

# The Curious Appellate Judge: Ethical Limits on Independent Research

Elizabeth G. Thornburg\*

I.	INTRODUCTION .....	132
A.	<i>Temptation</i> .....	132
B.	<i>Limits</i> .....	135
II.	CURRENT LAW .....	142
A.	<i>Contexts for Knowledge Acquisition</i> .....	142
B.	<i>Judicial Research on Pending Cases</i> .....	144
1.	The Legal Framework.....	144
a.	<i>Ethics Rules</i> .....	145
b.	<i>Different Types of Facts</i> .....	148
c.	<i>Judicial Notice of Adjudicative Facts</i> .....	157
2.	The Muddled Case Law .....	161
a.	<i>Research and Case-Specific Facts</i> .....	162
b.	<i>Research and More General Factual Information</i> .....	165
c.	<i>Why Is the Law Such a Mess?</i> .....	169
III.	THE MYSTERIOUS LAW–FACT DISTINCTION .....	174
IV.	CHOOSE: AN ARTICLE WITH ALTERNATE ENDINGS .....	182
A.	<i>Do No Independent Research</i> .....	183
1.	Due Process Advantages: Notice and the Opportunity to be Heard.....	184
2.	Due Process Disadvantages .....	188
a.	<i>Loss of Significant Information</i> .....	188
b.	<i>Loss of Notice and Opportunity to be Heard</i> ....	189
B.	<i>Research Anything—With Due Process Protections</i> .....	191
1.	Due Process Advantages.....	193
a.	<i>Notice and the Opportunity to be Heard</i> .....	193
b.	<i>Expanded Participation and Information</i> .....	196
2.	Due Process Disadvantages .....	198

---

\* Professor of Law, SMU Dedman School of Law. I would like to thank Bill Bridge, Anthony Colangelo, Linda Eads, Jeff Kahn, Fred Moss, Jenia Turner, John Burkoff, Stephen Gillers, and participants in the Faculty Colloquium at Texas Wesleyan School of Law for their comments on earlier drafts of this paper. I would also like to thank the SMU Dedman School of Law for a grant supporting the research that led to this Article, and to express my appreciation to Justice Elizabeth Lang-Miers of the Dallas Court of Appeals, Justice Denise Johnson of the Vermont Supreme Court, Judge James Wynn, Jr. of the North Carolina Court of Appeals, and Bankruptcy Judge Peter Bowie for their helpful discussions of the judicial perspective on this issue.

a.	<i>Loss of Notice and Opportunity to be Heard....</i>	198
b.	<i>Inconsistency Across Cases .....</i>	199
c.	<i>The Inefficiencies of New Appellate Information</i>	
	.....	199
V.	CONCLUSION .....	200

## I. INTRODUCTION

### A. *Temptation*

Appellate judges in the twenty-first century find themselves in a world where litigation—both civil and criminal—involves a vast array of complex and technical factual disputes. These lawsuits, in turn, may cause judges to seek a greater level of expertise in order to deal competently with the evidence that will be relevant to those disputes.<sup>1</sup> Courts are asked to decide questions such as: whether medicine can eliminate the risk of dying in severe pain; whether psychologists can predict future dangerousness; whether punishments deter crime; whether building projects threaten wildlife; and whether exposure to various chemicals creates a risk of public injuries or death.<sup>2</sup> An appellate court, ordinarily bound by a case’s trial court record, might want information outside the record because an issue is very difficult, or because the record is inadequate, especially if one party had far superior resources leading to a lopsided presentation, or because technical knowledge has evolved since the time of trial.

At the same time, advances in communication technology have brought the world’s library to the courthouse, requiring no onerous trips across town or index searches but only the click of a mouse. When judges feel the need for additional information, the

---

1. Rorie Sherman, *Judges Learning Daubert: “Junk Science” Rule Used Broadly*, NAT’L L.J., Oct. 4, 1993, at 3, 28 (quoting United States District Judge Jack Weinstein as saying, “After all . . . we’re not scientists. We’re in strange territory, and we want to do the best we can.”).

2. See Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 25 (1998) (expounding on the wide variety of cases a judge can hear).

easy availability of the Internet is a powerful temptation.<sup>3</sup> This combination of felt need and ready access has turned a once-marginal concern into a dilemma that affects courts and litigants daily. The problem of judicial research has always been with us, lurking in the margins, and yet we do not have a workable framework for discerning when it is and is not permissible. We can no longer comprehensively fail to engage this question, because it is now taking on a central importance to proper judicial decision-making in an increasing number of cases.

Consider the following fictional but typical situation:

Judge Felix was a member of a three-judge panel of an intermediate appellate court. The panel heard the appeal of a criminal matter involving an assault by a group of young men on another young man. The defendant denied that he had committed the crime, and the circumstantial evidence against him included testimony by a police officer that the defendant and his friends had been seen leaving a movie theater one block from the crime scene just seconds before the crime occurred. In addition, the defendant sought to introduce into evidence a brain scan done on the defendant. The defense alleged that the defendant had a pre-existing head injury which caused the defendant to suffer from thought disruptions and exhibit anti-social behavior. After a hearing at which both sides introduced evidence concerning the reliability and significance of the scan done on the defendant, the trial court refused to admit the evidence, finding that the underlying scientific theory and methodology was not sufficiently reliable to pass muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>4</sup> The defendant was convicted and appealed.

On appeal, the defendant argued that exclusion of the brain scan evidence was both erroneous and prejudicial. The state, based on the trial court record and citing cases from other jurisdictions,

---

3. See, e.g., Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002) (documenting dramatic increase in courts' citation of Internet materials); Molly McDonough, *In Google We Trust?*, A.B.A. J., Oct. 2004, at 30, 30 (citing frequency of judges "googling" items pertinent to their cases); see also David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, 16 PROF. LAWYER 2 (2005) (discussing judicial research on the Internet).

4. 509 U.S. 579 (1993).

argued that the science that supports the interpreted results of scanning is suspect and that other courts that have considered scans have found them not particularly useful. Defendant also challenged the sufficiency of the evidence supporting his conviction.

Judge Felix remembered a class that she had attended a year earlier at a conference on science in the courtroom (sponsored by the Foundation for Common Sense, held at a lovely resort in Arizona, and with tuition and expenses for the judge and her spouse underwritten by the American District Attorneys Association), which had materials on brain scanning. Judge Felix went to her syllabus, found the material, and read it. She found some of the material to be inconsistent with the trial record. Judge Felix then went online, found a scientific article about the testing, and noted numerous concerns about the value of such scanning. She also found articles to the contrary, which argued that certain kinds of physical injuries, as demonstrated by brain scans, have significant effects on a person's ability to control his behavior, but Judge Felix found these articles to be less persuasive than the view she had heard at the conference.

Armed with all of this information discounting the value of the scanning methodology, Judge Felix argued to her colleagues on the panel that the trial court was correct in excluding the brain scan evidence. In fact, she argued that the court should rule as a matter of law that henceforth in the state, brain scans are inadmissible to show any causal link between injury and impulse control.

At the case conference, Judge Felix's colleague, Judge Garfield, revealed some research of his own. He wanted to get a better feel for the strength of the circumstantial evidence, so he used Mapquest online, inserted the address of the movie theater and the address of the crime scene, and learned that they were actually about ten blocks apart. In case Mapquest was wrong, he double-checked the information on Google Maps and got the same answer. He then went to Google Earth, got a 3-D view of the area, and concluded that the defendant could not have made it from the theater to the crime scene in time to have committed the crime. At the case conference, Judge Garfield argued that the conviction should be reversed on that basis. (At trial, the only relevant testimony was the police officer's.)

It turned out that the third judge on the panel, Judge Sylvester, wrote the opinion for the court. She wanted to be sure that in writing about these brain scan issues she used the correct language in a knowledgeable way. The record from the trial court was a bit

sketchy. She therefore decided to do a tiny bit of research in her son's college psychology textbook just to provide context and answer some basic questions about the scanning methodology in order to frame the issues properly. She didn't want the opinion to sound stupid. Judge Sylvester's opinion disclosed neither her own research nor that of Judges Felix and Garfield.

All three of these judges made a decision to do independent research—to go beyond the trial court record, and beyond the information supplied by the parties, in order to deal with the issues in the case. Were they wrong?

### B. *Limits*

Concerned about the growing temptation to do factual research, the ABA Joint Commission to Evaluate the Code of Judicial Conduct (the Commission) explicitly addressed the research issue in the new ABA Model Code.<sup>5</sup> “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noted.”<sup>6</sup> The Internet rates an explicit mention, as one Comment notes that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”<sup>7</sup> The new rule sounds like a broad prohibition on independent research by

---

5. The work of the Commission is summarized on the ABA's website. Joint Commission to Evaluate the Model Code of Judicial Conduct Home Page, <http://www.abanet.org/judicialethics/home.html> (last visited October 5, 2008). The new Code was officially adopted in February of 2007, with the support of the Conference of Chief Justices and the co-sponsorship of the Judicial Division of the ABA, the ABA Standing Committees on Ethics and Professional Responsibility, on Professional Discipline and on Judicial Independence, and the ABA Sections of Litigation, Dispute Resolution and the American Judicature Society. *Id.* Information about state consideration and implementation of the 2007 Model Code of Judicial Conduct is available at the Center for Professional Responsibility Online. Center for Professional Responsibility, State Adoption of Revised Model Code of Judicial Conduct, <http://www.abanet.org/cpr/jclr/map.html> (last visited October 5, 2008).

6. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C) (2007). *Compare id.*, with MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990) (repealed 2007) (“A judge must not independently investigate facts in a case and must consider only the evidence presented.”).

7. Model Code of Judicial Conduct R. 2.9 cmt. 6 (2007).

judges, leaving the parties and the record as the primary source for decisions.

By including the reference to judicial notice, however, the Model Code opens a loophole. If the ethics rules are meant to incorporate the totality of federal and state evidence rules' approach to what judges can "know" on their own, the research prohibition is a narrow one. Judges may *not* independently investigate adjudicative facts—the facts that are at issue in the particular case—unless they are generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."<sup>8</sup> But they *may* independently ascertain and use information that meets the requirements for judicial notice, and they may investigate "legislative facts"—those that inform the court's judgment when deciding questions of law or policy—to their hearts' content, bound by no rules about sources, reliability, or notice to the parties.<sup>9</sup>

In addition to these specific rules about research—which is functionally treated as an *ex parte* communication—the new ethics rules also provide some limits based on bias and on the appearance of bias that can be created when a judge acquires information beyond the information in the case record. These limits stem from the fundamental need for the judicial system to provide—and to appear to provide—fair and unbiased decisions. As the preamble to the new Model Code of Judicial Conduct notes:

The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society.<sup>10</sup>

---

8. Fed. R. Evid. 201(b); *see also* 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5101.2 (2d ed. 1982) (discussing state variants on Rule 201).

9. *See infra* Part II.B.1.c and notes 76–79 and accompanying text.

10. MODEL CODE OF JUDICIAL CONDUCT pmb. (2007); *see also* R. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

Therefore, judicial information gathering can run afoul of the ethics rules if the research would “appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”<sup>11</sup> Information gathering may disqualify the judge from hearing a case if it gives the judge “personal knowledge of facts that are in dispute in the proceeding.”<sup>12</sup> Courts, however, have been hesitant to find that independent research on more general issues results in “personal knowledge of facts that are in dispute.”<sup>13</sup>

Other limits on judicial curiosity stem from due process values, specifically the importance of giving parties notice and an opportunity to respond to new information.<sup>14</sup> These fundamental values are not only constitutionally based, but are also embodied in a number of litigation rules including the disclosure provisions of the judicial ethics rules,<sup>15</sup> the notice requirements in the evidence rules,<sup>16</sup> and the pre-trial reporting requirements for expert witnesses contained in the procedure rules.<sup>17</sup> A judge who does independent research and then uses the results of that research without informing or consulting the litigants may compromise the litigants’ due process rights.

---

11. R. 3.1(C).

12. R. 2.11(A)(1) (listing such information gathering as a specific example of an occasion when “the judge’s impartiality might reasonably be questioned”); *cf.* 28 U.S.C. § 455 (2000) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”).

13. *See infra* note 59 and accompanying text.

14. *Cf.* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (requiring notice and opportunity to be heard to satisfy constitutional due process requirements; the opportunity to be heard in the context of judicial research translates to the opportunity to respond to any new information the judge may have learned in the course of his or her own research).

15. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.9(B) (addressing inadvertent ex parte communication); R. 2.11 cmt. 5 (stating that a judge should notify parties of information they might find relevant to disqualification); R. 3.15(A)(2) (recommending the reporting of gifts).

16. *See* FED. R. EVID. 201(e) (“A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.”).

17. *See* FED. R. CIV. P. 26(a)(2) (setting out automatic disclosure rules for expert witnesses).

Judicial fact research can also be inconsistent with the roles implicit in the adversary system. While managerial judging has modified our image of the passive judge awaiting party input, greater judicial involvement in processing cases does not extend to independently acquiring information. As Professor Abramson notes:

In many cases, discrepancies in the evidence probably tempt judges to conduct some “research” to resolve variations in the proof. While it is true that such contacts may assist judges in deciding issues and cases, American jurisprudence relies on the adversary process to resolve factual disputes.<sup>18</sup>

Finally, for appellate courts, independent research crosses another boundary: the case’s trial court record. Normally, any introduction of facts into the record occurs at the trial level. The appeal is a structured, stylized review of what happened below, complete with required references to the record and carefully prescribed standards of review. Litigants are not generally allowed to introduce new evidence at the appellate level; an appellate judge doing her own factual research may be improperly committing the same error.<sup>19</sup>

Despite these ethical and procedural limits, it appears that judges frequently do independent research and otherwise acquire information outside the record. For example, Thomas Marvell reported in 1978 that forty percent of the citations to empirical research appearing in the opinions of one state’s highest court had been obtained through the justices’ independent investigations.<sup>20</sup> In all probability, research is done more often than the public knows, because reported cases seldom disclose the source of the court’s

---

18. Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1367 (2000).

19. *See, e.g.*, *Dakota Indus. v. Dakota Sportswear*, 988 F.2d 61, 63 (8th Cir. 1993) (“Generally, an appellate court cannot consider evidence that was not contained in the record below.”); 20 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 310.02 (3d ed. 1997) (“The contents of the record as it is presented to the circuit court determine and limit the issues that may be addressed on appeal.”).

20. THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS* 174 (1978) (noting, however, that most of the citations were arguably to legislative facts).



citations.<sup>21</sup> It is only the occasional frank opinion, or criticism from other judges, which makes clear that the information on which the court has relied was *not* supplied by the parties.<sup>22</sup>

Opinion surveys demonstrate that judges themselves are sharply divided regarding the propriety of independent research. Some judges would very much like the power to supplement the record and may already do so *sub silentio*.<sup>23</sup> Other judges denounce the practice, while still others remain undecided.<sup>24</sup> These divergent views may indicate that the nation's judiciary is also divergent in its practices—different litigants may be subject to differing treatment, often without even knowing it.<sup>25</sup>

While some of the differences in judicial behavior undoubtedly come from different philosophies about the role of the judge,<sup>26</sup> more of the differences probably stem from the utter

---

21. See Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 953 (1955) (“[T]he difference between appearing to stay within the record and frankly acknowledging resort to extra-record sources . . . is usually only a difference in the degree of articulation of the grounds for decision.”).

22. See, e.g., *Mendler v. Winterland Prod., Ltd.*, 207 F.3d 1119, 1125 (9th Cir. 2000) (Rymer, J., dissenting) (noting that several items reviewed by the circuit court were not in the record); *People v. Mar*, 52 P.3d 95, 115 (Cal. 2002) (Brown, J., dissenting) (“[W]e could find a better means of informing ourselves than by relying on such secondary sources as a *student comment* in a law journal and a Progressive magazine article that bares its heart in its subtitle—*Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry*. A high school student who turned in a research paper with a bibliography like that would be unlikely to get high marks for either the distinction or balance of the authorities cited.” (footnote and citations omitted)).

23. Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1267 (2007) (surveying judges at a conference on Justice and Science sponsored by the National Foundation for Judicial Excellence and finding “a judiciary extremely divided, with roughly equal numbers of judges supporting independent research enthusiastically, denouncing it vehemently, and appearing undecided”); C.T. Harhut, *Ex Parte Communication Initiated by a Presiding Judge*, 68 TEMPLE L. REV. 673, 690 (1995) (surveying 430 active, senior Pennsylvania trial judges and finding that about half of those surveyed said that judges should not “fill in gaps left by counsel” whereas the other half felt that a court has “a responsibility to bring additional facts out on the record when the litigants fall short”).

24. See *supra* note 23.

25. MARVELL, *supra* note 20, at 212; Cheng, *supra* note 23, at 1306.

26. See Joseph A. Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51, 73–74 (1988) (“[T]here are great differences of opinions

confusion in the relevant law. Perhaps confusion about the applicable law used to be tolerable, but in an increasingly information-heavy world, with access to uncountable references a mouse-click away, addressing this confusion has taken on increasing urgency and importance. Once one goes beyond the obviously improper consultation with other people about case-specific facts, general research—the area that provides the greatest temptations—is shrouded in the greatest confusion. This is true for a number of reasons. First, the governing principles come from different areas of law,<sup>27</sup> and since this relationship is not generally recognized, the connections between the rules and their underlying principles have not been sufficiently articulated. In particular, the ties between the ethics rules and the evidence rules create a world of problems that often go unacknowledged. The structure of the ethics rule itself may also be confusing, as many do not think of reading written materials as an “ex parte communication.” The prohibition against investigating facts “in any medium” is the only part of the ex parte rule that does not involve communications with people.<sup>28</sup> Second, many of the rules—particularly those of procedure and evidence, but even the ethics rules—were developed with trial courts in mind, and therefore fail to address the special needs of appellate courts. Most significantly, the lines that separate proper from improper research are innately fuzzy and are built on legal fictions about the line between law and fact that commentators have rejected in other contexts as lacking predictable and meaningful content.<sup>29</sup> No wonder judges find little clear guidance about what they may and may not do when faced with these difficult issues.

This Article discusses what, if anything, can be done to clarify and to rationalize the rules governing judicial fact research.<sup>30</sup>

---

about the proper role of the courts. . . . One theory is that the litigants control the lawsuit and determine the issues to be decided. The other view is that courts have the ultimate responsibility to decide cases regardless of whether the appropriate issues are addressed by the litigants.”).

27. See *supra* notes 15–17 and accompanying text.

28. Model Code of Judicial Conduct R. 2.9.

29. See *infra* Part II.A.

30. By referring to the subject of the judges’ research as “facts,” the Article does not mean to imply that the information the judges come up with is necessarily correct. Indeed, it is problematic to talk about “facts,” because if that implies that the judges always locate and use correct and truthful information then the

Part II will examine the current state of the law, considering the ethics, evidence, and other rules governing judicial information-gathering when a case is “pending” or “impending” before a judge.<sup>31</sup> This section describes the failure of the cases to recognize all of the applicable rules and particularly the inadequacy of case law regarding independent judicial investigation of certain sources of general information—primarily science and social science—that are relevant not only to the specific case but also to a broad range of cases and to the development of the law. Part III explores the conceptual hole in the theoretical underpinnings of the existing patchwork of rules. Because the distinctions that the laws dealing with judicial research try to draw are based on the fiction that law and fact are qualitatively different and always distinguishable, the distinctions can never form the basis for a set of rules that are both clear enough to be the basis for discipline and sensible enough to give the courts optimal permission and limits.

Part IV recommends that state lawmakers choose clarity rather than confusion. To do so they should, when adopting the 2007 Model Code of Judicial Conduct, amend Rule 2.9. Rules regulating independent judicial research need not be tied to the mysteries of judicial notice. Judges wondering whether research is permissible need clear guidance, and parties need to know whether they should expect judges to rely on information that has come, untested by adversary presentation, out of the algorithms of Google.<sup>32</sup> Part IV thus proceeds like a movie with alternate endings: everything up to the end is the same, but the outcomes are very different. Accordingly, this Article suggests that independent research (except

---

phenomenon of independent research sounds unremarkable. It is exactly because this is not always the case—the information may be incorrect, incomplete, taken out of context, or misunderstood—that judicial research raises issues that go beyond notice and timing.

31. The 2007 Model Code of Judicial Conduct defines a “pending matter” as “a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.” MODEL CODE OF JUDICIAL CONDUCT Terminology (2007). An “impending” matter is one that is “imminent or expected to occur in the near future.” *Id.*

32. See JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 5.04 (4th ed. LexisNexis 2007) (“Independent factual investigation impairs the function of an adversarial system by allowing a judge to craft decisions on the basis of facts that may be unknown to one or both of the parties and therefore indisputable by them regardless of their accuracy or relevance.”).

from other people) should either be freely permitted in all areas, subject to the requirement that the judge give the parties advance notice, or should be generally prohibited, with judges calling on parties, amici, and the lower courts to supply missing information. The choice between alternatives should be based not on a fictional distinction between law and fact, but on explicit policy choices about the proper roles of parties and lawyers, judges and juries, and trial courts and appellate courts. Any choice should focus on the need for public confidence in the judicial system, the benefits of transparency, and the requirements of due process.

## II. CURRENT LAW

### A. *Contexts for Knowledge Acquisition*

Four variables interact when determining the propriety of judicial research: 1) the source of the information; 2) the type of information; 3) the judge's use of the information; and 4) the time at which the information was acquired. It is the combination of factors, rather than any single variable, that will determine whether the judge has behaved properly or improperly in doing independent research.

Knowledge can come from a wide variety of sources. Judges may have conversations with other people—such as friends and neighbors, experts in various areas, law clerks, and judicial colleagues. These people may convey ordinary factual information, expert opinion, or thoughts about the law. Judges may also acquire information through personal experience, such as an experiment or a “view” of a particular place or thing. Judges, like most people, read, watch television, and see movies. The sources here may include professional publications, non-legal materials, or popular culture views of legal issues or the legal system. Generally, judges practiced some kind of law before becoming judges, and that experience provides information and shapes the judge's perception of various people and issues. Judges may actively research a topic, and may do so using traditional written materials, digital databases, and the Internet. Finally, judges may attend educational seminars, some of which are arguably neutral and paid for by the judge's employer or an issue-neutral non-profit entity, while some are arguably biased

and paid for by an organization whose members or contributors would be affected by relevant litigation.<sup>33</sup>

The knowledge acquired by a judge also varies in its relationship to the judge's professional role. Some information—the most problematic under all the relevant standards—is specifically relevant to a case before the judge, and only to that case. Other information is more general. It may involve a more generic portion of a disputed fact, general factual background to a disputed fact, or general principles (usually of science or social science) that are relevant to a decision to make or to apply the law in a particular way. And, of course, the judge's research may provide information about general or specific approaches to legal issues.<sup>34</sup>

Judges make different uses of the information they acquire. In some cases, the judges are not planning to use the information nor do they in fact use it in connection to any case that comes before them. Other times, they use research for what they regard as “background” information—as in the case of Judge Sylvester in the hypothetical from Part I using research to write a coherent introduction to an opinion. Sometimes judges use research about a general area to help guide their understanding of the information provided by the parties and to discern when more information is needed. In still other cases, judges' use of outside research correlates more directly with decisions that affect the outcome of a case: they use the information to decide issues of discovery relevance; to decide whether an expert's testimony will be admitted; to decide whether a jury verdict was supported by sufficient evidence; or to inform decisions about the wisdom of adopting or applying a particular legal rule. These different uses also influence whether the judge chooses to (or is required to) notify the parties about the research and give them an opportunity to present other relevant information in response. The challenge is to develop a clear and workable

---

33. See Douglas T. Kendall & Jason C. Rylander, *Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary*, 18 GEO. J. LEGAL ETHICS 65 (2004) (noting how privately funded judicial-education trips undermine confidence in the nation's courts); Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tenative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539 (1994) (detailing ways to regulate and control inevitable judge contact with external sources of information).

34. See generally MARVELL, *supra* note 20, at 210–34 (discussing judges' practices in getting information from outside the adversary system).

framework for regulating judicial research that both allows judges access to necessary information and comports with the fundamental requirements of due process.

*B. Judicial Research on Pending Cases*

1. The Legal Framework

Judges are not expected to live in Cones of Silence,<sup>35</sup> nor do they come to the bench without past knowledge or experience. In fact, knowledge and experience can lead to wisdom and good judgment, both desirable qualities in a judge. Thus the general knowledge, legal and non-legal, that a judge may be expected to possess is not usually going to be thought of as “research” and is not going to present ethical difficulties. Judges may educate themselves about issues of law and non-law that may come before them in later cases. They may read law journals and bar journals, and they may subscribe to publications relevant to current events or computers or science or the environment, or anything any citizen may read. The ethics rules even allow judges to accept “books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use,”<sup>36</sup> even if the “publishers” are advocacy organizations.<sup>37</sup> Concerns arise, however, if earlier-acquired information turns out to be relevant in a later lawsuit, or if the means of acquiring or communicating the information creates the appearance of bias.<sup>38</sup>

Once a judge is handling a particular case, a wider array of rules comes into play. At this point in time, under the ethics rules, a judge’s acquisition of facts not provided by the parties is an *ex parte*

---

35. The phrase first appears in *Get Smart: Mr. Big* (NBC television broadcast Sept. 18, 1965).

36. Model Code of Judicial Conduct R. 3.13(B)(7).

37. See Ill. Bar Ass’n. Opinion No. 01-08 (July 25, 2001) (stating that judges may accept publications from specialty bar associations under the same rules as publications from any other publisher).

38. See ALFINI ET AL., *supra* note 32, § 4.05F (“A judge is disqualified if he or she has prior personal knowledge of evidentiary facts regarding a proceeding before a judge.”).

communication.<sup>39</sup> In addition, the rules of evidence regulate the admissibility of information the judge acquires on her own through rules governing judicial notice, expert testimony, and hearsay.<sup>40</sup> Constitutional and procedural principles govern appellate courts' ability to review fact finding,<sup>41</sup> the standard of review,<sup>42</sup> and the allocation of decision-making between judge and jury.<sup>43</sup> And basic principles of adversarial justice inform parties' rights to notice and hearing regarding disputed issues in the litigation.<sup>44</sup>

*a. Ethics Rules*

The Model Code of Judicial Conduct contains two types of regulation that are relevant here: 1) discussion of what kinds of communications are prohibited<sup>45</sup> and 2) information about when a communication will disqualify a judge from hearing a case.<sup>46</sup> The former are prophylactic,<sup>47</sup> while the latter are more likely to come into play when a judge is facing discipline or recusal.

---

39. See MODEL CODE OF JUDICIAL CONDUCT R. 2.9 (restricting a judge's ability to obtain information from non-party sources to limited circumstances).

40. See FED. R. EVID. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); FED. R. EVID. 702 (subjecting the introduction of expert information to three rigorous requirements); FED. R. EVID. 803(18) (excepting information obtained from treatises only insofar as certain requirements met).

41. 19 MOORE ET AL., *supra* note 19, ¶¶ 206.02–03.

42. *Id.* ¶ 206.01.

43. U.S. CONST. amend VII.

44. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (requiring notice and opportunity to be heard to satisfy constitutional due process requirements).

45. See MODEL CODE OF JUDICIAL CONDUCT R. 2.9 (2007) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending[] or impending matter . . ."); R. 2.10 (limiting the types of communications judges may have).

46. See R. 2.11 (detailing scenarios under which information obtained by a judge will result in disqualification).

47. See MODEL CODE OF JUDICIAL CONDUCT Scope [6] (2007) ("Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline.").

Rule 2.9 governs all types of *ex parte* communications. It provides that a judge “shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers.”<sup>48</sup> When we think of *ex parte* communications, we normally think about people having conversations with other people, and the rules certainly address this situation. A judge, for example, may “consult with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.”<sup>49</sup> The judge should not, however, discuss the case with a judge who has previously been disqualified from hearing the matter, or with a judge who has appellate jurisdiction over the case.<sup>50</sup> If the judge wants to get some advice from a law professor about the law, those communications are circumscribed:

A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.<sup>51</sup>

More generally, the comments to the Model Code of Judicial Conduct note that the prohibition on communications includes “other persons who are not participants in the proceeding.”<sup>52</sup> These limits also apply to the investigation that a law clerk might do— “[a] judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge’s direction and control.”<sup>53</sup>

---

48. R. 2.9(A).

49. R. 2.9(A)(3).

50. R. 2.9 cmt. 5.

51. R. 2.9(A)(2).

52. R. 2.9 cmt. 3.

53. R. 2.9(D); *see also* R. 2.12(A) (“A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.”).



A judge's interaction with written or digital research materials also constitutes a communication outside the presence of the parties and their lawyers. Rule 2.9 therefore also addresses research: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."<sup>54</sup> Research involving written materials, as opposed to communications with people, was not mentioned as a form of ex parte communication until the 1990 Code, where it was found only in a comment.<sup>55</sup> The new Model Code, however, promotes this prohibition to rule status, and it is this prohibition that is most often at issue in disputes about a judge's independent investigations.

The impact of a violation of Rule 2.9 varies. In the context of trial and appellate procedure, a violation of this rule may or may not result in a reversal of a judgment, depending on whether the research is considered to be harmful error.<sup>56</sup> Prompt disclosure of the investigation may cure the problem entirely.<sup>57</sup> In the context of the ethics rules, a violation will only sometimes require recusal. Disqualification is only mandated when "the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding."<sup>58</sup> Courts have been hesitant to treat knowledge of general factual information as facts "in dispute in the proceeding" and have also rejected claims that a judge's general experience or attitudes about issues represent disqualifying biases.<sup>59</sup> Because of this narrower definition of preju-

---

54. R. 2.9(C); *see also* R. 2.9 cmt. 6 ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.").

55. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990).

56. *See infra* Part II.B.2.

57. ALFINI ET AL., *supra* note 32, § 5.05.

58. R. 2.11. The comments emphasize that the listed circumstances are not exclusive: "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions . . . apply." *Id.* cmt. 1.

59. For example, one appellate court was not sympathetic with a biological mother who complained that the trial judge denied her custody of her child based in part on a controversial child psychology book—*Beyond the Best Interests of the Child*, which advocates treating temporary caregivers as "psychological parents"—

dice and of disqualifying factual information, some types of research may be improper under Rule 2.9 but will not force disqualification unless treated as sufficiently serious that the judge's "impartiality might reasonably be questioned."

*b. Different Types of Facts*

It is not clear from the drafting history of the 2007 Model Code whether the Committee, by including the reference to judicial notice, intended to import the entire edifice of the evidence rule treatment of judicial notice into the ethics rules. It is entirely logical, however, to so interpret them because the judicial notice rules have, until quite recently, been the main tool used to control judicial research.<sup>60</sup> Judges do research to use in deciding cases, and the judi-

---

without giving the parties notice or an opportunity to respond. *Ross v. Hoffman*, 364 A.2d 596, 599 (Md. Ct. Spec. App. 1976), *aff'd*, 372 A.2d 582 (Md. 1977). The appeals court found "no error in the fact that a trial judge continues his general education by reading, or that his reasoning is influenced by such education or by his experiences during his lifetime." *Id.* at 600. In another case, a Sixth Circuit judge rejected a claim that his attendance at an arguably partisan conference on DNA evidence disqualified him from hearing an appeal where that scientific information was relevant. *United States v. Bonds*, 18 F.3d 1327, 1328 (6th Cir. 1994) ("[A] judge should never be reluctant to inform himself on a general subject matter area, or participate in conferences relative to any area for the law, for fear that the sources of information might later be assailed as 'one sided.' . . . Just as a judge's personal reading list is not subject to monitoring and condemnation on that basis, neither is the speaker's list at a conference that the judge may attend."). Similarly, judges have rejected arguments that they should be disqualified from cases because their practice experience or expressed views would affect their judicial reaction to a legal issue in a case. *See Laird v. Tatum*, 409 U.S. 824, 831–33 (1972) (citing examples of Justices who had taken public positions prior to joining the Court but had later ruled on cases in those areas). *But see* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 590 (1987) ("[T]he Chief Justice made a grave error by participating in *Tatum*.").

60. The 1924 ABA Canons of Judicial Ethics prohibited *ex parte* communications, but focused on oral communications and briefs. "[A judge] should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application. While the conditions under which briefs of arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to

cial notice rules govern when various types of information may and may not be used. By regulating when disqualification or reversal was required, the judicial notice rules provided the permission slip or punishment for research. In making the link between the ethics rules and judicial notice explicit, the new Model Code acknowledges a tie between ethics and evidence that has always existed but that has rarely been discussed.<sup>61</sup> Unfortunately, the manipulability of the evidence concepts turns out to be poorly suited to a system that tries to provide advance guidance about prohibited behavior.

One reason for the lack of clarity regarding independent research is that there are different kinds of “facts.” It is improper to do independent research for information to be used in certain ways, and it is proper for the same information to be used in other ways. Under the rules of evidence and judicial practice, the propriety of research (and use of information outside the record) turns on whether the “facts” involved are *adjudicative* or *legislative*. This terminology was coined in 1942 by Professor Kenneth Culp Davis in the context of administrative law.<sup>62</sup> Adjudicative facts relate to the parties and

---

influence action should be made known to opposing counsel.” CANONS OF JUDICIAL ETHICS Canon 17 (1924). The 1972 Code of Judicial Conduct prohibited *ex parte* communications, except for certain disclosed consultations with legal experts, but said nothing about other types of research. MODEL CODE OF JUDICIAL CONDUCT Canon 3A(4) (1972). Even the 1990 Model Code put its prohibition on independent research in a comment to the *ex parte* rules, rather than adopting a rule prohibiting it. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) cmt. (1990).

61. The commentary to the 1990 Model Code did not cross-reference judicial notice, and thus created some ambiguity about whether research that would be permitted by the judicial notice rules would nevertheless be considered a breach of judicial ethics. Cheng, *supra* note 23, at 1297 (“Whether the prohibition [on research] encompasses legislative facts, and by extension general scientific facts used to make admissibility decisions, is unclear. The Model Code, unlike the Federal Rules of Evidence, however, does not distinguish between types of facts.”).

62. Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). *But see* WRIGHT & GRAHAM, *supra* note 8, § 5103.2 (“As anyone who ever tried to teach it will appreciate, Davis’ distinction between ‘legislative’ and ‘adjudicative’ facts rapidly fades when one tries to apply it. Proper application of the distinction has eluded courts, student writers—even rulesmakers.”). In addition, the administrative context did not raise the kinds of concerns as the use of these concepts in evidence

their dispute-relevant activities. “When [a court] finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the [court] is performing an adjudicative function, and the facts may conveniently be called adjudicative facts.”<sup>63</sup> The usual way to prove adjudicative facts is to introduce evidence at trial, and judges may only do independent research regarding adjudicative facts if those facts meet the reliability requirements of judicial notice and if the judge gives notice to the parties.<sup>64</sup>

The issue is actually even more complicated than this, because certain types of case-specific information fall into a separate category. At the “basic cultural information” end of the scale, the notes to the evidence rules excise a type of information from the content and procedure requirements for judicial notice.<sup>65</sup> The notes create a separate category for “non-evidence” facts that are part of the judicial reasoning process, beyond the scope of the judicial notice rule.<sup>66</sup> The concept is somewhat analogous to the instructions that permit jurors to evaluate the evidence in light of their common knowledge. As the Advisory Committee explained:

[E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says “car,” everyone, judge and jury included, furnishes from non-evidence sources within himself, the supplementing information that the “car” is an automobile, not a railroad car, that is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on . . . . These items could not possibly be introduced into evidence, and no one suggests that they be. Nor

---

rules—the issue of the right to have a jury decide disputed facts is not present in the administrative context.

63. Davis, *supra* note 62, at 402.

64. See, e.g., FED. R. EVID. 201 (detailing procedure for judicial notice of adjudicative facts).

65. R. 201 advisory committee’s note.

66. *Id.*

are they appropriate subjects for any formalized treatment of judicial notice of facts.<sup>67</sup>

While it is unlikely that these basic kinds of generally-known facts would be the subject of independent judicial research, the existence of yet another type of fact beyond the record, the “non-evidence” fact, also complicates attempts to set limits on judicial curiosity.

Judges have also argued that any kind of research for “background” information is proper because it is not “in dispute” in the proceeding. The issue of researching “background” facts was raised by judges when Rule 2.9 was being drafted, but the ABA did not change the rule’s language to specifically allow such research.<sup>68</sup>

---

67. *Id.* (citing Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *PERSPECTIVES OF LAW* 69, 73 (Roscoe Pound et al. eds., 1964); A. Leo Levin & Robert J. Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139 (1956)); see also JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 279–80 (1898) (“In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.”).

68. *See* JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS’N, SUMMARY OF MINUTES OF TELECONFERENCE: MAY 12, 2005, at 1 (2005), [http://www.abanet.org/judicialethics/meetings/minutes/minutes\\_sum\\_051205.pdf](http://www.abanet.org/judicialethics/meetings/minutes/minutes_sum_051205.pdf) (“Regarding proposed Rule 2.09(a), the Joint Commission considered whether it would be inadvisable to restrict judges’ access to the Internet or other electronic databases in connection with particular cases when such activities are only for the purpose of obtaining background reference material.”). It was only after this meeting that the reference to judicial notice was inserted in the rule. *See* REPORTER’S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT, 2007, at 22 (2007), <http://www.abanet.org/judicialethics/mcjc-2007.pdf> (“Specific acknowledgement of the category of evidence or facts that are judicially noticed was considered a beneficial clarification, and was therefore added to this paragraph.”). The reference to judicial notice was not inserted until almost a year after the discussion of electronic research, after further discussion of the propriety of Internet research. *See* JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, AM. BAR ASS’N, SUMMARY OF MINUTES OF MEETING: APRIL 8–9, 2006 (2006), [http://www.abanet.org/judicialethics/meetings/minutes/minutes\\_sum\\_040906.pdf](http://www.abanet.org/judicialethics/meetings/minutes/minutes_sum_040906.pdf) (“Rule 2.10(B) was revised to state, ‘[a] judge shall not independently investigate facts in a case, and shall consider only the evidence presented and any facts that may properly be judicially noticed.’”); George Kuhlman, *Teleconference Minutes*, November 15, 2005 (on file with author) (“Members discussed proposed Rule 2.10

In fact, the provision allowing judicial notice was added to the current rule after judges raised the issue of background research, raising the inference that background research is only permissible when that “background” is generally known or indisputable.<sup>69</sup>

Another type of information gets the label *legislative facts*. Davis describes them this way: “When [a court] wrestles with a question of law or policy, it is acting legislatively . . . and the facts which inform its legislative judgment may conveniently be denominated legislative facts.”<sup>70</sup> The most obvious examples of legislative facts are those used by the highest court in a jurisdiction when framing legal rules. The United States Supreme Court uses legislative fact frequently. In *Roe v. Wade*, for example, Justice Blackmun cited “legislative facts” about the dangers that accompany abortions and medical information about gestation periods in holding that a woman’s constitutional right to privacy took supremacy over the state’s interest in restricting abortions.<sup>71</sup> In *Brown v. Board of Education*, the Court cited articles discussing the psychological effects of racial discrimination.<sup>72</sup> Other state and federal courts, including trial courts, routinely make similar use of various kinds of information. A federal district court in New York used legislative facts regarding the history and development of multinational corporations in concluding that traditional personal jurisdiction analysis was inadequate in that context.<sup>73</sup> The Washington Supreme Court used legislative facts about marital relationships in abolishing a cause of action for alienation of affection.<sup>74</sup> In choosing the common law rule to be applied to determine the validity of a repurchase option for corporate shares, a California court took

---

cmt. 8, which concerns judicial notice and independent investigation of facts, in particular, investigation on the Internet. They considered whether to add language stating that independent investigation of facts on the Internet generally is inappropriate, but in instances where the judge deems it to be appropriate, the judge should give notice to the parties and allow them to respond. They rejected a suggestion to eliminate the first sentence of the comment and to retain the rest, choosing instead to keep the existing language.”).

69. See *supra* note 68.

70. Davis, *supra* note 62, at 402.

71. 410 U.S. 113, 148–49 (1973).

72. 347 U.S. 483, 494 n.11 (1954).

73. *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981).

74. *Wyman v. Wallace*, 615 P.2d 452, 453–55 (Wash. 1980).

judicial notice that, as a matter of common knowledge, shares of a closely held corporation lack an easily ascertainable market value.<sup>75</sup>

The most significant feature of legislative facts is that judges may investigate them on their own. The Federal Rules of Evidence and their state counterparts limit only judicial notice of adjudicative facts.<sup>76</sup> Further, the Advisory Committee Notes encourage unfettered use of legislative facts, arguing that judicial access to legislative facts should not be restricted to any limitation in the form of indisputability or formal notice.<sup>77</sup> This is partly for reasons of efficiency. As one evidence treatise notes: “Requiring formal proof of legislative facts would be inhibiting, time-consuming, and expensive.”<sup>78</sup> It also reflects the courts’ unwillingness to be limited in the arguments they can make in support of their lawmaking decisions.<sup>79</sup>

One problem, of course, is that in practice it can be difficult to put judicial research into either the adjudicative or legislative

---

75. *Chow v. Levi Strauss & Co.*, 122 Cal. Rptr. 816, 820 (Ct. App. 1975). For other definitions and examples of legislative facts, see WRIGHT & GRAHAM, *supra* note 8, § 5102.1.

76. FED. R. EVID. 201 advisory committee’s note (“This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of ‘adjudicative’ facts. No rule deals with judicial notice of ‘legislative’ facts.”). Unfortunately, the text of the rule itself does not contain this distinction or language setting out when it does or does not apply. Instead, it regulates only a small slice of the judicial notice universe, leaving the rest for common law development.

77. *Id.* The Advisory Committee clearly equated legislative facts with law, and in justifying this argument it quoted Professor Edmund Morgan’s discussion of the judge’s ability to determine the law: “[T]he judge is unrestricted in his investigation and conclusion. . . . He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.” *Id.* (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270–71 (1944)). The Advisory Committee also quoted Professor Davis: “Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.” *Id.* (quoting Davis, *supra* note 67, at 82).

78. 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 201.51[1] (Joseph M. McLaughlin ed., 2d ed. 2008); *see also* George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 39 (noting that judges often take judicial notice merely to refresh their memories).

79. WRIGHT & GRAHAM, *supra* note 8, § 5103.2.

category.<sup>80</sup> First, it is not the information itself but the way in which it is used that distinguishes the two.<sup>81</sup> Judges setting out to do research may not know where that research will lead, so judges intending to research only materials that might inform a policy decision about the law itself may encounter information that influences their assessment of the facts of a case. In addition, information may be used for more than one purpose, so outside research may lead to nuggets of information that are used both adjudicatively and legislatively. For example, Professor Davis's influential article on judicial notice discussed cases raising the question of whether the Communist Party advocated the forcible overthrow of the government and demonstrated that the courts' use of that "fact" could be viewed as both legislative and adjudicative.<sup>82</sup>

Another authority uses obscenity cases as an example. If the test the court must apply is whether to the "average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," is the court dealing with legislative or adjudicative facts if it considers other available pornography, public opinion polls, or the judge's own experience at the newsstand?<sup>83</sup>

Professors Monahan and Walker have pointed out the ways in which social science evidence has qualities of both adjudicative

---

80. See generally Richard B. Cappalli, *Bringing Internet Information to Court: Of "Legislative Facts,"* 75 TEMP. L. REV. 99, 100–01 (2002) (noting that the tidy theoretical distinction between legislative and adjudicative facts "blurs in operation").

81. See Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 21 (1988) (noting that to decide whether a fact is adjudicative or legislative "[w]e must answer the questions: 'Why, under the reasoning of the court, is the disputed fact material to disposition of the case before the court, and is it, or was it, material to decision of an issue of law?'").

82. Davis, *supra* note 21, at 967–71 (also demonstrating that courts may use information that turns out to be incorrect as legislative facts).

83. WEINSTEIN & BERGER, *supra* note 78, § 201.51[3] (citing *Roth v. United States*, 354 U.S. 476, 489 (1957); *United States v. Various Articles of Obscene Merchandise Schedule No. 2102*, 709 F.2d 132, 135 (2d Cir. 1983); *United States v. Various Articles of Obscene Merchandise Schedule No. 1303*, 562 F.2d 185, 190 n.9 (2d Cir. 1977)); see also *Landell v. Sorrell*, 382 F.3d 91, 203–04 (2d Cir. 2002) (Winter, J., dissenting) (noting the difficulty of distinguishing between legislative and adjudicative fact).



and legislative fact, as it is used both to inform the development of the law and to decide fact issues in individual cases.<sup>84</sup> While these authors make the case that high quality social science information should be treated more like law than fact, it is important to note that independent research of this kind appears to be inconsistent with the ethics and evidence rules unless the “social framework” information either meets the requirements of judicial notice or is used as a legislative rather than an adjudicative fact.

The same kinds of arguments have been made with regard to general scientific principles.<sup>85</sup> These categories of general information are the most likely to lead to judicial research and are especially difficult to categorize. While most legislative fact is general in nature, not all general information is legislative fact. Rather, general propositions, both clearly established and debatable, are used for a number of purposes. Sometimes that information provides context for understanding a technical question at issue in a lawsuit, provides clues as to the credibility of a witness’s testimony, or provides the basis for an inference needed to decide a case-specific fact. In a jury trial, it would normally be the jury that would make these types of factual decisions. Sometimes, as noted above, the general information is used to help the court make a decision about what the law should be, or how it should be applied to the facts of the case.

Other times, as when the court is deciding whether expert testimony is admissible under *Daubert*, the general scientific or social question is itself the issue to be decided. *Daubert* analysis operates on three fact levels, some that transcend the individual

---

84. John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 479 (1986) [hereinafter Monahan & Walker, *Social Authority*]; Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 560 (1987).

85. See, e.g., David L. Faigman, Elise Porter & Michael J. Saks, Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence, 15 CARDOZO L. REV. 1799, 1825 (1994) (“This Article seeks to improve the choice and application of a legal test by illuminating the nature of scientific knowledge. We believe that the law can best manage and use scientific expertise by accommodating itself to the nature of the beast, an approach that has rarely been pursued. Historically, courts have not taken the time to examine, in all its complexity, the scientific enterprise.”).

dispute and some that are specific to it. The first fact level is the soundness of the abstract theory or principle that provides authority for the conclusions drawn from the data. For instance, consider the theory that physical characteristics of all living things are determined by DNA and that each person's DNA is unique.<sup>86</sup> The second fact level is the general technique or procedure that produces the data. In the DNA example, a second-level question would be whether the laboratory procedure used to extract and study DNA generally is sufficiently reliable and accepted. The third fact level is the specific practice used to produce the data in this case. In our example, the third-level issue might be whether the technician properly took the sample, whether the equipment was properly calibrated and working properly, and whether the results were properly interpreted. The first two levels will have implications beyond the particular case, and in that sense, they resemble legislative facts or even law. But they are also applied to resolve a disputed issue in the particular case, and in that sense they are adjudicative facts. The third level is a case-specific adjudicative fact. But it is virtually impossible for a judge, deciding to do his or her own research on general science for a *Daubert* claim, to confine that research to the information that will be used legislatively.

It is in decisions about the admissibility of expert testimony where the forces of curiosity, availability, and legal muddle create a perfect storm of confusion. In these cases the court is often dealing with very difficult material, and the science or methodology are likely to be disputed facts. In addition, the relevant doctrine means that the court is making decisions about facts that are not treated as normal factual decisions. At the trial court level, the judge is making a preliminary decision about admissibility, and it is essentially a factual one: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>87</sup> For policy reasons, however, the judge rather

---

86. *See id.* at 1825–26 (explaining the hierarchy of scientific abstractness using the DNA example).

87. Fed. R. Evid. 702.

than the jury makes this factual call.<sup>88</sup> On appeal of a decision allowing or disallowing expert opinion testimony, the court is also faced with an essentially factual decision. Were those three requirements met? Yet at the greater levels of generality—the general principle on which the science is based and its incarnation in general tests or methodologies—appellate courts often convert their factual decisions, drawn from the record in a particular case, into questions of law: Process X satisfies the requirements of admissibility henceforth in this state.<sup>89</sup> Does this somehow convert a case-specific factual issue into a legislative fact?<sup>90</sup> Appellate courts also review the trial court's decision on initial matters, factual though it may be, using a standard of review more often associated with procedural decisions by a judge—the abuse of discretion test.<sup>91</sup>

*c. Judicial Notice of Adjudicative Facts*

The various rules surrounding judicial notice were not designed to control research; they were designed to control what types of fact-finding judges could do outside the normal process of proof. Facts that are judicially noticed are often supplied by the parties. The judicial notice rules exist partly for efficiency reasons (to avoid the time needed to prove obviously accurate information) and partly as a means of control over juries (in civil cases, the judge instructs the jury that it must accept the judicially noticed

---

88. Edward J. Imwinkelried, *Judge vs. Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 616 (1984).

89. *See, e.g.*, *People v. Leahy*, 882 P.2d 321, 325 (Cal. 1994) (“[O]nce a trial court has admitted evidence derived from a new technique and the decision is affirmed on appeal in a published opinion, it will become precedent controlling subsequent trials.”); *State v. O’Key*, 899 P.2d 663, 673 (Or. 1995) (“Once a trial court has decided that proffered expert scientific testimony is scientifically valid and has admitted such evidence for the particular purpose to which it is directed, and that decision is affirmed by this court in a published opinion, it will become precedent controlling subsequent trials.”).

90. The court in those cases is making a legal rule, but it is generally using case-specific facts as the basis for that rule. This is yet another pattern that makes the lines between adjudicative and legislative fact difficult to draw, as adjudicative facts from the case before the court are used to justify lawmaking decisions.

91. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (rejecting a more stringent standard of review of the court's exclusion of expert evidence).

information as true).<sup>92</sup> However, by incorporating judicial notice concepts into the ethics rules, the 2007 Model Code has tied the rule about what a judge can research to what a judge can notice. As discussed above, that allows complete license for facts that are labeled *legislative*. Even for adjudicative facts, the ethics rules permit research regarding facts qualifying for judicial notice.<sup>93</sup>

Because of the judicial notice rules, independent fact research by the judge is subject to two kinds of restrictions, one on the type of information to be used and the other on the judge's ability to use the information without prior notice to the parties. Federal Rule of Evidence 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."<sup>94</sup> In addition, Rule 201(e) gives parties the right to respond to the noticed information. "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."<sup>95</sup> Judicial notice may also be taken on appeal.<sup>96</sup>

The drafters of the evidence rules were deeply influenced by academic discussion of judicial notice, which, in the mid-twentieth century, advocated a broader use of the device.<sup>97</sup> At that time, judicial notice was often limited to general community knowledge, so that well-established but generally unknown bodies of knowledge,

---

92. See *infra* notes 97–106 and accompanying text.

93. There is a logistical problem here as well: how does a judge, in beginning to do research, know in advance whether information will be sufficiently reliable to meet the judicial notice requirements?

94. Fed. R. Evid. 201(b).

95. R. 201(e).

96. R. 201(f); WRIGHT & GRAHAM, *supra* note 8, § 5110.1.

97. See, e.g., THAYER, *supra* note 67, at 309 ("[Judicial notice] is not nearly as much used . . . as it should be."); 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2583 (3d ed. 1940) ("[Judicial notice] is an instrument of a usefulness hitherto unimagined by judges. Let them make liberal use of it; and thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings."); Currie, *supra* note 78, at 52 ("Judges have . . . failed to make use of [judicial notice] to the extent they should.").

like certain scientific principles, did not qualify.<sup>98</sup> Judges and scholars were concerned that juries, left to their own devices, would refuse to conform their verdicts to developing science, as when blood type evidence demonstrated that a man could not be the biological father of a child.<sup>99</sup> Based on these arguments, modern judicial notice rules allow specialist information to be judicially noticed, as long as it meets the requirements of indisputability and its source is unquestionably accurate.<sup>100</sup> Until recently, judges and litigants typically used this provision to consult dictionaries, government documents, maps, encyclopedias, and well-recognized treatises.<sup>101</sup> But further uncertainty is created when a wider variety of sources come into play, and the propriety of the judge's research turns on whether a fact is so indisputable and a source so unquestionable that judicial notice would be proper.

One court provided an extensive list of the types of information that may be judicially noticed:

---

98. See, e.g., Charles T. McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 301–03 (1952) (“[J]udicial notice of scientific facts can be taken only when such facts are ‘generally recognized.’”).

99. See, e.g., Davis, *supra* note 21, at 951 (“Not only do courts constantly take notice of disputable facts which are not determinable from sources of indisputable accuracy, but they should do so.”); Arthur John Keefe, William B. Landis & Robert B. Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 665, 669 (1950) (discussing blood type evidence, and arguing that juries should not be permitted to find contrary to a judicially-noticed fact); Morgan, *supra* note 77 (arguing for greater use of judicial notice and for facts judicially noticed to be binding on the jury rather than rebuttable presumptions).

100. FED. R. EVID. 201(b).

101. Even traditional sources may not be as reliable as one might think. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 276 (1999) (noting that an inconsistent approach and vague standards create problems in courts' use of dictionaries). And the Internet has added new layers of uncertainty even about definitions. See, e.g., *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 666 (7th Cir. 2008) (citing the Wikipedia definition of “wear and tear” and using it in preference to those in dictionaries). *But see* *Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008) (reversing the lower courts for relying on a Wikipedia article); R. Jason Richards, *Courting Wikipedia*, TRIAL, Apr. 2008, at 62, 62 (“Since when did a Web site that any Internet surfer can edit become an authoritative source by which law students could write passing papers, experts could provide credible testimony, lawyers could craft legal arguments, and judges could issue precedents?”).

[T]he laws of nature; human impulses, habits, functions and capabilities; the prevalence of a certain surname; established medical and scientific facts; well-known practices in . . . businesses and professions; the characteristics of familiar tools and appliances, weapons, intoxicants, and poisons; the use of highways; the normal incidence of the operation of trains, motor vehicles, and planes; prominent geographical features . . . ; population and area as shown by census reports; the days, weeks, and months of the calendar; the effect of natural conditions on the construction of public improvements; the facts of history; important current events; general economic and social conditions; matters affecting public health and safety; the meaning of words and abbreviations; and the results of mathematical computations.<sup>102</sup>

Some general principles of science and social science will meet these requirements. Many others—especially those that a judge might be tempted to research due to confusion or inadequacy of the information provided by the parties—will not. Sadly, courts have sometimes taken judicial notice of “facts” that now seem highly debatable at best, such as when the Supreme Court declared in 1900 that while tobacco’s effects “may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of the opinion that it cannot be classified . . . [as] a nuisance to the health of the entire community.”<sup>103</sup>

Appellate judges tempted to find and use adjudicative facts under the rubric of judicial notice also need to be keenly aware of the role of the jury. Unless the judicially-noticed fact is a question to be decided by the court, judicial notice of a subsidiary fact may invade the fact-finding province of the jury. In civil cases, this could violate

---

102. *Hinkle v. Hartsell*, 509 S.E.2d 455, 457–58 (N.C. Ct. App. 1998) (quoting 1 KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE § 24, at 97 (5th ed. 1998)); see also WEINSTEIN & BERGER, *supra* note 78, § 201.12.

103. Christopher Onstott, *Judicial Notice and the Law’s “Scientific” Search for Truth*, 40 AKRON L. REV. 465, 467 (2007) (quoting *Austin v. Tennessee*, 179 U.S. 343, 345 (1900)).

a party's Seventh Amendment right to jury trial. In criminal cases, at the trial level, the court can only instruct the jury that it may, but is not required to, accept as conclusive the facts judicially noticed and may not direct a verdict for the prosecution.<sup>104</sup> This is based on concerns about the defendant's Sixth Amendment right to a speedy and public trial by an impartial jury.<sup>105</sup> For this reason, an appellate court must be careful not to judicially notice an adjudicative fact in order to find that the evidence was sufficient for a conviction, as to do so would be tantamount to the use of a binding instruction concerning a judicially noticed fact at trial.<sup>106</sup>

## 2. The Muddled Case Law

Since the general principles governing research are far from clear, and the law regarding judicial notice is similarly untidy, it should not be surprising that when courts attempt to apply those principles the results are inconsistent.<sup>107</sup> It is somewhat comforting that there is—mostly—general agreement that a judge should not research case-specific facts by contacting human sources.<sup>108</sup> Nevertheless, some judges simply reveal that they have done case specific Internet research in explaining the basis for their decision.

---

104. FED. R. EVID. 201(g); *see Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) (“[The judge] may not direct a verdict for the State, no matter how overwhelming the evidence.”).

105. *Sullivan*, 508 U.S. at 277.

106. *Cf. United States v. Bliss*, 642 F.2d 390, 392 n.2 (10th Cir. 1981) (declining to take judicial notice that bank was member of Federal Reserve system in absence of proof below, as this would be akin to granting a partial directed verdict for the prosecution).

107. “One of the impediments to developing the scope of Rule 201 are [sic] the many cases in which courts take judicial notice without mentioning Rule 201 and without explaining why it does not apply. It may make little difference to the parties if the matter would have been noticeable under Rule 201. But where the court notices facts that do not appear to be noticeable under Rule 201 or refuses to notice facts that would be noticeable under the Rule without attempting to justify its actions under Rule 201, readers can only speculate whether the ruling rests on some sophisticated argument that the fact noticed is beyond the scope of Rule 201 or should be attributed to judicial arrogance or stupidity.” WRIGHT & GRAHAM, *supra* note 8, § 5103.3.

108. *See infra* notes 109–18 and accompanying text.

When the research is of a more general nature, case results diverge more dramatically.

*a. Research and Case-Specific Facts*

In most situations, there is general understanding that judges should not gain independent knowledge through personal experience, and particularly not by having *ex parte* communications with people. Judges' investigations of this type are routinely held to be improper.<sup>109</sup> Here are some examples of rejected research:

- Prior to sentencing, a judge conducted an *ex parte* inquiry into the defendant's background by speaking to the victim of the crime and to previous employers of the defendant.<sup>110</sup>
- A judge telephoned two of the victim's relatives before the pre-sentence hearing.<sup>111</sup>
- A judge sent his law clerk to view a machine that was the subject matter of the litigation.<sup>112</sup>
- A trial judge, in a murder case accusing the defendant of using insulin to murder several people, talked to doctors at cocktail parties about the effects of insulin.<sup>113</sup>

---

109. There may be some confusion even here when the people consulted are experts. For example, in the process of deciding the civil procedure classic, *Arnstein v. Porter*, a disagreement emerged behind the scenes in the Second Circuit between Judge Frank and Judge Clark. Judge Clark, it seems, had called his friend Professor Luther Noss, a Yale University music scholar, to seek advice about the similarity of plaintiff's and defendant's tunes, and Judge Frank criticized him for doing so. MARVIN SCHICK, *LEARNED HAND'S COURT* 126–28 (1970).

110. *State v. Emanuel*, 768 P.2d 196, 199 (Ariz. 1989).

111. *State v. Leslie*, 666 P.2d 1072, 1073 (Ariz. 1983).

112. *Price Bros. v. Phila. Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980) (holding the *ex parte* communication harmless error because the judge claimed not to have relied on the information).

113. *People v. Archerd*, 477 P.2d 421, 435 (Cal. 1970) (holding error harmless).



- A judge called two friends, who were jewelers, to try to verify defendant's statements about the jewelry business.<sup>114</sup>
- A judge sought the assistance of a knowledgeable state legislator for help in drawing a state redistricting plan.<sup>115</sup>
- A judge undertook his own view of the stairs on which the plaintiff fell.<sup>116</sup>
- The parties in a case agreed to the appointment of an expert panel to investigate and report on the constitutionality of the Illinois mental health system.<sup>117</sup> The panel, as had been agreed, met with patients and state employees outside the presence of counsel. The trial judge, without the parties' agreement, met with the panel for a preview of their conclusions and a description of their methodology.<sup>118</sup>

When research is done on the Internet, however, judges seem to lose sight of the fact that they are still investigating case-specific facts, and case results are not so clear. In one case, a judge was reversed for independently checking defendant's website and a state insurance department website in ruling on a personal jurisdiction motion.<sup>119</sup> In more cases, however, Internet research of case-specific adjudicative facts took place without apparent consequence:

---

114. *State v. Romano*, 662 P.2d 406, 407 (Wash. 1983).

115. *In re Complaint of Earl Against U.S. Dist. Judge Nowlin* (Judicial Council 5th Cir. May 15, 1992) (unpublished report on file with 5th Circuit Court Clerk), cited in Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1686 n.217 (1993).

116. *Lillie v. United States*, 953 F.2d 1188, 1189 (10th Cir. 1992) (holding the view was harmless error).

117. *Edgar v. K.L.*, 93 F.3d 256, 257 (7th Cir. 1996).

118. *Id.* at 259.

119. *NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co.*, 798 N.Y.S.2d 309, 312 (App. Term 2004).

- A U.S. Magistrate Judge used Google in addition to a transcript review when he decided that a prosecutor had improperly used peremptory challenges to keep Hispanics off a jury.<sup>120</sup> Judge Maas searched the Internet to check the name of a juror who had been seated, leading him to question the prosecutor's contention that the juror was Hispanic.<sup>121</sup>
- A U.S. District Judge searched the Internet for "Strange Music" references in a trademark infringement case to help decide whether consumers would be confused by the name similarity between a hip-hop label and a music composer.<sup>122</sup>
- In an appellate case, the dissenting judge criticized the majority's use, in interpreting a contract, of "two web sites, one computer software user's guide, one book, two dictionary definitions, and six newspaper or magazine articles—none of which was referred to, introduced, validated, used or argued in the district court or to us."<sup>123</sup>
- A dissenting judge used competing Internet map programs to demonstrate that Chicago had a street named "18th Street," a fact that was significant in the context of the case.<sup>124</sup>

---

120. *Rodriguez v. Schriver*, No. 99 Civ. 8660(FM), 2003 WL 22671461, at \*7 n.12 (S.D.N.Y. Nov. 12, 2003), *vacated on other grounds*, 392 F.3d 505 (2d Cir. 2004).

121. *Id.*

122. *Strange Music, Inc. v. Strange Music, Inc.*, 326 F. Supp. 2d 481, 492 (S.D.N.Y. 2004).

123. *Mendler v. Winterland Prod., Ltd.*, 207 F.3d 1119, 1125 (9th Cir. 2000) (Rymer, J., dissenting).

124. *United States v. Harris*, 271 F.3d 690, 708 n.1 (7th Cir. 2001) (Wood, J., dissenting) ("While someone consulting the Internet map source MapQuest (<http://www.mapquest.com>) would find only South Martin Luther King, Jr. Drive

b. *Research and More General Factual Information*

When a judge does research about relevant but more general facts, courts disagree about whether that research was proper. Some of the differences in case results could be explained by the distinction between adjudicative facts and legislative facts, or by the rules of judicial notice, although these are not generally cited as part of the courts' reasoning. Other differences simply reflect a difference of opinion about the wisdom of a judge supplying information not offered by the parties. There is also a greater tendency to condemn independent research in situations in which the reviewing court believes that the information obtained by the judge was incorrect.<sup>125</sup> Nevertheless, the case law taken as a whole is neither informative nor consistent.<sup>126</sup>

---

between South 17th Street and South 19th Street, the alternative map source MapBlast! (<http://www.mapblast.com>) shows the exact same street as 18th Street.”).

125. For example, the Washington Commission on Judicial Conduct censured a judge for initiating an ex parte investigation about gender reassignment surgery, including consultation with various medical societies about the procedure, and then using the information in the proceedings in which petitioners sought a name change. *In re Hutchinson*, CJC No. 93-1652-F-47, 1995 WL 902265, at \*1 (Wash. Comm'n on Judicial Conduct Feb. 3, 1995). The information the judge located was incorrect, and the Commission also concluded that he “used words and descriptions that had the potential to disparage or demean, and did in fact humiliate the petitioners.” *Id.* at \*2.

126. When a judge acquires research materials during the pendency of a case by attending a judicial seminar, the issue is not analyzed as an ex parte communication, but only examined for bias. *Compare Aguinda v. Texaco, Inc. (In re Aguinda)*, 241 F.3d 194, 203 (2d Cir. 2000) (holding that a judge's attendance at an arguably slanted judicial seminar on environmental issues at which judge's fees and expenses were paid for by a conservative foundation to which Texaco was a contributor, while the judge had impending responsibility for an environmental claim against Texaco, did not disqualify the judge because Texaco's involvement was “too remote to create a plausible suspicion of improper influence” and because, even if the seminar persuaded the judge that environmental laws are harmful, the judge could be presumed to have set aside his personal beliefs and applied the law), *with Pfizer, Inc. v. Kelly (In re Sch. Asbestos Litig.)*, 977 F.2d 764, 781 (3d Cir. 1992) (holding that when judge attended conference indirectly sponsored by plaintiffs in case before him, and involving presentations by pro-plaintiff expert witnesses, judge was disqualified because “his partiality could

Very similar types of research were approved by some courts and condemned by others. For example, the Colorado Supreme Court reversed the intermediate appellate court for using medical treatises outside the record to assess whether an electric shock could cause serious injury without leaving a burn mark.<sup>127</sup> The court commented that the appellate court “in effect assumed the role of an expert medical witness” because it used a treatise “which properly should be interpreted only by experts in the appropriate field.”<sup>128</sup> In contrast, the Eleventh Circuit found unremarkable a trial judge’s reading of medical journal articles on iron poisoning, which was central to the case, before hearing expert testimony on the issue, noting that “it is a matter of common knowledge that courts occasionally consult sources not in evidence, ranging anywhere from dictionaries to medical treatises.”<sup>129</sup>

Sometimes disagreements about the propriety of research surface within a single court. For example, in *Ballew v. Georgia*, Justice Blackmun cited several noted studies of the effects of jury size on decision making, noting that “some” of the studies were submitted by the parties and that the Court “carefully” read them “because they provide the only basis, besides judicial hunch, for a decision.”<sup>130</sup> In his concurring opinion, Justice Powell criticized Justice Blackmun’s “heavy reliance” on studies that had not been “subjected to the

---

reasonably be questioned,” but not holding that the conference provided the judge with “personal knowledge of disputed evidentiary facts”). Both the rules of the Judicial Conference of the United States and the 2007 Model Code of Judicial Conduct include stronger limits on judicial attendance at privately-sponsored seminars than was the case when *Aguinda* was decided. See MODEL CODE OF JUDICIAL CONDUCT R. 3.14 (2007) (subjecting judges to reporting and general conduct requirements when taking “all expense paid” judicial seminar trips); Linda Greenhouse, *Federal Judges Take Steps to Improve Accountability*, N.Y. TIMES, Sept. 20, 2006, at A18 (“Judges will be prohibited from accepting reimbursement for attending a private seminar unless its sponsor has filed a public disclosure statement on the content of the program and all sources of financing.”).

127. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 854 (Colo. 1983) (en banc).

128. *Id.*

129. *Johnson v. United States*, 780 F.2d 902, 910 (11th Cir. 1986). The treatises might have satisfied the requirements of judicial notice, but the court did not rest its conclusion on this argument. Instead it cited Justice Blackmun’s research at the Mayo Clinic used in *Roe v. Wade*, even though the trial court’s research in this case was adjudicative rather than legislative. *Id.*

130. 435 U.S. 223, 231–32 n.10 (1978).

traditional testing mechanisms of the adversary process.”<sup>131</sup> At the state level, the Texas Court of Criminal Appeals split on the issue of whether new scientific information supporting the admission of expert testimony could be supplied through the justices’ own research.<sup>132</sup>

Courts are even more likely to place a stamp of approval on their *own* independent research. The Oregon Supreme Court conducted its own research and considered “numerous other sources” beyond the scientific evidence introduced at a hearing considering the admissibility of the Horizontal Gaze Nystagmus test to show inebriation.<sup>133</sup> The California Supreme Court used a Google search to learn about stun belts and their medical effects to reinforce its

---

131. *Id.* at 246 (Powell, J., concurring).

132. *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003) (en banc). At issue in *Hernandez* was the state’s use of a lab technician to introduce evidence of urinalysis done by a machine called an “ADx analyzer” at a probation revocation hearing. *Id.* at 28. The technician could not explain the scientific theory underlying the test or the technical aspects of the machine’s operation. *Id.* The court held that the testimony and lab report were inadmissible because the state did not properly prove the reliability of the test at trial, rejecting information supplied only in the state’s appellate briefs. *Id.* at 31–32. Justice Keller, concurring, wrote:

An appellate court that consults scientific literature on its own initiative thrusts itself into the position of a fact finder—a position appellate courts traditionally do not occupy and for which they are ill-suited. No matter how careful the appellate investigation, there is always the risk that appellate research will fail to uncover scientific sources that are crucial to determining the reliability of a scientific theory or technique. Moreover, appellate courts cannot hear live testimony, and such testimony may be important to litigating a particular scientific claim.

*Id.* at 32 (Keller, J., concurring) (citations omitted).

The dissenting Justice argued that the appellate court should consider any relevant information, whether or not offered in evidence at trial, and review decisions about the admissibility of expert testimony *de novo*. *Id.* at 50–51 (Keasler, J., dissenting). Justices Keller and Keasler revisited their debate in dueling articles. Michael E. Keasler & Cathy Cramer, *Appellate Courts Must Conduct Independent Research of Daubert Issues to Discover “Junk Science,”* 90 JUDICATURE 62 (2006); Sharon Keller & Donald Cimics, *Appellate Courts Should Resist the Temptation to Conduct Their Own Independent Research on Scientific Issues*, 90 JUDICATURE 64 (2006).

133. *State v. O’Key*, 899 P.2d 663, 682 (Or. 1995) (en banc).

ruling that a defendant should not have been compelled to wear one while testifying.<sup>134</sup> And the Mississippi Supreme Court refused to declare its own extra-record use of medical treatises in a medical malpractice appeal improper, observing that many appellate courts use treatises to familiarize themselves with a field of expert testimony.<sup>135</sup>

A set of three appellate cases actually reach conflicting conclusions about the propriety of three trial judges' use of the same research. At one time a child psychology book, *Beyond the Best Interests of the Child*, became quite influential in custody disputes between a child's biological mother and the child's temporary caregivers because the book argued that the caregivers had become the child's "psychological parents" and that separation would cause extreme trauma.<sup>136</sup> A Maryland appellate court was not sympathetic with a biological mother who complained that the trial judge denied her custody of her child based in part on this controversial book without giving her notice or an opportunity to respond.<sup>137</sup> It found "no error in the fact that a trial judge continues his general education by reading, or that his reasoning is influenced by such education or by his experiences during his lifetime."<sup>138</sup> Under very similar facts, however, the Vermont Supreme Court reversed an adoption decision in which the trial court quoted extensively from the book (still not part of the record),<sup>139</sup> and the Tennessee Court of Appeals reversed a

---

134. *People v. Mar*, 52 P.3d 95, 116 (Cal. 2002) (Brown, J., dissenting). As the court was not only deciding a particular case but also formulating a rule to be followed in all cases, it might have considered its research to be a matter of legislative fact.

135. *Samuels v. Mladineo*, 608 So. 2d 1170, 1184–85 (Miss. 1992) (en banc) (denying rehearing of its earlier opinion).

136. Joseph Goldstein, Anna Freud & Albert J. Solnit, *Beyond the Best Interests of the Child* (1973).

137. *Ross v. Hoffman*, 364 A.2d 596, 599 (Md. Ct. Spec. App. 1976), *aff'd*, 372 A.2d 582 (Md. 1977). This case may be distinguished in that the judge apparently read the book *before* being assigned this particular case, but he nevertheless based his opinion on his independent reading and neither informed the parties nor gave them an opportunity to respond before using the information as part of his decision-making process.

138. *Id.* at 600.

139. *In re J.*, 365 A.2d 521, 522–23 (Vt. 1976).

trial court's custody order which was based, in part, on the same non-record psychological theories.<sup>140</sup>

c. *Why Is the Law Such a Mess?*

The cases discussed above hardly provide a clear roadmap for conscientious appellate judges trying to determine whether it would be proper to seek out information on their own. The morass stems in part from the disparate sources of permission and prohibition. Principles relevant to judicial research come from the worlds of ethics, evidence, procedure, and the Constitution. These worlds could probably be harmonized at a purely doctrinal level. Putting them all together, one could say that a judge may consider the same kinds of everyday knowledge as jurors do, may research and use information (through judicial notice) that can be determined with certainty from reliable sources (but must give notice to the parties when doing so), and may research and use information in order to guide its more legislative judgments. Even with regard to judicial notice, the judge must take care not to usurp the jury's fact-finding role,<sup>141</sup> particularly in criminal cases, and must keep in mind that even general questions of science and social science can be case-specific facts. Other than in the areas where research is permitted, the appellate judge may not go outside the record. While the application of these rules to particular situations could still remain

---

140. *Finney v. Finney*, 619 S.W.2d 130, 133–34 (Tenn. Ct. App. 1981) (“The Trial Judge based his custody award, at least in part, on the fact that ‘all of the studies that I have seen indicated that for a child this young . . . [it] can be very harmful . . . for the custody to be changed [and for] the psychological parent not to continue to have the child . . . .’ We have searched this record and our search fails to disclose any such psychological data or studies. Psychological data or studies referred to by the Trial Judge are not such facts as may be judicially noticed. The Trial Court’s judgment must be based on evidence in the record or on matters of which judicial notice can be taken.” (citations omitted)), *modified on other grounds sub nom. State ex rel. Cooper v. Hamilton*, 688 S.W.2d 821 (Tenn. 1985). All three cases were decided before the ethics codes specifically treated research as an *ex parte* communication.

141. See *WRIGHT & GRAHAM*, *supra* note 8, § 5102.2 (“The manifest policy of Rule 201 is to preserve and strengthen the role of the jury in factfinding. Since [the rule] binds the jury to accept facts judicially noticed by the judge, strict limits on the scope of judicial notice are needed to prevent judges from encroaching on the right to trial by jury.”).

nightmarish, at least the body of law governing judicial curiosity could be seen as a whole, and the confusion confined to application rather than doctrine.

The cases reflecting or examining judicial research, however, rarely see more than one piece of the puzzle. Some look only at the ethics rules.<sup>142</sup> This narrow examination is understandable when the forum is charged with the question of whether to discipline the judge, but more curious when the issue is whether the research should lead to case reversal. Although courts cite the ethics rules in cases involving communications with people about case-specific facts,<sup>143</sup> when considering whether it was *proper* to research more general facts, not a single court referred to the rules of ethics.<sup>144</sup>

Most commonly, cases examining fact research into general principles, whether they approve of it or reject it, look only at the

---

142. See, e.g., *Edgar v. K.L.*, 93 F.3d 256, 261 (7th Cir. 1996) (relying on the Canons to disqualify a judge for ex parte communications with a mental health panel); *Price Bros. v. Phila. Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) (examining rules concerning ex parte communications); *In re Complaint of Earl Against U.S. Dist. Judge Nowlin* (5th Cir. Judicial Council, May 5, 1992) (unpublished report on file with the 5th Circuit Court Clerk), cited in Issacharoff, *supra* note 115 (finding that Judge Nowlin, a former Republican state legislator, acted inconsistently with the Code of Judicial Conduct for United States Judges when he conducted ex parte conversations with interested Republican political leaders and prospective Republican candidates for office concerning the court-ordered redistricting of the Texas Senate); *State v. Leslie*, 666 P.2d 1072, 1073 (Ariz. 1983) (en banc) (examining rules concerning ex parte communications); *State v. Emanuel*, 768 P.2d 196, 199–200 (Ariz. Ct. App. 1989) (focusing on Canons of professional conduct and cases construing those rules in determining whether judge should be recused); *State v. Romano*, 662 P.2d 406, 407–08 (Wash. Ct. App. 1983) (“[A] judge may not initiate or consider ex parte communications concerning a pending proceeding.”); *In re Hutchinson*, CJC No. 93-1652-F-47, 1995 WL 902265 (Wash. Comm’n on Judicial Conduct Feb. 3, 1995) (focusing exclusively on Canons 1, 2, and 3 in disciplining judge). Cases involving old-fashioned ex parte communications with people, or improper views, are far more likely to be analyzed using the ethics rules.

143. See, e.g., *Edgar*, 93 F.3d at 258 (relying on the Canons to disqualify a judge for ex parte communications with a mental health panel); *Leslie*, 666 P.2d at 1073 (holding that a judge should have been disqualified under the ethics rules for discussing sentencing with a victim’s relatives).

144. This is entirely understandable for cases decided before commentary concerning research was inserted into the ex parte communication provisions of ethics rules; cases decided before 1990 would lack a clear and on-point ethics rule to cite. Later cases, however, overlooked an important source of guidance.



rules governing judicial notice,<sup>145</sup> while a few cite adversarial system concerns or the problem of straying outside the appellate record.<sup>146</sup> Because of their failure to look at the big picture, cases appear more random and provide less guidance than they should. For example, many of the cases that write approvingly of research may be explainable because the research was used as a legislative fact or because the certainty requirements of adjudicative fact judicial notice were met. But because the courts fail to mention that law or make that argument, the impact of the decisions is unclear.

Perhaps the best example of the unnecessary vagueness of cases can be found in the Mississippi Supreme Court's rambling defense of its independent use of medical treatises.<sup>147</sup> In reversing a

---

145. See, e.g., *Lillie v. United States*, 953 F.2d 1188, 1189 (10th Cir. 1992) ("The issue presented is whether the district judge erred when he took the view without providing counsel the opportunity to attend, and, if so, whether taking an improper view is reversible error."); *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 854 n.5 (Colo. 1983) (en banc) ("Thus, even if we accept the court of appeals' use of judicial notice, the facts noticed are not sufficient to undercut the doctor's opinion and the referee's conclusions drawn from the evidence as a whole."); *Samuels v. Mladineo*, 608 So. 2d 1170, 1186 (Miss. 1992) (en banc) (discussing prior precedents concerning judicial notice); *State v. O'Key*, 899 P.2d 663, 672-73 (Or. 1995) ("[W]e hold that, in the absence of a clear case, a case for judicial notice, or a case of *prima facie* legislative recognition, trial courts have an obligation to ensure that proffered expert scientific testimony that a court finds possesses significantly increased potential to influence the trier of fact as 'scientific' assertions is scientifically valid."); *Finney*, 619 S.W.2d at 134 ("The Trial Court's judgment must be based on evidence in the record or on matters of which judicial notice can be taken."); *Hernandez v. State*, 116 S.W.3d 26, 28 (Tex. Crim. App. 2003) (discussing rules of judicial notice and their application to introduction of scientific evidence).

146. *Mendler v. Winterland Prod., Ltd.*, 207 F.3d 1119, 1125 (9th Cir. 2000) (Rymer, J., dissenting) ("These things were not in the record, and I don't even know whether they existed at all when the contract was formed in 1991. In any event, these data are not the usual stuff of contract interpretation."); *NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co.*, 798 N.Y.S.2d 309, 313 (App. Term 2004) ("In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings."); *In re J.*, 365 A.2d 521, 522 (Vt. 1976) ("The parties here were denied the opportunity for cross-examination, rebuttal, or the introduction of further testimony, particularly relative to the conclusion that the appellant was no longer the psychological parent of her children, and such is error.").

147. *Samuels*, 608 So. 2d at 1184.

judgment for the defendant in a medical malpractice case, the court cited four medical treatises for an uncontroversial statement about possible causes of scarring.<sup>148</sup> This observation was made in passing, as the court primarily relied on the expert testimony of two prominent doctors who had testified at trial.<sup>149</sup> When, in a motion for rehearing, the defendant doctor challenged this citation of non-record sources, the court could have justified its actions as judicial notice. Instead, the opinion was much more diffuse. After noting that the use of treatises was mere surplusage, the court's discussion begins with a general carte blanche for research (and more judicial notice):

It is of interest, and it is noted, that most appellate courts, when dealing with complex issues, often resort to various periodicals and treatises to become familiar in understanding the subject matter at hand. In seeking to understand expert testimony from any specialized field, e.g., engineering, mechanics, medicine, etc., this Court is not confined to what is stated or explained in the trial record by witnesses, or counsel in a brief, but may resort to any and all authoritative sources. A judge or justice has the same responsibility to try and understand what a case is all about as a lawyer. This is part of our search for truth and justice.<sup>150</sup>

The court then quotes the recollections of one of Justice Black's former law clerks about Black's research practices and the clerk's speculation that some citations in opinions did not come from the parties' briefs.<sup>151</sup> It then quotes Thomas Marvell's study of appellate courts, in which he notes that appellate judges may need empirical information and may get it from books or experts.<sup>152</sup> Next, the court quotes at length Professor Davis's 1942 law review article, in which he distinguished legislative from adjudicative facts (even though

---

148. *Id.*

149. *Id.* at 1178–79.

150. *Id.* at 1184.

151. *Id.* (quoting JOHN P. FRANK, MARBLE PALACE 114 (1958)).

152. *Id.* at 1185 (quoting MARVELL, *supra* note 20, at 186).

there is no question that the Mississippi court's use of the medical treatises was entirely adjudicative).<sup>153</sup> Finally, the court cites *Ross v. Hoffman*, the Maryland case in which a judge was not reversed for referring to a child psychology book that he had read before the beginning of the case in which he used it.<sup>154</sup> The court did not cite in its analysis the two other cases that had reversed judges who relied on that same book.<sup>155</sup> Having run the gamut from general permission, to legislative facts, to a judge's pre-case knowledge, the opinion returns to broad statements:

While we are not obligated to go beyond the record or briefs of counsel, neither are we obligated to exclude from our consideration any scientific law, fact or truth which helps to explain, amplify or affect the validity of an expert opinion. Moreover, when a decision in a case rests upon technical, specialized or scientific knowledge, if we find the record does not make the subject matter sufficiently clear, we will not hesitate to conduct authoritative study on our own. This is not to find additional "facts," but to understand and intelligently evaluate the facts in evidence . . . . There is nothing in counsel's petition which persuades us any statement in the questioned paragraph is inaccurate.<sup>156</sup>

Apart from the final cryptic reference to the information's accuracy, the court ignored judicial notice, the doctrine most relevant to its research, and completely failed to consider the ethics rules. Instead, it provides an anecdotal and irrelevant wander through other research contexts, implying that all appellate research is fine so long as it is intended to further the search for truth. This is neither accurate nor helpful.

The current state of the law, from a doctrinal standpoint, could use improvement. Clearer focus on the purposes for which

---

153. *Id.* (quoting Davis, *supra* note 62, at 403).

154. *Id.* at 1186 (citing *Ross v. Hoffmann*, 364 A.2d 596 (Md. Ct. Spec. App. 1979)).

155. *See supra* notes 136–40 and accompanying text.

156. *Samuels*, 608 So. 2d at 1186.

judges may do research (and hence on the operation of the judicial notice rules) could result in a more useful body of precedent that could guide a curious judge. However, serious problems would remain. It is not actually possible to draw clear lines between research about case-specific facts and research that the court will use in a more legislative way in deciding how the law applies to those facts. It is not actually possible, in many cases, to know in advance whether the research a judge undertakes will lead to indisputable information. And conflating the question of what facts a judge may find so authoritatively as to use judicial notice (which, in civil cases, takes that fact away from the jury) with what questions a judge may research independently mixes rules based on different policies and adds additional layers of confusion.

The problems with the distinctions that the rules try to apply—between basic everyday facts, case-specific adjudicative facts, and legislative facts—are far more fundamental. Because they assume that there is a meaningful and clear difference between fact, on the one hand, and law, on the other, they will never be truly workable no matter how hard codes and cases try to be clear about the situation at hand. As in other areas of the law in which courts distinguish between “law” and “fact,” the line between adjudicative facts and legislative facts is an artificial one, based on policy considerations rather than observable reality. The next section, therefore, turns to the conundrum of the distinction between fact and law.

### III. THE MYSTERIOUS LAW–FACT DISTINCTION

There are countless contexts in which courts distinguish between law and fact.<sup>157</sup> There is also the large intermediate category, often called “mixed questions of law and fact” or the

---

157. *See, e.g.*, *Thompson v. Keohane*, 516 U.S. 99 (1995) (analyzing the law/fact divide with respect to federal habeas relief); *Miller v. Fenton*, 474 U.S. 104 (1985) (distinguishing legal and factual matters with regard to whether a confession was voluntarily given); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (dealing with legal and factual matters in the context of Title VII discrimination).

“application of law to fact.”<sup>158</sup> And there are often significant consequences associated with the label that one chooses for a particular decision. Those consequences are most often related to who has the power to make or review a particular decision. Unfortunately, those distinctions are often based more on (sometimes unspoken) policy than on logic, so the labels obscure rather than reveal the road to sensible decisions. The same is true of judicial notice—and therefore also of independent judicial research—and so it is extremely unlikely that model rules of ethics or rules of evidence will be able to impose order on this area.

A number of commentators, in a number of contexts, have noted the lack of meaningful content to the law/fact distinction. Even the Supreme Court, while using the distinction, has referred to it as “elusive,”<sup>159</sup> “slippery,”<sup>160</sup> and “vexing.”<sup>161</sup> Although authorities disagree about whether there is any meaningful difference between law and fact, all agree that the terms act as proxies for policy determinations. Professors Allen and Pardo, for example, argue that there is no ontological, epistemological, or analytical distinction between the two, as even “law” is a fact.<sup>162</sup> Professors Monaghan and Friedman contend that there is a meaningful analytical difference between law and facts, although the application of the distinction becomes ugly for mixed questions.<sup>163</sup> All agree that the true basis for decision is policy rather than logic:

[T]he doctrinal distinction between “law” and “fact”  
 . . . must be decided functionally rather than by

---

158. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 384 (2000) (distinguishing the standard of review for pure questions of law from the “reasonability” review of mixed questions of law and fact); *United States v. Gaudin*, 575 U.S. 506, 512 (1995) (“The application-of-legal-standard-to-fact sort of question . . . commonly called a ‘mixed question of law and fact,’ has typically been resolved by juries.”).

159. *Miller*, 474 U.S. at 113.

160. *Thompson*, 516 U.S. at 111.

161. *Pullman-Standard*, 456 U.S. at 288.

162. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1800–06 (2003).

163. See Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 932 (1992) (discussing the “analytic difference” between legal and factual contentions); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (discussing the analytic distinction between law and fact).

reference to purported ontological, epistemological, or analytical differences between the concepts. This is precisely why the cases on the distinction are so apparently haphazard rather than orderly: there is no algorithm for generating correct conclusions about which is which, and so the courts muddle along attempting to rationalize a process whose primary purpose is allocative in terms of the nature of the entities. There is thus a mismatch between task and tool, leading to the perfectly predictable sense of chaos surrounding the matter.<sup>164</sup>

The Supreme Court itself has conceded that this is the case, at least in some contexts—“the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.”<sup>165</sup>

To illustrate the point, it helps to consider some of the contexts in which courts have identified particular questions as “law,” despite the questions being quite fact intensive. Sometimes they do so to give more power to the court of appeals rather than the trial court.<sup>166</sup> For example, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Supreme Court held that the issue of whether a punitive damage award is excessive is a legal rather than factual question, and so appellate courts should use a de novo standard of review rather than a standard that is deferential to the jury.<sup>167</sup> And while the Court (unconvincingly) attempted to explain why punitive

---

164. Allen & Pardo, *supra* note 162, at 1806.

165. *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (indicating that whether a confession is voluntary is not a question of fact entitled to presumption of correctness, but rather is a legal question that is decided independently by a judge in a habeas corpus proceeding).

166. See Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. REV. 993, 997 (1986) (explaining how the law/fact divide allocates power between trial and appellate courts); see also Kevin Clermont, Jurisdictional Fact, 91 CORNELL L. REV. 973, 990 n.59 (2006) (discussing the artificial nature of the law/fact line in review of jurisdictional facts).

167. 532 U.S. 424, 436 (2001).

damage decisions based on moral condemnation and deterrence are not really factual, its real point was to assign the final decision about punitive damages to appellate courts.<sup>168</sup> In a similar way, the Court has treated certain kinds of facts in constitutional litigation—so-called constitutional facts—as if they were law, so they can be reviewed *de novo*.<sup>169</sup> As Judge Easterbrook once explained, “That admixture of fact and law, sometimes called an issue of ‘constitutional fact,’ is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”<sup>170</sup> The Court has not been consistent in its use of the constitutional fact doctrine, however. While in some cases the Court emphasizes the importance of the constitutional right and requires far-reaching appellate review, in others it labels an issue a mere question of ultimate fact and prohibits *de novo* review. Thus the issue of “actual malice” in defamation cases gets *de novo* review as a constitutional fact, while the issue of intent in a racial discrimination claim does not.<sup>171</sup> Facts underlying constitutional decisions may be

---

168. *Id.* at 436 (“Our decisions in analogous cases, together with the reasoning that produced those decisions, thus convince us that courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.”).

169. *See* *Norris v. Alabama*, 294 U.S. 587, 589–91 (1935) (“[W]henver a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.”).

170. *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (explaining the basis for *de novo* review of a district court’s finding based on empirical studies that a state abortion law would create an undue burden). The doctrine of constitutional fact apparently derived from that of jurisdictional fact, a concept that allowed *de novo* review of facts on which the court’s power depended. *See* *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”).

171. *Compare* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (granting independent judicial review of actual malice determinations in cases concerning defamation of public officials), *and* *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 510–11 (1984) (restating the holding in *Sullivan*), *with* *Pullman-Standard v. Swint*, 456 U.S. 273, 285–86 (1982) (noting that discriminatory intent is a “pure question of fact” and subject to the highly deferential “clearly erroneous” standard of review).

defined either as law or fact, as the Court's pragmatic assessment of the proper scope of review dictates. Even outside the realm of constitutional law, courts sometimes define a mixed question of law and fact as "law," allowing a demanding standard of review, and sometimes define them as questions of fact to be reversed only if clearly erroneous.<sup>172</sup>

In other cases, issues are defined as "law" in order to allocate decisional power to the judge rather than the jury. Consider, for example, the contrasting way in which courts treat issues of negligence and issues of contract interpretation. Negligence decisions are treated as facts—and decided by juries—even when they include evaluative, law-application considerations such as whether the defendant's conduct was "reasonable."<sup>173</sup> Contracts cases, on the other hand, often define the ultimate fact issue, such as whether a contract was "breached" or whether it is "unconscionable" as a question of law for the court.<sup>174</sup> Why? Not because there is some inherent difference between the kinds of facts being decided, but because courts have rejected a normative role for the jury in the

---

172. 9C CHARLES ALAN WRIGHT & ARTHUR A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2588 (3d ed. 1998) (collecting examples). Similar games are played by state supreme courts whose jurisdiction is limited to reviewing questions of law. For example, the Texas Supreme Court may not review a case to determine whether there was factually sufficient evidence to support the jury's decision, but has decreed that the issue of whether the intermediate appellate court used the proper evidentiary standard in reaching its judgment on these questions of fact is a question of law, and the supreme court has jurisdiction. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (decreeing that the court of appeals must detail the evidence and explain its analysis when reversing for factual insufficiency reasons).

173. *Richmond & D.R. Co. v. Powers*, 149 U.S. 43, 45 (1893) ("[There is] no suggestion that the law as to negligence and contributory negligence was not properly stated to the jury."); *Elcox v. Hill*, 98 U.S. 218, 221 (1878) ("Negligence is usually . . . wholly a question of fact for the jury.").

174. *See Garza v. Southland Corp.*, 836 S.W.2d 214, 219 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (holding that the issue of whether a party breached a contract is a question of law rather than fact, and should not be submitted to the jury); U.C.C. § 2-302 (2003) (discussing unconscionable contracts). *See generally* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407 (1999) (discussing the evolution of the allocation of decisional power between judge and jury in contract and tort cases).



commercial area.<sup>175</sup> The courts, while talking about fact and law, are actually assigning decisions they consider to be more important to the judge rather than to the jury.<sup>176</sup> In patent litigation, the Supreme Court has decreed that the question of the scope of the claim is a question of law, even though it involves drawing factual inferences from extrinsic evidence.<sup>177</sup> The reason, again, is not a logical consideration of the difference between law and fact, but a policy decision that judges rather than juries are better equipped to make the decision and that uniformity is desirable.<sup>178</sup>

Across subject areas, it is a fictional fact/law distinction that makes summary judgment and directed verdicts possible. In order to prevent juries from making a decision at odds with the overwhelming weight of the evidence, courts have labeled the decision in such cases as questions of law, allowing the court to take the case away from the jury. Underneath the label, however, may be a decision by the court that an inference is not reasonable, based on the totality of the evidence—a factual decision. Once again, “the setting of the line of demarcation between questions of fact and questions of law implicates many important social values, including the relative distribution of authority between laypersons and the bench.”<sup>179</sup>

---

175. See, e.g., Gergen, *supra* note 174, at 442–50; William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 943–44 (discussing disadvantages of allowing juries to decide issues of contract interpretation).

176. Even in tort cases, when a court wants to control a jury’s ability to make a decision, perhaps because it fears jury sympathy toward the plaintiff, it will define an element of the claim as a question of law. For example, the Texas Supreme Court has defined the question of whether a landlord has a duty to protect tenants from the crimes of third persons (which in turn depends on whether the risk of criminal conduct is so great that it is both unreasonable and foreseeable) as a question of law, to be decided by the court and not the jury. See *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 663 (Tex. 1999) (Baker, J., concurring) (“Duty is the threshold inquiry, which is a question of law for the court to decide.”); *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996) (“The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question.”).

177. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996).

178. *Id.* at 388–91.

179. 11 MOORE ET AL., *supra* note 19, ¶ 56.11[6], [7].

Cases trying to deal with judicial notice, and trying to distinguish between adjudicative fact and legislative fact, can also be better explained as policy decisions about the kind of information judges should be permitted to rely on, and the kinds of procedures they should use when doing so.<sup>180</sup> When courts are engaged in making law—whether that means filling in statutory gaps, advancing the common law, interpreting the constitution, or deciding how to apply the law to a novel set of facts—they want to be allowed to access and use types of information that are unlikely to be “indisputable.” The types of facts needed to resolve policy disputes are apt to be general, forward-looking, and diffuse. They might also be extremely expensive and time consuming if parties had to use traditional evidence to prove them at trial. Further, even if the parties were willing to try to prove up the kinds of empirical and theoretical data often involved, courts would not want to be limited to what the parties have produced in making policy decisions. The law made by the court will affect not just these parties, but everyone to whom the law applies. Consequently, when thinking about rules of judicial notice as it affects lawmaking, the evidence rules put the information in the law category—“legislative” facts—in order to allow the judges to choose what facts to use.

On the other hand, when courts are engaged in deciding concrete disputes between identified litigants about who did what to whom, values about party control of the proceedings, the passive role of the judge, the rules of procedure and evidence that govern presentation of information in court, and the right to jury trial are paramount. For this reason, the law labels this kind of information as “adjudicative” and puts far stricter limits on the judge’s intervention into the collection and presentation of this information. At the appellate level, rules that required parties to raise an issue at the trial level or waive it, for reasons of judicial economy, also work in favor of consigning issues to the world of “fact” so that any applicable information had to be developed below.

---

180. Perhaps this explains why the committee that drafted the federal judicial notice rule, and the rule itself, define neither “adjudicative fact” nor “legislative fact.” As one commentator noted, “Lamentably, the Advisory Committee provided no guidance on how to determine whether the matter noticed is law or fact; they simply excluded judicial notice of law from Rule 201 without considering this difficulty.” WRIGHT & GRAHAM, *supra* note 8, § 5103.

This kind of policy analysis makes arguments about judicial notice (and research) of general questions of science and social science make more sense. Doctrinally, it is often incorrect to say that they are not part of the fact questions to be decided in a particular case. From the perspective of “who should decide,” however, it is possible to argue, as in other law/fact debates, that judges are better suited to process complex general information and that decisions about science and social science can influence non-parties just as law can. So, the argument goes, even though quite factual in nature, these general issues should be defined as “law” or “legislative facts” in order to allocate the decisional power to the judge.<sup>181</sup> As between trial courts and appellate courts, some also argue that from a policy perspective appellate courts are at least as well suited as trial courts—and maybe better equipped—to make decisions with far-reaching consequences. The real argument is again about allocation of decisional power—an argument based on institutional suitability to make the relevant decision. How, though, should this subtext of the policy debate—which focuses on who should decide—fit into an ethics rule that governs research rather than decision, and merely refers to black letter law? “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noted.”<sup>182</sup>

The policy perspective may even make more sense of the Mississippi Supreme Court’s rambling discussion of its right to do research.<sup>183</sup> Even with respect to case-specific facts, appellate courts may have an additional policy concern. They want the results of

---

181. This is exactly what Professors Monahan and Walker have argued in several articles on the subject. Monahan & Walker, *Judicial Use of Social Science Research*, *supra* note 84 (discussing courts’ use of social science research); Monahan & Walker, *Social Authority*, *supra* note 84 (discussing at length how judges should evaluate social authority once they have found it); Walker & Monahan, *supra* note 84 (“[Social science] should be evaluated by the judge according to accepted common law principles; and only then should it be conveyed to the jury, by instruction from the judge.”); *see also* Michael J. Saks, *The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence*, 40 *JURIMETRICS* 229, 235 (2000) (“The soundness of scientific theories and general applications are comparable to matters of law; the soundness of specific applications are matters of fact.”).

182. Model Code of Judicial Conduct R. 2.9(C) (2007).

183. *See supra* notes 147–56 and accompanying text.

litigated cases to bear some correspondence to a sense of “truth” outside the courtroom. The law/fact distinction is also not helpful here. Responsible judges want to get both the law and the facts right, or at least to make their decisions in a responsible way. Thus interpreted, the Mississippi court can be read as saying that whatever the context, law or fact, they should be allowed to use any tool needed in searching for the “truth,” whether or not the information was used at trial and however it was acquired. This stakes out a coherent policy position, even if the court’s expression of it is doctrinally flawed. It explains the court’s willingness to use medical treatises to double check their treatment of conflicting expert opinion. It also explains the desire of the fictional Judge Garfield, in this Article’s opening hypothetical,<sup>184</sup> to use facts about geography that might lead to the reversal of defendant’s conviction, even when the defendant’s lawyer failed to produce the information either at trial or on appeal.

The current law of judicial notice, then, is muddled in a way that cannot be clarified simply by urging courts to think more clearly about all of the applicable law. Rule 2.9, by explicitly importing these concepts into the ethics rules, recognizes existing law but chooses a vehicle that is badly suited to guide anyone. Although the question of when judges should be permitted to independently find and use information is at its base a question of policy, the governing law uses those policy considerations only as subtext. The following section discusses whether there is a better way to structure the ethics rules’ treatment of the research issue.

#### IV. CHOOSE: AN ARTICLE WITH ALTERNATE ENDINGS

To research or not to research? To disclose or not to disclose? To provide clarity or trust judges to do the right thing under cover of doctrinal swamp? A clear rule, and one chosen explicitly because it best fits the role of the judge in the adversary system and the requirements of due process, would be better than the current muddle. But which way to go? Like *Clue*,<sup>185</sup> *28 Days*

---

184. See *supra* Part I.A.

185. *CLUE* (Debra Hill Productions 1985). This movie, based on the popular board game, had three different endings with three different characters being

*Later . . .*,<sup>186</sup> and *The Simpsons*,<sup>187</sup> this Article offers multiple solutions. Each has advantages and disadvantages from a due process perspective, and each would force lawmakers to acknowledge the trade-offs involved in the solution.

A. *Do No Independent Research*

One way to provide clarity is to prohibit judges from doing any kind of independent research—books or Internet, adjudicative or legislative. If a judge felt the need for more information, the correct way to obtain it would be to request the parties to provide it. In order to implement this choice, Rule 2.9(C)<sup>188</sup> would be modified to delete the reference to judicial notice:

**A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented.**

To be even clearer that this rule is meant to be a break from current practice, the rule could read, “A judge shall not investigate

identified as the killer. In the theater, only one ending was shown to any given audience, while the DVD includes all of the alternate endings. *Clue* (1985) - Alternate Versions, <http://www.imdb.com/title/tt0088930/alternateversions> (last visited Oct. 26, 2008).

186. *28 DAYS LATER . . .* (British Film Council & DNA Films 2002). Danny Boyle directed this British film. While the movie was still in theatrical release, a darker ending (preferred by the writer and the director) in which the protagonist died was added after the credits. *28 Days Later . . .* (2002) - Alternate Versions, <http://www.imdb.com/title/tt0289043/alternateversions> (last visited Oct. 26, 2008).

187. *The Simpsons: Who Shot Mr. Burns* (Fox television broadcast May 21, 1995 & Sept. 17, 1995). Several endings were scripted, and at least two shot, for this two-part episode of the popular television show. The “true” ending has baby Maggie Simpson shooting Mr. Burns, who had tried to steal her candy, while in another Burns was shot by his assistant Waylon Smithers. The alternate endings were shown on a *Simpsons* retrospective show, *The Simpsons: 138th Episode Spectacular* (Fox television broadcast Dec. 3, 1995), and may sometimes be seen on the Internet, e.g., Hulu - *The Simpsons: Alternate Ending*, <http://www.hulu.com/watch/20690/the-simpsons-alternate-ending> (last visited Oct. 26, 2008).

188. In fact, it might be better to pull any rule regarding research out of the ex parte communications rule and place it on its own, as there seems to be some conceptual resistance to thinking about research as falling into this category, and greater prominence might result in greater compliance.

independently adjudicative or legislative facts, including general scientific or technical information, except as allowed by this Rule.” A “no research” rule would enforce a number of policies: leaving control of litigation to the parties; keeping the judge’s role in the adversary system freer from undisclosed biasing influences; allowing adversarial presentation of information to provide more accuracy and to promote the search for truth; and promoting transparency in the judicial system. The advantages and disadvantages of this approach can be considered within a framework of constitutional due process and of how well it would further “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>189</sup>

1. Due Process Advantages: Notice and the Opportunity to be Heard

In terms of clarity, this rule would eliminate the uncontrollable logistical and doctrinal confusion of the current rules and thereby provide greater notice and participation rights to the parties. A judge, setting out to do research, cannot control whether she sees information that, in retrospect, would be used in an adjudicative rather than legislative way. In researching, she cannot control seeing information that is disputable or is from sources of questionable reliability. Yet in doing the research the judge will see this information, and cannot “un-see” it or avoid the information having some impact on her view of the issues in the case. Similarly, eliminating independent research eliminates the risk that a judge will subconsciously gravitate toward sources that confirm the judge’s pre-existing biases because those sources will seem more believable. While some scientific information is generally agreed to, in many of the areas involving controversy in the courts the science is in fact highly disputed, and the search for “neutral” expertise is more likely to be apparent than real.<sup>190</sup>

---

189. Fed. R. Civ. P. 1.

190. See Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 123 (1988) (noting that “neutral” applications of expert knowledge are subtexts for partial or biased perspectives). The Supreme Court has recently recognized that some studies may be problematic because they were funded by the litigants. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 n.17 (2008) (citing articles about the unpredictability of punitive damages

The “no independent research” rule is also more consistent with the role of the judge in the adversary system. The progress of a dispute is meant to be party driven, and greater judicial involvement in issues that affect the merits threatens both the judge’s actual and apparent neutrality. To some extent judicial research also lessens the parties’ control over their own cases, as sometimes research is used with no notice until an opinion is written and entered. A research prohibition also leaves burdens of proof intact—the party with the burden (not the judge) must meet the burden of production or persuasion or will lose the case. For appellate courts, the no research rule also reinforces their role in reviewing the actions of the court below, looking only to the record; the appellate courts are not meant to be first-instance fact finders.

Prohibiting independent research by judges also helps deal with the danger of misunderstood information, which is particularly strong when information is independently acquired and used without cross-examination or supplementation. Many experts question whether judges, however intelligent and well-schooled in law, can properly evaluate the kinds of scientific and technical information often involved in the judges’ research:

There is no reason to think that [a judge] who is not a scientist would have, or could have, or should have found the time to gain the enlightenment in oncology, epidemiology and pediatrics needed to render his decision . . . with the assurance of correctness. . . . Today, even a trained scientist is barely more knowledgeable than a layman about the almost innumerable proliferated specialized scientific and technological areas outside the scientists own specialty.<sup>191</sup>

The same is true in the social sciences. “Few judges are trained in statistics, demography, psychoanalysis, cognitive psychology, or

---

and stating, “[b]ecause this research was funded in part by Exxon, we decline to rely on it.”).

191. Edward Gerjuoy, *Judicial Understanding of Science*, in *SCIENCE AND TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS, AND JUDICIARY* 470, 470–71 (William T. Golden ed., 1988).

whatever the relevant social science material might be.”<sup>192</sup> The courts’ use of scientific evidence in the criminal context has been particularly criticized for errors and misunderstandings, even when subjected to adversarial presentation.<sup>193</sup>

Aside from the special problems in understanding information usually wielded by experts, a “no research” rule would eliminate the problem of the nature and impermanence of information available on the Internet. As Jon Stewart, host of the *Daily Show*, noted, “The Internet is just the world passing around notes in a classroom.”<sup>194</sup> While some information on the Internet is very reliable, some is not, and it is not always easy to tell the difference.<sup>195</sup> Further, citations to Internet sources in judicial opinions are not helpful in the long run, as websites come and go quickly enough that links are often broken shortly after the opinion is

---

192. Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1026 (1990); see also *Lockhart v. McCree*, 476 U.S. 162, 168–69 n.3 (1986) (noting that two courts of appeals reached different conclusions from the same social science evidence regarding “death qualified” juries); Cynthia Stevens Kent, *Daubert Readiness of Texas Judiciary: A Study of the Qualifications, Experience, and Capacity of the Members of the Texas Judiciary to Determine the Admissibility of Expert Testimony Under the Daubert, Kelly, Robinson, and Havner Tests*, 6 TEX. WESLEYAN L. REV. 1, 15 (1999) (reporting that seventy percent of state judges have “limited, and potentially outdated, education or experience with the evaluation of scientific methodology”); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 232–33 (2000) (“Judges and lawyers may not have the ability to detect flaws in research methodology, or distinguish valid studies from invalid ones.”).

193. See Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 721–22 (2007) (noting that technological advances may actually exacerbate contemporary problems in the use of forensic science at trial); Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 424 (2001) (citing statistics from the Innocence Project indicating that unintentional, as opposed to fraudulent, forensic science errors play a factor in 63% of wrongful conviction cases).

194. Thomas Goetz, *Reinventing Television: We Interrupt this Broadcast to Bring you a Special Report from Jon Stewart*, WIRED, Sept. 2005, at 102, 102, available at <http://www.wired.com/wired/archive/13.09/stewart.html>.

195. Mary J. Koshollek, *Assessing Information on the Internet*, WIS. LAW., Nov. 2006, at 26, 26–28, available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&template=/CM/ContentDisplay.cfm&contentid=61473](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=61473).



published.<sup>196</sup> All of these problems inherent in untested judicial research militate in favor of including all information that is of consequence to the action within the framework of party notice and participation.

Sometimes, however, the court will genuinely need more information (or, in a trial court, want the jury to have more information) than the parties have provided. If the ethics rules prohibit research, will the fact finders be forced to make a decision on an inadequate record? No. Trial courts can request the parties to introduce more or better evidence. They can also enlist the help of court-appointed experts when necessary.<sup>197</sup> Appellate courts are more limited in their ability to enhance the record,<sup>198</sup> but can request further briefing, help from amici,<sup>199</sup> or if necessary remand to the trial court for further fact-finding.<sup>200</sup> Although the need to remand

---

196. Barger, *supra* note 3, at 429–30.

197. Robert E. Keeton, Legislative Facts and Similar Things: Deciding Disputed Premise Facts, 73 MINN. L. REV. 1, 45–47 (1988); see also Joe S. Cecil & Thomas E. Willging, Accepting Daubert’s Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity, 43 EMORY L. J. 995 (1994) (detailing the process by which a court can utilize an appointed expert).

198. See Weinstein, *supra* note 33, at 557 (“The problem is more difficult for appellate judges than for trial judges, since the latter can more readily schedule new views and hearings with the cooperation of counsel when a review of the record while writing an opinion reveals a gap. . . . A better way would be for the court to ask the parties to supplement the record—preferably by stipulation at the appellate level. . . . Fact finding should be on the record.”). The logistical problems an appellate court would encounter in giving the parties notice of its intent to judicially notice adjudicative facts are another factor making independent research inadvisable.

199. A number of law review articles recommend ways in which careful appellate briefing can bring information to the court’s attention. See, e.g., Cappalli, *supra* note 80 (suggesting that lawyers make more extensive use of Internet sources to bring legislative facts to the court’s attention); Cathy Cochran, *Surfing the Web for a “Brandeis Brief,”* 70 TEX. B. J. 780, 781 (2007) (emphasizing use of briefs composed both of legal argument and pertinent background information); Margolis, *supra* note 192, at 235 (“Non-legal materials in support of policy arguments can be a powerful tool for argument in an appellate brief.”); Brenda See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 GONZ. L. REV. 157, 179–81 (2004–2005) (discussing efficacy of carefully worded and organized briefs).

200. See, e.g., *Pinter v. Dahl*, 486 U.S. 622, 640–41 (1988) (requiring further fact-finding on remand); *Spratt v. R.I. Dep’t of Corr.*, 482 F.3d 33, 43 (1st Cir. 2007) (“The factual record on these issues is quite thin. As such, it would also

could, in the short run, increase expense and delay, if trial courts and lawyers get the message and create more adequate records, the long-term result could be better decision making at all levels.<sup>201</sup> Because the trial court is better equipped than the appellate court to gather evidence and to find facts, a shift to that level for information gathering is preferable.<sup>202</sup>

## 2. Due Process Disadvantages

### a. *Loss of Significant Information*

A prohibition on research would not come without costs, especially in the area of what are now labeled “legislative facts.” In a world in which parties had unlimited and equal resources, relying on the parties to supply information relevant to a court’s lawmaking function would be safe. Even if they did not provide desired testimony on their own, the court could require it. Real courts do not operate in that ideal world, however, and the presentation of evidence can be skewed by inadequate party resources or incentives. A rule prohibiting judges from doing research would result in a system in which the courts made decisions about the policy aims of the law armed only with the information supplied by the parties. If at times information gained in judicial research is valuable, and the information would not be provided by the parties, the “no research” rule would lead to a loss of valuable information.<sup>203</sup>

---

be improvident at this point to grant summary judgment in favor of Spratt. We have held that entry of summary judgment for defendant was not warranted. Each side, on remand, may present further evidence and argument.”); *Galstian v. Ashcroft*, 63 Fed. App’x 413, 414 (9th Cir. 2003) (remanding for further fact-finding concerning attorney’s fraudulent activities).

201. “Part of the Supreme Court’s problem is created by the unwillingness of lower court judges to complicate their proceedings with factual inquiries that go beyond the facts about the parties. Part of the Supreme Court’s task is to train lower court judges to do just that. Occasional exhortations in opinions may help, but remanding a few cases may turn out to be more effective.” Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 98.

202. *Id.*

203. This dilemma could lead a state to adopt a hybrid position (a third ending?) in which independent research is generally prohibited, but which creates a narrowly tailored exception, requiring the court to announce in advance its intention to do specified research, to make specific findings that information is

In addition, a prohibition on research could force an appellate court to affirm a decision it strongly believes to be factually incorrect. While the Sixth Amendment prohibits appellate courts from using judicial notice as a directed verdict of conviction,<sup>204</sup> in other cases it can be used to correct a miscarriage of justice below, particularly when one of the litigants has inadequate resources or poor representation. Must the court affirm a conviction, or in a civil case a summary judgment or jury verdict, based on a factually tenuous record because it is not allowed to research the facts that would document the problem? Are judges stuck with the trial court record in reviewing *Daubert* decisions on the admissibility of expert testimony, when a quick Internet search would reveal that the parties below failed to provide a significant piece of the puzzle? On the one hand, courts might find such situations intolerable; on the other hand, appellate judges frequently face situations where procedural default requires them to affirm flawed judgments. A prohibition on using independent research to correct the results in individual cases, then, might not frustrate judges as much as would the interference with their lawmaking roles.

*b. Loss of Notice and Opportunity to be Heard*

Faced with a prohibition on research, judges have only their own experiences and beliefs about the world to turn to, and they may base decisions on “an uneven mixture of a priori conjectures and partially informed guesses.”<sup>205</sup> “Facts” about the way the world works would more often be presented as factual propositions, without support in the record or otherwise.<sup>206</sup> Courts already take judicial notice of various matters, citing nothing at all. For example, Professor Davis noted long ago the contrast between legislative fact

---

needed that cannot be supplied by the parties, and to allow the parties to object to the need for research and to respond to the accuracy and interpretation of the information unearthed by the court.

204. See U.S. CONST. amend. VI (stating that all criminal cases must be tried by a jury).

205. Davis, *supra* note 21, at 953.

206. A prohibition might also merely “drive independent research underground.” Cheng, *supra* note 23, at 1312.

formed from judicial impression and that formed from empirical research:

The especially enlightening cases of this kind are those in which the Court has divided, with some of the justices drawing factual conclusions out of thin air and others making the needed factual investigation. *Jay Burns Baking Co. v. Bryan* is one of the best examples. The question there was the constitutionality of a statute prescribing standardized sizes for loaves of bread. In holding the statute a denial of due process, the majority of the Court said: “There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or ten ounce loaf for a pound (16 ounce) loaf . . . and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.” The Court found its “common experience” neither in the record nor in specific extra-record sources. . . . Mr. Justice Brandeis in one of his most impressive factual opinions demonstrated with specific facts drawn from identified sources that buyers of bread had been deceived and that compulsory standardization of the size of loaves had proved to be a successful experiment in various places.<sup>207</sup>

Forcing judges to fall back on their own biases and experiences, then, could be worse than allowing the possibility that research might broaden or challenge their views.

Further, if research were forbidden and replaced by gut reactions, there would be no mechanism to compel—or politely urge—judges to disclose the factual bases of their opinions to the parties and to allow the parties to respond. A litigant, especially on appeal, has no way to cross-examine the basis for a judge’s belief that packaging does not confuse consumers, that privileges are necessary to encourage a client to confide in his attorney, that

---

207. Davis, *supra* note 21, at 955–56.

interspousal immunity from battery claims protects family harmony, or that consumer arbitration is generally affordable. Taking independent judicial research out of the closet might better allow it to be made a part of the adversary process and closely examined.

*B. Research Anything—With Due Process Protections*

A rule prohibiting all independent judicial research would theoretically increase the parties' rights to notice and hearing and allow all information to be tested in an open and transparent way. However, a research prohibition might instead result in less candor, less notice, and less acceptable outcomes. Rule-makers could, therefore, choose to provide clear guidance to judges by going in the other direction: instead of prohibiting all research, the ethics rules could allow judges free rein for research so long as everything is disclosed to the parties and they receive an opportunity to challenge the information and to provide supplemental information. There would again be no need to tie the rules to false distinctions between adjudicative and legislative fact.

Under this alternative, Rule 2.9 would be modified in a different way. The prohibition on ex parte communications generally would be retained, so that section (A) would still instruct judges not to "initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter."<sup>208</sup> Comment 3 would still emphasize that this prohibition extends to lawyers, law teachers, and other persons. The taboo against talking to people about the case-specific facts, despite occasional lapses, is important and is generally understood. As to other types of research, however, the bar would be lifted, but the process would be controlled. The model for the research rule could be the current rule regarding consulting experts on the law. Rule 2.9(C) might read something like this:

**A judge may investigate the facts in a matter independently only if the judge gives advance notice to the parties of the subject of the judge's proposed investigation, and affords the parties a**

---

208. Model Code of Judicial Conduct R. 2.9 (2007).

**reasonable opportunity to object to the research,  
and to respond to the information the judge  
obtains through the judge's investigation.**

Comment 6, instead of prohibiting electronic research, would limit Rule 2.9(C) to investigation from non-human sources, so that it would not be understood as a license to speak informally with parties, fact witnesses, or experts. Except for communications with people, comments could also specifically allow the research for adjudicative as well as legislative facts. Even for trial court judges, the risks of bias inherent in *ex parte* communications with people, which cannot be replicated for the parties, seem different from the risk of the judge gaining access to information in some tangible form which could then be provided to the parties, along with an opportunity to respond. This rule would also need to interact with the disqualification rules. Although it seems unlikely that appellate judges would often have reason or opportunity to research case-specific facts, the possibility of disqualification might still loom if the judge somehow, through non-human sources, acquired “personal knowledge of facts that are in dispute in the proceeding.”<sup>209</sup> In order to avoid continued problems of line-drawing, the disqualification rules should clarify that research into general principles does not constitute personal knowledge of disputed facts. The notice and hearing provisions of the “research freely” rule would provide the needed check against bias in this area.

Implementing the “research freely” proposal would also require amending the evidence and procedure rules. While the ethics rules on the subject have consequences only if they lead to disqualification or censure, the evidence rules provide procedural limits on use of information by the court. Currently Rule 201 of the Federal Rules of Evidence covers only judicial notice of adjudicative facts. In order to guarantee the parties’ due process rights to comment on the legislative facts unearthed by the court, Rule 201(e)’s requirement that parties be given “an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed”<sup>210</sup> would need to be extended to legislative as well as

---

209. R. 2.11(A)(1); see MARVELL, *supra* note 20, at 160 (“Independent investigation at the appellate level for case facts is virtually nonexistent.”).

210. Fed. R. Evid. 201(e).

adjudicative facts. The hearsay rules tie the use of treatises to expert testimony, or to the requirements of judicial notice.<sup>211</sup> In addition, as far as adjudicative facts are concerned, any procedural rule limiting the appellate court to facts in the record would need to be amended to permit the use of new facts discovered by the judge.<sup>212</sup> When the judge-found information reveals that the jury was deprived of relevant facts, however, the appellate court could at most remand for a new trial.<sup>213</sup>

This “research freely” rule would be based on policies of empowering judges to do anything necessary to maximize the information available to make a decision; helping judges overcome the partisan bias in information presented to them by the parties; and allowing judges in lawmaking mode to access important information, since parties do not always have adequate incentives to supply it. Less nobly, it would be based on a belief that some judges will do independent research despite the rule, and that it is better to bring that research out of the closet and regulate it than to have it proceed in secret.

1. Due Process Advantages

- a. *Notice and the Opportunity to be Heard*

This proposal improves on current practice by requiring the court to give the parties the same kind of notice and opportunity to respond to any type of judicial fact research, not just adjudicative

---

211. *See, e.g.*, FED. R. EVID. 803(18) (limiting the use of “learned treatises” at trial).

212. But courts could retain rules requiring issues to be raised at trial before they can be raised on appeal. Such requirements promote efficiency and would limit the subjects about which judicial research would be relevant.

213. *But see* *Weisgram v. Marley Co.*, 528 U.S. 440, 441 (2000) (holding that Federal Rule of Civil Procedure 50 allows appellate courts to direct the entry of judgment as a matter of law when they determine that evidence was erroneously admitted and that the remaining evidence was insufficient; the plaintiff’s contention that allowing appellate courts to direct the entry of judgment for defendants unfairly prejudices plaintiffs—who could have shored up their cases by other means had they known their expert testimony was inadmissible—was unconvincing).

facts. In many cases, legislative facts can be as outcome-determinative as adjudicative ones, and due process principles favor procedures that give parties notice of the court's intention to rely on information. Nor will the costs of such a rule create inefficiencies that outweigh the advantages of party input. In some cases the parties' responses may involve only briefing; in others they will include providing the judge with additional written materials. Only occasionally (at the trial court level) will a research-and-disclose system require the use of expert testimony and cross-examination to help evaluate the information located by the judge and the issue more generally.<sup>214</sup> Notice and comment rights for the parties have long been advocated even by judicial notice enthusiasts. For example, Professor Morgan (on whose views the Advisory Committee on the Rules of Evidence relied) warned that in reading appellate cases citing data, "one often has a feeling that they might have been contradicted or modified or explained by diligent counsel aware that the court intended to use them."<sup>215</sup> Professor McCormick, while vigorously promoting judicial notice of disputable legislative facts, insisted that "[n]o rigid requirement of certainty should curb it, but appropriate safeguards should be developed. Among these are the giving of notice to the parties . . . affording them opportunity to furnish materials, or supplementary materials, when such notification is needed."<sup>216</sup>

Some courts have already embraced this vision. In *Bulova Watch Co. v. Hattori & Co.*, for example, the trial judge did independent research but also involved the parties in the process through the kind of notice and comment opportunities that would be used for judicial notice of adjudicative facts.<sup>217</sup> As Judge Weinstein noted, providing the parties with an opportunity to respond to his proposed

---

214. In some cases the court's proposed research might be so unimportant and unremarkable that no response would be forthcoming.

215. Morgan, *supra* note 77, at 293.

216. McCormick, *supra* note 98, at 318.

217. 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981) ("In view of the extensive judicial notice taken, based partly upon the court's own research, the court issued a preliminary memorandum and invited the parties to be heard on the 'propriety of taking judicial notice and the tenor of the matter noticed' upon motion made within ten days."). The district judge in this case researched the nature of global business as well as the defendant's contacts with the forum state in deciding a question of personal jurisdiction. *Id.*



findings “has the advantage of reducing the possibility of egregious errors by the court and increases the probability that the parties may believe they were fairly treated, even if some of them are dissatisfied with the result.”<sup>218</sup> Unlike more drastic measures such as hiring court-appointed experts or appointing expert advisory panels, permission to research with party input leaves the fact-finding process in the normal parameters of the adversary system.

Certain pragmatic arguments also favor allowing research. One is based on the relationship between pre-case knowledge and pending-case research. If a judge happens to be informed about a general issue before the case is assigned to him, he will be allowed to use that knowledge in deciding the case and it will not disqualify him.<sup>219</sup> Only in the rarest of circumstances will such information, even if arguably acquired in a setting that presented the information in a misleading or slanted way, disqualify the judge from hearing the case.<sup>220</sup> A judge, then, could research an area (such as DNA testing) before being assigned a relevant case, but under a “no research” regime would not be allowed to do that same research once he actually needed to use it. Parties would have no ability to respond to the judge’s pre-case reading, while the “research freely” rules (combined with a requirement to disclose any non-record sources on which the judge relies) would allow them to contend directly with the judge’s understanding of the area, whether pre-existing or done in connection with a case. Further, allowing research would mean that identical pre- and post-case research receives similar ethical treatment.

This is not a mere theoretical speculation: judges are trying to educate themselves. Numerous groups—with selfish and unselfish motives—are busily coming forward with seminars aimed directly at a judicial audience.<sup>221</sup> Courts are also organizing pro-

---

218. *Id.* at 1328–29.

219. *See supra* notes 35–38 and accompanying text.

220. *See supra* notes 35–38 and accompanying text.

221. *See, e.g.,* Breyer, *supra* note 2 (noting joint efforts by the scientific and legal communities to increase judicial expertise in scientific areas); Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public’s Trust*, 25 HARV. ENVTL. L. REV. 405, 467–70 (2001) (discussing the issue of private entities funding and consequently shaping the continuing legal education of judges); Weinstein, *supra* note 33, at 547–56 (emphasizing need to constrain judicial

grams for judicial education. For example, thirty-nine states have joined together to form the Advanced Science and Technology Adjudication Resource Center, which will train “resource judges” to assist other judges faced with technical and scientific issues in their cases.<sup>222</sup> There is no apparent ability of the parties to learn or respond to the information supplied by the “resource judge,” making this well-intentioned program also less transparent than disclosed research in a particular case.

The other pragmatic reason for choosing the “research freely” option is a prediction about judicial behavior: whether the rules permit research or prohibit it, judges will do it anyway. In today’s world, many people—judges included—have made Internet research a part of their basic, habitual way of getting information about the world. We use Internet browsers to find movie times, restaurants, recipes, driving directions, high school sweethearts, and resumes. Wondering, “Where have I seen that actor before?” leads not to a frustrating memory failure but to [imdb.com](http://imdb.com) to find the answer. Internet resources prove remarkably accurate in navigating through everyday life, and it would take superhuman resolve for a judge not to use that same resource when curious about a case. If all of that is true, it is again better to allow the research but force its disclosure, so that litigants have an opportunity to respond to what the judge has found before it makes its way into an opinion.

*b. Expanded Participation and Information*

Appellate judges are highly educated professionals with strong research skills. They are also tasked with making very difficult decisions that increasingly require technical expertise. Allowing judges to get the information they need to evaluate the

---

contact with external sources); National Center for State Courts, Science, Technology and the Law FAQs (May 20, 2008), <http://www.ncsconline.org/wc/CourTopics/FAQs.asp?topic=SciTec> (providing numerous links for judicial education concerning scientific areas).

222. ASTAR Homepage, <http://einshac.org/> (last visited Oct. 26, 2008); see Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 47 JUDGES’ J. 4, 11–12 (2008) (describing Advanced Science and Technology Adjudication Resource Center program).

reliability of evidence offered by the parties can promote rather than impair the truth-seeking function of the judicial process. And because “courts make law for parties other than the litigants, courts need to develop techniques for obtaining the views of, or effects on, the unrepresented or underrepresented.”<sup>223</sup> If judges are allowed to do research to help compensate for differences in party resources, the comparative wealth of the parties is less likely to distort the information available to the court. One of the strengths of this version of reform is allowing independent research to continue to aid courts’ legislative functions, even when the information sought would not satisfy the rigorous requirements for judicial notice of adjudicative fact.

Many would also argue that allowing judges to research general principles of science for purposes of making *Daubert* admissibility decisions is preferable to leaving the judge at the mercy of the parties’ partisan presentations.<sup>224</sup> The trial judges themselves are the decision makers on these issues, and the appellate courts’ decisions recognizing scientific methods as reliable can become the law for the state. For that reason, appellate judges may reasonably seek out information beyond that submitted by the parties. Proponents of allowing this type of research, such as Professor Cheng and Judge Marlow, would also require judges to offer parties a meaningful opportunity to be heard before the judge bases her decision on the researched information.<sup>225</sup>

---

223. Woolhandler, *supra* note 190, at 6 (explaining reform proposals).

224. *But see* Adam J. Siegel, Note, *Setting Limits on Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium*, 86 CORNELL L. REV. 167, 209–12 (2000) (arguing that a more restrictive rule should be in place regarding the independent research of judges when deciding the admissibility of scientific research).

225. Cheng, *supra* note 23, at 1302; George Marlow, *From Black Robes To White Lab Coats: The Ethical Implications of a Judge’s Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN’S L. REV. 291, 333–34 (1998) (“A judge should be given the discretion . . . to determine at what point in the case he or she is required to disclose the identity of items read ex parte. However, disclosure should be required in ample time for the parties to read the material and offer any oral or written comments to the court, at the judge’s discretion, or to allow the lawyers an opportunity to offer additional material responsive and relevant to the ex parte material that the judge has disclosed.”).

## 2. Due Process Disadvantages

### a. *Loss of Notice and Opportunity to be Heard*

While the “research freely” option requires disclosure of the material on which the judge will concede reliance, the process of research itself will likely remain undisclosed and can create biases that remain resistant to the attempts of the adversary system to guide judges’ acquisition and use of information. If the process of doing the research commits a judge to confidence in the accuracy of what she has found, no subsequent party commentary may be enough to dislodge the resulting bias. In addition, if the complexity or nature of the relevant area exceeds a non-expert’s ability to evaluate it, the rule allows deviations from the judicial role with no corresponding benefit to the system; the search for truth is as likely to suffer as to benefit from independent judicial research despite a procedure for party participation. Finally, the belief that neutral expertise can be achieved when it is the judge who performs the research misconceives the nature of science and of expert testimony, so that independent judicial research at the appellate level provides only the illusion of more reliable information. As Professor Jennifer Mnookin explains:

[W]hile the partisanship of experts may create the illusion of disagreement even when little exists in the broader community, even in situations far removed from the use of “hired guns” in court, significant interpretive disagreements can occur among scientists operating in good faith—and this may be so even in instances when the available quantity of data is unusually substantial. Evidence synthesis is an especially complex and fraught area, one in which reputable scientists may simply disagree about the extent to which an imperfect body of data justifies an inference of causation. While partisanship may exacerbate these differences, and the lure of high pay may risk creating the appearance of disagreement when it would be unlikely to exist outside of the courtroom, the converse is simply not true: interpre-

tive disagreement is not necessarily the result of partisanship. It may well be the product of genuine methodological and interpretive differences, not only across scientific disciplines, but even within them.<sup>226</sup>

A completely reliable and “neutral” approach to an area of scientific disagreement simply does not exist.

*b. Inconsistency Across Cases*

Permission to do research might also morph into a perceived responsibility to do research. Courts are already under-resourced for the job they are expected to do. If judges are also expected to provide a sufficient quantity of independently unearthed information, their resources will be stretched even thinner and the quality of the resulting research may suffer. Alternatively—and more likely—some judges would seize the opportunity to do research, filling in the gaps left by counsel, while others would not. Would an unacceptably uneven level of justice result? Or would this be just one more variable in the already-diverse world of judicial discretion?<sup>227</sup>

*c. The Inefficiencies of New Appellate Information*

This disadvantage is the flip side of the truth-seeking advantages that new information brings and of the disadvantage of the “no research” rule when a prohibition on research would deprive the court of information demonstrating that the outcome below was

---

226. Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009, 1026 (2008).

227. See Cheng, *supra* note 23, at 1307–14 (arguing that legal system already has multiple types of inconsistency and that inconsistent research practices would fall into acceptable range). The author’s experience in presenting Rule 2.9(C) to the Appellate Judges Educational Institute leads her to believe that some judges feel so strongly about their right to do research that nothing would prevent them from doing it, while others are so strongly opposed to such research that nothing would lead them to undertake it. After the judges discussed the hypothetical in Part I of this article, no punches were thrown, but feelings ran high and voices were raised. This is an issue about which judges have very strong feelings as well as strong philosophical differences.

inaccurate. Here, the concern is that the party-driven principles of the adversary system, and the efficiency concerns that mandate the raising of issues in the trial court, make appellate activism undesirable. Under these assumptions, it is not the role of the appellate courts to bring new facts to the table. Rules of procedure, evidence, and court structure place the obligation of creating a factual record and making decisions about facts at the trial level. For reasons of both fairness and efficiency, the parties and their attorneys are required to present their evidence at trial, and allowing an appellate judge to re-open questions on appeal through independent research could create inefficiencies and unfair surprise.<sup>228</sup> The conflict between the desire for a just outcome and maintenance of the adversarial system values in this situation exemplifies the tension inherent in Rule 1 of the Federal Rules of Civil Procedure's command to provide "just, speedy, and efficient" resolution of cases.

Further, when the appellate court is assigned a deferential standard of review, as is the case for most fact-related issues, its role is to evaluate the job the trial court did on the record before the trial court, not the job it did in light of all of the information potentially available in the universe. Outside the area where the court acts legislatively, independent fact investigation could work a fundamental change in the relationship between trial and appellate courts.

## V. CONCLUSION

A judge who takes it upon herself to do fact research departs from her normal role and from the parties' expectations about the sources of information on which the court will depend. The rules governing independent judicial research should therefore make it clear to both judges and litigants when research is and is not permitted, and should subject judge-supplied information to the same adversarial testing as any other kind of evidence. But under the current rules, confusion reigns. Case law is sparse, inconsistent, and badly explained. Even judges who are trying diligently to follow the rules have to follow a murky path filled with false assumptions,

---

228. It seems unlikely, though, that a trial lawyer would actually choose not to put on evidence in hopes that an appellate judge might independently do the research that would save her case.

particularly assumptions that facts are either adjudicative (research bad) or legislative (research good), and that there is a real and discernible difference between finding facts, applying the law to those facts, and making new law. Current law also calls on the judge to base the decision about whether to do research on these jurisprudential imponderables rather than on the tradeoffs between accuracy and the integrity of the adversary system, knowledge and efficiency, party control and judicial supervision.

This Article therefore recommends that judicial ethics codes unbundle the concepts of judicial research and judicial notice. Instead, states should adopt clear rules that either allow or prohibit research, freed from distinctions based on where use of the information will fall along the fact/law continuum. Judges would then know what they may and may not do. Parties will know what to expect from judges, and will have the opportunity to respond at a meaningful time and in a meaningful way to information on which a case might depend. While both the “no research” and the “research freely but disclose” systems have advantages and disadvantages, a state should choose the rule it believes would best maximize the quantity and reliability of information, assure transparency, and allow party involvement in the entire judicial process. The ABA Joint Commission has done the legal system a huge service by highlighting the difficulty of this issue. States should honor that service not by adopting Rule 2.9(C) as drafted, but by using it as a springboard to a clearer, fairer rule.