

Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard

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I. INTRODUCTION

Should appellate courts raise and decide issues that the parties have not presented and argued? The Supreme Court often insists it will not decide issues that have not been raised below.¹ But the Supreme Court—and lower appellate courts—frequently fall off the wagon.

In fact, some of the Supreme Court's most famous opinions decided issues not presented by the briefs or addressed below. In *Erie Railroad v. Tompkins*, the Court overturned sua sponte an ancient precedent on applying the common law in diversity cases.² *Mapp v. Ohio* overrules a prior case and applied the Fourth Amendment exclusionary rule to the states, without briefing or argument on the issue.³ In *Washington v. Davis*, the Court decided that Title VII standards did not apply to constitutional discrimination, even though the parties had agreed that they did.⁴ *Younger v. Harris* prohibits injunctions against pending state

1. See, e.g., *Glover v. United States*, 531 U.S. 198, 205 (2001).

2. *Erie R.R. v. Tompkins*, 304 U.S. 64, 81–90 (1938) (Butler, J., dissenting).

3. *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961). *Mapp* overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), and applied the Fourth Amendment exclusionary rule for unreasonable searches and seizures to the states. According to the Court, that issue was not raised by the appellant but was raised by amicus curiae, who was permitted to participate in oral argument. *Mapp*, 367 U.S. at 646 n.3. But see *id.* at 671 (Douglas, J., concurring) (arguing that the question was raised, albeit not argued). In dissent, Justice Harlan emphasized that the issue had not been briefed or argued, the appellant's counsel had disclaimed overruling *Wolf*, and the amicus brief mentioned by the Court had only raised the point in a paragraph. *Id.* at 672–74 & nn.4–6, 677 (Harlan, J., dissenting) (suggesting that the case should have been set for reargument after additional briefing).

4. *Washington v. Davis*, 426 U.S. 229, 238 (1976).

court criminal cases, even though the issue was not argued on appeal.⁵ Indeed, in *Stanley v. Illinois*, the Court held that due process requires hearings and an opportunity to make submissions before a state can terminate the parental rights of unwed fathers.⁶ But the Court decided this without briefing or argument—without a hearing on the issue or an opportunity for the parties to make submissions.⁷

What should happen when an appellate court looks at the briefs and arguments presented by the parties and feels that the issue has not been framed correctly? When appellate judges believe that a potentially dispositive issue was missed by the parties, they have several options: (1) they can ignore the issue;⁸ (2) they can spot the issue in their opinion, but treat it as not properly raised or waived; (3) they can spot the issue and remand it for resolution in the first instance in the trial court; (4) they can ask the parties for supplemental briefs before deciding the issue; (5) they can decide the issue without briefs; (6) they can spot the issue in the opinion, and write dicta.

Courts make one of these six choices every day. But the Supreme Court and other appellate courts have failed to follow any consistent practice about sua sponte holdings.⁹ The difficulty courts have is illustrated by the fact that even the most prominent appellate judges sometimes say they want procedural regularity, but in other cases exercise the freedom to do what they like. Some examples follow.

Justice John Paul Stevens wrote: “As I have said before, ‘the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.’”¹⁰ But, he also wrote: “Notwithstanding the

5. *Younger v. Harris*, 401 U.S. 37, 40–41 (1971).

6. *Stanley v. Illinois*, 405 U.S. 645 (1972).

7. *Id.* at 659–61 (Burger, C.J., dissenting) (criticizing the Court for raising the due process issue sua sponte without briefing and argument).

8. Common sense tells us that appellate judges choose to ignore many issues that have not been briefed. Most of the time, we cannot show it; the court will not record that it has ignored issues. *Cf.* Letter from Richard Posner, Chief Judge of the Court of Appeals for the Seventh Circuit, to the Chicago Council of Lawyers (Dec. 28, 1993) (stating that the author would discuss issues not recognized by the parties and “say outright what other judges prefer to keep under their hat”), *quoted in* Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 794–95 (1994). One set of decisions where we do know that the Court ignored issues were those leading up to *Brown v. Board of Education*, 347 U.S. 483 (1954). The implications of the decisions striking down aspects of de jure segregation were clear for decades, but the National Association for the Advancement of Colored People (NAACP) avoided a frontal attack for many years. The Supreme Court, in turn, avoided addressing the larger issues until 1954. *See* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1975).

9. *See infra* notes 128–66 and accompanying text.

10. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S.

apparent waiver of the issue below, I believe that the Court should reach the issue . . . because resolution of the question is so clearly antecedent to disposition of this case.”¹¹ In addition he wrote:

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years, I believe the Court acts wisely in resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court.¹²

Justice Antonin 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.”¹³ Elsewhere, he said: “The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”¹⁴ But he also said: “[T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary.”¹⁵ In addition, Justice Scalia ruled that even if an issue is not pressed before it,

164, 194–95 n.4 (1994) (Stevens, J., dissenting) (discussing the desirability of ordering supplemental briefing *sua sponte* concerning questionable precedent (quoting *Patterson v. McLean Credit Union*, 485 U.S. 617, 623 (1988) (per curiam) (Stevens, J., dissenting from order directing reargument) (quoting *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (dissenting from order directing reargument))); *see also* *Washington v. Davis*, 426 U.S. 229, 255–56 (1976) (Stevens, J., concurring) (discussing that the court *sua sponte* applied different standards to constitutional discrimination than those applied by Title VII).

11. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36–37 (1991) (Stevens, J., dissenting) (dissenting from the Court’s refusal *sua sponte* to decide an issue that had not been briefed or argued by the parties, although it had been raised by amici). Justice Stevens continued: “On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered ‘fairly subsumed’ by the actual questions presented.” *Id.* at 37.

12. *Batson v. Kentucky*, 476 U.S. 79, 110–11 (1986) (Stevens, J., concurring) (footnote omitted) (overruling a prior constitutional precedent despite the fact that the ground used by the Court had been specifically disclaimed by the petitioner; the ground had been mentioned by the respondent and discussed by amici).

13. *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

14. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Justice Scalia added that the rule is inapplicable if the parties agree to a basic, but wrong, rule of law. *Id.*; *see infra* note 120 and accompanying text.

15. *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring).

the Supreme Court feels free to raise the issue if it was passed on below.¹⁶

Judge Richard Posner (then Chief Judge), criticized the opinion in *Hope Clinic v. Ryan*,¹⁷ where the en banc majority invented a new federal remedy sua sponte, and wrote:

The court . . . expand[s] federal judicial power over the states by a method that the Supreme Court has never countenanced and that violates Article III of the Constitution. It is a bone, incidentally, that the plaintiffs didn't ask for; neither side, in either case, requested this novel form of relief or commented on it in their briefs. We are taking a leap into the unknown without any input from the parties.¹⁸

On allowing a party to raise an issue for the first time at oral argument, Judge Posner said: “[I]t would not be quite cricket of us to place decision” on a ground not raised until the oral argument on appeal, because the other party may have been lulled into presenting its case differently.¹⁹ Similarly, Judge Posner has emphasized the importance of waiver to the adversary system, writing:

Ours is an adversarial system; the judge looks to the parties to frame the issues for trial and judgment. Our busy district judges do not have the time to play the “proactive” role of a Continental European judge. True, they want to do justice as well as merely umpire disputes, and they should not be criticized when they point out to counsel a line of argument or inquiry that he has overlooked, although they are not obliged to do so and (with immaterial exceptions) they may not do so when an issue has been waived.²⁰

16. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

17. 195 F.3d 857 (7th Cir. 1999) (en banc), *motion for stay of mandate denied by equally divided court*, 197 F.3d 876 (7th Cir. 1999) (en banc), *vacated by* 530 U.S. 1271 (2000). In *Hope Clinic*, Judge Easterbrook's majority opinion sua sponte invented a “precautionary injunction” against a state statute. That remedy preserved the statute's constitutionality by declaring some potential applications unconstitutional. *Id.* at 867–70, 875.

18. *Hope Clinic*, 195 F.3d at 876 (Posner, C.J., dissenting). For that matter, compare Judge Easterbrook's decision in *Hope Clinic* with his comments in *Afterword: On Being a Commercial Court*:

I have also left out of the list [of praiseworthy qualities in judges] any praise for judges who seize the moment to write essays about issues the parties did not present. Just as parties may choose the terms of their contract, they may choose the subjects of their litigation. Resolving a case on a ground not presented denies the parties this autonomy and increases the risk that an uninformed opinion will impede rather than promote commerce. It is hard enough to navigate when the court sticks to questions fully ventilated by counsel.

Frank H. Easterbrook, *Afterword: On Being a Commercial Court*, 65 CHI.-KENT L. REV. 877, 880 (1989).

19. *Principal Mut. Life Ins. Co. v. Charter Barclay Hosp. Inc.*, 81 F.3d 53, 56 (7th Cir. 1996). *See also* *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1214 (7th Cir. 1993) (discussing why the court would not act sua sponte to undo a result the court viewed as unjust); *see infra* notes 75–83 and accompanying text.

20. *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992) (citations omitted); *see also* *Tom v. Heckler*, 779 F.2d 1250, 1259–60 (7th Cir. 1985) (Posner, J., dissenting) (“I

But Judge Posner also said: “Despite much pretense to the contrary by judges and lawyers, it is one of the marks of the great judge to recast the issues in cases in his own image rather than to assume a passive, ‘umpireal’ stance.”²¹

There are similar examples from many other judges, including Justices White, Stewart, and O’Connor.²²

wonder in what sense we can claim to have an adversarial system of justice if appellate judges conceive their duty to be to search the record . . . for errors that the appellant’s counsel missed, and to reverse if any are found. . . . But the adversarial system is the system we have, and *ad hoc* modifications which cast an appellate judge . . . in the role of *juge d’instruction* are unlikely to improve the system . . .”).

21. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 144 (1990); *see also* Lucien v. Johnson, 61 F.3d 573, 575 (7th Cir. 1995) (finding that it is permissible to reach an unbriefed issue because the court was sure the plaintiff had no claim); Chicago Council of Lawyers, *supra* note 8, at 795–96 (criticizing the opinion in *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1982), *vacated and replaced en banc*, 706 F.2d 1488 (7th Cir. 1983), *aff’d en banc*, 726 F.2d 1150 (7th Cir. 1984), *rev’d*, 470 U.S. 373 (1985) (deciding the antitrust issue on the merits in an appeal of a discovery order)).

22. Justice White: *compare* Hill v. California, 401 U.S. 797, 805 (1971) (“In this posture of the case, the question, although briefed and argued here, is not properly before us.”), and *City of Memphis v. Greene*, 451 U.S. 100, 130 (1981) (White, J., concurring in judgment) (“I much prefer as a matter of policy and common sense to answer the question for which we took the case.”), *with* Stanley v. Illinois, 405 U.S. 645, 658 n.10 (1972) (stating that it was proper for the Court to apply a theory not raised or briefed by the parties because the “method of analysis [was] readily available to the state court”).

Justice Stewart: *compare* United States v. Feola, 420 U.S. 671, 696–97 (1975) (Stewart, J., dissenting) (criticizing the Court for deciding *sua sponte* an issue raised by a pending petition for certiorari in another matter, but not briefed or argued in the current case), and *Gravel v. United States*, 408 U.S. 606, 631 (1972) (Stewart, J., dissenting) (criticizing the Court for deciding an issue not contained in the petition for certiorari or the briefs, and raised only tangentially in oral argument), *with* Connor v. Finch, 431 U.S. 407, 430 (1977) (Powell, J., dissenting) (criticizing the majority opinion by Justice Stewart for providing a remedy that had not been requested by any party).

Justice O’Connor: *compare* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 67–68 (1993) (O’Connor, J., concurring in judgment) (disagreeing with the Court’s decision of the ripeness issue that was not considered below and was briefed only in passing), *with* Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 540 (1999) (O’Connor, J.) (approving consideration of issues waived by the parties below and in certiorari petition because they were essential to consideration of the case), and *id.* at 552–53 (Stevens, J., dissenting) (complaining that the issue discussed by Court was not briefed by the parties because they agreed the issue was not before the Court).

For other examples, see Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1045 n.88 (1998) (citing inconsistent positions taken by Judge Lawrence Silberman) and Easterbrook, *supra* note 18, at 880.

Even the Supreme Court Rules reflect this tension. Rule 24(1)(a) provides that the merits brief may not raise additional questions or change the substance of the questions presented in the writ of certiorari or jurisdictional statement. SUP. CT. R. 24(1)(a). At the same time, Rule 24(1)(a) provides: “At its option, however, the Court may consider a

Although the concern has been largely unstated, sua sponte decisions trouble judges because due process interests are implicated when a court recasts the questions presented and decides a case on issues not discussed by the parties without remanding or providing an opportunity for briefing. The fundamental core of due process is that a party should have notice and a meaningful opportunity to be heard before a claim is decided.²³ The adversary system is based on the premise that allowing the parties to address the court on the decisive issue increases the accuracy of the decision. In addition, it increases the parties' sense that the court's process and result are fair.²⁴

In 1997, the Supreme Court indicated a preference, but not a requirement, for requesting supplemental briefing when a court raises a new issue sua sponte.²⁵ But the Supreme Court has never squarely decided whether due process prevents an appellate court from raising new issues without giving the parties a chance to be heard. As far back as 1940, the Court accepted certiorari on the question of whether an appellate court could decide a case "on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence."²⁶ That case was decided, however, on other grounds.

The absence of a consistent principle leaves courts open to the accusation that ignoring the adversary process is a political action, where a court reaches out to legislate instead of following judicial norms.²⁷ But

plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." *Id.*; see also *Glover v. United States*, 531 U.S. 198, 205 (2001) (stating that Supreme Court Rule 14.1(a) limits certiorari to the issue presented). See generally Edward A. Hartnett, *Deciding What to Decide: The Judges' Bill at 75*, 84 JUDICATURE 120, 124-27 (2000) (discussing how the Court's implementation of certiorari to limit review to particular issues is contrary to the original understanding that certiorari review would bring up the entire case).

23. See, e.g., *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465-68 (2000) (stating that the trial court could not enter a judgment against a new party on an amended claim without giving the party time to respond and an opportunity to be heard); *Lachance v. Erickson*, 522 U.S. 262, 266 (1998); see also, e.g., *Bush v. Gore*, 531 U.S. 98, 109-10 (2000) (suggesting that due process required the Florida Supreme Court to provide the "opportunity for argument" before it created a statewide standard for manual recounts in the presidential election).

24. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); see also *infra* notes 54-58 and accompanying text.

25. See *Trest v. Cain*, 522 U.S. 87, 92 (1997) (declining to decide whether the Fifth Circuit was permitted to raise an issue in a habeas case sua sponte, but expressing preference in dicta for supplemental briefing).

26. *LeTulle v. Scofield*, 308 U.S. 415, 416 (1940).

27. See Rosemary Krimbel, Note, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 919-20 & n.6, 942-43 (1989) (criticizing the sua sponte Supreme Court rehearings as raising countermajoritarian difficulty and possibly violating case and controversy requirement (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 3-7, 29-33 (1960))).

raising and deciding new issues is by no means limited to any one part of the political spectrum. Liberal and conservative judges alike decide new issues sua sponte; each side complains when the other does it.²⁸

There are four serious questions at stake: First, why do appellate courts have so much trouble taking consistent positions on waiver and raising issues sua sponte? Second, when are parties entitled to notice and an opportunity to be heard before an appellate court decides an issue? Third, what should appellate courts do if they believe that the right issue governing the case has not been raised, and they want to raise it sua sponte? Fourth, under what substantive circumstances should courts raise issues sua sponte, and when should they treat the issue as waived?

Although these questions raise fundamental concerns about the role of appellate courts, the adversary system, and due process, they have received surprisingly little attention.²⁹ This Article explores the

28. Chief Justice Burger, and Justices Harlan, Stewart, Marshall, and O'Connor have all criticized sua sponte decisionmaking. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 67–68 (1993) (O'Connor, J., concurring in judgment) (disagreeing with the Court's decision of the ripeness issue that was not considered below and was briefed only in passing); *McCleskey v. Zant*, 499 U.S. 467, 522–23 (1991) (Marshall, J., dissenting) (criticizing the Court for deciding an issue that was not litigated or briefed below, and not argued in response to the question presented by the Court); *United States v. Feola*, 420 U.S. 671, 696–97 (1975) (Stewart, J., dissenting) (deciding a criminal case); *Gravel v. United States*, 408 U.S. 606, 631 (1972) (Stewart, J., dissenting) (pertaining to a grand jury proceeding); *Stanley v. Illinois*, 405 U.S. 645, 659–61 (1972) (Burger, C.J., dissenting) (criticizing the Court for raising a due process issue sua sponte without briefing and argument); *Utah Pub. Serv. Comm'n v. El Paso Nat'l Gas Co.*, 395 U.S. 464, 473–76 (1969) (Harlan, J., dissenting) (criticizing the Court for enforcing the Court's prior mandate sua sponte and without full briefing and argument when the parties had settled, and claiming that the Court's desire to "do justice" was improper); *Stevens v. Marks*, 383 U.S. 234, 246–48 (1966) (Harlan, J., concurring and dissenting) (noting that the Court decided the case on an issue that was missed below and not contained in the petition for certiorari).

29. Professor Robert Martineau wrote an entertaining article on a closely related subject: what an appellate court should do when a party tries to raise a new issue. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987). Professor Martineau's article has been cited both for its merits and for its citation to the work of Gary Larson. *Id.* at 1057 n.137. See also Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts I–III), 7 WIS. L. REV. 91, 160 (1932), 8 WIS. L. REV. 147 (1933); Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958–59); Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985 (1989); Miller, *supra* note 22, at 1049–51; David William Navarro, Comment, *Jury Interrogatories and the Preservation of Error in Federal Civil Cases: Should the Plain-Error Doctrine Apply?*, 30 ST. MARY'S L.J. 1163 (1999); Ernest H. Schopler, Annotation, *What Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised by the Parties*, 42 L. Ed. 2d 946 (1976).

questions raised by sua sponte dispositions in civil cases.³⁰ Part II explores how the age-old tension between law and equity is the source of much confusion by the courts. Part III discusses the “adversary process model” of litigation, and shows its relationship to the waiver doctrine. Part IV discusses how the courts’ desire to do equity leads both to sua sponte decisions and to unpredictability in the courts’ decisionmaking. Part V explores whether sua sponte appellate decisions of unbriefed issues violate due process. Part VI proposes that appellate courts should give the parties notice and an opportunity to be heard when they raise an issue sua sponte. Part VII concludes with suggestions on the most difficult problem—when a court should raise new issues sua sponte.

II. WHY COURTS ARE INCONSISTENT: THE UNRESOLVED TENSION BETWEEN LAW AND EQUITY

Courts are confused about the power to raise and decide issues sua sponte because our appellate system embraces two conflicting historical ideas about adjudication. The first is the idea of the adversary process; the second is the courts’ desire to see that justice is done.³¹ The first model assumes a court is an umpire who calls balls and strikes; the second expects judges to step in to prevent injustices occurring before their eyes.³²

30. Because the policy considerations and rules governing criminal cases are different, this Article will focus on civil cases (though some of the governing Supreme Court rules derive from criminal and habeas cases). The role of a court to intervene to assure that justice is done is arguably stronger in a criminal case. This may underlie the recognition of the broader scope of the plain error doctrine in criminal cases. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416, 436–43 (1996) (Stevens, J., dissenting) (discussing the scope of the court’s powers to act sua sponte in criminal cases); Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 KAN. L. REV. 947 (1998); Martha C. Warner, *Anders in the Fifty States: Some Appellants’ Equal Protection Is More Equal than Others’*, 23 FLA. ST. U. L. REV. 625, 639–41 (1996) (discussing the scope of the court’s obligation to find issues sua sponte when counsel wishes to withdraw in a criminal appeal). Plain error is not always recognized as a ground for review in civil cases. *See infra* notes 50–52 and accompanying text.

31. *See Martineau, supra* note 29, at 1026–28; Krimbel, *supra* note 27, at 941 (stating that “control of the issues by the litigants is central to our adversarial system of law”).

32. This tension is illustrated by an oft-told anecdote from Judge Learned Hand: [Holmes] was to me the master craftsman certainly of our time; and he said: “I hate justice,” which he didn’t quite mean. What he did mean was this. I remember once I was with him; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupé. When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: “Well, sir, goodbye. Do justice!” He turned quite sharply and he said: “Come here. Come here.” I answered: “Oh, I know, I know.” He replied: “That is not my job. My job is to play the game according to the rules.”

The conflict is a byproduct of the merger of law and equity. In the old English law courts, lower courts addressed cases brought under specific pleading rules, or forms of action. Appellate courts did not review trial court decisions *de novo*, but instead entertained a “writ of error.” The writ evolved from an independent action against the trial judge or jury for a false judgment or verdict.³³ A writ of error was required to “assign” specific issues in which the trial court made an error under existing precedent or analogies to that precedent.³⁴ The appellate court’s job was to determine if an error occurred, not to substitute its judgment as to who should prevail on the merits. Appellate courts were not free to raise new issues *sua sponte*; issues not assigned as error were waived.³⁵

At the same time, English equity courts decided cases not fitting within the existing rules of law.³⁶ Equity courts dispensed justice that fit the facts of the case, within general rules. Appellate courts in equity were free to consider any issue *de novo*, whether an issue of law or fact.³⁷ Unlike the law courts, equity developed flexible procedures to address the needs of individual cases. One of those procedures was the device of rehearing, which allowed the court to address new facts or law not originally raised by the parties. A showing of legal error was not

Michael Herz, “*Do Justice!*”: *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 146 (1996) (alteration in original) (quoting LEARNED HAND, *A Personal Confession*, in *THE SPIRIT OF LIBERTY* 302, 306–07 (Irving Dilliard ed., 3d ed. 1960)). Professor Herz’s essay explores the political uses to which this anecdote has been put as well as the tension between concepts of law and justice.

33. See Martineau, *supra* note 29, at 1026; Dennerline, *supra* note 29, at 985–86.

34. The Supreme Court’s original appellate jurisdiction was by writ of error. See Krimbel, *supra* note 27, at 924 (citing Judiciary Act of 1789, ch. 20, §25, 1 Stat. 73, 85–86 (1789)). Certiorari review was not introduced until 1891. *Id.* at 925 (citing Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891)).

35. Because the appellate court was limited to assigned issues, it could rule only on questions reflected in the record, for that was the only basis to determine the lower court’s rulings. At the time, the record consisted of documents filed in court. Since verbatim transcripts were not kept, a party could ask the judge or a third party to record in writing the action or inaction of the judge and the party’s exception to the ruling. This bill of exceptions became the basis for the appeal. See generally Martineau, *supra* note 29, at 1026–27; Dennerline, *supra* note 29, at 986; Krimbel, *supra* note 27, at 924, 927–30.

36. Krimbel, *supra* note 27, at 928 (“[E]quity exists for circumstances ‘wherein the law (by reason of its universality) is deficient.’” (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 61 (1765))).

37. Martineau, *supra* note 29, at 1027 (stating that the “appellate court could review the entire case, both law and facts, and render any type of judgment it thought justice demanded, without regard to whether the issue upon which the appellate court based its judgment had been presented to the lower court”); Dennerline, *supra* note 29, at 986.

required for a rehearing in equity.³⁸

Federal courts (and most state courts) long ago merged law and equity. One set of appellate courts administers both systems.³⁹ Nevertheless, American appellate procedures are overtly based on the principles of writ of error review at common law, rather than the appeal in equity.⁴⁰ Some commentators, prominently including Dean Roscoe Pound, have criticized this choice, saying that focusing on error limits the courts' proper concern for justice.⁴¹ In spite of criticism, the writ of error approach, with its emphasis on the adversary process, remains the dominant theory of appellate review.⁴² Under the surface, the historic tensions underlying law and equity persist, and still compete in the workings of appellate courts.⁴³

III. PROCEDURAL REGULARITY: THE ADVERSARY PROCESS MODEL

The adversary process model of appeal brings with it a set of procedural principles that derive from the writ of error and underlie the conventional role of appellate courts.

A. The "General Rule": Appellate Courts Only Consider Issues Raised by the Parties

1. Appellate Courts Will Not Consider Issues Not Raised in the Trial Court

What Professor Robert Martineau refers to as the "general rule"⁴⁴ was stated by the Supreme Court in *Singleton v. Wulff*:⁴⁵ "It is the general rule, of course, that a federal appellate court does not consider an issue

38. See Krimbel, *supra* note 27, at 927–30.

39. See *id.* at 927.

40. See Martineau, *supra* note 29, at 1027–28; see also Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7–8 (1940) ("To this day . . . we employ formal assignments of error because six hundred years ago the judge was held to be entitled to know what were the charges against him . . .").

41. See Martineau, *supra* note 29, at 1027–28 (citing ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 107–10, 318–20 (1941)); Sunderland, *supra* note 40, at 7–8. The idea that law should be about justice and not rules was a theme of the legal realists. See Martineau, *supra* note 29, at 1028 (citing ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 107–10, 318–20, 374–76 (1941)). See generally Sunderland, *supra* note 40.

42. See Martineau, *supra* note 29, at 1028.

43. See, e.g., Krimbel, *supra* note 27, at 930 (commenting that the equitable decision to rehear a case does not follow from common law and may proceed from concepts as varied as "fairness," "moral good," and "justice").

44. Martineau, *supra* note 29.

45. 428 U.S. 106 (1976).

not passed upon below.”⁴⁶ Several provisions of the Federal Rules of Civil Procedure require that issues be raised in the trial court, or they will be treated as waived.⁴⁷ Even if a party briefs and argues a question in the appellate court, it will be considered waived if not argued below.⁴⁸ Further, an issue must have been presented in a timely fashion below; if presented too late to the trial court, it is waived.⁴⁹

Another formulation of the waiver doctrine is that there is no plain error review available in civil cases.⁵⁰ This differs from criminal

46. *Id.* at 120; *accord* *Glover v. United States*, 531 U.S. 198 (2001); *see* Martineau, *supra* note 29, at 1023, 1044.

It is a long-standing rule that, in order to be reviewable on appeal, a claim or issue must have been “pressed or passed upon below.” The reason for such a rule is obvious: “[analyzing] the facts of a particular [issue] without the benefit of a full record or lower court determination is not a sensible exercise.” A claim or an issue is “pressed or passed upon below” when it fairly appears in the record as having been raised or decided.

19 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 205.05[1], at 205–55 (3d ed. 2002) (footnotes omitted) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (quoting *Lytle v. Householf Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990))); *accord* ROBERT STERN ET AL., *SUPREME COURT PRACTICE* 344 (7th ed. 1993) (collecting cases); 17 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4036, at 9–10 (2002) (collecting cases).

After stating the general rule, the Court in *Singleton* proceeded to say there is “no general rule.” *Singleton*, 428 U.S. at 121; *see also* Martineau, *supra* note 29, at 1023, 1044; *infra* notes 122–27 and accompanying text.

47. These include Rule 12(h), FED. R. CIV. P. 12(h) (stating that certain defenses waived if not raised at first opportunity), Rule 46, FED. R. CIV. P. 46 (stating that party must advise trial court of action requested and grounds therefor), and Rule 51, FED. R. CIV. P. 51 (stating that party must raise issues by instructions and objections).

48. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (remanding the case because the parties had raised an issue not presented below); *Hill v. California*, 401 U.S. 797, 805 (1971) (deciding a criminal case); Martineau, *supra* note 29, at 1028–29. *But see* *Stanley v. Illinois*, 405 U.S. 645 (1972) (deciding the case on a ground raised sua sponte by the Court); *id.* at 659–60 (Burger, C.J., dissenting) (pointing out that Justice White wrote flatly inconsistent majority opinions for the Court in *Stanley* and in *Hill*).

49. *See, e.g.*, FED. R. CIV. P. 51 (requiring a timely objection to jury instruction); *Peña v. Mattox*, 84 F.3d 894, 903 (7th Cir. 1996) (Posner, C.J.) (stating that a claim for false arrest was not raised until after the judgment was waived, even though the facts were pleaded in the complaint); Carter, *supra* note 30, at 947. An issue can also be presented too early to the trial court. *See* *Wilson v. Williams*, 182 F.3d 562, 566–67 (7th Cir. 1999) (en banc) (deciding that when the trial judge makes the conditional or the tentative ruling on the pretrial objection, the party must renew the objection during trial to preserve the position for appeal).

50. *See* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 276–77 & 276 n.7 (1981) (Brennan, J., dissenting); *Carter v. Chicago Police Officers*, 165 F.3d 1071, 1077–78 (7th Cir. 1998) (finding no civil plain error for jury instructions); *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1216 (7th Cir. 1993) (Cudahy, J., concurring in

procedure, where appellate reversal for plain error is included in the Federal Rules of Criminal Procedure⁵¹ and is necessary to protect defendants' rights. As a logical matter, the absence of review for plain error is the flip side of the waiver rule; allowing plain error review would relieve parties of the consequences of their waivers.⁵²

2. Arguments Not Raised in the Briefs Are Usually Treated as Waived

Similarly, issues must be briefed in the appellate court or they will be treated as waived.⁵³ The policy underlying that rule overlaps the policy in *Singleton* requiring that issues be raised in the trial court—it wouldn't be fair to decide cases on issues where the parties had no opportunity to introduce evidence or make their best arguments. As Justice Scalia (then Circuit Judge) 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."⁵⁴

3. Justifications for the General Rule of Waiver

In *Singleton*, the Court gave three reasons for the general rule. First, the waiver rule makes it more likely the parties will offer all the evidence they believe relevant to the issues; if a party does not know an issue will be decided, it may choose not to offer evidence.⁵⁵ Second, it prevents the court from making an uninformed decision, because the

part and dissenting in part); *Kensington Rock Island Ltd. P'ship. v. Am. Eagle Historic Partners*, 921 F.2d 122, 125 n.2 (7th Cir. 1990); *Dillipaine v. Lehigh Valley Trust Co.*, 322 A.2d 114, 177 (Pa. 1974) (abolishing the plain error rule in civil cases); *see also* Martineau, *supra* note 29, at 1052–55 (arguing strongly that the rationale of the plain error rule does not apply to civil cases because waiver concerns are present and because the integrity of justice concerns present in criminal cases are usually absent).

51. Compare FED. R. CIV. P. 30, and FED. R. CIV. P. 52, with FED. R. CIV. P. 46, and FED. R. CIV. P. 51, and FED. R. CIV. P. 61. *See generally* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2558, at 468–69 (1995).

52. Plain error review is only available when errors have been waived. If the error has been asserted below, no waiver has occurred. *See* Martineau, *supra* note 29, at 1040 (arguing that if the plain error had been pointed out to the trial court, it would have in many cases reached the other result (because the error was so plain), obviating the need for appeal).

53. Examples of such rulings are discussed *infra* notes 70–83 and accompanying text.

54. *See, e.g.*, *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *cf.* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 408 (1995) (O'Connor, J., dissenting) (stating that the waiver rules rest upon a limited view of judicial power).

55. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). A trial court may also preclude the introduction of evidence if an issue has not been raised.

court has no idea what evidence the party might have offered if it had been given an opportunity.⁵⁶ Third, as a matter of fairness, parties should have the opportunity to present legal arguments on the issue decided.⁵⁷ As noted above, there is a sense that “it would not be quite cricket” to place decision on a ground not raised until the oral argument on appeal, because the other party may have been lulled into presenting its case differently.⁵⁸

In addition to the adversary process, the waiver rule has been justified by the need for efficiency: waiver rules mean that the trial court’s effort is not wasted. They also allow an appellate court to dispose of a case immediately—without more briefing, arguments, or remands. In a time when courts complain about their dockets, this is an important factor.⁵⁹

56. *Id.*; see also *Neitzke v. Williams*, 490 U.S. 319, 329–30 & 329 n.8 (1989) (discussing the importance of notice and opportunity for argument prior to ruling on a dismissal motion under Rule 12(b)(6) and reserving ruling on propriety of trial court sua sponte dismissals under that rule).

57. *Singleton*, 428 U.S. at 120; see also *Schopler*, *supra* note 29, at 949. For other reasons for the general rule, see *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720–21 (10th Cir. 1993) (collecting cases); *Carter*, *supra* note 30, at 950; *Martineau*, *supra* note 29, at 1028–34; *Dennerline*, *supra* note 29, at 986–88; *Vestal*, *supra* note 29, at 487–95.

58. *Principal Mut. Life Ins. Co. v. Charter Barclay Hosp., Inc.*, 81 F.3d 53, 56 (7th Cir. 1996); see *Miller*, *supra* note 22, at 1050.

59. As Professor Martineau noted, waiver rules derive from the premise that rules of procedure are necessary to a final resolution of a dispute. Waiver rules require parties to assert their rights and positions at the first opportunity. Otherwise, parties can benefit from their own inaction, and cases may never end. *Martineau*, *supra* note 29, at 1030–31. The general rule prevents parties from inviting alleged error in the trial court (taking a chance they would win on another ground) and reversing their position in the appellate court (to make sure they would win on the ground where error had been invited). See Michelle Lawner, Comment, *Why Federal Courts Should Be Required to Consider State Sovereign Immunity Sua Sponte*, 66 U. CHI. L. REV. 1261, 1282–86, 1283 n.124 (1999) (citing *Wisconsin Dep’t of Corrs. v. Schacht*, 524 U.S. 381, 393–98 (1998) (Kennedy, J., concurring)).

The Tenth Circuit in *Lyons* also identified a number of ways in which concerns of waiver can arise:

One is a bald-faced new issue. Another is a situation where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial. A third is a theory that was discussed in a vague and ambiguous way. A fourth is issues that were raised and then abandoned pre-trial. A fifth is an issue raised for the first time in an untimely motion. These are all different aspects of the same principle that issues not passed upon below will not be considered on appeal.

Lyons, 994 F.3d at 722.

4. Expansion of the Waiver Doctrine

Courts have expanded waiver in recent years.⁶⁰ Courts now treat as waived even issues that were raised in the briefs, because they were not briefed with sufficient detail.⁶¹ Arguments in footnotes,⁶² of just one page or less,⁶³ without citation of authority,⁶⁴ incorporating briefs presented below,⁶⁵ or presented for the first time in reply briefs⁶⁶ or oral argument⁶⁷ have been rejected.⁶⁸ Even claims of waiver have been deemed waived because they were not raised at the first possible time.⁶⁹

60. Perhaps this is a response to perceptions of court crowding or a reaction to judicial activism. Courts hearing civil cases may also have been influenced by the rulings in postconviction cases that prisoners cannot challenge their convictions if issues were not raised in their direct appeals. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Murray v. Carrier*, 477 U.S. 478, 486 (1986).

61. *See, e.g.*, *Ladner v. United States*, 358 U.S. 169, 172–73 (1958); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 780–81 (7th Cir. 1999) (stating that a novel theory was waived because it was insufficiently developed); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 n.1 (2d Cir. 1994) (stating that the issue was raised but not sufficiently developed); *see also* *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 230 (7th Cir. 1992) (stating that a party loses if the brief fails to “make a minimally complete and comprehensible argument” for each claim, regardless of the claim’s merits).

62. *See* *Cooper v. Parsky*, 140 F.3d 433, 441–42 (2d Cir. 1998) (stating that a contention is waived when it is asserted for the first time in a footnote in a reply brief).

63. *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1480 (11th Cir. 1997) (stating that an issue that is stated but not argued is waived); *Palmquist v. Selvik*, 111 F.3d 1332, 1342 (7th Cir. 1997) (stating that an issue that is stated in a single paragraph is waived); *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir. 1994) (stating that an argument raised in one page without authority is waived); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (stating that an issue is abandoned if it is raised but not supported by argument).

64. *See* *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 726–27 n.2 (7th Cir. 1998) (stating that an argument that is unsupported by pertinent authority is waived); *Mathis v. New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998) (stating that even a pro se litigant must file an argument citing supporting authority); *LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 921–22 (7th Cir. 1997) (stating that the failure to cite authority constitutes a waiver); *In re Maurice*, 21 F.3d 767, 774–75 (7th Cir. 1994) (stating that the court will not do a party’s legal research).

65. *See* *Pitsonbarger v. Gramley*, 141 F.3d 728, 740 (7th Cir. 1998) (stating that the court will not consider an argument if it refers to arguments presented to the district court).

66. *See, e.g.*, *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997).

67. *See* *Frobese v. Am. Sav. & Loan Ass’n of Danville*, 152 F.3d 602, 612–13 (7th Cir. 1998); *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995) (Posner, C.J.) (stating that a claim that discovery cutoff prevented the plaintiff from proving that the defendants’ employees knowingly placed a child whom was beaten in danger was waived because it was not raised in the brief).

68. The severity of the rule that arguments are waived if not properly developed is heightened by increasing insistence that parties adhere to strict page limits. *See* *Chicago Council of Lawyers*, *supra* note 8, at 703–05.

69. *See, e.g.*, *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000) (Posner, C.J.); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 790 (7th Cir. 1999)

B. Under the Adversary Process Model, Waiver Can Lead to Harsh Results

But strict enforcement of waiver rules can lead to very harsh results. Three Seventh Circuit cases illustrate this point. In each case, the facts were before the court, but the correct legal doctrine had not been argued.

Two are discrimination cases, where plaintiffs with potentially meritorious claims lost because their lawyers advanced the wrong theory. In *Sanders v. Village of Dixmoor*,⁷⁰ a police officer was suspended by a new police chief with the words, “Nigger, you’re suspended.”⁷¹ The court ruled that the plaintiff’s discrimination claim had been waived because it had been erroneously argued as a harassment claim.⁷² In *DeClue v. Central Illinois Light Co.*,⁷³ a female lineman challenged her company’s practice of failing to provide a restroom for her to use during work performed outdoors. The court ruled that her disparate impact claim was waived because she had only argued sexual harassment.⁷⁴

A classic case of the harshness of waiver—with a result even the court handing down the decision viewed as unjust on the merits—is Judge Posner’s opinion in *Hartmann v. Prudential Insurance Co. of America*.⁷⁵ In *Hartmann*, the court applied the waiver rule against orphans whose stepmother killed their father after bribing an insurance agent to defraud the orphans. The orphans sued for fraud and equitable reformation of the policies.⁷⁶ There was no question of guilt—the wife and insurance agent were convicted of mail fraud in connection with the murder.⁷⁷ The Seventh Circuit held that the court could not grant reformation of the contract, but that fraud damages were theoretically available. In oral

(Posner, C.J.). In recent years, courts have been willing to raise sua sponte procedural defaults in habeas cases even if the state has waived the argument by failing to raise it. See, e.g., *Kurzawa v. Jordan*, 146 F.3d 435, 440 (7th Cir. 1998); *Magouirk v. Phillips*, 144 F.3d 348, 357–60 (5th Cir. 1998) (collecting cases); see also *Calderon v. Thompson*, 523 U.S. 538, 547–49 (1998) (discussing the sua sponte recall of mandates in habeas cases).

70. 178 F.3d 869 (7th Cir. 1999).

71. *Id.*

72. *Id.* at 870.

73. 223 F.3d 434 (7th Cir. 2000) (Posner, J.).

74. *Id.* at 436–37. A dissent by Judge Rovner disagreed with the court’s sexual harassment ruling but did not challenge the waiver holding. *Id.* at 437–40.

75. 9 F.3d 1207, 1214 (7th Cir. 1993).

76. *Id.* at 1208–09.

77. See *United States v. Hartmann*, 958 F.2d 774, 778 (7th Cir. 1992).

argument, however, the plaintiffs' lawyer said—incorrectly—that reformation was required before damages were available.⁷⁸ Because the plaintiffs' lawyer did not argue the correct grounds, the Seventh Circuit applied waiver and refused to reach the correct result *sua sponte*.⁷⁹ In discussing the applicable policies, Judge Posner wrote:

We are not happy with this result. This is a sympathetic case for the plaintiffs. But we cannot have a rule that in a sympathetic case an appellant can serve us up a muddle in the hope that we or our law clerks will find somewhere in it a reversible error. One consequence of such an approach would be that prudent appellees would have to brief issues not raised or pressed by appellants lest the appellate court fasten on such a (non)issue and use it to upend the judgment of the trial court. So briefs would be even longer than they are, and their focus even more diffuse. Another consequence would be to diminish the responsibility of lawyers and to reduce competition among them, since the court would tend to side with the weaker counsel even more than it does anyway, at least when his was the more appealing case. Our system unlike that of the Continent is not geared to having judges take over the function of lawyers, even when the result would be to rescue clients from their lawyers' mistakes. The remedy, if any, for the questionable tactical decisions apparently made by the plaintiffs' counsel in this case lies elsewhere.⁸⁰

After explaining why the adversary process model requires waiver, Judge Posner acknowledged that courts sometimes have not followed that model, but explained why those cases were different:

It is true that courts sometimes relieve parties from the consequences of their waivers, even if the case does not fall within one of the established exceptions such as those for issues of jurisdiction or comity. We did that in a recent case where the defendant had waived an issue in the district court, but it was a pure issue of law fully briefed in our court and we could find “no reason to defer its resolution to another case. There will be no better time to resolve the issue than now.” This is not such a case. Nor is it a case . . . where a court decides to reexamine a precedent so deeply entrenched in the law that a litigant might not think to challenge it . . .⁸¹

Judge Posner concluded that the plaintiffs were not entitled to relief from the waiver rule in *Hartmann* because the lawyer had told the

78. *Hartmann*, 9 F.3d at 1213–14.

79. The court stated:

We would not be disposed to hold the plaintiffs' lawyer to a concession made in the distracting atmosphere of an oral argument. But we have searched his briefs in this court in vain for any hint of an argument that the fraud case against Loochtan and Debra can survive the dismissal of the claim against Prudential. There is nothing. This is a case neither of a ground abandoned in the district court and sought to be revived here, nor of a ground pressed in the district court and abandoned here—and either would be a case of waiver.

Id. at 1214. Chief Judge Posner added that the plaintiffs' counsel had his arguments “backwards.” *Id.*

80. *Id.* at 1214–15. Judge Cudahy dissented in part, preferring to apply a different agency rule. He grudgingly accepted, however, that the plaintiffs had waived the fraud claim. *Id.* at 1215–16.

81. *Id.* at 1214–15 (citations omitted).

appellate court he was not advancing what later proved to be the correct theory, “but the court’s independent research and reflection persuade the court that the lawyer is wrong.”⁸² The plaintiffs were bound by their lawyers’ mistake because: “If reversal on such grounds is proper, we no longer have an adversary system of justice in the federal courts.”⁸³

Hartmann cries out for a different result. If there were ever a case where a strict application of waiver in private litigation seems inappropriate on its facts, it would seem to be a case involving orphans (whose father’s killing was arranged by their stepmother) suing an insurance company whose agent had been bribed. The *Hartmann* judges seemed to share this view, but felt bound by doctrine. What else could they have done?

IV. DOING JUSTICE, REGARDLESS OF THE PROCEDURAL STATUS

A. *The Tradition of Equity and the Federal Courts*

Because judges also see their role as doing justice in the tradition of equity (or at least avoiding miscarriages of justice), courts frequently refuse to apply the waiver rule and instead raise issues *sua sponte*. This theory of the judicial role is also consistent with portions of the Federal Rules of Civil Procedure.

The original theory of the Federal Rules was to create a more flexible system of justice. Many provisions were deliberately designed to abolish the old forms of action and “theory of the pleadings” approaches of the English law courts.⁸⁴ These provisions include Rule 15(b), allowing liberal amendments to conform to the evidence, even at or after trial, and Rule 54(c), allowing a court to “grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.”⁸⁵ Rules 15(b) and 54(c) are in

82. *Id.* at 1215.

83. *Id.* Judge Cudahy dissented in part, seeing no reason not to apply an agency rule contrary to that applied by the court because it was supported by prior precedent. He grudgingly accepted, however, that the plaintiffs had waived the fraud claim. *Id.* at 1215–16.

84. See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1219, at 188–95 (2d ed. 1990). Federal Rules “make[] it very plain that the theory of the pleadings mentality has no place under federal practice.” *Id.* at 190.

85. FED. R. CIV. P. 54(c). In addition, 28 U.S.C. § 2106 authorizes the courts of appeals to reach a result that is just under the circumstances. 28 U.S.C. § 2106 (2000). This has been used as justification in exceptional circumstances for bypassing the waiver

tension with strict application of waiver law and stand for an opposing principle—the courts’ desire to reach justice on the merits.⁸⁶

The adoption of the Federal Rules was followed by decisions endorsing the equity model. A good example is Justice Black’s opinion for the Court in *Hormel v. Helvering*.⁸⁷ There, the Court approved consideration of an issue not squarely presented before a trial court:

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.⁸⁸

This desire for justice was recently restated by Justice Stevens. In *Carlisle v. United States*, he wrote that a judge is “more than a referee whose authority is limited to granting or denying motions advanced by the parties.”⁸⁹ Quoting Learned Hand, he noted that a “judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary.”⁹⁰ Justice Stevens explained that every court of justice has a power “to correct that which has been wrongfully done by virtue of its process.”⁹¹

B. The Tension Between Doing Justice for the Parties and Stating Broad Rules for Future Cases

In addition, courts are influenced by another dichotomy—the tension between deciding cases principally for the parties and the view that appellate courts should issue opinions that state broad rules of general applicability that will guide future conduct. Both the desire to do justice and the idea of setting forth broad rules can lead judges to go beyond the issues presented by the adversary process.

rule. See Mitchell J. Waldman, Annotation, *When Will Federal Court of Appeals Review Issue Raised by Party for First Time on Appeal Where Legal Developments After Trial Affect Issue*, 76 A.L.R. FED. 522, 525 (1986).

86. See Martineau, *supra* note 29, at 1030–31 (noting that justice requires a system of rules that the parties must obey).

87. 312 U.S. 552 (1941).

88. *Id.* at 557. See Dennerline, *supra* note 29, at 993–94; see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246–47 n.12 (1981) (“We may consider questions outside the scope of the . . . order [granting review] when resolution of those questions is necessary for the proper disposition of the case.”).

89. *Carlisle v. United States*, 517 U.S. 416, 437 (1996) (Stevens, J., dissenting).

90. *Id.* (quoting *Brown v. Walter*, 62 F.2d 798, 799 (2d Cir. 1933)).

91. *Carlisle*, 517 U.S. at 437 (Stevens, J., dissenting) (quoting *Arkadelphia Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 146 (1919)). Although the quote discusses a trial court’s power in a criminal case, the broad statement of principle was not so limited.

The adversary process model is focused on doing justice for the parties before the court. As Justice Ginsburg (then Judge) wrote: “First, courts strive to ‘get it right’—to reach a correct result in the case at hand.”⁹² This is undoubtedly the view of almost all litigants.⁹³

As discussed above, within this focus the tension between enforcing procedural norms and doing justice leads courts to sometimes find injustice and to raise issues *sua sponte*. But appellate courts are also affected by the view that their job is to provide broad rules for future cases.⁹⁴ Focusing on judicial economy or the need to guide litigants in their conduct, courts will sometimes discuss issues that are not ripe, by strict procedural standards.⁹⁵ Judge Posner expressed this view in his book about Justice Cardozo:

It was a good point, well worth making, and more useful for the guidance of bench and bar than an interpretation of a particular contract. Legal craft values in a traditional sense that emphasizes meticulous accuracy and an unwavering duty to place decision on the narrowest possible ground are here compromised in pursuit of a larger sense of judicial responsibility.⁹⁶

1. Relaxing Procedural Rules to Decide Important Issues

The disregard of procedural limits to articulate broad guidelines for future conduct is illustrated in several different types of cases. It can be seen in cases that present issues that, while not raised *sua sponte*, would normally not be reached because they were not necessary to the decision.⁹⁷ In *American Manufacturers Mutual Insurance Co. v.*

92. Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 206 (1985).

93. See Chicago Council of Lawyers, *supra* note 8, at 684–85; Krimbel, *supra* note 27, at 930.

94. See Hartnett, *supra* note 22, at 124–27; Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–27 (1999) (arguing that the judicial function is to decide cases by issuing judgments).

95. Getting an issue right in the abstract is not necessarily the same as getting it right for the litigants in the case. The author always becomes nervous when reading that an opinion has “simplified” the facts. See, e.g., *Fischbein v. First Chi. NBD Corp.*, 161 F.3d 1104, 1104 (7th Cir. 1998) (Posner, C.J.) (“The facts are not in dispute, and we offer an abbreviated and simplified summary.”). Cases are won or lost on those little facts. See Chicago Council of Lawyers, *supra* note 8, at 799.

96. POSNER, *supra* note 21, at 107.

97. For an unconvincing defense of deciding issues unnecessary to the decision, see John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999).

Sullivan,⁹⁸ for example, the Supreme Court held that there was no state action, so 42 U.S.C. § 1983 was inapplicable. The Court nevertheless reached the merits of a Due Process Clause issue. The Court reasoned that it had granted review of the question, and added: “This question has been briefed and argued, it is an important one, and it is squarely presented for review. We thus proceed to address it.”⁹⁹

A similar situation arises where the issue was not preserved but the Court nevertheless decides it. In *City of Newport v. Fact Concerts, Inc.*,¹⁰⁰ the Court acknowledged that the petitioner had failed to preserve an issue below by failing to make a timely objection. The Court decided the issue because it was novel and important, had been briefed by the parties, and had been decided by the district court as an alternate holding. The Court decided that it would further efficient judicial administration to decide the issue.¹⁰¹ The desire to issue a broad rule often influences courts to abandon traditional procedural norms and instead to reach out and decide issues not presented by a case or argued by the parties.¹⁰²

2. *Obiter Dicta*

The desire to guide future conduct also leads to obiter dicta, where a court reaches out to express an opinion on issues not before it. In many cases, judges will spot an issue that has not been briefed, piously refuse to decide it, but then express an opinion. Courts write what they know to be dicta to express their views on unbriefed issues.

Authors of separate opinions frequently criticize unbriefed dicta.¹⁰³

98. 526 U.S. 40, 50–51 (1999).

99. *Id.* at 59; *see also* *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (stating that the Court would consider a question that was fully briefed, important, recurring, and was pending in another certiorari petition, despite the fact that the question had not been presented below).

100. 453 U.S. 247 (1981).

101. *Id.* 255–57. Justice Brennan dissented on the ground that the issue was waived. *Id.* at 271–79 (Brennan, J., dissenting); *see also* *Martineau*, *supra* note 29, at 1040–41 (arguing that if the issue is going to come up in another case anyway, there is no need to reward a party that waived it).

102. *See* *Chicago Council of Lawyers*, *supra* note 8, at 685; *see also* *Krimbel*, *supra* note 27, at 930 (noting the tension between a rehearing sua sponte and the goal of attaining justice for particular litigants).

103. *See* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 221 (1999) (Thomas, J., dissenting) (stating that the Court should not pass on the important question of federalism that was not briefed or argued, even in dicta); *United States Dep’t of Labor v. Triplett*, 494 U.S. 715, 736–37 (1990) (Brennan, J., separate statement) (stating that a court should not sua sponte and without briefs and arguments address a standing issue that is not necessary to the result); *Washington v. Davis*, 426 U.S. 229, 257 (1976) (Brennan, J., dissenting); *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1134 (7th Cir. 1995) (Rovner, J., concurring); *Ill. Corporate Travel, Inc. v.*

Many lawyers also take a dim view of dicta on unbriefed issues: “When the court expresses dicta on an issue that is unbriefed and not supported by a factual record, it necessarily expresses an opinion that is not fully informed. Nevertheless, the dicta will influence the law in the district courts or state courts without being fully considered by . . . the court.”¹⁰⁴

Obiter dicta have been widely criticized as unreliable¹⁰⁵ and violative of proper procedures, because dicta are not based on full briefing and have not received the court’s full consideration.¹⁰⁶ Thus, it has always been the rule that when court opinions go beyond what is necessary to decide a case, the court’s views “may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”¹⁰⁷ When dicta are written, the court is less likely to fully consider the possible effect of the rule on all other cases.¹⁰⁸ Accordingly, dicta are generally viewed as not providing a binding precedent,¹⁰⁹ and will be more freely reversed.¹¹⁰ Nevertheless,

Am. Airlines, Inc., 806 F.2d 722, 731 (7th Cir. 1986) (Flaum, J., concurring in the judgment) (criticizing Judge Easterbrook’s majority opinion for commenting on an issue that was neither briefed nor argued); *Abraham v. Pekarski*, 728 F.2d 167, 175–76 (3d Cir. 1984) (Sloviter, J., concurring); *Stefanac v. Cranbrook Educ. Cmty.*, 458 N.W.2d 56, 83 (Mich. 1990) (Levin, J., dissenting).

104. Chicago Council of Lawyers, *supra* note 8, at 686.

105. See *United States v. Teague*, 953 F.2d 1525, 1536 (11th Cir. 1992) (en banc) (Edmondson, J., concurring in the result) (“[D]icta is inherently unreliable for what a court will do once faced with a question squarely and once its best thoughts, along with briefs and oral argument, are focused on the precise issue.”); Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 713 (1999).

106. See generally Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994).

107. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

108. *Id.* at 399–400; accord *Santamarena v. Georgia Military Coll.*, 147 F.3d 1337, 1342–43 n.13. (11th Cir. 1998); see *United States v. Bennett*, 100 F.3d 1105, 1109–10 (3d Cir. 1996) (commenting that a statement in a prior opinion concerning an issue not briefed or argued on appeal is dicta and is not binding precedent); *Bruns v. Ledbetter*, 583 F. Supp. 1050, 1053 (S.D. Cal. 1984) (stating that “vagrant [appellate] observations about important questions” that sua sponte “went beyond the scope of the questions presented” are “wholly nugatory”); *Roberts v. Labor and Indus. Relations Comm’n*, 869 S.W.2d 139, 142–43 (Mo. Ct. App. 1993) (stating that sua sponte comments in an earlier opinion were obiter dictum and were not controlling).

109. See, e.g., *Watt v. Ann Arbor Bd. of Educ.*, 600 N.W.2d 95, 98 (Mich. Ct. App. 1999). But see *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 388–89 & n.5 (1988) (stating that a decision was not dicta just because the issue was not briefed and that even if it were dicta, the court is still bound by the view of the Federal Circuit).

110. See, e.g., *Scheele v. City of Anchorage*, 385 P.2d 582, 583–84 (Alaska 1963) (reversing an earlier sua sponte retroactivity ruling because dicta were not properly considered); *Flax v. Kansas Tpk. Auth.*, 596 P.2d 446, 449 (Kan. 1979) (stating that

courts often wish to guide future conduct, and write dicta despite the rule.¹¹¹

In writing dicta instead of a holding, the court at least pretends to abide by the waiver rule, which precludes the court from deciding the issue.¹¹² Nevertheless, the court views the issue as too interesting to deprive the world of its views, even if its views do not have the benefit of briefs and have no controlling legal effect.¹¹³

C. Doing Justice by Clarifying What the Parties Presented

Finally, there are situations where an issue is not fully briefed but is necessary to the decision. This can occur when the court feels that the litigants have not raised the proper legal issues or identified the correct principle of law.¹¹⁴

1. Courts Frequently Will Cite to Precedent that the Parties Have Not Raised

The Supreme Court has ruled that appellate courts are free to decide pure questions of law by citing to precedent not cited to the trial court.¹¹⁵ As Judge Posner elaborated:

Judges are not umpires, calling balls and strikes; or judges of a moot court,

dicta are not binding upon the court after it has opportunity for further enlightenment by briefs and arguments).

111. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 46–48 (1994) (arguing that dicta may have greater weight if it was fully considered by the court, even if it turned out not to be necessary to the decision).

112. See *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1280–81 (7th Cir. 1990) (Posner, J.) (commenting sua sponte on an antitrust issue; noting that the government had not raised the issue and therefore had waived it).

113. The *Rockford Memorial* case is a good example of this as well. *Id.*

114. *Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 164 (7th Cir. 1995) (Easterbrook, J.) (“[L]itigants’ failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties’ circumstances.”). After citing this language, Eric Miller added:

Judge Easterbrook’s observation reflects the fact that courts are properly concerned with more than just the interests of litigants. The adjudication of cases generates precedents and clarifies the law, providing benefits to everyone in society. The precedent-generating function of courts is inhibited when courts defer to parties’ incorrect statements of the law rather than declare which legal principles in fact govern the case. Moreover, courts have a valid interest in preserving their own institutional prestige and legitimacy, both of which are reduced when courts decide cases based on incorrect principles of law.

Miller, *supra* note 22, at 1048 (footnotes omitted).

115. See *Elder v. Holloway*, 510 U.S. 510, 511–14 (1994).

awarding victory to the side that argues better . . . 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 . . .¹¹⁶

2. Reframing Issues Pending Before the Court

The Supreme Court has not limited appellate courts to citing new precedent—it has ruled that appellate courts can reframe the legal theories posed by the parties, in order to ensure that the law is correctly decided. As the Court wrote in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*: “[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 . . .”¹¹⁷ The court noted that prohibiting the appellate court from reframing the issues would allow the parties to force the court to misstate the law by agreeing on the legal issue presented.¹¹⁸ This could lead to the opinion of a court on hypothetical acts of Congress or dubious constitutional principles. Accordingly, the Court said it was proper for a court to decide that a law had been repealed—even though that issue had not been raised: “[A] court may consider an issue ‘antecedent to . . . and ultimately dispositive of ‘the dispute before it,

116. *Smith v. Farley*, 59 F.3d 659, 665 (7th Cir. 1995) (citation omitted); *accord Palmer v. Bd. of Educ.*, 46 F.3d 682, 684 (7th Cir. 1995) (Easterbrook, J.) (“A court should apply the right body of law even if the parties fail to cite their best cases.”). It is difficult to reconcile Judge Posner’s opinion in *Principal Mutual Life Insurance Co.* and his observation in *Smith*. Compare *Principal Mut. Life Ins. Co. v. Charter Barclay Hosp., Inc.*, 81 F.3d 53, 56 (7th Cir. 1996) (stating that it “would not be quite cricket” to rest a ground of decision on a ground not raised until oral argument on appeal), with *Smith*, 59 F.3d at 665 (stating the view that “[j]udges are not umpires”). Perhaps it has something to do with the difference between cricket and baseball. For more discussion of the metaphor of judges as umpires, see Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and “The Sex Stuff,”* 28 CONN. L. REV. 813, 832–35 (1996).

117. *United States Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446–47 (1993) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (alteration in original)). In *Kamen*, the Court said that reframing the issues is permitted, but not required; an appellate court has discretion to treat an issue as waived and deprive the party of unfavorable precedent when the party does not raise the issue or precedent in a timely fashion. *Kamen*, 500 U.S. at 100 n.5.

118. *United States Nat’l Bank of Or.*, 508 U.S. at 447.

even an issue the parties fail to identify and brief.”¹¹⁹ Furthermore, the Court stated that a court “need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it.”¹²⁰

Raising cases not cited by the parties is an easily understood exception to the adversary process model. Reframing the legal theories to ensure the law is correctly decided takes the court’s inclination to do justice a little further. It can often be difficult to see the line between new theories and new points.¹²¹ Nevertheless, a rule that appellate courts will reframe issues but not raise new ones is a distinction that is still tethered to seeing that the law is correctly stated and applied. But the Supreme Court has not stopped there.

D. Going All the Way: The Gorilla Rule

In *Singleton*¹²² the Supreme Court discussed when questions may be raised on appeal for the first time (not necessarily *sua sponte*). After stating the general rule that such issues will not be considered, the Court then said there was *no* general rule, and announced what Professor Martineau referred to as the “gorilla rule” (based on the old joke about where a 500 pound gorilla can sit):¹²³

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt or where “injustice might otherwise result.”¹²⁴

After *Singleton*, the general rule is that issues will not be taken up for the first time on appeal, except there is no general rule. Instead, the Court promulgated the gorilla rule—that an issue can be raised for the first time on appeal if it is a really easy issue or if “injustice might otherwise result.”¹²⁵

119. *Id.* (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)).

120. *Id.* (quoting *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment)). See generally *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 622 (1996) (plurality opinion) (“[W]e are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts.”); see also *Miller*, *supra* note 22, at 1045–47.

121. See *Campbell*, *supra* note 29, at 97–98.

122. See *supra* notes 43, 54–55 (discussion of the *Singleton* case).

123. See *Martineau*, *supra* note 29, at 1023.

124. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citation omitted) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

125. *Id.*

Following the gorilla rule, the Court has said that even if an argument is not pressed before it, the Court will feel free to review an issue if the issue was passed on below.¹²⁶ Going a step further are Supreme Court cases that state that once a federal 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.¹²⁷

E. The Gorilla Rule at Work: Areas Where Courts Have Acted Sua Sponte

Despite the difficulty, some lower courts have tried to articulate neutral principles explaining when matters should be considered sua sponte.¹²⁸ But reviewing the types of cases in which the Supreme Court and lower courts have acted sua sponte makes it difficult to articulate consistent general principles for sua sponte action—other than the gorilla rule.¹²⁹

126. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)); *see also* *Thigpen v. Roberts*, 468 U.S. 27, 29 (1984) (relying on the briefs below even though the issue was not briefed in the Supreme Court); STERN ET AL., *supra* note 46, at 344. Indeed, in *Williams*, the Court said that a point just had to have been mentioned by the court below as a settled rule of law. The Court found it important that the United States had argued the point in a prior case below, even though it had not been argued in *Williams*. *Williams*, 504 U.S. at 43–45.

127. *Lebron*, 513 U.S. at 379 (Scalia, J.) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

128. A typical formulation is in *Hardiman v. Reynolds*:

Generally, where the parties have not raised a defense, the court should not address the defense sua sponte. . . .

However, this general rule contains at least two important exceptions. First, a court must raise a defense sua sponte if that defense implicates the court's subject matter jurisdiction. Second, as noted by the Third Circuit, where a "doctrine implicates [nonjurisdictional] values that may transcend the concerns of the parties to an action, it is not inappropriate for the court, on its own motion, to invoke the doctrine."

Hardiman v. Reynolds, 971 F.2d 500, 502–03 (10th Cir. 1992) (citations omitted) (quoting *Brown v. Fauver*, 819 F.2d 395, 398 (3d Cir. 1987)). Although *Hardiman* was a habeas case, the principles here were not limited to habeas actions; *see also, e.g.*, *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1101 (7th Cir. 1992) (stating that the issues not argued below are waived "except in rare cases involving jurisdiction or if justice demands flexibility" (quoting *Magicsilk Corp. v. Vinson*, 924 F.2d 123, 125 (7th Cir. 1991))).

129. *See Martineau*, *supra* note 29, at 1056–59. One way of dealing with a sua sponte issue is to deny that it is being raised sua sponte. As quoted above, the Supreme Court in *United States National Bank of Oregon* said that an appellate court is free to reframe issues in order to apply the proper construction of governing law and avoid deciding a hypothetical or dubious issue. *See* discussion *supra* notes 117–20. But on many occasions when courts act sua sponte, they do not try to characterize their action as

Examples of sua sponte action include the following types of cases.¹³⁰

1. Jurisdiction

The most accepted ground for acting sua sponte is jurisdictional.¹³¹ This is part of the rule that a court is always free to raise subject matter jurisdiction.¹³² As corollaries to the jurisdiction rule, courts often raise sua sponte prudential issues that are related to the courts' power to act and related issues such as standing, capacity, and ripeness.¹³³

2. Limiting Federal Court Power

Because of the increased concerns about the role of the federal courts

just a different ground for review; they recognize that they are raising a new issue but point to some prior court decision that considered a similar new issue. See Martineau, *supra* note 29, at 1034–35 & n.36 (collecting cases).

130. Allan Vestal pointed out that we will usually know that a court has decided an issue sua sponte only if there is a separate opinion raising the point. Vestal, *supra* note 29, at 497.

131. See, e.g., *id.* at 498–502; see also STERN ET AL., *supra* note 46, at 346; Martineau, *supra* note 29, at 1045–46 (collecting cases); Campbell, *supra* note 29, at 100–04; Lawner, *supra* note 59, at 1282–86; Miller, *supra* note 22, at 1040–41 (collecting cases); Schopler, *supra* note 29, at 950–65. A court's having subject matter jurisdiction can be seen as a precondition to Professor Martineau's general rule. See Martineau, *supra* note 29, at 1047.

132. See, e.g., *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Freytag v. Commissioner*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in part and concurring in the judgment) (stating that a subject matter jurisdiction defect must be noticed by the court sua sponte at any point in litigation). While a court will raise the absence of subject matter jurisdiction sua sponte, many federal courts will not raise sua sponte a point that will create jurisdiction. See *Perry R. Pennington Co. v. T.R. Miller Co.*, 994 F.2d 390, 392–93 (7th Cir. 1993) (refusing to take action to correct judgment under Federal Rule of Civil Procedure 60(c), which would restore appellate jurisdiction, because the court had thought of it and counsel had not asked); cf. *Guar. Nat'l Title Co. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) (Easterbrook, J.) (refusing to give lawyers another chance to allege facts showing diversity jurisdiction).

133. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (stating that courts may raise ripeness issues sua sponte, whether as a matter of jurisdiction or as a prudential matter); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 n.4 (1980) (Rehnquist, J., dissenting) (stating that the court is obligated to raise standing sua sponte (citing *Judice v. Vail*, 430 U.S. 327, 331 (1977))); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 935–36 (2d Cir. 1998) (stating that the capacity to sue may be raised sua sponte when there is a question as to collusion in order to create federal jurisdiction, and remanding the issue for resolution of factual questions in the trial court); cf. *Frietsch v. Refco, Inc.*, 56 F.3d 825 (7th Cir. 1995). In *Frietsch*, Chief Judge Posner applied waiver to foreclose an argument arising from venue and forum selection clause rules. *Id.* at 830. A dissent suggested an exception was appropriate because the court's result would leave the plaintiff with no remedy (due to German law) but would only allow the late raising of the argument where it would prejudice no one and where venue was similar to jurisdiction. *Id.* at 831 (Shabaz, J., dissenting). The loss of a valid claim did not move the majority. *Id.* at 830.

in injunction cases, particularly cases involving state governments, federal courts raise comity or abstention¹³⁴ or sovereign immunity¹³⁵ questions sua sponte, even if they have been waived.¹³⁶ Similarly, federal courts have raised questions about the propriety or scope of an injunction or consent decree sua sponte.¹³⁷

3. *Questions of Law*

Courts have said that they are more likely to raise pure questions of law, involving no fact-finding, sua sponte.¹³⁸ There are also particular

134. See *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) (ruling on an Eleventh Amendment question); *Morrow v. Winslow*, 94 F.3d 1386, 1390–92 (10th Cir. 1996); *Stone v. City and County of San Francisco*, 968 F.2d 850, 855–56 (9th Cir. 1992); *Miller*, *supra* note 22, at 1044–45 (discussing courts’ willingness to consider issues sua sponte when they involve “nonjurisdictional doctrines of judicial restraint”); see also *Granberry v. Greer*, 481 U.S. 129, 134–35 (deciding a habeas case); *Eaglin v. Welborn*, 57 F.3d 496, 499 (7th Cir. 1995) (en banc) (Posner, C.J.) (collecting cases) (stating that the Supreme Court has a more relaxed attitude on waiver in questions involving comity); *ACORN v. Edgar*, 56 F.3d 791, 796–97 (7th Cir. 1995) (Posner, C.J.) (raising sua sponte the question of relations between governments and finding waiver inapplicable); *Martineau*, *supra* note 29, at 1050.

135. See *Martineau*, *supra* note 29, at 1047–49. For an argument that sovereign immunity questions should be treated as jurisdictional matters that should always be raised sua sponte see *Lawner*, *supra* note 59, at 1282–86. The comment states strong policy reasons why raising sovereign immunity sua sponte would address the problem of states being allowed to litigate a matter in the trial court, see how it goes, then raise sovereign immunity on appeal. *Id.*; see *Wisconsin Dep’t of Corrs. v. Schacht*, 524 U.S. 381, 393–98 (1998) (Kennedy, J., concurring).

136. See *Brown v. Hotel & Rest. Employees & Bartenders Int’l Union Local 54*, 468 U.S. 491, 500 n.9 (1984) (enforcing the waiver of a *Younger* abstention claim against a state attorney general); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 515–16 n.19 (1982) (declining to raise sua sponte an Eleventh Amendment issue that was waived and specifically not asserted at oral argument); *id.* at 524–25 (Powell, J., dissenting) (criticizing the Court for applying the waiver doctrine); *Carr v. O’Leary*, 167 F.3d 1124 (7th Cir. 1999) (Posner, C.J.) (applying waiver to a prison warden and a state official because they failed to raise the issue, despite an intervening favorable opinion); *id.* at 1128–30 (Ripple, J., concurring) (criticizing the court for applying the waiver doctrine aggressively in a case involving state sovereignty); *Winston v. Children and Youth Servs.*, 948 F.2d 1380, 1385 (3d Cir. 1991) (following *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491).

137. *McKenzie v. City of Chicago*, 118 F.3d 552, 555 n.* (7th Cir. 1997) (Easterbrook, J.) (stating in dicta that the appeals court must act to vacate an injunction exceeding the district court’s power under Article III of the Constitution, regardless of waiver); *ACORN v. Edgar*, 56 F.3d 791, 797–98 (7th Cir. 1995) (Posner, C.J.).

138. See *Martineau*, *supra* note 29, at 1035–40 (collecting cases). If a pure issue of law has been waived below but briefed in the appellate court, it will sometimes be considered. *Diersen v. Chicago Car Exch.*, 110 F.3d 481, 485 (7th Cir. 1997) (“There is no reason to defer its resolution to another case. There will be no better time to resolve

situations where courts are more likely to raise an issue sua sponte. These include the following: if the issue was posed by a new court decision since the lower court ruling¹³⁹ to reconsider an existing precedent about which the court is concerned,¹⁴⁰ if the questions are antecedent to the issues presented and dispositive of the dispute,¹⁴¹ or if the issue involves the retroactivity of the court's decision.¹⁴²

4. Frivolous Cases

Courts are more likely to raise an issue sua sponte in a frivolous case.¹⁴³

5. Important Cases

Courts are also more likely to raise an issue sua sponte if they believe the issue involves a matter of important public concern.¹⁴⁴

the issue than now.” (quoting *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993)); see also *Niedert v. Rieger*, 200 F.3d 522, 527–28 (7th Cir. 1999).

139. Cf. *Old Ben Coal Co. v. Director, OWCP*, 62 F.3d 1003, 1007 (7th Cir. 1995) (stating that waiver is flexible when a party asks remand to permit administrative agency to consider the intervening precedent). But see *Carr v. O’Leary*, 167 F.3d 1124 (7th Cir. 1999) (Posner, C.J.) (applying waiver to a prison warden and a state official because they failed to raise the issue, despite an intervening favorable opinion); *id.* at 1128–30 (Ripple, J., dissenting) (criticizing the court for failing to apply the waiver doctrine).

140. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 645–46 (1961); *United States v. Spears*, 965 F.2d 262, 282 (7th Cir. 1992) (Flaum, J., dissenting) (dissenting from the denial of a hearing en banc concerning the court’s sua sponte decision to revise the standard of appellate review of probable cause cases); *United States v. Lyons*, 731 F.2d 243, 250–53 (5th Cir. 1984) (en banc) (Rubin, J., concurring in part and dissenting in part) (criticizing the court’s sua sponte decision to revise the standard for the insanity defense, despite the parties’ failure to argue the issue); see also *England v. Louisiana State Bd. of Med. Exam’rs*, 375 U.S. 411, 423 (1964) (Douglas, J., concurring) (arguing for reexamining sua sponte the validity of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)).

141. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36–38 (1991) (Stevens, J., dissenting) (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)).

142. *Teague v. Lane*, 489 U.S. 288, 300 (1989) (deciding a habeas case (citing *Allen v. Hardy*, 478 U.S. 255, 261–62 (1986) (Marshall, J., dissenting) (deciding a habeas case))); cf. *Scheele v. City of Anchorage*, 385 P.2d 582, 583 (Alaska 1963) (stating that the retroactivity discussion in the initial opinion was obiter dictum because the issue was not briefed, and then reaching an opposite result after briefing).

143. In *Lucien v. Johnson*, the court reached the merits sua sponte even though they had not been briefed. There, the state defended a suit involving a claim by a state prisoner of lost property on the grounds of mootness. The court ruled the case was not moot but viewed the merits as so frivolous that there was no point in further consideration, “for we are sure that [the plaintiff] has no claim.” *Lucien v. Johnson*, 61 F.3d 573, 575 (7th Cir. 1995) (Posner, C.J.).

144. See William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit’s Discomfort with its Appellate Role*, 15 BERKELEY TECH. L.J. 725, 736–39 (2000) (stating that the federal circuit has acted inconsistently in considering issues sua sponte, apparently based on its perception of the importance of the issue); Schopler, *supra* note 29, at 965–66 (collecting cases). This factor may also have motivated the Fourth Circuit to raise the reconsideration of *Miranda* in *United States v. Dickerson*. 166

6. To Avoid Plain Error

Despite its inconsistency with the waiver rule,¹⁴⁵ some courts do apply plain error to civil cases and use the doctrine to avoid applying a strict theory of waiver.¹⁴⁶ Indeed, despite the waiver rule, the Supreme Court reserves for itself the right to review plain error. Supreme Court Rule 24(1)(a) provides that at its option, “the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.”¹⁴⁷ Even courts that normally claim they will not apply the plain error doctrine, or courts that apply it strictly, will recognize exceptions to the rule.¹⁴⁸

F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000); *see generally, e.g.*, Erwin Chemerinsky, *Point/Counterpoint: The Court Should Have Remained Silent: Why the Court Erred in Deciding Dickerson v. United States*, 149 U. PA. L. REV. 287 (2000).

145. *See* Dennerline, *supra* note 29, at 999–1001 (questioning whether the plain error standard as applied is meaningful); Navarro, *supra* note 29, at 1196–1208 (discussing the split in circuits); WRIGHT & MILLER, *supra* note 51, § 2558, at 456–69.

146. *See, e.g.*, Holmes v. Texas A&M Univ., 145 F.3d 681, 685–86 (5th Cir. 1998) (citing Highlands Ins. Co. v. Nat’l Union Fire Ins. Co., 27 F.3d 1027, 1031–32 (5th Cir. 1994)); Chute v. Sears Roebuck & Co., 143 F.3d 629, 631 & n.1 (1st Cir. 1998); Crawford v. Falcon Drilling Co., 131 F.3d 1120, 1123–24 (5th Cir. 1997); *see also In re Celotex Corp.*, 124 F.3d 619, 631 (4th Cir. 1997) (recognizing civil plain error, but possibly envisioning a standard harsher than in criminal cases); Jeffrey R. Teeters, Case Note, *Internal Consistency of Ohio Jury Interrogatories*, O’Connell v. Chesapeake & Ohio Railroad, 569 N.E.2d 889 (Ohio 1991), 61 U. CIN. L. REV. 365, 373–74 (1992) (noting that Ohio courts apply plain error in criminal cases).

147. SUP. CT. R. 24(1)(a). The placement of this sentence in a section on briefs suggests that it may not extend to issues not briefed. The Court may not, however, feel such a limitation. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238 & n.9 (1976); *see also* STERN ET AL., *supra* note 46, at 346; Schopler, *supra* note 29, at 970–75. Of course, there is no evident principle as to when the Supreme Court will find a plain error and when it will not. *See* STERN ET AL., *supra* note 46, at 346 (“To an outsider the errors in those cases seem no more ‘plain’ than other errors not corrected by the Court; indeed in each of the above cases several Justices dissented.”).

148. *See* Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999) (utilizing civil plain error only to avoid a miscarriage of justice or for error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings); Poindexter v. Atchison, Topeka & Santa Fe Ry. Co., 168 F.3d 1228, 1232 (10th Cir. 1999) (utilizing civil plain error for miscarriage of justice or instructions that are “patently plainly erroneous and prejudicial” (citing Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1516 (10th Cir. 1984), *aff’d*, 472 U.S. 585 (1985))); Pa. Envtl. Def. Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 234 (3d Cir. 1998) (stating that civil plain error may be sparingly applied for a “serious and flagrant error that jeopardized the integrity of the proceeding,” such as a “clear deviation from an established legal rule”); Walden v. Ga.-Pac. Corp., 126 F.3d 506, 520–21 (3d Cir. 1997); McKinney v. Ind. Mich. Power Co., 113 F.3d 770, 774 (7th Cir. 1997) (stating that plain error is only available for questions of subject matter jurisdiction); Stringel v. Methodist Hosp. of Ind., Inc., 89 F.3d 415, 421–23 (7th Cir. 1996) (stating that plain error is

7. *When the Issue Has Already Been Mentioned*

Courts are more likely to raise an issue without full briefing if it has been raised by amici, particularly if there has been some briefing or argument on the subject.¹⁴⁹

8. *When There Is Little Additional Work Involved*

Courts are more likely to decide a new issue without briefing if there is little additional work involved.¹⁵⁰

9. *To Affirm the Judgment Below*

Courts are more likely to raise an issue sua sponte to affirm the judgment below, than to reverse it.¹⁵¹

10. *Because the Case Is Before Trial*

Courts have decided a new issue sua sponte because the case is before trial and raises a potential claim that should be fully considered.¹⁵²

reserved for “the truly extraordinary case”); *Prymer v. Ogden*, 29 F.3d 1208, 1214 (7th Cir. 1994) (stating that plain error may only be treated as open if exceptional circumstances exist, substantial rights are affected, and in order to avoid a miscarriage of justice (quoting *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988))); *see also* *Amcel Corp. v. Int’l Executive Sales, Inc.*, 170 F.3d 32, 34–37 (1st Cir. 1999) (distinguishing among raised issues, deliberately waived issues, and issues not waived in connection with the appellate court’s decision to address an issue not preserved, and finding that plain error exists in civil cases under Federal Rule of Evidence 103).

149. *See* *Davis v. United States*, 512 U.S. 452, 457–58 n.* (1994) (deciding a criminal case and stating that the Court will consider arguments raised in amicus brief, but chose not to do so because it involved a statute and the United States had declined to take a position); *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Batson v. Kentucky*, 476 U.S. 79, 108–110 (1986) (Stevens, J., concurring); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961). *But see* *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991) (Marshall, J., dissenting) (collecting cases) (criticizing the Court for deciding the case on a ground advanced by amicus curiae and not by the party); *Batson*, 476 U.S. at 117 (Burger, C.J., dissenting) (quoting *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (stating that if a point made in an amicus brief has never been advanced by petitioners, the Court has no reason to pass upon it)). *See generally* STERN ET AL., *supra* note 46, at 344–45 (stating that the Court’s position on deciding issues raised only in amicus brief is “fluid and unpredictable”).

150. *Vestal*, *supra* note 29, at 510.

151. The Supreme Court is more likely to raise an issue that was not presented for review by the petitioner if it has been asserted by the respondent as an alternate ground for affirmation. *See* *Batson*, 476 U.S. at 109 (Stevens, J., concurring). *But see id.* at 116–17 (Burger, C.J., dissenting). *See generally* *Vestal*, *supra* note 29, at 506–07.

152. *See* *Lang v. Bank of N.D.*, 423 N.W.2d 501, 502–03 (N.D. 1988); *see also* *United States v. Boyd*, 208 F.3d 638, 651–52 (7th Cir. 2000) (Ripple, J., dissenting) (deciding a criminal case), *vacated by* 531 U.S. 1135 (2001).

There is . . . no rigid and undeviating judicially declared practice under which

11. To Protect Pro Se Litigants

A few courts have raised an issue sua sponte to protect a pro se litigant.¹⁵³ However, this seems out of fashion at the moment.

12. To Determine Facts

A recent article argues that the Supreme Court often determines facts on its own.¹⁵⁴

13. In the Interests of Justice

Courts have decided cases sua sponte to avoid a “miscarriage of justice” or to prevent a result “inconsistent with substantial justice.”¹⁵⁵ Unfortunately, these phrases are almost meaningless, because any time the new issue would affect the result, it could be a miscarriage of justice for the party that lost below not to be permitted to raise the issue.¹⁵⁶

courts of review invariably and under all circumstances decline to consider all questions which have not previously been specifically urged. Indeed there could not be without doing violence to the statutes which give federal appellate courts the power to modify, reverse or remand decisions as may be just under the circumstances. *Exceptional cases or particular circumstances* may prompt a reviewing court, *where injustice might otherwise result or where public policy requires*, to consider questions neither pressed nor passed upon below. *Id.* (quoting *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961) (alteration in original) (emphasis added)).

153. See *Gramegna v. Johnson*, 846 F.2d 675, 677–78 (11th Cir. 1988) (suspending the rules and raising a matter sua sponte to protect a pro se litigant).

154. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 333–51 (1999) (stating that the Supreme Court’s fact-finding has gone beyond judicial notice in a variety of contexts).

155. *Estate of Vak v. Comm’r*, 973 F.2d 1409, 1412 (8th Cir. 1992); see Waldman, *supra* note 85, at 64 (collecting cases) (applying standards like “whenever public interest or justice so warrants”).

156. See Martineau, *supra* note 29, at 1041–42; see also Campbell, *supra* note 29, at 175–76.

[C]ommon sense supports the proposition that this court will not decline to consider a proposition of law that goes directly to the merits of the entire case, though the question was never presented to or determined by the trial court. Otherwise a result absolutely unwarranted by law might have to stand, and great injustice follow.

Id. (quoting *Chicago, Milwaukee & St. Paul Ry. Co. v. Sprague*, 167 N.W. 124, 125 (Minn. 1918)).

14. Because the Issue Is Related to Another Issue Before the Court

In *Kolstad v. American Dental Association*,¹⁵⁷ the Court decided a question that had not been briefed, had not been addressed below, and that the parties agreed was not before it.¹⁵⁸ Over a vigorous dissent by Justice Stevens,¹⁵⁹ the Court justified its procedure by saying that the issue decided was “intimately bound up” with the Court’s discussion and was “easily subsumed within the question on which we granted certiorari.”¹⁶⁰ The Court added: “The Court has not always confined itself to the set of issues addressed by the parties.”¹⁶¹

15. For No Reason at All

In *United States v. Feola*,¹⁶² the Court decided a question¹⁶³ that was not presented in the certiorari petition, was not briefed or argued, and was squarely presented in the certiorari petition in another case pending at the same time.¹⁶⁴ Justice Stewart, dissenting, asked why *Feola* could not have been held until after certiorari was granted in the second case and after it was argued and decided.¹⁶⁵ The Court’s only response was that “we are not always guided by concessions of the parties, and the very considerations of symmetry urged by the Government suggest that we first turn our attention” to this issue.¹⁶⁶

* * * * *

All of these cases exist side-by-side with the waiver cases. They are hopelessly irreconcilable with them.

157. 527 U.S. 526 (1999) (considering the circumstances where punitive damages could be awarded under Title VII, and deciding not to apply common law agency principles to punitive damages).

158. *Id.* at 552–53 (Stevens, J., dissenting). Respondent’s counsel had stated at oral argument that: “[W]e all agree . . . that that precise issue is not before the Court.” *Id.* at 552.

159. *Id.*

160. *Id.* at 540.

161. *Id.* (citing *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 93–102 and n.1 (1998)); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243–249 (1989); *Cont’l Ill. Nat. Bank & Trust Co. v. Chi. Rock Island & Pac. Ry.*, 294 U.S. 648, 667–75 (1935).

162. 420 U.S. 671 (1975).

163. The question was whether an assault on a federal officer violates 18 U.S.C. § 111 even when the assailant is unaware that the victim is a federal officer. *Feola*, 420 U.S. at 696–97 (Stewart, J., dissenting).

164. *See id.* (Stewart, J., dissenting) (citing *Fernandez v. United States*, 420 U.S. 990 (1975)).

165. *Id.* at 697 (Stewart, J., dissenting) (“This conspicuous disregard of the most basic principle of our adversary system of justice seems to me indefensible.”).

166. *Id.* at 677.

F. Courts Exercise Almost Unbridled Discretion in Deciding Which Issues to Raise Sua Sponte

In summary, apart from questions of jurisdiction, courts are more likely to raise an issue sua sponte if they think a case is really important or if the judges really want to reach a particular result.¹⁶⁷ This, of course, poses dangers, depending on the political views and restraint of the judges.¹⁶⁸ Why did the Seventh Circuit apply the waiver doctrine harshly to orphans in *Hartmann* and to victims of discrimination in *Sanders* and *DeClue*, but not to the states opposing partial birth abortions in *Hope Clinic* or to the corporate demand requirement in derivative actions in

167. See Dennerline, *supra* note 29, at 1004–05 (stating that there is no discernable set of guidelines between or even within circuits as to when a new issue raised by parties should be heard); see also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.15 (1981) (implying that the Court can disregard procedural norms and consider issues that would normally be considered waived whenever it feels it appropriate); *Washington v. Davis*, 426 U.S. 229, 238 (1976) (suggesting that the plain error provision of then Supreme Court Rule 40(1)(d)(2) permitted the Court to raise sua sponte a plain error not presented). See also Justice Powell’s rather odd comment in *Robbins v. California*: “The parties have not pressed this argument in this case and it is late in the Term for us to undertake sua sponte reconsideration of basic doctrines.” *Robbins v. California*, 453 U.S. 420, 435 (1981) (Powell, J., concurring in judgment). Is sua sponte reconsideration acceptable earlier in the Term?

168. Compare Judge Easterbrook’s sua sponte raising of a new issue in *Hope Clinic v. Ryan*, 195 F.3d 857, 869 (7th Cir. 1999), with the opinion of the court in *Sanders v. Village of Dixmoor*, 178 F.3d 869 (7th Cir. 1999), where he provided the decisive vote. See *supra* text accompanying notes 70–72. Also compare Chief Judge Posner’s criticism of the *Hope Clinic* majority with his dissent in *Kopec v. City of Elmhurst*, 193 F.3d 894, 905 (7th Cir. 1999) (Posner, C.J., dissenting). The *Kopec* majority charged Chief Judge Posner with raising a number of issues not raised by the parties. *Id.* at 902 n.5; see also, e.g., *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000) (stating that a claim of retaliation in employment was waived because the employee only raised a harassment claim).

It is also difficult to reconcile the views of Judges Posner and Easterbrook on waiver and raising issues sua sponte with their tendency to deny parties leave to amend the complaint or raise new issues after discovery. Compare *Eckstein v. Balcors Film Investors*, 58 F.3d 1162 (7th Cir. 1995) (Easterbrook, J.) (“Years into a complex piece of commercial litigation, a district judge is entitled to treat the issues as frozen.”), with *Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1347 (7th Cir. 1990) (Easterbrook, J.) (creating sua sponte federal common law of demand on corporate directors), *rev’d*, 500 U.S. 90 (1991); compare *Peña v. Mattox*, 84 F.3d 894, 903 (7th Cir. 1996) (Posner, C.J.) (stating that a claim for false arrest was not raised until after judgment was waived, even though facts were pleaded in the complaint), with *Goodhand v. United States*, 40 F.3d 209, 214 (7th Cir. 1994) (Posner, C.J.) (stating that the fact that the plaintiff’s lawyer in the heat of argument did not mention any other alleged act of negligence should not be held against him).

Kamen v. Kemper Financial Services, Inc.?¹⁶⁹ Why did the Supreme Court raise and decide issues sua sponte in *Mapp*, *Washington v. Davis*, or *Erie Railroad*, but refuse to address them in so many other cases? It is hard to reach any conclusion but that sua sponte decision of new issues has been subject to the gorilla rule of unbridled discretion.¹⁷⁰

If we are left with courts acting based on their sense of injustice in each case, exercising unbridled discretion, what happens to the idea of a rule of law that includes procedural norms? As Judge Easterbrook said:

Legal rules committing decisions to judicial discretion suppose that the court will have, and give, sound reasons for proceeding one way rather than the other. “We must not invite the exercise of judicial impressionism. Discretion there may be, but ‘methodized by analogy, disciplined by system.’ Discretion without a criterion for its exercise is authorization of arbitrariness.”¹⁷¹

In fact, if courts can decide issues that parties have not raised or addressed, are the parties receiving due process of law?

V. DO SUA SPONTE DECISIONS VIOLATE DUE PROCESS?

The Supreme Court has never squarely decided whether an appellate court must give parties the opportunity to brief a new issue before

169. 908 F.2d 1338, 1347 (7th Cir. 1990) (ruling sua sponte and creating a federal common law of demand on corporate directors); *see also supra* notes 15–16, 69–81.

170. *See Martineau, supra* note 29, *passim*; STERN ET AL., *supra* note 46, at 346 (“The exception from the normal rule is not circumscribed by any particular formula, and that it reflects the Court’s discretionary authority to dispose of cases in what it determines to be the most sensible and reasonable way.”).

[T]he theory [of the plain error exception] has never developed into a principled test, but has remained essentially a vehicle for reversal when the predilections of a majority of an appellate court are offended. . . . The theory has been formulated in terms of what a particular majority of an appellate court considers basic or fundamental. Such a test is unworkable when neither the test itself nor the case law applying it develop a predictable, neutrally-applied standard.

Martineau, *supra* note 29, at 1033 (quoting *Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114, 116–17 (Pa. 1974)).

171. *York Ctr. Park Dist. v. Krilich*, 40 F.3d 205, 209 (7th Cir. 1994) (quoting *Brown v. Allen*, 344 U.S. 443, 496 (1953) (Frankfurter, J.) (deciding a habeas case) and CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 139, 141 (1921)); *see also Calderon v. Thompson*, 523 U.S. 538, 566–73 (1998) (Souter, J., dissenting) (commenting on a habeas decision and stating that because the abuse of discretion review is very deferential, a court of appeals’ decision to recall mandate sua sponte should be deferred to something approaching a clear error standard); *People v. Kuntu*, 720 N.E.2d 1047, 1050–52 (Ill. 1999) (Freeman, C.J., specially concurring) (using a rule that either errors affecting substantial rights will not be waived or the plain error doctrine involves stating conclusions and stating that a court must explain why a particular case justifies departure from procedural norms); Martineau, *supra* note 29, at 1033–34 (stating that plain error or interests of justice review of new issues on appeal is inconsistent with appellate process because each ignores precedent, turns only on the factors of one case, and makes predictability impossible).

deciding it. Do sua sponte decisions—without opportunity for briefing—violate due process? If not, are they, at a minimum, an abuse of judicial power?

A. Notice and an Opportunity to Be Heard

1. The Basic Principles

The Supreme Court wrote: “The core of due process is the right to notice and a meaningful opportunity to be heard.”¹⁷² In most contexts, the Court has said that a meaningful opportunity to be heard requires that the hearing occur before the decision is made. The basic cases in this line are *Goldberg v. Kelly*¹⁷³ and *Mathews v. Eldridge*.¹⁷⁴ Under *Goldberg* and *Mathews*, where a statute creates a right to receive benefits, due process requires a pretermination hearing before the benefits can be stopped by the government.¹⁷⁵

In subsequent cases, courts have looked to see whether a hearing prior to the initial decision is required for the decisionmaking process to comply with due process, or whether a hearing following the initial decision provides all the process that is due. In *United States v. James Daniel Good Real Property*,¹⁷⁶ the Court ruled that when property is taken by forfeiture, a hearing must precede the government seizure.¹⁷⁷ The Court said exceptions to the general rule of predeprivation notice and hearing could occur only in “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”¹⁷⁸ Determining whether a particular judicial remedy justifies an exception to the general rule of

172. *Lachance v. Erickson*, 522 U.S. 262, 266 (1998); *see also Gosnell v. City of Troy*, 59 F.3d 654, 658 (7th Cir. 1995) (Easterbrook, J.) (stating that notice and an opportunity to be heard is “due process in its proper sense”).

173. 397 U.S. 254 (1970).

174. 424 U.S. 319 (1976).

175. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59–61 (1999) (discussing the requirement of a statutorily created property interest in continued benefits before the right to a pretermination hearing accrues and construing *Goldberg v. Kelly* and *Mathews v. Eldridge*).

176. 510 U.S. 43 (1993).

177. *Id.* at 62; *see also United States v. 20832 Big Rock Drive*, 51 F.3d 1402, 1405 (9th Cir. 1995) (stating that absent exigent circumstances, the government must provide preseizure notice and a meaningful opportunity to be heard).

178. *James Daniel Good Real Prop.*, 510 U.S. at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))).

predeprivation notice and hearing “requires an examination of the competing interests at stake, along with the promptness and adequacy of later proceedings.”¹⁷⁹

To make that examination, the Court looked to the three-part inquiry of *Mathews v. Eldridge*. Under *Mathews*, a court must weigh the following three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the Government’s interest, including the administrative burden that additional procedural requirements would impose.¹⁸⁰ The governmental interest in efficiency is not a general interest but the interest in prompt action before a full hearing was possible.¹⁸¹ In weighing these factors, the *James Daniel Good Real Property* Court put the judicial thumb firmly on the side of predeprivation court hearings before a seizure: “[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”¹⁸²

The analyses in *Mathews* and *James Daniel Good Real Property* suggest that the due process issue is substantial. Sua sponte decisions deny the parties a significant private interest—whatever the subject of the litigation. They increase the possibility for error by a court because the court does not have the benefit of the parties’ views. And providing notice and an opportunity to be heard may not substantially impair a court’s interest in efficiency.

2. Supreme Court Cases on Sua Sponte Action

Although the Supreme Court has never ruled on whether sua sponte decisions violate due process, it has issued a number of rulings on related points (in addition to the decisions stating general due process principles).

179. *Id.*

180. *Id.*

181. *Id.* at 56.

182. *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring) (alteration in original)). The Court continued:

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. . . . [T]he availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure. Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure.

Id. at 55–56.

a. Sua Sponte Trial Court Dismissals May Violate Due Process

The Court has addressed several issues concerning sua sponte dismissals by trial courts. For example, the Court ruled that “before an absent class member’s right of action was extinguishable due process required that the member ‘receive notice plus an opportunity to be heard and participate in the litigation.’”¹⁸³ In another case, the Court expressly reserved ruling on the “permissible scope, if any, of sua sponte dismissals under Rule 12(b)(6).”¹⁸⁴

The Court did hold that sua sponte dismissals do not invariably violate the due process clause in *Link v. Wabash Railroad Co.*¹⁸⁵ There, the Court held that a trial court is authorized, if the party to be dismissed had sufficient warning, to dismiss a case sua sponte as a sanction under Rule 41(b) of the Federal Rules of Civil Procedure. In *Link*, the Court said that while due process requires notice and an opportunity to be heard, “this does not mean that every order entered without notice and a preliminary adversary hearing offends due process.”¹⁸⁶ If the party has sufficient notice to recognize the consequences, advance notice and a hearing are not necessarily required.¹⁸⁷ Furthermore, the Court added that the availability of Rule 60(b) relief “renders the lack of prior notice of less consequence.”¹⁸⁸

b. Failing to Give a Party a Chance to Respond Violates Due Process

In *Nelson v. Adams USA, Inc.*,¹⁸⁹ the Supreme Court ruled that due process was violated when a court added a defendant and entered judgment without giving the defendant an opportunity to file a

183. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

184. *Neitzke v. Williams*, 490 U.S. 319, 329 n.8 (1989). The holding of *Neitzke*, concerning the proper scope of sua sponte dismissals in in forma pauperis litigation, was overturned by statute. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996). See *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (collecting cases).

185. 370 U.S. 626 (1962).

186. *Id.* at 632.

187. *Id.*, quoted in *Adams v. Trs. of the N.J. Brewery Employees’ Pension Trust Fund*, 29 F.3d 863, 871 (3d Cir. 1994); accord, e.g., *Claude E. Atkins Enters., Inc. v. United States*, 899 F.2d 1180, 1184–85 (Fed. Cir. 1990).

188. *Link*, 370 U.S. at 632; accord *Brent v. Bd. of Trs. of Davis & Elkins Coll.*, 311 S.E.2d 153, 158 (W. Va. 1983).

189. 529 U.S. 460, 465–68 (2000).

responsive pleading. The Court said that the “opportunity to respond” is “fundamental to due process.”¹⁹⁰ The Court added that “[b]eyond doubt . . . a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served.”¹⁹¹ Citing to *Alice in Wonderland*, the Court observed that “[p]rocedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process.”¹⁹²

c. Appellate Decisions Reached Without Full Briefing Are Given Lesser Weight

As part of its ambivalence on sua sponte decisions, the Court has ruled that decisions reached without full briefing and argument have a lesser precedential value for purposes of stare decisis.¹⁹³ But even Supreme Court Justices who have criticized deciding issues sua sponte have not always questioned the Court’s power to do so. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁹⁴ for example, Justice Souter criticized the Court’s earlier decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁹⁵ In *Church of the Lukumi*, Justice Souter said the rule announced in the *Smith* decision was squarely addressed by neither party. He added that “[s]ound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.”¹⁹⁶ After noting that the *Smith* rule was unnecessary to the result, Justice Souter continued:

190. *Id.* at 466.

191. *Id.* at 467.

192. *Id.* at 468 n.2 (citing LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 108 (Messner 1982) (1978)).

193. *Hohn v. United States*, 524 U.S. 236, 251 (1998) (collateral review).

194. 508 U.S. 520, 571–73 (1993) (Souter, J., concurring in part and concurring in the judgment) (criticizing *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)). *Smith* was also criticized for its sua sponte decision in an article by Michael McConnell. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1113–14 (1990) (“The most important decision interpreting the Free Exercise Clause in recent history . . . was rendered in a case in which the question was entirely hypothetical, irrelevant to the disposition of the case as a matter of state law, and neither briefed nor argued by the parties.”).

195. 494 U.S. 872 (1990).

196. *Church of the Lukumi Babalu Aye*, 508 U.S. at 572 (citations omitted). Justice Souter quoted *Ladner v. United States*, stating that the Court was “declining to address ‘an important and complex’ issue concerning scope of collateral attack upon criminal sentences because it had received ‘only meagre argument’ from the parties, and the Court thought it ‘should have the benefit of a full argument before dealing with the question.’” *Id.* (quoting *Ladner v. United States*, 358 U.S. 169, 173 (1958)).

While I am not suggesting that the *Smith* Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put into play by the parties, approaches without more the sort of ‘dicta . . . which may be followed if sufficiently persuasive but which are not controlling.’¹⁹⁷

d. Stanley v. Illinois: No Due Process in Stating a New Rule on Due Process

The most ironic sua sponte case is undoubtedly *Stanley v. Illinois*.¹⁹⁸ In *Stanley*, the Court required hearings, under the Due Process Clause of the Fourteenth Amendment, before a state could terminate the parental rights of unwed fathers. In ringing language, the majority said that considerations of efficiency alone cannot overcome the need for procedures to protect citizens from the overbearing concern for efficiency:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.¹⁹⁹

Chief Justice Burger’s dissent criticized the ruling, inter alia, because the Due Process Clause argument had been neither briefed nor argued, but was raised sua sponte. The dissent also criticized the Court for setting up straw arguments against its holding that had not been made by the state. The Chief Justice did not, however, claim that the Court’s action itself violated due process.²⁰⁰

197. *Id.* at 572–73 (Souter, J., concurring in part and concurring in the judgment). Justice Souter continued:

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing and argument necessarily lacks precedential weight. Over time, such a decision may become ‘part of the tissue of the law,’ . . . and may be subject to reliance in a way that new and unexpected decisions are not.

Id. at 573 (quoting *Radovich v. NFL*, 352 U.S. 445 (1957)); accord *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 404 (1995) (O’Connor, J., dissenting) (questioning the Court’s prudence, but not its authority, in addressing a waived claim sua sponte).

198. 405 U.S. 645 (1972).

199. *Id.* at 656.

200. *Id.* at 659–61 (Burger, C.J., dissenting).

B. Some Lower Court Judges Have Taken a Broad View of the Due Process Implications of Sua Sponte Decisions

Some lower court opinions have gone further than the Supreme Court by suggesting that sua sponte court decisions can violate due process. Chief Justice Robin Davis (then Justice) of the West Virginia Court of Appeals, for example, recently argued that her court's sua sponte award of attorneys' fees, not requested by the parties, was a "fundamental violation of state and federal due process guarantees" because it occurred without notice and an opportunity to be heard.²⁰¹ Her view is supported by cases which have suggested that sua sponte agency²⁰² or trial court decisions of issues violate due process.²⁰³ This comes up most frequently when a trial court sua sponte dismisses a nonfrivolous complaint.

Several courts have held that sua sponte trial court dismissals violate due process.²⁰⁴ In *California Diversified Promotions, Inc. v.*

201. *Maikotter v. Univ. of W. Va. Bd. of Trs.*, 527 S.E.2d 802, 808–10 (W. Va. 1999) (Davis, J., concurring in part and dissenting in part).

202. *See Stoyanov v. INS*, 172 F.3d 731, 735 (9th Cir. 1999) (stating that the Board of Immigration Appeals decision of issue without notice to the party violated due process).

203. *See Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (stating that fundamental issues of fairness are raised when the Court of Appeals for Veterans Claims decides an issue sua sponte); *Kerrigan, Estess, Rankin & McLeod v. State*, 711 So. 2d 1246, 1249 (Fla. Dist. Ct. App. 1998) (holding that the "trial court denied [the law firm] due process when it sua sponte ruled unenforceable the contingent fee contract on which those liens were based, without notice and an opportunity for the parties and counsel to be heard"); *Grissom v. Grissom*, 886 S.W.2d 47, 58 (Mo. Ct. App. 1994) (stating that the trial court's imposition of sanctions sua sponte without notice and hearing violated due process); *Storer Communications of Jefferson County, Inc. v. Oldham County Bd. of Educ.*, 850 S.W.2d 340, 342 (Ky. Ct. App. 1993) (stating that the trial court's grant of summary judgment sua sponte was a denial of due process); *Brown v. Triple "D" Drilling Co.*, 585 P.2d 987, 990 (Kan. 1978) (stating that an order reinstating the case sua sponte deprives a defendant of due process).

204. *See, e.g., Esslinger v. Davis*, 44 F.3d 1515, 1527–28 & 1528 n.45 (11th Cir. 1995) (stating that a magistrate judge's raising of exhaustion and procedural default in a habeas case sua sponte was improper). "[T]o be afforded due process, [the petitioner] must receive notice of the court's inclination to interpose the default, an opportunity to demonstrate 'cause' for the default and 'prejudice,' and, if material issues of fact are present, an opportunity to present his evidence." *Id.* at 1528 n.45; *see also Roman v. Jeffes*, 904 F.2d 192, 196 (3d Cir. 1990) (raising the dismissal issue sua sponte under Federal Rule of Civil Procedure 12(b)(6), which provides due process when the plaintiff is given an opportunity to address the issue either orally or in writing); *Holzer v. Jochim*, 557 N.W.2d 57 (N.D. 1996) (stating that the trial court deprived the party of due process by redetermining liability sua sponte without notice that issue would be decided); *King v. Mosher*, 137 N.H. 453, 629 A.2d 788, 790 (1993) (stating that the fundamental requirements of due process require that the party be provided with notice and an opportunity to be heard before dismissal of the nonfrivolous complaint and applying the state due process clause, N.H. CONST. pt. I, art. 15). Compare section 105(a) of the Bankruptcy Code, 11 U.S.C. §105(a), which gives the bankruptcy court the power to act

Musick,²⁰⁵ for example, the Ninth Circuit cited to the rule that due process requires notice and an opportunity to be heard with “proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.”²⁰⁶ The court held that it was error to dismiss a claim on the merits without notice, a hearing, and an opportunity to respond, noting: “The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system, and the judge’s feeling that the case is probably frivolous does not justify by-passing that right.”²⁰⁷ Similarly, the Seventh Circuit, which has often issued its own decisions *sua sponte*, does not approve of the same practice by trial courts. It has held that a trial court’s *sua sponte* dismissal deprives a plaintiff of notice and an opportunity to respond.²⁰⁸

Other appellate courts have prohibited *sua sponte* trial court dismissals of nonfrivolous complaints, without reaching the due process issue.²⁰⁹ The reasoning of these decisions is consistent with a ruling, under a due process analysis, that a party must have notice of the ultimate issue before being deprived of its day in court.²¹⁰

sua sponte. See generally *In re Hammers*, 988 F.2d 32, 34–35 (5th Cir. 1993).

205. *Cal. Diversified Promotions, Inc. v. Musick*, 505 F.2d 278 (9th Cir. 1974).

206. *Id.* at 280 (quoting *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233, 246 (1944)).

207. *Id.* at 281 (quoting *Harmon v. Superior Court*, 307 F.2d 796, 798 (9th Cir. 1962)). The court reserved ruling on whether a Rule 60(b) post-ruling motion was sufficient to make “the denial of prior hearing and other due process rights . . . harmless error.” *Id.*

208. See *Stewart Title Guar. Co. v. Cadle Co.*, 74 F.3d 835, 836–37 (7th Cir. 1996) (stating that the district court was required to give notice and an opportunity to respond before dismissing the complaint *sua sponte*):

We have found that *sua sponte* dismissals without such procedures conflict with our traditional adversarial system principles by depriving the losing party of the opportunity to present arguments against dismissal and by tending to transform the district court into ‘a proponent rather than an independent entity.’ . . . [S]uch dismissals often create avoidable appeals and remands, draining judicial resources and defeating the very purpose for which *sua sponte* actions are employed.

Id. (quoting *Ricketts v. Midwest Nat’l Bank*, 874 F.2d 1177, 1184 (7th Cir. 1989)).

209. *United States v. One 1974 Learjet 24D*, 191 F.3d 668, 674 (6th Cir. 1999); *Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) (stating that it was an abuse of discretion to raise procedural default in the habeas case *sua sponte* without giving the party notice and opportunity to respond before the decision); *Porter v. Fox*, 99 F.3d 271, 273 (8th Cir. 1996) (deciding a habeas case); see *Cochran v. Morris*, 73 F.3d 1310, 1320–21 (4th Cir. 1996) (en banc) (Michael, J., dissenting) (collecting cases). Note that the law in habeas cases has been changed by statute. See, e.g., *Benson v. O’Brian*, 179 F.3d 1014 (6th Cir. 1999).

210. See *Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991) (per curiam) (stating

*C. Some Courts View a Motion for Rehearing as Providing
Sufficient Process*

Other courts believe there is no due process violation as long as there has been an opportunity for reconsideration.²¹¹ In an unpublished opinion, the Fourth Circuit ruled that a rehearing procedure satisfied the “bare minimum requirements of procedural due process” in a case involving the request of a prisoner to videotape his execution.²¹² Despite discomfort with the procedure, the court said:

[W]e must acknowledge that the plaintiffs did, eventually, brief the issue of the constitutionality of the videotaping matter on the merits and that this opportunity to ask for rehearing, under these particular circumstances in this sui generis case, appear to have given the state court a reasonable opportunity to rectify its error in denying notice, and thus satisfied the bare minimum requirements of procedural due process under the Fourteenth Amendment.²¹³

These decisions are supported by decisions that hold that sua sponte trial court dismissals of nonfrivolous complaints do not violate due process. There are also some decisions that suggest an intermediate standard, lower than frivolous—that trial courts can dismiss cases sua sponte if it is patently obvious that the plaintiff cannot obtain relief.²¹⁴

that the district court must give an opportunity to be heard before dismissing a nonfrivolous complaint sua sponte); *Street v. Fair*, 918 F.2d 269, 272 (1st Cir. 1990) (per curiam) (stating that the district court must give notice and an opportunity to be heard before dismissing nonfrivolous complaint sua sponte); *Tingler v. Marshall*, 716 F.2d 1109, 1111–12 (6th Cir. 1983) (stating that the sua sponte dismissal of nonfrivolous complaints is “not in accordance with our traditional adversarial system of justice,” and is “unfair to the litigants and ultimately waste, rather than save judicial resources”); *Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983) (stating that notice and an opportunity to be heard is required before dismissal on the merits of a nonfrivolous complaint); *Lewis v. New York*, 547 F.2d 4, 5–6 (2d Cir. 1976); see also *Eliason v. Intel Corp.*, 82 F.3d 731, 738 (7th Cir. 1996) (Posner, C.J.) (stating that a trial or appellate court must give notice before granting summary judgment sua sponte). Not much notice is required however.

211. See also *Harris v. Marsh*, 123 F.R.D. 204, 218 (E.D.N.C. 1988) (“[T]o the extent imposition of the original reprimand and fine violated any due process right of counsel, by providing for reconsideration and seriously entertaining counsel’s arguments, due process requirements of notice and an opportunity to be heard have now been satisfied.”).

212. *Lawson v. Dixon*, No. 94-6640, 1994 WL 258629, at **4 (4th Cir. June 13, 1994) (unpublished opinion).

213. *Id.* It is surprising that this opinion, with its unusual fact situation and its decision of a novel issue, was not published. Cf. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated by* 235 F.3d 1054 (8th Cir. 2000) (en banc).

214. See, e.g., *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (stating that sua sponte dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper when it is “patently obvious” that the plaintiff could not prevail); *Baker v. Director, United States Parole Comm’n*, 916 F.2d 725, 726 (D.C. Cir. 1990) (stating that the trial court can dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the claimant cannot possibly win relief).

VI. WHAT SHOULD COURTS DO?

From a legal realist's perspective, "what process is due" is a tautology: as much process is *due* as the Supreme Court says is due.²¹⁵ In the author's view, Chief Justice Davis was correct, however, when she argued that due process requires appellate courts to offer the parties a meaningful opportunity to be heard before an issue is decided.²¹⁶ The Court's analyses in *Mathews v. Eldridge* and *United States v. James Daniel Good Real Property* are fully applicable to sua sponte appellate decisions.²¹⁷

But whether or not sua sponte decisions violate due process, the principles of fairness upon which it is based suggest that a court should take the obvious course when it thinks the right issue has not been presented to it. An appellate court should always ask for the parties' submissions before ruling.²¹⁸

A. Courts Raising New Issues Frequently Will Ask the Parties for Further Input Before Ruling

There are two ways input can be sought: first, asking for supplemental briefing, and second, remanding for a new ruling by the trial court.

1. Asking the Parties for Supplemental Briefs

Many courts routinely ask the parties for supplemental briefs when deciding a new issue.²¹⁹ As Chief Justice Traynor of the California Supreme Court wrote: "[I]t is only fair that the appellate court direct the attention of counsel" to legal theories, cases, or other materials not covered by the briefs, "if it appears that they may affect the outcome of

215. Cf. Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 357 (1996) (noting that except for notice and hearing, the definition of due process is close to tautological).

216. *Maikotter v. Univ. of W. Va. Bd. of Trs.*, 527 S.E.2d 802, 808–10 (W. Va. 1999) (Davis, J., concurring in part and dissenting in part).

217. See *supra* notes 174–82 and accompanying text.

218. *Accord* William N. Early et al., *USCMA and the Specified Issue: The Current Practice*, 123 MIL. L. REV., Winter 1989, at 9, 22.

219. See *id.* at 26–27 (discussing the practice in several courts); *United States v. Mussari*, 168 F.3d 1141, 1142, 1146 (9th Cir. 1999) (Kozinski, J., dissenting) (deciding a criminal case and stating the circuit's practice of ordering supplemental briefing when it raises an issue sua sponte).

the case, and give them the opportunity to submit additional briefs.”²²⁰

In 1997, the Supreme Court indicated a preference for requesting supplemental briefing when a court raises a new issue sua sponte. In *Trest v. Cain*,²²¹ Justice Breyer wrote the following dicta for the Court:

We note that the parties might have considered these questions, and the Court of Appeals might have determined their relevance or their answers, had that court not decided the . . . question without giving the parties an opportunity for argument. We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way ‘round is the shortest way home.²²²

Thus, the Court itself often directs supplemental briefing on issues it raises sua sponte, either when issuing the order accepting questions for oral argument,²²³ or after argument.²²⁴ Lower courts also frequently follow this practice.²²⁵ As Justice Ginsburg wrote about the District of Columbia Circuit: “The parties’ contentions ordinarily determine the issues to be addressed. If the panel or the opinion writer spots a potentially dispositive question not raised by the parties, the judges generally invite supplemental briefs, thereby affording the litigants a chance to have their say.”²²⁶

Cases involving the decision of new issues after supplemental briefing

220. Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957); see also Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 558 (1977) (arguing that parties should have the opportunity to brief retroactivity before the issue is decided).

221. 522 U.S. 87 (1997).

222. *Id.* at 92 (stating that the district court is not required to raise a procedural default issue sua sponte in the habeas case if the state fails to raise the issue and declining to decide whether the Fifth Circuit was permitted to raise the issue sua sponte); see also John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) (“The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.”).

223. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 115 (1986) (Burger, C.J., dissenting) (collecting cases); STERN ET AL., *supra* note 46, at 245, 340 (collecting cases); cf. *Propper v. Clark*, 337 U.S. 472, 476 n.6 (1949) (asking the parties to brief an issue that had been raised by petitioner, but as to which the Court had not originally granted certiorari).

224. See, e.g., *Patterson v. McLean Credit Union*, 485 U.S. 617, 622–23 (1988) (Stevens, J., dissenting from order directing reargument); *Batson*, 476 U.S. at 115 (Burger, C.J., dissenting) (collecting cases); STERN ET AL., *supra* note 46, at 341 (collecting cases); Krimbel, *supra* note 27, at 931–46. The Court’s first use of the power to request rehearing sua sponte was an 1819 case where one of the Justices had been absent. The first time the Court stated the power to request rehearing sua sponte when a justice “doubts the correctness of his opinion” was in *Brown v. Aspden*, 55 U.S. (14 How.) 25, 26–27 (1852). See Krimbel, *supra* note 27, at 932–33.

225. See *United States Nat’l Bank of Or. v. Indep. Ins. Agents*, 508 U.S. 439, 448 (approving the raising of new issues by the court of appeals and ordering supplemental briefing).

226. Ginsburg, *supra* note 92, at 214–15 (footnote omitted).

cover a range of areas. The most frequent area is probably jurisdiction.²²⁷ Other common grounds for supplemental briefing include the following: to address mootness;²²⁸ whether to overrule prior precedent;²²⁹ whether to consider an issue not raised below;²³⁰ to address an intervening statute,²³¹ ruling²³² or precedent;²³³ to address a portion of an issue the court believes was not adequately briefed;²³⁴ to redécide a case together with new cases where certiorari has been granted;²³⁵ or prior to an award of sanctions.²³⁶

227. *See, e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 743–44 (1975); *Shegog v. Bd. of Educ.*, 194 F.3d 836, 837 (7th Cir. 1999) (Easterbrook, J.); *United States v. Accra Pac, Inc.*, 173 F.3d 630, 631–32 (7th Cir. 1999) (Easterbrook, J.); *Union Oil Co. of Cal. v. John Brown E & C*, 121 F.3d 305, 308, (7th Cir. 1997); *Peters v. Welsh Dev. Agency*, 920 F.2d 438, 440 (7th Cir. 1990); *In re Phillips*, 844 F.2d 230, 231 (5th Cir. 1988) (supplemental letter briefs); *Citibank, N.A. v. Data Lease Fin. Corp.*, 645 F.2d 333, 337 (5th Cir. 1981).

228. *See, e.g.*, *Buckley v. Archer-Daniels-Midland Co.*, 111 F.3d 524, 526 (7th Cir. 1997).

229. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 194–95 (1994) (Stevens, J., dissenting) (criticizing the Court for sua sponte ordering parties to address question concerning validity of prior precedent that they had not raised); *Batson*, 476 U.S. at 115 (Burger, C.J., dissenting) (collecting cases where supplemental briefing was ordered to reconsider precedent); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 834 n.1 (4th Cir. 1990) (ordering supplemental briefs on the issue to permit the en banc court to consider overruling prior RICO precedent).

230. *United States Nat'l Bank of Or.*, 508 U.S. at 445, 448 (stating that the court of appeals acted within its discretion in raising the validity of the statute sua sponte and ordering supplemental briefing); *Winston v. Children & Youth Servs.*, 948 F.2d 1380, 1385 (3d Cir. 1991) (stating that after the supplemental briefing, the court would not consider the abstention issue that had been raised below but not appealed).

231. *See, e.g.*, *Lindh v. Murphy*, 96 F.3d 856, 861 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

232. *See, e.g.*, *United States v. D.F.*, 115 F.3d 413, 414 (7th Cir. 1997) (considering the parties' supplemental statements submitted after remand from the Supreme Court).

233. *See, e.g.*, *Turkhan v. INS*, 123 F.3d 487, 488 n.2 (7th Cir. 1997) (ruling after directing the parties to file briefs on intervening precedent).

234. *See, e.g.*, *Little Co. of Mary Hosp. & Health Care Ctrs. v. Shalala*, 165 F.3d 1162, 1164 (7th Cir. 1999) (Posner, C.J.) (ordering supplemental briefs to explore the purpose of regulation that was at issue in the case).

235. *See United States v. Ohio Power Co.*, 353 U.S. 98 (1957); *see also Krimbel*, *supra* note 27, at 934–37.

236. This is required by Federal Rule of Appellate Procedure 38, which requires notice from the court and a reasonable opportunity to be heard before the court issues sanctions sua sponte. *See, e.g.*, *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1309 (7th Cir. 1988) (ordering supplemental briefing to see if all attorneys should be sanctioned for failure to advise the court of jurisdictional issues); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606–07 (1st Cir. 1988) (Breyer, J.) (stating that sanctions comply with due process when they are issued after notice and briefing). Rule 38 was amended after earlier sanction orders were issued without notice. *See Chicago Council of Lawyers*, *supra* note 8, at 699–701.

The Supreme Court has also ordered supplemental briefing when the Court questions a legal point made by the court below that has not been challenged by the parties.²³⁷ In addition, the Court recently appointed an amicus curiae to argue for the position taken by the appellate court, when neither party defended that position in the Supreme Court.²³⁸

2. *Spotting an Issue and Remanding to the Lower Court*

Another option is for a court to spot an issue that has not been briefed and, if the issue looks decisive, remand it for resolution in the first instance by the lower court.²³⁹ This is the most procedurally conservative approach to addressing a new issue and is the only one fully consistent with the usual rule that issues not raised below will not be considered on appeal.²⁴⁰ Remand protects the role of the district court, which may have useful light to shed on the issue.

Courts often spot an issue and then remand when a new precedent or law has arisen since the lower court's decision.²⁴¹ Remand is also frequently used when new facts have arisen since the trial court's decision.²⁴² In *Florida Power & Light Co. v. Lorion*,²⁴³ for example, the Court noted that another case decided the same day²⁴⁴ raised a new issue not briefed or argued by the parties and unnecessary to the decision of

237. See *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 129 (1987).

238. See *Great-West Life Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 226 n.1 (2002) (Ginsburg, J., dissenting).

239. See, e.g., *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 160 F.3d 925, 935–36 (2d Cir. 1998) (remanding the issue for resolution in the trial court, and stating that the capacity to sue may be raised sua sponte when there is a question as to collusion to create federal jurisdiction); *Lucero v. Trosch*, 121 F.3d 591, 595 (11th Cir. 1997) (remanding to the trial court for an inquiry on mootness following a sua sponte order directing supplemental briefing on mootness).

In *Chambers Medical Technologies of South Carolina, Inc. v. Bryant*, 52 F.3d 1252, 1260 n.11 (4th Cir. 1995), the court was tempted to proceed to a ruling without briefing or a remand to “resolv[e] the legal uncertainty surrounding this issue and . . . conserv[e] the resources of the courts and the parties.” The court decided, however, that because a party was entitled to defend its position, it would remand the case to the trial court for further proceedings on the issue. *Id.*; see also *Lang v. Bank of N.D.*, 423 N.W.2d 501, 502–03 (N.D. 1988) (reversing dismissal with a direction for the trial court to explore a statute not considered below).

240. See *supra* notes 52–69 and accompanying text.

241. See, e.g., *Richardson v. Wright*, 405 U.S. 208, 209 (1972) (new regulations); *Maxwell v. Bishop*, 398 U.S. 262, 264 (1970) (new precedent); *Nicely v. McBrayer*, *McGinnis, Leslie & Kirkland*, 163 F.3d 376, 388 (6th Cir. 1998) (new precedent). *But cf.* *Hernandez v. Cowan*, 200 F.3d 995, 997 (7th Cir. 2000) (Posner, C.J.) (refusing to apply new precedent in a habeas case because the state was aware of the argument and could have raised it below and, perhaps, because the court thought the state's conduct at trial was reprehensible).

242. See generally Benjamin, *supra* note 154.

243. 470 U.S. 729 (1985).

244. *Heckler v. Chaney*, 470 U.S. 821, 828–35 (1985).

the issues presented to the Court. The *Lorion* Court expressed no opinion as to its proper resolution and stated that the issue was open to the court of appeals on remand.²⁴⁵

*B. The Arguments Against Ordering Supplemental Briefing
Are Not Convincing*

Ordering supplemental briefing and argument is not without its critics. From one side, some judges and commentators view asking the parties to address an issue they did not raise as too intrusive into the adversary process.²⁴⁶ Justice Stevens has repeatedly criticized the Court for sua sponte raising an issue for further briefing, saying it interferes with the adversary process.²⁴⁷ Other judges view raising a new issue as fine, but see supplemental briefing as unnecessary. They may believe that they know the law and do not need assistance, that they are in as good or better a position than counsel to address and resolve the issue, or that counsel in a particular case are not likely to add anything helpful.²⁴⁸ Judges have also expressed concern that the delays caused by supplemental briefing may outweigh the benefits.²⁴⁹

There appear to be several reasons for the reluctance of appellate courts to give notice and an opportunity to be heard to appellate litigants who have missed what the court views as the decisive issue. First, it is

245. *Lorion*, 470 U.S. at 735 n.8. A variant of this approach is to address the issue in dicta, then to remand the case for further proceedings. See *Doll v. Brown*, 75 F.3d 1200, 1206–07 (7th Cir. 1996) (Posner, C.J.) (suggesting the lost-chance theory of damages in employment discrimination cases despite the fact that it had not been briefed). This is not as pure as remanding the case for a decision in the first instance, without comment.

Courts sometimes avoid waiver or the use of dicta by spotting an issue as relevant but deciding that it is not dispositive and leaving it for another day. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (stating that the issue raised by amici was not necessary to the decision and leaving it for another day). This is a traditional role for a concurring opinion. See, e.g., *Wisconsin Dep't of Corrs. v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) (noting important questions but suggesting resolution in a later case following full briefing and argument).

246. See Krimbel, *supra* note 27, *passim*.

247. See *supra* text accompanying note 10.

248. See Chicago Council of Lawyers, *supra* note 8, at 689.

249. See Ellen A. Peters, *Forum on Judicial Ethics*, 66 NEB. L. REV. 448, 452 (1987). *But cf.* *Bush v. Gore*, 531 U.S. 98 110 (2000) (stating that the parties' entitlement to an opportunity to be heard prior to when the Florida Supreme Court had issued statewide standards was of critical importance to the outcome of the presidential election). The Supreme Court would not waive the opportunity to be heard below, even though (or some would say because) the presidential election was at stake. See *id.*

more efficient not to order rebriefing. It is more difficult for the judges to consider a case twice than to consider it once. Some courts have reasoned that additional briefing takes time away from other matters the courts can consider.²⁵⁰ The efficiency concern is particularly strong for appellate courts that sit in rotating panels. Next, courts may believe that lawyers have nothing to add on particular issues, because the judges can decide the law for themselves. Furthermore, courts may believe that many lawyers are not likely to add anything useful because of a perceived lack of quality.²⁵¹ Finally, the court may suspect that the parties ducked the issue for tactical reasons. None of these grounds are persuasive.

First, in many cases, briefing will sharpen the issue and lead to better decisions. The adversary process may bring a perspective to legal issues that the court will miss—no matter how learned the judges are.²⁵²

Second, even if the court knows the law better than the parties do, the parties know the facts better. The results may not be fair to the parties without their factual input, because that input could affect the choice of the appropriate legal rule and its application to their case. In addition, the parties may have presented different evidence if they had known the issue would be considered. Without such notice, relevant facts may, or may not, be in the record.²⁵³

Third, an issue may have been deliberately waived by a party for tactical reasons or other proceedings below may have affected the procedural status of the matter. This may not always be obvious to the appellate court.²⁵⁴ Requesting supplemental briefs will allow the parties to advise the court of points in the record that affect the fairness of the result.

Fourth, the court's actions appear arbitrary if they are not based on the parties' briefs. This makes it more difficult for lawyers to advise their clients as to the likely outcome of cases—making it less likely that cases will settle. It also makes it more difficult for businesses and individuals to order their affairs.²⁵⁵

250. See, e.g., Chicago Council of Lawyers, *supra* note 8, at 688–90; *id.* at 797 & n.573 (discussing Chief Judge Posner's view on the perceived crisis in the federal appellate courts).

251. See *id.* at 798 (reporting that Chief Judge Posner often expressed the view at oral argument that the lawyers' briefs were not very helpful). See also *Smith v. Farley*, 59 F.3d 659, 665 (7th Cir. 1995) (Posner, C.J.) (“The better lawyers resent this, feeling that it is ‘unfair’ for judges to do the work of the weaker lawyers.”).

252. See Chicago Council of Lawyers, *supra* note 8, at 690; Martineau, *supra* note 29, at 1038–39; Miller, *supra* note 22, at 1050.

253. See Chicago Council of Lawyers, *supra* note 8, at 685, 690; Martineau, *supra* note 29, at 1036–39.

254. For example, the briefs may not note every point that was raised or expressly waived below.

255. See Chicago Council of Lawyers, *supra* note 8, at 685 n.15; Martineau, *supra*

Fifth, it is not clear that sua sponte decisions cost the court more time, because the court may spend less time researching and considering the issue if it is briefed.²⁵⁶ This point was made by Justice Breyer in *Trest v. Cain*.²⁵⁷

Sixth, and perhaps most important, parties and counsel may not perceive the court's judgment as fair and legitimate unless they get their say before the court decides.²⁵⁸ As the authors of the leading treatise on Supreme Court practice have said: "[G]oing beyond the limited questions and resting decision on grounds not briefed or argued is unfair to the losing party."²⁵⁹

Finally, as to judicial efficiency, in the age of e-mail, fax machines, overnight mail, and telephone conferences, it does not take much extra time for judges to get together and discuss a case after supplemental briefing, even if they do not have chambers in the same city. While courts do have to ration their time, they still need to spend enough time on each decision to make sure it is right, and that the result is fair.²⁶⁰

That a court would usually reach the same result—even ninety-five percent or more of the time—without the supplemental briefing does not answer either the due process question or the issue of whether acting without supplemental briefing is fair. Trial court judges would probably reach the same result most of the time without closing argument, or even without a trial, just on affidavits and a cold record. Our system is based on an opportunity to be heard before the decision, in most circumstances. That concept is deeply engrained in litigants as well as in lawyers and the law.²⁶¹

note 29, at 1033–34.

256. See Miller, *supra* note 22, at 1050; Martineau, *supra* note 29, at 1032.

257. See *Trest v. Cain*, 522 U.S. 87, 29 (1997); see also *supra* note 222 and accompanying text (discussion of *Trest*).

258. See Chicago Council of Lawyers, *supra* note 8, at 684–85, 690; Miller, *supra* note 22, at 1050 & n.115 (stating that allowing briefing will mitigate concerns caused by lack of notice); cf. *N.Y. Currency Research Corp. v. CFTC*, 180 F.3d 83, 85 (2d Cir. 1999) (quoting LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 156 (Crown Publishers 1984) ("Sentence first—verdict afterwards.")). This is the point made by the Supreme Court in *Nelson v. Adams USA Inc.*, 529 U.S. 460, 468 (2000). For a particularly rabid illustration of this point, see Vincent P. Tassinari, *Patent Compensation Under 35 U.S.C. § 284*, 5 J. INTELL. PROP. L. 59, 136–53 (1997) (criticizing allegedly unbriefed dicta in the plurality opinion in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 502–13 (1964)).

259. Cf. STERN ET AL., *supra* note 46, at 244.

260. See Chicago Council of Lawyers, *supra* note 8, at 690–91.

261. See *Adams*, 529 U.S. at 468 n.2.

*C. Supplemental Briefing Does Not Require Either Full Briefing
or Substantial Delay*

Full briefs need not always be requested when the court raises a new issue. The nature of the briefing can vary with the importance of the issue.²⁶² An appropriate opportunity to respond may be by short supplemental briefs, letters, or otherwise.²⁶³

The Chicago Council of Lawyers suggests the proper course to follow. Whenever the court (or an individual judge) is considering addressing significant or potentially dispositive issues, precedents, legal theories, arguments, or facts not contained in the briefs and the record, the court should notify the parties and provide them with an opportunity to address these matters. Examples include the following: (1) Before oral argument, if the court discovers an issue that the parties can address in oral argument but have not briefed, the court should send a short written notice to the parties asking them to prepare the issue for oral argument. (2) During or after oral argument, if the court discovers an issue that the parties should address, it should ask the parties to address it in writing.²⁶⁴ The response can be limited in both length and time. For example, an order directing simultaneous submissions not to exceed five pages within seven days would be entirely appropriate.²⁶⁵

Raising an issue at oral argument without giving lawyers time to think and respond is not enough of an opportunity to be heard. While many courts will allow brief letters or briefs to be filed after argument, lawyers often aren't aware of this procedural option, and should be told.

The delay from this procedure would be minimal. Parties can be asked to brief before or after argument. They can be asked shortly before argument to address a case at argument. Briefs can be filed successively or simultaneously.²⁶⁶

262. See *Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) (refusing to specify the briefing requirement as a per se rule).

263. Many court rules permit parties to file supplemental filings to address new matters. See, e.g., FED. R. APP. P. 28(j) (stating that a party may file a letter with supplemental authority). *Bush v. Gore*, 531 U.S. 98 (2000), has also taught us how rapidly supplemental briefs can be filed, when necessary.

264. See, e.g., *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 (7th Cir. 1999) (directing supplemental briefs after oral argument).

265. Chicago Council of Lawyers, *supra* note 8, at 689. The Council added another useful point:

In preparing for oral argument, if the court locates a case or statute that it believes should be addressed by the parties, the court should so notify the parties prior to oral argument so that counsel can prepare properly. In this case, a telephone and fax notice should suffice.

Id.

266. One objection to this suggestion is that there will be trouble with drawing lines between new issues and old issues. Courts have argued in the past about whether issues

D. Remand Should Be Used when Trial Court Input Would Be Useful

Appellate courts should use remand in lieu of supplemental briefing whenever trial court or agency input would be useful.²⁶⁷ This can occur in the following several cases: (1) when the trial court or agency has already conducted a hearing and decided questions of facts or mixed questions of fact and law that are affected by the decision, (2) when it would be unfair to the parties to reach a decision without allowing the introduction of additional evidence, and (3) any other circumstance where the appellate court would benefit from the trial court's decision.

VII. WHEN SHOULD COURTS BE MORE THAN UMPIRES?

It is relatively easy to conclude that courts should give notice and an opportunity to be heard before deciding issues *sua sponte*; in most cases the costs are low and the benefits are high. Ordering supplemental briefing (or a similar procedure) meets the due process objection to *sua sponte* decisions and accommodates many of the concerns raised by the tension among the adversary process model, the desire to do justice, and the desire to state rules for future cases.

But ordering supplemental briefing does not resolve all concerns, for it does not answer when a court should raise a new issue (and order supplemental briefing) in the first place. Any time an appellate court steps in, it is acting inconsistently with the adversary process model. Is it possible to articulate a consistent rationale for doing so?

A. Possible Grounds for Sua Sponte Review

Some commentators believe the answer is never. One commentator has argued that the Supreme Court should never order rehearing *sua*

are "new" or were sufficiently raised by the parties. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379–83 (1995) (discussing whether the issue is new); *id.* at 400–08 (O'Connor, J., dissenting) (disagreeing with the majority's conclusion); *Mapp v. Ohio*, 367 U.S. 643, 676–77 (1961); *Jackson v. Principi*, 265 F.3d 1366, 1369–71 (Fed. Cir. 2001) (discussing whether the issue is new enough so that due process was violated by deciding it); *Schmalle v. Schmalle*, 586 N.W.2d 677 (N.D. 1998). There will always be a question of line drawing; there is for every rule. But that does not mean that there should be no line. Whenever a court is raising an issue so that it is new enough so that the parties will think it was not previously raised, they should be given an appropriate opportunity to address the issue.

²⁶⁷ See *INS v. Ventura*, 123 S. Ct. 353, 354 (2002) (reversing the court of appeals for failing to remand the case for redetermination by the Board of Immigration Appeals).

sponte, except in the limited circumstances where a Justice missed the argument or the Court has changed composition.²⁶⁸ This extreme position is consistent with the adversary process model, but it fails to take into account the real, practical, and equitable concerns that lead courts to act sua sponte.

Professor Martineau argued that appellate courts should allow parties to raise new issues on appeal only when they involve jurisdiction or in the same circumstances that they are permitted under Rule 60(b) of the Federal Rules of Civil Procedure, such as mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud. A new issue should not be raised unless the party could not have raised it at trial. He suggested that the well-developed body of law and limited reach of these exceptions would cabin appellate discretion within bounds.²⁶⁹

This narrow scope for sua sponte raising of new issues on appeal seems too crabbed.²⁷⁰ The Supreme Court and other courts have responded to the legitimate pull of equity when they have raised issues sua sponte. The challenge is whether courts (or commentators) can articulate factors that can provide some guidance to future courts, lawyers, and litigants as to when new issues should be raised.

Suggesting this challenge is far easier than meeting it. While subject matter jurisdiction is clearly a proper issue to raise sua sponte,²⁷¹ it is difficult to see how any other category can be applied in a neutral fashion. The following are some examples: First, issues such as comity, abstention, and federalism are very political to begin with. While it is possible to argue that a state's interest in being free from an improper result is high, state officials should not be allowed to defer raising defenses, permitting them to gamble on winning on other grounds in the trial court while counting on the appellate court to save them.²⁷² When state officials fail to raise these issues or make deliberate concessions, why should states not be held to deliberate waivers?

Second, an exception for issues of important public interest seems desirable at first blush, but what is an important public interest to one court will be unimportant to another. The line will be particularly

268. Krimbel, *supra* note 27, at 946.

269. Martineau, *supra* note 29, at 1060; *see also* Larry A. Klein, *Allowing Improper Argument of Counsel to Be Raised for the First Time on Appeal as Fundamental Error: Are Florida Courts Throwing Out the Baby with the Bath Water?*, 26 FLA. ST. U. L. REV. 97, 124–26 (1998) (following Martineau and arguing that improper jury arguments should not be raised for the first time on appeal).

270. Dennerline, *supra* note 29, at 1006 (criticizing Martineau, *inter alia*, for focusing on the lawyer and not on the right of the litigant).

271. *See* Martineau, *supra* note 29, at 1047.

272. *See supra* notes 133–35 and accompanying text.

difficult to draw and will often appear nakedly political.²⁷³

Third, an exception for issues that are entirely questions of law and have no factual dispute would allow sua sponte injection of new issues in many cases. Such an exception, if uniformly applied, may be fair, enabling courts to ensure that the correct law is applied, as long as parties had not deliberately waived an issue below.²⁷⁴ If an appellate court would suggest the correct legal rule and order briefing in every case that was an option, the parties would likely view the result as more fair than the current system. But courts would see a significant rise in their workload.

Fourth, the miscarriage of justice standard is the most open to manipulation of all.²⁷⁵ Either a court must limit its use to the most rare cases or it must recognize that it is either changing its method of appellate review from the adversary process model to the equity model or it is allowing its judges to exercise unbridled discretion.²⁷⁶

B. Should We Have the Adversary Process Model or an Equity Model?

In the end, the answer to the question of when appellate courts should be permitted to raise new issues sua sponte may depend on whether courts accept the arguments made by Dean Roscoe Pound that our appellate courts should move from the adversary process model to the concern for justice and truth that underlie the equity model.²⁷⁷ But if one accepts the premise that writ of error review remains the best model, appellate courts should be permitted to raise nonjurisdictional matters

273. See Dennerline, *supra* note 29, at 1001–03.

274. If a deliberate waiver had occurred, that could be raised in the supplemental briefing.

275. See *supra* notes 154–55 and accompanying text.

276. In addressing the question of when courts should allow parties to raise a new issue on appeal, a commentator has suggested that courts use a rule to balance the competing concerns of raising new issues to do justice, the limitations on the ability of the appellate court to find facts, and the need to prevent lawyers from hiding issues until appeal. The proposed rule would permit sua sponte consideration either when there is great public interest or when there was no intentional waiver. No further factual development of the record is necessary; there was no opportunity to raise the issue below and there would be no prejudice. Dennerline, *supra* note 29, at 1011. But this proposal does not help—the “great public interest” category swallows up the general prohibition against raising new issues. Further, the parties will almost always have had the opportunity to raise sua sponte issues in the trial court—the issue is probably coming up because it is likely that the court’s version of the right answer did not occur to the parties or the court below.

277. See ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 385 (1941).

sua sponte only in the most exceptional cases, to remedy the gravest injustices.

If the view were accepted that the equity model fits better with modern notions of justice and procedure, the adversary process model would not apply. Instead, appellate courts could raise sua sponte any legal issue, or even any question, that they thought would lead to the fair, correct result in the case. The court would then order supplemental briefing on the issue. One ground to oppose the raising of the new issue would be waiver; the party opposing the new issue could always assert that the facts of that case made the application of the waiver rule appropriate, either because the waiver was deliberate or because any other result would encourage gamesmanship.²⁷⁸ The court could then decide whether to address the new issue and reach the proper result.

There is no federal constitutional reason why all state courts must choose either the adversary process model or an equity model. This may be a situation where the legal system would benefit by states applying different models for a period to see how they develop. If the states were expressly to choose an adversary process model or an equity model for raising issues *sua sponte* in civil cases—and stick to it—we would be able to see whether states can administer the process (either way) fairly and consistently.²⁷⁹

The author's preference is for the equity model—even though its application will involve more work for appellate courts. *Hartmann* was wrongly decided²⁸⁰ because the result was unfair, and the court knew it was unfair. Plaintiffs' counsel had not engaged in gamesmanship in choosing issues to waive, the court's analysis advanced the law, and there was no reason for the court not to apply the correct rule of law to the litigants. In the author's view, appellate courts should be more free in suggesting that parties rebrief or reargue an issue that will lead to the correct result when fact situations squarely present unbriefed issues. From the lawyers' side of the bench, the extra work that will be required for appellate courts to order and review supplemental briefing seems worth the increased number of correct, fair results.

278. Cf. Dennerline, *supra* note 29, at 989–90 (arguing that a lawyer who did not know of an issue below should be treated differently than a lawyer who intentionally concealed the issue).

279. This Article does not attempt to catalog the state statutes that may affect the right of a court to reach new issues sua sponte on appeal. For such a listing, see generally Campbell, *supra* note 29.

280. See *supra* notes 74–81 and accompanying text.

VIII. CONCLUSION

Lawyers and judges disagree on whether courts should take an activist stance towards raising new issues *sua sponte*. But whichever stance a court chooses, the key is consistency. “The only consistent feature of the current system is its inconsistency.”²⁸¹ Spouting the general rule in some cases and the gorilla rule in others cannot be the correct answer. That is not a system of law; it is too close to a game of chance.

The Supreme Court and lower courts have struggled for decades with the tension between following rules and doing justice. They have failed to articulate a meaningful standard for when courts should depart from the waiver rules of the adversary process model to raise new issues *sua sponte*.

Justice Harlan’s words in *Mapp v. Ohio* still carry force:

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling *Wolf* without full-dress argument is aggravated by the circumstance that that decision is a comparatively recent one I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument leads to the determination of an important issue. . . .

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the court’s present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court’s adjudicatory process or for the stability of its decisions.²⁸²

Were *Erie Railroad Co.*, *Mapp*, *Washington v. Davis*, *Younger*, and *Batson* wrongly decided on the merits? That is in the eye of the beholder. Would any of those decisions have been seen as less of an exercise of judicial will if the issues had been briefed before they were decided? Possibly. Would counsel and the parties have thought their cases received a fairer shake if the cases were decided on grounds they had been given a chance to brief? That seems likely. Are parties entitled to notice and an opportunity to be heard before decision? The

281. Martineau, *supra* note 29, at 1061.

282. *Mapp v. Ohio*, 367 U.S. 643, 676–77 (1961) (Harlan, J., dissenting) (footnote omitted).

answer should be “yes” from appellate courts, just as it is for other decisionmakers.

The tension between law and equity, between procedural rules and doing justice, will always be with us. So will the tension between doing justice for the parties and stating rules that will guide future conduct. But those tensions can be lessened by always giving parties notice and an opportunity to be heard before a court decides an issue. Due process should require it; simple fairness already does.

Notice and an opportunity to be heard before deciding a case *sua sponte* does not resolve the question of when a court should raise an issue *sua sponte*—it just makes the unequal application of waiver more fair to the litigants (and increases the accuracy of the decisionmaking process in some cases). But courts should pay more attention to articulating and following a consistent series of rules for when they will intervene in the adversary process.

The gorilla rule may be fine in the jungle. But it does little to create respect for law in the courthouse. It is time to use process to tame the gorilla.