Involved Appellate Judging

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I. INTRODUCTION

What happens when the parties miss the point? It is well established that if a party has failed to address an issue, either in a lower court or in an appellate brief, that party has waived the issue, and the court is under no obligation to consider it. This usual formulation of the principle focuses on the actions and the justified expectations of the parties, rather than those of the court. Thus it is clear that from the court's perspective, there is no obligation to consider an issue that has not been properly raised or preserved on appeal. It is not as clear, however, to what extent the court may choose to consider such an issue *sua sponte.* Even less clear, although perhaps more interesting, is the question of what the court should do when it notices that the parties have failed to raise a particular argument to support an already properly raised issue, or when the court sees an anterior issue that must logically be decided before reaching the issues the parties have properly raised, or even when the court sees a completely different framework in which to view the case.

That is, what happens when the parties simply miss the point? To what extent should the court involve itself in the process by adding to or refining the arguments the parties have made to support the issues they have raised on appeal? Is the role of an appellate judge simply to decide between or among the arguments set before it, implementing whatever rules of procedure apply? Or is it to reflect on the issue the parties have brought to the court and to reach the most correct resolution of that issue? This Article will ultimately conclude that, above all else, these questions need to be more carefully and openly examined by the appellate courts that deal with them. My own answer is that judges should at least be strongly encouraged to be more "involved" in

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1. See, e.g., Singleton v. Wulff, 428 U.S. 106, 120 (1976); see also, e.g., Cubic Defense Sys., Inc. v. United States, 45 Fed. Cl. 450, 467 (1999) ("Any experienced appellate litigator knows that issues not raised in a brief are waived.") (citing 16A Wright et al., Federal Practice and Procedure Juris. 3d § 3974.1 n.12 (1999)).
the sense in which I will use that term in this Article—by using their discretion to improve the law by implementing the most correct reasoning. This Article concludes that judges serve in some respects as trustees or custodians of the law, and therefore have an active role to play in directing individual cases to the best and clearest conclusions.

One famous example of an actively involved judge is that of Justice Marshall in *Marbury v. Madison.* In that case, when Thomas Jefferson did not show up to argue the case, Justice Marshall took it upon himself to go through the steps of proposing what arguments Jefferson might have made for his side of the case:

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine. Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.3

Only after he completed this exercise did Justice Marshall determine that the Court had no jurisdiction over the case. The simpler approach would have been to dispense with the case on the jurisdictional point without going to the trouble of imagining an absent party’s legal arguments. However, the Court considered it a matter of sufficient importance to conduct a full exploration of the case in order to reach the best—that is, the most correct—possible result. This is perhaps an extreme example, but it illustrates the breadth of possibilities for how a judge may consider a matter and how he may define his role.

This question concerning the role of the court is somewhat distinct from the more typical jurisprudential question of what a judge should do when encountering an ambiguity or a gap in the law. This formulation of the question asks not what the law is, but what the role of the judiciary is. It asks what a judge should do (or, more particularly, what a judge may, must, or cannot do), when personal experience, reflection, or research indicates to the judge that there is a better argument than any of those actually presented to the court by the parties. After all, parties may simply fail to see all of the possible arguments relevant to the issues they have raised, or they may have tactical or strategic reasons for arguing an issue in a particular way that omits

2. 5 U.S. (1 Cranch) 137 (1803).
3. Id. at 159.
relevant legal arguments. The adversarial nature of the process is of course intended to draw out the best arguments, but it provides no guarantee that all pertinent arguments or theories will be presented to the court. One or more of the omitted theories may be in some way better for the resolution of the case than those the parties have put forward. Ultimately, this question concerns the relative importance in our legal system of "getting it right," as opposed to just ending a dispute between two parties, and the role the judge should play in the process of reaching the intended goal.  

If a judge is at least permitted to consider any alternative legal theories or reasons not presented by the parties, a question which is by no means settled, then a further question exists regarding the lengths to which a judge may, should, or must go in seeking the one "best" reason, for the "most correct" result. For example, is a judge limited as to the sources from which he may bring new ideas to a case? In turn, is the judge required to involve the parties in any arguments or modes of reasoning that go beyond those presented in the briefs and oral arguments? The answers to these questions may depend to some extent on philosophical notions of jurisprudence, on one's concept of the ownership of the law (whether public or private), on the value given to the principle of precedent, and on one's method of legal reasoning. All of these issues bear on the overall role of the judge. This Article will attempt to

4. One recent article has addressed some aspects of this question. See Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245 (2002). However, that article takes a somewhat different approach to the analysis of the question. Milani and Smith’s article begins with certain assumptions, some acknowledged, some not. This Article will instead examine such underlying assumptions before reaching the heart of the analysis of the question. Playing God focuses throughout on a practical solution, while this Article first seeks answers to questions about how best to reason the way towards a practical solution. Ultimately, I reach a different conclusion and a different practical solution. It is probably fair to say that in many ways these two articles ultimately differ in terms of basic beliefs about the jurisprudence and policies behind what the role of the appellate judiciary is or should be. Milani and Smith take a certain plot of high ground in their process-dominant view, which is of course defensible in many ways, but ultimately I conclude that a solution such as theirs is in the first place unrealistic, due to a lack of resources necessary to achieve it, and is furthermore a bad policy in that it permits bad lawyering to result in bad law, where that eventuality may be avoidable.

5. This Article analyzes only the question of judicial consideration of additional legal arguments, assuming that no additional factual determinations need to be made in order to consider those legal arguments. It assumes that any additional factual determinations would be beyond the scope of the appellate judge’s authority. Appellate courts note that even district courts act beyond their authority in addressing facts concerning issues not raised by the parties. See, e.g., United States v. Cofield, 272 F.3d 1303, 1307 n.4 (11th Cir. 2001) ("The district court erred in judicially-noticing the report, and judicially-noticing facts about an issue not raised by the parties or supported by the evidence, and assigning weight to those facts in its credibility determinations.").

6. See, e.g., discussion, infra notes 79-93 and accompanying text, regarding the current dispute among judges of the District of Columbia Circuit over the role of amici curiae in the context of this question.
determine not only what is allowed or required of judges in theory, but how best to approach this type of situation in actual practice.

The possible approaches to this question range widely from a strict prohibition against raising outside arguments or other considerations to an absolute duty to find the one best theory on which to decide the case. Between these extremes, the spectrum of possibilities includes strict limitations, strong cautions, unfettered discretion, encouragement in limited circumstances, and encouragement across the board. There is a similarly wide range of possibilities in what materials and other considerations judges might conceivably be able to draw on outside of the briefs and oral arguments. These resources might include amici curiae, supplementary independent experts, the judge's own past experience (as a judge, as a practicing attorney, as an academic, or otherwise), the judge's own research, or requests for supplemental briefing or oral argument from the parties.\footnote{Amici present a particularly interesting question in this regard, as there seems to be an inconsistency of opinion as to how those arguments are to be taken, regardless of whether they are voluntary or requested by the judge.}

\textit{A. Ownership of the Law}

In order to develop a practical approach to answering the question presented here, it is necessary first to identify the role of the appellate judge. In order to identify that role, however, it is necessary to start further back, by examining the question of ownership of the law—whether, metaphorically speaking of course, the law is the property of the public, with judges serving as trustees of the law, or the property only of the particular parties before the court in a specific instance, with judges constrained by the parties' control over the issues and arguments to be considered. The answer to that question will establish in large part the values the judge is supposed to be promoting. This answer will also help to clarify who has control over the arguments to be considered in a particular case. There is a tension, of course, between the autonomy of the parties and the public interest in judicial decisions. The background principle of standing clearly underscores the value placed on the real interest of the parties themselves—they must have a stake in the outcome, or they may not bring a question before the court. The discussion cannot end with the example of standing, however, as scholars have also examined the tension between public and private in the context of other topics, such as settlement and vacatur by consent.\footnote{See generally Judith Resnik, \textit{Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century}, 41 UCLA L. REV. 1471 (1994); Owen M. Fiss, Comment, \textit{Against Settlement}, 93 YALE L.J. 1073 (1984). Along similar lines, Judge Kleinfeld, of the Ninth Circuit, has expressed a strong disapproval of the practice similar to the one described in this article.}

On one side is the idea that the role of the
court is to act as an impartial arbiter—to settle the specific disputes between the parties before the court, answering only the questions explicitly presented, and doing so by considering only the arguments the parties have explicitly presented. On the other side is the idea that the role of the court is to determine and announce what the law is, and that in a common law system, determination of the law affects more than just the parties before a single court in a given case. When so much value is placed on precedent, the ramifications of decisions are too important to allow parties any kind of absolute control over the decisionmaking process.

This debate about the ownership of the law came up in the context of a Ninth Circuit majority’s requests for supplemental briefing by both the parties and an amicus curiae in *Warren v. Commissioner of Internal Revenue.* Unfortunately, it was unclear in that case whether the dissent placed the higher value on deference to the wishes of the parties, or on respect for the constitutional avoidance doctrine. The issue came up somewhat less explicitly in the context of treatment of stipulations on legal questions in *United States v. Alameda Gateway Ltd.*, in which the court held that there was no impropriety in a court’s refusal to accept a stipulation of the parties on a question of law.

However the question of ownership of the law is resolved, it must certainly bear on the question presented by this Article. If developing law is to be considered the property of only the parties before the court, then judges should take a more reserved or passive approach. If instead, judges serve as trustees or custodians of the law, protecting a property right of the public, then they should be under some kind of mandate to become more involved, and

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of vacating judgments by consent. *See, e.g.,* Mancinelli v. IBM Corp., 95 F.3d 799, 800 (9th Cir. 1996) (Kleinfeld, J., dissenting) (“The disposition we filed is ‘not merely the property of private litigants,’ and there is a public interest in leaving it on the record because of its value ‘to the legal community as a whole.’”) (citations omitted).

9. 282 F.3d 1119 (9th Cir. 2002).

10. *Id.* at 1123–24 (Tallman, J., dissenting). Judge Tallman emphasized the fact that the parties had not raised the question on which the court requested supplemental briefs and an amicus curiae, and that “each party has advised the Court that they do not wish to [raise this question].” *Id.* at 1123. He continued: “I believe it injudicious to appoint an amicus curiae to attack the constitutionality of the parsonage income tax exclusion when no one but the other panel judges improvidently wish to reach that issue.” *Id.* Throughout his dissent, he continued to emphasize the parties’ failure to raise the question. *Id.* at 1123–24. However, intertwined with that language there is also an argument for avoiding a constitutional issue that need not be reached. *Id.* In the end it is not clear which of these arguments is dispositive.

11. 213 F.3d 1161 (9th Cir. 2000).

12. *Id.* at 1167–68 (holding that non-binding nature of regulation is jurisdictional question, which requires Court of Appeals to raise it *sua sponte* on appeal when parties present issue as to compliance with regulation); *see also* Young v. United States, 315 U.S. 257, 259 (1942) (holding administration of criminal law is too important to be left to stipulations of parties).
ensure that the cases before them are decided on the best grounds, using the best reasoning possible.

B. Definition of Terms

It will be beneficial at this stage to step back and flesh out the terms used throughout this Article. Courts often state that an “issue” not raised below is waived on appeal. However basic and well established the proposition may seem, it does require some refinement.

First of all, it is clear that a party may not present an entirely new claim that was not raised below.\(^{13}\) However, in Lebron v. National Railroad Passenger Corp.,\(^{14}\) the Supreme Court held that once a claim is properly presented, a party can make any argument in support of that claim and is not limited to the precise arguments made below.\(^{15}\) Even if a party disavows an argument below, and does not explicitly raise it until its brief on the merits before the appellate court, as long as the lower court has considered the argument, as long as it is found to have been fairly embraced within the questions presented and the argument set forth in the petition, and as long as it is a “prior” rather than merely a “related” or “complementary” question, an appellate court will not prevent the party from presenting the argument.\(^{16}\)

A comparison with an earlier Supreme Court case may be helpful here. In Yee v. City of Escondido,\(^{17}\) the court noted the same rule—that as long as a claim is properly before the court, a party is not limited to the arguments made below—but found that the arguments in question were in one instance neither raised nor addressed below, and in the other instance not fairly included in the question on which the court had granted certiorari, so the court would not address them.\(^{18}\) Even though it declined to address the arguments in the case at hand, the Court noted the difference between what are here referred to as “claims” and “arguments” when it pointed out that a litigant “generally possesses the ability to frame the question . . . in any way he chooses.”\(^{19}\) The Court further noted that, as a technical matter, on occasion the Court itself rephrases a petitioner’s question or requests a petitioner to address a point not raised in the petition.\(^{20}\) This Article examines the extent to

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15. Id. at 378–84.
16. Id. at 379–82.
18. Id. at 532–38.
19. Id. at 535.
20. Id. The Court prefaced this discussion with a point about the nature of the doctrine—that
which the court should undertake such recasting of issues *sua sponte*. It focuses not at the level of “issues” or “claims,” but at the level of support for a party’s position on an issue, which might be termed “theories,” “arguments,” “frameworks,” or “legal reasons.”

A simple paradigm of the hierarchy of terms might look something like the following: An appeal is based on “whether the lower court erred.” That is not an issue, but is broader than an issue. The issue might be styled “whether the lower court erred *by not granting a directed verdict.*” There is a gray area at the next level, between issues and arguments: “whether the lower court erred *by not granting a directed verdict because stipulations were not read into the record.*” That might be considered either an issue or an argument.

while this is a prudential doctrine as to cases arising from the federal courts, it remains unclear whether the rule against addressing claims not raised below is jurisdictional or prudential in cases arising from state courts, but the Court declined to attempt to resolve that question in this case. *Id.* at 532–33.

21. This is a gray area because courts have not been at all consistent in maintaining a clear distinction between legal issues and legal arguments or reasons, as such. Looking back at the past decade of Supreme Court cases demonstrates inconsistency (and perhaps a lack of awareness of, or focus on, the issue here) in the use of these terms. See, e.g., Glover v. United States, 531 U.S. 198, 205 (2001) (referring to government’s “arguments” for alternative “grounds,” calling them “contentions” and “arguments,” but referring to parties’ having “joined issue at least in part on these points,” stating that the court does not decide “questions” not raised below, then referring to these points as “issues” outside “questions” presented) (emphasis added); Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 245 n.2 (2000) (referring without definitions to party’s “theory,” “claim,” and “argument,” then stating that “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below”) (quoting Yee v. Escondido, 503 U.S. 519, 534 (1992) (emphasis added)); Nelson v. Adams USA, Inc., 529 U.S. 460, 469–70 (2000) (using “issues,” “potential grounds of decision,” “substance of the issue,” “core of [the] argument,” “ground,” and “arguments” without clearly differentiating between meanings of these words); AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 226 n.2 (1998), reh’g denied, 524 U.S. 972 (1998) (“This issue of noncontract evidence neither was included within the question presented for our review... nor was raised by respondent as an alternative ground in support of the judgment... There was no hint of an argument that, even if that willful breach could not form the basis for an action, other alleged intentional acts sufficed to support the judgment below... [W]e have no obligation to search the record for the existence of a nonjurisdictional point not presented, and to consider a disposition (remand instead of reversal) not suggested by either side.”) (emphasis added); Bennett v. Spear, 520 U.S. 154, 166 (1997) (using word “grounds” for the proposition that party is entitled to defend judgment “on any ground supported by the record”) (citations omitted) (emphasis added); Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 n.13 (1996) (referring to “nonjurisdictional argument,” but later calling it an “issue... fairly included within the question presented”) (emphasis added); Holly Farms Corp. v. NLRB, 517 U.S. 392, 400 n.7 (1996) (declining to address “contention” also called “argument”) not explicitly raised, and citing for support version of general rule, which states that courts “do not address arguments that were not the basis for decision below”) (quoting Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 376, 379 (1996) (emphasis added)); Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 456–57 (1995) (declining to address additional argument based on a statute not raised by party in lower court, despite being “flagged” by lower court, deeming it an issue not raised until merits briefing at Supreme Court level) (emphasis added); United States v. Alvarez-Sanchez, 511
At the next level of particularity are the arguments to support the “because” component of the previous statement, that is:

whether the lower court erred by not granting a directed verdict because stipulations were not read into the record, based on the argument that this was harmless error, based on the argument that the stipulations were, in any event, ‘deemed admitted,’ or based on the argument that failure to raise the question in the trial court constituted a waiver.²²

This Article is concerned primarily with the last two levels in this paradigm. However, it also deals, in some instances, with “issues” to the extent that the court may find an issue to be antecedent to, or otherwise dispositive of the issues, claims, or questions explicitly and properly raised by the parties.²³ The arguments on which this Article focuses also include legal alternatives that are not based on a judge’s personal, political, or religious views or background, but that may seem, by analogy to another pre-existing legal framework, perhaps in another type of case or another area of law, to provide a potentially relevant approach to answering the question presented to the judge. The question presented in this Article is whether and how a judge should incorporate such alternative theories into the case.

C. An Apparent Answer

On a few occasions, appellate courts have made statements that might be taken to answer the question presented here. However, in most of these cases, the courts have supplied either no authority or weak authority to support their

U.S. 350, 360 n.5 (1994) (using interchangeably words “claim” and “argument” in declining to address party’s “alternative ground” for affirmance of suppression ruling based on Fourth Amendment, where only Fifth Amendment argument and Section 3501 argument had been made below) (emphasis added).

²². The examples of arguments here are drawn from the facts of United States v. Harrison, 204 F.3d 236 (D.C. Cir. 2000). (For further discussion of Harrison, see infra note 94.) In a few cases, judges have made this distinction between issues and arguments very clear. See, e.g., Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374, 379–81 (1995); Eldred v. Reno, 239 F.3d 372, 383–84 (D.C. Cir. 2001) (Sentelle, J., dissenting); Gallenstein v. United States, 975 F.2d 286, 290 n.4 (6th Cir. 1992). However, until all judges recognize and treat these distinctions consistently, the problems remain.

²³. Yet another gray area surrounds the question of what constitutes “raising” an issue below, or “preserving” an issue for appeal. Some judges appear more willing than others to find that a question or an argument was “fairly included” within the argument presented below (and therefore appropriate for an appellate court to consider), even though not explicitly contended. See Monge v. California, 524 U.S. 721, 741 n.2 (1998) (Scalia, J., dissenting) (finding that issue, while not explicitly contended, was fairly included within argument made, and thus should have been addressed by the Court).
statements. In several cases, the authority cited can be traced back to a 1991 Supreme Court case, *Kamen v. Kemper Financial Services*, which includes a statement that appears on the surface to answer the question. Ultimately, neither *Kamen* nor the other cases before and after it in the line often cited can stand up to scrutiny on this point. A close examination demonstrates not only that the Supreme Court has not really resolved the point at issue here, but also that the authority cited in the Court's reasoning does not provide genuine support for the Court's conclusion.

In *Kamen*, the Court wrote that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." The Court dropped a footnote from the paragraph of the opinion in which this statement appears, stating that judges do have discretion to ignore issues and arguments not timely raised by the parties, but cautioned that "if a court undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law," the court should be very careful, in issuing its opinion, not to mislead lower courts by the precedent it may establish. There, the Court was referring specifically to a scenario in which an antecedent question of law may be dispositive of the question actually raised by the parties. The quoted language from the text is, however, far from the focus of the case. On the contrary, it is only dictum.

25. *Id.* at 99–100; see also supra note 21 (listing various contradictory statements bearing on answers to this question).
26. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991). This case concerned a derivative action on behalf of shareholders in a money market fund against the investment adviser for issuing a materially misleading proxy statement. At the district court level, the plaintiff, suing in federal court under a federal statute, relied on federal common law for an exception to the demand requirement. *Id.* at 93–94. The district court dismissed for failure to plead the exception with particularity. *Id.* at 94. It was not until she wrote a reply brief before the court of appeals that the plaintiff raised an argument that state law also supported the federal common law policy, rather than the alternative approach of the American Law Institute. *Id.* at 95. The court of appeals refused to consider this argument on the grounds that it had been presented too late. *Id.* The Supreme Court decided that the court of appeals had been wrong to ignore the state law consideration in such a case. *Id.* at 97–100. In arguing this, the Supreme Court stated that the Court could not rely on the fact that the plaintiff had raised it too late as support for its refusal to consider the argument. *Id.* at 99–100. The Court stressed that state law was simply a factor that the Court was supposed to consider regardless of timing and even regardless of whether the plaintiff had raised the point at all. *Id.* at 97–100. Thus, it is not clear that the Court was focusing on the procedure of when a court can, may, or must consider another argument, so much as the substance of this particular issue—i.e., that the state law was a consideration that must of necessity come into the interpretation in which the court of appeals was engaged.
27. *Id.* at 100 n.5.
The Court did provide a citation to support its general proposition. However, the case the Court cited, *Arcadia v. Ohio Power Co.*, does not provide explicit support for the statement. There is no legal reasoning in *Arcadia* that supports the proposition for which it is cited. In *Arcadia*, the Court raised an issue underlying one of those explicitly raised by the parties. However, the support, if any, that *Arcadia* provides for the broad statement in *Kamen* is quite limited. First, the proposition in *Kamen* was apparently drawn only from what the *Arcadia* Court did, not from anything it said, because the *Arcadia* Court did not provide any authority for its own action. Furthermore, the proposition that might be drawn from what the *Arcadia* Court did is much narrower than the proposition for which *Kamen* cites it. The authority must be limited to situations in which the lower courts have made an incorrect assumption that is dispositive of the outcome of the issues properly raised. In those cases, *Arcadia* stands for the proposition that the court may examine that underlying assumption as an antecedent issue. Furthermore, while the *Arcadia* Court did raise the antecedent issue of its own accord, it then sent the case back to the lower court for incorporation of the new issue. Having identified the issue that had been improperly omitted by the parties, the Court did not take it upon itself to resolve the issue and the case as a whole. Thus, the broad statement in *Kamen*, that a court is free to consider any argument bearing on a properly raised issue, is not explicitly supported by either the language or the action of the *Arcadia* Court.

The Court in *Kamen* made its statement only as an incidental point, rather than as the focus of its case, and it stands on fairly shaky ground. Even leaving aside the uncertainty of the support provided by the *Arcadia* precedent, the situation in *Kamen* itself is not even so broad as its general statement implies. In *Kamen*, the Court was considering the interpretation of law where there is a gap to be filled. The Court held that in the particular type of gap with which it was faced, a certain state law argument is simply one that courts are supposed to consider as a matter of course. Thus the statement concerning what courts are supposed to look at in deciding cases may not have been intended as a general statement, but one applicable in those situations in which there is one specific argument or antecedent issue that the court is obligated to consider, regardless of whether or when the parties themselves may have raised it. Thus it may say nothing at all authoritative.

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31. See id.
32. Id. at 85.
about what courts are allowed to do, or what they should do generally. The statement in *Kamen* is simply broader than the situation the case really addresses.

Two years later, the Court returned to its language from *Kamen* in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*[^33] In that case, the appellate court had raised an argument of its own accord and had ordered supplemental briefs on that omitted point.[^34] The Supreme Court, in reviewing the conduct of the appellate court, stated that "prudence" did not require the appellate court to treat the unasserted argument as waived.[^35] The Court supported this assertion with a quotation of the previously discussed language from *Kamen*.[^36] (The Court also pointed to *Arcadia*, but treated the case before it differently, asking for supplemental briefs from the parties, rather than merely raising the issue itself and then remanding the case to the lower court.)[^37] *Kamen* and *Independent Insurance Agents* are now cited on occasion for the basic proposition that as long as an issue is properly raised, the court may consider any argument it wishes to consider,[^38] despite the fact that such a broad proposition stands on somewhat unstable ground. One might argue that the later use of *Kamen* has legitimized a statement that was poorly supported and out of context when it came from *Kamen* alone. However, even if it were considered well supported from the beginning, the proposition as expressed in this line of cases still leaves unclear the extent or scope of discretion or obligation on the part of courts, and it also leaves very unclear the level of involvement of the parties and the power of courts to issue their own decisions on the matters.[^39] Must the court remand


[^34]: *Id.* at 445. This argument was similar to the one raised by the Supreme Court in *Arcadia*: the court of appeals raised the issue of validity of the law with which the case was concerned. *Id.* at 444. The court of appeals determined that the statute had been effectively repealed long before the case arose. *Id.* at 444. The issue the parties had originally raised was whether the comptroller properly relied on this statute. *Id.* at 443–45. Both sides presented arguments on this issue, but neither raised the basic validity argument. *Id.* at 444. This could be read either as a reason to support the issue of the propriety of reliance on the statute, or as an antecedent issue—that the fact that the statute had been repealed disposed of the issue of proper reliance.

[^35]: *Id.* at 447.

[^36]: *Id.* at 446 (citing *Kamen*, 500 U.S. at 99).

[^37]: *Compare id.* at 445–48, *with Arcadia*, 498 U.S. at 85–86.


[^39]: It may be helpful here to note the distinction between the *Kamen* and *Independent
the case, or require supplemental briefs, or may it address the matter without
the parties’ involvement?

This line of cases, while it may purport to give an answer to the question
presented here, is thus not entirely satisfying. There is no apparent agreement
on a practical course of action in these situations. One might anticipate
finding an answer to the question in either of two other sources: the Model
Code of Judicial Conduct (“CJC”) or the individual rules of a particular court.
However, neither the CJC nor the court rules provide any direct guidance.

_Insurance Agents_ line of cases and the _Yee_ and _Lebron_ line of cases and also how they may
intertwine. The former cases focus on the discretion of the court to bring new ideas into the cases
before them. The latter cases (particularly _Yee_) focus on the discretion of the parties to
recharacterize the arguments they present at the appellate level. Obviously, both have implications
for the court because the latter implicates the court’s ability to exclude certain material. The two
lines of cases developed independently, though _Lebron_ eventually intertwines the two by citing both
_Yee_ and _Independent Insurance Agents_ for the general propositions that on the one hand, the court
cannot decline to consider a new argument for a properly raised issue, and on the other, the court, far
from being precluded from looking at new (and particularly antecedent and dispositive) arguments is
in fact encouraged to look at them independently. _Lebron_, 513 U.S. at 379–83. In the end, however,
even _Lebron_ does not give a satisfactory answer to the questions presented by this Article, as the
Court fails to explain satisfactorily the extent to which the doctrine here is prudential or
jurisdictional, discretionary or obligatory, before taking a course different from those it had taken
before in similar situations. In _Lebron_, the Court did not request supplemental briefs on the
arguments, gave little indication of exactly what research it might have conducted on its own, and
then decided the issue at stake (whether Amtrak is a state actor) on its own, rather than remanding to
the lower court for a determination. _Id._ at 383–400. It remanded the case to the court of appeals only
for the further determination of whether, as a state actor, Amtrak violated the First Amendment. _Id._
at 400.

40. For examples of differing views among appellate judges, see examples discussed _infra_ Part
II.D.

41. The Model Code of Judicial Conduct (“CJC”) advises judges to avoid the appearance of
impropriety by not allowing any personal, social, or political issues to influence their conduct or
judgment on the bench. MODEL CODE OF JUDICIAL CONDUCT Canon 2, § B (1990). The CJC also
advises judges not to be swayed by partisan interests or public clamor. _Id._, Canon 3, § B(2). The
judge is supposed to hear from everyone who has a legal interest, but not to permit or consider ex
parte communications. _Id._, Canon 3, § B(7). A judge also may not investigate facts independently.
_Id._, Canon 3, § B(7)(c), cmt. 6. The exceptions to the rules against ex parte communications include
the possibility of inviting a disinterested expert to contribute (preferably by means of an amicus brief,
and certainly the opportunity for the parties to respond), and of course, the possibility of consulting
with court personnel (such as law clerks). _Id._, Canon 3, Sec. B(7)(c), cmt. 4. However, judges may
not consult with other lawyers or law professors on matters pending before them. _Id._, Canon 3, §
B(7)(c), cmt. 1. A final general consideration is the requirement that judges resolve cases promptly
and efficiently, which would seem to counsel against too much extra research by judges into
arguments not explicitly presented by the parties. _Id._, Canon 3, § B(8). However, that particular
ramification is not addressed in the commentary to this section.

42. The Rules of the Supreme Court and the Federal Rules of Appellate Procedure, as well as
individual courts’ rules are similarly general in their guidance on this question. For Supreme Court
practice, Rule 14 requires that the questions (though not the specific arguments) to be considered by
the Supreme Court be contained in the petition for certiorari. SUP. CT. R. 14.1(a) (requiring
presentation of questions for review, “expressed concisely in relation to the circumstances of the
Thus, there remains no explicit answer to this question, so this Article will continue to seek an answer in an examination of the relevant ways in which courts behave in practice, keeping the statement from Kamen as background.

II. PRACTICAL APPROACHES IN CURRENT CASE LAW

A survey of recent case law uncovers some aspects of what judges are in fact doing with the cases before them, as it bears on this question. Their approaches differ in some ways according to the level of the court, the case, without unnecessary detail,” noting that “statement of any question presented is deemed to comprise every subsidiary question fairly included therein,” and stating that “[o]nly the questions set out in the petition or fairly included therein, will be considered by the Court”). Rule 24 requires that the brief on the merits not raise any additional questions or change the substance of the questions already presented, but acknowledges the freedom of the Court to “consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.” SUP. CT. R. 24.1(a). Rule 37 indicates that the contribution of an amicus curiae should bring to the Court’s attention “relevant matter not already brought to its attention by the parties.” SUP. CT. R. 37.1. The general rules for appellate court practice indicate that the parties’ briefs must contain their “contentions and the reasons for them, with citations to the authorities and parts of the record on which the [party] relies.” FED. R. APP. P. 28(a)(9)(A), (b). None of these rules speaks directly to the discretion or obligation of the judges to consider arguments beyond those presented by the parties.

43. It is worth mentioning here, for the sake of exhausting all possibilities, that there is another similar situation in which a recent Sixth Circuit case makes a broad statement as to the propriety of sua sponte consideration of new arguments, but rests upon authority which does not in fact provide the support asserted. In Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869–70 (6th Cir. 2003), the Sixth Circuit relied upon an argument it recognized only as a result of its independent review of the statute at issue in the case. Id. at 869–70. The court noted that neither party had addressed the issue on appeal or before the district court, and cited as authority for its consideration of such an issue two prior cases. Id. The court quoted Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 250–51 (4th Cir. 1971), as follows: “[I]f deemed necessary to reach the correct result, an appellate court may sua sponte consider points not presented to the district court and not even raised on appeal by either party.” Baker, 349 F.3d at 870. Washington Gas Light cited as authority for this proposition a Supreme Court case called United States v. Continental Can Co., 378 U.S. 441, 457 (1964). However, Continental Can does not actually make such a claim. The only relevant language in the Continental Can opinion, in its entirety, is the following:

This line of commerce was not pressed upon the District Court. However, since it is coextensive with the two industries, which were held to be lines of commerce, and since it is composed largely, if not entirely, of the more particularized end-use lines urged in the District Court by the Government, we see nothing to preclude us from reaching the question of its prima facie existence at this stage of the case.

Id. at 457. Thus, the Court neither made the statement asserted by the Fourth Circuit in Washington Gas Light, nor did it cite any authority for such a proposition.

44. This Article focuses on the appellate level, but the question it presents bears also on the role of judges at the trial court level. At the trial court level, many of the issues to be considered and the approaches that might be used are the same as those considered in reference to the appellate courts. Many of the same general principles apply, as to those issues that the court should or must raise sua sponte. Subject matter jurisdiction is one example here. See, e.g., Norfolk S. Ry. Co. v. Guthrie, 233 F.3d 532, 534 (7th Cir. 2000) (noting with approval that though defendant moved to dismiss on
procedural posture, whether the case is civil or criminal, and to some extent also according to the particular subject matter involved. After looking at various categories of case law, this Part attempts to draw rough paradigms from the opinions of several federal judges.

A. General Principles

Without offering a simple or uniform answer to this question, appellate courts have articulated certain relevant background principles. There are several matters into which courts consider themselves obligated to inquire \textit{sua sponte}. Courts must, for example, raise questions of subject matter jurisdiction \textit{sua sponte}.\textsuperscript{45} Although there is less certainty as to the level of

several theories, "[t]he district court chose one not argued by the parties: lack of a case or controversy under Article III"). Furthermore, whatever the appellate courts do or say in the way of raising issues independently must be seen as an indication to the lower courts that they ought to do the same in the cases before them.

The chance for overlap in what a trial court judge might see as an "issue" rather than an "argument" is somewhat greater than it is for the appellate judge, for whom the case has been more narrowly tailored. Thus the question whether an issue has been raised might be treated differently at the trial court level. A trial court judge has duties that may conflict with a perfectly passive model. For example, the judge must ensure that the parties are being adequately represented and so may inquire into the lawyers' theories and plans to make sure all of the relevant theories are dealt with. \textit{See Schwarzer, infra note 54} (presenting obligation of judge to take active role in managing cases and lawyers before him to extent of ensuring that adversarial process works); \textit{see also} Judith Resnik, \textit{Managerial Judges}, 96 HARV. L. REV. 374 (1982).

In the broader scheme, though, is the situation in which the trial judge does not just introduce an additional argument, but reconceptualizes, redirects, or refocuses the case before him. A prominent example of this occurred in the agent orange litigation in the Eastern District of New York, in which Judge Weinstein, having taken over the case during the discovery phase from Judge Pratt, informed the lawyers of his view that causation, rather than the government contract defense, would be the central issue in the case. \textit{See} PETER H. SCHUCK, \textit{AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS} 113 (1986). As soon as he took over, Judge Weinstein, "being careful to provide no ground for legal challenge... deftly and unmistakably turned the Agent Orange case around, inside out, and on its head." \textit{Id.} at 112. Among other things, he informed the lawyers for both sides that, contrary to the approach of the previous five years of activity in the case, the foremost issue was not the government contract defense, but the issue of causation. \textit{Id.} at 113. Judge Weinstein provided an entirely new framework for the cases—one which neither side had apparently advocated.

obligation, they may also raise questions regarding public policy, sovereign immunity, qualified immunity, and perhaps international conflict of laws issues, as well as abstention or avoidance questions. An appellate court

46. See Fomby-Denson v. Dep’t of Army, 247 F.3d 1366, 1373 (Fed. Cir. 2001) (holding public policy to be an appropriate issue for courts to raise sua sponte).

This case presents a threshold question not briefed by the parties whether it would be contrary to public policy to construe a settlement agreement to bar the Army from referring Ms. Fomby-Denson to the German authorities. Although the parties on this appeal did not brief this issue, it is well-settled that “[e]ven if neither party’s pleading or proof reveals the contravention [of public policy], the court may ordinarily inquire into it and decide the case on the basis of it if it finds it just to do so, subject to any relevant rules of pleading or proof by which it is bound.”

Id. (quoting RESTATEMENT (SECOND) OF CONTRACTS, Intro. to ch. 8, topic 1, at 5 (1981)).

47. There is some dispute as to whether sovereign immunity may be raised sua sponte, or must be raised sua sponte. Compare Larson v. United States, 274 F.3d 643, 648 (1st Cir. 2001) (sovereign immunity may be raised sua sponte), and Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 227 (4th Cir. 1997) (“We believe that, because of its jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any time, even sua sponte.”), with Wisc. Dep’t of Corrs. v. Schacht, 524 U.S. 381, 389 (1998) (“Unless the State raises [sovereign immunity], a court can ignore it.”). For more on this debate, see Michelle Lawner, Comment, Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte, 66 U. Chi. L. Rev. 1261 (1999).

48. See Elder v. Holloway, 510 U.S. 510 (1994) (ruling that “appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by, the district court”). The question in this case was whether the precedent was raised (“unearthed”) too late. One side argued that plaintiffs were required to put into the record all “legal facts” just the same as other facts, or else forfeit them. Id. at 514. The Court held that the law is the law, regardless of when it is raised, so courts must consider all relevant precedent, regardless of timing. Id. at 516. But see Nelson v. Geringer, 295 F.3d 1082, 1098 n.16 (10th Cir. 2002) (cataloging Supreme Court’s inconsistency as to obligatory consideration of Eleventh Amendment issues).

49. See, e.g., Curley v. AMR Corp., 153 F.3d 5, 12–13 (2d Cir. 1998) (noting inadequate statement of Mexican law by party seeking its application; requesting further briefings by both sides after oral argument; conducting independent research into Mexican law; urging use by district court of flexible provision in FED. R. CIV. P. 44.1 to determine issues of foreign law). This applies only once the parties have raised the issue of application of foreign law—then the courts have an obligation to look into the substantive foreign law. But see Gen. Elec. Co. v. Deutz Ag, 270 F.3d 144, 155 (3d Cir. 2001) (noting that neither party urges application of federal law, both have agreed to limit their options to Swiss or Pennsylvania law, and “[i]n general, we respect the choice of law that parties agree upon to resolve their private disputes”); Carey v. Bahama Cruise Lines, 864 F.2d 201, 205–06 (1st Cir. 1988) (noting unanimous agreement among other circuits that there is no obligation to require application of foreign law). The Carey court stated:

By their silence, the litigants’ [sic] consent to having their dispute resolved according to the law of the forum. This arrangement is not unwelcome from the court’s perspective because it is spared a complicated international choice-of-law problem and can apply law with which it is more familiar. We do not see any harm in a court deferring to the litigants in these circumstances.

Id. at 206.

50. See, e.g., Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc., 45 Fed. Appx. 585,
may also have an obligation to participate more actively in forming, or at least liberally construing, the arguments of pro se litigants.\textsuperscript{51} In contrast, though, courts will rarely deem it appropriate to raise \textit{sua sponte}, for example, the issue of procedural defaults.\textsuperscript{52} There is a limitless variety of such matters that fall into a gray area at present as to whether a court may, should, or must consider them.\textsuperscript{53} An examination of the basis for these general principles may lead to a better understanding of the broader picture. If we can determine why, in these particular circumstances, the court is allowed, encouraged, or required to be more actively involved in the adversary adjudicatory process, it may become clear whether and why a court is or is not allowed to consider any other arguments it comes up with independent of the parties' presentations.

It is clear that a court has an obligation to involve itself actively in any

\textsuperscript{51} See, e.g., Cato v. United States, 70 F.3d 1103, 1105-06 (9th Cir. 1995). In Cato, the appellate court noted the propriety of the district court's handling of the case in attempting to "identify any legally cognizable basis upon which plaintiff's claims may proceed." \textit{Id.} at 1105. The court stated: "On our own, we have tried to conceive of possibilities for stating a cognizable claim." \textit{Id.} Later the court explained further: "The complaint itself does not refer to any basis upon which the United States might have consented to suit. However, because Cato was proceeding \textit{pro se}, the district court construed her papers liberally and surveyed the most likely authorities for waiver, but found them unavailing." \textit{Id.} at 1106. The court noted that while the appellant had been unrepresented at the district court level, she was represented at the appellate level by counsel who did make various additional suggestions for curative amendments to the complaint. \textit{Id.} at 1107. Nonetheless the court noted again in its conclusion its participation in the attempt to find a basis for the complaint: "As the United States has not waived its sovereign immunity with respect to any of Cato's theories of relief . . . or any other source that we can identify . . . " \textit{Id.} at 1111 (emphasis added). While all courts are supposed to construe liberally the arguments of \textit{pro se} litigants, it is not clear how many would go quite so far in seeking out all possible theories of the case. There is at least a clear end to this liberality of construction at the point in the proceedings at which the litigant gets representation. See Ghana v. Holland, 226 F.3d 175, 180 (3d Cir. 2000) (construing \textit{pro se} notice of appeal liberally to allow consideration of prior orders not specifically raised by \textit{pro se} litigant, but ruling reply brief too late for litigant (who was represented by counsel as of his opening brief) to raise new error).


\textsuperscript{53} One example here is a scenario that occurred in a Tenth Circuit case, in which the court raised of its own accord a notice provision in a state statute involved in a case before it. See Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist., 353 F.3d 832, 838 (10th Cir. 2003). The court explained that it did so because state case law provided that courts interpreting the statute could do so. \textit{Id.}
aspect of the process that determines the propriety of its own role in the dispute before it. In one way or another, all of the general principles listed above can be viewed as jurisdictional questions. However, the reasoning behind the court’s obligation might take one of two paths. In a passive model of judging, the court might embrace these general principles out of a concern to avoid any involvement that is not necessary. An active approach, on the other hand, would have the court inquire into these general principles of jurisdiction out of a concern that the court reach the best answer, so it must pursue and resolve all possible arguments to find that one best answer.

B. A Passive Approach

One popular model of judging analogizes the role of the judge to that of an impartial umpire in a game. The rules of the game are already established, and the judge must simply ensure that the parties follow the rules and the better case prevails. In keeping with this concept, a passive approach to what an appellate judge may consider might range anywhere from absolutely forbidding any supplementary arguments to be raised by the judge to requiring the full involvement of both parties in any further arguments the court deems necessary. The most extreme practical version of this passive model comes directly from an interpretation of the general rule that any issue not raised below is automatically waived on appeal. Of course, that rule applies to the parties, as distinct from the court itself, and applies more specifically to “issues” than to legal reasons or arguments, but not all courts have made such clear distinctions in practice. If the reasoning behind a court’s refusal to consider any argument the parties have not raised is that the court lacks sufficient information (either factual or legal) to reach a considered judgment, a less extreme version of the passive approach, short of


55. This version of the passive approach might also come with the corollary rule that where a court does consider sua sponte an argument not raised by the parties, there is an automatic ground for appeal. See Greenberg v. Comerica Bank, 229 F.3d 1163 (Table), Nos. 98-1349, 98-1366, 95-B-663, 2000 WL 1174625 at *2 n.5 (10th Cir. Aug. 18, 2000) (“[W]hen, as here, a court disposes of a case on a point not argued by the parties, it is axiomatic that the parties may challenge that ruling and the court’s underlying analysis on appeal.”).

56. See, e.g., Mauldin v. Worldcom, Inc., 263 F.3d 1205, 1211, 1211 n.2 (10th Cir. 2001) (stating that “because neither party argues that the option contracts are subject to [ERISA], we do not consider ERISA in analyzing Mauldin’s contract claims,” but dropping footnote to add that “[i]t is surprising that neither party briefed the issue whether ERISA governs [the agreements], especially since at least one court has considered this to be a substantial question.”) (emphasis added); Westberry v. Principi, 255 F.3d 1377, 1380 n.1 (Fed. Cir. 2001) (“Neither party briefed or argued whether Ms. Westberry’s claim would be eligible for equitable tolling .... Thus, we decline to decide that issue today.”) (emphasis added).
knowingly deciding the case with a blind eye to a potentially relevant argument, would be to remand the case to the district court. As mentioned above, the court could request or require the submission of supplemental briefs or oral arguments. A similar approach might be to request a brief from an amicus curiae. This does not happen often, but it does happen, particularly when an appellate court wants to decide a case, but believes one side to have been poorly argued.

57. See, e.g., United States v. McHan, 11 Fed. Appx. 304, 308 n.* (4th Cir. 2001) ("Neither party in this case raised the issue of the applicability of this statute below and did not raise it in this appeal until the date of oral argument. On remand, the district court should decide whether the statute applies to this action."); Lani v. McDaniel, 23 Fed. Appx. 644, 644-45 (9th Cir. 2001) ("[N]either party has briefed these alternative grounds upon appeal, and we decline to reach them sua sponte. Accordingly, we remand for further proceeding so that the district court may decide these remaining questions."); Univ. of D.C. Faculty Ass'n v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 163 F.3d 616, 625 (D.C. Cir. 1998) ("[B]ecause the way the matter was initially presented, neither party focused on the contractual issue in the District Court. . . . Prudence beckons, so we will remand the contract claim to the District Court.").

58. See, e.g., Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 825 (1997) (requesting supplemental arguments on jurisdictional and statutory interpretation questions); Smith v. Roper, 12 Fed. Appx. 393, 395-98 (7th Cir. 2001) (requesting supplemental arguments by parties, but on not receiving any, proceeding to make decision without them); Providence Journal Co. v. Providence Newspaper Guild, 271 F.3d 16, 19 (1st Cir. 2001) (requesting supplemental arguments on jurisdictional question); United States v. Young, 266 F.3d 468, 475 n.8 (6th Cir. 2001) (requesting supplemental arguments on jurisdictional question); Mentor H/S, Inc. v. Med. Device Alliance, Inc., 244 F.3d 1365, 1373 (Fed. Cir. 2001) (requesting supplemental arguments on jurisdictional question); Kuhai v. INS, 199 F.3d 909, 913-14 (7th Cir. 1999) (holding that lower court erred by not allowing alien to submit supplemental briefs on undeveloped issue of Ukrainian citizenship before deciding issue).

59. See, e.g., Shaboon v. Duncan, 252 F.3d 722, 737 (5th Cir. 2001) (finding that supplemental issue could be relevant, but could not be resolved without briefing by parties); Kee v. City of Rowlett, 247 F.3d 206, 217 n.21 (5th Cir. 2001) (finding that supplemental issue could be relevant, but could not be resolved without briefing by parties); Prudential Ins. Co. of Am. v. Athmer, 178 F.3d 473, 477 (7th Cir. 1999) ("[W]e do not reverse judgments in civil cases on the basis of grounds not argued by the appellant at any stage of the litigation—grounds, therefore, that the appellee had no opportunity to meet."); Walsh v. Int'l Longshoremen's Ass'n, 630 F.2d 864, 867 (1st Cir. 1980) (ordering supplemental briefs on issue of res judicata).

60. However, some courts will proceed without even requesting supplemental argument by the parties, if they believe the issues are not dispositive or are easily resolved. See Galletta v. Deasy, 9 Fed. Appx. 909, 915 n.9 (10th Cir. 2001) (determining without supplemental arguments by the parties (none were requested), that issue was not dispositive, and that unbriefed, though possibly relevant, case was distinguishable).

61. See Alabama v. Shelton, 534 U.S. 987 (2001) (inviting an outside attorney, Charles Fried, to submit an amicus brief and to argue in opposition to the judgment below, providing a narrowly tailored position for which brief and argument should advocate, and allotting amicus ten minutes of petitioner's time for oral argument); see also Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 226 n.1 (2002) (Ginsburg, J., dissenting) ("Because neither party defended [the lower court] ruling in this Court . . . we appointed an amicus curiae to argue in support of the Ninth Circuit's judgment."); Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (discussed infra notes 79-88 and accompanying text); Resident Council of Allen Parkway Vill. v. U.S. Dep't of HUD, 980 F.2d
INVOLVED APPELLATE JUDGING

Even a judge using a passive approach may find that there are exceptional circumstances that allow the judge liberty to take a more active role in the case than might ordinarily be countenanced. In extreme circumstances, for example, a court might be able to note error where it has not been raised by the parties.62

The passive model is concerned, above all else, with procedural fairness.63 It works on the assumption that a good process is the best way to achieve good and fair results. If all of the procedural standards are met, everything should have been done correctly, and that affords the best possibility of getting to the truth, and ultimately to the best “correct” answer. A judge who interferes with the process by stepping out of the role of umpire and into the role of adversarial participant by becoming involved in the fashioning of arguments may risk upsetting the process and producing bad results. The passive model is ultimately concerned that each player maintain his own role, thereby affording a measure of consistency, predictability, and integrity that may in some respects surpass a more active model. It is perhaps easier for an adherent of the passive model to know what to do and how to do it. The judge must stay within the boundaries established by the rules and traditional values of procedure, strictly construed. However, the judge who so values process will be left with little recourse, should he see those values obscuring a

1043, 1049 (5th Cir. 1993) (stating that, absent exceptional circumstances, court is constrained only by rule that amicus cannot expand scope of appeal to implicate issues not presented by parties). Note that there is even some debate concerning how arguments of ordinary (i.e., not specially court-requested) amici curiae are to be taken by the court.

62. See, e.g., United States v. Olano, 507 U.S. 725, 725 (1993) (noting in case syllabus that a “court of appeals has discretion under Rule 52(b) to correct ‘plain errors or defects affecting substantial rights’ that were forfeited because not timely raised in district court, which it should exercise only if the errors ‘seriously affect the fairness, integrity or public reputation of judicial proceedings’” and listing three limitations on appellate authority, which are (1) there must be an error; (2) the error must be plain; and (3) the error must affect substantial rights) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)); Singleton v. Wulff, 428 U.S. 106, 120–21 (1976) (acknowledging general rule against addressing issues not passed upon by lower court, but allowing discretion to do so, particularly where proper resolution is beyond doubt, or injustice might otherwise occur); Wright v. Hickman, 24 Fed. Appx. 990, 996 (10th Cir. 2002) (“[A]lthough it is rarely done, an appellate court may, sua sponte, raise a dispositive issue of law when the proper resolution is beyond doubt and the failure to raise the issue would result in a miscarriage of justice.”) (quoting Counts v. Kissack Water & Oil Serv., Inc., 986 F.2d 1322,1325–26 (10th Cir. 1993)); United States v. Portillo-Mendoza, 273 F.3d 1224, 1227 (9th Cir. 2001) (“Although neither party raised this issue, ‘[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken . . . .’”) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)); see also United States v. Arrous, 320 F.3d 355, 356 (2d Cir. 2003) (characterizing sua sponte consideration of harmless error doctrine as matter of common sense).

63. This is the ultimate value on which Milani and Smith put most emphasis. See Milani & Smith, supra note 4.
substantively superior result in the matter before him. As the Supreme Court has stated, form should not defeat justice:

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.64

As another caution, the Court has stated that it would be improper to leave the administration of criminal law to the stipulation of the parties, which indicates an aversion to an entirely passive model.65

C. An Active Approach

The various practical approaches in the passive model can in some ways blend over into the category of active approaches. That is, one might see a request for supplemental briefs, or the use of discretion, even in very limited circumstances, to be the mark of an active, rather than a spectatorial judge.66 Another example that might fall on either side of the line is the situation in which a judge affirms the lower court, but does so on a different theory.67 That the result remains unchanged might call for a passive characterization, but the effort to correct the reasoning is surely a sign of active judicial participation in the case—a particular concern to reach the best result.68

65. See, e.g., Young v. United States, 315 U.S. 257, 259 (1942).
66. One example of these contrasting views appears in Warren v. Commissioner of Internal Revenue, 282 F.3d 1119 (9th Cir. 2002). The majority opinion defended as standard careful procedure its request for supplemental briefs both by the parties and an amicus on what it considered to be a necessary antecedent issue to the one explicitly presented by the parties. Id. at 1120–22. The dissent criticized the request for supplemental briefs to address the new issue as unacceptable activism on the part of the judges. Id. at 1123–24 (Tallman, J., dissenting).
67. See, e.g., Loftis v. UPS, Inc., 342 F.3d 509, 514 (6th Cir. 2003) (stating that court is free to affirm for any reason, whether or not presented by parties, and therefore finding removal was defective, though not raised by either party).
68. See, e.g., United States v. Ripplinger, 14 Fed. Appx. 720, 721 (8th Cir. 2001) (arguing that where there is no change in result, the activism should not be considered erroneous); United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994) ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.") (quoting Medina v. City & County of Denver, 960 F.2d 1493, 1495 n.1 (10th Cir. 1992)). Another situation that may fall into this same category is that in which the court sees an issue that would not change the result, but should be addressed, even though not raised by the parties, because it is an important question of law. See, e.g., Kosakow v. New Rochelle
A truly active model, however, would extend beyond the bounds of such potential overlap. At the extreme, an active model might make it a requirement that the court seek out the correct or best answer, whether it is one presented by the parties or one the judge raises of his own accord. This clearly departs from the realm of discretion, however aspirational. It raises theoretical questions about the duty of the judge as well as practical questions about how exactly the judge is expected to manage such an undertaking. A judge in such a position might call in his own expert, request an amicus brief, undertake his own research, or call on his own past experiences to find the best legal reasoning or best legal argument, to support the correct decision in the case. A less extreme approach might not require or aspire to perfection in all cases, but at least in those cases in which manifest injustice would otherwise occur.

Regardless of its precise scope, an active approach raises fairness concerns, if the parties are not involved. Two general rules may shed some light on the fairness issue. First, courts generally do not look favorably upon arguments raised by parties at the eleventh hour—for example, at oral argument. The reason for disfavoring the presentation of new arguments at

Radiology Assocs., 274 F.3d 706, 728 (2d Cir. 2001). Finally, there may be cases in which a court notes that it need not address an issue that was not raised, but also notes that if it were to be addressed, it would bolster the court's decision. See, e.g., United States v. Murphy, 248 F.3d 777, 780 n.2 (8th Cir. 2001).

69. Indeed, there is some indication of the desirability of such an end in cases addressing those scenarios in which the court is presented by the parties with new arguments on appeal. One of the major considerations proposed for such cases is "whether resolution of the new issue will materially advance the... litigation." Jackson v. Holland, 80 Fed. Appx. 392, 405 (6th Cir. 2003) (quoting Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1461 (6th Cir. 1988)) (unpublished decision) (considering also whether parties have presented issue with sufficient clarity and completeness).

70. Courts sometimes explicitly indicate that they have done independent research. See, e.g., United States v. Morris, 259 F.3d 894, 900 (7th Cir. 2001) ("Neither party nor our own research has led us to any statutory authority that empowers the court...") (emphasis added); Jutzi-Johnson v. United States, 263 F.3d 753, 760-61 (7th Cir. 2001) (finding parties' research into case law inadequate, so conducting independent research to find correct case law).

71. See, e.g., Humanitarian Law Project v. U.S. Dept. of Justice, 352 F.3d 382, 394 (9th Cir. 2003); Ciralsky v. CIA, 355 F.3d 661, 673 (D.C. Cir. 2004) (noting principle applies only where manifest injustice is more than just possible, and stressing outcome could have been easily avoided by the party in question here); see also, e.g., DeRoo v. United States, 223 F.3d 919, 926 (8th Cir. 2000) (applying FED. R. CRIM. P. 52(b)).

72. See Cubic Def. Sys., Inc. v. United States, 45 Fed. Cl. 450 (1999). In Cubic, the court recounted that Cubic devoted the entire time for oral argument to "a new argument never briefed," including references to four cases not contained in briefs. Id. at 457. The court noted that "[a]ny experienced appellate litigator knows that issues not raised in a brief are waived." Id. at 467. The court reasoned that the agreement across the circuits on this point is grounded in "the unfairness resulting from arguing issues that have not been briefed." Id. The court stated that any exceptions to this rule would be at the absolute discretion of the court, but that if the new argument were allowed,
a late date is the court’s concern for fairness. If one side “ambushes” the other with an argument, it would be unfair to decide the issue without allowing sufficient time for the preparation of a response. It seems only logical that if the universally accepted duty of the judge were to find the correct answer, it would be most important to ensure that all potentially relevant legal arguments have been presented. Simply changing the facts so that it is a judge, rather than one of the parties, who brings in a new argument at the eleventh hour does not avoid the fairness argument.

Second, courts generally do not take it upon themselves to rearrange the lawsuit before them so that the plaintiffs will get the most effective relief available to them. They do not fix those situations in which the plaintiff has, for example, sued the wrong party, sued under the wrong statute, or failed to request the most suitable form of relief.73 Even at the appellate stage, the plaintiff is master of his own complaint.74 Thus, there may be situations in which a court can see the “best” or most correct outcome of the case in the larger scheme of things, but is restrained from leading the parties to that precise scenario. The reasoning here might also be based on grounds of fairness to the parties (i.e., the judge should not be participating or helping the parties because he is supposed to be an impartial arbiter), efficient allocation of resources (i.e., dockets are crowded enough without judges taking the time

the court “would have to allow the other side sufficient time to prepare and present a response.” Id. The court concluded its discussion on this point as follows:

We decline to undergo the legal gymnastics of characterizing Cubic’s arguments as anything but “too late.” . . . [Cubic] conducted litigation by ambush, pure and simple, and not for the first time in this case. Accordingly, we find that plaintiff’s . . . [new] claims are out of order. We disapprove of this kind of tactic and believe it negates the entire concept behind the modern system of civil litigation. Still, at the risk of seeming to condone Cubic’s behavior, we discuss the arguments briefly, if for no other reason than to show how futile they are.

Id.

73. See, e.g., Griffin v. County Sch. Bd. of Prince Edward County, 363 F.2d 206 (4th Cir.), cert. denied 385 U.S. 960 (1966) (denying relief on appeal from denial of injunction without offering to rescue plaintiffs from failure to seek a stay or an appellate injunction); Downey v. State Farm Fire & Cas. Co., 266 F.3d 675, 679 (7th Cir. 2001) (pointing out that regulation relied upon allows direct action against different person from the one plaintiff sued, but that plaintiff is “stuck with that choice” rather than suggesting possibly more effective course, writ of mandamus, to get injunction directly from appellate court); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) (denying relief on appeal of temporary restraining order because TRO was not appealable order, but not suggesting or offering the equivalent relief available by means of writ of mandamus). This failure to assist the parties is noted by both the concurrence and the dissent, id. at 228 (Martin, J., concurring), 231–32 (Brown, J., dissenting), while the majority argues in response that that option would prove inapplicable, id. at 224. But see Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) (liberally construing complaint of pro se litigant).

to rearrange, reargue, and perfect all of the cases before them), or even curbing abuse of state power.

Thus, it is difficult to make the extreme argument that judges must find the right answer and reach the best result at any cost or by any means. However, having abandoned that absolute requirement, it becomes even more difficult to discover, from the indications of recent case law, any other objective or clear measure of the duty of an appellate judge. If the courts are to be left only with a discretionary standard, where can lines be drawn as to what they may or may not (or indeed must or must not) undertake? A general survey of appellate case law reveals predictably inconsistent approaches to the problem, and in many cases, no explicit explanation of the reasoning underlying a particular court's approach to the problem.

As with the passive approach, it will be helpful to explore the underlying concept of the approach to better understand its practical application. Again, that concept is based on a particular kind of fairness, but in this case, it is substantive, rather than procedural fairness that lies at the heart of the practical approach. The participatory model of appellate judging is concerned primarily with reaching the best result, however that must be achieved. Thus the participatory judge is not as constrained by procedural boundaries between the roles of the various players. The values of process give way to a concern with substance. This balancing of values reveals an inherent problem of the conceptual model: The participatory approach suffers from a difficulty of defining limits on how far a judge may stray into the traditional role of the adversarial party, and in what manner it is appropriate to do so.

There is a key distinction between the problems of the two approaches. Whereas the conceptual modeling of the passive approach suffers from the inability to adjust to the situation in which the model does not work, the flaw in the more active approach is more susceptible of a remedy. The remedy...

75. One opinion in the Eighth Circuit treated this fairness question as a constitutional issue of procedural due process. Jenkins v. Missouri, 216 F.3d 720, 726 (8th Cir. 2000). The district court had determined sua sponte a question that neither party had any expectation was an issue to be tried. Id. at 725. The Eighth Circuit looked to a Seventh Circuit opinion in which Judge Posner disapproved of such judicial involvement in shaping the litigation. Id. at 725–26 (citing United States v. Bd. of Sch. Comm’rs, 128 F.3d 507 (7th Cir. 1997), discussed further infra note 150). The Eighth Circuit stated that due process requires no less than notice to the parties and an opportunity to prepare for a hearing on the issue. Id. at 726–27. The court thus remanded the case to the district court. Id. at 727. The dissenters in the case, however, characterized the district court’s action as a sensible one that was not undertaken without sufficient factual evidence, and that would efficiently dispose of a fifteen-year-old case without an additional hearing. Id. at 735 (Beam, J., dissenting).

76. See, e.g., Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1228 (10th Cir. 1996) (quoting Singleton v. Wulff, 428 U.S. 106, 120 (1976)) (mentioning fairness concerns along with concerns about need for finality and importance of district court’s awareness of issue, but noting waiver rule is not inflexible and room is left for exercise of discretion).
simply requires the establishment and acceptance of certain boundaries, with an attendant expectation of some flexibility in their application. Obviously this does not solve the problem entirely—it leaves some ambiguity as to boundaries in the practical application—but it goes some distance towards a practical compromise between the objects of substantive and procedural fairness. That is, both of these fairness values strive for the same ultimate goal: the most correct answer to the problem at hand, but they rely on different mechanisms to reach that goal. The mechanism employed by the procedural fairness approach affords no such opportunity for compromise or the necessary flexibility for reaching the common goal of the right answer.

To the extent that safeguards are necessary in the active approach, at least two possibilities are immediately apparent. First, a party who believes that a court’s newly interjected argument was incorrect may petition for rehearing—a procedural right with no associated fee.77 Second, a judge who is particularly concerned that the new argument or new reasoning might benefit from more involvement by the parties might offer them a limited amount of time to brief the new argument, or indeed might require them to brief and argue the new argument.

A survey of federal appellate case law thus demonstrates a broad range of approaches. It is difficult to glean from this material how any one of those theories or practical applications might play out beyond any one of the cases cited above or the particular panel of judges who wrote it. Thus the following section focuses further in on a case study of a few judges on the Court of Appeals for the District of Columbia Circuit to better understand how courts’ and individual judges’ theories and practices play out.

D. Case Study: Working Approaches of Three Federal Appellate Judges

Perhaps the most effective way of bringing out the practical and theoretical facets of this debate is to look at the way a handful of judges have dealt with such questions in the cases before them. To that end, this section presents the approaches and theories of three judges from the United States Court of Appeals for the District of Columbia Circuit, as far as they can be discerned from the language used and courses of action taken in their opinions.78 It begins by looking at the debate not even about what arguments

77. See Fed. R. App. P. 40. Note, however, that in most circumstances, unless the court requests it, an answer is not permitted when a petition for rehearing is filed. Fed. R. App. P. 40(a)(3).

78. The selection of these judges was originally based on the neatly opposing views of Judge Sentelle and Judge Ginsburg in the Eldred opinions. From there, I simply looked for a middle road between the two from among the D.C. Circuit judges, and came up with Judge Edwards. None of these judges has, to my knowledge, written explicitly on his personal views on this question.
the court may raise *sua sponte*, but what arguments the court may consider when they are presented by amici curiae (i.e., non-parties to the litigation), although the opinions do touch on both scenarios. With that as background, the Part goes on to compare the different working approaches of three of the judges as they bear on the further question of what a court may raise on its own, as well as why and how it should do so.

The District of Columbia Circuit has expressed contrasting views on the subject in two relatively recent opinions. In *Eldred v. Reno*, the majority opinion devoted an entire section of its discussion of the merits to its response to the dissent’s arguments about the use of arguments offered by amici. Judge Ginsburg, writing for the majority, stated that an argument contained in an amicus brief was not properly before the court because it had been expressly disavowed by the actual parties to the case. Judge Ginsburg supported this view with comments on the importance of the avoidance doctrine and the fairness issue concerning notice to the other side of the need to argue on a given point (because the argument had been disavowed by the actual party-opponent). Judge Sentelle, writing in dissent, vigorously disagreed. Judge Sentelle argued that the majority was wrong to believe his reading of the precedential case at issue was “foreclosed by the fact that it accepts the argument of an amicus.” He noted that “[n]either [he] nor the amicus raise any issue not raised by the parties to the case, nor disposed of by a majority of the court.” He continued: “That the amicus argues more convincingly in appellants’ favor on the issue raised by the appellants than [the appellants] do themselves is no reason to reject the argument of the amicus.” He pointed to D.C. Circuit Rule 29, which provides that an amicus brief must avoid repetition of legal arguments made in the principal brief, and must focus on points not made or adequately elaborated upon in the principal

80. *Id.* at 378.
81. *Id.* (citing Resident Council of Allen Parkway Vill. v. HUD, 980 F.2d 1043, 1049 (5th Cir. 1993); Harmon v. Thornburgh, 878 F.2d 484, 494 (D.C. Cir. 1989); and Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).
82. It is perhaps noteworthy here that the majority and dissent disagree not only as to the role of amici, but also as to the basic interpretation of the precedent at issue in the question before the court. *Eldred*, 239 F.3d 372 *passim*. They disagree over the proper way to construe *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), which deals with copyright law, but Judge Sentelle, in his dissent, notes that as regards the disagreement over the role of amici, “it does not matter if I disagree with the language of *Schnapper*.” *Eldred*, 239 F.3d at 382 (Sentelle, J., dissenting).
83. *Eldred*, 239 F.3d at 383.
84. *Id.* See also further general discussion of the role of court rules, *supra* notes 41–42 and accompanying text.
85. *Id.*
brief. Judge Sentelle continued by drawing a distinction between issues and arguments—an amicus may not expand the appeal to implicate new issues, but may certainly add new arguments. Judge Sentelle then quoted the language of *Kamen* to underscore the absence of limitations on legal theories that courts may consider.

The dispute did not end with this opinion. Five months later, the same panel reiterated its respective positions when denying a petition for rehearing, and for rehearing *en banc*. Once again, Judge Ginsburg, for the majority, stressed that the plaintiff-appellants in the case had adopted a position diametrically opposed to that of the amicus, and had expressly disavowed the amicus' argument at oral argument. This, Judge Ginsburg again argued, deprived the government of the opportunity to argue against the point at issue, and thus resulted in the absence of meaningful argument on that point. Judge Sentelle, joined by Judge Tatel in the dissent from the denial of rehearing *en banc*, reiterated his previous argument as well, but with a new focus—Judge Sentelle demonstrated extreme concern about the precedent this case would create for amici in the D.C. Circuit. Judge Sentelle wrote:

Merely because the parties fail to advance the proper legal theory underlying their claim does not—indeed cannot—prevent a court from arriving at the proper legal disposition. Once the issue is raised, a court has an obligation to determine what the law is which will govern the case at hand. This is so irrespective of whether *amicus curiae* enter an appearance.

86. *Id.*
87. *Id.* at 383–84. This debate plays, of course, directly into the debate about ownership of law.
88. *Id.* at 384.
90. *Id.* at 850–51.
91. *Id.* at 851.
92. *Id.* at 852 ("[P]rocedurally, the Court's opinion in this case effectively eliminates any role for *amicus curiae* [sic] in the practice of this circuit . . . "). Judge Sentelle continued on this point later in the dissent:

Under the panel's holding, it is now the law of this circuit that *amicus* are precluded *both* from raising new issues *and* from raising new arguments. If allowed to stand, this holding will effectively bar future *amicis* from adding anything except possibly rhetorical flourish to arguments already outlined and embraced by the parties. This is particularly the case for those *amicis* who, true to their traditional role as "friends of the court," operate independently to assist the Court in its determinations. If this Court is to adopt such a rule—and I hope we do not—we should do so sitting *en banc*, not by a divided panel.

93. *Id.* at 853.
Thus, these opinions indicate a genuine split of opinion on the role of the court in the question presented by this Article.

1. Judge Sentelle

The opinions written by Judge David Sentelle, of the D.C. Circuit, indicate a basic philosophy that the judge’s task is to find the best possible theory of law on which to decide the case. If the parties do not themselves argue that theory, but it is known to the judge, the judge should decide the case on the most correct theory regardless of the parties’ failure to argue it. Under Judge Sentelle’s approach, it appears that the judge need not necessarily present a newly introduced theory to the parties or request supplemental briefing prior to rendering a decision based on that point. Of course, if the judge does not, in considering the arguments explicitly presented by the parties, perceive a defect or omission in the briefs or arguments, and the judge knows of no better theory of law on which to decide the case, there is no apparent obligation to conduct independent research to ensure that the best theory has been presented. Rather, in this view the judge simply retains the discretion to use a theory not argued by the parties.

Judge Sentelle’s opinions appear to endorse a rather aggressive use of that discretion. This approach might be based on a basic concept of the judge as determiner of the law in its broader sense, not just as between the parties to a

94. Judge Sentelle’s opinion for the majority in United States v. Harrison, 204 F.3d 236 (D.C. Cir. 2000) (see discussion supra note 22), as well as his dissents in Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (see discussion supra notes 79–88 and accompanying text) and Eldred v. Ashcroft, 255 F.3d 849 (D.C. Cir. 2001) (see discussion supra notes 89–93 and accompanying text) demonstrate his basic approach. Judge Sentelle does note at least one limitation on the need to decide the case on the most correct theory of law, in that if there is already developed “law of the case” it cannot ordinarily be changed by the appellate court, regardless of the court’s different conception of issues or arguments, unless there are particularly compelling circumstances. See Lever Bros. Co. v. United States, 981 F.2d 1330, 1332 (D.C. Cir. 1993).

95. See United States v. Paxson, 861 F.2d 730, 735 (D.C. Cir. 1988) (noting that “[n]either party has cited any case applying the work-product privilege to facts paralleling those in this record,” presenting cases court itself has found to be relevant, and noting “we think that the principles laid down in [the cases we cited] are perfectly applicable to the facts present here”).

96. In line with the discretion to use another theory or argument, a judge may also, under Judge Sentelle’s approach, address an issue not raised by the parties if that issue is antecedent to those already properly before the court. See Global NAPS, Inc. v. FCC, 247 F.3d 252, 256 (D.C. Cir. 2001) (noting that FCC’s pleading requirements “bar a complainant from amending or otherwise ‘introducing new issues late in the development of the case,’” but finding nonetheless that the legal theories involved were antecedent to those presented). “Though the precise legal theories relied upon by the Commission were different than those raised by Verizon, GNAPs cannot credibly argue that the effect of the ongoing state proceeding on GNAPs’ tariff and Verizon’s payment obligations was not squarely before the agency.” Id. at 257.
That is, it is important that the judge not issue an opinion based on bad law, simply because the lawyers did not do a good job of arguing. Judge Sentelle's approach promotes efficiency. Judicial resources cannot, as a practical matter, afford unlimited time for supplemental briefing of cases, so if a judge can provide a correct answer quickly, he will avoid further delay and thereby gain time for other pending matters. There is a fairness issue inherent in this last point, but one might also argue that if the parties did not present the issue or argument to the court in the first place, they may be considered to have waived their opportunity to do so. Judge Sentelle might say more specifically that if the court is going to affirm the lower court result, even if on a different rationale, there is no need to raise the issue before the parties. On the other hand, Judge Sentelle does not appear to object to the option of remand to the district court for resolution of the issue the appellate court thought should be addressed.

97. Though this seems a likely conclusion to draw about Judge Sentelle's reasoning, there is at least one curious example to bring it into question. In a case in which Judge Sentelle did not agree with the majority on the denial of a suggestion for rehearing en banc, he also did not join the dissent of Judge Silberman, whose opinion appears to present the position often taken by Judge Sentelle. See Nat'l Treasury Employees Union v. United States, 3 F.3d 1555, 1556, 1559-68 (D.C. Cir. 1993). Silberman wrote, in dissent:

To be sure, it does appear that both parties litigated the case on the assumption that the statute's amendment... was of no significance. It is certainly understandable, therefore, that the panel majority and the dissenting judge would not have focused on the possibility of a limiting construction of the statute. We need not, however, ignore the actual language of the statute in order to resolve the dispute the parties put before us. [Silberman cited Indep. Ins. Agents]. Indeed, we had previously recognized our particular obligation to consider an argument not precisely raised if to do so avoids a constitutional issue. Id. at 1562 (Silberman, J., dissenting) (citations omitted).

98. Judge Sentelle does not, however, take this so far as to fix procedural mistakes made by the parties in the lower court. For example, he would not correct or overlook a party's failure to move below for substitution of another party. See Peralta v. U.S. Attorney's Office, 136 F.3d 169, 171 (D.C. Cir. 1998) ("[r]ejecting the government's attempt to rewrite the history of this case"). Similarly, he will not hear objections to procedure that were not made below. See United States v. Paxson, 861 F.2d 730, 736 (D.C. Cir. 1988) (refusing to hear suggestion concerning in camera examination of certain memoranda because suggestion had not been made to trial court).

99. See Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1230 (D.C. Cir. 1991) (noting that appellant was incorrect in believing court to be restricted to the original ground of decision in such a case, noting failure of appellant to respond to the other argument in its reply brief, and stating that "if appellants have a response to [the other] argument, they would have done well to have asserted it. Apparently they have none.").

100. See Peralta, 136 F.3d at 173 (noting that "because the government raised this argument for the first time on appeal, we shall not consider it.... The government is free to reassert this argument on remand if it desires.").
2. Judge Ginsburg

Opinions issued by Judge Douglas Ginsburg, also of the D.C. Circuit, present the idea that the judge’s primary task is to ensure that the process of adjudication is fair. In deference to fairness concerns, the judge should not decide a case on a ground other than one argued by the parties. Judge Ginsburg would go so far as to limit this strictly to the parties themselves, leaving aside even those arguments presented by amici curiae, regardless of the importance of any arguments that would thereby be omitted. The judge may circumvent this fairness problem by requesting and receiving for consideration supplemental briefs from the parties on the point the judge would like to raise. Another solution would be to flag the new issue and send the case back to the district court for resolution. Finally, the court could simply leave the issue or argument out of the case entirely.

101. Justice Scalia, when he was on the D.C. Circuit, wrote an opinion that agrees emphatically with this position. See Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983). His rhetoric deserves repetition here. Having stated that the court will not resolve an issue that was not adequately briefed or argued on appeal, he wrote: "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." Id. at 177. At this point, he invoked Federal Rule of Appellate Procedure 28(a)(4), which requires all contentions to be contained in the brief. Id. He continued:

Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution. Of course not all legal arguments bearing upon the issue in question will always be identified by counsel... through our own deliberation and research. But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, “important questions of far-reaching significance” are involved.

Id. (quoting Ala. Power Co. v. Gorsuch, 672 F.2d 1, 7 (D.C. Cir. 1982)).

102. See supra notes 79–93 and accompanying text (discussing D.C. Circuit controversy over use of arguments by amici).

103. See Conn. Valley Elec. Co. v. FERC, 208 F.3d 1037, 1042–43 (D.C. Cir. 2000) (requesting oral argument on issue not raised by either party, concerning jurisdiction of appellate court to adjudicate in first instance dispute arising under particular section of statute; finding that it would be usurpation of district court role to address in first instance).

104. See FEC v. Int’l Funding Inst., Inc., 969 F.2d 1110, 1113, 1118 (D.C. Cir. 1992) (remanding case in which court thought “neither party ha[d] it quite right”). Judge Edwards concurred in this judgment, but did not speak separately to the issue of remand. Id. at 1119 (Edwards, J., concurring).

105. See Flynn v. Comm’r of IRS, 269 F.3d 1064, 1065 (D.C. Cir. 2001) (“Because appellants did not raise this argument at the Tax Court, we decline to address it now.”). Another area in which a court may simply ignore an issue that has not been raised is that of choice of law. Parties’ agreements as to choice of law may be accepted by the court without question. See Tidler v. Eli Lilly & Co., 851 F.2d 418, 421 (D.C. Cir. 1988) (noting that neither party has argued that law of other jurisdictions should apply, so court may assume that is correct). It is perhaps worth noting that in the same case, Judge Ginsburg also noted that a late request (i.e., one not made at the District Court) for
Ginsburg's framework of practical approaches seems to be based on concepts of basic fairness, (including issues of notice, expectations, etc.), prudence (similar to an avoidance theory of not deciding constitutional issues unless absolutely necessary), caution (so that courts will make fewer mistakes), and finally preservation of resources (because courts lack the time, money, or personnel to conduct extra research).

3. Judge Edwards

Judge Harry Edwards, also of the D.C. Circuit, might present a middle road between Judge Ginsburg and Judge Sentelle. He acknowledges several areas in which the courts should take up issues that the parties have not raised of their own accord—jurisdiction and sovereign immunity are two examples. However, he has also often found that in other areas the court need not address issues or arguments not raised below. For example, in the area of conflicts of law, he urges that the courts should leave these issues alone if the parties do not dispute them. Basically, Judge Edwards's approach entails a two-step process: first, a determination about whether the argument is properly before the court, and second, a determination about whether to consider it. Overall, if the issue is pertinent, his view seems to certification of questions to various states whose jurisdiction applies would not be granted, particularly when the court had no genuine uncertainty about a question of state law before it. Id. at 425–26.


107. Flynn v. Comm'r of IRS, 269 F.3d 1064, 1065 (D.C. Cir. 2001) ("Because appellants did not raise this argument at the Tax Court, we decline to address it now."); Honeywell Int'l, Inc. v. NLRB, 253 F.3d 125, 135 (D.C. Cir. 2001) ("Honeywell did not raise the availability of grievance procedures and arbitration before the Board and no 'extraordinary circumstances' have been cited to excuse this failure. Therefore, this court cannot consider the argument."); United States v. Smith, 232 F.3d 236, 238 (D.C. Cir. 2000) (stating that court need not reach substance of new argument not raised at trial concerning admission of evidence, but instead reviews admission only for plain error).

108. See Ekstrom v. Value Health Inc., 68 F.3d 1391, 1394 (D.C. Cir. 1995) (noting that parties have explicitly (and carefully) agreed to choice of governing substantive law, neither party argues for application of any other law, and District of Columbia choice of law doctrine generally allows parties to specify applicable law, as long as relationship between parties bears reasonable relation to state specified).

109. See Wabash Valley Power Ass'n, Inc. v. FERC, 268 F.3d 1105, 1114 (D.C. Cir. 2001). Judge Edwards explained:

[T]he failure of FERC to challenge a petitioner's objection on the ground that it was not raised below does not remove this court's independent obligation to determine whether, in fact, the argument is properly before us.

Many of the objections raised by Wabash in its petition for review were not raised in
be that the best course is not to ignore it, but to point it out and remand to the lower court for resolution. While he has cited the proposition that an issue is waived or moot if not raised, he has tempered that with the caution that if an issue is important enough to make him reluctant to find it "waived" or "forfeit[ed]," he would "happily eschew the task of wandering through the maze of District of Columbia law," for example, and so would remand to the district court.

The first instance in an application for rehearing to FERC. The court therefore has no jurisdiction to consider these objections. . . .

There is one claim that has been raised by Wabash that may be considered by the court even though it was not raised below. Wabash contends that FERC's merger was inconsistent with a subsequently released staff report. Though not raised in the application for rehearing by Wabash, this argument may be properly considered by this court because the Federal Power Act allows consideration of arguments raised for the first time on appeal if "there is reasonable ground for failure" to raise objections in the request for rehearing. Because this report was issued . . . several months after Wabash's rehearing request, this court has jurisdiction to review this challenge by Wabash.

Id. (citations omitted).

110. See Arent v. Shalala, 70 F.3d 610, 615 n.4 (D.C. Cir. 1995) (responding to criticism of concurring judge regarding consideration of argument not explicitly raised). Judge Wald, in her concurrence, expressed the following concern about the court's approach:

I worry that second-guessing the parties and counsel on the primary analytic mode for their challenges causes unnecessary confusion and uncertainty among administrative law practitioners. I think a court should refrain from reframing or abandoning the issues raised by the parties unless their formulations are frivolous or misconceived. Otherwise we are posing the questions, and then answering them ourselves without help from counsel. Generally, courts ought to stick closely to the issues raised and the arguments made by counsel, and I would have done so here by resolving this case under the Chevron mode of analysis.

Id. at 620–21 (Wald, J., concurring). Judge Edwards responded as follows:

In view of these indications that the parties contemplated the application of arbitrary and capricious review in this case, we disagree that, by deciding this case under State Farm, we are in any way "second-guessing the parties" or "reframing" the issues so as to decide this case on grounds not raised or argued by the parties.

Id. at 615 n.4.

111. See Teledesic LLC v. FCC, 275 F.3d 75, 83 (D.C. Cir. 2001) (noting that when agency issued new order relevant to party's claims prior to oral argument, and party did not file petition for reconsideration, claims would be considered moot and court would not address them). This is distinct, however, from those situations in which the court simply declines to reach further implicated issues—that is, issues that are subsequent to or related to, rather than antecedent to, those explicitly raised by the parties. See, e.g., Local 2578, Am. Fed. of Gov't Employees v. Gen. Servs. Admin., 711 F.2d 261, 267 n.19 (D.C. Cir. 1983) ("Because the issue is not before us, we need not decide the extent to which the parties may limit arbitral authority to mitigate employer-imposed penalties.").

112. See Univ. of D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 163 F.3d 616, 624–25 (D.C. Cir. 1998) (remanding to lower court for further argument on point not addressed before appeal). Judge Edwards wrote:
These approaches within the D.C. Circuit indicate the variety of views from the appellate bench. They also begin to demonstrate the jurisprudential concepts from which those approaches develop. The next Part will turn to a further exploration of the jurisprudential concepts themselves.

III. JURISPRUDENTIAL THEORIES

Another place in which we might expect to find an answer to the question

In this case... because of the way the matter was initially presented, neither party focused on the contractual issue in the District Court... In these circumstances, we are loath to find that appellants “waived” anything; indeed, all that may be at issue here is a possible “forfeiture” of the exhaustion defense. In any event, we happily eschew the temptation to wander through the maze of District of Columbia law—to cut fine lines between futility, forfeiture, waiver, exhaustion, and jurisdiction—when a less indulgent course is apparent.

Prudence beckons, so we will remand the contract claim to the District Court.

Id. at 625 (citations omitted); see also GAO v. GAO Pers. Appeals Bd., 698 F.2d 516, 518 (D.C. Cir. 1983) (remanding case on issues requiring further consideration by personnel appeals board). As noted above, while sitting on the D.C. Circuit, Judge Antonin Scalia urged an approach similar to that presented by Judge Edwards. See Carducci v. Regan, 714 F.2d 171, 172, 177 (D.C. Cir. 1983) (arguing that court should not resolve issues implicated in cases if not adequately briefed or argued on appeal). Scalia wrote:

The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. [Scalia raised Rule 28(a)(4), which requires all contentions to be contained in the brief.] Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution. Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research. But where counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, “important questions of far-reaching significance” are involved.

Id. at 177 (quoting Ala. Power Co. v. Gorsuch, 672 F.2d 1, 7 (D.C. Cir. 1982)). Sitting on the Supreme Court a decade later, Justice Scalia characterized the decision of the court whether to consider additional arguments as a matter of “prudence.” See Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

113. Just before this Article went to press, the D.C. Circuit issued an opinion that demonstrates the extent to which these questions are alive and well and not limited to the three judges examined here. In United States ex rel. Totten v. Bombardier Corp., No. 98CV00657 (D.C. Cir. Aug. 27, 2004), Judge Roberts, writing for himself and Judge Rogers, asserted the impropriety of employing an argument put forward not by the parties (or even an amicus), but by the third judge on the panel. Judge Garland, writing in dissent, seems more inclined toward the view that the priority is to reach the best-reasoned decision. Indeed, as he notes, having requested and received supplemental briefing form the parties on the argument Judge Garland raised sua sponte, the court has eliminated any potential fairness concerns.

Due to the timing of publication, it is not possible to incorporate further discussion of this case into this Article, but it does demonstrate the continuing vitality of this debate.
of the role of the judge is in the work of scholars of jurisprudence. Perhaps with a deeper understanding of the philosophical underpinnings of the possible active or passive approaches, it may be clearer how to develop a workable and practical approach. Not all of the scholars whose views are canvassed here have written directly to the question of the appellate judge's role, but some of their views may be gleaned from writings on related subjects.

A. Aspirations of Perfection

Ronald Dworkin comes the closest of any of these jurisprudential theorists to declaring that there is a "right" answer to a given legal question and that a judge should actively pursue that precise answer. Judges, according to Dworkin, have the task of continually perfecting the law, building on what has come before, to make the developing law the best that it can be.114 This is an active model he calls "law as integrity."115 It focuses on "fit" and on the coherence of the law as a whole. Dworkin would have a judge look for a fit both with past cases and with the specific area of law at issue and consider with deference any "local priority" that may exist.116 Furthermore, there is Dworkin's concept of foundational "principles" that make up the coherent body of law into which a case should be made to fit.117 These principles are, however, at times difficult to distinguish from normative value statements.118 This, along with the idea of certain local priorities, may be an avenue in Dworkin's approach for the introduction of those individual views of the judge that may inform his view of a case. Indeed, Dworkin acknowledges that often judges will unthinkingly rely on instinct or feel for a particular

114. RONALD DWORiN, LAW'S EMPIRE 239 (1986).
115. Id. at 225, 225-75. Dworkin states:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. Id. at 243.

116. Id. at 250-54.
117. Unlike the pragmatists, Dworkin states that "[j]udges must make their common-law decisions on grounds of principle, not policy." Id. at 244. He distinguishes principle from policy, broadly speaking, by defining policy as something narrower in its application than a principle. Id. at 221-24. It is not entirely clear where Dworkin draws the line in practice, however, between foundational descriptive legal principles and normative value statements. See, e.g., Kent Greenawalt, The Rule of Recognition and the Constitution, 85 MICH. L. REV. 621, 627-28 (1987) (noting fuzziness of Dworkin's distinction between legal standards and moral standards).

118. See DWORiN, supra note 114, at 240-41. Dworkin labels these "interpretations," but it is difficult to differentiate them from what he labels "principles."
judgment, rather than a strictly legal analysis.\textsuperscript{119}

Dworkin’s model thus endorses no apparent limits as to what may enter into the decisionmaking process, so judges are presumably not limited to consideration only of what the parties present to the court. Despite his avowal of the existence of a right answer, Dworkin acknowledges that even having accepted the model of law as integrity, a judge may simply disagree with other judges.\textsuperscript{120} These ideas together demonstrate Dworkin’s appreciation of the circumstances in which a judge may find himself when the parties present plausible arguments, but the judge can think of a better one.

For the purpose of demonstrating the workings of his model, Dworkin posits a fictional character. Judge Hercules “is a careful judge, a judge of method. He begins by setting out various candidates for the best interpretation of the precedent cases even before he reads them.”\textsuperscript{121} Dworkin acknowledges at the outset that his Judge Hercules does not exist, and therefore cannot be the true model for judges.\textsuperscript{122} However, there would be little point in using the example of Hercules if Dworkin did not believe that judges should at least attempt as much as practicable in the way of being actively involved in the pursuit of the best version of the legal answer they can attain in the cases before them.\textsuperscript{123} Dworkin advises as much in the following statement:

But an actual judge can imitate Hercules in a limited way. He can allow the scope of his interpretation to fan out from the cases immediately in point to cases in the same general area or department of law, and then still farther, so far as this seems promising. In practice even this limited process will be largely unconscious: an experienced judge will have a sufficient sense of the terrain

\textsuperscript{119} \textit{Id.} at 256. While Dworkin does not purport to encourage the injection of personal views into a judge’s consideration of a case before him, he acknowledges that the personal will, almost inevitably, creep in. \textit{Id.} at 255–56. This idea might find a parallel in Cardozo’s statement that:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherneted instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James’s phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where choice shall fall.

\textsc{Benjamin N. Cardozo, The Nature of the Judicial Process} 12 (1921) (citations omitted).

\textsuperscript{120} \textit{Dworkin, supra} note 114, at 239.

\textsuperscript{121} \textit{Id.} at 240.

\textsuperscript{122} \textit{Id.} at 245.

\textsuperscript{123} See \textit{id.}
surrounding his immediate problem to know instinctively which interpretation of a small set of cases would survive if the range it must fit were expanded. But sometimes the expansion will be deliberate and controversial. 124

This is, however, an aspirational suggestion, rather than a mandate to judges to attempt, in such a manner, to pursue the best answer to the legal question presented. Dworkin indicates that the actual judge can expand the scope of considerations as far as seems promising (which might be quite far indeed, without any further definition), and even presumes that this already happens to some extent, so that the addition can be no great new burden on the judge. Upon close examination, there is no real specific or practical guidance here for judges, but only the endorsement of a discretionary or aspirational standard of participation in the arguments before the court.

B. Thoroughness Without Perfection

Like Dworkin, Steven Burton is concerned with upholding the law by taking care to identify, interpret, and apply all of the legal considerations involved, but he appears less concerned with the idea of perfecting the law. 125 Burton, like Dworkin, openly acknowledges that theory is different from practice, and in reality a judge cannot possibly decide each case before him in accordance with the law in its entirety. 126 Indeed, Burton does not appear wholly convinced that this would be wholly desirable in reality. 127 Unlike Dworkin, Burton would limit the inputs that a judge may consider by dividing legal reasons from ad hominem reasons, and any reasons otherwise excluded by judicial duty or the law’s standards. 128 He refers to discretion as a tool to be used in situations in which multiple outcomes are lawful. 129 To this extent, Burton’s model may be slightly less realistic than Dworkin’s. In Burton’s model, the judge weighs the reasons appropriately before him (i.e., the legal reasons), by assigning relative importance to each possible reason. 130 Here Burton may reveal his approach to the precise problem presented in this

124. Id. at 245–46.
125. See STEVEN J. BURTON, JUDGING IN GOOD FAITH, 7, 56 (1992). Burton, however, is more concerned in his writings with the problem of “gap” cases, and what he calls “stubborn indeterminacy,” than with the problem of a multiplicity of solutions. See id. at 5–34.
126. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 136 (2d ed. 1995).
127. See id.
128. BURTON, supra note 125, at 37.
129. Id. at 43.
130. Id. at 54–62.
Article. His description of the weighing process refers to a stage in which the judge himself identifies "all" legal considerations. Burton thus apparently contemplates a paradigm in which the judge is ultimately responsible for ensuring that all potential theories or reasons have been identified.

Burton's views on this question appear, however, to be somewhat flexible. His acknowledgment that judges may reach the same legal conclusion in a given case, even if they give different explanations for the conclusion, seems to indicate a belief that it is not necessary to find the single best rationale on which to decide a case. In his discussion of the impracticability of considering everything, Burton states that "[t]o make law and legal reasoning manageable, you must select from the whole law those parts that are most germane to a particular case." This clearly indicates a process in which fewer than all possible considerations are before the judge, but is not necessarily in tension with the idea of a judge considering more than has been presented by the parties. Burton notes that as a practical matter, judges are limited to the cases before them, and are further limited by procedural rules as to how a case can be brought and how the lawyers must present it. This context, he argues, narrows the focus of any decision that a judge must make, thus rendering it more manageable.

Such a narrowing of context could indicate a desire to make possible the search for a "best" answer. Burton presents the following scenario for the judge, once he or she has received the plaintiff's complaint, and the briefs on both sides:

Furthermore, the law is spent by the identification of legal reasons and the exclusion of other reasons. All legal considerations to be taken into account enter at the identification step. Reasons are either relevant or irrelevant. Once all relevant reasons have been identified, no new reason can enter as the ground for the weight of any of them. Irrelevant reasons are irrelevant. Accordingly, the weight of a legal reason must be a function of the other relevant reasons together.

Id. at 56. Burton describes the process in the following way:

131. Id. at 56. Burton describes the process in the following way:

132. In this paradigm, the judge's perspective on the lawyers might be analogized to Holmes's "bad man" view of the law. That is, the judge might treat the lawyers' interpretations of the law as somewhat suspect, and thus more actively attempt to discover the correct answer to the question before them, rather than relying solely on what the lawyers tell them. See Oliver Wendell Holmes, The Path of the Law, 78 B.U. L. REV. 699, 701 (1998), reprinted as originally delivered on Jan. 8, 1897 (describing necessity of viewing law as a "bad man, who cares only for the material consequences").

133. BURTON, supra note 126, at 117.
134. Id. at 136.
135. Id.
136. Id.
Only then would the judge be in a position to decide the question. *She would not, however, have to think about everything before doing anything.* The complaint and the rules and precedents cited in this [sic] parties' briefs would be before the court. These documents would call the judge's attention to parts of the legal experience that, in the lawyers' opinions, are relevant to the case. The judge's reasoning would focus on the cited rules and precedents, though she could draw as well on her own research and general knowledge concerning the law of torts and related criminal or property law, theories of compensation and responsibility, rules and theories of civil procedure, and other aspects of the law. Her decision would be manageable because the lawyers will have presented the case in a manner that poses a discrete question and proposes a reasoned decision.... The lawyers thus take the initiative to bring into prominence the most relevant aspects of the law in its entirety, leaving the rest in the background as the context for thought.\(^{137}\)

Thus it is clear that Burton would allow judges discretion to raise or to incorporate arguments and information not presented by the parties, but would not actually require the judge to raise all possible considerations before making a determination in a case.

**C. Precedent Over Perfection**

While Dworkin acknowledges the unreality of Judge Hercules, he presents a clear view that more considerations will lead to a better solution of the question before the judge. In stark contrast to this, Cass Sunstein presents a system of legal values that places precedent over perfection of the law.\(^{138}\) Sunstein cautions judges against any attempt to "reach reflective equilibrium," due to the attendant risk of upsetting precedent.\(^{139}\)

Sunstein poses the question of what it means "to say that a difficult case is 'rightly decided,'" and looks for an answer in the realm of analogical reasoning.\(^{140}\) While noting certain commonalities between analogical reasoning and the search for reflective equilibrium, he prefers the less ambitious mode, describing analogical reasoning as a truncated form of the search for reflective equilibrium, which cuts off the analysis just where "the

\(^{137}\) Id. at 139 (emphasis added).


\(^{139}\) Id. at 280.

relevant principles go beyond a low level of generality.” Perhaps this is somewhat like the distinction between what Dworkin’s Judge Hercules can do, and what an actual judge is meant to do to imitate him at a more practical, limited level. However, none of this analysis resolves the question that must always be central to analogical reasoning—that is, the question to what the judge will draw the analogies. Encompassed in that question is whether the judge will conduct the analogical reasoning based upon the analogies in the materials presented by the parties, or whether he will look for a better analogy—a more relevant similarity or difference—for himself. Sunstein does not provide an answer to this question. Thus we are left with only the idea that he is opposed to the pursuit of perfection in the law insofar as it entails extensive or expansive research and reflection on anything beyond directly relevant precedent.

D. Ambiguity in Reality

Somewhere between Dworkin and Sunstein, with a bit of the same ambiguity apparent in Burton’s writings, are the views of Richard Posner. He presents an interesting scenario because he might reasonably be expected to have the most informed view of all scholars on this question, owing to his position as an active appellate judge. As an academic, however, he has not written directly to the question presented by this Article. In one of his books, while not clearly advocating a normative theory, he describes a pattern of actual practice that appears relevant to the question, and of which he does not at least appear to disapprove. In that context, he argues that because judges are required to decide difficult cases the best they can, there must be an implicit discretion to consider anything relevant to deciding the case, “whether drawn from positive law or natural law sources.” He states that a judge’s decision would “have to be pretty crazy before it can fairly be called ‘lawless.’” Perhaps most instructive in this vein is the following statement:

Many disputes, however, have to be resolved at once, even if the rules are unclear or have to be made up on the spot; and then the judges do the best they can, using whatever information and insight that the lawyers give them or that they can dredge up out of their own reading and experiences.

141. Id. at 754.
143. Id.
144. Id.
145. Id. at 233.
It is not clear, though, whether such broad discretion is to be used in any case, or only in those cases in which the rules are "unclear." It is similarly unclear what it means for a rule to be "unclear." It may be that Posner is here referring to so-called "gap" cases. It may be that he refers to scenarios in which the rules seem clear to the parties and less so to the judge.

Posner underlines the idea of the judge "thinking outside the box" in terms of the inputs he receives from the parties' arguments and from established case law, when he minimizes the weight of precedent. He posits instead a "predictive" model in which the judge attempts to decide a case based on how he thinks a higher court would decide it. Thus, if the higher court would have gone against precedent, it may also be permissible for the lower court to do so: "Precedents are essential inputs into the predictive process but they are not 'the law' itself...." Thus, Posner's academic work, while not clearly advocating a particular theoretical or practical approach to this precise question, certainly appears to leave open to judges at least the discretion to consider additional arguments.

On the other hand, Posner as a judge, rather than as an academic, is hard to pin down to a particular position. His opinions very often raise points that might be relevant, but then state that those points not argued by the parties need not be pursued by the court. This accords with his caution against district court judges using too much of their own knowledge to shape cases in ways that the parties have not requested. Judge Posner has strongly cautioned district court judges not to yield to the temptation that comes with knowledge—not to become too involved a participant in the cases before them. He urged this in a case in which a judge entered an injunction

146. Id. at 225.
147. Id. at 227.
148. Indeed, Posner himself warns academics against the attempt to discern much about any judge from his opinions, since those opinions are largely written by law clerks.
149. See, e.g., IDS Life Ins. Co. v. Royal Alliance Assocs. Inc., 266 F.3d 645, 650 (7th Cir. 2001) (raising point not argued, but dropping it because it was not argued).
150. United States v. Bd. of Sch. Comm'rs, 128 F.3d 507, 512 (7th Cir. 1997). In this case, the district court judge modified an injunctive order in a way neither party had explicitly requested. Id. Thus, no factual record had been developed on the specific point of modification. Id. Appellees, who had not requested, but wished to keep in place, this new modification, defended the judge's action based on an argument that the judge had extensive experience in this area. Id. Posner counseled in response:

But great knowledge is a temptation as well as a resource: a temptation to blur the separation of powers, to shift the balance between the federal courts and state and local government too far toward the courts, and to disregard procedural niceties, all in fulfillment of a confident sense of mission.
tailored in a way that neither party had requested. Judge Posner acknowledged the district court judge’s superior knowledge in the area, but cautioned him nonetheless. It may be that Judge Posner would limit this caution to “issues,” because the particular situation he describes might refer to an “issue” rather than an “argument,” but he has not explicitly limited his remarks to such a context. The language of the warning is, on the contrary, very general. In another opinion, Judge Posner notes the lack of resources for identifying any issues the brief should have discussed, by having law clerks “searching haystacks for needles.”\(^{151}\) He concluded that “[a] search of the trial record might turn up additional issues some of which had arguable merit, but . . . we do not conceive that to be our function.”\(^{152}\)

At the same time, however, there is ample evidence that Judge Posner engages in independent research and reflection beyond that presented to him by the parties.\(^ {153} \) Even though he often dismisses possible theories he has considered \textit{sua sponte}, saying for example that they are inapplicable to the precise facts of the given case, the fact remains that they entered into his reflection on the case—indeed they were prominent enough in his thinking to afford them a presence in the finished opinion.\(^ {154} \) Furthermore, he wrote the following passage in an opinion considering whether a lower court should have allowed an issue to be rebriefed:

Judges are not umpires, calling balls and strikes; or judges of a moot court, awarding victory to the side that argues better; least of all is that their disposition in a death case. Appellate courts do rely on counsel to present the grounds for reversal, but in this country, unlike the practice in England, where the judges have no law clerks, they do not depend on counsel to find all the cases and all the reasons in support of the appeal. The better lawyers resent this, feeling that it is “unfair” for judges to do the work of the weaker lawyers. But that is the way it is, and consequently, except in highly unusual cases that we cannot at present envision, it is only when counsel fails to perfect his client’s appeal or waives potentially meritorious grounds for reversal that his

\(^{151}\) United States v. Wagner, 103 F.3d 551, 553 (7th Cir. 1996).

\(^{152}\) Id.

\(^{153}\) See, e.g., Jutzi-Johnson v. United States, 263 F.3d 753, 760–61 (7th Cir. 2001) (stating, in dicta, that both parties have presented incorrect notions of comparable cases, and listing examples of damage amounts from cases the court found on its own, but remanding on the separate issue of liability).

\(^{154}\) See, e.g., Builders Ass’n of Greater Chicago v. County of Cook, 256 F.3d 642, 644 (7th Cir. 2001); United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001); Rager v. Dade Behring, Inc., 210 F.3d 776, 779 (7th Cir. 2000).
substandard performance will be deemed sufficiently prejudicial to warrant giving his client a new appeal. We add that the issues that the Indiana Supreme Court did not allow to be rebriefed, as it were, have no apparent merit.\textsuperscript{155}

Judge Posner perhaps cabins his position in one opinion, stating that a court of appeals does "not reverse judgments in civil cases on the basis of grounds not argued by the appellant at any stage of the litigation—grounds, therefore, that the appellee had no opportunity to meet."\textsuperscript{156} This sounds very much like a fairness argument. It might suggest that it would be acceptable for the court to take such action (i.e., reversal) if the parties had an opportunity to submit supplemental briefs or oral arguments on the otherwise omitted point. Thus, perhaps Judge Posner, in his role as judge, would advocate a judge's discretion (but not obligation) to inquire into omitted points, as long as the parties are involved in that inquiry.

None of the theories discernible in these jurisprudential writings provides a direct answer to the question of the role of the appellate judge, or any very practical insight into the proper scope of a judge's involvement in the development of the case before the court. However, they do flesh out certain background principles that must factor into the formulation of a practical approach.

\section*{IV. A Related Note on the Role of Precedent and the Use of Unpublished Opinions}

There is a related point that must be added to the discussion before reaching any conclusions as to the best practical approach to the problem presented here—that is, the role of precedent and the use of unpublished opinions. Most scholars and judges assume to a certain extent the role of precedent as a basic element of common law. For example, Dworkin's chain novel model,\textsuperscript{157} in which the judge continually improves on what is already there, and Sunstein's analogical reasoning model,\textsuperscript{158} are based in some measure on the idea that while it is not always perfect, precedent is too valuable to be overlooked in legal decisionmaking. Judges are largely bound by what has come before—and in turn, their judgments become a part of the

\begin{thebibliography}{99}
\bibitem{155} Smith v. Farley, 59 F.3d 659, 665–66 (7th Cir. 1995) (citations omitted).
\bibitem{156} See Prudential Ins. Co. of Am. v. Athmer, 178 F.3d 473, 477 (7th Cir. 1999); see also Cosgrove v. Bartolotta, 150 F.3d 729, 735 (7th Cir. 1998) (noting that "the damages awarded by the jury were excessive, but as the defendants do not object to the verdict on this ground, the point is waived").
\bibitem{157} DWORKIN, \textit{supra} note 114, at 228–32.
\bibitem{158} SUNSTEIN, \textit{supra} note 138, at 742–49.
\end{thebibliography}
law for deciding future cases. This is an enormous responsibility, and is in itself an argument for the importance of having judges decide each case on the best grounds, with the best reasoning, and within the most appropriate theoretical framework possible. However, it also raises a question about what "precedent" includes.

There is a divide in the current system, between published and unpublished opinions, in terms of the ways in which they may be used and the weight they may be accorded.\textsuperscript{159} The current debate over proposed Federal Rule of Appellate Procedure 32.1 has excited comment from judges, lawyers, and nonlawyers alike.\textsuperscript{160} Judges must, of course, decide each case according to the law, but they can, by ordering a case either published or unpublished, select which of their decisions may (or, perhaps more importantly, may not) be cited back to them as binding precedent in later cases.\textsuperscript{161} Lawyers and judges both have access in their research to the full array of opinions, but some of these opinions come with a notation that they are not to be cited, except, perhaps, in some limited circumstances.\textsuperscript{162} If a judge is supposed to decide the case on the best theory of law, it seems counterproductive for the judge to leave the whole body of unreported decisions completely unexamined, as if it did not exist. On the other hand, if a judge may look at unreported decisions in his own research into the law at issue (or even without research, simply by recollection of a past unreported decision), it seems unreasonable to refuse lawyers the opportunity to comment on what the judge...

\textsuperscript{159} The Eighth Circuit has been at the center of a high-profile debate on the publishing divide. \textit{See Anastasoff v. United States}, 223 F.3d 898 (8th Cir. 2000), \textit{vacated} \textit{en banc} as moot, 235 F.3d 1054 (8th Cir. 2000). However, every circuit has a rule expressing some variation of the theme of two-tiered authority. \textit{See} Thomas R. Lee & Lance S. Lehnhofer, \textit{The Anastasoff Case and the Judicial Power to "Unpublish" Opinions}, 77 \textit{Notre Dame L. Rev.} 135, 137–38 n.13 (2001).

\textsuperscript{160} Proposed Federal Rule of Appellate Procedure 32.1 would prohibit any limitations on citation of unpublished cases. It is very narrow in its potential effects, however. It would allow the cases to be raised, but would not take any position on their precedential or persuasive weight.

\textsuperscript{161} The basic dividing line is that a case will be published only if it establishes, alters, modifies, clarifies, or explains a rule of law, if it criticizes existing law, if it involves a legal issue of continuing interest, but not if it is duplicative. \textit{See}, e.g., \textit{4th Cir. Internal Oper. P. 36.3}. Lawyers may move for publication of decisions, which may or may not be granted. \textit{See}, e.g., \textit{4th Cir. Internal Oper. P. 36.4}. This system does not appear to be a highly scientific one, but merely a question of characterization. That may leave too much to chance, as to what may or may not become precedential law.

\textsuperscript{162} Unreported or unpublished opinions often come with a rule something like the following: These opinions are not to be considered "precedent," but only "persuasive" authority with respect to a material issue that has not been addressed in a published opinion. \textit{See}, e.g., \textit{10th Cir. R. 36.3}. They are only, in such cases, to be cited where there is no published authority on the point at issue. Some courts (namely the Second, Fourth, Seventh, and Ninth Circuits) do not even allow for that exception, but instead make the ban absolute.
might find there.\textsuperscript{163}

There are of course genuine concerns about judicial backlogs and workloads and the need for a fast-track by way of shorter opinions.\textsuperscript{164} However, it is extreme to conclude that an entire (and quite extensive) set of decisions should not be mentioned in later cases, if they are relevant—even if they should not actually be considered precedential. If they were decided properly, they must be relevant. If they are relevant, then a lawyer should be able to cite them to a judge in the same way he would cite any other opinion he wished to use for support of his argument or for distinguishing the argument of his opponent. If there must be a “do not cite” rule, then for the sake of fairness and predictability, perhaps there ought to be a corresponding way in which to assure lawyers that the contents of an unpublished opinion will in no way form a part of the judge’s reasoning in his case.

Some judges might argue that the rules governing publication of opinions already represent an effort to promote the ends endorsed in this Article—that is, to strive continually for perfection in the law. This argument might emphasize the balancing act between the thoroughness that goes into published opinions, leaving anything that does not advance the law by making a new or different statement to the realm of the unpublished, and thus promoting efficient use of resources. That is, a judge need not spend a great deal of time perfecting an unpublished opinion because there is little or no danger that it will be cited as authority. The judge will instead focus great attention on the published opinions in order to make sure that anything new is definitively correct. This is not a satisfactory answer, either in theory or in practice. As long as there are loopholes allowing for citation of unpublished cases, then it is always possible that one of these “unperfected” opinions will at some point be cited to the court. To be satisfied with a less than optimally written opinion invites further trouble down the road. The problem of getting around bad precedent is not an insignificant one. This is all to say nothing of the injustice to the parties that may result from an unpublished opinion that does not “get it right.”

\textsuperscript{163} One might, of course, make a similar argument regarding precedent from outside the jurisdiction of the court. If a court is allowed to look beyond those cases cited by the parties, and may even look for guidance (or even just for ideas) in cases from outside the jurisdiction, it may be difficult for lawyers to know how far abroad they might reach in endorsing or countering the ideas the judge might find in these outside cases. Like the unreported decisions from within the jurisdiction, of course neither the judge nor the lawyers will believe these cases to be authoritative, but there ought to be concern about how, in the context of the judge’s deliberations, they may color the interpretation of the arguments explicitly presented by the parties.

Thus, though the matter of published and unpublished opinions is not the subject of this Article, the debate and its ramifications on what constitutes precedent must form a part of any conclusions that may be drawn about whether a judge will consider an argument of his own conception, and perhaps more importantly, how he will do so.

V. CONCLUSION

This Article has been critical of the lack of a consistent, reasoned approach in recent appellate case law and the lack of practical advice from either philosophers or judges. Such criticism calls for an effort to fill that gap. The gap must be filled with certain background principles or values in mind. These include fairness (both to the litigants and to the public); predictability and uniformity (for the sake of the parties and their attorneys); preservation of the adversarial process; and the importance of reaching the best answer in the most practical and efficient manner. With these values in mind, although I would theoretically endorse a rule of finding the most correct resolution of any legal question, I believe the reality of judicial resources must preclude an absolute obligation on the part of appellate judges to ensure that all possible arguments or legal reasons have been presented. This leaves only a discretionary standard. I would nonetheless stress that though necessarily discretionary, such a standard should not be entirely aspirational. I would advocate an aggressive use of that discretion, strongly urging judges to follow their instincts about unargued points that they believe may be important to resolution of a particular case.

Regarding the involvement of the parties, both the fairness considerations and the asserted importance of an adversarial process for discovering the right answer, I believe the process need not be unreasonably delayed by requirements for supplemental briefs or arguments. The reality of appellate judging is that there are first of all internal checks, both from the judge’s law clerks who will as a matter of course do their own research from an objective perspective, and from other judges on the panel and from the circuit as a whole. Furthermore, appellate judges are fully aware of the possibility of reversal, either by their own circuits en banc or by the Supreme Court, and certainly seek to avoid that fate. Ultimately there is a procedural check in the hands of parties as well. A petition for rehearing or for rehearing en banc may be made in any case in which a party believes the court erred in its application of the law, an opportunity for which no fee is required.

But this is not just about fairness to the parties. One element of the reasoning behind the encouragement of more active participation by judges is that courts are entrusted with determining the law for the public, rather than
just those parties before the court in a particular case. In a common law system, any decision may affect a future litigant. Thus, the law must be considered in some measure to be the property of the public. With this in mind, it should be of the utmost importance to reach the best conclusion (to "get it right") in each case. Precedent is too highly valued in our legal system to permit decisions that are based on less than the best reasoning.

This model has serious implications for both judges and lawyers. For lawyers it may mean that it would be wise to argue on as many points as may seem at all relevant, even those that might seem less important (or less controversial) to the lawyer. In those cases, the lawyer's version of a given argument will be before the court in case a judge wonders about its relevance and has found a different answer in his own research. For judges it may mean a slightly greater investment of time, to the extent that there is a stronger push towards consideration of more than just what appears before the court. It is likely, however, that much of this activity already occurs. This is simply a mandate for a more conscious exercise of that consideration.

Judges should not just look at cases cited by the parties to ensure that they

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165. Of course, the lawyer is already required by Model Rule of Professional Conduct 3.3(a)(2) to disclose any adverse authority (which, incidentally, lends strength to an argument for a systemic interest in "getting the law right"), but the statement here instead encourages lawyers to come up with all possible ways of conceptualizing the issues or the arguments in the case, in order to dispose of every way in which the judge might, on his own, conceptualize the case.

166. Indeed, this may be the hardest paradigm for which to find examples in case law, as the judge who sees it as a matter within his discretion will rarely justify his action or take the trouble to explain the reasoning that leads him to go outside the arguments presented by the parties. See, e.g., Yongo v. INS, 355 F.3d 27, 34 (1st Cir. 2004) (offering no authority for doing so, but considering sua sponte whether ALJ below misread crucial case); Grimes v. New Century Mortgage Corp., 340 F.3d 1007, 1012 n.1 (9th Cir. 2003) (McKeown, J., dissenting) (pointing out that majority rests on argument of contract interpretation not pressed by parties); United States v. Cont'l Can Co., 378 U.S. 441, 457 (1964) (cited on occasion as authority for discretion to consider arguments not made by parties, but providing no authority or reasoning for that proposition, stating merely that it can "see nothing to preclude us from reaching the question").

167. Occasionally, courts already pursuing their own reasoning go to another extreme, as in the example of United States v. Hardman, 297 F.3d 1116 (10th Cir. 2002), which provides a seemingly unending string of authority and justifications for exercising its discretion to go beyond the parties' arguments. See id. at 1123-24 (justifying its use of discretion on grounds that Singleton's list of two conditions is not an exhaustive list, that procedural posture here is unique, that court had asked all parties to brief RFRA issue for this rehearing en banc and RFRA issue had been before all three trial courts and before one panel, that judicial resources would be conserved by addressing argument, sua sponte, that proper administration of criminal law cannot be left to stipulation of parties, that Federal Rule of Criminal Procedure 52(b) allows court to address, sua sponte, any question affecting criminal defendant's substantial rights, that court should avoid constitutional grounds if others are available, etc.). However, this indicates a certain defensiveness in over-justifying the court's authority to go beyond the bounds of the parties' arguments. I would urge that courts should be mindful and open about going beyond the parties' arguments, but any such defensiveness undermines the very assertion of authority.
accurately reflect what the parties aver, but should pursue any further questions that the thoughtful examination of those cases might raise. This should only happen when the judge believes there is an omitted issue or an argument that might be dispositive or highly influential in the decision. There is no need to conduct exhaustive independent research on points that raise no particular concerns for the judge. Furthermore, the additional investment of time for allowing brief supplemental submissions by the parties once a new argument has arisen would require only minimal additional judicial resources.

At any rate, there will always be an issue of judicial resources. This raises an underlying practical question about the difference between a judge who has been on the bench for twenty years, and a judge who has been on the bench for two weeks—the difference between their judicial experiences and instincts may make a dramatic difference in the treatment of the case regardless of their treatment of issues not raised by the parties. With a wholly discretionary or aspirational standard, the newer judge may be unsure of the extent to which he is required to reach beyond the arguments presented by the parties. However, it may not be feasible to require the newer judge to conduct extra research to inform himself about all possible theories or arguments or parallels in other areas of law in order to reach a result as “correct” as the more experienced judge might reach. Thus, the model I have proposed might require much more of the newer judge’s resources than it would of the more experienced judge. Some discrepancy must already exist, even without a heightened standard, but it is unclear whether the effect of the heightened standard would be felt any more by one or the other of these two judges, and whether that difference would be of sufficient importance to abandon such a heightened standard.

Leaving aside the distinction between the experience levels of judges, one might argue that placing the burden on judges to be certain (presumably by conducting their own research) to find the best reasoning, the best analogy, or the best framework on which to decide the case creates a risk that lawyers will almost entirely give up the responsibility for presenting all of the possible arguments and instead leave it to the judge to do the work. However, if the lawyer has any interest in winning the case, that is clearly not the advisable course to take. On the contrary, the idea that a judge may look beyond the arguments presented should encourage lawyers to present a more extensive case than they otherwise would, in order to make certain that the judge considers their clients’ position on a given argument.

With judges looking for the best answer, from whatever source, lawyers should do their best to prepare their cases even more thoroughly. That should, in turn, result in better briefs and arguments, which might in turn reduce the amount of additional judicial resources that must be committed to the search
for the best answer. In the end, the result should also be better statements and explanations of the law from the courts, which will benefit the public in terms of the integrity of the law and in terms of predictability for future conduct and future lawsuits, and will benefit both the judges and lawyers in that perhaps consideration of more possible arguments in a given case will clarify the applicability of certain theories of law.

If a judge were to be constrained by the kind of absolute procedural boundaries suggested, for example, by Milani and Smith, so that the judge’s choices are between ignoring the better argument or involving the parties in rebriefing and rearguing, there are several potential problems. First is the danger that the judge will be wary of the extra time that would be required and might attempt to construe the original briefs and arguments as having raised the judge’s new argument or reasoning. The danger there is that in the process, the judge may have to twist the arguments actually made so that the resulting case law may be less clear than it might have been if the judge had been able to be straightforward about the alternate reasoning. Another risk is that the judge might leave out the better argument entirely, and there again the case law may be less clear or less correct than it might otherwise have been. Finally, there is a possibility that the judge may indeed involve the parties in the new reasoning but will as a result take longer to resolve cases and thus be able to deal with fewer cases. If the judge can cut out the extra time by setting things on the right path, albeit in a careful manner, showing his work, so to speak, the parties will always have the chance to petition for rehearing if the judge got the reasoning wrong.

In all likelihood, though it is difficult to gather any kind of quantifiable evidence, judges often do employ their own reasoning where the briefs have not made the best arguments, but do not note that they are doing so. I would urge judges to use those qualities for which they were chosen to act as judges not only to reason as well and as clearly as possible, but to account for their reasoning by laying their cards on the table as they do so.

VI. A FINAL NOTE

It is perhaps worth noting here that a large number of the points in this Article have been drawn from or have relied upon remarks and discussions found in footnotes and dissents. This indicates not only that the issue addressed here is a matter of some contention, but also that it has not yet attracted the kind of attention that it merits. Thus, perhaps the first practical step the courts must take on this issue is to bring the discussion into the fore—that is, to the text of the majority opinions to which it is relevant. Then, at least we might gain a clearer vision of how appellate judges conceive of their
role as potential participants in the conceptualization of the matters before them.