



Summer 1999

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Recommended Citation

Bruce W. Burton, *The O.K. Corral Principle: Finding the Proper Role for Judicial Notice in Police Misconduct Matters*, 29 N.M. L. Rev. 301 (1999).

Available at: <https://digitalrepository.unm.edu/nmlr/vol29/iss2/4>

THE "O.K. CORRAL PRINCIPLE": FINDING THE PROPER ROLE FOR JUDICIAL NOTICE IN POLICE MISCONDUCT MATTERS

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I. INTRODUCTION

For more than a century, American courts' varying uses of judicial notice in police misconduct matters have produced some notable political controversies. The contrasting models for such use of judicial notice illustrate the classic tension between authoritarian and libertarian values which informs so much of America's political history. Controversy has occurred regardless of whether judicial notice was exercised in conformity with a model that fears law enforcement's unique powers, presuming that the police are often driven by inherently predatory tendencies which threaten individual liberties, or by the contrasting model of judicial notice that sees criminal activity as a mortal threat to civil order. The latter model views the powers of law enforcement as society's last, and perhaps only effective, line of defense.

A shootout of mythic proportions in 1881 near the O.K. Corral in Tombstone, Arizona provides a paradigm for one of the models of exercising judicial notice in police misconduct inquiries.¹ By contrast, a celebrated 1996 decision respecting a group of South Bronx drug dealers provides the paradigm of the opposite model.²

Judicial notice can be a dual-edged sword, and the logic of the Constitution's purposes must inform the judiciary's challenges in its proper use in police misconduct cases. This article will examine the use of each of these contrasting models. It will also propose a new judicial protocol that would not rely on ultimate presumptions concerning either the all-important value to society of police power or the destructive, negative and predatory nature of modern American law enforcement.

A. Tombstone and the "O.K. Corral" Incident: The Crime Control Model

One windy afternoon in October 1881, in the Territory of Arizona, a group of four Tombstone police officers and special deputies faced a band of five armed men known as "the Cow Boys."³ These two groups faced each other at close range in an open area on the westerly end of town between Fly's Photo Studio and the Cow Boy's Dance Hall. The two groups exchanged less than one minute of deadly gunfire. When the shooting stopped, two of the local police had been wounded and three of the five "Cow Boys" were dead.

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1. Following a month of hearings, Judge Wells Spicer of Tombstone, Arizona Territory, filed his findings of fact and conclusions of law incident to the shootout at the O.K. Corral of October 26, 1881. See THE O.K. CORRAL INQUEST 217-26 (Alford E. Turner ed., 1981) [hereinafter INQUEST]. Judge Spicer's report was heavy with judicial notice of facts concerning the nature of crime and law enforcement in the Territory. See *infra* notes 4-13 and accompanying text.

2. See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), discussed in part I.B., *infra*.

3. The following facts are from THE TOMBSTONE EPITAPH, pages 1-4 (Oct. 27, 1881) and INQUEST, *supra* note 1, at 15-17.

The episode, which soon became mythologized as the "Gunfight at the O.K. Corral," gave rise to one coroner's inquest and no fewer than three other judicial inquiries into questions of police conduct.⁴ The central issue in these hearings was, specifically, whether the law officers' use of lethal force was justified.⁵

Besides the judicial hearings, there began a long series of retribution killings by both sides of the conflict which took place both in Tombstone and the surrounding area of Cochise County. First blood was drawn when allies of the Cow Boys gunned down local deputy Morgan Earp, the younger brother of Town Marshal Virgil Earp and U.S. Deputy Marshall Wyatt Earp. This was shortly followed by the killing at the Tucson railroad depot of a companion of Cow Boy leader Ike Clanton by Doc Holiday and Wyatt Earp. A long-lasting trail of blood ensued.⁶

The most extensive of the "O.K. Corral" court hearings into police conduct at the time of the shoot-out was held before Judge Wells Spicer, in Tombstone, from October 31 to November 29, 1881, involving seven attorneys and thirty witnesses who were heard in person or by sworn deposition, plus documentary evidence such as statements signed by sixty-two character witnesses from Dodge City and Wichita, Kansas, for Deputy U.S. Marshal Wyatt Earp.⁷ These participants and eyewitnesses of the "O.K. Corral" violence presented two dramatically disparate visions of the three Earp brothers and "Doc" Holiday.

One version saw these men as murderers, though deputized and holding authority by way of Town Marshal Virgil Earp. The foursome was seen—especially by O.K. Corral survivors and other "Cow Boys" or their allies—as a *cadre* of fatally biased, quick-triggered, violence-prone, pistol-whipping, irresponsible law enforcement officers.⁸ By this view, the officers' intent from the outset was to settle old scores with the "Cow Boys"⁹ and permanently eliminate these men for a variety of personal, business, and political reasons. This group portrayed the "Cow Boys" as the continual victims of Earp-led persecutions, pistol whippings, and threats.¹⁰ In this light, for the "Cow Boys" to have surrendered their weapons in compliance with local ordinances and as demanded by Town Marshal Virgil Earp could well have meant sudden execution.¹¹

A second version, more widely testified to, stressed that the Tombstone ordinance prohibiting private persons to go about armed was vital to civil order

4. See *INQUEST*, *supra* note 2, at 15, 55.

5. The anti-Earp legal maneuvers arising out of the O.K. Corral shootings included several well-financed attempts to prosecute the Earps in court, and perhaps even paid assassination attempts upon them. See *id.* at 51. Will McLaury, thought to have financed these unsuccessful maneuvers, once wrote that the only satisfactory outcome of all the money he spent was "the death of [Deputy Town Marshal] Morgan [Earp], the crippling of [Town Marshal] Virgil Earp and death of [Earp ally] McMasters." *Id.* at 51.

6. Wyatt Earp and Doc Holiday, sometimes with a deputized posse, appear certainly to have eliminated over the ensuing months such noted Tombstone area characters as "Indian Charlie" Cruz, "Curly Bill" Brocius, "Johnny Ringo," and Frank Stillwell. See *JOSEPHINE EARP, I MARRIED WYATT EARP* 79 (Glenn G. Boyer ed., 1976).

7. See *INQUEST*, *supra* note 1, at 50-52, 168-171.

8. See *id.*

9. These "old scores" included conflicts between Ike Clanton and the Earps and Doc Holliday relating to Earp-led schemes and the "strong arm" role of the Earps on behalf of the town's vigilante group of merchants. See *id.* at 13, 97-122 (presenting testimony of Wm. Allen, Wesley Fuller, Wm. Clairborne, and Joseph "Ike" Clanton).

10. See *id.*

11. See *id.*

within the town.¹² It portrayed a scenario whereby the three Earps and Holiday approached the unlawfully armed "Cow Boys" near the O.K. Corral in order to enforce the ordinance against carrying firearms and in direct response to numerous reports that the "Cow Boys" had widely announced their intentions to kill both Virgil and Wyatt Earp. The four officers attempted to achieve the lawful end of disarming the "Cow Boys" with discussion and firm demands, which were prudently backed up by a direct show of strength.¹³ According to this view, the "Cow Boys" were notorious county-wide rustlers, stage robbers, bullies, and belonged to a political group that wanted to subordinate the town to the designs of certain rural ranchers such as "Old Man" Clanton and others.¹⁴

At the conclusion of a month of taking evidence, Judge Spicer's written opinion took extensive judicial notice of many general facts concerning the lawlessness found in certain local areas and the generally deadly hazards of law enforcement on the frontier. Judge Spicer also judicially noticed similar specific facts about the Tombstone area at the time. At one point, Judge Spicer wrote:

[W]hen we consider the condition of affairs incident to a frontier country; the lawlessness and disregard for human life; the existence of a law-defying element in [our] midst; the fear and feeling of insecurity that has existed; the supposed prevalence of bad, desperate and reckless men who have been a terror to the country and kept away capital and enterprise; and consider the many threats that have been made against the Earps, I can attach no criminality to his [Town Marshal Virgil Earp's] unwise act. In fact, as the result plainly proves, he needed the assistance and support of staunch and true friends, upon whose courage, coolness and fidelity he could depend, in case of an emergency.

In view of the past history of the county and the generally believed existence at this time of desperate, reckless and lawless men in our midst, banded together for mutual support and living by felonious and predatory pursuits, regarding neither life nor property in their career, and at the same time for men to parade the streets armed with repeating rifles and six-shooters and demand that the chief of police and his assistants should be disarmed is a proposition both monstrous and startling. This was said by one of the deceased only a few minutes before the arrival of the Earps.

In view of all the facts and circumstances of the case, considering the threats made, the character and positions of the parties, and the tragic results accomplished in manner and form as they were, *with all surrounding influences bearing upon the res gestae of the affair*, I cannot resist the conclusion that the defendants were fully justified in committing these homicides—that it is a necessary act, done in the discharge of an official duty (emphasis added).¹⁵

12. See *id.*, passim.

13. One powerful piece of evidence in Judge Spicer's hearings was the fact that Ike Clanton, unarmed at the time of the shoot-out, was not fired upon by the Earps. See *id.* at 36 n.3, 223.

14. See *id.* at 11-13; see also testimony of Wyatt Earp, Virgil Earp, H. F. Sills, Julius Kelley, R.J. Campbell. The ranchers' designs basically were to control the prime land in the city as well as local government. See *id.* at 13-14.

15. INQUEST, *supra* note 1, at 220, 224—25 (emphasis added).

This gives a clear example of the “crime-control” premise used by a judge in taking judicial notice of facts not in the record, relating to the nature and extent of area crime and its threat to civil order and law enforcement officers.

Was Spicer only informed by personal bias or was he a competent jurist? The few facts known are that he had practiced law in Utah prior to coming to Tombstone. In 1875, he defended an accused in a massacre of immigrants.¹⁶ By 1881, the time of the O.K. Corral Shoot-out, Spicer was a fifty-year old lawyer and justice of the peace for Cochise County, Arizona Territory. Moreover, there is current historical evidence that justifies Spicer’s characterizations of the crime problem in Tombstone and the surrounding counties.¹⁷ From its creation by President Lincoln in the 1860s and until the 1890s—or even later—Arizona Territory *was* the genuine Wild West. Shootouts, stage robberies, Indian attacks, stabbings, vigilante justice, lynchings, and heavily armed citizens made Tombstone “a fundamentally lawless community.”¹⁸

Many facts, recited as part of Judge Spicer’s judicial notice in the case, obviously led him to adopt the judicial policy of what modern commentators classify as the “crime control” model (as contrasted to a “due process” or “police control” model) in his determination of the case.¹⁹ As flows from the logic of Spicer’s adopted model, he formally determined that, as law enforcers in a dangerous place and dangerous era confronted with a potentially deadly situation, the Earps and Doc Holiday “acted wisely, discreetly, and prudentially, to secure their own self-preservation.”²⁰ Under Spicer’s view, Holiday and the Earp brothers “saw at once the dire necessity of giving the first shots, to save themselves from certain death! [sic]”²¹ Moreover, Judge Spicer placed heavy reliance on the “character and positions of the parties.”²² Thus, he found no sufficient evidence to bind over Doc Holiday or the Earps for trial.²³

16. See *EARP*, *supra* note 6, at 109, n.1. On the parallel issue of whether Wells Spicer was a judge of integrity, it is important to note that four months before the O.K. Corral hearings he handled the trial of felony charges against the Tombstone mayor on charges in criminal malfeasance brought by a business partner of the Earp brothers. See *INQUEST*, *supra* note 1, at 11. Judge Spicer was well-known for being politically opposed to, and regarded the defendant Mayor Alder Randall as, a fraud, liar and a front for hoodlums in public land deals. See *id.* Spicer said as much in his written findings of the case. Yet Judge Spicer discharged the defendant on a technically strict reading of English Common Law and the territorial statutes of Arizona, failing to find in either that official malfeasance, nonfeasance, or misfeasance were classified as felonies. See *id.* at 12. Such a scrupulous judge would be an unlikely candidate four months later to knowingly abuse the power of judicial notice.

17. See *EARP*, *supra* note 6, at 109 n.1.

18. Angelo Patane, *Old Fashioned Justice: Law and Disorder on the Arizona Frontier*, 34 *ARIZ. ATT’Y 26* (Feb. 1998); see also *INQUEST*, *supra* note 1, at 13, 21.

19. See, e.g., JOHN KLEINIG, *THE ETHICS OF POLICING* 225-28 (1996). The “police control model” (sometimes called the “due process model”) would emphasize the danger of police power and be skeptical about the good faith of police. See *id.* The “crime control model”—like Judge Spicer’s viewpoint—would exhibit as understanding of the demands of police work and have a greater acceptance of the fundamental good faith of law enforcement officers. See *id.*

20. *INQUEST*, *supra* note 1, at 223-24.

21. *Id.* at 224.

22. See *id.*

23. See *id.* at 225.

B. *The South Bronx Incident: The Police Control Model*

Another model—one of “police control”—views law enforcement officers as either the dangerous vanguard of a police state or the instruments of suppression of a brutalized urban American underclass.²⁴ A recent paradigm of this model for use of judicial notice derives from federal district Judge Harold Baer’s initial determinations in *United States v. Bayless*.²⁵ Judge Baer took notice that the residents in a crime-ridden neighborhood in the South Bronx tended to regard police officers as corrupt, abusive, and violent. Based upon a documented history of police-neighborhood mistrust,²⁶ Judge Baer initially analyzed the facts in *Bayless* and came to the conclusion that certain otherwise suspicious conduct on a South Bronx public street at 5:00 a.m. was normal and innocent conduct for area residents when confronted by police, and thus prevented the introduction of seized evidence.²⁷

Under the *Bayless* facts, several male defendants, all African Americans, were observed placing large duffel bags into the open trunk of a red Chevrolet Caprice, which was an Alamo Rental car bearing Michigan license plates.²⁸ The car was driven by a woman who never left the vehicle but who opened the trunk by an automatic lever from inside the car while it sat idling in the street.²⁹

Upon the approach of police, the duffel-bag carriers fled the scene.³⁰ Upon investigation, police found two duffel bags containing approximately thirty-four kilograms of cocaine and two kilograms of heroin.³¹ However, Judge Baer determined that the conduct of the male suspects in fleeing when the police car approached under these circumstances was normal conduct and, as a matter of law, did not give rise to a reasonable suspicion by the police which would justify an investigative stop “based on specific facts and reasonable inferences which could be drawn from those facts.”³²

Judge Baer’s original opinion referred sarcastically and frequently to the lack of credibility of New York City police, the incredibility of their testimony about the discovery of the drugs, using words such as “gossamer” and “suspect.”³³ Based upon this “police control” viewpoint, Judge Baer did not accept their assertions of reasonable suspicion to stop and search.³⁴ Therefore, evidence of the seized heroin

24. See KLEINIG, *supra* note 19, at 225-28; *United States v. Bayless*, 913 F. Supp. 232, 241-42 (S.D.N.Y. 1996), *later vacated, recanted, judge recused* in 921 F. Supp. 211 (S.D.N.Y. 1996); 926 F. Supp. 405 (S.D.N.Y. 1996).

25. 913 F. Supp. at 234. It should be noted that Judge Baer’s original *Bayless* decision acknowledged the research of an N.Y.U. L.L.M. candidate and that the decision’s opening discussion begins with a cryptic use of President Kennedy’s language about pervasive myths as the enemy of truth. See *id.* Exactly what dishonest myth was being targeted by Judge Baer (or the L.L.M. candidate) is not explained, but likely related to the “myth” that police are protectors of the public order.

26. See *id.* at 242 n.18.

27. See *id.* at 242.

28. See *id.* at 234-35.

29. See *id.* at 235.

30. See *id.*

31. See *id.* at 234.

32. *Id.* at 243.

33. See *id.* at 239. This skeptical judicial regard for the good faith, or even basic honesty of the police officers, is a characteristic of the “police control model.” See KLEINIG, *supra* note 19, at 226-27.

34. See *id.* at 239.

and cocaine in the duffle bags was suppressed. *Bayless* shows a model of judicial notice that views law enforcement as a hostile army of occupation in the South Bronx, an army whose mere presence on the streets terrifies the citizenry and whose professionalism and honesty are lacking.³⁵

Thus, based upon the O.K. Corral example and the South Bronx example, judicial notice in the examination of police conduct can range between polar extremes. The pro-police factors concerning the need for crime control taken into account by Judge Spicer in the Tombstone inquiry, and the antagonistic view of police as suppressors of inner city neighborhoods whose populations are victimized, as shown in Judge Baer's opinion, exemplify the "crime control" and the "police control" models. This paper will examine the principles of judicial notice involved in adjudications respecting pre-arrest police conduct and suggest a series of criteria for such use of judicial notice which are grounded in neither the O.K. Corral paradigm nor the South Bronx paradigm.

II. SOME NOTIONS UNDERLYING THE TWO MODELS

A. *The Madisonian Logic of Police Control*

The "police control" model (sometimes referred to as the "due process" model) represents a judicial value system that is grounded in a fundamental skepticism—even suspicion—toward the good faith of law enforcement officers. This view is characterized by attaching no material weight to the hazard-filled demands of police work.³⁶ Any jurist holding the police control model as a powerful part of his or her value system would likely stress the second portion of James Madison's famous constitutional prescription:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*. A dependence on the people is, no doubt, the primary control of the government; but experience has taught mankind the necessity of auxiliary precautions.³⁷

It flows from Madison's prescription that a judge must be ever alert to the need for government to control government. This means that the proper judicial role should be to prevent the state's monopoly upon coercive force, as expressed in police power, from destroying self-government. Police authority should be judicially checked at every turn where it bears its force upon individual citizens. Accordingly, governmental self-control demands that police use of force be suspect and be narrowly and tightly restricted by the judiciary.

35. Judge Baer subsequently backed off from his starkly stated "police control model" as the White House and members of Congress began to question his fitness for the judiciary after his initial decision. See Monroe H. Freedman, *The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 HOFSTRA L. REV. 729, 737-41 (1997).

36. See KLEINIG, *supra* note 19, at 225-28.

37. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). Madison's mention of the need for "auxiliary precautions" highlights the sort of process reforms in the use of judicial notice in cases examining questions of police misconduct which are proposed *infra* notes 88-113 and accompanying text.

A jurist accepting this logic and faced with making determinations respecting questions of police misconduct should thus be expected to exercise judicial notice, if at all, in fashions hostile toward law enforcement. Faced with issues of reasonable search and seizure, such a jurist will likely follow the same path as Judge Baer and determine that otherwise suspicious conduct by suspects was justified. This inevitably follows from taking judicial notice of reported incidents of police notoriety and the like.³⁸

As readers may recall, Judge Baer finally did not have the stomach to stand against the angry firestorm of opposition that greeted his anti-police use of judicial notice, a firestorm that echoed from the tabloid press to the corridors of the White House and Congress. Under threats that both President Clinton, who had appointed Judge Baer to the bench in the first place, and others might call for his resignation, the judge began a backwards dance. He held new hearings and issued a slew of face-saving language—finally voluntarily recusing himself from the case—and recast the entire incident into a decidedly pro-police result.³⁹ None of this later back-sliding alters the clarity of Judge Baer's initial choice of a "police control" model for his use of judicial notice.

The potential for the "police control" model influencing judicial notice as to police investigatory tactics permeates other search and seizure situations.⁴⁰ For instance, in a checkpoint case on the Texas-Mexico boundary, a border guard stuck his face into the open window of a van while questioning the occupants and smelled marijuana.⁴¹ The Fifth Circuit took judicial notice of the border guard's testimony in an earlier, similar case that he always sticks his head through open driver's side car windows in order to "judge the veracity or evasiveness of a person's response to questions."⁴² The court determined that such conduct amounted to an unfounded search for something suspicious.⁴³ Thus, the court added to the litany of facts of which judicial notice is taken in criminal cases and held that the scent of marijuana, and all evidence that it led to in the guard's examining the car's luggage, were excluded.⁴⁴

38. For instance, Judge Baer placed significant reliance on New York's Mollen Commission Report as to the way South Bronx residents regard police officers and New York Daily News reports respecting the 34th Police Precinct as to police corruption, perjury, and unjustified arrests. See *Bayless*, 913 F. Supp. 232, 242 n.18.

39. See *supra* note 19.

40. See, e.g., *U.S. v. Pierre*, 932 F.2d 377, 388 (5th Cir. 1991); *Lykken v. Vavreck*, 366 F. Supp. 585, 595 (D. Minn. 1973); H.L. "Mike" McCormick, *Excessive Force Claims Under the Fourteenth Amendment*, 29 THE URBAN LAWYER 69, 70-72 (1997). For contrast, compare the dissenting opinion in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) with majority opinion at pages 290-93.

41. See *Pierre*, 932 F.2d at 379.

42. *Id.* at 389.

43. See *id.* at 390.

44. See *id.* at 388. See generally Murl A. Larkin, *Article II, Judicial Notice: Texas Rules of Evidence Handbook; Part I*, 30 HOUS. L. REV. 193 (1993). The impact of judicial notice is wide-ranging in the criminal law. See *United States v. Murdoch*, 98 F.3d 472, 478 (9th Cir. 1996) (judicial notice of diagnostic standards of the American Psychiatric Association); *United States v. Yates*, 22 F.3d 981, 987 (10th Cir. 1994) (judicial notice that a defendant's criminal conduct was ongoing and escalating in seriousness); *United States v. Evans*, 994 F.2d 317 n.1 (7th Cir. 1993) (judicial notice of high crime areas and judicial notice of a drugs-weapons linkage in crime areas); *United States v. Arbizo*, 928 F.2d 409 (9th Cir. 1991) (judicial notice of criminal modus operandi); *United States v. Short*, 597 F.2d 1122, 1130 (8th Cir. 1979) (judicial notice of the expenses of criminal incarceration). See also *infra* cases, notes 51-65.

Apart from search and seizure questions, court inquiries respecting police use of force are also subject to utilizing the police control model of judicial notice. In the issue of whether law enforcement officers used excessive force, there are instances of judicial notice being employed by courts in the sway of this same value system. As already noted, in the first of Judge Baer's decisions he took notice of the "abusive and violent" nature of the local precinct.⁴⁵ In a civil action for damages against Minneapolis law enforcement officers, the U.S. District Court took judicial notice that heinous police misconduct resulting in more severe injuries frequently occurs throughout the nation than in the Minneapolis case, but that did not justify police conduct that is less injurious.⁴⁶ A contrasting example of the impact of the police control model at work in another way was the refusal to take judicial notice of the violence and force used by criminal suspects and was given by the U.S. Court of Appeals for the District of Columbia in *Dellums v. Powell*.⁴⁷ There, examining alleged police misconduct in dealing with a group of anti-war protestors, the majority treated the May 5, 1972, allegedly criminal incident and police response in isolation, refusing to take judicial notice of violent mob actions from April 18 to May 5.⁴⁸ The dissent in *Dellums v. Powell* believed that police conduct needed to be portrayed in the light of three weeks of "mob rule conditions" leading up to May 5, thus resulting in police immunity from civil damages.⁴⁹ In short, the "police control" model can be used to stress prior police conduct, even geographically far-distant misconduct, and to ignore the history of private party conduct in the area.

B. The Madisonian Logic of Crime Control

Madison's famous prescription for successful governance shifts emphasis dramatically when used to rationalize a "crime control" viewpoint: "In framing a government which is to be administered by men over men . . . you must *first enable the government to control the governed* . . ."⁵⁰ In controlling the governed, it would follow, the authority of government ultimately rests upon its monopoly in the lawful use of coercive force. If the judiciary undermines the conduct of the police as government's domestic mechanism for excising coercive power, then society may fail the first priority of Madisonian self-governance.

Accordingly, a judge emphasizing a crime control model would see herself as acting in a principled fashion. Without coercive authority, self-government itself can become impotent to deal with the problems of crime. Thus, judicial notice tied to crime control would be seen as protecting the bedrock ordering of the state itself.

Courts have used a variety of tools of judicial notice of evidentiary facts to assist law enforcement and prosecution. Courts have taken judicial notice of the chemical

45. See *Bayless*, 913 F. Supp. at 241.

46. See *Lykken*, 366 F. Supp. at 595.

47. 566 F.2d 167 (D.C. Cir. 1977).

48. See *id.*

49. See *id.* at 211-14 (Tamm, J., dissenting).

50. FEDERALIST NO. 51, *supra* note 37 (emphasis added).

properties and uses of coca leaves,⁵¹ the basics of DNA analysis,⁵² the credibility of suspects' alibis regarding watching a televised football game,⁵³ the scientific basis and use of firearms,⁵⁴ the status of urban high-rises,⁵⁵ geography,⁵⁶ federal jurisdiction,⁵⁷ and general violent lawlessness.⁵⁸

For example, a court which adheres to the value system inherent in the "crime control" model can be expected to use judicial notice in a fashion far more akin to the dissent in *Dellums*. For instance, in *United States v. Powless*, a search and seizure case involving weapons and ammunition being transported in a van without license plates, the Eighth Circuit expressly used judicial notice in assessing the reasonableness of the police search of the vehicle.⁵⁹ The *Powless* court took notice as a matter of "general knowledge" of a recent history of violence, including the use of firearms, on the Pine Ridge Indian Reservation, where the van was headed when police stopped and searched it.⁶⁰ Conceptually, such uses of judicial notice are predicated on the underlying social value of the "crime control" model as contrasted to the "police control" model.

C. *The Need for a Formalized Process*

A trial court's selection of a "crime control model" or a "police control model" in its exercise of judicial notice is inherently a legislative choice. Clearly, the notice taken by Judge Spicer that Arizona Territory was riddled with armed and violence-prone outlaws and that law enforcement officers face mortal risk in the performance of their duties does not deal with the adjudicatory facts of who did or said what at the O.K. Corral shootout. It is a determination of legislative facts that then leads to a policy choice. (Naturally, policy choices involved in judicial notice of legislative facts are present in many other areas of the law. Negligence versus strict product liability⁶¹ and market-share liability versus pure causation⁶² are some examples.) In the O.K. Corral situation, the policy choice by Judge Spicer was his adoption of the "crime control model." It is closely akin to the legislative facts which the Tombstone Town Council, as a legislative body, likely determined when enacting the ordinance forbidding the carrying of firearms within the town limits.

Similarly, Judge Baer's selection of a "police control model" in the South Bronx case was a legislative choice. The facts of widespread predatory practices and

51. See *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976); *United States v. Berrojo*, 628 F.2d 368 (5th Cir. 1980).

52. See *United States v. Beasley*, 102 F.3d 1440 (8th Cir. 1996).

53. See *People v. Burt*, 279 N.W.2d 299 (Mich. 1979).

54. See *State v. McGuire*, 601 P.2d 1348 (Ariz. 1978).

55. See *In re Malone*, 592 F. Supp. 1135 (E.D. Mo. 1984).

56. See *United States v. Piggie*, 622 F.2d 486 (10th Cir. 1980).

57. See *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979). *Gov't of Canal Zone v. Burjan*, 596 F.2d 690 (5th Cir. 1979); *United States v. Bowers*, 660 F.2d 527 (5th Cir. 1981).

58. See *United States v. Powless*, 546 F.2d 792 (8th Cir. 1977).

59. See *Powless*, 546 F.2d at 792.

60. See *id.* at 795 n.1; See also *United States v. Yates*, 22 F.3d 981, 987 (10th Cir. 1994).

61. See, e.g., *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 443-44 (Cal. 1944) (Traynor, J., concurring).

62. See, e.g., *Sindel v. Abbott Labs*, 607 P.2d 924 (Cal. 1980).

corruption of the police force were legislative facts that inevitably led to Baer's adoption of a policy choice—the "police control model"—in dealing with the case.

However, the current processes of judicial notice fall far short of normal legislative activities. Neither Judge Spicer nor Judge Baer gave notice of public hearings or invited interested groups or parties to be heard. Neither trial judge had gone through the usual legislative process of holding hearings, receiving witnesses, receiving comments from constituents or interest groups or the media, or openly debated or amended the proposition before a final vote would be taken. In short, when a judge sits in a matter touching upon police conduct, the judge may arrive at a fundamental legislative policy via judicial notice totally absent the usual policy making processes of legislatures.

Of course "judicial legislation" happens in courts all the time. The nature of the common law embraces, if nothing else, the making and changing of social policies by the judiciary, including trial court judges.⁶³ This has been true for evolutionary, incremental changes in the law and sometimes for very dramatic, even revolutionary, changes. And sometimes even trial court judicial legislation is soundly supported by briefs and pertinent data.⁶⁴

However, police misconduct determinations are a unique species of cases. These can involve legislative facts which go directly to the question of the government's use of coercive power and are, accordingly, of a very special nature. When a trial judge exercises judicial notice of legislative facts in this arena, the stakes are extremely high. Few areas involve so directly the core challenge of self-government. In this group of cases the classic Madisonian tension between government's preservation of the social order and government's potential stifling of individual rights is directly and powerfully in play.⁶⁵

There exist a few analogies to the profoundly significant questions raised by the government's exercise of coercive force. For example, in the death penalty cases, the Supreme Court has mandated the examination of pre-set factors to be used to guide judicial and jury discretion in imposing this ultimate sanction; the risk of bias is not acceptable and is to be avoided given the high stakes of such decisions.⁶⁶ As is true of all analogies there are distinctions of importance, and the death penalty cases involved facts that are distinct from the legislative facts involved in the "crime control" or "police control" models. But the underlying policy value is the same—whenever the state's ultimate use of coercive force upon its citizens is present, special care should be taken to avoid factually uninformed or factually biased results.

One current criticism of judicial thinking is the courts' theorizing, which is essentially divorced from solid empirical knowledge.⁶⁷ In a real sense, both the "crime control" model and the "police control" model are theories derived from the dilemma respecting the nature of self-government posited by Madison.⁶⁸

63. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 69, 98-141 (1921).

64. See McGreal *infra* note 110.

65. See *supra* notes 37, 49, and accompanying text.

66. See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gregg v. Georgia*, 428 U.S. 153 (1976).

67. See Judge Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 5 (1998).

68. See *supra* notes 37, 49, and accompanying text.

Accordingly, it is a thesis of this paper that under circumstances where a trial court's use of judicial notice will lead to the court adopting a "police control model" or a "crime control model," special protocols should be in place. Processes are needed which provide the court, for society's benefit, with the sort of input of legislative facts that are required of so fundamental a question of democratic governance.

III. BASES OF JUDICIAL NOTICE

At foundation, the courts' role in the interpretation of the laws was noted from the very birth of the republic.⁶⁹ But the less Olympian judicial role, that of applying the laws to specific cases at trial, is also a vital function and one where judicial notice impacts police conduct. To craft a role for the proper use of judicial notice in police misconduct questions it is necessary to look briefly at the underlying bases of the doctrine.

Throughout its mixed history, judicial notice has been used by some judges only for the purpose of establishing facts that are regarded by all reasonable persons as indisputable, where resort to easily accessible and indisputable materials such as almanacs and calendars and scientific tables can readily support the fact of which judicial notice is being taken.⁷⁰ By others, it has been used more actively, either to instruct a jury or adopt by the court technical facts where some level of consensus exists within the scientific community.⁷¹ However, judicial activism can become a "Catch 22" in its involvement with evolving scientific principle since ascertaining the appropriate level of scientific consensus can be elusive.⁷² Of course there exists an added riddle—should judicial notice be taken of the potential consensus that underlies the alleged scientific fact of which judicial notice is to be taken?

Some would limit judicial notice to facts known in the local trial situs or within the governmental or political jurisdiction or solely to historical facts which are not in dispute.⁷³ Other courts, often following Federal or state evidentiary rules, use judicial notice for recognition by the court of the laws of the jurisdiction where the trial is being held as well as all foreign law and international law.⁷⁴ Some would draw the line at refusal to take judicial notice of any fact which was an "ultimate

69. See FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

70. See generally MCCORMICK ON EVIDENCE §§ 329-332 (4th ed. 1992).

71. See *id.*

72. See *infra* notes 80-81.

73. See MCCORMICK, *supra* note 70, at § 329 n.1.; North Hempstead v. Gregory, 65 N.Y.S. 867 (1900). The 1997 proposed revisions to the Federal Rules of Evidence would allow trial and appellate courts to take judicial notice of law—foreign or otherwise—in accord with some standards of procedural fairness. Paul R. Rice, The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary, 171 F.R.D. 330. More broadly, these new rules attempt to set forth procedural etiquette for the use of judicial notice as to *adjudicative facts*. See *id.* at 392-405. The thrust of this article is directed towards judicial notice of legislative facts in questions of police conduct.

Texas' recent revision and consolidation of its criminal and civil evidentiary rules provides a similar example. Procedural etiquette for use of judicial notice as to "adjudicative facts" (party requests, opportunity to be heard, jury instruction that judicially noted adjudicative facts are not conclusive) are established. TEX. R. EVID. 210(a). Again, a similar etiquette should be established for judicial notice of legislative facts in police misconduct matters. See DAVID A SCHLUETER, THE NEW TEXAS RULES OF EVIDENCE: AN OVERVIEW, Rules 202, 204 (St. Mary's University Law School, 1998).

74. See MCCORMICK, *supra* note 70, at § 335.

fact"—a fact which is dispositive of the case—unless the judge is also prepared to issue a directed verdict.⁷⁵ Alternatively, one notable judge has indicated that he would personally take notice of the variety of corrupt or tainted operations of business corporations in America and base this notice upon personal knowledge which he acquired during his days in private practice.⁷⁶

A. Pragmatism and Efficiency

In sum, the general concept of judicial notice is one of those flexibly vague legal notions that contains a dynamic of internal contradictions. There are important strands of useful pragmatism since the concept is grounded in judicial efficiency and ordinary sense. By its use, a tribunal can efficiently dispense with time-consuming proofs of vast amounts of ordinary, commonly accepted data.⁷⁷ After all, should costly court time be wasted to bore the jury and participants by presenting and allowing cross-examination and rebuttal of commonplace information and readily accepted scientific principles? This pragmatic element suggests that, properly used, judicial notice can vastly expedite many matters and promote judicial efficiency.

B. Intellectual Honesty and Scientific Accuracy

Another vital strand of judicial notice is promoting intellectual honesty. The doctrine can be seen as the acid of reality cleansing away theoretical sophistries or legislative hypocrisy, as in the famous dissent by Justice Harlan in *Plessey v. Ferguson*.⁷⁸ In this hypocritical case, Justice Harlan pointed out that the majority had closed its eyes to the true social reality of the segregation-promoting doctrine of "separate but equal."⁷⁹ This legal theory was inherently and purposely designed to circumvent the express post-Civil War constitutional policies against racial segregation "and everyone knows" it.⁸⁰ In the bracing eloquence of common sense, Harlan took judicial notice of the politics of "Jim Crow" legislative programs and their undeniable purposes.⁸¹ To the modern mind, untied from the political pressures of the *Plessey* era, this use of judicial notice seems a stringent dose of realism by an observant, and intellectually courageous, scholar.

Thus, across many classes of cases the use of judicial notice may be viewed as a concept that has called upon the use of a "common fund of knowledge" for judges (and juries) which can be resorted to on an active basis.⁸² Whenever the ability of

75. See *id.* at § 330; see also *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (10th Cir. 1946).

76. Judge Stanley Sporkin, Federal Judges Association Annual Meeting, on C-SPAN2, May 12, 1997.

77. See MCCORMICK, *supra* note 70, at § 329.

78. 163 U.S. 537, 557 (1895) (Harlan, J., dissenting). Harlan sets forth that "everyone knows" the state Jim Crow laws are designed to keep blacks away from whites, then adds a terse summary of principles of such judicial notice: "No one would be so wanting in candor as to assert the contrary." See *id.*

79. See *id.* at 562.

80. *Id.* at 557.

81. See *id.*

82. Commentators speak of "non-adjudicative" facts which are also not legislative in the sense of determining a social policy which underpins particular rules of law, nor are they adjudicative in the sense of bearing upon the specific facts of the case at bar. These non-adjudicative, non-legislative facts of which judicial notice can be taken involve an entire range of matters. Historical facts, geographical facts, jurisdictional facts, the position

a scientific principle to help determine material factors in a case is at issue, there is always a challenge that could be raised, not to the scientific principle itself but to its testing, application, or understanding with respect to a particular case. Many of the alleged violations of the FBI laboratory or certain of the DNA testing facilities have to do with the procedures and their pristine and scientific methodology in handling and testing of materials (the chain of custody and laboratory procedures).⁸³

C. General Dangers of Judicial Notice

Standing apart from these positive factors, there is a competing view that regards judicial notice uneasily. It can become a dangerous universal solvent, meaning that its use, once unleashed, cannot be contained. For the most part, judges are usually generalists, not trained in the theoretical sciences nor the applied sciences such as medicine.⁸⁴ Moreover, improperly used, judicial notice as a tool of judicial efficiency has the potential for allowing injustice where cases can turn upon unexamined bias, misinformation, folk wisdom, or unrebutted or unrebuttable value systems.⁸⁵ It is self-evident that the personal biases of a judge present a real and

and powers of principal officers of government and other questions of operative political science, the records of government offices, courts, and other bodies would also fall into this category. See MCCORMICK, *supra* note 70, at 395-96.

The fundamental scientific knowledge necessary to determine admissibility of evidence might fall into this category. The scientific acceptance of fingerprinting, DNA, blood tests, polygraphs, ballistic reports, radar speed detectors, and voice recognition technology are a few of the evolving scientific principles that might come to be recognized through judicial notice and thereby come to determine questions of admissibility, and weight, with respect to a particular case. Various tests are proposed for the admissibility of such scientific data. A key issue deals with scientific consensus. For instance, is there a sufficient consensus within the appropriate scientific community respecting DNA, for example, to render DNA identification from blood, semen, or hair admissible as bearing upon the identity of the person allegedly leaving the deposit of blood, semen or hair? The difficulty, of course, is that totality or universality of scientific acceptance within the community is not always a fixed point. Frequently, consensus is evolving, and the question becomes at what point is the scientific consensus strong enough that it should render the principle as scientifically suitable for purposes of judicial notice? Moreover, there exists a potentially troublesome area in the judicial notice of matters not found in the so-called "hard sciences" (mathematics, engineering, medicine, physics, and chemistry). These would be facts arising in the social sciences, psychology and other behavioral disciplines.

83. See e.g., Daniel Klaidman & Peter Annin, *Under the Microscope*, NEWSWEEK, Feb. 10, 1997, at 32; Elaine Shannon, *The Gang That Couldn't Examine Straight*, TIME, Apr. 28, 1997, at 30-31; Gordon Witkin, *Black Marks for Federal Sleuths*, U.S. NEWS, Apr. 28, 1997, at 39; CARIBBEAN TODAY 8 (May 31, 1997); CNN Interactive (Jan. 30, Mar. 7, Apr. 16, 1997); Andrew Cohen, *FBI Agent Poses Threat to Case Against Suspects*, DENVER BUS. J., June 14, 1996.

84. Stephen G. Breyer, *The Interdependence Of Science And Law 6* (Address at Annual Meeting of The American Ass'n for the Advancement of Science, Philadelphia, Feb. 16, 1998. See also Justice Breyer's recent remarks:

Judges are not trained scientists. They inevitably lack the scientific training that might facilitate the evaluation of scientific claims or the evaluation of expert witnesses who make such claims. They typically are generalists, dealing with cases that may vary widely in respect to substantive subject matter. Their primary objective is usually process-related: That of seeing that a decision is reached fairly and in a timely way.

(quoted in Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion From Athletics*, 8 MARQUETTE SPORTS L. J. 189, 211 (1998)).

85. A judge who takes judicial notice of specific adjudicative facts is subject to severe criticism. See *Wasserman v. Bartholemew*, 923 P.2d 806, 815 n.26 (Alaska 1996) (trial judge improperly took judicial notice of facts within his personal knowledge respecting one's community and business involvements); *Cordova v. State*, 675 So.2d 632, 635 (Fla. App. Ct. 1996) (use of judicial notice to establish conclusive existence of a particular fact

present danger to justice when unchecked.⁸⁶ That is to say, when judicial notice is not properly standardized, its use can be a tool for judicial tyranny.

At the core of this paper's criticism is the messy quandary that the limits of judicial notice are inexact. Frequently, the test for judicial notice is one of "common notoriety" of facts bearing on a litigated matter. This means that things of notoriety—facts or theories known to the judges as well as other matters apart from facts or theories not strictly included in either formal classification—are grist for the mill. These are facts which may properly be before the court without either evidence or argument being presented. This is, of course, so vague as a standard to admit a very great deal without the customary formalities of proof.⁸⁷

The distinction between legislative and adjudicative facts highlights another danger in use of judicial notice. Adjudicative facts become an especially controversial issue in criminal proceedings when judicial notice is taken by the court. This is so because of the distinction which is often drawn, and sometimes ignored by courts, respecting the material difference between a court taking judicial recognition of so-called adjudicative facts—those facts specifically necessary to settle a particular question in litigation—and other facts.⁸⁸

By contrast to the array of items classified as adjudicative facts, there is the area of legislative facts.⁸⁹ This involves the court taking judicial notice of matters of public policy, criminal or civil, which undergird the principles of law that are applicable to a particular case. "Judges regularly resort to extra-writ record data" and by judicially noticing public policies or tendencies, judges become "an active participant . . . adopting law to a volatile socio-political environment."⁹⁰ It is this feature—the proper adoption of public policy in the area of police misconduct—which constitutes the area most strongly calling for judicial caution.

IV. TOWARD NEW PROTOCOLS FOR JUDICIAL NOTICE IN POLICE MISCONDUCT MATTERS

As illustrated above, the doctrine of judicial notice is a multi-edged sword. In the area of police misconduct inquiries, the major challenge to its proper use is to

runs afoul of the Fifth and Fourteenth Amendments' due process rights); *State v. Murnahan*, 689 N.E.2d 1021, 1026 (Ohio App. 1996) (error and abuse of discretion for trial judge to take judicial notice of a confidential plea bargaining agreement during sentencing phase and violates Fourteenth Amendment's due process clause); *State v. Stubblefield*, 953 S.W.2d 223, 225 (Tenn. Ct. App. 1997) (implying that sentencing based upon pre-trial felony arrests, not convictions, would be improper use of judicial notice); *In re Asbestos Litigation*, 829 F.2d 1233, 1257 (2nd Cir. 1997) (dissent: the ultimate fact for adjudication—culpability of the manufacturers for product liability—was improperly reached through judicial notice of legislative facts, which should be more properly confined to determining the rationality of a policy decision). Note Judge Sporkin's remarks regarding his personal knowledge of corporate wrongdoing based upon his practice experience prior to coming to the federal bench. See CARDOZO, *supra* note 70.

86. As Justice Scalia put it: "What does a judge consult . . . [W]hat binds biases of judges? Prevents him from simply implementing his own prejudices?" Scalia, speech at Catholic University on October 18, 1996.

87. See *Gottstein v. Lister*, 153 P. 595, 602 (1917); *Chiulla de Luca v. Board of Park Comm'r*, 107 A. 611 (Conn. 1919).

88. See *supra* note 82.

89. See MCCORMICK, *supra* note 70, at §§ 328-29.

90. *Id.* at § 328.

address the dual challenges of Madisonian logic—enabling the police to control the governed while simultaneously controlling the police.⁹¹

Several principles present themselves which should be utilized in this task. These principles are useful irrespective of whether the facts of which judicial notice may be taken are characterized as adjudicative or legislative. In short, it should not matter whether adjudicative facts, legislative facts, scientific or sociological facts, or otherwise are to be noticed by the court. All judicially noticed facts in police conduct questions *which may bear upon the outcome* should be treated alike as a matter of prudent policy. Such treatment would require visibility, testing, and the avoidance of any cultural cocoon that may be material.

A. *Visibility of Judicial Notice*

First, there is the question of to what extent a trial court should be explicit or non-explicit respecting the value premises which it adopts when it takes judicial notice of underlying societal or other principles.⁹² Should a modern judge do as Judge Spicer did in Tombstone in 1881 and take *explicit* notice of the cultural conditions underlying the relationship between the police forces and certain classes of citizens? Recall that Judge Spicer went to considerable length to describe in detail the lawless nature of the Arizona frontier.⁹³ He also described the sociopolitical climate of Tombstone, plagued, as he stated, by stage robberies, rustlings, shootings, intimidation and fear.⁹⁴ Judge Spicer took further judicial notice of a legislative fact that in this violent and crime-prone culture, the police authorities must, in the nature of things, be highly self-protective, the climate being one of constant, mortal danger to their own persons.⁹⁵

In New York City in 1996, U.S. District Judge Baer—after opening with his ambiguous Kennedy quote respecting pervasive myths as the great enemy of truth—took less exact but modestly visible judicial notice of a very stark set of legislative facts respecting the sociopolitical climate of the 34th Precinct.⁹⁶ He explicitly recognized a history of alleged police corruption, abuse, and violence practiced by the officers of the 34th Precinct upon nearby neighborhoods.⁹⁷ From this judicially noted predicate of widespread fear and distrust of the police, Judge Baer determined that a group of suspects fleeing from approaching police was rational conduct, and, accordingly, such flight could not constitute evasive conduct leading to reasonable cause for the police to investigate further.⁹⁸

In both instances the judges were reasonably straightforward in stating their judicially noted facts. It is a thesis of this article that such visibility in the exercise

91. See *supra* notes 37, 49, and accompanying text.

92. E.F. Roberts has argued cogently that the intellectual arrogance of some judges, the pious talk of others, interior untested hunches, and the flawed art of human thinking play powerful roles in real world judicial reasoning processes. See E.F. Roberts, *Judicial Notice: An Essay Concerning Human Misunderstanding*, 61 WASH. L. REV. 1435 (1986).

93. See *supra* note 15 and accompanying text.

94. See *id.*

95. See *id.*

96. 913 F. Supp. at 242, 234 nn.12, 13, 17, 18. See *supra* notes 33-36 and accompanying text.

97. See *id.*

98. See *id.*

of judicial notice is a vital, but not a final, precondition. Visibility's key value is that it will help avoid unannounced, *de facto* exercises of judicial notice.⁹⁹

B. Testing Judicially Noted Facts

Visibility, for its own sake, is of limited value as a workable protocol for the most effective use of judicial notice in dealing with police misconduct issues but it does make possible important additional features. Visibility is a first step in moving the process from an informal *de facto* role to a formal *de jure* one. It is posited that the contending parties involved in a police misconduct matter could readily be invited to address the proposed judicial notice in advance of its use in the ultimate decision of the case.

For instance, if Judge Spicer in the O.K. Corral inquiry had invited the seven participating attorneys to review and argue his statements of judicial notice, these could have been subjected to adversarial scrutiny prior to the decision. Similarly, Judge Baer in the *Bayless* case might have done the same insofar as his extensive judicial notice of the South Bronx police precinct's alleged notoriety for brutality and dishonesty. Additionally, perhaps other social interests, such as the state attorney general or others with a concrete interest in the outcome, should be invited to present legislative facts in police misconduct cases.

In both instances the court would have enjoyed the benefits of adversarial testing of the social-political "facts" upon which their ultimate decisions would come to rest. Other facts are tested in the nature of our trial system, why not these? Moreover, in Judge Baer's case, the blunt legislative fact that, prior sociological studies or not, the general public and current government leaders were not disposed to adopt the "police control" values under circumstances of the large-scale drug transaction which was involved in *Bayless* obviously carried weight as things worked out later. This may have been brought to Judge Baer's contemplation and saved the judge considerable embarrassment.

C. Neutralizing the Cultural Cocoon

Judicial notice, whether its use is *de jure* or *de facto*, derives from the reality that all social institutions—including the courts—must be run by humans who are a part of the culture served by those courts. The complex dynamics of a culture's entire fabric of shared values, its learning and lore, its social and professional networks, political allegiances, general normative standards and customs, are integral to a judge who is both cocooned within the culture while also serving in the most pivotal role of its system of justice.

Consider for a moment the history of the Chicago judiciary.¹⁰⁰ Posit a Chicago judge whose personal upward social mobility was tightly linked to an ethnic political machine with entrenched and systematic business relationships among police and organized crime. Such a judge could well be expected to come to the

99. For similar principles arguing for judicial openness as to statutory-legislative interplay, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 166-71 (1982).

100. See Mark H. Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J. OF AM. HIST. 619-35 (1970).

bench with a fundamental set of beliefs as well as attitudes.¹⁰¹ The culture had informed such a judge of its principles long before ascension to the bench. These beliefs and attitudes might include a keen awareness that certain levels of criminal conduct were "immune" within the system of Chicago justice.¹⁰² Other levels of criminal conduct were never to be tolerated, and still other conduct was immune under some circumstances but not otherwise.¹⁰³

Contrast this to another Chicago judge who might have come to the trial bench or, historically more likely, to the Cook County juvenile courts, tightly linked to suburban reformers, newspapers, churches, and "legitimate" business interests.¹⁰⁴ Beliefs and attitudes of such a judge could be expected to include a fixed set of viewpoints about a wide or narrow use of judicial discretion in the trial of cases, abhorrence of political influence within the system—except, of course, for the influence of reformers and others who selected such judges—and a broad mandate to eradicate the long list of self-perpetuating urban evils as seen by the Cook County reformist groups.¹⁰⁵

Invariably, each of these judges could be expected to think and act in some large measure as a result of his or her cultural and subcultural experiences and allegiances. This is not a Marxist view based on rigid principles of economic determinism that sees judges as prevented from donning a disinterested and balanced judicial temperament with their robes, uninfluenced by the prevailing economic powers.¹⁰⁶ This is a political, but even more profoundly, a psychological factor because, like most of us, the minds and values of magistrates are shaped by and rooted in the complex of their life experience within the cocoon of their culture.¹⁰⁷

In the narrow area of judicial hearings related to police misconduct, it is important that judicial notice be invoked independent of the cultural cocoon of the jurist. It is manifest that society is less-well served when the answer to Madison's core dilemma of government may be automatically derived in a case from the social and cultural background of the judge rather than the broader facts of the society. But how can a judge rise out of the cultural cocoon? Isn't such an independence an impossible dream?

Actually, it's not. Human learning and the consequent adaptability of thought and conduct is a powerful engine of our species. Judges are as likely able to learn and adapt to new concepts as others.¹⁰⁸ It is submitted that the adversarial testing out of

101. *See id.*

102. *See id.*

103. *See also* Roberts, *supra* note 92.

104. *See* Haller, *supra* note 100.

105. *See id.*

106. Dean Carl Auerbach's 1965 classroom critique of the anti-Marxist conventional wisdom pertaining to judicial determination. Auerbach's central point was that it is a straw case to argue that a classical Marxist sees judges tied to their social class of origin (*e.g.*, landowning gentry). Classical Marxism would see the judges as instruments of the state which is largely controlled by, and responsive to, the dominant economic class (*e.g.*, owners of industrial capital).

107. *See* CARDOZO, *supra* note 63, at 167-177.

108. "Human beings have the capacity to break free from the patterns of thought into which they have been born and, by imagining a different world, change it." A quote sometimes, perhaps erroneously, attributed to Professor Jay Kenneth Koch of Columbia University.

judicially noticed facts in police misconduct hearings should explicitly admit of examining the judge's cultural cocoon. That is merely accepting the realism of the exercise of judicial power.

Quite apart from all the philosophical considerations of legal realism, what if it was *expected* that in the testing of such facts, the judge and the parties would freely address the possible cultural bias question. For instance, in the example of the Chicago reformist judge linked to suburbs, newspapers, churches and business groups, an inquiry as to whether proposed judicially noticed facts truly had a factual basis? Or were they merely derived from the policy viewpoints of those groups who supported the judge in question? Lawyers discuss such matters about a judge's view of things outside the courtroom all the time. Make such discussion a part of the protocol in police misconduct questions.

Simply knowing that this type of inquiry could legitimately be made would, perhaps, cause a more reflective basis for judicially noticed facts. Sunlight, it has been urged, is the best disinfectant.¹⁰⁹ Perhaps, additionally, those judicially noticed facts which are both supported with a credible factual basis as well as being the foundation of political policies of active leadership groups in the community would enjoy far more solid esteem.

Of course, there is another view of the matter that could regard the airing of a judge's cultural biases as destructive of public confidence. That is the view of preserving a useful hypocrisy. In this case, the useful hypocrisy of keeping such inquiries off-limits avoids a demoralization of the public which has a need to regard the courts—and the judiciary which peoples them—as somehow beyond the reach of prejudice producing cultural forces. This argument is akin to historic objections to the principle of legal realism which once objected to bluntly acknowledging that judges don't merely discover law innately present in the web of society's rules but, in fact, make law.¹¹⁰

V. THE BENEFITS OF JUDICIAL SELF-CONSCIOUSNESS

A system of visibility and testing of proposed judicially noticed facts introduces a new tone to judicial notice in police misconduct matters. Rather than allowing politics, media trends, personal dogma, or private factors—even unconscious or subconscious cultural values—to dominate below the surface the choice of model for any particular jurist, the proposed protocol introduces self-conscious realism.¹¹¹

The courts's choice of a "police control" model or a "crime control" model should be a product of such self-conscious realism. Rather than the choice of model—"crime control" versus "police control"—being derived from mistaken impressions or one's personal value scheme, the choice of model for purposes of judicial notice questions should be a function of all the relevant circumstances prevailing at the time and place of the police conduct. A judge should not use either model for purposes of judicial notice unless openly and self-consciously derived in

109. See JUSTICE LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKS USE IT* 62 (1914).

110. See Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J. LAW & PUB. POL'Y 596 (1992) (focusing on the proper use of judicial notice when judges "make facts.").

111. See Roberts, *supra* note 90, at 1439.

the context of the case. By "self-conscious realism," it is meant that a jurist approaches all use of judicial notice in such matters in a systematic manner and with the fullest benefit of visibility and the adversarial process.

After visibility and testing, a judicially self-conscious choice of a "crime control" model in the battle zone of a frontier town such as Tombstone, Arizona, might be appropriate. But this appropriateness may fail in ways that would make it highly inappropriate and unacceptable in other contexts. The incidence of local violence, use of weapons, frequency of arrest, injuries or fatalities among law enforcement officers who are investigating or apprehending suspects involved in felonies in a particular area and at the particular moment in time, are significant facts which could be material to the use of judicial notice.

A garden variety stolen car chase in a reasonably crime-controlled city, perhaps involving joyriding teenagers, may result in a different model than suspects fleeing on foot from a vehicle with a trunkful of cocaine in a neighborhood of intensive drug dealing. Officers patrolling border crossing points where drugs or illegal aliens frequently enter the United States, but where violence and firearms are not noteworthy incidents,¹¹² may be subject to a different model than riot-stressed police after three weeks of violent mob confrontation.¹¹³ Whatever the choice of model in any given case, it is urged that it be made self-consciously and explicitly. This means that explicit judicial notice needs to be taken of the times, the locale, crime statistics, the incidence of police-suspect conflict in the area, such as Judge Baer noted in the South Bronx, and similar matters. A self-conscious and visible trail to the choice of model—whether "police control" or "crime control" or something else—allows appellate courts, the media, and political decisionmakers to follow the court's rationale. The compelling reason for a self-conscious selection of a model is that pertinent decisions in the case can flow from that selection.

VI. CONCLUSION

Thus, it can be seen in both the Tombstone and South Bronx examples that judicial notice of pertinent legislative or policy facts can be outcome determinative.¹¹⁴ Accordingly, the following steps in judicial self-consciousness are important:

- (1) The trial court should ascertain whether police misconduct would be dispositive of one or more of the issues before the court.
- (2) The trial court should explicitly frame its proposed judicial notice of facts pertaining to any police matters, much in the fashion of Judge Spicer of Tombstone and to a lesser degree of Judge Baer in the Bronx situation.
- (3) Counsel for the parties should be invited to submit factual rebuttal to the judicially noted facts prior to implementation of judicial notice by the trial court.
- (4) An open examination of any cultural cocoon of the judge which may affect her use of judicial notice should be readily accepted.

112. *United States v. Pierre*, 932 F.2d 377, 388 (5th Cir. 1991).

113. *See Dellums v. Powell*, 566 F.2d 167, 211-14 (D.C. Cir. 1977) (Tamms, J., dissenting).

114. *See INQUEST*, *supra* note 1, at 25-26; *United States v. Bayless*, 913 F. Supp. 232, 241-42 (S.D.N.Y. 1996).

(5) All of the trial court's judicially noted facts should be explained by the trial judge in terms of the evidence submitted and also be subject to *de novo* review upon appeal.¹¹⁵

Judicial notice can be a tool of mischief and, unchecked, can become a universal solvent not containable in any known, rational vessel of the law. Such potential for mischief is greatly magnified when the doctrine of judicial notice of legislative facts is brought to bear at trial upon police conduct and the use of coercive governmental force in a variety of settings. These settings may include the admissibility of seized evidence at trial, the injury to or death of suspects in civil suits against the police, and many other situations. Thus, an etiquette is needed whereby the judicial notice of legislative facts pertaining to police conduct *must* be visible, subjected to adversary testing, and dealt with self-consciously because of the vital questions of governance itself that are inherent in such issues.

Now is an appropriate time to establish a new procedural protocol for use in the determination of facts by judicial notice in police conduct cases.¹¹⁶

115. MCCORMICK, *supra* note 70, at § 333. Also note the similarity of the proposal to the notice, reasoned decisions, and comment principles under the Administrative Procedures Act. See AMAN, JR. & MAYTON, ADMINISTRATIVE LAW §§ 8.4.3, 9.3, 10.02, 2.1.4 (1993).

116. See *supra* notes 60-64 and accompanying text.