests in interpretation, it is in fact analytically distinguishable. Let me, therefore, try to explain my title and thus put this discussion into a jurisprudential context.

II. OF CASES HARD AND EASY

It is a notorious truth that both jurisprudence and legal education tend to emphasize the so-called hard case. Indeed, perhaps the major article by the most-discussed contemporary jurisprude, Ronald Dworkin, is entitled “Hard Cases.” A defining characteristic of such cases is that


3. Ibid. at 52. A more contemporary definition is provided by Hans-Georg Gadamer: “By hermeneutics is understood the theory or art of explication, of interpretation.” “Hermeneutics as Practical Philosophy” in H.-G. Gadamer, Reason in the Age of Science, trans. F.G. Lawrence (Cambridge, Mass: MIT Press, 1982) at 88. He would reject, however, any notion that it is a “branch of science.”

4. Ibid. at 53.


each side in the dispute can bring cogent arguments to bear. The legal realist, or nihilist, often uses such cases to exemplify both the indeterminacy of legal argument and the extent to which adjudication becomes the imposition by a judge of his or her favorite public policy. Others, uncomfortable with the radical implications of the indeterminacy thesis, may instead use hard cases as occasions to exemplify that mysterious quality called ‘craft’, whereby a John Marshall Harlan or Henry Friendly (to name two especially notable American judges) can distill from extraordinarily complex material the ‘correct’ legal solution. Both realists and their critics, however, agree that well-trained lawyers can participate on both sides of the issue. Dworkin, for one, has certainly never suggested that the lawyers on either side of a hard case behave improperly. Indeed, partisans of the adversary system regard such participation and the vigorous presentation of conflicting arguments as essential so that all of the subtle nuances can be presented to the judge. But do we (and should we) focus, whether as jurisprudes or as lawyers, on hard cases alone? Frederick Schauer, for example, argues that the emphasis on the hard case distorts an adequate understanding of the law. Thus, he asserts the importance of becoming more aware of the ubiquity of ‘easy cases’ in the practice of law, in which disputation (almost) never occurs because every competent lawyer does indeed know the answer to a given question. Schauer makes his argument as part of a more general examination of the role of language in constraining legal possibility. He therefore focuses on such patches of American constitutional text as those requiring that public officials be of certain age, that election and inauguration days occur at specific times, and the like. It is, he correctly argues, not a hard case to decide when a newly elected American President takes the oath of office or how many houses of Congress there are. He thus criticizes neo-realists, like myself, for evading recognition of the millions of easy cases in favour of focusing on the relatively few hard cases.

Schauer’s essay, in turn, is part of an important debate about the character of what might be described as ‘legal knowledge’ — a topic with both jurisprudential and educational ramifications. At the jurisprudential level, the question is whether there are ‘legal facts of the matter’ requiring that one must recognize a certain statement as being an indubitably correct statement of the law rather than either a (genuinely)

---

9 See my reply to Schauer, S. Levinson, “What do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore” (1985) 58 S. Cal. L. Rev. 441.
debatable opinion or a prediction, à la Holmes, that most adjudicators
would in fact adopt the statement at this particular time though there
are logically possible alternatives. At the educational level, the question
is whether or not students genuinely become more 'knowledgeable' in
the course of legal education. Do they become, to use an old-fashioned
phrase, genuinely 'learned in the law'?10 Or, on the contrary, do they
simply become more skilled in the use of what Plato denounced 2500
years ago as mere techniques of oratory — of rhetoric — that help one
in persuading an audience of the validity of any given proposition?

Most of us have little trouble, at least at the level of everyday speech,
in believing that in the course of their educations doctors become
knowledgeable about medicine or that engineers become knowledgeable
about the physics of bridge building. Do law students learn (and
experienced lawyers know) similar 'truths' of their discipline? Hard cases,
by definition, are scarcely a good test of the existence of legal knowledge
any more than focusing on the lack of knowledge about the etiology
of or potential cure for AIDS would genuinely establish the lack of reliable
medical knowledge. Indeed, the very recognition of a case as 'hard',
one may argue, requires the concomitant recognition of other cases as
'easy'. In the absence of such an opposition, we would only have cases
of equal difficulty. Picturing the distribution of case types is surely central
to one's overall portrait of the legal system and of 'thinking like a lawyer'.
How is it to be done?

Allan Hutchinson and John Wakefield strongly argue that Dworkin
makes only "a series of casual and generalized remarks about the possible
identity of a 'hard case'."11 One of the attributes cited is the ability of
"reasonable lawyers [to] disagree about rights."12 Dworkin does indeed
contrast hard and easy cases. The hard case generates a self-consciously
'principled' decision by the judge, who makes reference both to rules
and to general principles of the legal order. In contrast, the easy case
can be resolved through syllogistic analysis. "[T]he entire argument of
the court's opinion [can be cast] in the form of one or more syllogisms."13
As Hutchinson and Wakefield note, this does not explain how one
recognizes such cases but only indicates what follows from such a

Texas L. Rev. 35 for an argument that lawyers do indeed become learned in law.


12 Taking Rights Seriously, supra, note 6 at xiv. See also ibid. at 81: "[R]easonable lawyers
and judges will often disagree about legal rights."

13 Hutchinson & Wakefield, supra, note 11 at 91 (quoting R. Dworkin, "Judicial Discretion"
(1963) 60 J. Phil. 623 at 625-26).
recognition. Indeed, they conclude that “on Dworkin’s own terms, every case adjudicated upon must be treated as a ‘hard case’, if such a phenomenon is characterized by the use of principled reasoning by the judge.”

One obvious problem identified by Hutchinson and Wakefield is the haziness, if not disappearance, of Dworkin’s own distinction between hard and easy cases. Yet some theorists insist on the phenomenological reality of ‘easy’ cases. Thus Fred Schauer appeals to our experience as lawyers that we do not have equal difficulty in assessing all cases presented to us, whatever the nature of our abstract jurisprudential ideas. No doubt he is right. It is impossible to challenge the accuracy of such phenomenological reports given that most of us have on occasion dismissed one or another legal argument as absurd and simply unworthy of serious attention.

The phenomenon of ‘easiness’ is not in question. What is in doubt, however, is what explains our perception of certain cases as easy. In particular, can any formal criteria be offered, or are we ultimately left to decidedly informal norms such as ‘the sense of the community’ or the intuitions of what Henry Hart referred to as “first-rate lawyers”?  

14 Hutchinson & Wakefield, ibid. at 107 (emphasis in original). Dworkin has recently responded that Hutchinson and Wakefield have created “a pseudoproblem.” R. Dworkin, Law’s Empire (Cambridge, Mass.: Belknap Press, 1986) at 354. There is not, he says, “one method for hard cases and another for easy ones.” An analyst will use the same method for both, but the obviousness of the answers to easy cases leaves us aware that any theory is at work at all. We think the question whether someone may legally drive faster than the stipulated speed limit is an easy one because we assume at once that no account of the legal record that denied that paradigm would be competent. But someone whose convictions about justice and fairness were very different from ours might not find that question so easy: even if he ended by agreeing with our answer, he would insist that we were wrong to be so confident.

Ibid. The question at this point presumably involves the basis by which we take a different set of “convictions about justice and fairness” seriously enough to give it a respectful hearing (and answer) that requires on our own part a recognition that strong confidence in our own views might be misplaced.

15 Such dismissals have occurred not only in the abstract, as in discussions with colleagues, but also in the concrete reality of grading final examinations, when certain arguments seem so devoid of acceptable models of legal analysis as to warrant failure.

16 We should not assume that a case is easy only if it is indubitable that it could not go the other way. The Cartesian view that we have knowledge only if we have indubitable knowledge is not persuasive and in any case will not sustain any invidious comparison between, say, law and physics. . . . One could, of course, bite the bullet and defend skepticism about law on the ground of general skepticism: that we know nothing at all. That is a venerable philosophical position though one which is easier to state than to accept. But in any case general skepticism deprives legal skepticism of its political punch. Lawyers pretend to knowledge they lack, but then so does everyone else, including those who make that claim.

Letter from Leslie Green to Sanford Levinson (10 April 1986). I am extremely grateful for Professor Green’s comments on the draft initially presented at Osgoode Hall Law School.

17 See P. Bobbitt, Constitutional Fate (New York: Oxford University Press, 1982) at 53.
One practical problem with Schauer's argument is that it seems to rest ultimately on unlitigated or unasserted cases, cases that are truly never pursued because they are so easy. One way of reading his argument is that any case that is brought is by that very fact an 'uneasy' case. He can thus be read as substantially accepting much of the realist argument in regard to litigated cases, while at the same time chastising realists for failing to recognize that cases constitute only a fraction of the legal world. We should, he says, think of a law office conversation where a lawyer discourages the bringing of a case because it is, alas, an easy case that cuts against the client. In such conversations, according to Schauer's view, the true professionalism of the lawyer asserts itself, for it consists precisely in the ability of the educated lawyer to inform the lay client that 'the law' simply does not support his or her hopes. Lawyers may not know much in the way of hard-and-fast knowledge, but they can at least recognize the truly easy case.\(^{18}\)

### III. FROM EASINESS TO FRIVOLOUSNESS

Both hard and easy cases are inhabitants of what might be called a jurisprude's universe. There is, however, a linked concept that inhabits not only the conceptual universe of the jurisprude but also the more mundane (and socially important) universe of the practicing lawyer, both in the United States and in Canada. This is the 'frivolous case'.\(^{19}\) In theory, at least, a lawyer is not permitted to bring just any lawsuit for which a client is willing to pay the bill. According to the recently revised Rule 11 of the *U.S. Federal Rules of Civil Procedure,*

> The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his 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. . . . (Emphasis added)

---

\(^{18}\) Schauer, *supra,* note 8 at 421.

\(^{19}\) Professor Green has suggested that 'easy' and 'frivolous' cases are not so linked as I maintain. He views the hard-easy dichotomy (or continuum) as raising questions about cognition. In an easy case, propositions of law are bivalent, they are either true or false; in a hard case they may be neither true nor false but indeterminate. The frivolity of a case, on the other hand, is a function of the value of putting it. A case is frivolous only if the value of its being heard is not worth the costs (in a large rather than narrow or economic sense). Now this is an evaluative classification. Some frivolous cases are easy, some are hard.

Letter from Leslie Green, *supra,* note 16.

I agree that this distinction is possible, but I think that it misses the most plausible purpose of the prohibitions against frivolous litigation discussed in the text. Insofar as we accept a modernist notion of subjective value, I think that we are willing to tolerate a litigant's bringing a case that most of us would find radically 'uneconomic', so long as the formal legal arguments are not preposterous. After all, some individuals might have an exaggerated sense of honour that requires them to sue for defamation or invasion of privacy when the rest of us would shrug our shoulders. A lay person might call such a suit frivolous, but I do not think that a trained lawyer would. (Some, of course, would use this as an example of the professional deformation of legal 'training'.)
Sanctions for breach of Rule 11 include the award of costs and attorneys' fees to the other side. Similarly, Rule 38 of the U.S. Federal Rules of Appellate Procedure provides that "if a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Not surprisingly, the Supreme Court of the United States also has a rule permitting the award of damages "when an appeal or petition for writ of certiorari is frivolous." 20 Though my examples are taken from federal law, at least twenty states have enacted statutes authorizing sanctions for the bringing of frivolous claims. 21

The language of Rule 11 simply tracks that of the Model Code of Professional Responsibility, which ostensibly prohibits a lawyer from "[k]nowingly advanc[ing] a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law." 22 This rule was recently modified by the American Bar Association (ABA) when it submitted the Model Rules of Professional Conduct to the states for their consideration. The new rule states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." 23 A note attached to this new rule indicates that it is intended to generate an objective test, so that mere subjective belief in the plausibility of one's argument is not enough to escape censure. 24 A Canadian analogue to these American examples is the Ontario Barrister's Oath, which requires the vow that the barrister will not, among other things, "promote suits upon frivolous pretences." 25

As part, perhaps, of the general concern expressed these days about the purported litigation overload of the judicial system, judges in the United States seem increasingly interested in enforcing Rules 11 and 38. Further, awards of costs or attorneys' fees cannot always be passed

20 Rules of the Supreme Court of the United States, Rule 49.2.
24 See "Model Code Comparison" of 3.1 with DR 7-102(A)(1), ibid.
on to the client. As the Seventh Circuit put it in a recent case, the pressing forward of a frivolous appeal, "though attributable to the appellant, is in fact more a reflection of the incompetence or obstinacy of the appellant's attorney." The panel therefore assessed the penalty directly against the attorney as a means of deterring such conduct and, presumably, encouraging greater competence. Moreover, the very ethic of professionalism, if it is taken seriously, requires that lawyers pay the costs, for by definition the client cannot be expected to be able to monitor the lawyer's decision as to what passes beyond the line of permitted implausibility into the arena of prohibited frivolity.

Indeed, a recent article in the National Law Journal noted that attorney sanctions have been imposed upon some of the leading law firms in the United States, including Cravath, Swaine & Moore of New York and Gibson, Dunn & Crutcher, the Los Angeles firm to which former Attorney General William French Smith belongs. As the Journal put it, "[A]ttenuated arguments, made in a why-not-try-it spirit, now can cost the lawyer fees incurred defending against them — a price courts often order the attorney himself to pay and not pass on to the client." 

26 Maneikis v. Jordan (1982), 678 F.2d 720 at 722. See also Thornton v. Wahl (1986), 787 F.2d 1151 (7th Cir.), where the Court, after awarding costs and attorneys fees "on its own initiative" at 1153, labeled the appellant's arguments as "preposterous" and "a serious misstatement of state law" at 1154 and specifically allocated the burden of its award of fees:

Ordinarily we impose attorneys' fees on the party, leaving party and lawyer to settle accounts.

But we do not suppose that the representations about state law were approved by Mrs. Thornton personally; although she is responsible for pursuing this litigation, she has received bad legal advice. We therefore impose [half] of the award on counsel personally.

Ibid. In Golden Eagle Distributing Corp. v. Burroughs Corp. (1984), 103 F.R.D. 124 at 129 (N.D. Cal.), the court specifically ruled that "[s]anctions shall be paid by the firm of Kirkland & Ellis and shall not be reimbursed by the defendant. In addition, both Kirkland & Ellis [and local counsel] shall submit a statement certifying that a copy of this opinion was given to each partner and associate of each firm."

See also Jorgensen v. County of Volusia (1986), 625 F. Supp. 1543 (M.D. Fla.) (lawyer fined $500 for failing to cite controlling cases in a motion for a temporary restraining order).

27 Indeed, I have been informed by a colleague of his having witnessed, during his tenure as a law clerk for a federal district judge, several lawyers pleading not be to sanctioned under Rule 11 because companies holding their malpractice insurance require Rule 11 sanctions to be reported.

28 Strasser, "Sanctions: A Sword Is Sharpened" (11 November 1985) Nat. L.J. 1. See also S.S. Partridge, J.C. Wilkinson & A.J. Krouse, "A Complaint Based on Rumors: Countering Frivolous Litigation" (1985) 31 Loyola L. Rev. 221 at 241, n.114 for a citation of a number of recent cases imposing sanctions. Though not concerning sanctions imposed against lawyers, a recent decision by the Washington State Supreme Court may nonetheless interest professorial readers of this article. The Court upheld an award of $50,000 of legal fees imposed on a University of Washington chemistry professor for filing a "frivolous" lawsuit against the university regarding alleged mistreatment by his department. The Supreme Court described the professors involved as "bickering adults" and said that "the courts are an inappropriate forum in which to settle a personal squabble among professional colleagues." The professor against whom the fee was assessed makes $28,000 a year. Describing himself as "absolutely stunned" by the decision, he says that he may have to declare bankruptcy. The award of fees was opposed by the American Association of University Professors and the American Civil Liberties Union. See S. Heller, "Professor Is Told to Pay $50,000 for 'Frivolous' Lawsuit" (28 May 1986) Chronicle of Higher Educ. 1 at 22.
One judge, who has written an article specifically encouraging his fellow jurists to be more active monitors of argumentative propriety under Rule 11, fined the Chicago firm of Kirkland & Ellis $3155 in attorneys fees for filing a motion for summary judgment that "presented an argument calculated to lead the Court to believe that it was 'warranted by existing law' rather than 'a good faith argument for the extension... of existing law'." This part of Judge Schwarzer's opinion involved an argument concerning Minnesota law. In addition, in an argument concerning California law, the brief cited only a 1965 California case and did not mention a 1979 case pointing in the opposite direction. Kirkland & Ellis made what Judge Schwarzer conceded was the "technically correct" claim that the 1965 case had not been specifically overruled, but he awarded damages nonetheless. According to Robert J. Kopecky of the firm, "[t]hat's what makes this controversial and concerns a lot of lawyers. In our view, it runs contrary to the nature of advocacy not to state as forcefully as possible a case consistent with the law." A brief submitted by the firm to the Ninth Circuit warned that allowance of the sanctions would "produce a more subservient, more cautious, even a more timid bar" and "change basic notions of advocacy rooted in the classical and common law legal traditions."

Because of my background, I am of course knowledgeable primarily about American law. However, to use the Ontario Rules of Civil Procedure as an example of Canadian law, imposition of costs upon a solicitor is permissible "[w]here a solicitor for a party has caused costs to be incurred without reasonable cause." Apparently few cases are directly on point, but one of them, United Van Lines (Canada) Ltd v. Petrov, seems to have involved a frivolous position. Use of a particular legal

29 W. Schwarzer, "Sanctions Under the New Federal Rule 11 — A Closer Look" (1985) 104 F.R.D. 181. Judge Schwarzer was described in Strasser's article, supra, note 28 at 1 as "a leading judicial activist on the sanctions front." Not all judges are so enthusiastic as Judge Schwarzer about the merits of Rule 11. Thus Chief Judge Jack B. Weinstein of the U.S. District Court in Brooklyn has severely criticized Rule 11 for"increasing[ing] the tensions in litigation, and... the amount of extra motions and extra appeals. To date, the effects have been adverse." T. Lewin, "A Legal Curb Raises Hackles" New York Times (2 October 1986) D1 at D8. See also M.L. Nelken, "Sanctions Under Amended Federal Rule 11 — Some 'Chilling' Problems in the Struggle Between Compensation and Punishment" (1986) 74 Geo. L. Rev. 1313.
30 Golden Eagle Distributing Corp. v. Burroughs Corp., supra, note 26 at 126.
31 Ibid. at 129.
32 Strasser, supra, note 28 at 32.
33 Ibid. The Ninth Circuit has recently reversed the trial decision. (1986) 801 F. 2d 1531.
34 Rules of Civil Procedure, O. Reg. 560/84. O. Reg. 786/84, Rule 57.07.
35 (1975), 13 O.R.(2d) 479, 1 C.P.C. 307 (Co. Ct.).
procedure was "a gross neglect or inaccuracy in a matter which it is
a solicitor’s duty to ascertain with
accuracy." 36

Professor Gold makes the important point that a lawyer is viewed
as an officer of the court, 37 and he suggests "that it may be part of
a solicitor’s duty to the court that he only raise points which are fairly
arguable. To take a thoroughly bad and unmeritorious point which results
in extra costs to the parties may justify a costs order against a solicitor." 38

In any event, the presence of ‘frivolousness’ as a legal concept makes
it possible to test the proposition that the legal system generates truly
easy, as well as hard, cases. One of my aims is, therefore, to begin an
inquiry into the enforcement of the prohibition against frivolousness in
the law. 39 Can such an examination help us in our more basic juris-
prudential deliberations, with their focus on ‘hard’ and ‘easy’ cases? I
should make clear that I am focusing on only one aspect of the ‘frivolous
case’ problem, that is, the aspect dealing with legal arguments. The other
aspect, which appears to account for the majority of actual cases, involves
factual frivolousness, where claims are asserted without sufficient in-
vestigation into the actual existence of the underlying facts that concededly
would be necessary in order to support a claim. 40

IV. TOWARD A JURISPRUDENCE OF LAWYERING

I have two reasons for being interested in frivolous cases. One, as
has already been explained, is the connection with traditional jurispru-
dential inquiry. But the second reason involves a rather explicit rejection
of the conventional Anglo-American jurisprudential infatuation with the
thought processes of judges. I have referred elsewhere to our traditional

E.R. 481 (H.L).
37 Gold, supra, note 25 at 72-73, discussing Myers v. Elman, ibid.
38 Ibid. at 79. I gather that lawyers in Ontario have expressed some concern that Rule 57.07
might be used by the courts to tax attorneys should they make losing arguments of particular
novelty or controversy.
39 A linked subject, of course, is the tort of malicious prosecution, which under certain
circumstances allows a successful defendant to sue the plaintiff for having brought the suit. These
circumstances include, in addition to a lack of probable cause for the underlying suit, the successful
termination of the suit in the defendant’s favour and, perhaps most importantly, malice on the
part of the original plaintiff. See Note, “Groundless Litigation and the Malicious Prosecution Debate:
A Historical Analysis” (1979) 88 Yale L.J. 1218 at 1219. See also J.K. Jones, Jr., “Liability for
Duty to Reject Groundless Litigation” (1980) 26 Wayne L. Rev. 1561. I am not concerned in
this essay with the technicalities of malicious prosecution, however, primarily because of the malice
requirement, which necessarily includes subjective examination of the motivation of the plaintiff.
I am much more concerned with the objective legal knowledge that can be expected of an attorney.
40 See, e.g., Partridge, Wilkinson & Krouse, supra, note 28, which focuses on “complain[s]
based on rumors.”
jurisprudence as generating a model of "law without lawyers,"41 but I think that we very much need to integrate lawyers into our operating conceptions of law.

The traditional emphasis on judges is most notably seen in our own time in the work of Ronald Dworkin, with his model judge, Hercules, whose task it is to search for right answers to legal questions. Although I have written critically of Dworkin, I have always been willing to concede a measure of plausibility to his phenomenological description of the task of judging.42 Whether we are judging law or interpreting a poem, it seems psychologically accurate to say that our obligation is to present our audience with the best interpretation of which we are capable. To do anything else is to dissemble, perhaps even to lie. We are free, of course, to say that we find more than one interpretation equally good. What we cannot do, however, if we are to retain our integrity either as judges or as scholars, is to present a public argument that we privately believe to be weaker than an alternative.

Much of the swirl of argument surrounding Dworkin has either involved the plausibility of searching for unique solutions to complex legal problems or the defining of the particular relationship between what he calls 'principles' and 'goals'. There have been few attacks on the phenomenological model just described. It should be absolutely clear, though, that Dworkin's model of law cannot possibly explain the ordinary reality of the practicing lawyer. The academic emphasis on judges has generated an understanding of law that ill accords with what lawyers actually do or how they actually think. Although I shall elaborate this point below, for now let it suffice to state that it is not an essential part of a lawyer's role to actually believe the argument being asserted. Lawyers are fully licensed to present arguments to judges — including Herculean judges — that they do not believe and that, indeed, they would quickly reject were they in the judge's place.

Failure to take account of whether we are describing judge's law or lawyer's law has had important implications in our jurisprudential history. For example, Justice Holmes's predictive theory of law makes perfectly good sense once one realizes that Holmes was not talking to judges about their law but rather to law students — future lawyers — about theirs.43 He grasped, as few have before or since, that lawyers and judges live remarkably different lives as servants of the law.

41 Levinson, *supra*, note 9 at 454.
I have already alluded to what I consider to be one of the central realities of the lawyer's life — the legitimacy of disbelief in one's public utterances. This legitimacy is spelled out with perfect clarity in the codes of so-called legal ethics within the United States. Thus the American Bar Association in its *Model Code of Professional Responsibility* specifies that "[t]he advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." Further, the *Code* immediately goes on to validate the representation of a client by a lawyer "even though [the] client has elected to pursue a course of conduct contrary to the advice of the lawyer." Now it is true that both quotations are incomplete as stated. The first limits the advocate to arguing a position "supported by the law or ... supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous." The latter equally rejects representation of the advice-rejecting client when it would require the lawyer "to take a frivolous legal position."

Nonetheless, both the established standards and the actual conventions of legal practice give the advocate permission to make weak but non-frivolous arguments. The tolerance of vigorous advocacy on both sides of a hard case is extended to cases that, at least from an orthodox jurisprudential perspective, scarcely warrant that appellation. Here the advocate's task is indeed similar to that of the orator in ancient Greece, to make what is felt to be the lesser argument appear the greater. A skilled lawyer-orator can presumably lead a non-Herculean judge to adopt a misreading of the law that, through the very issuance of the resulting opinion, may become the law.

What I have discussed up to now presupposes that these arguments will take place within the context of litigation, which assures at least some public exposure. The organized American Bar, however, is equally tolerant of disbelief even in non-litigation contexts. Perhaps the most important example involves advice given to clients preparing tax returns, who must decide, for example, whether to report certain transactions as income or whether to take certain deductions.

---

44 *CPR, supra,* note 22, EC 7-4. The "Comment" accompanying Rule 3.1 recently adopted by the American Bar Association as part of its new *Model Rules of Professional Conduct* specifically ratifies this understanding of the lawyer's role: "[An] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail."

45 *CPR, ibid.* EC 7-5.

46 *Ibid., EC 7-4.*

47 *Ibid., EC 7-5.*
The ABA Committee on Ethics and Professional Responsibility only this past July issued an opinion specifically treating the legitimacy of a lawyer's advice to a client regarding the position to take on a tax return. The Committee adopted the standard already quoted: It allows a lawyer to advise "positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law." The Committee takes note of the fact that "good faith belief" can co-exist with a belief that "the client's position probably will not prevail. However, good faith requires that there be some realistic possibility of success if the matter is litigated." The ABA does not indicate whether 50-1 counts as a "realistic possibility." (After all, long shots do occasionally come in. I need not tell a Toronto audience what the odds were of Kansas City coming back in the 1985 playoffs and subsequent World Series.)

Lest one believe that "realistic possibility" requires, for example, the lawyer to be able to cite at least some case law or similarly authoritative material favorable to an argument, the Committee states that good faith can be present even where "there is no 'substantial authority' in support of the position." The Opinion does state that lawyers should advise their clients that positions unsupported by substantial authority can potentially lead to a significant penalty imposed by the Internal Revenue Service (IRS), a penalty that can be avoided if the tax return includes adequate disclosure of the controversial "facts in the return or in a statement attached to the return." However, the Opinion leaves the decision whether to include such a disclosure to the client, who can "decide to risk the penalty by making no disclosure and to take the

---

49 Ibid. at 151-53.
50 Does it matter, in assessing a lawyer's conduct, whether the lawyer (or the assessor) believes that, as a matter of public policy independent of the interests of the particular client, his or her particular construction of the Code is a desirable one, even if benighted judges are unlikely to accept it? Or is the only relevant interest that can be taken into account by the lawyer (or the assessor) that of the client?
51 Opinion, supra, note 48 at 153. 26 USC §6702 states that a taxpayer who takes "a position which is frivolous ... shall pay a penalty of $500." 26 USC §6673 authorizes the Tax Court to assess damages of up to $5000 against a taxpayer who litigates in behalf of a position that "is frivolous or groundless."
52 26 USC §6661(b)(2)(B)(i).
position initially advised by the lawyer in accordance with the standard stated above."\(^{53}\)

Perhaps the most noteworthy feature of this example is that no realistic expectation exists that the position taken will in fact ever become part of a litigation process and thus be tested by any kind of public examination. Every American tax lawyer is familiar with the so-called tax lottery, based on the remarkably low percentage of returns actually audited within the United States. "This has led," say Professors Wolfman and Holden, "to an 'audit lottery' in which taxpayers who adopt aggressive (doubtful, albeit reasonable) positions rely for success not so much on their conviction that they will be able to prevail on the merits if challenged as on their firm knowledge that they have a 98% chance of never being challenged."\(^{54}\)

Tax advice may present a particularly dramatic kind of problem. No one knows how much of the American deficit could be cut if people were restrained by their lawyers from taking positions where the chance of prevailing was worse than one in four. One suspects, though, that a substantial number of the hungry and the homeless, whose pittances are being cut in order to reduce the deficit, could be fed and housed out of the money that would flow to the government under this counterfactual supposition. But there is surely nothing unique about tax law in terms of the basic problem under discussion, that is, the implications for a legal system of allowing lawyers to counsel their clients by reference to good faith readings of the law.

As many persons have pointed out, usually in criticism of our focus as legal academics on appellate case law, most legal events are in fact never litigated. Clients and their lawyers most often conclude their interactions in law offices rather than in courtrooms. The advice lawyers feel free to give their clients has far more to do with structuring our legal system than does the legal opining of judges in specific cases. This is true whether we are referring, for example, to the kinds of contracts lawyers write for their clients or the kinds of labour policies adopted by companies on advice of counsel. \textit{At most} a lawyer is bound only


Frivolous Cases: Do lawyers really know anything at all?

1987

Frivolous Cases Do lawyers really know anything at all?

to predict to the client the possible consequences of litigation: no one is seriously obligated to structure her or his behaviour on the basis of such predictions.

Indeed, a remarkable aspect of American legal practice exists where even almost completely predictable judicial consequences are flouted with apparent impunity. I am referring to what is euphemistically called 'nonacquiescence' by federal agencies in the interpretation of statute law by courts. Agencies such as the IRS, the National Labor Relations Board (NLRB), and the Social Security Administration (SSA) have on occasion refused to accept as guiding precedents the decisions of United States Courts of Appeals, even within the Circuit affected by a particular decision. The position of these agencies appears to be that only the United States Supreme Court can issue an authoritative interpretation of the law and a lower court decision is merely suggestive; therefore the United States is not 'collaterally estopped' from relitigating questions that have already been decided.

The IRS has formally issued Revenue Rulings indicating nonacquiescence to the particular doctrine enunciated in a decision of the Tax Court, thus indicating that no precedential effect would be accorded to the decision. A similar procedure has apparently been used in regard to decisions of the United States Courts of Appeals. The SSA also has on occasion issued specific rulings indicating non-acquiescence in court decisions.

The NLRB is less formal, though it has sometimes criticized administrative Trial Examiners for following "certain decisions of U.S. Courts of Appeals which expressed views contrary to those of the Board, and which the Board has not accepted." Such rejection of judicial

---


56 It has long been an accepted part of American jurisprudence that one circuit court cannot bind another.


58 See Buzbee, supra, note 55 at 588-89: "Cases of intracircuit nonacquiescence, however, appear to be an uncommon exception instead of a concerted policy, and the IRS may, in fact, no longer practice intracircuit nonacquiescence."

59 Ibid. at 585-86, n.26.

60 Iowa Beef Packers, Inc. v. NLRB (1963), 144 N.L.R.B. 615 at 616, enforced in part, (1964) 331 F.2d 176 (8th Cir.). See generally Eichel, supra, note 55 at 470 and notes 45-46, supra.
authority has been met, as one might expect, with vigorous opposition
from the courts themselves. Thus, the Third Circuit Court of Appeals
has written, “For the Board to predicate an order on its disagreement
with this court’s interpretation of a statute is for it to operate outside
the law.”\textsuperscript{61} The Second Circuit similarly described the NLRB practice
as “intolerable if the rule of law is to prevail.”\textsuperscript{62}

In recent years the most important example of non-acquiescence
has involved the SSA, which insisted on relitigating non-eligibility
determinations made under procedures declared illegal by courts. Al-
though it may be true that “victory is a foregone conclusion for each
citizen who directly challenges an agency on the basis of settled circuit
precedent,”\textsuperscript{63} many of the disappointed claimants are either unaware of
the illegality of the procedures or unable to afford lawyers who can
litigate even this open-and-shut case. Reports have been published, though,
of at least some United States attorneys who have refused to represent
the SSA in court because the Administration’s position is without a basis
in law.\textsuperscript{64} A Ninth Circuit judge equated this non-acquiescence policy
of the Reagan Administration as a denial of the principle of judicial
supremacy similar to that found in the Old South doctrine of nullification.\textsuperscript{65}

It is for these reasons, among others, that I have argued that the
central source of so-called legal nihilism, a topic much written about
these days, is the behaviour (and supporting ideology) of the practicing
bar. For it is there — and not merely in the abstract writings of legal
academics — that one will discover the genuinely important emphasis
on the inherent indeterminacies within the law and the concomitant ability
to distinguish practically any case or construe practically any statute
in a way that will count at least as a “good faith argument for the
extension, modification or reversal of existing law.”\textsuperscript{66}

It should be easily apparent that the model of lawyering I am
presenting is radically different from Schauer’s. The important point is,
however, that both of us may well be correct. That is, I am willing
to concede that millions of potential lawsuits might never take place

\begin{itemize}
\item \textsuperscript{61} \textit{Allegheny General Hospital v. NLRB} (1979), 608 F.2d 965 at 970 (3d Cir.).
\item \textsuperscript{62} \textit{Ithaca College v. NLRB} (1980), 623 F.2d 224 at 228 (2d Cir.). The Court emphasized
\textit{that, “When [the Board] disagrees in a particular case, it should seek review in the Supreme Court.”}
\textit{Ibid.}
\item \textsuperscript{63} Buzbee, \textit{supra}, note 55 at 602-3.
\item \textsuperscript{64} See \textit{ibid}. at 609, n.174.
\item \textsuperscript{65} \textit{Lopez v. Heckler} (1983), 713 F.2d 1432 at 1441 (9th Cir.) (Pregerson J., concurring).
\item \textsuperscript{66} \textit{Federal Rules of Civil Procedure}, Rule 11.
\end{itemize}
because lawyers in fact recognize certain cases as easy and successfully
dissuade their clients from pressing forward with litigation. In addition,
though I am asserting that additional millions of legal encounters occur
in which lawyers assure their clients that given positions are ‘tenable’
even if likely losers, or, as in the case of non-acquiescence, federal agencies
successfully order their lawyers to disregard what the naive might regard
as binding precedent. I also suspect that flamboyance in the interpretation67
of legal materials is a direct function of the perceived odds against
litigation. This simply repeats the observation of Holmes and the realists
made over a half-century ago that the relationship between law on the
books and the law in action is extremely tenuous. What remains all
too true, though, even after half a century, is that the empirical research
that might provide some greater clarity about the actual behaviour of
lawyers is sadly lacking.

V. CONTROLLING FRIVOLOUS ARGUMENT

Still, we do know that the law on the books says that lawyers, though
allowed to make weak arguments, have no right to present frivolous
ones. It is time, then, to turn more explicitly to what ‘good faith’ might
entail, especially once we move beyond reliance on callow subjectivity,
where a lawyer can purchase immunity simply by demonstrating his or
her own sincerity of belief in an otherwise preposterous argument. Two
problems will particularly concern us: First, does the standard provide
genuine knowledge to a lawyer seeking guidelines as to what arguments
can be presented on behalf of a client? Second, and related, is this new
interest in preventing ostensibly frivolous litigation in fact part of a
conservative reaction against imagination in general? Is it a subtle attempt
to deter lawyers, in the language of the Benchers of the Law Society
of Upper Canada,

from bringing to trial causes of action or defences that are novel, controversial
or difficult because of the risk that the lawyer could be called upon to pay the
costs personally if the action or the defence fails. If such should be the result
of the rule, the members of the public could be denied their right to legal
representation at a time when it is needed most, and the natural development
of the law would suffer.68

This paper is concerned with the first question more than the second,
but everyone should be aware of the political concerns that hover over
this issue.

67 That is, the willingness to deviate substantially from the generally accepted conventions
of legal argumentation.

68 Law Society of Upper Canada, “Communiqué” No. 156 (1 August 1985).
In a recent United States Supreme Court case, Justice Brennan, joined by Justices Marshall and Stevens, dissented from a decision awarding $500 damages against a violator of the Supreme Court rule prohibiting frivolous appeals or petitions for certiorari. Justice Brennan objected that the Rule "sets no standards for determining when a petition for certiorari is 'frivolous'." These Justices seem to suggest that the prohibition of frivolous litigation, without further elaboration, violates the general norm against vagueness in the law. One of the central interpretations of due process of law is that the State must provide "fair notice" of what it "commands or forbids." It is, I suspect, no coincidence that writers on frivolousness have tended to adopt versions of Justice Stewart's famous (or is the correct word 'notorious'?) test of pornography, that is, "[P]erhaps I could never succeed in intelligently [defining it] ... [b]ut I know it when I see it." Thus a writer notes that "[f]rivolousness, like madness and obscenity is more readily recognized than cogently defined." I suspect that Justice Brennan would be tempted to adopt Justice Black's comment about the deficiencies of attempted regulation of obscenity: "[N]o person, not even the most learned judge ... is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity'.” Substitute 'argument' for 'material' and 'frivolousness' for 'obscenity', and the heart of the critique of the rules mentioned earlier is made manifest.

Consider, for example, several reported cases or arguments in regard to deciding what counts as frivolity in the law. My favorite 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

---

69 Hyde v. Van Wormer (1985), 106 S.Ct. 403 at 404. See also Tatum v. Regents of University of Nebraska (1984), 462 U.S. 1117, where damages were also awarded over the objection of the same three Justices. In Gullo v. McGill (1984), 462 U.S. 1101, Chief Justice Burger and Justices Rehnquist and O'Connor indicated that they would have awarded damages.


74 Oil Gas Futures, Inc. of Texas v. Andrus (1980), 610 F.2d 287 (5th Cir.).
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.

Or, at the level of constitutional argument, imagine a distinguished former member of the Court of Appeals for the Seventh Circuit solemnly telling the Supreme Court of the United States that municipal attempts to limit the access of teenagers to electronic video games were a violation of the rights established by the First Amendment protecting the game designer’s ability to communicate with his or her potential audience. (I suspect that every experienced legal practitioner or law professor could regale us with war stories entirely on point. What he or she might not be willing to do is to confess to his or her own most dubious arguments.)

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 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 mentioned earlier. Consider in this context one of my favorite quotations from the

---

75 Ibid. at 288.

76 See Alladin’s Castle, Inc. v. City of Mesquite (1980), 630 F.2d 1029 (5th Cir.), rev’d in part on other grounds, (1982), 455 U.S. 283. Yet here, too, the ‘rhetorical force’ of my example is undercut by the fact that this argument has in fact been accepted by at least three courts, even as it has been rejected by others. See the cases cited in Caswell v. Licensing Commission for Brockton (1983), 444 N.E.2d 922 at 926 (Sup. Jud. Ct. Mass.) (rejecting First Amendment argument).

77 The examples immediately above, and the general topic of this essay, is the restraint placed upon lawyers in presenting arguments. If one extends the search for frivolity to pro se cases, one can find considerably more colourful examples. Thus George v. Texas (1986), 788 F.2d 1099 (5th Cir.), concerns an alleged “right to sex” that would prohibit the vice squad of the Houston, Texas police department from using policewomen to pose as prostitutes and then arresting men who propositioned them. The court found George’s appeal of a lower court dismissal of his claim to be “patently frivolous” at 1100 and awarded the appellees double costs and attorney’s fees under Rule 38 of the Federal Rules of Appellate Procedure.

78 Professor Schneyer in correspondence has suggested that “one may take frivolousness seriously so long as one considers the existence of a legal speech community [as] something to be wished for, something worth treating as if it were the case.” Letter from Professor Schneyer to Sanford Levinson (3 July 1986).
legal literature, Professors Mishkin and Morris writing in 1965 on the prospects for the adoption of comparative negligence by courts:

[It seems clear that there is no substantial likelihood that any court will act today, as a matter of common law development, to substitute comparative negligence for an existing rule of contributory negligence in the general accident field. Indeed, lawyers will not even consider arguing this possibility to a court.\textsuperscript{79}]

Is it unfair to interpret this as suggesting that an argument on behalf of comparative negligence would be frivolous? One hesitates to accept that suggestion inasmuch as comparative negligence was indeed adopted by a number of state courts within a decade of Mishkin and Morris' ill-timed prognostication.

This is one of many possible examples to support the genealogy of law described by Professor Risinger: “Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though not the law), then accepted as the law.”\textsuperscript{80} Professor Risinger cites other examples of legal arguments made in the face of apparently overwhelming authority to the contrary, including pre-1954 suggestions that 'separate but equal' was not really a constitutionally tenable standard, regardless of existing Supreme Court precedents. Thus, he concludes that “a court should be very cautious before it ever finds a . . . violation based on the improper espousal of a legal position.”\textsuperscript{81}

An English judge, Lord Harman, has expressed some similar reservations about assessing lawyer's arguments:

[If it be misconduct to take a bad point, a new peril is added to those of the legal profession, and unless a bad point be taken knowing it to be bad and concealing from the court, for instance, an authority which shows it clearly to be a bad point,\textsuperscript{82}]

\textsuperscript{79} P. Mishkin & C. Morris, \textit{On Law in Courts} (Brooklyn: Foundation Press, 1965) at 256, quoted in I. Englard, “Li v. Yellow Cab Co. — A Belated and Inglorious Centennial of the California Civil Code” (1977) 65 Cal. L. Rev. 4 at 6-7, n.18. See also, on a more contemporary note, S. Wermiel, “The Costs of Lawsuits, Growing Ever Larger, Disrupt the Economy” \textit{The Wall Street Journal} (16 May 1986) 1: “Cases once thought to be 'frivolous' [says Victor Schwartz, a former law professor now practising law in Washington, D.C.], 'have become the law.' Fifteen years ago, he says, it was considered frivolous to sue for emotional injury allegedly caused by the mere witnessing of a car accident. ‘Now, three states allow it.’” \textit{Ibid.} at 8.

\textsuperscript{80} D.M. Risinger, “Honesty in Pleading and Its Enforcement: Some 'Striking' Problems with Federal Rule of Civil Procedure 11” (1976) 61 Minn. L. Rev. 1 at 57 (article examining pre-1983 version of Rule 11). Compare Professor Dworkin's recent statement that "questions considered easy during one period become hard before they again become easy questions — with the opposite answers." Dworkin, \textit{supra}, note 14 (concluding sentence of passage quoted above).

\textsuperscript{81} Risinger, \textit{ibid.} at 58.
then it would be a very dangerous doctrine indeed to say that the advocate ought to be mulcted in the costs because he took a point which failed.\textsuperscript{82}

Still, one is justifiably reluctant to accept the proposition that all arguments are non-frivolous so long as someone called a lawyer is willing to make them. After all, as a distinguished federal judge once wrote in an opinion, "Having been many years at the Bar before being on the Bench, we know from our own experience that there is no position — no matter how absurd — of which an advocate cannot convince himself."\textsuperscript{83}

A very good reason for such reluctance relates to the so-called American rule regarding the payment of legal fees. The United States rejected the English practice whereby losers in a lawsuit compensate the winners for the costs of their attorneys fees. Instead each side bears its own costs in the absence of specific statutory authority permitting a court to shift costs. Rule 11 and the other rules are examples of such authority. Indeed, Rule 11 in form requires sanctions such as fee shifting upon a determination of frivolousness rather than merely permitting them.

It is surely no coincidence that one of the contemporary federal judges most interested in the issue of frivolous cases is Frank Easterbrook, who before his appointment to the Seventh Circuit Court of Appeals was a professor at the University of Chicago, where he drank deeply from the well of law-and-economics identified with that school. Thus,

\textsuperscript{82} Abraham v. Jutson (1963), [1963] 2 All E.R. 402 at 404, [1963] W.L.R. 658 at 664 (C.A.), quoted in Gold, \textit{supra}, note 25 at 79 n.101. Gold also says that “there is authority which would require a lawyer to take on a speculative cause for his client’s sake and the sake of justice.” See \textit{Clyne v. Bar Association of New South Wales} (1960), 104 C.L.R. 186, [1960] A.L.R. 574 (Aust. H.C.). \textit{Lewin, supra}, note 29, details a recent $165,000 sanction in a case involving toxic substances as a “perfect example of Rule 11 gone wrong.” A lawyer representing the estate of Alan Glaser, a young doctor who had died of leukemia after working in a chemical company during summer vacations, sued 101 manufacturers of benzene, a carcinogenic chemical used in the facility. According to \textit{Lewin}, “It is hard to establish who can be held liable for a worker’s exposure to a common chemical, and in a few cases in which it could not be determined which company made the actual substance that caused the injury, the courts have allowed recovery from the whole industry, dividing the damages on a market-share basis.” This approach, known as ‘enterprise liability’, was initially adopted by the lawyers representing Ann Glaser, the widow. “After some pretrial proceedings, however, the lawyers found they would not need to use that theory, so they agreed to drop 89 defendants.” The judge in the case, referring to enterprise liability as a “grade school teacher’s tactic of punishing the entire class until someone in the class identifies the guilty party,” proceeded to fine the lawyers $165,000 for “meritorious joinder of numerous defendants.” The lawyers are appealing to the Court of Appeals for the Third Circuit. According to Harvard Professor Arthur Miller, who is helping on the appeal, manufacturers are putting some very complex products out there, and in toxic tort cases, a lawyer may not have the capacity to identify all the correct defendants. Sometimes the defendant is the only one who has the information that’s needed, and he won’t share the records. The only real issue about Rule 11 is whether it will chill creative lawyering, but this is one of the very few cases where that’s a problem.

\textit{Ibid.} at D8.

Judge Easterbrook has written, "[S]uits are easy to file and hard to defend. Litigation gives lawyers opportunities to impose on their adversaries costs much greater than they impose on their own clients. The greater the disparity, the more litigation becomes a predatory instrument rather than a method of resolving honest disputes."84 What Easterbrook describes as "[a] lawyer's reckless indifference to the law may impose substantial costs on the adverse party. . . . [The law] permits a court to insist that the attorney bear the costs of his own lack of care."85 Fee shifting, especially if directed at the attorneys themselves, can supply an economic control against frivolity that is otherwise lacking in the American system. "The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them."86

The obvious question is how to resolve the tension between the descriptions presented by Risinger and Easterbrook, both of which capture real truths about the practice of law. Can we fix on a definition of frivolousness that is not either void for vagueness or otherwise too much a threat to the genuinely innovative lawyer who is first in queue with a new legal argument? As to vagueness, Judge Easterbrook, writing for the Seventh Circuit, has recently noted that "[c]ourts have been imposing penalties for frivolous litigation for hundreds of years, [cases cited] and the ambiguities that lurk in 'frivolous' (or in any other word) in marginal cases do not prevent the imposition of penalties. Uncertainty is a fact of legal life."87 He goes on immediately to quote from a 1930 Supreme Court case acknowledging that "[w]henever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the . . . law to make him take the risk."88

Judge Easterbrook emphasizes the objective nature of the inquiry. "If a person should have known that his position is groundless, a court may and should impose sanctions."89 He sharply rejects a subjective standard of bad faith. "An obtuse belief — even if sincerely held — is no refuge, no warrant for imposing delay on the legal system and

---

84 Re TCI Ltd. (1985), 769 F.2d 441 at 446 (7th Cir.).
85 Ibid. at 445.
86 Ibid. at 446.
87 Coleman v. Commissioner of Internal Revenue (1986), 791 F. 2d 68 at 71 (7th Cir.) (Emphasis added).
88 United States v. Wurzbach (1930), 280 U.S. 396 at 399.
89 Coleman, supra, note 87 at 71.
costs on one's adversaries. The more costly obtuseness becomes, the less there will be.\(^9\)

In private correspondence, Judge Easterbrook has suggested that something is frivolous only when (a) we've decided the very point, and recently, against the person reasserting it, or (b) 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable. Either one is a pretty stiff test.\(^9\)

My colleague Douglas Laycock has pointed to a potential ambiguity in Judge Easterbrook's formulation generated by the word "untenable." One meaning would make "tenable" synonymous with a prediction as to the actual likelihood of the position prevailing. This would allow, for example, each of the one hundred lawyers to indicate beliefs both that a) the position would in fact lose and b) the position is eminently reasonable albeit a loser. Thus, under this interpretation, at least one of the respondents would have to be actually persuaded by the argument and predict its acceptance in order for a case not to be deemed frivolous. The second meaning makes 'untenable' more synonymous with what we as professors might regard as a failing, rather than merely a C minus, performance. That is, to describe an argument as 'untenable' is indeed to pronounce it at the very same time as 'unreasonable' and therefore 'frivolous'.

Yet Judge Easterbrook's comment does suggest a way that courts might in fact handle the frivolousness issue. Practicing attorneys (and perhaps law professors as well) might be impaneled to provide advice to judges whenever a claim of legal frivolity is made by a losing party. If one is particularly worried about preventing the attribution of frivo-

\(^9\) See also Christiansburg Garment Co. v. E.E.O.C. (1978), 434 U.S. 412 at 421, where the Supreme Court held that attorney's fees can be recovered from the plaintiff in an employment discrimination suit only if the court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (Emphasis added.)

\(^9\) See also Re Marriage of Flaherty (1982), 31 Cal.3d 637, where the California Supreme Court held that an appeal could be considered frivolous "when any reasonable attorney would agree that the appeal is totally and completely without merit." Ibid. at 650. Compare the test for the standard for proof of "lack of probable cause" in a claim involving a suggested new tort of "groundless suit" suggested by a student note in the Yale Law Journal: The complainant "would have to demonstrate such an insufficiency of reasonably reliable evidence that no reasonable person confronted with such evidence could have believed that the action brought might succeed." Note, supra, note 39 at 1235 (emphasis added). The student author acknowledges that this "objective" test "means that a few plaintiffs who have retained negligent counsel and sued in good faith on the strength of counsel's advice may be subject to ultimate liability." Ibid. at 1236, n.124. The author goes on to advocate the right of "innocent plaintiffs who are misled by their attorneys into filing wrongful suits to recover from their lawyers in subsequent malpractice actions on proof of simple negligence." Ibid.
lousness to worthy arguments, the panel might be charged with a standard of beyond reasonable doubt, that is, each must be truly certain of an argument's utter worthlessness; all judgment calls must be resolved in favour of the lawyer accused of presenting the frivolous argument. In any event, such reliance on an actual community of lawyers, rather than a judge's own intuition about the probable response of such a survey, might serve to limit the possibility of political abuse that worries some of the practicing bar. However, if one is in fact interested in deterring frivolity through imposing sanctions, reliance on such a panel might be counter-productive.

The Federal Judicial Center has recently conducted An Empirical Study of Rule 11 Sanctions. One of ten hypothetical cases, modeled after actual cases, was sent to federal judges who agreed to participate in the study. Each judge indicated his or her view about any violation of Rule 11 and a concomitant willingness to impose sanctions. The cases mixed examples of both legal and factual frivolity. In none of the ten cases was there a unanimous reaction, though 97 percent did agree that one particular case, in which a suit was filed without any significant investigation of the underlying facts, presented a violation of the rules. Only two of the remaining nine cases elicited more than 75 percent agreement. Although this is scarcely a dispositive test of Judge Easterbrook's standard, these results certainly do not suggest the kind of shared communal understandings required if the standard is to be effective.

---

92 Compare this with the cautionary language of the California Supreme Court in Re Marriage of Flaherty, ibid., expressing its concern that the test of frivolousness there adopted should not have "a serious chilling effect" on the policy favoring free access to the judiciary and emphasized that "[c]ounsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is not by definition frivolous and should not incur sanctions." Ibid. at 650 (emphasis in original). Courts should be cautious in deeming an appeal "frivolous" instead of merely "without merit," and sanctions should "be used most sparingly to deter only the most egregious conduct." Ibid. at 651. See generally J. Cohn, "Serious Business" (August 1986) Cal. Lawyer 43.


94 Even here only 85 percent would have imposed the sanctions "required" by the Rule. Ibid. at 55.

95 Similar doubt is generated by a recent decision of the Court of Appeals for the Ninth Circuit, where a retiring college teacher sued the Teachers Insurance and Annuities Association of America (TIAA) claiming the right to receive a lump-sum payment instead of the annuity specifically set out in the contract. Connick v. TIAA (1986), 784 F.2d 1018 (9th Cir.). The District Court granted summary judgment for TIAA, and the Court of Appeals had no trouble affirming. It noted that the relevant contracts "specifically state that they contain no provision for cash surrender." Ibid. at 1020. Moreover, the no-surrender provisions had been construed and upheld in at least two reported state court decisions. Yet the panel refused the request for attorney's fees. "An appeal is considered frivolous when the result is obvious or appellant's arguments are wholly without merit. [Case cited.] We hold that Connick's appeal was not so lacking in merit to justify an award of attorney fees." Ibid. at 1022.
Problems of a different sort are suggested by the response of the Supreme Court in a 1980 case involving a petition by a prisoner alleging unconstitutional treatment by the state of Illinois. The courts below had not only dismissed the petition, but also awarded the State $400 in attorney's fees against the hapless prisoner. On appeal, the Supreme Court reversed. It held that at least one of the multifarious complaints of the prisoner stated a potential claim and vacated the award of attorney's fees. "Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District Court and the Court of Appeals."

Justice Rehnquist dissented on both the merits and the award of fees. He would have held that the claim was "meritless" in toto and that the "award of attorney's fees was entirely proper." As Mark Tushnet has written, "[I]t seems that, in Justice Rehnquist's view, a claim can be 'meritless' even though six members of the Supreme Court found that it stated a claim on which relief could be granted." There is, to put the matter gently, something troublesome about this willingness to uphold an award of fees in this instance, at least if one applies the Easterbrook standard.

Perhaps Judge Easterbrook did not expect to be taken with such seriousness; his suggestion appears not in a published article, but in some private thoughts that he was kind enough to share with me. But does not his suggestion point to the underlying problem with 'frivolousness' as an operative standard structuring the practice of law? We seem forced into one or another difficult position. We can, on the one hand, argue that in fact a communal consensus exists, though this rests only on assertion rather than demonstrated evidence. However, unless we are in fact willing to test the existence of such a consensus by reference to something like the panel suggested above, this position in practice reduces to the proposition that each given judge can be trusted to intuit frivolousness when he or she sees it, as limited by appellate review. Or, alternatively, we might throw up our hands in despair and assert that there is no such thing as a frivolous argument: that is, that a competent lawyer can indeed argue anything.

---

96 Hughes v. Rowe (1980), 449 U.S. 5. I am grateful to Mark Tushnet for bringing this case to my attention.
97 Ibid. at 15.
98 Ibid. at 23.
99 Letter from Mark Tushnet to Sanford Levinson (13 June 1986).
VI. CONCLUSIONS

Is there a way out of this dilemma? The fascinating thing about the problem of frivolousness is that such cases can be recognized.\textsuperscript{100} What can not be done, I have discovered, is to explain (or teach to students) exactly what constitutes the frivolous case as contrasted with those that are weak but nonetheless non-frivolous.

It is hard, perhaps impossible, to imagine a legal system that does not include the category of ‘frivolous’ arguments. As I have argued from the outset, to reject that category is to reject the central tenet of professionalism itself and its claims to privileged knowledge. Yet there seems to be no way of stating a recognition rule that can genuinely avoid charges of arbitrariness and, dare I say it, radical indeterminacy. Yet Judge Easterbrook is clearly correct in emphasizing the inability to achieve what Justice Holmes might have called ‘the repose’ of a Cartesian legal universe featuring completely certain, completely determinate legal concepts. That is not our human destiny, and no serious legal analysis can be predicated on its achievement.

My conclusion is frustratingly weak on answers. Yet the questions themselves, I hope, have been worth asking. The one position of which I am strongly confident is that the actual practice of law by lawyers, especially in what are sometimes regarded as its most routine aspects, presents puzzles that are worth our most serious attention. Certainly our jurisprudence and perhaps even our legal practices would benefit from at least a diminution of our obsession with judges and a closer look at lawyers.

\textsuperscript{100} Indeed, I find persuasive most of the reported frivolous cases, including those written by judges with political views quite different from mine, like Judge Easterbrook.