Cleveland State Law Review

Volume 69 | Issue 1 Article 6

11-30-2020

The Ambiguity and Unfairness of Dismissing Bad Writing

Benjamin D. Raker
Alaska Public Defender Agency

THE AMBIGUITY AND UNFAIRNESS OF DISMISSING BAD WRITING

BENJAMIN D. RAKER, ESQ.*

ABSTRACT

Courts routinely choose to explicitly dismiss arguments and issues raised by parties, regardless of their merit, based on unexplained determinations that the briefing was bad. This practice, which I call abandonment by poor presentation, is sometimes justified by practicality, by pointing to federal and local rules, by waiver and forfeiture doctrines, and by the norm of party presentation. None of these justifications hold water. I contend that the real reason judges find abandonment by poor presentation is agenda control: judges rely on the practice as a means of retaining control over how they decide cases. This unexplained, poorly justified, and subjective practice creates a number of problems for litigants and the law. I propose a simple solution: judges should stop finding abandonment by poor presentation. As common as the practice is, it actually serves little purpose and can easily be avoided.

Judges regularly ignore litigants' arguments because they are, in the judges' views, poorly explained. To hear them tell it, judges do more than simply ignore these arguments: they find arguments and issues "waived," "forfeited," or "abandoned," solely because the litigant's writing was bad.[1] We all know bad writing can get a

* Assistant Public Defender, Alaska Public Defender Agency. I would like to thank Ryan Cooke for his friendship and insightful comments on this Article. Many thanks as well to Pratik Ghosh, Neil Greenwell, John Kerkhoff, Andrew Marino, and Kasey Youngentob for their thoughts, friendship, and encouragement—I would not have submitted this Article without them. Laura Dolbow and Susanna Rychlak Allen too provided invaluable friendship, support, and assistance in the submission process. I would like to thank the staff and editors of the Cleveland State Law Review for their patience and excellent work during what I'm sure is a difficult time to produce a law review. And finally, thank you to everyone who has taught me legal writing, and to think critically about it.

[1] Waiver: *See* Katz v. Murphy, 165 P.3d 649, 662 (Alaska 2007) ("[C]ursory treatment of an issue amounts to a waiver."); Weismueller v. Kosobucki, 667 F. Supp. 2d 1001, 1006 (W.D. Wis. 2009) ("[A] failure to meaningfully develop an argument could result in a waiver of the claim."); Kaltman-Glasel v. Dooley, 228 F. Supp. 2d 101, 110 n.10 (D. Conn. 2002) ("The Court notes that such haphazard briefing is perilously close to waiver of an issue."). Forfeiture: Huntington v. U.S. Dep't of Com., 234 F. Supp. 3d 94, 101 (D.D.C. 2017) ("[Plaintiff] only raised that argument in a brief footnote and failed to discuss it in its Reply. The Court thus considers the issue forfeited." (citation omitted)); People v. Edem, No. B212705, 2010 WL 1611106, at *1 (Cal. Ct. App. Apr. 22, 2010) ("[W]e conclude he has forfeited those arguments by providing only perfunctory arguments and failing to cite to the record and/or legal authority in support of those arguments."). Abandonment: Conn. Light & Power Co. v. Dep't of Pub. Util. Control, 830 A.2d 1121, 1128 (Conn. 2003) ("Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (quotation marks omitted)); Callahan v. Barnhart, 186 F. Supp. 2d 1219, 1230 n.5 (M.D. Fla. 2002) ("Such a cursory

lawyer into trouble. But when judges consciously ignore an argument, even a meritorious argument, only because the writing is subjectively sub-par, it should raise more eyebrows. Should a litigant lose their chance to present an argument just because the judge thought it was poorly presented? What constitutes such poor presentation? Is there a limit to a judge's discretion when tossing an issue, or a whole case, because the briefing is bad?

Despite the high regularity of this practice, these questions are almost entirely unanswered. Case reporters from virtually every jurisdiction in the United States are filled with the same lines: "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived";[2] "[W]e decline to consider arguments made in such a perfunctory fashion";[3] "An issue which is not adequately briefed is deemed abandoned."[4] Every judge, staff attorney, and law clerk has these citations at the ready, poised to fire the condemnation of a "fleeting reference"[5] or a "merely intimated"[6] argument at poorly presented issues that, in the eyes of the aforementioned judge, staff attorney, or clerk, deserve no further attention. As one judge put it, "Few principles are more a part of the warp and woof of appellate practice than the principle that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.' We have parroted this principle with a regularity bordering on the monotonous."[7] But where does this power come from, and why is it used? When? And *should* it be used?

This Article answers those antecedent questions, and as to the ultimate question my answer is "no," this power should not be used. Courts should stop finding arguments and issues waived, forfeited, and abandoned because of bad writing. The justifications for the practice are jumbled. Arguments are brushed off because judges aren't mind readers—but no one is asking them to be.[8] Courts cast away contentions because of the norm of party presentation, but judges regularly research and even raise issues on their own.[9] Issues are ignored in an effort to discourage sloppy lawyering

---

treatment of a potentially important issue is taken by this Circuit to be a sign that the party has abandoned the argument.").

2 Vargas-Colón v. Fundación Damas, Inc., 864 F.3d 14, 24 (1st Cir. 2017) (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)).

3 Lash v. Lemke, 786 F.3d 1, 10 (D.C. Cir. 2015).

4 State v. Holmes, 102 P.3d 406, 422 (Kan. 2004).

5 *See* United States v. Anguiano, 795 F.3d 873, 876 n.3 (8th Cir. 2015).

6 Butler Aviation Int'l, Inc. v. Whyte (*In re* Fairchild Aircraft Corp.), 6 F.3d 1119, 1128 (5th Cir. 1993) (footnote omitted), *abrogated on other grounds by* Tex. Truck Ins. Agency, Inc. v. Cure (*In re* Dunham), 110 F.3d 286 (5th Cir. 1997).

7 Casillas-Diaz v. Palau, 463 F.3d 77, 83 (1st Cir. 2006) (citations omitted).

8 *See infra* Part II.A.1.

9 *See infra* Part II.A.4.

and deceitful tactics,[10] but it doesn't seem to be working: more and more arguments are being dismissed for poor writing,[11] and the inconsistency with which this "rule" against perfunctory argument is applied could itself be encouraging sloppy prose.[12] The real motivation is likely that judges lean on bad briefing to accomplish the ends of agenda control: it allows them to exercise control over how they decide cases.[13]

This practice causes real and pervasive problems. Courts make this determination—whether an argument or issue was raised well enough to consider—often and obliquely. It is an everyday practice, exercised without a lot of boundary to the judges' discretion, and at great consequence to lawyers and, more importantly, litigants. Giving an argument short shrift could be the difference between freedom and imprisonment,[14] even life or death.[15] Yet these important matters can often be swatted away offhandedly, with a quick reference to "perfunctory statements" or "cursory arguments." "These reiterations," one judge admonished, "are not meant to be regarded as empty words,"[16] but when, as the same judge noted, those words are parroted "with a regularity bordering on the monotonous"[17] they tend to have that feeling. What's more, despite the big (and often repetitive) talk about ignoring poorly presented arguments, courts often ignore their threat of ignore-ance and consider the argument anyway;[18] or disagree with each other as to what constitutes a poorly or

---

10 *See infra* Part II.A.3; Patterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988).

11 *See* Comment, Christopher F. Edmunds, *The Judicial Sieve: A Critical Analysis of Adequate Briefing Standards in the Federal Circuit Courts of Appeals*, 91 TUL. L. REV. 561, 569 (2017) (noting that "a cursory survey of case law suggests that [briefing standards as justification for dismissing arguments] came into fashion between the mid-1990s and the early 2000s"). After my own cursory review of the case law, I agree with Edmunds, as I will discuss below. *See infra* text accompanying notes 196–201. Other commentators appear to think this is a relatively new practice, which suggests it is occurring more frequently. *See* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1268 (2002) ("Courts *now* treat as waived even issues that were raised in the briefs, because they were not briefed with sufficient detail." (emphasis added)).

12 *See infra* text accompanying notes 220–21.

13 *See infra* Part III.

14 *See* United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir. 1993) (remanding, but noting that if the same issue had been challenged on direct appeal instead of habeas petition, the challenge would have been deemed "waived"); *see also* Edmunds, *supra* note 11, at 580 (discussing criminal defendants' losses due to adequate briefing standards).

15 Carter v. Lee, 283 F.3d 240, 252 n.11 (4th Cir. 2002) (finding death penalty defendant waived argument by not presenting it in opening brief).

16 Casillas-Diaz v. Palau, 463 F.3d 77, 83 (1st Cir. 2006).

17 *Id.*

18 *See, e.g.*, United States v. Erpenbeck, 532 F.3d 423, 434 (6th Cir. 2008) (noting that argument was not sufficiently briefed, but then considering merits anyway); Baloga v. Pittston Area Sch. Dist., 927 F.3d 742, 752 n.8 (3d Cir. 2019) (same). Noting that an argument is "waived" or "abandoned" due to poor briefing but then stating that this waived or abandoned

properly raised argument.[19] This all injects a degree of uncertainty into the process that is inimical to our system of justice.[20] It exacerbates resource disparity and harms disadvantaged litigants. It encourages over-presentation of issues and long-winded briefs, and it leads to bad precedent.[21]

This topic is almost entirely unexplored. Outside of a single student note,[22] no one has engaged with this topic directly. That could be because ignoring or dismissing arguments on the grounds of poor briefing is perceived as a relatively new practice.[23] While there is some evidence that it has ticked upward in its popularity,[24] it is not a recent phenomenon.[25] More likely, the lack of scholarship on this topic arises from the fact that it is taken for granted—there is not a lot of scholarship on the practice of writing arguments on paper either. Whatever the reason, this topic, like other topics addressing common court practices, has been overlooked.[26] As David Foster Wallace observed, "the most obvious, important realities are often the ones that are hardest to

---

argument has no merit is an old and common practice. *See, e.g.*, United States v. L.A. Soap Co., 83 F.2d 875, 889 (9th Cir. 1936) ("This alleged error is neither specified nor argued in the appellees' brief, and we must assume that it has been abandoned. At any rate, we do not believe that the claim of deviation has merit." (citation omitted)).

19 *See infra* notes 233–39 and accompanying text.

20 *Cf.* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1033, 1057–58 (1987) (discussing how inconsistency in application of the rule against considering new issues on appeal is "inimical to the system of justice").

21 *See infra* Parts IV.C and IV.D.

22 *See generally* Edmunds, *supra* note 11.

23 *See* Miller, *supra* note 11, at 1267 ("Courts *now* treat as waived even issues that were raised in the briefs, because they were not briefed with sufficient detail." (emphasis added)). Edmunds suggests this practice arose in the decades following the adoption of the Federal Rules of Appellate Procedure and in response to an increase in federal caseloads. Edmunds, *supra* note 11, at 567–70.

24 *See infra* text accompanying notes 197–201.

25 *See infra* note 75 and accompanying text. *But see* Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc., 722 F.2d 1319, 1323 (7th Cir. 1983) (noting that the court "would be within [its] rights in refusing to decide this appeal in view of the paucity of appellants' brief," but not doing so because the court "ha[s] not so acted in the past and therefore deem it unfair to do so here without advance notice").

26 *See* Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1528 (2012) (discussing the practice of appellate courts addressing issues for the first time on review and noting that "[g]iven the fundamental nature of the questions posed by appellate courts' acting as 'first responders,' . . . there is less scholarly commentary than one might expect" on this issue); Miller, *supra* note 11, at 1261 ("Although these questions raise fundamental concerns about the role of appellate courts, the adversary system, and due process, they have received surprisingly little attention.").

see and talk about."[27] They also tend to be the ones worth discussing. When you have rhetoric and precedent saying one thing, practice going the other way, and a dearth of theory as to why, you have all the ingredients of a topic that needs to be tackled. As Professor Amanda Frost wrote of the similar topic of judicial issue creation—something that is formally shunned, often practiced, and little discussed: "As a purely practical matter . . . the tension between the rhetoric . . . and the practice is one that deserves further discussion for the benefit of judges struggling to reconcile their conflicting obligations in specific cases."[28] Same here.

This Article proceeds as follows. In Part I, I define the scope of this Article and the terms I use. In Part II, I critically investigate some of the justifications for the practice. Next, in Part III, I discuss what is really going on. I submit that dismissing and ignoring bad arguments is really a tool of agenda control. That is, courts dismiss or ignore "cursory" arguments in order to control how they decide cases. Part IV lays out the primary problems with this practice, including its inconsistent application and the possibility of creating bad precedent. Finally, in Part V, I present my solution: judges should stop finding issues and arguments waived or forfeited due to bad writing. I will explain that the alternatives are not disruptive. If, however, judges insist on continuing the practice, I recommend that they more explicitly address why arguments are insufficient so that courts can develop better briefing standards. In short, the practice of dismissing arguments on the back of poorly explained writing critiques should end (or at least improve) in order to better serve the interests of justice.

CONTENTS

---

[27] David Foster Wallace, Kenyon Commencement Address 1 (May 21, 2005) (transcript available at https://web.ics.purdue.edu/~drkelly/DFWKenyonAddress2005.pdf).

[28] Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 451 (2009).

I. DEFINING TERMS

The focus of this Article is losing by poor presentation; when judges rule against a party—either on a specific issue or a pleading or an entire case[29]—because, according to the judge, the party did not explain its position well. Practitioners are familiar with this concept expressed as "waiver," "forfeiture," or "abandonment," as those are terms courts commonly use to explain (or justify) this practice.[30] As I will discuss below,[31] "waiver" is not quite right, as waiver is theoretically an intentional act, and lawyers rarely present arguments in an intentionally poor manner.[32] "Forfeiture" is closer to the mark but is more related to bad timing than bad writing.[33] That leaves "abandonment," which best describes this phenomenon from the perspective of both the litigant and the law. The litigant is giving up or leaving behind an issue or argument, and whether that action is intentional or not the court will deem it "abandoned," much like if you accidentally put that priceless antique lamp in a pile

---

29 *See* Jorden v. Walmart Stores, Inc., 332 F. Supp. 2d 1172, 1177 (C.D. Ill. 2004) (granting summary judgment to defendant in part because the plaintiff's "perfunctory and undeveloped legal argument is utterly insufficient to survive a motion for summary judgment"); Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 132 (2d Cir. 2004) (noting that briefing problems would justify summarily dismissing the appeal, but considering the merits anyway).

30 *See* sources cited *supra* note 1.

31 *See infra* Part II.A.3.

32 Waiver is the intentional relinquishment of a known right. United States v. Olano, 507 U.S. 725, 733 (1993).

33 Forfeiture is the failure to timely assert a right. *Id.*

of junk next to the "free" sign. Thus, this Article concerns "abandonment by poor presentation."

In the only previous work directly on this topic, Christopher Edmunds ably addressed the similar issue of "briefing standards."[34] That is an accurate catch-all for describing the universe where this topic belongs, but the thrust of this Article is narrower. Briefing standards writ large is not its focus. Page limits, fonts, and margins will not be discussed. Structural briefing requirements, such as rules requiring a statement of issues, or an argument section, will be tangentially addressed,[35] but only in relationship to our true north of sloppy exposition—or writing that appears sloppy to the judges reviewing it.

This Article does not concern stage preclusion-related briefing failures, such as the consequences of not raising an argument in the court below, or in an opening brief. These topics are naturally related to the topic of this Article, as they concern judges' determining whether a litigant sufficiently raised an issue. But this Article is not about the response to silence—the failure to raise an argument. Rather, it concerns the response to whispers and innuendo—the failure to raise an argument in a "clear" or "cogent" manner.[36] Or at least this is where I aim; it is not always clear whether an argument was raised poorly or not at all.[37]

Finally, a note on the scope of this Article's primary source material. Edmunds focused exclusively on the federal courts of appeals. Related scholarship into waiver and agenda control tends to look upwards: to the Supreme Court. The scope of this Article is significantly broader. I looked at federal courts of appeals, federal district courts, state courts of all levels, and some administrative tribunals. The Supremes make the occasional appearance, but were not my focus for two reasons. First, by the time a case wends its way to the Supreme Court the issues have generally been highly

---

34 Edmunds, *supra* note 11.

35 Running afoul of these rules can result in a court ignoring arguments as well. *See, e.g.*, *In re* Interest of C.W.S., 498 S.E.2d 813, 814 (Ga. Ct. App. 1998) ("[T]he failure to present arguments in the format specified by our rules may result in a refusal by this Court to even consider one's argument."); Burston v. State, 343 S.W.3d 691, 694 n.2 (Mo. Ct. App. 2011) (argument raised in the argument section of brief but not in the "points relied on" section of brief will not be considered); Banks v. Ruth B., 23 N.Y.S.3d 575, 575 (N.Y. App. Div. 2016) ("Another ground for dismissal is the insufficiency of the appendix."). Even when it has significant consequences. *See* Mendoza v. State, 87 So. 3d 644, 663 (Fla. 2011) (not considering argument by capital defendant on appeal because he incorporated the argument by reference, in contravention of FLA. R. APP. P. 9.210(b)(5)).

36 *See* Singer v. Borbua, 497 So. 2d 279, 281 (Fla. Dist. Ct. App. 1986) ("[I]n order to obtain appellate review, alleged errors relied upon for reversal must be raised *clearly*, concisely, and separately as points on appeal." (emphasis added)); Goodwin v. Deboer, 112 N.E.3d 214, 222 n.1 (Ind. Ct. App. 2018) (citing IND. R. APP. P. 46(A)(8)(a)) (referring to Indiana's "cogent argument rule"). Although it is not always clear whether an argument was raised poorly or not at all.

37 *See* United States v. Valimont, No. 8:12-CR-430, 2013 WL 1975850, at *7 (D. Neb. May 13, 2017) ("Finally, Valimont makes no actual argument in support of his due process claim. The Court declines to address arguments raised in such a cursory fashion.").

refined, as has the lawyering.[38] Therefore, waving off issues because of poor presentation is going to be rarer at the Court. Second, the Court is generally unique when it comes to procedure, in part because it is unique when it comes to substance.[39] The certiorari docket is entirely discretionary and geared towards confrontation of the most pressing, unsettled, and consequential areas of the law.[40] Investigating when the Court sees fit to order additional briefing, appoint amici, or consider unraised issues sua sponte is not going to shed much light on when other courts should be doing these things.[41] A general problem with inquiry into sua sponte decisionmaking and rules of waiver or briefing standards is that, for the reasons stated, it has focused too much on the Supreme Court.[42] Widening the lens helps focus on the root causes of the practice of abandonment by poor presentation and filter out some of the noise that comes from applying sui generis Supreme Court justifications to lower courts.

So, the focus of this Article is on abandonment by poor presentation, at any stage in litigation, as enforced by federal courts of appeals and district courts, state courts, and even some administrative tribunals. Those parameters set, we can interrogate the traditional justifications for abandonment by poor presentation.

II. THE JUSTIFICATIONS FOR ABANDONMENT BY POOR PRESENTATION—WHAT COURTS SAY IS GOING ON

Why do courts dismiss and ignore arguments that were raised in a dismissive or ignorant manner? In the following section, I set out to answer that question with a critical eye. I will interrogate the traditional justifications that judges themselves put forward when waving off a bad brief. For example, I will question the proposition that poor arguments should be considered abandoned because judges are not "mind-readers," as well as the common assumption that poor briefing amounts to "waiver" or "forfeiture."

But before turning to *why* courts routinely enforce abandonment by poor presentation, it is worth briefly addressing whether courts can do it all. From where do they derive this power? That courts can decline to consider argument on the ground

---

38 *See* Adam Liptak, *Just Ideology? A Study Finds Another Predictor of Supreme Court Decisions*, N.Y. TIMES (July 22, 2019), https://www.nytimes.com/2019/07/22/us/politics/supreme-court-expert-lawyer.html ("In the early 1980s, fewer than a quarter of lawyers arguing before the justices had ever done so before. In recent years, some 60 percent had.").

39 *See* Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROCESS 61, 78 (2019) (declining to focus on the Supreme Court for a study on citation practice because "[i]t is unique and therefore unrepresentative of courts in general").

40 *See* SUP. CT. R. 10.

41 *See* Bennardo & Chew, *supra* note 39, at 73–74 ("Because the Supreme Court is a judicial body that is uniquely not bound by the traditional system of precedents, studying it provides a skewed perspective into judicial decision making writ large.").

42 *See* Miller, *supra* note 11, at 1273–74 (discussing some SCOTUS cases that suggest the rules are different there—because the issues are really important).

of poor presentation seems obvious, but, like most things that are taken for granted, that itself provides a good reason to question it.

The most basic, and far reaching, source of the power to ignore poor writing in the federal courts is, as the Supreme Court put it in *Landis v. North American Company*, the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[43] The right to police the quality of briefs could be part of these inherent powers which are in turn encompassed by the "judicial power" vested in the Supreme Court in the United States Constitution.[44] That is, this is the type of duty left to the courts under our conception of separation of powers. This explanation provides a sound source of the power for federal courts as well as many state courts because many state constitutions have an analogous reference to the "judicial power,"[45] and impart analogous conceptions of separation of powers.[46] This is not an entirely bulletproof font of authority, however, because there is little doubt that Congress and state legislatures can, to some extent, impose standards on litigation in federal and state courts.[47] In the federal courts it could stem from the case and controversy requirement. As will be discussed below, a common justification for refusing to consider poorly presented arguments is that

---

43 Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); *see* Edmunds, *supra* note 11, at 587–88.

44 *See* Link v. Wabash R.R., 370 U.S. 626, 630 (1962) (recognizing that, under the Constitution, lower courts have some "inherent power" to "manage their own affairs").

45 *See In re* Parole of Hill, 827 N.W.2d 407, 427 (Mich. Ct. App. 2012) ("The state constitution vests judicial power 'exclusively in one court of justice,' and the circuit courts are a division of the state's 'one court of justice.' . . . A circuit court's inherent power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." (internal citations and quotation marks omitted) (quoting MICH. CONST. art. VI, § 1)).

46 Brown v. Cox, 387 P.3d 1040, 1044 (Utah 2017) (discussing how the Utah Constitution "compels" the Supreme Court of Utah to "manage the appellate process" (quoting UTAH CONST. art. VIII, § 4)); C.R. for Seniors v. Admin. Off. of the Cts., 313 P.3d 216, 220 (Nev. 2013) ("As a separate branch of government under the Nevada Constitution, the judiciary has the inherent authority to manage its own affairs, make rules, and carry out other incidental powers when 'reasonable and necessary' for the administration of justice." (emphasis omitted)); State v. Ashcraft, 859 P.2d 60, 69 (Wash. Ct. App. 1993) ("In Washington, trial courts have control over all aspects of the docket and cases which come before them, and are vested with the power to manage that case load. This power to manage the court docket derives from the state constitution as well as from legislation giving the courts the power to adopt civil and criminal rules of procedure." (citation omitted)); People v. Farren, No. 312951, 2014 WL 1051664, at *10 (Mich. Ct. App. Mar. 18, 2014) (per curiam) ("Courts have the inherent power 'to control the movement of cases on its docket' through a variety of means." (quoting Persichini v. William Beaumont Hosp., 607 N.W.2d 100, 109 (Mich. Ct. App. 1999))).

47 There is *some* doubt. *See, e.g.*, Ordunez v. Bean, 579 S.W.2d 911, 915 (Tex. Crim. App. 1979) (Clinton, J., concurring) (questioning constitutionality of Texas Speedy Trial Act on the ground that it "trenches upon [the] power and authority of state trial courts to manage their affairs, including control of their dockets"); Briggs v. Brown, 400 P.3d 29 (Cal. 2017) (challenging California law on the ground that it "runs afoul of the separation of powers doctrine by materially impairing the courts' ability to resolve capital appeals and habeas corpus petitions, and to manage their dockets in general").

judges should not go looking for issues that are not presented, and doing so may run afoul of the principle of party presentation and the need for a live controversy. However, as we will see, this justification for the practice is weak, as is the principle of party presentation. Relying on the "inherent" power of courts, emanating penumbra-like from a constitutional conception of "judicial power" is a wishy-washy justification to be sure. But an amorphous source of power does not mean that there are no limits to its exercise.[48]

There is no definitive answer as to where this power comes from. Perhaps due to the lack of investigation into the area as a whole and the obviousness and regularity of courts' exercise of this power, this practice is infrequently questioned and, as far this writer can tell, never challenged in court.[49] In the end, the amorphous inherent power discussed in *Landis* is the best if not most clear explanation. That is because this "power" to dismiss issues on briefing grounds is better thought of as a general understanding that judges do this type of thing. It is a pervasive understanding. If challenged, a court could perhaps hide behind a constitution, but that defense vanishes for administrative tribunals, and they find abandonment by poor presentation with regularity.[50]

A. The Justifications

We have determined that courts have the power to find abandonment by poor presentation, so we can turn to why. In the following section I will address the four common justifications for this practice and demonstrate why none is satisfactory. Those justifications are: 1) Judges aren't mind-readers, 2) rules that impose briefing standards, 3) the doctrines of waiver and forfeiture, and 4) the norm of party presentation.

1. Judges Are Not Mind-Readers

The simplest explanation for the phenomenon of ignoring bad briefing is that judges cannot address what is not presented to them. They are not mind-readers.[51]

---

48 Moossun v. Orlando Reg'l Health Care, 826 So. 2d 945, 954 (Fla. 2002) (Lewis, J., dissenting) ("While trial courts certainly do have the inherent power to manage their dockets so as to move cases toward final judgment, dismissal of cases just to reduce the overall number of pending actions before a court is not, I submit, a proper method of fulfilling the obligations that the judiciary owes every Floridian.") (footnote omitted); *see* Spitz v. Iowa Dist. Ct. for Mitchell Cnty., 881 N.W.2d 456, 467 (Iowa 2016).

49 To be clear, the inherent source of the authority to toss briefs on poor presentation grounds does not appear to have been challenged. Whether a court abused its discretion in exercising that authority has been challenged.

50 *E.g.*, Fleming v. Shaw Grp., No. 14-070, 2015 WL 5921337, at *1 (U.S. Dep't of Lab. Aug. 19, 2015); *Ex parte* Ryan, No. 2011-013038, 2014 WL 1262721, at *3 (P.T.A.B. Mar. 27, 2014); Westborough, 10 E.A.D. 297, 311 (EAB 2002).

51 Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly.") (quotation marks omitted).

This is a common justification for the practice.[52] As Richard Posner put it, in a characteristically colorful quip: "Judges are not like pigs, hunting for truffles buried in briefs."[53]

This justification is both the simplest to explain and the simplest to discredit. Of course judges are not "clairvoyant."[54] No one expects them to be. If an issue or argument is indeed left unsaid no one would question a judge leaving it unaddressed.[55] What one would question (I do) is the practice of *explicitly* not addressing poorly presented arguments or issues, a practice that cannot be justified by an appeal to a lack of telepathy. Put differently, "[t]hat judges have no *duty* to sift through the record is self-evident, but what explains their willingness to turn a blind eye towards evidence discovered by a panel member who voluntarily does the sifting?"[56]

Thus, there is a logical flaw at the heart of a judge's "perfunctory" pronouncement that she has neither the power of divination nor the proclivities of a pig. An argument is not so poorly presented as to be undiscernible if a judge discerns it, only to dismiss it. A statement that a judge should not be expected to consider improperly presented arguments begs the question: what about the argument was improperly presented?[57] These statements are not airtight defenses to the practice of abandonment by poor presentation.

If this was the true justification for abandonment by poor presentation, we would likely have no idea the practice is indeed practiced. Why? Because if the arguments were truly "perfunctory," in fact raised only in a "fleeting" manner or alluded to as an afterthought, then they would only be addressed at best in denials of motions for

---

52 *E.g.*, United States v. Dupree, 617 F.3d 724, 728 (3d Cir. 2010) ("[E]ven the most learned judges are not clairvoyant."); United States v. Nee, 261 F.3d 79, 86 (1st Cir. 2001); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991); Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir.1988).

53 *Dunkel*, 927 F.2d at 956.

54 *See Dupree*, 617 F.3d at 728.

55 There are some exceptions. There are probably certain things that a judge would have to address regardless of whether they were presented, outside of the familiar sua sponte provoking issue of subject-matter jurisdiction, such as standards of review. *See Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520, 1527–28 (2019); Andrew L. Adler, *The Non-Waivability of AEDPA Deference's Applicability*, 67 U. MIAMI L. REV. 767 (2013). But poor briefing can get in the way even of subject-matter jurisdiction. *See* Alken-Ziegler, Inc. v. Waterbury Headers Corp., 600 N.W.2d 638, 642 (Mich. 1999) (noting that a Michigan Court of Appeals panel had rejected a subject-matter jurisdiction argument because it was "no more than a bare assertion"); Richard Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part I*, 7 WIS. L. REV. 91, 104 (1932).

56 Edmunds, *supra* note 11, at 478.

57 *Cf.* Ind. Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731, 742 (D.C. Cir. 1992) (Silberman, J., dissenting) (pointing out that the statement that courts should only consider claims that are properly before the court "begs the question, because the hard analysis comes in determining when an issue or claim is properly before the court"), *rev'd sub nom.* U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993).

rehearing, which are rarely published.[58] Judges would not address that which they have not considered and would only justify their lack of consideration when it is pointed out post hoc.[59] Instead, judges often find themselves saying that they needn't consider an issue that wasn't clearly presented,[60] yet apparently it was presented *enough* to say out loud that they don't need to consider it.

For these reasons, this is not a defensible rationale for ignoring badly briefed issues and arguments. Judge Posner was answering to a strawman.[61] But this is a good rationale to start with because it clarifies the subject matter. We are not dealing with issues and arguments stated so poorly as to be indecipherable, but rather writing that passes some threshold such that a judge feels compelled to explain why she is going to ignore it. Further, we are considering only poorly presented "arguments." Thus, dismissing poorly *pleaded* claims, or poorly stated answers presents a separate issue. If a party alleges in a complaint only that "the officer's action was unconstitutional," that complaint may be dismissed (perhaps even sua sponte) without employing abandonment by poor presentation. The problem there is a failure to allege sufficient facts to state a claim. The problem here is more opaque; a failure to present sufficient verbiage to say what you mean to say.

2. Playing by the Rules

Another justification for abandonment by poor presentation is that courts are simply playing by the rules, namely rules of civil, criminal, and appellate procedure as well as a court's own local rules. The Federal Rules of Appellate Procedure, as well as many of the states' analogues, do contain provisions on the necessary contents of a brief.[62] FRAP 28(a)(8)(A) requires that briefs contain an "argument," which "must contain appellant's contentions and the reasons for them, with citations to the authorities and parts of the records on which the appellant relies." This is not infrequently cited by federal appellate courts when finding abandonment by poor presentation.[63] Some states lean on their analogous rules for this purpose as well,[64] and

---

58 But occasionally are. *See* Savoie v. Huntington Ingalls, Inc., 824 F.3d 468 (mem.) (5th Cir. 2016) (denying rehearing because "colorable" argument was not adequately presented in briefing).

59 *See id.* at 469.

60 *See, e.g.*, Gross v. Rell, 585 F.3d 72, 95 (2d Cir. 2009); Elder v. Jones, 608 P.2d 654, 660 (Wyo. 1980).

61 *See* Frost, *supra* note 28, at 508 ("No one contends that judges should affirmatively search out the best arguments for one side or other.").

62 *See* FED. R. APP. P. 28(a)(8)(A); *see also, e.*g., VT. R. APP. P. 28(a)(4); ILL. SUP. CT. R. 341(h)(7); MISS. R. APP. P. 28(a)(3), (7).

63 *E.g.*, Niagara Mohawk Power Co. v. Hudson River-Black River Reg. Dist., 673 F.3d 84, 107 (2d Cir. 2012); United States v. Hook, 471 F.3d 766, 775 (7th Cir. 2006); Rotskoff v. Cooley, 438 F.3d 852, 854 (8th Cir. 2006) (quoting United States v. Zavala, 427 F.3d 562, 564 n.1 (8th Cir. 2005)); Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

64 *E.g.*, State v. Shepherd, 989 P.2d 503, 510 (Utah Ct. App. 1999) (relying on UTAH R. APP. P. 24(a)(9)); Goodwin v. Deboer, 112 N.E.3d 214, 222 n.1 (Ind. Ct. App. 2018) (citing IND. R.

some states' rules explicitly warn that issues could be "waived" if "perfunctory" or not supported by argument.[65] (Unfortunately, these rules never define what constitutes "perfunctory," or what it means to "argue.")

Edmunds focuses on briefing standards in the federal courts and centers FRAP 28 as a primary culprit in the courts' war on ambiguity, crediting the rule as a justification for the "significant[]" expansion of "the scope of waiver."[66] There is reason to think FRAP 28 has played a part in this story, but it is more of an ad hoc justification for an extant judicial impulse and less an inspiration for a new briefing standard. Finding abandonment because of sloppy briefing does appear to increase after the implementation of the Federal Rules of Appellate Procedure. But when it stands accused as the primary perpetrator of abandonment by poor presentation, FRAP 28 has quite a few alibis.

To begin, statements that purport to rely on FRAP 28—statements that admonish "cursory," "conclusory" or "perfunctory" argument as insufficient—are used by all kinds of courts that have no reason to follow FRAP 28. You can find this language, and the broader practice of abandonment by poor presentation, in state appellate courts,[67] but also federal district courts, whether acting as appellate courts,[68] or as ordinary courts of first review.[69] If this is a practice that originates from the Federal Rules of Appellate Procedure, federal district court judges did not get the memo.[70] Going farther afield, a *federal* rule of *appellate* procedure should not be the justification for a practice in a state court of first review, and yet lower state courts

---

APP. P. 46(A)(8)(a)); HNS Dev., L.L.C. v. People's Couns. for Balt. Cnty., 42 A.3d 12, 26 (Md. 2012) (citing MD. REV. CT. APP. R. 8-504(a)(5)).

65 *See, e.g.*, Antilles Sch., Inc. v. Lembach, 64 V.I. 400, 428 n.13 (2016) (quoting V.I. SUP. CT. R. 22(m)); Baker v. City of Iowa City, 750 N.W.2d 93, 103 (Iowa 2008) (citing IOWA R. APP. P. 6.14(1)(c)). It appears that Iowa's Rules of Appellate Procedure changed after *Baker*. *See* IOWA R. APP. P. 6.903(2)(g)(3) (2009).

66 Edmunds, *supra* note 11, at 568.

67 *See* Elder v. Jones, 608 P.2d 654, 660 (Wyo. 1980) (referring to abandonment by poor presentation as a "basic premise of appellate practice").

68 Morrison v. Brosseau, 377 B.R. 815, 826 (Bankr. E.D. Tex. 2007).

69 *See* Conn. Light & Power Co. v. Dep't of Pub. Util. Control, 830 A.2d 1121, 1128–29 (Conn. 2003) ("These same principles apply to claims raised in the trial court." (quotation marks omitted)); Gorman v. Town of New Milford, No. CV085004455S, 2011 WL 5041895, at *9 (Conn. Super. Ct. Sept. 28, 2011).

70 *See, e.g.*, John Richards Homes Bldg. Co. v. Adell (*In re* John Richards Homes Bldg. Co.) 404 B.R. 220, 241 (Bankr. E.D. Mich. 2009) (quoting McPherson v. Kelsey, 125 F.3d 989, 995–96 (6th Cir. 1997)); Herrell v. Benson, 261 F. Supp. 3d 772, 776 n.1 (E.D. Ky. 2017) (citing *McPherson*, 125 F.3d at 995–96); Coopersmith v. Lehman Bros., 334 F. Supp. 2d 783, 790 n.5 (D. Mass. 2004) (quoting Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 61 n.17 (1st Cir. 1999)); United States v. Lopez-Diaz, 940 F. Supp. 2d 39, 46 n.10 (D.P.R. 2013) (quoting Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 58 (1st Cir. 2013)).

have relied on federal law in this area.[71] As have administrative tribunals.[72] This could be an instance of the gravitational pull of federal procedural law.[73] Once something, anything, is written in a federal reporter, it takes on an air of significance in all contexts that it may only have in few, if any. State, federal, and administrative law judges may trace the legitimacy of these statements to FRAP 28, but I doubt they do so consciously and in any event the genealogy is a tortured one.[74]

But the federal rules, either directly or through their gravitational pull, cannot entirely account for abandonment by poor presentation. For one, this practice goes back much farther than the Federal Rules of Appellate Procedure.[75] Exhibit A: the Notes of Decisions for Rule 28 on this topic include cases that were decided before Rule 28 was promulgated.[76] For another, the federal rules were meant to lower barriers to entry for litigation, not heighten briefing standards. The federal civil rules were generally designed to be less technical and more user-friendly.[77] The Federal Rules of

---

71 Yet it happens. *See* St. Hillaire v. City of Auburn, No. AP-00-18, 2001 WL 1671582, at *4 (Me. Sup. Ct. Aug. 31, 2001) (citing United States v. Zanino, 895 F.2d 1, 17 (1st Cir. 1990)).

72 *E.g.*, Hasan v. Sargent & Lundy, No. 05-099, 2007 WL 2573634, at *5 (U.S. Dep't of Lab. Aug. 31, 2007) (citing Tolbert v. Queens Coll., 242 F.3d 58, 75–76 (2d Cir. 2001)).

73 *See generally* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016).

74 For example, in *Warner v. Astrue*, 880 F. Supp. 2d 935, 945 (N.D. Ill. 2012) the court wrote "the Seventh Circuit 'repeatedly ha[s] made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived," but it cited *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000), for this proposition, which in turn relied on FED. R. APP. P. 28(a). *See also* Moody v. Berryhill, 245 F. Supp. 3d 1028, 1033 (C.D. Ill. 2017) (quoting United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991) (citing FED. R. APP. P. 28(a))); Morton v. Soc. Sec. Admin., No. 15-4435, 2016 WL 5724810, at *4 (E.D. La. Sept. 15, 2016) (citing Perez v. Barnhart, 415 F.3d 457, 462 n.4 (5th Cir. 2005) (citing FED. R. APP. P. 28(a))).

75 *See* Derby v. Hannin, 5 Abb. Pr. 150 (N.Y. Sup. Ct. 1856) (noting that specification of error was "too vague and general"); Farmers & Merchs. Nat'l Bank of Hooker v. Cole, 87 P.2d 149, 150 (Okla. 1939) (noting, in 1939, the "long established rule" that assignments of error unsupported by argument will not be reviewed); United States v. Randall, 27 F. Cas. 696, 705, 1 Deady 542 (D. Or. 1869) (No. 16,118) ("The second ground of the motion for a new trial—that the verdict was against law—was not argued by counsel and needs no particular consideration by the court."); *Randall*, 1 Deady 524 at synopsis ("The second question made by the demurrer was abandoned on the argument, and not particularly mentioned or considered in the disposition of it.").

76 *See, e.g.*, Clay v. S. Ry., 284 F.2d 152 (5th Cir. 1960); Risken v. United States, 197 F.2d 959 (8th Cir. 1952).

77 *See* Foman v. Davis, 371 U.S. 178, 182 (1962); Conley v. Gibson, 355 U.S. 41, 47 (1957); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 536–37 (2002) ("[T]he [Rules] Committee meant to rectify the exceedingly technical nature of the earlier procedural schemes which strict pleading typified. . . . The Committee intended to craft a national code of procedure which was simple, uniform, and trans-substantive. . . ."); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649 (1981) (discussing different ways "[t]he drafters of the federal rules emphasized procedural

Appellate Procedure, adopted a few decades later, were no different.[78] A prominent treatise has noted that "[o]ne of the most striking achievements in the federal rules from the first has been the simplified procedures they introduced for taking appeals."[79] If FRAP 28 spurred greater scrutiny of litigants' writing, that is not in keeping with the mood of the federal rules. And even Edmunds, who largely attributes dismissal of "perfunctory" argument to FRAP 28, observed that the practice increased substantially in the late 1990s in response to the "caseload crisis" in federal courts, and not in response to the passage of the federal rules of appellate procedure which had occurred two decades earlier.[80] Although reliance on state analogues to FRAP 28 is also common, these rules fall short as catch-all justifications for much the same reasons. The practice generally predates them, and it does not appear to become common immediately following their promulgation.

Although the federal civil rules have no general briefing requirements,[81] a number of district courts have local rules that bear a passing resemblance to FRAP 28.[82] Here too, courts rarely rely on these rules alone as a reason to dismiss an argument, and instead either ignore the local rule in favor of a citation to case law,[83] or cite the rule while providing additional justification.[84]

---

simplicity," including devaluing "the importance of technical pleadings with fixed requirements"); Subrin, *supra* at 1651 ("Advocates [of the federal rules] wanted procedure to be less technical and more flexible in order to meet newly recognized social needs and to permit the expanded role of the federal government."); Edmunds *supra* note 11, at 567. Literally Rule number one is to construe the rules to affect a "just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

78 Tobias, *supra* note 77, at 557 ("[M]ost of the major precepts, such as uniformity, simplicity, and inexpensive, prompt dispute disposition, underlying the civil rules also supported the FRAP.").

79 *See* 20 Charles A. Wright & Mary Kay Kane, FEDERAL PRACTICE DESKBOOK § 111 (2019).

80 *See* Edmunds, *supra* note 11, at 577–78.

81 There are, of course, rules for pleading. *E.g.*, FED. R. CIV. P. 8, 11. But there are no federal rules concerning the substance of a memorandum of law in support of a motion, or an opposition, or similar briefing documents.

82 *E.g.*, E.D.N.Y. & S.D.N.Y. LOC. R. 7.1(a)(2) (2018) (requiring a "memorandum of law, setting forth the cases and other authorities relied upon in support of the motion, and divided, under appropriate headings, into as many parts as there are issues to be determined"); N.D. IOWA & S.D. IOWA LOC. R. 7(d) (requiring motions to be accompanied by "a brief containing a statement of the grounds for the motion and citations to the authorities upon which the moving party relies").

83 *E.g.*, Lima v. Hatsuhana of USA, Inc., No. 13 Civ. 3389, 2014 WL 177412, at *1 (S.D.N.Y. Jan. 16, 2014) (quoting Lyn v. Inc. Vill. of Hempstead, No. 03 Civ. 5041, 2007 WL 1876502, at *16 n.13 (E.D.N.Y. June 28, 2007)); Knutson v. Ag Processing, Inc., 273 F. Supp. 2d 961, 998 n.8 (N.D. Iowa, 2003) (citing Bickel v. Korean Air Lines Co., 96 F.3d 151, 154 (6th Cir. 1996)), *rev'd on other grounds*, 394 F.3d 1047 (8th Cir. 2005).

84 *E.g.*, Dairy Rd. Partners v. Maui Gas Ventures, L.L.C., No. 16-00611, 2018 WL 1244147, at *16 (D. Haw. Mar. 9, 2018); Clay v. Credit Bureau Enters., Inc., 882 F. Supp. 2d 1083, 1111

All of this suggests that FRAP 28 provides a black letter hook on which to hang a general intuition that poorly raised arguments should not be considered. It is a post hoc justification and not the genesis of the practice. That these rules are employed as a positive law cover up for a looser standard could help explain why arguments that may technically comply with the rules are still deemed "waived" or "abandoned." For example, Massachusetts Rule of Appellate Procedure 16(a)(9)(A) contains the fairly typical requirement that arguments contain the "contentions of the appellant," the "reasons therefor," and "citations to the authorities."[85] But in *Care and Protection of Martha*, the Supreme Judicial Court of Massachusetts found an argument not presented under this rule because the brief "consist[ed] of two passages lifted from" a case.[86] Block quoting authority could easily fit within the letter, if not the spirit, of a rule that only requires contentions, reasons, and authorities.

In *X Technologies, Inc. v. Marvin Test Systems, Inc.*, the Fifth Circuit found an issue "waived" because the "one-half page argument" did not comply with FRAP 28: the argument was not in the statement of issues, there was no standard of review, and it did not provide "supporting authority or record citations, other than to [the appellant's] motion to dismiss."[87] But the "issue" was the appellant asking that *if* the court sides with them and remands, it should remand to a different court because of an exclusive venue provision in a contract.[88] It is hard to see why this would be set forth in a "statement of issues"—it was not sought as a ground for reversal. As for the lack of a "standard of review," FRAP 28(a)(8)(B) explicitly does not require the standard of review to be reiterated at the beginning of each issue; it can appear in a separate heading before the discussion of the issues. And again, it is not clear that this is an "issue" in the FRAP 28(a) sense because the appellant was not seeking reversal or review of a lower court decision. As for a lack of citation, the court *admitted* that the appellant did in fact provide citation to the record—it cited its earlier motion to dismiss. Moreover, this was all presented in the appellant's opening brief so the appellee had a chance to respond. In short, this "one-half page argument" almost surely complied with FRAP 28(a) but was either too short to be persuasive or presented an issue that the judges wanted to ignore,[89] so they fell back on the rules.

In *Garden v. Central Nebraska Housing Corporation*, the court's failure to follow the letter of the rule was even clearer. As the dissenting judge noted:

> [The party who ostensibly "waived" their argument] argued that the district court analyzed the issue incorrectly. . . cited to the portion of the district court's opinion that it disputed, and . . . described the purportedly proper

---

(N.D. Iowa 2012) (first quoting Ramirez v. Debs-Elias, 407 F.3d 444, 447 n.3 (1st Cir. 2005); and then quoting N.D. IOWA & S.D. IOWA LOC. R. 7(d)).

85 MASS. R. APP. P. 16(9)(A).

86 Care & Prot. of Martha, 553 N.E.2d 902, 906 n.7 (Mass. 1990).

87 X Techs., Inc. v. Marvin Test Sys., Inc., 719 F.3d 406, 411 n.3 (5th Cir. 2013).

88 *See* Brief of Appellant, *X Techs., Inc.*, 719 F.3d 406 (No. 12-50230), 2012 WL 3781470, at *55.

89 *See infra* Part III.A for a discussion of agenda control and relying on abandonment by poor presentation to avoid issues.

> framework of analysis, including a case citation. This is all that is required under [the] Federal Rule[s] of Appellate Procedure.[90]

Moreover, there are cases where it is apparent that an argument did *not* comply with the rule, but the court heard it anyway.[91] Based on cases like *X Technologies*, *Garden*, and *Care and Protection of Martha*, my suspicion is that even if FRAP 28 or an analogue or local rule provides justification for the practice, judges rarely apply the rule in the traditional sense but rather determine that an argument is not up to snuff and find the rule to support it.

Put another way, federal, state, and local rules at best crystalize and provide support for a general judicial sense that bad briefing can result in abandonment of an issue or argument. Another common justification hews closer to traditional concepts of how to treat "abandonment" in legal argument. Namely, the justification that poor briefing amounts to a "waiver" or "forfeiture" of an issue. However, like the defense that the judges are not mind-readers or that the rules require it, waiver and forfeiture are not comfortable doctrinal foundations for the practice of abandonment by poor presentation.

3. Waiver and Forfeiture

Courts often find that poorly raised arguments are "waived" or, less frequently, "forfeited."[92] If, as the First Circuit has stated, these common reiterations are "not meant to be regarded as empty words,"[93] then perhaps we should take these courts seriously. Perhaps the justification for ignoring bad briefing is that it amounts to a "waiver" or "forfeiture."

Waiver and forfeiture are not the same, although Justice Scalia noted that Supreme Court cases "have so often used them interchangeably that it may be too late to introduce precision."[94] It may have seemed too late when Scalia wrote those words in

---

90 Garden v. Cent. Neb. Hous. Corp., 719 F.3d 899, 909 (8th Cir. 2013) (Gruender, J., dissenting).

91 *See* Gaither v. Aetna Life Ins., 394 F.3d 792, 809–11 (10th Cir. 2004) (Murphy, J., dissenting) (dissenting judge arguing that one argument clearly did not meet requirements of FED. R. APP. P. 28(a)(8) and that in considering the argument the majority "perpetrates a great injustice against the defendant-appellee").

92 United States v. Fattah, 914 F.3d 112, 146 n.9 (3d Cir. 2019); Cal. Pac. Bank v. Fed. Deposit Ins., 885 F.3d 560, 570 (9th Cir. 2018); M.G. Skinner & Assocs. Ins. Agency v. Norman-Spencer Agency, Inc., 845 F.3d 313, 321 (7th Cir. 2017); Grayson O Co. v. Agadir Int'l, L.L.C., 856 F.3d 307, 316 (4th Cir. 2017); United States v. Hardman, 297 F.3d 1116, 1131 (10th Cir. 2002); United States v. Anguiano, 795 F.3d 873, 876 n.3 (8th Cir. 2015); Tolbert v. Queens Coll., 242 F.3d 58, 75 (2d Cir. 2001); McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir. 1997); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990); United States v. Fagan, 821 F.2d 1002, 1015 n.9 (5th Cir.1987).

93 Casillas-Diaz v. Palau, 463 F.3d 77, 83 (1st Cir. 2006).

94 Freytag v. C.I.R., 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in the judgment). Professor Edward Rubin has noted that "[t]he more ubiquitous and significant a particular legal term, often the less clearly that term will be defined." Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 478 (1981).

1991, but in the intervening years there has been somewhat of a renaissance in semantic precision with regard to these terms.[95] Waiver is the "intentional relinquishment or abandonment of a known right."[96] Forfeiture is its unintentional cousin: "the failure to make the timely assertion of a right."[97]

Let's start with waiver. Strictly speaking, abandonment by poor presentation is rarely if ever going to be the result of an "an intentional relinquishment or abandonment of a known right." Remember, we are considering the practice of dismissing or ignoring poorly presented arguments, not the practice of ignoring arguments that were never raised. Lawyers generally do not intentionally poorly state their arguments.[98] There may be reasons that a litigant chooses not to raise at all even a plainly meritorious issue. For example, "institutional litigants often have strategic reasons for avoiding certain issues or refusing to make certain arguments that may benefit them in a particular case but be against their long term or broader interests."[99] In any event, the usual motivations for intentionally leaving out an argument are almost entirely absent from a decision to make the argument but in such a cursory fashion that the judge ignores it.

Almost, but not quite. There is always the lurking possibility of "sandbagging," where the party intentionally elides an issue with the hope that a higher (and perhaps more favorable) court will address it on review.[100] Courts have always suspected lawyers of sneaky maneuvering, including when they fail to flesh out their arguments,[101] and there may be some reason to suspect poor phrasing and buried arguments as a vehicle for sandbagging. A litigant could wish to assert an issue but just barely, in the hopes that the opposing counsel misses it and "waives" their response.[102] Or, a clever lawyer might "seed[] the record with mysterious references

---

95 *See* Manning v. Caldwell *ex rel.* City of Roanoke, 930 F.3d 264, 300 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting); United States v. Fattah, 858 F.3d 801, 807 n.4 (3d Cir. 2017); United States v. Soto, 794 F.3d 635, 652 (6th Cir. 2015).

96 United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

97 *Id.*

98 *See* Edmunds, *supra* note 11, at 587; Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 334 (2014) ("[I]t seems that litigants most often seek to raise new issues or arguments on appeal because their trial counsel inadvertently overlooked them.").

99 *Id.* at 330–31.

100 *See* Certain Computs., Inv. No. 337-TA-841, 2013 WL 4520498, at *14 (U.S.I.T.C. Aug. 2, 2013) ("If such vague allusions were allowed to preserve arguments, Section 337 investigations would descent (further) into a morass of gamesmanship and sandbagging.").

101 *See* Blandin v. Blandin, 53 So. 15, 15 (La. 1910) ("The purely perfunctory character of the argument submitted in support of this assignment of errors leads us to suspect strongly that the present suit is a mere friendly proceeding, and that the secret wish and hope of the appellant is that this court will affirm the judgment.").

102 *See* Garner v. G.D. Searle Pharms. Co., 581 F. App'x 782, 784 (11th Cir. 2014) ("Ironically, however, Searle has also waived its argument against waiver."); Jackson v. Bd. of

to unpled claims, hoping to set the stage for an ambush should the ensuing ruling fail to suit."[103] Still, if courts justify abandonment by poor presentation as a prophylactic against sandbagging their fear is likely overstated. It is an extremely risky gamble to assert a meritorious issue in such a perfunctory manner that it might cost a litigant the case and even land the lawyer in trouble,[104] all in the offhand chance you can convince a higher court that it was presented correctly. Further, abandonment by poor presentation is an everyday practice in courts across the country. Occam's razor[105] teaches that between the possibility of thousands of lawyers playing 4-D chess and craftily raising buried arguments on the one hand and the possibility that lawyers often do not write clearly on the other, we should, sadly, presume the latter.

Moreover, if "waiver" is the justification for abandonment by poor presentation, it appears to mean something else than "waiver" in other contexts. Not only is it likely not intentional, but "waiver" here carries a different consequence than it ordinarily does. Courts frequently note that an issue was presented too perfunctorily and then consider the merits anyway.[106] In *Federal Housing Financial Agency v. Merrill Lynch & Co.*, a federal district court held that an issue was "waived" for poor presentation, but that "the defendants [who waived the issue] remain free to raise these arguments on summary judgment."[107] This is not how waiver works. Generally, when you waive a right you "relinquish" it; the court cannot assert it for you and you are not "free" to raise it again at a later stage of litigation.[108] To be fair, there is at least one case where

---

Election Comm'rs of Chi., 975 N.E.2d 583, 599 (Ill. 2012) (Freeman, J., concurring in part and dissenting in part) (contending that majority should not have found abandonment by poor presentation in part because the opposing party "forfeited the opportunity to claim forfeiture").

103 Patterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988).

104 *See* Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 133 (2d Cir. 2004) (putting lawyer "on notice" that further violations of Federal Rules of Appellate Procedure for bad briefing "will result in discipline").

105 "Occam's razor is a philosophical principle that states the simplest explanation is usually the best one." *Occam's Razor*, DICTIONARY.COM, https://www.dictionary.com/e/pop-culture/occams-razor/ (last visited Oct. 13, 2020).

106 *See, e.g.*, Miller, supra note 11, at 1274 ("In many cases, judges will spot an issue that has not been briefed, piously refuse to decide it, but then express an opinion."); 16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3974.1 (Thomson Reuters 2020) ("Litigants must bear in mind that the failure to properly argue their contentions may well result in a finding of abandonment, though courts will sometimes overlook such failures and address the merits."); Grayson O Co. v. Agadir Int'l, L.L.C., 856 F.3d 307, 316 (4th Cir. 2017) (noting deficiency of briefing, but addressing merit of argument anyway); United States v. Mann, 493 F.3d 484, 494 (5th Cir. 2007) (same); Miss. River Corp. v. F.T.C., 454 F.2d 1083, 1093 (8th Cir. 1972) (same); United States v. L.A. Soap Co., 83 F.2d 875, 889 (9th Cir. 1936) (same); *In re* Application of Miller and Lieb Water Co., 651 P.2d 486, 488 (Haw. 1982) (same); Mulvaney v. Burroughs, 132 N.W. 873, 875 (Iowa 1911) (same).

107 Fed. Hous. Fin. Agency v. Merrill Lynch & Co., 903 F. Supp. 2d 274, 277 n.3 (S.D.N.Y. 2012).

108 *See Waiving* Chevron *Deference*, *supra* note 55, at 1523–24.

a court took the definition of waiver in this context seriously. In *United States v. Holm*, the Seventh Circuit declined to find that a defendant's bad briefing amounted to waiver "because waived clams, unlike forfeited claims, cannot be considered even under the plain error standard," so the court would "not find waiver lightly."[109] But this case appears to be the exception that proves the rule; most courts hold that something is waived by poor presentation without grappling with the relatively dramatic consequences of that determination.

This Article is not the first time courts have been criticized for an inconsistent application of the voluntariness element of waiver. Writing in 1970, Michael Tigar criticized the Supreme Court's 1969 cases relating to waiver, noting that "one searches the opinions in vain for a consistently applied concept of voluntariness which integrates these decisions one with another and with prior cases on waiver and consent."[110] Tigar pointed to other examples of "waiver" in contexts where the action was likely not knowing and voluntary in the traditional sense, such as when someone waives a privilege by accidentally speaking too much.[111] His assessment of the Court's application of the intentional and knowing requirement was that "[t]he cases show that it has commonly been ignored or, what may be worse, has received a kind of token obeisance which serves only to rob its words of whatever cognitive, as opposed to emotive, significance they possess."[112] Sounds familiar. The misuse of the term "waiver" in the abandonment by poor presentation context is greater than in the other contexts highlighted by Tigar because, unlike a person who accidentally waives, say, the testimonial privilege by speaking too much on the stand, the litigant whose lawyer pens a cursory argument likely does *nothing* intentionally. That is, the person waiving the testimonial privilege may not knowingly waive their right, but they are in a sense acting intentionally to not exert a right—they are choosing not to keep quiet. The poorly lawyered client intends the very opposite—to assert their rights (or arguments, or issue)—but she does so sub-par, and through no fault of her own.

So, what about forfeiture? As a justification for abandonment by poor presentation, forfeiture has the benefit of being more doctrinally sound than waiver, but the baggage of being far less frequently cited. Forfeiture is "the failure to make the timely assertion of a right."[113] It is a "failure" to act instead of an intentional forbearance, and that strikes closer to the reality of abandonment by poor presentation. Furthermore, courts have more leeway in overlooking forfeiture and often overlook abandonment by poor presentation. But if we take these courts at their word, they find "forfeiture" significantly less often than they find "waiver." Moreover, it is not doctrinally snug because timing is not usually the issue; parties regularly abandon arguments through poor presentation in their opening briefs at all levels of litigation, so the problem is not the failure to *timely* assert a right, but the failure to assert a right clearly or well.

---

109 United States v. Holm, 326 F.3d 872, 877 (7th Cir. 2003).

110 Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).

111 *Id.* at 10.

112 *Id.* at 9.

113 United States v. Olano, 507 U.S. 725, 733 (1993).

Even if, like Scalia, we assume some lack of "precision" in the use of these terms, and do as the courts do—i.e., use these terms to mean generally the giving up of some legal thing—the underlying principles of waiver or forfeiture are just not rock-solid justifications for the practice of finding abandonment by poor presentation. There are not a lot of general theories of waiver or forfeiture,[114] but under any such theory, bad brief writing should not amount to either. One of the first (and only) general theories of waiver was posited by Professor Edward Rubin, in *Toward a General Theory of Waiver*, where he argued that the validity of a waiver should be judged from the perspective of what the litigant gets in return for waiving.[115]

> [When determining the validity of a waiver, courts should] require that parties who waive a particular right obtain the functional equivalent of that right in the context of their more informal interaction. To do so, a court would determine the nature of the right that has been waived, identify the kind of protection that the right provides, and then require that an informal version of those same protections be provided.[116]

A challenging standard in any context but impossible here. The nature of the right is ambiguous and could either be construed as peripheral (such as, "the right to make a particular argument") or fundamental (such as, "the right to present your case"). More importantly, the litigant gets *nothing* in exchange for clumsy writing (aside from perhaps saving some money on a cheaper attorney). The ambiguity of the right, the uncertainty of whether it is voluntarily given up, and the lack of a reward for doing so: these factors sink the chances that any general theory of waiver can provide a justification for the practice of abandonment by poor presentation. Theories of waiver often "rely on efficiency or other law and economics rationales,"[117] that, like Rubin's theory, require at least some sense of the trade-off for the litigant. In contrast, Professor Jessica Wilen Berg has proposed a theory of waiver centered on autonomy,[118] but that fails because of the aforementioned ambiguity surrounding the voluntariness of these "waivers."

"Waiver" and "forfeiture" are not solid rationales for the practice of abandonment by poor presentation, but to the extent courts thoughtfully use these terms, and are not merely parroting them, they likely reflect two aspects of how courts view bad briefing and their responses to it. First, waiver and forfeiture are terms borrowed from equity and the simplest explanation here may be a sort of equitable "clean hands" principle: that a party should not get the benefit of a sloppily written brief.[119] For example, one court determined that an issue was waived for bad briefing and noted that the party's

---

114 Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 284 n.15 (2003).

115 *See generally* Rubin, *supra* note 94.

116 *Id.* at 537.

117 Berg, *supra* note 114, at 285.

118 *See id.* at 289–305.

119 *Cf.* Tigar, *supra* note 110, at 10–11 (discussing "Misconduct as Waiver"); Martineau, *supra* note 20, at 1030 (discussing how declining to hear new arguments on appeal has an equitable flavor to it).

"halfhearted effort [fell] far short of sufficiently raising an issue on appeal."[120] The Maryland Court of Appeals once found an issue waived for lack of citation and specifically noted the "well-developed body of law" addressing the issue, as if to say that it was not simply a lack of citation that resulted in waiver, but a lack of citation when it would have been easy to find the cases.[121] Such language suggests that it is the party's literary misconduct that justifies the practice. Second, the use of the term "waiver" could be a psychological crutch for some judges that belies their discomfort with dismissing these partially-raised issues. If the issue or argument were plainly meritless, a judge could simply reject it on the merits, as judges often do when faced with bad arguments; even when they are bad and cursory.[122] Instead, judges finding abandonment by poor presentation may be struggling with the possibility that a poorly raised issue hidden in a footnote actually has some legs on it. In such an instance, it might be more psychologically comforting to find the issue "waived." Instead of the judge sweeping a nagging argument under the carpet, it becomes the *litigant's* intentional choice not to raise the argument at all, or at least their fault for raising it poorly. As we shall see in the following discussion of the final rationale, judges are rather comfortable justifying their actions on the ground that it is the parties who play the game while the judge calls only balls and strikes, even though no one really believes that is true.

4. Party Presentation

The final rationale is likely the most common justification for the practice of abandonment by poor presentation. Edmunds points to the Federal Rules as *the* legal justification for this practice, but he points to the norm of party presentation as *the* reason, although he refers to it as "adversarialism."[123] I use the term "party presentation," because in my view "adversarialism" is a bigger target. When I refer to the norm of party presentation, I mean the assumption that the parties to a case—and only the parties—present the necessary materials for the court to make a determination. It is up to the plaintiff and defendant to state the claims, raise the legal issues, present the evidence, and attack the other party's case. Party presentation is a component of, but not equivalent to, "adversarialism."[124] And it is not a necessary component. A justice system could be entirely "adversarial" but entirely contrary to the norm of party presentation. When the Supreme Court appoints amici or when a court orders supplemental briefing, one could say these courts are operating in a fully

120 Universal Truck & Equip. Co. v. Southworth-Milton, Inc., 765 F.3d 103, 111 (1st Cir. 2014).

121 HNS Dev., L.L.C. v. People's Couns. for Balt. Cnty., 42 A.3d 12, 26 (Md. 2012).

122 *See infra* Part V.A.2.

123 *See* Edmunds, *supra* note 11, at 577.

124 *See* Frost, *supra* note 28, at 459 (noting that Professor Stephen Landsman, "a scholar of the adversarial system," has described "reliance on party presentation of evidence" as "one of the 'key elements' of adversarialism" (quoting STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988))).

adversarial mode, but departing from the norm of party presentation.[125] When courts justify abandonment by poor presentation they generally fall back on the importance of party presentation (although paeans to adversarialism are not absent).

No doubt, the norm of party presentation is a ubiquitous justification for abandonment by poor presentation. For example, courts will refuse to consider a poorly briefed argument because doing so would require the court to "assume a partisan role and undertake the appellant's research and advocacy."[126] A court may find a "point" forfeited because "[t]he court will not do [the party's] research for him."[127] Courts of all stripes tend to agree that they are not "obligated" to "distill and develop" arguments for the parties.[128] When a party leaves it "up to the court to develop [the] arguments," the thinking goes, those arguments "should be deemed waived."[129] In other words, it's up to the parties to make their case.

It makes sense that party presentation is a common justification for this practice, because party presentation is a fundamental notion of our justice system. The Supreme Court has explained:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.[130]

---

125 *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 303 (2002) (noting that asking for supplemental briefing is consistent with judicial neutrality and adversarialism). Ironically, in one of the more notable recent cases in which the Court defended the importance of party presentation and adversarialism, the Court appointed amici to defend the judgment of the court below. *See* Greenlaw v. United States, 554 U.S. 237, 243 (2008).

126 Inghram v. Dairyland Mut. Ins. Co., 215 N.W.2d 239, 240 (Iowa 1974).

127 Phillips v. Hillcrest Med. Ctr., 244 F.3d 790, 800 n.10 (10th Cir. 2001).

128 Holland v. U.S. Dep't of Health & Hum. Servs., 51 F. Supp. 3d 1357, 1373 (N.D. Ga. 2014); *see* Handsome, Inc. v. Plan. & Zoning Comm'n, 119 A.3d 541, 553 n.7 (Conn. 2015) ("It is well established that [w]e are not obligated to consider issues that are not adequately briefed."); Baker v. City of Iowa City, 750 N.W.2d 93, 102 (Iowa 2008) (not addressing argument because the court is not "obliged" to do the party's research); Menholt v. State Dep't of Revenue, 203 P.3d 792, 796 (Mont. 2009) (noting that court is "under no obligation to locate authorities or formulate arguments"); Krupa v. Naleway, No. 06 C 1309, 2010 WL 145784, at *8 (N.D. Ill. 2010) ("It is not the obligation of the court to research and construct the legal arguments available to parties."); Barclays Bank PLC, 144 FERC ¶ 61041, 61208 (2013) ("[C]ourts have found that it is not their obligation to research and construct the legal arguments.").

129 John Richards Homes Bldg. Co. v. Adell (*In re* John Richards Homes Bldg. Co.), 404 B.R. 220, 241 (Bankr. E.D. Mich. 2009).

130 Greenlaw v. United States, 554 U.S. 237, 243 (2008).

We have been so relying on parties for a long time.[131] It is a practice that sets us apart, and of which we are fiercely proud.[132] Party presentation is sacred, to litigants and the law.

From the litigants' perspective, the norm of party presentation is a discernable ground rule they can count on. Focusing only on the issues raised by the other party cabins the universe of issues and arguments that a lawyer must address. In this light, ignoring a poorly raised argument appears vital to the fairness of the whole enterprise. Procedural rules, such as rules requiring "adequate briefing," serve the function of the "fair and orderly administration of justice . . . when applied evenhandedly to all parties, regardless of whether compliance is more difficult for some parties or whether compliance is strictly necessary to the court's resolution of a particular claim."[133] When courts entertain an intimated argument it is unfair surprise to the opposing lawyer, just as it is unfair for courts to willy-nilly entertain unpreserved arguments on appeal,[134] or raise issues sua sponte.[135]

Beyond whatever practical benefits it may have in terms of reliance interests for attorneys, the norm of party presentation is crucial to our imagining of our justice system and its results. Adversarialism and party presentation go together like baseball and apple pie: they are not naturally dependent on each other but their combination is deeply important to Americans for unclear cultural reasons.[136] Americans are individualistic and value personal choice.[137] These idealized notions of American society seep into our idealized notions of our justice system, where we value a process driven by the litigants themselves.[138] The norm of party presentation is in our blood.

But neither the lawyer's sense of fairness nor our collective sense of justice can mold the norm of party presentation into a functioning justification for abandonment by poor presentation. From the lawyer's perspective, although it may be unfair for a court to consider an *unraised* argument, if the judge can find it, so can you. Lawyers often make strategic decisions about which arguments, issues, points, and asides to respond to when crafting a reply; they do so knowing that a court may focus its attention elsewhere. If the court addresses an issue that was raised in the brief but that opposing counsel believed was too perfunctory to address, it is not meaningfully different from any other lawyerly miscalculation about the importance of an

---

131 *See* Norfleet Holding Co. v. Price, 132 So. 643, 644 (Fla. 1931) ("To determine whether 'error does not lie' or whether taken 'against good faith or merely for delay,' we make a cursory examination of the record, but will not resolve doubtful or debatable questions, nor will we examine authorities or arguments supporting counsel's theory of the cause.").

132 David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1638 (2009).

133 People v. Grimes, 340 P.3d 293, 345 (Cal. 2015) (Liu, J., dissenting).

134 *See* Martineau, *supra* note 20, at 1031.

135 *See* Miller, *supra* note 11, at 1291–92.

136 *See* Frost, *supra* note 28, at 504 ("[L]egal commentators observe that party presentation is well suited to the American national character.").

137 *See id.* at 505.

138 *Id.*

argument—a fixture and not a bug of the party presentation model. Courts often find an argument waived because it was only raised in a footnote,[139] but there are plenty of law students who would be surprised to learn that in our party-driven and complex legal system a lawyer does not have to sweat the footnotes. Moreover, although lawyers often request that a judge deem arguments abandoned by poor presentation,[140] it is often found sua sponte and in those cases the court subverts the norm of party presentation.

To the practicing lawyer, a rule of party presentation has something big going for it: it is a bright line. But even a bright line flickers from time to time—when courts only consider "issues raised by the parties" the courts still have to decide when an "issue" was "raised by a party," an inquiry of occasional considerable murkiness and disagreement. More importantly, this purported bright line is in fact an illusion; it gets dimmer the closer you get.

Despite our pseudo-religious reverence for party presentation it is a norm courts deviate from regularly. To put it mildly, "The rhetoric in favor of party presentation is not always consistent with actual judicial practice."[141] The Supreme Court recently noted, in affirming the party presentation principle that it is "supple, not ironclad."[142] Although courts frequently justify abandonment by poor presentation on the ground that courts cannot do the research for the parties, or are structurally incapable of deciding issues without the benefit of adequate briefing, neither is true. It is an open secret, if a secret at all, that judges do independent legal research.[143] A recent study showed that 51% of all citations in a sample of 325 federal courts of appeals cases were "endogenous," meaning they were not found in the parties' briefs.[144] Translation: over half of the cases cited were found by judges and law clerks; or at least they did not come from the parties who are supposed be doing the presenting. Whatever they say to justify ignoring a poorly written argument, the fact is courts are fully capable of doing research on their own and are inclined to do so regardless of whether the parties provide citations or not. "[A] court," in other words "is not hidebound by the precise arguments of counsel."[145]

---

139 Wandering Dago, Inc. v. N.Y. State Off. of Gen. Servs., 992 F. Supp. 2d 102, 134 (N.D.N.Y. 2014) (citing cases).

140 *See, e.g.*, Edmunds, *supra* note 11, at 584; United States v. Erpenbeck, 532 F.3d 423, 434 (6th Cir. 2008), Munitrad Sys., Inc. v. Standard & Poor's Corp. (*In re* Mun. Bond Reporting Antitrust Litig.), 672 F.2d 436, 439 n.6 (5th Cir. 1982); Lewis v. Berryhill, No. 1:17-CV-62, 2018 WL 1463725, at *5 n.3 (N.D. Fla. Mar. 1, 2018); Lloyd v. Gen. Motors Corp., 916 A.2d 257, 282 (Md. 2007).

141 Frost, *supra* note 28, at 455.

142 United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).

143 *See* Bennardo & Chew, *supra* note 39, at 69 (discussing a study of citation practice of a "supreme court of a northern industrial state" in 1978 where the author concluded that "courts generally do a lot of independent legal research" (citing THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 6 (1978))).

144 *Id.* at 84.

145 *Sineneng-Smith*, 140 S. Ct. at 1581.

Legal authority is (perhaps) different than a legal "issue."[146] One might argue that even if it is inside a judge's ken to perform legal research, the norm of party presentation means that courts are incapable of raising or deciding "issues" without the benefit of the parties' input. But again, that is not borne out by practice. Judges admit that "[o]n occasion . . . a court will find it necessary to go beyond the specific legal theories advanced by the parties."[147] Sometimes a court is required to raise or decide issues on its own, or at least without the benefit of adversarial briefing. When a federal court considers its subject-matter jurisdiction, when the United States government does not respond to a complaint, when any party does not respond to a motion for summary judgment,[148] or when a party confesses error—these are just some of the instances where courts are *required* to decide issues without hearing from both sides.[149] Established practices like appointing amici and common practices like ordering supplemental briefing violate the norm of party presentation,[150] but remain established and common practices nonetheless. Far from reprimanding lower courts when they take up issues without the parties' urging, the Supreme Court often condones the practice,[151] and explicitly encourages federal courts to consider precedent that was overlooked by the parties.[152] Despite criticism of courts raising and deciding issues on their own, no one doubts that courts are able to do so,[153] and no one can assert that they don't do it.

Deciding issues without adversarial briefing, or on grounds beyond those presented in the briefs is not just an occasional glitch or a necessary evil; there is good reason to *want* courts to look beyond the briefs. When judges dogmatically keep their

---

146 Despite the "general rule" that parties may not raise new "issues" on appeal, "[p]arties are free to raise, in the appellate court, legal authorities that they did not cite below, without violating [the] general rule." Steinman, *supra* note 26, at 1526. This suggests some distinction between legal authority and legal issues. Good luck drawing that line.

147 Ind. Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731, 733 (D.C. Cir. 1992), *rev'd on other grounds sub nom.* U.S. Nat'l Bank v. Ind. Ins. Agents of Am., Inc., 508 U.S. 439 (1993).

148 *See* Robinson v. Wix Filtration Corp., 599 F.3d 403, 410 n.9 (4th Cir. 2010). In *Robinson*, the court found that the defendant had abandoned by poor presentation his argument that the district court should have considered whether he had a meritorious defense to an unopposed motion for summary judgment. *Id.*

149 *See* Morley, *supra* note 98, at 294–97, 311–12.

150 *See* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 37 (2011) (criticizing practice of appointing amici on this ground); Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 873 (2013) (criticizing the practice of ordering supplemental briefing on this ground).

151 *U.S. Nat'l Bank*, 508 U.S. at 439.

152 Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995); Elder v. Holloway, 510 U.S. 510, 511–12 (1994); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991).

153 *See* Frost, *supra* note 28, at 460. Some commentators have suggested there are boundaries to raising issues sua sponte. *See* Steinman, *supra* note 26, at 1551–52, 1557.

blinders on, it can lead to absurd and harsh results.[154] For example, in *Hartmann v. Prudential Insurance Company of America*, orphans sued to recover insurance proceeds because their stepmother had conspired with an insurance agent and killed their father to keep the money.[155] Somehow, the case did not pull hard enough at the heartstrings of Judge Posner, who ruled against the orphans *despite* their possibly meritorious claims because the orphans' lawyer argued for recovery on the wrong ground. According to Judge Posner, the court could not abide 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."[156] Yet in ordinary cases without evil stepmothers appellants can serve up muddles and, whatever their hopes, judges and law clerks will do research and, possibly, find reversible error all on their own. Commentators have become increasingly critical of blind adherence to the principle of party presentation, noting that it reduces accuracy,[157] cedes judicial authority to private parties,[158] and mutes the benefits of having talented lawyers and law students serve as judges and law clerks.[159]

The adversary of our adversarialsim is the inquisitorial system of Continental Europe. "Avoiding inquisitorialism is taken to be a core commitment of our legal heritage,"[160] and "inquisitorialism" has become "an epithet among American judges";[161] a dirty word that hovers over many decisions by judges who find abandonment by poor presentation. But bad writing appears to be caught in this ideological cross-fire. A judge may fear the inquisitorial practices of the Continent, but that is not a sound excuse to ignore valid legal argument or factual contention because of bad briefing.[162] It is an even less defensible defense when judges regularly stray from the norm of party presentation in all kinds of other circumstances. We may have constructed our justice system "to avoid even the whiff" of inquisitorialism,[163] but at least with respect to abandonment by poor presentation, we have done so with incense and not with a deep clean. Judges ignore the norm of party presentation too often to cite it as an inexorable command to ignore a party's poorly stated argument.

---

154 *See* Miller, *supra* note 111, at 1269–70 (discussing cases).

155 Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1208–09 (7th Cir. 1993).

156 *Id.* at 1214.

157 Frost, *supra* note 28, at 500–01.

158 *See id.* at 482–83; Luke Ryan, *How the Party Presentation Rule Limits Judicial Discretion*, 4 ST. THOMAS J. COMPLEX LITIG. 31, 35 (2017).

159 *See* Morley, *supra* note 98, at 339.

160 Sklansky, *supra* note 132, at 1636.

161 Frost, *supra* note 28, at 460 (discussing Sklansky, *supra* note 132, at 1638).

162 *Cf.* Morley, *supra* note 98, at 336 ("Simply dismissing a certain practice as 'inquisitorial' does not seem a sufficient basis for rejecting it.").

163 Frost, *supra* note 28, at 460.

III. AGENDA CONTROL—WHAT'S REALLY GOING ON

The traditional justifications for finding an argument or issue abandoned due to poor presentation are not satisfying. No one is asking judges to read minds. Federal, state, and local rules are overbroad, infrequently relied on, and inconsistently applied. Waiver and forfeiture make little sense doctrinally. And the most common justification of all—the norm of party presentation—does not make sense in practice. These are the reasons courts provide and they fall short, which begs the question: what's really going on?

I submit that the answer is agenda control. By "agenda control," I mean the phenomenon of judges deciding what to decide, and when and how to decide it.[164] The phenomenon could also be referred to as "agenda setting."[165] Either way, it is uncomfortable terminology because judges are not supposed to have "agendas"—they simply decide the cases in front of them according to the law. But "deciding cases" involves deciding how to decide, whether we want to admit it or not. Despite any discomfort with saying it out loud, it is common for judges to exercise agenda control. When the Supreme Court decides to grant cert, when appellate courts decide to take a case en banc, when a panel member writes a concurrence inviting future cases, when the whole panel decides to resolve the case on one of several alternative grounds, or when it then decides whether to publish the opinion—these are all instances where judges are making decisions about whether and how to decide an issue or case. Agenda control is exercised in extraordinary ways by particular types of judges—in the example of federal appellate judges voting for a case to go en banc—and in everyday ways by every sort of judge, such as when choosing to decide a case on an alternative ground or choosing which arguments by the losing party to address. It may be exercised for ideological and political reasons, or for mundane ones, like avoiding extra work or appeasing one's colleagues.[166]

When judges miss arguments and issues entirely is, again, not the focus of this Article. Rather, my focus is on when judges *choose* to ignore arguments, and more precisely when they choose to tell us about it. In these instances, I submit that judges are not simply adhering to rules about waiver and proscriptions in the name of party presentation; they are often choosing to ignore issues and argument for purposes of agenda control. They likely do so for many reasons, but three stick out: to reach or avoid certain issues ("issue control"), to clear crowded dockets ("docket control"), and to encourage better writing ("writing control").

---

164 *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 679 (2012).

165 Alexander I. Platt, *Deciding Not to Decide: A Limited Defense of the Silent Concurrence*, 17 J. APP. PRAC. & PROCESS 141, 150 & n.39 (2016) (discussing "negative agenda-setting," where courts avoid issues, and "positive agenda-setting" where courts seek out issues).

166 *See* Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAIFL. L. REV. 1445, 1475 (2012) (Judge Wood noting that the decision to write a separate opinion could depend on pedantic criteria such as "the extra work that a separate opinion entails [and] her desire to get along with her colleagues").

A. Issue Control

There is a long history, going back to *Marbury v. Madison*, of judges using technical procedural vehicles to reach the issues they want to reach and avoid the ones they don't.[167] If a judge wants to control which issues a court reaches in a decision, abandonment by poor presentation is an attractive tool for the job. It can be exercised with virtually complete discretion;[168] "perfunctory" is generally in the eye of the beholder, and even if a judge notes that an argument is perfunctory or otherwise insufficient, it is close to random whether she chooses to ignore it or not.[169] Best of all, once invoked this decision is clothed in doctrinal legitimacy. In other words, a judge may have wide discretion in determining whether an argument is too "cursory" or "undeveloped," but she can explain her decision to ignore the issue in terms that make it sound as if she has no discretion at all. After all, courts have no right to do research on their own; the litigant waived the argument himself; I'm just following the rules!

Studying this type of issue control is like studying a black hole: it is impossible to look directly at it so you have to search for likely conditions. Judges do not explain that they are leaning on the doctrine of waiver or the norm or party presentation but in fact just want to avoid an issue. But there are some types of cases that suggest this is occurring. Appellate decisions where a majority determined an issue was abandoned but a dissenting judge disagreed are good places to start. In these situations, the perfunctory nature of the argument is borderline. Two or more judges contend that the issue is so poorly written as to be unreviewable, one judge (at least) disagrees. Thus, these cases are good candidates for instances where judges ignore the issue not because it is truly indecipherable, but for some other reason.

In some of these cases, the majorities avoided overturning convictions and sentences in tough cases. In *State v. Lockwood*, a majority of the Vermont Supreme Court determined that a criminal defendant waived by "not squarely raising" the issue of whether, under the Vermont Constitution, he was competent to stand trial for charges of sexually assaulting a child.[170] It was however squarely raised enough to mention it, and for the dissent to contend that this was the "real issue presented" in the case.[171] In *United States v. Sevilla-Oyola*, a majority of the First Circuit found that the defendant inadequately briefed a constitutional challenge to his initial plea hearing.[172]

---

167 *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (reaching issue of judicial supremacy but holding that the Court could not issue mandamus because it lacked appellate jurisdiction); Robert G. McCloskey, THE AMERICAN SUPREME COURT (5th ed. 2010) (referring to Justice Marshall's decision as a "masterwork of indirection," employing "negative maneuvers" to reach the decision Marshall wanted to in the way he wanted to do it).

168 See *infra* Part V.B for discussion of standard of review for abandonment by poor presentation.

169 *See supra* note 106 for examples of courts noting disqualifying problems with an argument but then considering it anyway.

170 State v. Lockwood, 632 A.2d 655, 659 n.1 (Vt. 1993).

171 *Id.* at 664 (Johnson, J., dissenting).

172 United States v. Sevilla-Oyola, 770 F.3d 1, 13–14 (1st Cir. 2014).

The result: the defendant's life sentence was upheld. Both the dissenting judge and the majority quoted the exact same portion of the defendant's brief and came to opposite conclusions as to whether it was clear enough to avoid "waiver."[173] The defendant had been accused of a shocking murder of an informant on the steps of the federal court house in Puerto Rico and the case already had a long and complicated procedural history.[174] In both *Lockwood* and *Sevilla-Oyola*, determining that the briefing was too perfunctory resulted in leaving alone challenging convictions and sentences.

Jackson v. Board of Election Commissioners of Chicago is another strong example of judges possibly leaning on abandonment by poor presentation to avoid disrupting otherwise settled issues.[175] In *Jackson*, the Illinois Supreme Court determined that even though the plaintiff's name should have been allowed on a ballot, she did not specifically request a special election as relief, and so the court did not order one.[176] Thus, the majority declined to order a special election in part because the plaintiff failed to argue for it, even though the dissenting judge believed the argument had been properly raised and, in either event, the Board of Elections had "forfeited the opportunity to claim forfeiture."[177] In other words, the majority avoided ordering a special election by sua sponte determining that an issue had not been properly raised.

In other cases (without dissents) debatably bad briefing allowed the majority to sidestep a close or challenging constitutional issue. In one case, the Supreme Court of Minnesota noted that the penalty provision of a law "may" "implicat[e] the Eighth Amendment's excessive fines clause," but "decline[d] to reach that issue in the absence of adequate briefing."[178] Avoiding constitutional issues is actually a sanctioned form of "issue control" in certain situations.[179] In his famous concurrence in *Ashwander v. Tennessee Valley Authority*, Justice Brandeis urged federal courts to avoid constitutional questions in a variety of situations.[180] "Bad briefing" was not one of them, but by now there is a general judicial inclination to avoid constitutional questions, especially when the court feels that it is on unsure footing. In fact, many courts specifically require a higher briefing standard to argue constitutional

---

173 *Compare id.*, *with id.* at 19 (Torruella, J., concurring in part and dissenting in part). #

174 *See id.* at 4–7 (majority opinion). #

175 *See generally* Jackson v. Bd. of Election Comm'rs of Chi., 975 N.E.2d 583 (Ill. 2012). #

176 *Id.* at 591–92. #

177 *Id.* at 598–99 (Freeman, J., concurring in part and dissenting in part). #

178 State Dep't of Labor & Indus. by the Special Comp. Fund v. Wintz Parcel Drivers, Inc., # 558 N.W.2d 480, 480 (Minn. 1997).

179 *See* Monaghan, *supra* note 164, at 676–77; Martineau, *supra* note 20, at 1050 (noting that federal appellate courts will often raise the issue of avoiding a state constitutional question even when it was not preserved, in violation of the general rule against hearing new issues on appeal).

180 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

questions.[181] And courts that do not have such standards for constitutional arguments still use abandonment by poor presentation to avoid thorny constitutional issues.

Take two examples from the First Circuit. In one case, the First Circuit characterized the appellant's argument that a Rhode Island state law waived Rhode Island's sovereign immunity as "promising," but declined to substantively address it because it was only raised in a footnote.[182] In another, the First Circuit ignored the issue of whether discrimination based on HIV status violated the Equal Protection clause because it was not argued "in more than a perfunctory manner."[183] In these and similar cases[184] courts managed to avoid challenging constitutional issues by noting the poor briefing.

Issue control does not always mean avoidance. Commentators have suspected courts of finding waiver and forfeiture, or ignoring waiver and forfeiture, in order to *reach* particular issues, instead of avoiding them.[185] Sometimes judges are suspected of this by another member of their court.[186] There is no reason to think courts would not rely on abandonment by poor presentation for the same purposes. In *Maffei v. Roman Catholic Archbishop of Boston*, the Supreme Judicial Court of Massachusetts considered the merits of the plaintiffs' claims despite the plaintiffs' possible lack of standing because the defendant abandoned a standing argument through poor presentation (as well as for other prudential reasons such as the likelihood that the issue would arise again).[187] *Maffei* appears to be a likely candidate where a court relied on abandonment by poor presentation to reach, and not avoid, issues. In *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, the dissenting judge accused the majority of reaching the issue the judges wanted to reach by ignoring abandonment by poor presentation.[188] *Moser* is a good all-around example of how abandonment by poor presentation can serve the ends of issue control: if one wanted to avoid a contentious abortion-related issue, she finds the issue abandoned by bad briefing; if one wanted to reach it, ignore the bad briefing and reach it anyway.

There are other examples of cases where the court appears to address poorly briefed issues because of their significance, when the court could easily have found

---

181 *See* Guy v. Town of Temple, 956 A.2d 272, 286 (N.H. 2008); Renault v. N.D. Workers Comp. Bureau, 601 N.W.2d 580, 585 (N.D. 1999); Mont. Milk Control Bd. v. Maier, 367 P.2d 305, 307 (Mont. 1961) (stating that when a party challenges the constitutionality of a statute they have to do so clearly).

182 R.I. Dep't of Env't Mgmt. v. United States, 304 F.3d 31, 47 n.6 (1st Cir. 2002).

183 Charles v. Rice, 28 F.3d 1312, 1319 (1st Cir. 1994).

184 *E.g.*, Bandoni v. State, 715 A.2d 580, 607–12 (R.I. 1998) (Flanders, J., dissenting) (commenting on Supreme Court of Rhode Island ignoring argument that money damages could be available for violation of Rhode Island Constitution's victims' rights amendment).

185 *See* Monaghan, *supra* note 164, at 693–707.

186 *See* Wuchter v. Pizzutti, 276 U.S. 13, 25 (1928) (Brandeis, J., dissenting).

187 Maffei v. Roman Cath. Archbishop of Bos., 867 N.E.2d 300, 312 (Mass. 2007).

188 Planned Parenthood of Kan. and Mid-Mo. v. Moser, 747 F.3d 814, 850 (10th Cir. 2014) (Lucero, J., dissenting).

the issue abandoned by poor presentation.[189] *Amnesty America v. Town of West Hartford*, for example, presented the Second Circuit with an extremely compelling opportunity to find abandonment by poor presentation.[190] The court noted that the appellant's brief was "little more than a doctrinal recapitulation masquerading as a legal argument, tantamount to an invitation [for us] to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant."[191] Moreover, the lawyer's writing had resulted in abandonment by poor presentation twice already in the same litigation, and he had run afoul of briefing standards at least five times in the past.[192] Yet, for a third appeal in a row the Second Circuit reversed and sent the case back down for trial. The case dealt with anti-abortion protestors who sued a city claiming that the police, with the blessing of the police chief, had used unreasonable force on the protestors.[193] Although it may be the type of issue some judges wish to avoid, the case's exceedingly long history and multiple appeals suggests that the judges of the Second Circuit wanted to get to the merits, no matter how bad the briefing was.

The above cases are not the norm. Abandonment by poor presentation occurs often and usually in less high-stakes cases and with less disagreement between judges (it also occurs frequently on the district court level, where there is no disagreement between judges). But these cases suggest two important things: 1) abandonment by poor presentation is a malleable standard and 2) it is likely employed to avoid or reach certain issues, i.e., to decide a case in a particular way. Although accusing judges of "issue control" has an air of controversy, my hypothesis is that judges are more frequently using the tool of abandonment by poor presentation in the service of issue control in rather more mundane ways. When judges avoid issues by way of abandonment by poor presentation, I imagine it is often dispatched as a pseudo-harmless-error determination. Judges might be more inclined to find the issue or argument abandoned due to poor presentation when an issue or argument appears to be a loser but could be challenging and complicated, and resolution in the party's favor would not significantly (or at all) affect the outcome. Put differently, when a case is a "hot mess,"[194] it might be tempting to just find some of the arguments waived than spill ink addressing them if it likely won't make a difference in the end.

B. Docket Control

A particularly mundane motivation for engaging in agenda control, although one with troubling implications, is clearing crowded dockets. In his survey of briefing

---

189 *See* Williams *ex rel.* Tabiu v. Gerber Prods. Co., 523 F.3d 934, 937 (9th Cir. 2008); Toussaint v. McCarthy, 801 F.2d 1080, 1106 n.27 (9th Cir. 1986).

190 Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 118 (2d Cir. 2004).

191 *Id.* at 132 (quotation marks omitted).

192 *See id.* at 120–22, 133–34.

193 *See id.* at 118–20.

194 Vargas-Colón v. Fundación Damas, Inc., 864 F.3d 14, 16, 24 (1st Cir. 2017) (referring to the case as "simply put, a hot mess," and then later determining that certain arguments were waived due to poor briefing).

standards in the Federal Courts of Appeals, Edmunds concluded that the "caseload crisis" of the late 1990s and 2000s was a significant factor in the apparent increase in the popularity of finding abandonment by poor presentation.[195] The practice of abandonment by poor presentation significantly predates the 1990s and occurs outside the federal circuits, but there does appear to be a connection, at least in the federal courts, between an increased caseload and increased findings of abandonment by poor presentation.

Many of the canonical statements of abandonment by poor presentation appear to date from the late 1980s, when the federal courts were in the middle of a massive increase in caseload. The principle that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" may be deeply a part of the "warp and woof of appellate practice" *now*, but it was absent before 1990, at least in that iteration. That particular phrasing was first used in *United States v. Zannino* in January 1990.[196] Instances of abandonment by poor presentation appear to tick steadily upwards from the late 1980s through the 2000s.[197] From 1984 to 1990, filings per judgeship on the Federal Courts of Appeals increased from 194 to 237, or roughly 22%.[198] They rose to 300 by 1997, an increase of over 50% in 13 years.[199] Widening the lens, "[b]etween 1960 and 1994, the number of filings in the circuit courts increased by 1139%, while the number of authorized circuit judgeships increased by only 146%."[200] Given this "half century of unrelenting growth in judicial workload,"[201] it is natural that overworked judges would find themselves more often relying on a legally defensible method of ignoring convoluted briefs and cursory arguments.

Other commentators have noted that caseload pressure could be impacting how judges decide what to decide. Professor Bert I. Huang has studied how increased workload might be loosening standards of review in the courts of appeals, leading to more affirmances.[202] He got the idea in part from statements by judges themselves who have mused that increased deference might be a "consequence of the heavy

---

195 Edmunds, *supra* note 11, at 568–70.

196 *See* United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

197 *See* Miller, *supra* note 11, at 1268 (writing in 2002 that "[c]ourts *now* treat as waived even issues that were raised in the briefs, because they were not briefed with sufficient detail" (emphasis added)).

198 *See* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 408 (2013).

199 *Id.*

200 Edmunds, *supra* note 11, at 568.

201 Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1111 (2011).

202 *See generally id.*

caseload pressures on the courts of appeals,"[203] and that perhaps the "remarkable achievement in productivity [by the circuit courts] has been attained at least in part by the adoption of a posture of increased deference to the rulings of the [district] courts."[204] Alexander I. Platt, in studying the practice of appellate judges issuing silent concurrences, noted that judges are "more likely to issue silent concurrences when they have more judicial work to attend to."[205]

In addition to the coincidence of higher caseloads and more abandonment by poor presentation, and beyond the widely-held suspicion that caseload pressures affect other judicial decisions, courts sometimes say as much when finding arguments abandoned. For example, in *Melford v. Kahane and Associates*, the Southern District of Florida noted that one of the problems with a party not sufficiently developing their arguments is that the "burden upon the Court is improperly increased."[206] The Supreme Court of Alabama has explained that the purpose of Alabama's FRAP 28 analogue is "to conserve the time and energy of the appellate court."[207] The Illinois Court of Appeals wrote that a "reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not merely a repository into which an appellant may dump the burden of argument and research."[208] Statements such as these are akin to the common defenses of abandonment by poor presentation on party presentation grounds; the "it is not our job" defense. But they suggest that part of the problem is not simply the impartiality of the court doing the parties' work but the impracticality of doing such work when it can barely handle its own.

C. Writing Control

Besides issue control and crowded dockets, a third possible example of agenda control that employs abandonment by poor presentation is judges' highlighting sub-par argument in an effort to encourage better writing. There is reason to think that judges explicitly ignore cursory writing in the hopes that doing so scares straight the bar. In simpler terms, a "benchslap."[209] Under this theory, a judge does not grapple with whether the conduct truly violates the letter of a rule of practice, conforms to a theory of waiver, or violates an ideal of party presentation. Instead, after wrestling

---

203 *Id.* at 1111 (quoting RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 345 (1996)).

204 *Id.* at 1112 (quoting John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Courts*, THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 22, 23 (Cynthia Harrison & Russell R. Wheeler eds., 1989)).

205 Platt, *supra* note 165, at 155.

206 Melford v. Kahane & Assocs., 371 F. Supp. 3d 1116, 1126 n.4 (S.D. Fla. 2019).

207 *Ex parte* Borden, 60 So. 3d 940, 943 (Ala. 2007).

208 U.S. Bank v. Lindsey, 920 N.E.2d 515, 535 (Ill. App. Ct. 2009) (quotation marks omitted); *see also* Slater v. Gallman, 339 N.E.2d 863, 865 (N.Y. 1975) (assessing costs against appellant because lengthy brief constituted an "unwarranted burden upon th[e] court").

209 Joseph P. Mastrosimone, *Benchslaps*, 2017 UTAH L. REV. 331, 333 (2017) (citing *Benchslap*, Black's Law Dictionary (10th ed. 2011)).

with tortured prose day in and out she decides at times to employ these justifications in the more extreme cases as a warning sign to future lawyers. It may be occasionally harsh, and not doctrinally coherent, but it is a necessary overreaction that drives lawyers to write better.[210]

This motivation could explain why courts commonly find issues "waived" or "abandoned" but consider them anyway: the judge feels uncomfortable not addressing an argument that has been raised but nevertheless wants to fire a shot across the bow. This is an old story. In 1861, the North Carolina Supreme Court admonished counsel for their poor presentation of the issues and thought "it right to call the attention of the gentlemen of the bar to this matter, so that it may not be drawn into precedent and a like indulgence be again asked for."[211] The court still addressed the merits, albeit with "much hesitation."[212] In 1894, the Eighth Circuit dinged a lawyer for not writing up to the briefing rules, but still considered the issue.[213] It remains a common practice in the face of clumsy briefing to note that the court *could* find the issue waived or abandoned, but then consider the issue regardless.[214] One hundred and fifty years after the North Carolina Supreme Court lectured the members of its bar on the consequence of bad writing while still considering the merits of the case, the Supreme Court of the Virgin Islands did the same thing.[215]

If abandonment by poor presentation is really a tool to sculpt a better bar, one might question if it is the right tool for the job. Finding abandonment by poor presentation only seems to be increasing, and the pastime of judges complaining about bad legal writing does not seem be fading.[216] The inconsistent application of the rule could certainly be hindering its effectiveness. In *Amnesty America*, the Second Circuit considered the merits of an issue even though it found the briefing subpar and held for the side with the unclear composition.[217] Nothing usual there. But the lawyer had been admonished by the district court several times in that litigation for bad writing practices, and had been found to abandon issues by poor presentation in the Second

---

210 *Cf.* John F. Muller, *The Law of Issues*, 49 WAKE FOREST L. REV. 1325, 1332–33 (2014) (discussing how strict application of rule against considering issues for the first time on appellate review encourages lawyers to present their best issues before the lower court).

211 Jones v. Gerock, 59 N.C. 190, 192–93 (1861).

212 *Id.* at 193.

213 City of Lincoln v. Sun Vapor Street-Light Co. of Canton, 59 F. 756, 758–59 (8th Cir. 1894).

214 *See supra* note 106 and accompanying text.

215 Antilles Sch., Inc. v. Lembach, 64 V.I. 400, 428 n.13 (2016) (considering a perfunctory argument but stating that "[m]embers of the Virgin Islands Bar . . . must be cognizant of their responsibility . . . which includes making all necessary legal arguments, including a non-perfunctory analysis of [relevant law]").

216 *See* Mastrosimone, *supra* note 209, at 346–52 (discussing some colorful examples of "benchslaps" since 2000).

217 Amnesty Am. v. Town of W. Hartford, 361 F.3d 113 (2d Cir. 2004).

Circuit in *five previous cases*.[218] It was only on this sixth strike that the court mentioned sanctions may be forthcoming.[219] Professor Robert J. Martineau suggested that inconsistent application of the "general rule" against appellate courts considering new issues on appeal could encourage more appeals with more unraised issues.[220] Here, courts' pat threats of avoidance might not function to scare up better writing because to lawyers it appears worth it to cram issues into a brief. In the end, judges might be better off addressing bad briefing through the normal channel of attorney sanctions.[221] Rules of professional conduct present a slightly more tangible and consistent standard and lawyers are sure to take such reprimands seriously.[222] Abandonment by poor presentation is likely an imprecise instrument, sweeping up earnest but fumbling attempts to raise genuine issues but failing to dissuade serial screed writers.

IV. PROBLEMS

Up to this point I have shown that abandonment by poor presentation is a widespread practice with shaky justifications that is likely driven by judges' out-of-view motivations to control how they decide cases. But the reader may well wonder: is that a problem? Sure, the traditional justifications may be unsatisfactory, but lawyers should be aware that bad writing gets them into trouble. And if judges regularly engage in agenda control anyway, this seems to be a fairly innocent method of accomplishing those goals.

The answer, however, is yes: abandonment by poor presentation does present problems. The biggest problem with the practice is inconsistency. This has already been hinted at in discussing its counterintuitive justifications as well as several cases where judges disagree about how perfunctory an argument really was, but I will first address how subjective and malleable the standards of poor presentation are. I will then briefly discuss three additional problems. Abandonment by poor presentation could exacerbate problems that arise from resource disparity between parties, it could ironically encourage over-presentation of issues, and it can lead to the proliferation of bad precedent.

A. Inconsistency

The most significant problem with abandonment by poor presentation is its inconsistency. Justice means that like are treated alike. But judges find abandonment by poor presentation with nearly unfettered discretion and without delineating virtually any standards. Commentators have noted that when judges consider an issue

---

218 *Id.* at 120–22, 132–33.

219 *Id.* at 133–34.

220 Martineau, *supra* note 20, at 1030; *see also* Steinman, *supra* note 26, at 1612–13.

221 *See* Mastrosimone, *supra* note 209, at 359–61 (arguing that sanctions under the rules of professional conduct would be more appropriate than "benchslaps").

222 In some instances, courts have taken the proactive, if condescending step of requiring lawyers who write poorly to take writing courses. *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 20–21 (1997).

sua sponte or for the first time on appeal the criteria for doing so are so shifting and subjective that it is "not a system of law; it is too close to a game of chance."[223] Anytime lawyers prioritize and spend less time on an issue they are playing a similar game of chance; one judge might consider the issue abandoned, another might find it squarely raised.

For example, take one of the most commonly stated guideposts: arguments will be considered abandoned when they are only raised in footnotes.[224] This is an easy enough line to draw—after all it is a literal line on the page—but judges do not abide by it. Courts do consider arguments raised in footnotes,[225] and probably more frequently than they admit.[226] In *Goeke v. Branch*, the Eighth Circuit did not consider an issue because, according to the Eighth Circuit, it had not been raised.[227] The Supreme Court disagreed, admonishing the Eighth Circuit for ignoring the issue because it had in fact been presented to the appellate court. Where? In a footnote.[228] A "one-sentence footnote buried on the last page" of one of the state's arguments.[229] Courts regularly say they will not consider arguments raised in a footnote, or arguments lacking citation,[230] but we know judges consider arguments raised in footnotes and we know judges do their own legal research.[231] Moreover, we know that

---

223 Miller, *supra* note 11, at 1309; *see* Martineau, *supra* note 20, at 1033.

224 "Federal courts routinely decline to consider issues raised only in a footnote and in a perfunctory manner." Wandering Dago, Inc. v. N.Y. State Off. of Gen. Servs., 992 F. Supp. 2d 102, 134 (N.D.N.Y. 2014) (quotation marks omitted) (citing cases); Gate Guard Servs., L.P. v. Perez, 14 F. Supp. 3d 825, 833 (S.D. Tex. 2014) ("[A]n argument raised in a footnote is insufficient and may be disregarded by the Court."); Wagner v. Georgetown Univ. Med. Ctr., 768 A.2d 546, 554 n.9 (D.C. 2001) (issue raised in a footnote was not considered); Wirium & Cash v. Cash, 837 P.2d 692, 713 (Alaska 1992) (same); People v. Carroll, 167 Cal. Rptr. 3d 60, 64 n.5 (Cal. Ct. App. 2014) (same); Conn. Light & Power Co. v. Dep't of Pub. Util. Control, No. CV010510850S, 2002 WL 31000014, at *3 n.3, (Conn. Super. Ct. 2002) (same).

225 *E.g.*, Williams v. Woodford, 384 F.3d 567, 587 n.5 (9th Cir. 2004).

226 In the ordinary case, why would a court say out loud that the argument they were discussing was mentioned in a footnote?

227 Goeke v. Branch, 514 U.S. 115, 116–17 (1995).

228 *See* Branch v. Turner, 37 F.3d 371, 374 (8th Cir. 1994) *rev'd sub nom.* Goeke v. Branch, 514 U.S. 115 (1995).

229 *Id.*

230 *E.g.*, R & J Rhodes, L.L.C. v. Finney, 231 S.W.3d 183, 188 (Mo. Ct. App. 2007) ("If an appellant fails to support a contention with relevant authority, the point is considered abandoned. Thus, this contention is abandoned." (citation and internal quotation marks omitted)); *see also* Ordower v. Feldman, 826 F.2d 1569, 1576 (6th Cir. 1987); Conn. Light & Power Co. v. Dep't of Pub. Util. Control, 830 A.2d 1121, 1128 (Conn. 2003); City of Santa Maria v. Adam, 149 Cal. Rptr. 3d 491, 508–09 (Cal. Ct. App. 2012).

231 *See supra* notes 147–53 and accompanying text.

putting an argument above the line and including some citations does not save you from the specter of abandonment.[232]

And beyond these deceptively dim bright lines, there are no clear rumble strips to let practitioners know when they are veering towards poor presentation. The common, monotonous, refrain is that an argument is abandoned because it is too short, i.e., "perfunctory" or "cursory." But how short is too short? In *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, the Fifth Circuit warned that "one paragraph . . . comprising two sentences" was short, but "despite the brevity of [the] briefing" the point was considered anyway.[233] In *X Technologies, Inc. v. Marvin Test Systems, Inc.*, the Fifth Circuit found that a "one-half page" argument, however, was too short and deemed it waived.[234] In *Calix v. Lynch*, the Fifth Circuit noted only that an argument was "thin" but "when the authority itself is thin, that may be sufficient."[235] There are other instances of courts noting how short an argument is yet considering it anyway.[236] In *Ford v. Leithead-Todd*, the Hawaii Court of Appeals noted that the appellee made "a cursory argument that this court should abstain from interfering with political questions, which we address in depth."[237]

Beyond brevity, courts will punish litigants when the arguments are simply confusing and "undeveloped"—except when they don't. There are prominent examples of judges overlooking extremely bad briefing. In a decidedly over-the-top example of a benchslap, a district judge in Texas went on for five pages excoriating the litigants for their terrible written advocacy, noting the "amateurish pleadings," and "dearth of legal authorities," the "gossamer wisp of an argument" from the plaintiff, and more.[238] The judge did not once mention that any issue or argument was abandoned. *Amnesty America*, discussed above, is another example of a court noting extremely bad briefing but then choosing to reach the merits.[239]

If the foregoing evidence of inconsistency is not enough to convincingly demonstrate how subjective these standards are, we can look to cases where judges disagree in the same case about the sufficiency of a party's brief. There are many examples, which speaks for itself, but a few are worth highlighting. In *Garden v. Central Nebraska Housing Corporation*, the Eighth Circuit brushed aside one of the defendant's arguments, stating that it was "waived" because the defendant had "failed to develop it."[240] The dissenting judge disagreed, strongly. Judge Gruender wrote that

---

232 *See supra* notes 85–91 and accompanying text.

233 Barnes *ex rel.* Estate of Barnes v. Koppers, Inc., 534 F.3d 357, 362 (5th Cir. 2008).

234 X Techs., Inc. v. Marvin Test Sys., Inc.,719 F.3d 406, 411 n.3 (5th Cir. 2013).

235 Calix v. Lynch, 784 F.3d 1000, 1003 (5th Cir. 2015).

236 Cal. State Legis. Bd. v. Mineta, 328 F.3d 605, 608 n.6 (9th Cir. 2003) ("Although the Union's arguments are indeed minimal, they are sufficient to avoid abandonment.").

237 Ford v. Leithead-Todd, 384 P.3d 905, 911 (Haw. Ct. App. 2016).

238 *See* Bradshaw v. United Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

239 *See supra* text accompanying notes 190–93.

240 Garden v. Cent. Neb. Hous. Corp., 719 F.3d 899, 905 n.2 (8th Cir. 2013).

"[i]n deeming this argument 'waived,' the Court demands a level of clarity and detail from CNH that is unprecedented."[241] In *Robinson v. Wix Filtration Corporation*, a dissenting judge on the Fourth Circuit thought that an issue argued in the opening brief was dispositive, but the majority determined that the issue had not been argued at all, stating that "[t]he dissent was simply inaccurate" about it being raised in the opening brief.[242] In a First Circuit case, *United States v. Sevilla-Oyola*, the majority and dissent disagreed about whether a particular challenge was adequately briefed.[243] The majority and dissenting opinions quoted the exact same portion of the defendant's brief. To the majority it was clear evidence of abandonment by poor presentation; to the dissent it was clearly enough to raise the argument.[244] In *Gaither v. Aetna Life Insurance*, the majority found for the appellant on an argument that, according to the dissent, plainly did not comply with FRAP 28(a)(8). The dissent thought the majority "perpetrat[ed] a great injustice against the defendant-appellee" by considering the argument.[245]

In these four cases, federal courts of appeals judges—some of the best legal minds in the country—read the same briefs and came to completely different conclusions; not about what the law said or what arguments were persuasive, but about whether a party had said something at all.

In fairness, inconsistent results are a known risk of the exercise of discretion. It is not shocking that some judges will disagree about what is too "perfunctory" or when an argument is "developed." But the lack of inquiry into this area and the doctrinal confusion undergirding abandonment by poor presentation combine to create an area where the standards are so loose that there may be no standards at all. When determining if an argument is sufficiently briefed, judges too often rely on the obscenity standard from *Jacobellis v. Ohio*: they know an inadequate brief when they see it.[246] Whatever efficiency may be gained from encouraging clearer and better writing and from ignoring mush is likely lost because of a lack of clear standards. Much the same has been said of the "general rule" against considering new issues on appeal: that its freeform exceptions render the rule almost meaningless and could encourage lawyers to raise new issues on appeal even though the rule is designed to prevent this from happening.[247] But at least there the occasional court and commentator attempt to make sense of the madness. Here, the subjectivity has gone unnoticed.

---

241 *Id.* at 909 (Gruender, J., dissenting).

242 Robinson v. Wix Filtration Corp., 599 F.3d 403, 410 n.9 (4th Cir. 2010). The majority went on to consider the merits of the issue anyway.

243 *Compare* United States v. Sevilla-Oyola, 770 F.3d 1, 13–14 (1st Cir. 2014), *with id.* at 19 (Torruella, J., concurring in part and dissenting in part).

244 *Id.* at 14 (majority opinion); *id.* at 19 (Torruella, J., concurring in part and dissenting in part).

245 Gaither v. Aetna Life Ins., 394 F.3d 792, 809 (10th Cir. 2004) (Murphy, J., dissenting).

246 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

247 *See supra* note 220 and accompanying text.

B. Party Disparity

Another problem with abandonment by poor presentation is party disparity—whether the briefing standards are strict, or ambiguous, or ever-changing it is generally going to redound to benefit of the rich and powerful; those who can hire better attorneys.[248] That is both because these expensive attorneys might write better but also because, like all ambiguous rules, it is easier to navigate if you are in the know. Moreover, hastily applied "perfunctory"-type statements can amount to a sort of judicial tone policing. Given how unclear it can be whether an issue is properly raised or not, there is some reason to suspect that at least occasionally judges are essentially tossing briefs because they don't sound right. Edmunds focuses on party disparity as the principle evil of heightened briefing standards, noting that they will disproportionally affect criminal defendants and pro ses.[249] There is no doubt that a strictly applied but ambiguously defined rule of clarity will negatively affect these types of litigants at a higher rate and, at least in the case of criminal defendants, with greater consequence.

I will not dwell on this particular facet of the problem with abandonment by poor presentation for three reasons. First, the impact on disadvantaged litigants is apparent and has already been well described by Edmunds in the only other work on this topic.[250] Second, although a likely story, it is not clear that abandonment by poor presentation affects disadvantaged litigants more frequently. Bad briefing can happen to anyone. Yes, a failure to meet briefing standards can sink a prisoner's habeas petition[251] or a pro se's appeal.[252] But "forfeiture rules generally apply to the government in the same manner and to the same extent that they apply to criminal defendants."[253] And indeed, a state's bad briefing can redound to the defendant's benefit. In *State v. Smith*, the Wisconsin Supreme Court's finding that the state's argument in the appellate court was cursory led to a prisoner going free.[254] State attorneys can be as cursory as anyone.[255] Repeat litigators and large companies with

---

248 *See* Edmunds, *supra* note 11, at 582–85 (discussing the impact of briefing standards on pro se litigants).

249 *Id.* at 579.

250 *See id.* at 579–85.

251 *E.g.*, Yohey v. Collins, 985 F.2d 222, 224 (5th Cir. 1993); Acosta-Heurta v. Estelle, 7 F.3d 139, 144 (9th Cir. 1992).

252 *See* Jessica Case, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701, 742 n.71 (2002) (citing Stephenson v. Twp. of Thornton, No. 00-3154, 2001 WL 1071765, at *1 (7th Cir. Sept. 7, 2001)); N. Cal. Presbyterian Homes & Servs. v. McInerney, No. H041335, 2016 WL 2860333, at *2 (Cal. Ct. App. May 12, 2016).

253 People v. Grimes, 340 P.3d 293, 345 (Cal. 2015) (Liu, J., dissenting).

254 State v. Smith, 905 N.W.2d 353, 357 (Wis. 2018).

255 *See* Hensley *ex rel.* N.C. v. Price, 876 F.3d 573, 580 (4th Cir. 2017) (noting state's waiver of issue in brief led to affirmance of denial of qualified immunity in police brutality case); Duerre v. Helper, 892 N.W.2d 209, 220 (S.D. 2017) (explaining that state waived argument by raising it in a footnote); Navistar, Inc. v. Testa, 39 N.E.3d 509, 517–18 (Ohio 2015) (finding

sterling representation fall prey to abandonment by poor presentation just like pro ses.[256] Which brings me to the third reason I focus on other problems beyond resource disparity: I do not want to frame this topic from a results-oriented perspective. This is not only a problem for disadvantaged litigants, and the solutions I propose below would not serve those litigants at the expense of governments and large corporations. In fact, courts have *less* of a blind spot when it comes to the perfunctory nature of pro se pleadings; they often explicitly afford such litigants more wiggle room when it comes to weak writing, or at least say they are doing so.[257] The inconsistency and confusion around abandonment by poor presentation make litigating harder for all parties; some litigants who think they have raised an issue will find it waived, other litigants will think they don't have to respond to an issue only to find it was raised adequately.[258] The result of the under-theorization of abandonment by poor presentation is not pro-defendant, pro-plaintiff, or pro-government. It is anti-lawyer and anti-litigant.

C. Over-Presentation of Issues

For all the handwringing about "perfunctory" and "cursory" arguments, judges and lawyers are just as *verklempt* about writing that is too long. Maybe more so. The "first benchslap in recorded history" comes from 1596 when a court jailed a lawyer over an unnecessarily long brief and then famously made the lawyer "wear the pleading" while being paraded around Westminster hall.[259] At the turn of the 20th century, the New York Court of Appeals reprimanded a lawyer in a published opinion for writing 117 printed pages about a "simple" false imprisonment case.[260] Admonishing lawyers for prolix briefing has persisted to the present day.[261] One practitioner who surveyed

---

tax commissioner abandoned argument by poor presentation at Ohio Supreme Court); Carroll v. United States, 227 F. Supp. 3d 1242, 1248 n.2 (W.D. Okla. 2017).

256 *See* Conn. Light & Power Co. v. Dep't of Pub. Utility Control, 830 A.2d 1121, 1128–29 (Conn. 2003); United States v. Medtronic, Inc., 189 F. Supp. 3d 259, 282 (D. Mass. 2016); Chevron Corp. v. Donziger, No. 11 Civ. 0691, 2013 WL 4045326, at *1 n.3 (S.D.N.Y. Aug. 9, 2013); Eastes v. Verizon Comms., No. Civ.A. 2:01-0763, 2005 WL 483369, at *4 n.1 (S.D. W. Va. Mar. 1, 2005).

257 *See, e.g.*, Hill v. Lappin, 630 F.3d 468, 471 (6th Cir. 2010) (discussing the "indulgent treatment" that "[c]ourts are instructed to give . . . to the 'inartfully pleaded' allegations of pro se prison litigants"); Twardowski v. Holiday Hosp. Franchising, Inc., 748 N.E.2d 222, 226 (Ill. Ct. App. 2001) ("[T]his court has held that our jurisdiction to entertain the appeal of a *pro se* plaintiff is unaffected by the insufficiency of his brief, so long as we understand the issue plaintiff intends to raise and especially where the court has the benefit of a cogent brief of the other party."); Joyce v. Postmaster Gen., 846 F. Supp. 2d 268, 289 n.25 (D. Me. 2012).

258 *See* Gaither v. Aetna Life Ins., 394 F.3d 792, 809–11 (10th Cir. 2004) (Murphy, J., dissenting) (explaining that the majority's finding an issue adequately presented "perpetrat[ed] a great injustice against the defendant-appellee" because the argument should have been found abandoned).

259 *See* Mastrosimone, *supra* note 209, at 345.

260 *See* Stevens v. O'Neill, 62 N.E. 424, 424–25 (N.Y. 1902).

261 *See* Fischer, *supra* note 222, at 22–24.

articles about good appellate writing concluded that "[j]udges tend to regard conciseness as the most important element of good writing."[262] Among the seven virtues of appellate brief writing set forth by the late Judge Harry Pregerson, number two is that the "Brief is Clear and Concise."[263] The federal rules that courts often rely on in support of finding abandonment by poor presentation tend to focus more on brevity than on perfunctory argument.[264] It may in fact be *more* a part of the "warp and woof" of appellate practice, and legal practice in general, to avoid longwinded briefs than it is to avoid perfunctory or undeveloped arguments.

Strictly enforcing abandonment by poor presentation, and doing so without clear guideposts, could have the unintended effect of undermining this effort at concise briefing. This is because lawyers will be encouraged to write at length on any issue they wish to preserve and present to the court, lest a shorter treatment of say, "one-half page,"[265] be deemed too perfunctory. Although lawyers should not raise superfluous issues, there are sound reasons to expend more time on some arguments and substantially less time on others even if you want to raise all of them. Lawyers are told to trim their briefing and focus on their best arguments.[266] As one judge, writing with two practicing lawyers, put it: "strong arguments lose their edge and persuasive force when surrounded by less persuasive arguments."[267] No doubt true, but that does not mean that lawyers should never make "less persuasive arguments." Imagine a defendant has strong persuasive arguments in her favor on the merits and a weak but plausible long-shot argument that the court lacks jurisdiction. Defendant's counsel might understandably focus her efforts on the stronger, merits arguments and raise the jurisdictional argument in a manner that could strike a reader as "cursory." Judges should think twice before imposing a rule that would put counsel in the position of choosing whether to drop the possibly winning jurisdictional argument in the name of writing a better brief, or sacrifice brevity in the name of including all arguments that could potentially secure victory. My suspicion is that many lawyers will choose the latter, and judges will not like the result.[268] Judges have noted that strict adherence to

---

262 Brian L. Porto, *Improving Your Appellate Briefs: The Best Advice from Bench, Bar, and Academy*, 36 VT. BAR J. 36, 41 (2011).

263 Harry Pregerson & Suzianne D. Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 SW. L. REV. 221, 226–27 (2008).

264 *See, e.g.*, FED. R. APP. P. 28(a)(6) (requiring a "concise statement of the case"); (a)(7) (stating that the summary of the argument must "contain a succinct, clear, and accurate statement of the arguments"); (a)(8)(B) (requiring a "concise statement of the applicable standard of review"); (a)(9) (requiring a "short conclusion").

265 *See* X Techs., Inc. v. Marvin Test Sys., Inc., 719 F.3d 406, 411 n.3 (5th Cir. 2013).

266 *See, e.g.*, Stephen J. Dwyer, Leonard J. Feldman & Ryan P. McBride, *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 421–22 (2008).

267 *Id.*

268 *See* Steinmetz v. Allegheny Gen. Hosp., 83 Pa. D. & C. 4th 249, 254–55 (Pa. Ct. Com. Pl. 2007) ("[T]he Superior Court has expressed concern that trial courts are hindered in preparing adequate legal analysis when appellants identify too many issues."). Even if judges are willing to sacrifice brevity for the cause of fewer perfunctory arguments, there is every

waiver rules in the appellate preservation context could lead to over-presentation of issues.[269] Strict adherence to waiver rules in this context could lead to the same result.

D. Bad Precedent

It could also lead to judges making the wrong decision. In our common law system, there is "a strong public interest in [judges] avoiding errors,"[270] even if those errors can be blamed on a lawyer's bad briefing. But "if litigants fail to fairly, completely, and accurately describe the law, judicial opinions may themselves contain flawed statements of law that will bind all who come after."[271] This is a risk if judges address poorly stated or half-made arguments, but it is a risk if judges ignore those arguments as well.[272] In either case, judges run the risk of issuing an opinion which relies on only part of the story—either omitting facts or precedent—and that could lead to erroneous precedential decisions.[273] Some of the Supreme Court's most far reaching holdings rested on no briefing at all,[274] or incomplete briefing.[275] Some, like *Erie Railroad v.*

---

reason to think lawyers will still find a way be long winded and cursory at the same time. *See* United States v. Skilling, 554 F.3d 529, 568 n.63 (5th Cir. 2009) ("If the absence of these basic elements of an appellate argument constitutes waiver in typical cases, waiver applies all the more where, as here, a party is given leave to file approximately 550 pages of briefing."), *aff'd in part and vacated in part*, 561 U.S. 358 (2010).

269 *See* Joseph v. United States, 135 S. Ct. 705, 706 (2014) (citing United States v. Vanorden, 414 F.3d 1321, 1324 (11th Cir. 2005) (Tjoflat, J., specially concurring) (per curiam)).

270 Morley, *supra* note 98, at 330.

271 Frost, *supra* note 28, at 492.

272 Edmunds, *supra* note 11, at 578–79 (citing Frost, *supra* note 28, at 475–76).

273 Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 206 (1985) (noting that one of then-Judge Ginsburg's "core values" for measuring the performance of appellate courts is whether they "get it right," and that "'[g]etting it right' looms larger when a court defines and applies the law, particularly in a system wedded to the concept that the judiciary both sets and follows precedent").

274 Dickerson v. United States, 530 U.S. 428, 432 (2000) (central holding not raised by parties); Stanley v. Illinois, 405 U.S. 645, 660 (1972) (same); Younger v. Harris, 401 U.S. 37, 40–41 (1971) (same); Monroe v. Pape, 365 U.S. 167, 192 (1961) (same); Erie R.R. v. Tompkins, 304 U.S. 64, 79–80 (1938) (same); Washington v. Davis, 426 U.S. 229, 245, 252 (1976) (showing that even though the parties agreed that Title VII standards did not apply to equal protection claims, the Supreme Court decided otherwise); *see* Miller, *supra* note 11, at 1255–56; Frost, *supra* note 28, at 450.

275 Teague v. Lane, 489 U.S. 288, 300 (1989) (central holding was raised by amicus); Mapp v. Ohio, 367 U.S. 643, 646 n.3 (1961) (same); Romer v. Evans, 517 U.S. 620, 635–36 (1996) (same); Batson v. Kentucky, 476 U.S. 79, 112, 116–17 (1986) (Burger, C.J., dissenting) (central holding was disclaimed by petitioner, but mentioned by respondent and amicus); *see* Frost, *supra* note 28, at 466; Miller, *supra* note 11, at 1257 n.12.

Tompkins, have long lasting and questionable consequences.[276] Appellate courts make questionable decisions without adequate briefing as well.[277]

To be sure, erroneous precedential decisions are a necessary evil in a common law system. "[A] number of judicial doctrines—such as stare decisis, law of the case, res judicata, and the requirement that lower courts adhere to superior court precedent—require judges to accept flawed legal determinations and incorporate them into current decisions."[278] But there are a few aspects of abandonment by poor presentation that exacerbate the problem. First, unlike the other doctrines just mentioned, abandonment by poor presentation requires judges to base their erroneous statements of the law on actions (or inactions) of "nonjudicial actors," i.e., the parties to a case.[279] In other words, it cedes lawmaking authority to private actors.[280] It is one thing for a judge to follow the wrong decision of a higher or earlier judge; it is another for a judge to issue a wrong decision because private parties negligently (or intentionally) hid facts and precedent from the judge's view. Unlike ordinary waiver situations, abandonment by poor presentation presents the odd combination of these two things: a judge choosing to hide her eyes from facts and precedent regardless of the intention of the parties.

Second, the type of issues and arguments that get abandoned by poor presentation are perhaps more likely to undermine the quality of precedent if ignored. No doubt many meritless arguments are abandoned by poor presentation.[281] But it is a doctrine that allows judges to intentionally ignore possibly meritorious arguments on shaky grounds, such as a confusing presentation, or because they are "undeveloped." Ignoring plainly meritless arguments on grounds of bad briefing will do little violence to the court's decision, but ignoring meritorious arguments could certainly lead to incorrect decisions that then bind similarly situated parties.[282]

---

276 *Erie*, 304 U.S. at 69; *see* Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 150–53 (2011); Milani & Smith, *supra* note 125, at 254.

277 *See* Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The "Gorilla Rule" Revisited*, 17 J. APP. PRAC. & PROCESS 113, 126–31 (2016) (discussing cases).

278 Frost, *supra* note 28, at 474.

279 *See id.* at 475.

280 *See* Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure it Reflects*, 63 EMORY L.J. 59, 92–94 (2013) (detailing how plaintiffs' lawyers failure to raise caselaw refuting "same actor" defense in employment discrimination cases appears to lead to more courts adopting the same actor defense).

281 Allen v. Hudson, 35 F.2d 330, 331 (8th Cir. 1929) (noting that "strictly speaking" the assignments of error were too broad to consider, but considering the contentions anyway and finding them meritless); Baloga v. Pittston Area Sch. Dist., 927 F.3d 742, 752 n.8 (3d Cir. 2019) (considering insufficiently briefed argument meritless); Resol. Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995) (same); *see supra* Part III.A (discussing "pseudo-harmless error").

282 The Court has cautioned that when a lower court "undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law, the court should

V. SOLUTION: IF YOU DON'T HAVE ANYTHING HELPFUL TO SAY, DON'T SAY ANYTHING AT ALL

Abandonment by poor presentation is a problem. It is a widespread practice that is rarely questioned. It relies on weak justifications. It is confusingly and inconsistently applied. This all results in a frustrating shadow doctrine that makes navigating the legal system harder for traditionally disadvantaged litigants, encourages unnecessarily wordy briefs, and leads to bad precedent, among other ills.

My solution is simple: stop doing it. No more "waived" or "forfeited" arguments because of perfunctory statements; courts should just stop finding abandonment by poor presentation altogether. As I will discuss, this is not a disruptive solution because there are simple and well-established methods of dealing with bad briefing. In the event that judges are too tied to this rudder-less doctrine, I propose that judges start working on a rudder. That is, if judges do find abandonment by poor presentation, they should explicitly discuss *why*, so that courts can begin to develop common law standards for adequate briefing.

I am not proposing any positive law solutions, such as amendments to the federal or local rules. Although defining briefing standards in federal and local rules is an attractive solution,[283] it would miss the mark for two reasons. First, rules are not the source of this practice, and I doubt amendments to rules would do much. Finding abandonment by poor presentation is older than FRAP 28.[284] And the rules do not appear to cabin discretion as is. Courts ignore arguments that technically abide by the rules and consider arguments that don't.[285]

Second, good luck crafting explicable standards in this arena. Judges would no doubt balk at rule changes that focus on strict quantitative requirements, such as "arguments under two sentences will be deemed waived." And in the absence of such formalistic language, the standards would be essentially what they are now—discouraging "perfunctory" or "undeveloped" arguments. Consider a standard that some appellate courts already purport to employ: an issue "has to be raised well enough for the trial court to consider it."[286] Although that sounds like a more concrete

---

refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding precedent on the issue decided." Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 100 n.5 (1991). It is unclear how much this advice is followed. And the Supreme Court does not set a great example. *See supra* notes 274–75 and accompanying text.

283 *See* Edmunds, *supra* note 11, at 589–90 (suggesting amendments to FED. R. APP. P. 28(a) and local rules).

284 *See supra* notes 75–76 and accompanying text.

285 *See supra* text accompanying notes 85–91.

286 *See, e.g.*, Butler Aviation Int'l, Inc. v. Whyte (*In re* Fairchild Aircraft Corp.), 6 F.3d 1119, 1128 (5th Cir. 1993) ("In short, the argument must be raised to such a degree that the trial court may rule on it—a standard that clearly was not met in the instant case." (footnote omitted)), *abrogated on other grounds by* Tex. Truck Ins. Agency, Inc. v. Cure (*In re* Dunham), 110 F.3d 286 (5th Cir. 1997); Elder v. Jones, 608 P.2d 654, 660 (Wyo. 1980) ("It is a basic premise of appellate practice that to preserve an issue for appeal, that issue must be called to the attention of the trial court in a clear manner."); Boldt v. Clackamas Cnty., 813 P.2d 1078, 1079 (Or. Ct.

standard, it really just begs the question of when something is presented "well enough." Indeed, appellate courts disagree with trial courts about when an issue was properly presented.[287] Sure, having these terms set forth in rulebooks would be a step in the right direction as it would provide a greater degree of notice for litigants. But "perfunctory" is really in the eye of the beholder.[288] Attempts to tamp down discretion would likely push the judges' discretion elsewhere. For example, if the standard was that "arguments of more than one-half page must be considered," judges could effectively employ the same loose standards they employ now, but under the rubric of determining what is and is not "argument," instead of how short the argument is. [289]

A. Say Nothing At All: Getting Rid of Abandonment by Poor Presentation

Rather than a positive law solution that would likely fail to cabin judicial discretion, we should swim all the way across the river and get rid of the practice of abandonment by poor presentation. Abandonment by poor presentation does not serve a useful purpose and is not worth the problems it produces. When an argument is in fact too perfunctory to address, judges should not address it. When it is long enough or developed enough to be worth addressing, but still so short or confusingly presented that the argument does not make sense, judges should simply explain that it is a losing argument for those reasons. Finally, if it is not too perfunctory to ignore, and not so confusingly stated as to be indecipherable, but in fact is a possibly meritorious argument that is not artfully explicated, courts should be more willing to order supplementary briefing. Although it is a very old and very well-established practice, abandoning abandonment by poor presentation is not very disruptive.

1. When Arguments Are Not Made: Say Nothing

Judges should feel comfortable not addressing arguments that are not presented. No one is asking judges to read minds.[290] If a perfunctory statement presents a perplexing problem, the judge should think: is this worth mentioning? If it is truly too perfunctory to be worth addressing then do not address it, and thereby avoid the Catch-22 of flagging an issue as un-flaggable.

One criticism of this approach is that it invites motions for reconsideration. Better to dispatch even potential arguments, the thinking goes, then wait to address them again in a later motion. This is a weak reason to find abandonment by poor

---

App. 1991) (holding that issues must be sufficiently presented to the Land Use Board of Appeals such that LUBA can rule on them in order to be preserved).

287 Robinson v. Wix Filtration Corp., 599 F.3d 403, 411 n.10 (4th Cir. 2010) (stating that the issue was not properly briefed below, but because the district court "appear[ed] to have understood the . . . argument as properly raised," the court of appeals considered the argument).

288 *See supra* text accompanying notes 240–45.

289 *Cf.* Muller, *supra* note 210, at 1358–59 ("One [solution to the problem of inconsistent consideration of new issues on appeal] would be to adopt a formalistic regime in which unpreserved issues simply could not be considered—although under such a regime one would expect courts to simply employ their existing analyses under the umbrella of assessing whether an issue advanced on appeal was advanced below.").

290 *See supra* Part II.A.1.

presentation for two reasons. First, motions for reconsideration are common no matter what the court addresses in its opinion, and motions for reconsideration in this situation would be relatively easy to dispense with. If the judge noted the perfunctory statement on a first pass then all she (or her law clerk) needs to do is keep her powder dry and briefly explain why she ignored that argument in the first place. Judges and law clerks regularly keep their notes on a case available at least until after the deadline for a motion for reconsideration. Any slight uptick in motions for reconsideration would not substantively strain judicial resources.

Second, inviting a motion for reconsideration is better than inviting a new line of argument and judges risk just that when they see arguments and issues that may not be there. Sometimes a confusing sentence or two is a clumsy attempt to raise a new issue or argument, but sometimes it's just a confusing sentence or two; the cigar may indeed be just a cigar.[291] Judges may read into the poor *explanation* of issue Y the perfunctory *raising* of issue X. By stating that the party has waived or abandoned issue X, or worse, stating that the party has waived or abandoned issue X even though it may be meritorious, the judge has given the litigant ideas. This could in turn lead to a motion for reconsideration where the litigant attempts to post hoc explain how they really did raise this issue squarely in earlier briefing, or could lead to (perhaps misplaced) reliance on issue X in later or similar cases. The judge has unintentionally violated the norm of party presentation in the name of protecting it and created additional work in the name of efficiency.

2. When Losing Arguments Are Made Poorly: Address the Bad Argument

Judges are presumably comfortable with not addressing purported issues and arguments that are so perfunctory as to be missed entirely. But things get more challenging when the perfunctory statement rises above a certain threshold and becomes merely a bad argument. This, I suspect, is the heartland of abandonment by poor presentation: statements by litigants that are noticeable attempts to make discernable arguments but the attempts are so bungled as to be difficult to dispense with. It strikes judges as simpler to chalk it up to abandonment by poor presentation.

Judges should stay their hands here too. Instead of rushing to declare the argument waived, judges should consider whether the true problem with the argument is that it is, simply, a loser. When the party being perfunctory bears the burden of persuasion, it is better to simply hold that the barebones argument is insufficient. It is not uncommon to rule against a party on this ground.[292] It is run-of-the-mill for appellate

---

291 A saying, often but dubiously attributed to Freud, is "sometimes a cigar is just a cigar," implying that even though we often see the world symbolically, sometimes an object is just meant to represent that object.

292 *See, e.g.*, Letourneau v. Hickey, 807 A.2d 437, 483 (Vt. 2002) ("The Letourneaus' vague suggestions as to what evidence or arguments they might have offered . . . fail to satisfy their burden of demonstrating prejudice, assuming there was error at all."); Morris v. Parkinson, No. 991027-CA, 2001 WL 311176, at *1 (Utah Ct. App. Mar. 8, 2001) ("Appellants' fleeting treatment of these issues did not include any marshaling of evidence. Thus, we affirm these jury findings."); Thornton v. Pandrea, 385 P.3d 856, 872 (Idaho 2016) ("[I]t was Mr. Thornton's burden to show that the district court abused its discretion in determining the award amount, and Mr. Thornton's cursory and conclusory argument fails to meet that burden."); State v. Berker, 314 A.2d 11, 15 (R.I. 1974) (finding "no need to respond" to defendant's "inquiry" that statute was vague because "[i]t is elementary that one who seeks a judicial veto of a legislative

courts to affirm a judgment because the appellant has failed to explain why it should be reversed.[293] Indeed, if appellate judges view their role as error correction alone,[294] as they at least theoretically should,[295] this is their only task: to determine whether the appellant has demonstrated error. Infusing the inquiry with abandonment by poor presentation can cause confusion. Take for example, a Sixth Circuit table decision, *Wilson v. Luttrell*, where the court stated that "Plaintiffs have waived this argument by failing to explain why the court erred."[296] In other words, "plaintiffs waived this argument because they lost this argument." Similarly, and more recently, the Fifth Circuit noted that appellants had not presented any authority to support their position that the district court erred, and that the court had found none on its own, and

---

act on constitutional grounds carries the burden of persuasion" and the defendant "merely assert[ed] that the eluding portion of [the statute] [was] vague and cite[d] one case"); Olson v. Griggs Cnty., 491 N.W.2d 725, 732 (N.D. 1992) ("When the record does not allow for intelligent and meaningful review of an alleged error, the appellant has not carried the burden of demonstrating reversible error."); Hopper v. Berryhill, No. 4:16 CV 1309, 2017 WL 4236974, at *15 (E.D. Mo. Sept. 25, 2017) ("Without the requisite specificity and analysis supported by the record, Plaintiff has not met his burden to show prejudicial error.").

293 *See* M.G. Skinner & Assocs. Ins. Agency v. Norman-Spencer Agency, Inc., 845 F.3d 313, 322 (7th Cir. 2017) ("This undeveloped argument gives no reason to reverse the district court's judgment on this claim."); Preemption Devices, Inc. v. Minn. Min. & Mfg. Co., 732 F.2d 903, 906 (Fed. Cir. 1984) ("We do not find in appellant's arguments on this point anything more than a general disagreement with the trial judge's appraisal of the evidence on the basis of well-established law of which the judge had a thorough grasp. We find a total failure by appellants to establish error on these two issues."); Schneider v. S. Cotton Oil Co., 87 So. 97, 99 (Ala. 1920) ("Our best judgment is that the brief for appellant points out no reversible error, and that the judgment must be affirmed."); Arp v. State Highway Comm'n, 567 P.2d 736, 744 (Wyo. 1977) (Raper, J., dissenting) ("Such perfunctory arguments should be dispatched summarily."). The Board of Immigration Appeals takes this approach often. *See, e.g.*, Diego Armando Cando-Molina, File No. AXXX XX3 016, 2015 WL 2090741, at *2 (B.I.A. Mar. 11, 2015). In Wisconsin, the courts often phrase the issue as one of admittance: if the arguments against are paltry, the issue is deemed "admitted." *See* Farr v. Evenflo Co., No. 2004AP1149, 2005 WL 1830908, at *12 (Wis. Ct. App. Aug. 4, 2005).

294 For explanation of the difference between the "writ of error" model and the appellate model, *see* Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997).

295 *See id.* at 915 (noting that our modern appellate system theoretically follows the writ of error model, even if it retains some flavor of the equitable appeal, where a higher court would hear the entire case de novo); Steinman, *supra* note 26, at 1521 ("Legal professionals, litigants, and the people of this country in general typically conceive of appellate courts as courts of review, courts that review decisions made by trial court judges, by decision makers in administrative agencies, or occasionally by arbitrators."); Offenkrantz & Lichter, *supra* note 277, at 117.

296 Wilson v. Luttrell, Nos. 99-5459, 99-5460, 99-5461, 99-5462, 2000 WL 1359624, at *7 (6th Cir. Sept. 13, 2000).

concluded that the "argument [was] forfeited for lack of sufficient briefing."[297] It would be far better to address bad briefing through a different lens—as an insufficient effort to show error or liability—than to find an argument "waived" because it failed to meet some unsaid briefing standard. And lest judges worry that this result is more work, remember: there is nothing wrong with answering a cursory argument in a cursory response.[298] Courts often deal off-handedly with arguments made in an off-hand manner.[299] Judges should have the courage of their convictions and dismiss these bad arguments on the merits instead of hiding behind waiver or forfeiture.

3. # When Winning Arguments Are Made Poorly: Order Supplemental Briefing

Occasionally, a judge may find herself grappling with an argument that is too substantial to fully ignore. It is not clearly meritless or a clear failure to meet a burden, but yet is so poorly made that it is difficult to address without additional research or clerk-hours spent etching the argument's contours. That judge may feel the temptation to leave it alone and find the argument abandoned for poor presentation. She should resist this urge—but indulge another. Namely, the urge to order supplemental briefing.

Ordering supplemental briefing in the face of a confusing but possibly meritorious argument is an old practice.[300] It is encouraged by the Supreme Court, and has occurred in some of its most famous cases.[301] It is also common.[302] To the extent bad briefing really is a rules violation, judges should feel especially justified in making litigants re-do their bad argument. Making a lawyer refile a brief because it does not comply with local rules or the rules of appellate procedure is routine. When a lawyer misses a table of contents, or a summary of the argument the clerk may not accept the brief, and the lawyer has to do it again. This often results in some delay. In *White v. White*, a Florida appellate court sent a brief back to a lawyer three times (*after* he

---

297 Mahmoud v. De Moss Owners Ass'n, 865 F.3d 322, 334 (5th Cir. 2017); *see also* State v. Hilt, 322 P.3d 367, 381 (Kan. 2014) ("Hilt's bare assertion is not enough to discharge his burden to demonstrate an abuse of discretion. We regard this argument as abandoned.").

298 *See* State v. Hanson, 808 N.W.2d 390, 401 (Wis. 2012) ("We will briefly address Hanson's remaining constitutional right-to-present-a-defense and interest of justice claims, because Hanson has addressed these arguments only in a cursory fashion."); Sawdey v. Schwenk, 87 N.W.2d 500, 539 (Wis. 1958) ("In the absence of such an argument, we do not feel called upon to give more than a fleeting comment with respect to such question.").

299 *E.g.*, Martin-Trigona v. Baxter, 435 N.W.2d 744, 746 (Iowa 1989) ("We also note that a cursory examination of Martin-Trigona's substantive arguments indicates to us that they are without merit."); State v. Buckner, 558 P.2d 1102, 1105 (Kan. 1976) ("No argument beyond the bare assertion is presented and from the evidence already recited it is apparent none can be made."); Dublin v. Commonwealth, 372 S.W.2d 416, 418 (Ky. 1963) ("The [argument] merits no consideration. Other than [a] bare assertion, there is no argument or authority given sustaining it. . . . There is nothing to consider.").

300 *See* Nash v. Nash, 69 Va. 686, 696–97 (1877).

301 *See* Milani & Smith, *supra* note 125, at 294–98 (discussing, *inter alia*, Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

302 *See* Miller, *supra* note 11, at 1298–99 (citing cases).

missed his initial filing deadline twice).[303] It did not find that he "waived" his chance to file a brief because the first, second, or third go around was not up to snuff. Ordering limited supplemental briefing to address specific perfunctorily stated arguments will likely cause less delay than this run-of-the-mill policing of briefing rules.[304]

Still, judges have a healthy fear of *anything* that increases the length of litigation.[305] But supplemental briefing is not a justifiable victim of that concern. Judges are in complete control of the supplemental briefing process. They can order parties to submit only five pages (or less!), simultaneously, and within as short a time span as they wish[306] (although concern for the lawyers is always appreciated). Ordering and responding to supplemental briefing is easier in the information age.[307] And this species of supplemental briefing can be particularly easy, because it can be particularly precise: the judge will have already considered the primary briefing and perhaps even oral argument and will be familiar with the issues. The order can be surgical, noting exactly where the cursory statement is in the briefing, and what exactly the judge is confused by: was the party intending to raise issue X? Support issue Y? Can she provide citations for either? Ordinary motions practice can remediate possible unfairness. If the opposing counsel believes that through supplemental briefing the perfunctory party is improperly raising a new issue too late in the litigation, counsel can move to file a surreply, or move to strike.

Litigation can be unnecessarily time consuming and wasteful, but the bulk of that waste results from ordinary process, such as discovery,[308] or busy judges taking a long time to issue decisions. Requesting a few extra pages addressing a specific issue at a point in the process when the issues have narrowed and the judge is close to reaching

---

303 White v. White, 627 So. 2d 1237, 1238–39 (Fla. Dist. Ct. App. 1993).

304 *See* Offenkrantz & Lichter, *supra* note 277, at 137 ("By any analysis, supplemental briefing would not 'substantially impair a court's interest in efficiency.'" (quoting Miller, *supra* note 11, at 1290)).

305 *See* Miller, *supra* note 11, at 1301–02 (noting that efficiency concerns are one of the main reasons appellate courts are reluctant to order supplemental briefing).

306 *See* Navigators Specialty Ins. v. St. Paul Surplus Lines Ins., No. 13-CV-03499, 2015 U.S. Dist. LEXIS 191265, at *2 (N.D. Cal. May 27, 2015) (ordering consecutive supplemental briefing of not more than five pages with one week deadlines); Airborne Athletics, Inc. v. Shoot-A-Way, Inc., No. 10-3785, 2012 WL 1948631, at *1–2 (D. Minn. May 30, 2012) (allowing defendant to take a deposition and ordering defendant to file supplemental briefing of five pages or less all within 45 days); Bear v. Nicholson, No. 03-2145, 2005 WL 1293713, at *1 (Vet. App. May 13, 2005) (ordering supplemental briefing due within 15 days); *see also* Miller, *supra* note 11, at 1304 (discussing supplemental briefing and noting that it can be short and simultaneous to avoid delay).

307 Miller, *supra* note 11, at 1303.

308 John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (citing *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 733 (1989) (surveying over two hundred judges, most of whom believed that discovery abuse was the most important cause of delay in litigation)); Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1656–57 (2016).

a decision is not going to greatly add to the reams of paper and billable hours sunk into everyday cases. At least when it comes to ordering supplemental briefing in order to clarify possibly meritorious perfunctory statements, "[t]he marginal time commitment for a court of adopting an accuracy-centric approach to adjudication . . . may not be as substantial as it might initially appear."[309]

The costs of ordering supplemental briefing in this context are low but the benefits may be high. Above all, the benefit is accuracy. Instead of issuing an adverse ruling on the basis of a loosely delineated and largely subjective "briefing standard," a court can take limited additional steps to get it right and do justice by the parties. A close second to accuracy is the benefit of legitimacy. The litigants reasonably expect that courts will thoughtfully hear and consider their arguments. Sure, everyone understands that weak lawyering can harm a litigant's chance of success, and most people may even accept this result as necessary in our adversarial, party-driven justice system. But to the extent judges can limit the perception that technical procedural rules get in the way of accurate and fair results, they should do so.[310] That is especially true when those technical rules are in fact subjective and ill-defined standards. Technical and harsh but fair and equal may be palatable; lose the fairness or equal application and our taste for the rule should naturally sour. And with abandonment by poor presentation, not only are the "rules" harsh, accuracy-neutral and subjective, they work to deprive a litigant of the chance to be heard.[311]

Limited supplemental briefing remedies these ills—helping the court to reach a more accurate decision and giving the litigants the satisfaction of knowing that their arguments were heard, even if it does not affect the outcome. In fact, supplemental briefing in these circumstances may often not affect the result, as it will simply confirm that an issue was, in fact, waived, or will produce five more incomprehensible pages from a bad lawyer. But the fact that it might not change the result is an unavailing criticism. After all, we still have plenty of trials and oral arguments in the name of due process even though the results are all but certain.[312]

B. Saying Something Helpful: Setting Standards for Adequate Briefing

If, however, judges cannot entirely give up abandonment by poor presentation, I recommend that when they find abandonment by poor presentation, they should explain in more detail what was deficient. This will accomplish two goals. First, greater explanation will result in abandonment by poor presentation occurring less often. Second, it will put the common law to work and allow for the creation of more concrete briefing standards.

---

309 Morley, *supra* note 98, at 339.

310 *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 731 (1906) ("The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules.").

311 *See* Miller, *supra* note 11, at 1303.

312 *See id.* (noting that "[t]rial 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," but that "[o]ur system is based on an opportunity to be heard before the decision").

The first goal is reflexive. Writing that an argument is too "perfunctory," or "undeveloped" is easy; explaining what was too perfunctory about it, or what additional trimmings would render the argument "developed," is hard. The (ironically) cursory nature by which many opinions dispatch cursory arguments likely encourages judges finding abandonment by poor presentation. If judges took the time to determine with some degree of precision what was deficient about the briefing, the practice would be less common. The time it takes to look up other abandonment by poor presentation cases and compare and contrast will often outweigh (or at least equal) the time it takes to better understand the perfunctorily-stated issue. At that point, instead of off-handedly plugging in some language about waiver, the judge can employ the approaches described above: if it's not worth mentioning, don't mention it; if it's just a bad argument, say so; and if it's worth considering, order additional briefing. Encouraging more thoughtful explanation of what constitutes abandonment by poor presentation will thus lead to less of it.

It will also naturally lead to more thoughtful explanations, and accomplish the second goal: setting standards. More explanation of what is perfunctory will help judges employ more concrete standards and give litigants better notice of what constitutes adequate briefing. Sometimes courts provide absolutely no explanation as to why an argument was inadequate.[313] More often they provide a conclusory sentence or two, stating that the argument is "undeveloped" or "perfunctory." If judges want to hold on to abandonment by poor presentation, they should forego the *Jacobellis* standard—they know it when they see it—and "explain in reasonable detail their decision to forego the merits of an issue in order to promote 'transparen[cy] in both their conclusions and their reasoning.'"[314]

This is not a difficult task. For example, instead of "this argument is perfunctory," the opinion could state: "The Court finds this argument (for the purpose of considering Defendants' motion to dismiss) waived because it is raised in a perfunctory manner, *i.e.*, a single sentence in a footnote in the opening brief."[315] Voila, a guidepost: a single sentence in a footnote is insufficient.[316] There are many examples of courts succinctly addressing what was inadequate about an argument.[317] Courts should start analogizing and distinguishing these cases instead of simply citing a canonical case stating, for example, "issues adverted to in a perfunctory manner are deemed waived." In addition to making supplemental briefing easier, the information age facilitates the creation of standards as well. Not only is legal research simpler which allows courts to quickly

313 *See* Edmunds, *supra* note 11, at 591 n.228 (citing cases).

314 *See id.* at 591 (quoting Gorod, *supra* note 150, at 62).

315 *In re* Molycorp, Inc. Sec. Litig., 157 F. Supp. 3d 987, 1003 n.10 (D. Colo. 2016).

316 Note also the court's attempt to distinguish this type of "waiver" from ordinary waiver by explaining that it is only "waived" "for the purpose of considering Defendants' motion to dismiss." *See supra* text accompanying notes 106–09.

317 *See, e.g.*, Lawson v. Berryhill, No. 16-CV-01846, 2017 WL 9286974, at *8 (D.S.C. May 16, 2017); Cotton v. GGNSC Batesville, L.L.C., No. 3:13-CV-00169, 2015 WL 1310034, at *4 n.1 (N.D. Miss. Mar. 24, 2015), *vacated on other grounds sub nom.* Gross v. GGNSC Southaven, L.L.C., 817 F.3d 169 (5th Cir. 2016); N.J. Bldg. Laborers Statewide Benefit Funds v. Perfect Concrete Cutting, No. 2:10-1540, 2010 WL 2292102, at *1 (D.N.J. June 2, 2010).

find other abandonment by poor presentation cases, it is easier to find briefs and easier to search them. Thanks to "control F" a judge or clerk could, for example, quickly determine that a plaintiff used the words "due process" only three times in a forty-page opposition brief against a motion to dismiss and never in the same sentences as "procedural." The judge could use those facts in support of a conclusion that the plaintiff abandoned a procedural due process argument. Later litigants can then analogize and distinguish.

In order to compel courts to explain themselves better, appellate courts (and appellants) should be more muscular in challenging the conclusions of lower courts. Courts are rarely overruled for improperly dismissing a well-presented argument under the guise of its ill-presentation. It is not even clear what the standard of review for such a challenge would be. De novo because appellate judges are just as good at district judges when it comes to reading briefs? Or abuse of discretion, because lower judges are exercising their inherent powers to manage their dockets? In any event, a complete lack of explanation, or a cursory sentence, should be considered an abuse of discretion and reversible error. Remanding for a district court to write an additional sentence or two about why a bad argument is bad is no doubt a frustrating solution, but only a few remands would be necessary to broadcast the message that judges should further explain themselves. Moreover, remands will not always be necessary, as the appellate court can note the lack of explanation as a reversible error but then find the error harmless because the purportedly perfunctory argument was indeed lacking for various reasons, either related to the writing or the merits.

As for what standards courts should employ, I leave that largely to the common law process to develop over time, but I will make a few suggestions. First, judges should look to analogous situations for guidance on when to find abandonment and when to ignore it. Those analogous situations are considering new issues on appeal and considering issues sua sponte. Commentators and judges have outlined several standards in these areas that will likely be applicable here.[318] For example, unpreserved but purely legal issues have a better chance of being heard on appeal than unpreserved factually dependent issues.[319] Similarly, a sloppily made legal argument should perhaps get more attention from courts than a sloppily made factual argument. Second, judges should consider different standards for "issues" and "arguments." For the bulk of this Article I have used these terms interchangeably, but there is a promise

---

318 *See* Martineau, *supra* note 20, at 1046–60 (discussing when judges consider new issues on appeal, and when they *should* consider new issues on appeal); Steinman, *supra* note 26, at 1612–16 (proposing criteria for when courts should consider new issue on appeal); United States v. Krynicki, 689 F.2d 289, 291–92 (1st Cir. 1982) (setting forth four criteria for when appellate courts consider new issues on appeal); Miller, *supra* note 11, at 1279–86 (noting when judges consider issues sua sponte); Milani & Smith, *supra* note 125, at 294–304 (making recommendations for when courts should consider issues sua sponte); Frost, *supra* note 28, at 508–513 (same). *But see* Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 1005–12 (1989) (critiquing Martineau's criteria and proposing different rule for when new issues should be considered on appeal).

319 *See Krynicki*, 689 F.2d at 291; Martineau, *supra* note 20, at 1043 ("The requirement that the issue be purely legal would appear to be a *sine qua non* of exceptions to the general rule.").

of some analytical distinction between the two terms.[320] Although the line is blurry, issues are broader and provide sources of relief whereas arguments are narrower and used to support or attack issues. Judges should be more forgiving of bad arguments, but stricter about finding issues abandoned by poor presentation. It is more important that opposing parties and the court have clear notice of what issues are raised in a case, and so parties should more clearly present them. Muddiness with regard to issues means it is harder to mount a defense and harder for future judges to determine what is precedential. If, however, a party is sloppy in her argument, judges should be more willing to look past the bad briefing to reach the right result with regard to the issue presented.[321]

VI. CONCLUSION

Finding abandonment by poor presentation is a widespread, amorphous practice. It is clothed in doctrinal legitimacy but is in fact a subjectively applied standard that permits judges to ignore thorny and confusing issues and arguments, even when they are meritorious. Although judges have discretion to manage their dockets, it is not without limit. This Article shows that the justifications for abandonment by poor presentation are lacking, the motivations behind the practice are suspect, and the problems it causes are real and pervasive. It also demonstrates that the practice is not at all vital. Courts will be able to function just as well by simply ignoring unpresented issues and addressing poorly presented issues on the merits—with the aid of supplemental briefing if necessary. This is low hanging fruit in the struggle against unnecessary technicality and gate-keeping in the legal system. It is past time we plucked it.

---

320 *See* Edmunds, *supra* note 11, at 575–76; Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 257–58 (2004); L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 EMORY L.J. 107, 116–23 (1999) (discussing how courts define "argument" for purposes of determining whether a party improperly argued in an opening statement).

321 *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("When 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."); Forshey v. Principi, 284 F.3d 1335, 1356 (Fed. Cir. 2002) ("[A]ppellate courts may apply the correct law even if the parties did not argue it below and the court below did not decide it, but only if an issue is properly before the court.").