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# 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<sup>1</sup>

GEORGE D. MARLOW<sup>2</sup>

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<sup>1</sup> This thesis is in partial fulfillment of the requirements for the Masters of Judicial Studies degree awarded jointly by the National Judicial College and The University of Nevada, Reno. The Masters of Judicial Studies program is a formal course of study for judges and is conducted for the most part on the campus of the University of Nevada, Reno. Judges who are so inclined may matriculate and earn the masters degree. The program has been in existence since 1986, and it has been attended by approximately 175 judges from nearly every state in the union and three foreign countries. To date, a masters degree has been earned by fifty eight judges. It is the only program of its kind in the United States, offering a degree specially suited for trial court judges.

<sup>2</sup> The author is a Dutchess County Court Judge, and he has been a member of the New York State Advisory Committee on Judicial Ethics since the Committee was created in 1987 by then Chief Administrative Judge Albert M. Rosenblatt. The author and his twenty judicial colleagues have participated in crafting more than sixteen hundred ethics opinions, which the Committee has issued in response to written inquiries by sitting judges and announced candidates for elective judicial office. Each inquiring judge and judicial candidate has sought the Committee's guidance in applying the New York State Chief Administrative Judge's Rules Governing Judicial Conduct to specific situations.

The author's interest in the subject of *sua sponte* research and *ex parte* communications of judges intensified following his 1996 appointment as the Committee's co-chair as well as from the Committee's earlier participation in the 1996 revision of New York's judicial conduct rules. In 1994, New York's Chief Administrative Judge charged the New York State Advisory Committee on Judicial Ethics with reviewing the American Bar Association's 1990 Model Code of Judicial Conduct. By 1994, the New York State Bar Association had adopted the Model Code in a modified form. The Committee's role was to compare the 1990 ABA and the 1994 New York versions of the Model Code with the then existing New York Chief Administrative Judge's Rules Governing Judicial Conduct. The Chief Administrative Judge invited the Committee to comment and to make recommendations for a revised set of rules to govern (1) New York State's approximately 3,400 full and part-time elected and appointed judges, (2) candidates for elective judicial office, and (3) various judicial hearing officers. The Committee studied all three sets of rules for nearly a year, and under the leadership of its former chair, retired Appellate Division Jus-

"Justice does hold true scales but it is not blind, nor should it be."

*Hon. Jack B. Weinstein*<sup>3</sup>

## I. INTRODUCTION

As scientific and technological issues appear in litigation more frequently and become more complex, judges will be inclined to conduct their own research in order to understand fully the questions facing the court. In *Judicial Use of Social Science Research*,<sup>4</sup> John Monahan and Laurens Walker propose that judges, during and as part of the decision-making process, may search for "legislative facts"<sup>5</sup> "through *sua sponte* library research"<sup>6</sup> and may consider empirical and social science research that they discovered by "searching for it themselves."<sup>7</sup> In their later text, *Social Science in Law: Cases and Materials*,<sup>8</sup> they repeat the same thought. At first blush, this suggestion appears at odds with orthodox American notions of due process and with traditional ethical concepts that discourage and prohibit judges from allowing, initiating, and considering any *ex parte* communications pertaining to cases pending or impending before them.<sup>9</sup>

tice Samuel J. Silverman, the Committee submitted proposals in 1995. The new rules became effective January 1, 1996, after New York's Chief Judge, Honorable Judith S. Kaye, in consultation with the Administrative Board of the State of New York, promulgated the current Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct. See N.Y. COMP. CODES R. & REGS. tit. 22, § 100 (1996). Section 100 is divided into six subsections and, in general, sets forth the obligations and duties of judges in New York.

<sup>3</sup> Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 539 (1994).

<sup>4</sup> John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991) [hereinafter *Judicial Use of Social Science Research*].

<sup>5</sup> See *infra* notes 55-56 and accompanying text (defining and explaining "legislative facts").

<sup>6</sup> *Judicial Use of Social Science Research*, *supra* note 4, at 574.

<sup>7</sup> *Id.* at 575.

<sup>8</sup> JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 499-500 (3d ed. 1994) [hereinafter *SOCIAL SCIENCE IN LAW*].

<sup>9</sup> See PAUL L. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 98-99 (1972) (discussing how the use of extra-legal facts was castigated when it conflicted with the Court's restrictive vision of substantive due process); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1460-62 (1990) (discussing the century-old debate concerning judicial activism and the influence of the famous dissents of Justices Holmes and Brandeis—the "Great Dissenters"—which opposed judicial interference with social and economic legisla-

However, as this article will demonstrate, certain limited steps can be taken to allow judges to acquire scientific and technological information through *ex parte* and *sua sponte* research, while still protecting due process rights.

The ethical dilemma posed by Monahan and Walker begins with a general proscription against *ex parte* communications initiated by or with a judge while a case is pending, impending, or within the decision-making process.<sup>10</sup> While the 1990 ABA Model Code of Judicial Conduct and its adopted versions in New York and in other states contain specific exceptions to that prohibition,<sup>11</sup> none explicitly permits judges to engage in non-legal library research or in any form of *ex parte* fact-finding in order to help judges correctly address vexing scientific questions raised in pending legal disputes. On the other hand, it could be argued that nothing in the current rules expressly and specifically forbids the kind of library exploration suggested by Monahan and Walker.<sup>12</sup> Thus, the core issue of this article is joined: may judges, while a case is pending or impending, and as part of the decision-making process, ethically engage in independent library or internet research, *sua sponte* and *ex parte*, to uncover, review, and consider legislative facts, social framework evidence, and other social, scientific and technological studies that affect the outcome of a case but are not adduced by the parties to the litigation?<sup>13</sup>

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tion). For an illustration of the traditional notion that judges should restrain themselves from *ex parte* communications, see the ABA Model Code of Judicial Conduct (1997), which provides in Canon 3B(7):

A judge shall not initiate, permit, or consider *ex parte* communications . . . concerning a pending or impending proceeding [except in certain prescribed circumstances] . . . (b) [a] judge may obtain the advice of a disinterested expert on the law . . . [i]f the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond . . . (e) [a] judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

<sup>10</sup> See *Judicial Use of Social Science Research*, *supra* note 4, at 582-84.

<sup>11</sup> See N.Y. COMP. CODES R. & REGS. tit 22, § 100.3(B)(6) (prohibiting judicial consideration of *ex parte* communications except in limited circumstances); MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1997) (proscribing *ex parte* communications except in certain circumstances); see also *supra* note 9 (setting forth *ex parte* communications restrictions in Canon 3(B)(7)).

<sup>12</sup> See *Judicial Use of Social Science Research*, *supra* note 4, at 574-76 (analogizing evaluation of scientific research to evaluation of case law).

<sup>13</sup> For other articles discussing issues related to the thesis of this article, see John R. Allison, *Combinations of Decision-making Functions, Ex Parte Communica-*

Given the changing legal atmosphere today, modifications of the rules concerning *sua sponte*, *ex parte* research may be forthcoming. The overwhelming majority of states, in varying degrees, have revised their judicial conduct codes since the adoption of the modified ABA Model Code of Judicial Conduct in 1990.<sup>14</sup> Much of that revision has been based upon the new ABA Model Code.<sup>15</sup> Therefore, the American legal system is likely to still be open to considering further clarification of and useful changes in current rules. Moreover, in the wake of the 1993 United States Supreme Court decision in *Daubert v. Merrell Dow*

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*tions, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1197 (1993) (defining and discussing *ex parte* communications); Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1 (1986) (advocating for legislative lawmaking over judicial lawmaking because the courts do not have access to the same information to which the legislature has access); Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955) (discussing what the author believes to be deficiencies in the judicial notice provisions of the evidence rules and offering alternatives); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-10 (1942) (discussing courts' uses of facts outside of the record); David Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) (discussing the role of social science in the law and proposing a framework by which its value can be assessed); C.T. Harhut, *Ex Parte Communications Initiated by a Presiding Judge*, 68 TEMP. L. REV. 673, 673 (1994) (addressing the lack of clear authority pertaining to judges' *ex parte* communications); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 513-14 (1986) [hereinafter *Social Authority*] (approving of an appellate court's authority to cite information not cited by the lower court when dealing with social science research); John W. Osborne, *Judicial/Technical Assessment of Novel Scientific Evidence*, 1990 U. ILL. L. REV. 497 (1990) (discussing various admissibility standards for scientific evidence).

<sup>14</sup> The author surveyed most of the fifty states in order to ascertain whether any states have ethics code provisions directly relevant to the core issue of this paper. Apparently, no state has such a code provision. Additionally, the author searched relevant code commentaries and conducted an extensive case law search. The results are incorporated in the body of this article.

<sup>15</sup> See Leslie Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 950 n.3 (1996) (listing the jurisdictions that have adopted the ABA Model Code of Judicial Conduct); Lisa L. Milford, *States Consider Adopting the 1990 Model Code of Judicial Conduct*, 13 JUD. CONDUCT REP. 1 (1992) (discussing state legislative movement to adopt portions of the ABA Model Code of Judicial Conduct); Memorandum from Cynthia Gray, Esq., Director, Center for Judicial Conduct Organizations, American Judicature Society (July 1997) (entitled *States' Consideration of the 1990 ABA Model Code of Judicial Conduct*) (on file with author). The author wishes to express his sincere appreciation to Ms. Cynthia Gray for her kind assistance during this project. She and her organization provide an enormously valuable resource to the judiciary.

*Pharmaceuticals, Inc.*,<sup>16</sup> which superseded the seventy year old *Frye* doctrine in some state courts and in federal courts,<sup>17</sup> the judiciary's role in considering all types of scientific evidence has been rapidly evolving, expanding, and undergoing re-examination by legal scholars, judges, and lawyers everywhere.<sup>18</sup> Also, modern America has seen an immense eruption of social and physical science research.<sup>19</sup> New scientific data, research results, and novel theories are advanced and published in virtually every field.<sup>20</sup> Together, these forces create pressure, which can sometimes be quite intense,<sup>21</sup> to give these new theories and

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<sup>16</sup> 509 U.S. 579 (1993). The *Daubert* Court held that the Federal Rules of Evidence provide the standard for admitting expert scientific testimony in a federal trial. *Id.* at 587-89. Under the *Daubert* standard, the *Frye* doctrine's requirement that the scientific method be "generally accepted" in the scientific community is not a determinative factor in considering the admissibility of scientific evidence. *Id.* at 588-89. Instead, it is simply a factor among many. *See id.* at 594.

<sup>17</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The *Frye* doctrine states that, in determining whether to admit scientific expert evidence, the court must examine whether the scientific method has attained "general acceptance" within the relevant scientific community. *Id.* at 1014.

<sup>18</sup> *See* James Richardson, *Dramatic Changes in American Expert Evidence Law: From Frye to Daubert*, 2(1) JUD. REV. 13 (1994) (discussing the increased role of the judiciary in analyzing and considering scientific data).

On June 16, 1997, A Conference of the Manhattan Institute's Center For Judicial Studies and the New York Academy of Sciences held a seminar entitled "Justice and 'Junk Science': Toward a Better Relationship Between Science, the Courts, and Society." This conference primarily dealt with issues surrounding the explosion of science into the justice system.

<sup>19</sup> *See* Alexander Morgan Capron, *Daubert and the Quest for Value Free "Scientific Knowledge" in the Courtroom*, 30 U. RICH. L. REV. 85, 85 (1996) (commenting on the continuous expansion of scientific research and its effects on our courtrooms); *see also* Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L. J. 624, 665 n.227 (1985) (noting that over the last few decades, scientific research has increased in the areas of race and I.Q.).

<sup>20</sup> *See, e.g.*, *People v. Taylor*, 552 N.E.2d 131, 132 (N.Y. 1990) (acknowledging the need, in certain circumstances, for expert testimony regarding rape trauma syndrome); *People v. Castro*, 540 N.Y.S.2d 143, 145 (Sup. Ct. 1989) (finding the use of DNA fingerprinting admissible in criminal cases); Victoria Slind-Flor, *Fertile Fields of Litigation: Did Power-Line Radiation Cause Cancer?*, NAT'L L.J., Apr. 26, 1993, at 1 (discussing the theory that electromagnetic fields from a utility company's high-voltage power lines may cause cancer).

<sup>21</sup> The author was a Judge of The New York State Family Court from 1984 to 1992. It was during that period and thereafter that a robust national legal debate raged over the scientific validity of the Child Sex Abuse Accommodation Syndrome (the "Syndrome"), and whether expert opinion testimony regarding the Syndrome that is offered to corroborate claims of child sex abuse should be admissible as evidence in a court. In 1987, New York found such testimony sufficiently reliable and therefore acceptable as corroborative evidence in *In re Nicole V.*, 518 N.E.2d 914, 917-18 (N.Y. 1987). Other states have drawn similar conclusions. *See, e.g.*, Stevens

findings a home in the courtroom.<sup>22</sup> Consequently, modern

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v. People, 796 P.2d 946, 948 (Colo. 1990); State v. Kim, 645 P.2d 1330, 1338 (Haw. 1982), *overruled by* State v. Batangan, 799 P.2d 48, 54 (Haw. 1990) (advising trial courts to admit such expert testimony cautiously); State v. Sandberg, 392 N.W.2d 298, 302-03 (Minn. 1986); State v. Middleton, 657 P.2d 1215, 1220-21 (Or. 1983). On the other hand, there are many courts and scholars who genuinely doubt the scientific reliability and viability of the Syndrome in the truth-finding process. See, e.g., People v. Nelson, 561 N.E.2d 439, 443 (Ill. 1990); *In re Gina D.*, 645 A.2d 61, 65 (N.H. 1994); see generally Mary Ann Mason, *The Child Sex Abuse Syndrome: The Other Major Issue in State of New Jersey v. Margaret Kelly Michaels*, 1 PSYCHOL. PUB. POL'Y & L. 399 (1995) (discussing the controversy over behavioral syndrome testimony in child sex abuse cases); James T. Richardson et al., *The Problems of Applying Daubert To Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995) (noting the difficulty in applying the Supreme Court's guidelines with respect to Syndrome evidence).

<sup>22</sup> For a look at the reaction of the New York Court of Appeals when confronted with the pressure to employ new theories in court, see *People v. Wesley*, 633 N.E.2d 451 (N.Y. 1994), and the concurring opinion of Chief Judge Kaye, where she wisely observes that "[i]t is not for a court to take pioneering risks on promising new scientific techniques, because premature admission both prejudices litigants and short-circuits debate necessary to determination of the accuracy of a technique." *Id.* at 462 n.4 (Kaye, C.J., concurring); see also *People v. Wernick*, 674 N.E.2d 322, 325 (N.Y. 1996) (ruling that narrowly tailored testimony about neonaticide syndrome is inadmissible without a *Frye* hearing to determine its reliability); *In re Nicole V.*, 518 N.E.2d 914, 916-18 (N.Y. 1987) (recognizing the child sex abuse syndrome as a legally cognizable diagnosis to corroborate other evidence of child abuse); *People v. Hughes*, 453 N.E.2d 484, 485 (N.Y. 1983) (overturning conviction, in part, due to wrongful admission of rape victim's post-hypnotic recollections); *People v. Serrano*, 631 N.Y.S.2d 340, 341 (App. Div. 1995) (denying defendant's request for a hearing to determine admissibility of expert testimony regarding use of analysis based on scanning electron microscope); *People v. Burton*, 590 N.Y.S.2d 972, 977 (Sup. Ct. 1992) (disallowing acute grief syndrome defense); *People v. Weinstein*, 591 N.Y.S.2d 715, 722 (Sup. Ct. 1992) (discussing the admissibility of expert psychiatric testimony); *People v. Smith*, 459 N.Y.S.2d 528, 542 (Sup. Ct. 1983) (declining to completely bar all post-hypnotic testimonial discrepancies); cf. *Williamson v. Reynolds*, 904 F. Supp. 1529, 1556 (E.D. Okla. 1995) (finding the admission of a hair sample comparison under the *Daubert* test in a capital case to be error), *aff'd sub nom.* *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Smith v. State*, 677 So.2d 1240, 1249 (Ala. Crim. App. 1996) (permitting conflicting DNA evidence to be submitted to the jury); *State v. Johnson*, 922 P.2d 294, 300 (Ariz. 1996) (admitting DNA probability calculations based on the modified ceiling method); *State v. Hunter*, 694 A.2d 1317, 1318 (Conn. 1997) (holding polygraph testing as per se inadmissible evidence); *State v. Ruthardt*, 680 A.2d 349, 356 (Del. Super. Ct. 1996) (admitting certain blood alcohol testing procedures subject to specialized expert testimony and prejudicial limitations); *People v. Haywood*, 530 N.W.2d 497, 499 (Mich. Ct. App. 1995) (holding bloodstain interpretation evidence admissible); *State v. O'Key*, 899 P.2d 663, 670 (Or. 1995) (holding admissible the Horizontal Gaze Nystagmus test to prove that the defendant-driver was under the influence of alcohol); *State v. Morel*, 676 A.2d 1347, 1353-56 (R.I. 1996) (upholding the trial court's decision to allow expert testimony on the statistical significance of DNA analysis); *State v. Moeller*, 548 N.W.2d 465, 481 (S.D. 1996) (acknowledging the polymerase chain reaction DNA typing procedure as a valid method of forensic identification); *State v. Jones*, 922 P.2d 806, 810-811

judges increasingly find themselves acting as gatekeepers in order to moderate, regulate, and edit the flow of science that routinely looks across legal thresholds for endorsement.<sup>23</sup> In this role, judges are forced to render decisions on a wide variety of scientific subjects in which probably most judges do not have extensive formal training or experience.<sup>24</sup>

New York Court of Appeal's Chief Judge Kaye's concurring opinion in *People v. Wesley*<sup>25</sup> plainly illustrates the relevance of the core issue of this article. Her opinion reaffirms the notion that courts facing the task of resolving the admissibility of novel scientific evidence must consider "whether, theoretically, the accepted techniques, when performed as they should be, generate results generally accepted as reliable within the scientific community."<sup>26</sup> Although Chief Judge Kaye made this statement in the context of describing the *Frye* doctrine,<sup>27</sup> which provides that scientific expert evidence is admissible when it has been "generally accepted" in the relevant scientific community, the statement, in large measure, remains valid in describing the federal standards recently set forth in *Daubert*. The *Daubert* Court placed continuing emphasis on the question of whether a novel theory or technique has attained widespread acceptance in a particular area of the scientific community as a relevant, but not a dispositive, factor in assessing its reliability; instead, the Court cited numerous factors that federal courts should consider in de-

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(Wash. 1996) (finding DNA probability evidence based on the interim ceiling principle admissible); *United States v. Bush*, 44 M.J. 646, 647 (A.F. Ct. Crim. App. 1996) (admitting the use of chemical hair analysis to establish the accused's use of cocaine), *aff'd*, 47 M.J. 305 (C.A.A.F. 1997), *cert. denied*, 118 S. Ct. 1048 (1998).

<sup>23</sup> See Peter W. Huber & Kenneth R. Foster, *Science in the Courts*, Center for Judicial Studies, THE MANHATTAN INSTITUTE, Civil Justice Memo No. 33 (Sept. 1997).

<sup>24</sup> See Richardson et al., *supra* note 18, at 11 (noting that *Daubert* places the onus of determining whether scientific evidence should be presented to the jury, on judges, compelling them to participate in fact-construction); Weinstein, *supra* note 3, at 555 (discussing how judges can overcome their lack of scientific training when presiding over massive tort cases requiring expert evidence). Judges have occasionally lamented their lack of training in technical subject areas which they must understand in order to issue informed rulings. For example, see *Morgan v. Kerrigan*, 530 F.2d 401, 421 n.29 (1st Cir. 1976), where the court wrote: "[t]hroughout this series of submissions this court has been burdened with reports written for sociologists by sociologists utilizing sophisticated statistical and mathematical techniques. We lack the expertise to evaluate these studies on the merits."

<sup>25</sup> 633 N.E.2d 451, 461-68 (N.Y. 1994).

<sup>26</sup> *Id.* at 462.

<sup>27</sup> See *id.*

termining the admissibility of scientific evidence.<sup>28</sup> Regardless of whether a judge must determine reliability under either the *Frye* or the *Daubert* standard, some judges will likely be tempted to look beyond the submitted materials, literature, and testimony to ascertain how a new technique or theory is regarded by other scientists.<sup>29</sup> Therefore, this seems a particularly apt moment in legal history to consider whether modern standards of judicial ethics should be adjusted to permit judges to engage in *sua sponte, ex parte* research while a case is pending or impending and, if so, how they may go about it without forsaking fundamental due process rights.

#### A. A Personal Anecdote: The Inclination to Look Beyond the Record in Family Court

Perhaps the following personal anecdote will help to demonstrate how this issue can arise. In 1988, when I was a New York State Family Court Judge, I decided a sex abuse/parental rights termination case, unquestionably the most difficult one in my then nine-year judicial career. In *Dutchess County Department of Social Services ex rel. T.G. v. Mr. and Mrs. G.*,<sup>30</sup> the respondent couple had been found by two separate courts (one in Georgia and one in New York) to have sexually abused the wife's four year old twin children of a prior marriage. Under New York's statutory permanency planning scheme, I had previously ordered

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<sup>28</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993) ("A 'reliability assessment does not require, although it does permit, . . . an express determination of a particular degree of acceptance within that community.'") (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)); see also *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1396 (D. Or. 1996) (finding that expert evidence has to qualify as scientific knowledge and be sufficiently reliable as required by *Daubert*); Stan Kitzinger, Note, *The Supreme Court Waves Good-Bye to Frye: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 58 ALB. L. REV. 575, 597-98 (1994) (analyzing the list of factors set forth in *Daubert* for determining reliability of evidence); Alan W. Tamarelli, Jr., Recent Development, *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability—The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony*, 47 VAND. L. REV. 1175, 1192 (1994) (discussing the non-determinative characteristic of the general acceptance factor under the *Daubert* test).

<sup>29</sup> In July of 1997, at a judicial seminar in Tarrytown devoted to "Scientific Proof and Expert Witnesses in New York," it was pointed out by Herald Price Fahringer, a highly regarded trial attorney, that as of July 9, 1997, *Daubert* had been cited or discussed in 643 federal cases. Herald Price Fahringer, Remarks at the Judicial Seminar on Scientific Proof and Expert Witnesses in New York (July 1997).

<sup>30</sup> 534 N.Y.S.2d 64 (Fam. Ct. 1988).

the couple into treatment in 1985 to give them the opportunity to overcome the behavioral disorder which had several months earlier resulted in the temporary, court-ordered foster care placement of T.G., their biological eighteen month old son.<sup>31</sup>

My goal was to afford these parents an opportunity to complete a process of treatment so they could eventually be trusted to provide T.G. with a safe, abuse-free home. Although they cooperated with the treatment plan in most respects for an extended period of time, they both adamantly and consistently refused to admit during the therapeutic process that they had sexually abused the children, even though they were twice found to have committed the abuse. Absent their acknowledgment that they abused the children, the attending psychologists opined that the respondents could not be successfully treated and consequently they could not be trusted to provide a safe home for their little boy.<sup>32</sup>

Whether a person's parental rights could be permanently terminated under those circumstances pursuant to New York law<sup>33</sup> was an issue which, until then, had never been the subject of a published decision by a New York court, and none was found elsewhere.

Recognizing the magnitude of the issue, the Dutchess County Department of Social Services' attorney, Kathryn Lazar, adduced exceptionally strong scientific testimony to support the agency's contention that successful treatment was unlikely in the absence of an admission by these parents that they had acted abusively toward Mrs. G's children.<sup>34</sup> The department requested termination of the couple's parental rights on the ground that they would likely never be able to assure T.G.'s safety.<sup>35</sup> After a lengthy hearing, I concurred, ending respondents' parental rights and freeing this little boy (and, later, his afterborn brother) for adoption.<sup>36</sup> That decision was affirmed on appeal by the Second Department of New York's Appellate Division,<sup>37</sup> the State's intermediate appellate court. The other three of New York's four appellate departments have since approved this

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<sup>31</sup> See *In re T.G.*, 491 N.Y.S.2d 901, 908 (Fam. Ct. 1985).

<sup>32</sup> See *Dutchess County*, 534 N.Y.S.2d at 70.

<sup>33</sup> See N.Y. SOC. SERV. LAW § 384-b (McKinney 1992 & Supp. 1997-98).

<sup>34</sup> See *Dutchess County*, 534 N.Y.S.2d at 67-69.

<sup>35</sup> See *id.* at 65.

<sup>36</sup> See *id.* at 71-72.

<sup>37</sup> See *In re Travis Lee G.*, 565 N.Y.S.2d 136, 137 (App. Div. 1991).

principle as well.<sup>38</sup>

The struggle to evaluate properly the scientific opinion testimony in that case was substantial given my limited scientific training.<sup>39</sup> However, the task of reaching a just decision was significantly advanced by Dutchess County's decision to call as an expert witness one of America's leading authorities on the treatment of sex offenders, Dr. Judith V. Becker, an associate professor of clinical psychology in psychiatry at the Columbia College of Physicians and Surgeons.<sup>40</sup> Dr. Becker's testimony was clear, well-reasoned, well-documented, and exceptionally articulate.

However, notwithstanding Dr. Becker's compelling testimony, I was nevertheless inclined to search for and assess scientific research results outside the record to confirm or challenge Dr. Becker's views. In my opinion, this case underscores the vital need for judges to be occasionally permitted and encouraged to reach beyond evidence presented by the parties and to obtain additional scientific research material in order to render the correct decision. Although the temptation to look beyond the record was considerable, the rules governing judicial conduct at the time did not invite such ventures.<sup>41</sup> Hence, in light of the

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<sup>38</sup> See *In re Rebecca D.*, 635 N.Y.S.2d 847, 848 (App. Div. 1995) (finding that respondent's inability to address the abuse that led to removal of the children from the home was inadequate for the future safety of the children); *In re Commitment of Guardianship and Custody of Diana Crystal D.*, 606 N.Y.S.2d 186, 187 (App. Div. 1994) (upholding decision to terminate parental rights because evidence established that respondent permanently neglected his children by failing to plan for their future); *In re Kayte "M."*, 608 N.Y.S.2d 711, 712 (App. Div. 1994) (affirming the family court's decision that the child was permanently neglected, thereby terminating respondent's parental rights).

<sup>39</sup> My experience with this case reinforced my belief in the wisdom of the statutory obligation contained in the New York Family Court Act, which mandates "[j]udges of the family court [to] also be familiar with areas of learning and practice that often are not supplied by the practice of law." N.Y. FAM. CT. ACT § 141 (McKinney 1983).

<sup>40</sup> See *Dutchess County*, 534 N.Y.S.2d at 65, 67-68.

<sup>41</sup> In the context of child protective proceedings, this need to look beyond the evidence in the record is greater than in other matters for numerous reasons: first, the evidence is often ambiguous and rarely overwhelming; second, the overall picture can change very quickly; and third, the stakes for the child and the parents are very high.

Although the *ex parte* information was of a very different character and was acquired in a very different way in *In re Michael B.*, 604 N.E.2d 122, 133 (N.Y. 1992), the New York Court of Appeal's willingness to depart from its usual procedures to act on information obtained outside the traditional record on appeal in order to protect the welfare and safety of children is evident. In that case, the majority

amount of activity and thought in the judicial-legal community about judicial ethics, the time seems suitable to examine and re-think this narrow aspect of the *ex parte* communications rules.<sup>42</sup>

### B. Assumptions

The underlying premise of this article is that often trial and appellate judges alike face the issue of whether they should resort to *sua sponte*, *ex parte* research, notwithstanding their inherently separate and distinct roles and positions in the justice system *vis a vis* the litigants, the lawyers, and the fact-finding process itself. While one could argue that any rules governing *sua sponte*, *ex parte* research should apply consistently at every judicial tier because the underlying principles and concerns affecting the content of these rules are in many ways parallel at each level of the judiciary, this article's focus is principally on trial level judges for a number of reasons: scientific evidence is first proffered and analyzed at the trial level;<sup>43</sup> each trial judge must face these often momentous and daunting decisions alone; the parties at the trial level may not be able to afford to hire expert witnesses to prove a theory;<sup>44</sup> and decisions about science are often not challenged on appeal.<sup>45</sup> Whether any new rule

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stretched beyond the record on appeal and relied on new factual information to protect a child at risk.

<sup>42</sup> See, e.g., 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, 1029-30 (1994) (analyzing the issue of *ex parte* communication between the judge and the appointed expert during the course of litigation); Harhut, *supra* note 13, at 673 (discussing rules governing *ex parte* communications between a presiding judge and a third party, including other judges).

<sup>43</sup> See generally Jay P. Kesan, Note, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985, 2011-12 (1996) (explaining that under the *Daubert* test, the Court delegated to trial judges the role of assessing the admission of scientific testimony as part of the gatekeeping process); Holley Davis Thames, Comment, *Frye Gone, But Not Forgotten in the Wake of Daubert: New Standards and Procedures for Admissibility of Scientific Expert Opinion*, 63 MISS. L.J. 473, 489 (1994) (discussing the roles of trial judges and juries in considering the admissibility of scientific expert testimony).

<sup>44</sup> See Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A Closer Look at Juror "Incompetence" and Scientific "Objectivity"*, 25 CONN. L. REV. 1083, 1092 (1993) (commenting on the growth of an expert witness "industry" to provide witnesses to parties that are able to afford them); David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 288 (1990) (denoting the inability of an indigent in some cases "to assert legitimate claims or defenses solely because of her inability to hire an expert witness").

<sup>45</sup> See Carl F. Cranor et al., *Judicial Boundary Drawing and the Need for Con-*

should apply equally to appellate judges is an issue best left for another day.<sup>46</sup>

Similarly, while the concept of judicial notice<sup>47</sup> is somewhat related to the issue of the judicial use of scientific research information obtained *ex parte*, it involves significantly different ethical implications. Therefore, judicial notice as it may relate to *sua sponte* and *ex parte* research is not treated in this article. Furthermore, based on many conversations with judges from New York and other states with diverse demographic backgrounds, and upon the dearth of literature on the precise issue of this article, this article assumes that relatively few judges have attempted to analyze this issue in depth. Indeed, I contacted the federal and all of the thirty-nine state judicial ethics advisory committees, and received a response from a majority of the committees. From those responding, there appear to be no ethics opinions written by any of them regarding this article's core issue.

### C. Definitions

This paper relies on the following definitions:

An *ex parte* communication is an oral or a written utterance by a person or a party, to a judge, about the substantive or procedural merits of a pending or impending lawsuit that may affect the outcome of the case.<sup>48</sup> An *ex parte* communication is one delivered to the judge or made in the judge's presence, without the knowledge of, and normally outside the presence of, at least one of the parties to the case.<sup>49</sup>

*Sua sponte* is a phrase used to characterize a self-initiated

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*text-Sensitive Science in Toxic Torts After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 16 VA. ENVTL. L.J. 1, 18 (1996) (discussing the standard of review regarding a trial judge's decision on the admissibility of scientific evidence, which in most circuits allows overturning only if "manifestly erroneous").

<sup>46</sup> For an interesting discussion of the issue of this article and related issues in the context of appellate level litigation, see 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 (1960).

<sup>47</sup> See 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 201.1 (4th ed. 1996) (explaining the doctrine of judicial notice that allows acceptance of matters as true without formal evidentiary proof).

<sup>48</sup> See 5 U.S.C. § 551(14) (1994) (defining *ex parte* communication); *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 632 n.31 (D.C. Cir. 1979) (Wright, J., concurring) (same); Allison, *supra* note 13, at 1197 (same).

<sup>49</sup> See BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

decision or act of a judge,<sup>50</sup> as distinguished from an act or decision of a judge undertaken at the behest of, or in response to a request, act, or statement of an attorney or a party.

*Sub judice* describes the period of time during which a pending case is being heard and considered for decision by a court.<sup>51</sup>

*Adjudicative fact* is a phrase defined by Professor Kenneth Culp Davis in *An Approach to Problems of Evidence in the Administrative Process*,<sup>52</sup> as follows: "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>53</sup> The concept is again explained in *Bowling v. Department of Insurance*,<sup>54</sup> where Judge Smith referred to "adjudicative facts" as "garden-variety" and "conventional" facts.<sup>55</sup> Hence, "adjudicative facts" refers to facts established through testimony and physical exhibits introduced by the parties in an adversarial setting at hearings and trials.

*Legislative facts* are also defined by Professor Kenneth Culp Davis as follows: "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>56</sup> Monahan and Walker define "legislative facts," distinguishing them from "adjudicative facts," in the following way:

Legislative facts . . . are facts that courts use when they make law (or "legislate"), rather than simply apply settled doctrine to resolve a dispute between particular parties to a case. While the determination of adjudicative facts affects only the litigants before the court, the determination of legislative facts influences the content of legal doctrine itself, and therefore affects many parties in addition to those who brought the case.<sup>57</sup>

*Social framework* evidence, according to Monahan and Walker, refers to "general conclusions from social science re-

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<sup>50</sup> See *id.* at 1424.

<sup>51</sup> See *id.* at 1425.

<sup>52</sup> 55 HARV. L. REV. 364 (1942).

<sup>53</sup> *Id.* at 402.

<sup>54</sup> 394 So. 2d 165, 174 (Fla. 1981).

<sup>55</sup> *Id.*

<sup>56</sup> Davis, *supra* note 52, at 402.

<sup>57</sup> SOCIAL SCIENCE IN LAW, *supra* note 8, at 129.

search in determining factual issues in a specific case."<sup>58</sup>

## II. HISTORICAL BACKGROUND

The inclination of most courts to look beyond traditional adjudicative facts and live expert testimony is not a new phenomenon. In the early twentieth century, courts, in rendering decisions with long range significance, began to consider legislative facts developed as the result of scientific or other research. However, they limited themselves to materials cited by the parties in their briefs.<sup>59</sup> Recently, that limitation has given rise to a review of this ethics issue. For example, modern legal scholars, such as John Monahan and Laurens Walker, have advocated that "as courts are free to find legal precedents that the parties have not presented, they should also have the power to locate

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<sup>58</sup> Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 560 (1987); see also Teresa S. Renaker, *Evidentiary Legerdemain: Deciding When Daubert Should Apply to Social Science Evidence*, 84 CALIF. L. REV. 1657, 1687 (1996) (stating that one of the uses of social science evidence is to decide issues of fact specific to the case at hand). This concept was born from Walker's and Monahan's belief that the Kenneth Culp Davis model, which defines legislative facts and distinguishes them from adjudicative facts, fails to give judges guidance about how social science research may be acquired, evaluated, and used to give appropriate effect to legislative facts in a particular case. Because Davis treats scientific research as fact, rather than as the functional equivalent of legal precedent, Walker and Monahan believe that courts may not independently search for such research material since, generally, "factual" investigations may not be undertaken by courts without the parties' knowledge, consent, and participation. They urge that only if courts change their attitudes about social science research evidence (legislative facts) and view it as having precedential authority—i.e., social authority similar to case law—may it then conveniently and effectively enhance the formulation of rules of law. See Walker & Monahan, *supra*, at 585-87. They argue that viewing high quality social science research as "social authority" (legal precedent), instead of treating it as fact, can be done fairly and without compromising the parties' rights or the reliability of judicial outcomes. See *id.* at 585.

<sup>59</sup> See, e.g., David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 560-61 (1991) (discussing the Court's use of a theory of human relations contained in the party's brief in *Muller v. Oregon*, 208 U.S. 412 (1908)); Neil Coleman McCabe, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 TEMP. L. REV. 1229, 1231 (1992) (stating that the *Muller* Court used information contained in the original "Brandeis brief" to aid in its decision). Since the early twentieth century, courts have conducted independent library research that has been incorporated into the decision-making process. See Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 31-32 (1988) (citing *Brown v. Board of Education*, 347 U.S. 483 (1954), to illustrate the Court's consideration of evidence beyond the record in deciding fundamental factual issues presented in the case).

social science research through independent investigation.”<sup>60</sup> The following cases illustrate how some courts have employed social science research within certain limits.

In the 1908 case *Muller v. Oregon*,<sup>61</sup> the Supreme Court considered the legality of Oregon’s statutory effort to protect women from health and other risks resulting from working excessively long hours.<sup>62</sup> Attorney Louis Brandeis presented a brief to the Court containing legislative facts—namely, research reports and findings, as well as laws from foreign countries and other states—which convincingly demonstrated a rational and factual basis for Oregon’s legislation limiting the number of hours that women may work.<sup>63</sup> The Court overruled precedent and upheld the Oregon law containing these new labor restrictions.<sup>64</sup>

Time and again since 1908, judges have reached out for social science evidence, scientific survey results, legislative facts, social framework evidence, and other research to support their legal and factual conclusions.<sup>65</sup> Among the most well-known and significant twentieth century examples of judicial use of social science research to support a legal conclusion is the United

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<sup>60</sup> *Social Authority*, *supra* note 13, at 497 (footnote omitted).

<sup>61</sup> 208 U.S. 412 (1908).

<sup>62</sup> *Id.* at 416-17.

<sup>63</sup> *See id.* at 419-20 n.1. In a decision written by Justice Brewer, the opinion refers to the corresponding law of nineteen states and seven foreign nations offered in support of Louis Brandeis’ brief to the Court. *See id.* The Brandeis brief concluded that women’s “maternal functions . . . [were] so important and so far reaching” that justification for statutory hourly labor restrictions “need hardly be discussed.” *Id.*

<sup>64</sup> *See id.* at 423. It is believed that this is the first major case in which judges extensively used social scientific studies to justify a legal result. *See* 16 AM. JUR. 2d *Constitutional Law* § 134 (1979) (discussing the Brandeis Brief and its impact on the courts’ use of economic and sociological studies); John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center’s New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183, 1184 (1996) (discussing how the Brandeis Brief was the beginning of the judiciary’s “love-hate relationship with scientific evidence”); Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 628 (1985) (discussing Brandeis’ persuasive use of social science in *Muller v. Oregon*); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 304 (1989) (discussing the Brandeis Brief and stating that it was the first use of social science evidence in a court’s decision). For a complete reading of the Brandeis brief, see LOUIS D. BRANDEIS, *MULLER V. OREGON, BRIEF FOR DEFENDANT IN ERROR* (1907), reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63 (1975).

<sup>65</sup> *See generally* Currie, *supra* note 46 (discussing various instances when courts have consulted material outside of the record to aid in their decision-making process).

States Supreme Court's opinion in *Brown v. Board of Education of Topeka*,<sup>66</sup> where the Court adopted a factual finding of a Kansas court declaring that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children."<sup>67</sup> The Supreme Court added that "this finding [was] amply supported by modern authority."<sup>68</sup> Then, in a footnote of the opinion, the Court cited a list of psychology and social science literature as supporting authority.<sup>69</sup>

Similarly, the Court's opinion in *Miranda v. Arizona*<sup>70</sup> is replete with references to studies, analyses of police interrogation tactics, and other writings relevant to the subject of obtaining statements from crime suspects.<sup>71</sup> The *Miranda* Court, however, went further than merely citing sociological studies of varying descriptions. The Court also referred to the New York Times' newspaper accounts of cases of police misconduct<sup>72</sup> and the Los Angeles Times' chronicle of cases involving criminal confessions.<sup>73</sup>

<sup>66</sup> 347 U.S. 483 (1954) (holding that separate public school facilities for black and white children are inherently unequal).

<sup>67</sup> *Id.* at 494 ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone.").

<sup>68</sup> *Id.*

<sup>69</sup> The Court cited the following sources containing the opinions of sociologists and psychologists: K.B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY AND DEVELOPMENT (Midcentury White House Conference on Children and Youth 1950); WITMER & KOTINSKY, PERSONALITY IN THE MAKING (1952); Deutscher & Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); BRAMFELD, EDUCATIONAL COSTS, IN DISCRIMINATION AND NATIONAL WELFARE 44-48 (MacIver ed. 1949); FRAZIER, THE NEGRO IN THE UNITED STATES 674-681 (1949); and MYRDAL, AN AMERICAN DILEMMA (1944). See *Brown*, 347 U.S. at 494-95 n.11.

<sup>70</sup> 384 U.S. 436 (1966) (holding that the government may not use statements of criminal defendants obtained by police questioning unless the police demonstrate the use of procedural safeguards before such questioning).

<sup>71</sup> *Id.* at 440 (referencing the many scholarly works pertaining to the Fifth Amendment rights of suspects in police custody); see also *id.* at 445 n.5 (identifying studies undertaken in the 1930s and in 1961 that addressed police interrogation techniques). These studies concerned the prevalence of "third degree" interrogation of criminal defendants and thus became relevant to the Court's holding.

<sup>72</sup> See *id.* at 455 n.24 (describing events involving police interrogation techniques that resulted in a suspect making false confessions).

<sup>73</sup> See *id.* at 441 n.3 (discussing the views of a Los Angeles police chief and a prosecutor regarding the admissibility of improperly obtained confessions).

In *Ballew v. Georgia*,<sup>74</sup> Justice Blackmun cited several noted studies of the effects of jury size on decision-making.<sup>75</sup> He wrote that, although “some” of the studies were pressed upon the court by the parties, the Court “carefully” read them “because they provide[d] the only basis, besides judicial hunch, for a decision.”<sup>76</sup> Thus, unlike the Court’s opinions in *Muller*, *Brown*, and *Miranda*, it seems that the *Ballew* Court went beyond the record to review social science data, which eventually played a part in the Court’s decision-making process. That inference is supported by Justice Powell’s three member concurring opinion criticizing Justice Blackmun’s “heavy reliance” on studies that had not been “subjected to the traditional testing mechanisms of the adversary process.”<sup>77</sup>

In the same way, in *State v. O’Key*,<sup>78</sup> the Oregon Supreme Court conducted “[its] own research”<sup>79</sup> and considered “numerous other sources”<sup>80</sup> beyond the scientific evidence adduced at a hearing considering the admissibility of the Horizontal Gaze Nystagmus test.<sup>81</sup> Similarly, in *State v. Marcus*,<sup>82</sup> the Appellate Division of the New Jersey Superior Court appears to have gone beyond the proof adduced at a *Frye* hearing held to determine the admissibility of DNA evidence in a murder case. The *Marcus* court cited a report of the National Research Council issued subsequent to the conclusion of the hearing in order to help determine the admissibility of the evidence.<sup>83</sup> The court affirmed the defendant’s murder conviction and held the DNA evidence to be admissible.<sup>84</sup>

These cases are examples of courts setting their sights either beyond traditional adjudicative facts or beyond the trial record

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<sup>74</sup> 435 U.S. 223 (1978).

<sup>75</sup> *Id.* at 231 n.10. The Court, for example, acknowledged the prevalence of bias in small groups as well as the inability of a small group of jurors to remember all of the facts of the case at bar. *See id.* at 232-33.

<sup>76</sup> *Id.* at 232.

<sup>77</sup> *Ballew*, 435 U.S. at 246 (Powell, J., concurring) (questioning both the “wisdom” and “necessity” of using such studies).

<sup>78</sup> 899 P.2d 663 (Or. 1995) (en banc).

<sup>79</sup> *Id.* at 686.

<sup>80</sup> *Id.* at 682.

<sup>81</sup> *Id.* at 670 (explaining police administration of the Horizontal Gaze Nystagmus field sobriety test in a prosecution for driving while intoxicated).

<sup>82</sup> 683 A.2d 221 (N.J. 1996).

<sup>83</sup> *See id.* at 227 (citing a pre-publication copy of a 1996 report by the Committee on DNA Forensic Science of the National Research Council).

<sup>84</sup> *See id.* at 233-34.

itself to discover relevant information "outside the courtroom."<sup>85</sup> These decisions demonstrate how conscientious judges will inevitably prize more and better information whenever they attempt to answer complex, new, or uncommon questions of science. Nevertheless, because information obtained *ex parte* has the potential of misleading the court and creating bias on the part of judges, the rules of judicial conduct must ensure that *ex parte* data is received in a balanced way in order to simultaneously achieve the benefits of better information and to avoid the risks inherent in its *ex parte* acquisition.<sup>86</sup>

### III. ETHICS CODE DEVELOPMENT

Society's ideals, as voiced in rules of conduct and comportment for judges, have evolved over centuries to become the relatively well-developed and generally uniform sets of principles observed by modern American judges in all state and federal courts. The earliest written expectations about judges that this writer has unearthed are Biblical. In I Deuteronomy, 16-17 and XVI Deuteronomy 19, it is respectively proclaimed:

And I charged your judges at that time, saying, Hear *the causes* between your brethren, and judge righteously between *every* man and his brother, and the stranger *that is* with him. Ye shall not respect persons in judgment; *but* ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment *is* God's: and the cause that is too hard for you, bring *it* unto me, and I will hear it.<sup>87</sup>

Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift: for a gift doth blind

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<sup>85</sup> Jay C. Carlisle, *Ex Parte Communication by the Judiciary*, N.Y. ST. BAR J., Nov. 1986, at 12. Professor Carlisle quotes New York's former Chief Judge Charles Breitler as saying: "The impulse for seeking assistance, of course, is the desire to learn and to make sure that one's reasoning and conclusions will more likely be correct. This is done quite often, from what I learn." *Id.* (quoting Honorable Charles Breitler, Address to a Conference on Judicial Ethics at the Chicago Law School, reprinted in 154 N.L.J. 1 (Oct. 8, 1965)).

<sup>86</sup> See generally Stephan Landsman & Richard J. Rakas, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (discussing the potential biasing effects of *ex parte* material on both judges and jurors).

<sup>87</sup> *Deuteronomy* 1:16-17 (King James). One could, perhaps with tongue in cheek, argue that this last command is the earliest attempt to initiate an *ex parte* communication.

the eyes of the wise, and pervert the words of the righteous.<sup>88</sup>

One of history's most profound assertions about society's perceptions of its judges is inscribed in Magna Charta, which illustrates the high priority that society gives to the quality of the judiciary and to its mission. Magna Charta XLV echoes Deuteronomy, defining the judiciary's mission as sacred: "We will not make Justiciaries . . . excepting of such as know the laws of the land, and are well disposed to observe them."<sup>89</sup>

Sir Francis Bacon (1561-1626), in his essay *Of Judicature*, refers to certain key traits that we expect judges to exhibit: these traits include integrity, patience, restraint, and open-mindedness. In terms of this article's core issue, Bacon offers an early clue that prohibitions against *ex parte* communications would someday be the norm. He wrote: "Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar."<sup>90</sup> This comment can be interpreted in a manner so as to credit Bacon with being one of the first scholars to emphasize the importance of judges listening to and focusing on the evidence presented by lawyers instead of trying, *sua sponte*, to find it elsewhere.

In *LORD HALE'S RULES FOR HIS JUDICIAL GUIDANCE: Things Necessary to Be Continually Had in Remembrance*,<sup>91</sup> Sir Matthew Hale set forth a more detailed guide for judicial behavior. This seventeenth century primer for judicial conduct is simpler than, and different from, our more extensive and detailed modern rules. It reads as follows:

1. That in the administration of justice I am entrusted for God, the king of the country; and therefore,
2. That it be done, 1st, uprightly; 2ndly, deliberately; 3rdly, resolutely.
3. That I rest not upon my own understanding or strength, but

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<sup>88</sup> Deuteronomy 16:19 (King James).

<sup>89</sup> MAGNA CHARTA art. 45 (1215), reprinted in BOYD C. BARRINGTON, *THE MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND* 228, 241 (1993).

<sup>90</sup> George D. Marlow, *Opinions of the New York State Advisory Committee on Judicial Ethics: Their Language and Rhetoric*, 69 N.Y. St. B. J. 32 (Nov. 1997).

<sup>91</sup> See *In re Code of Judicial Conduct*, 643 So. 2d 1037, 1039 n.2 (Fla. 1994) (reprinting an excerpt from LORD HALE'S FOR HIS JUDICIAL GUIDANCE, *Things Necessary to Be Continually Had in Remembrance*).

implore and rest upon the direction and strength of God.

4. That in the execution of justice I carefully lay aside my own passions, and do not give way to them, however provoked.

5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions.

6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.

7. That I never engage myself in the beginning of a cause, but reserve myself unprejudiced till the whole be heard.

8. That in business capital, though my nature prompt me to pity, yet to consider that there is also pity due to the country.

9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

10. That I be not biased with compassion to the poor or favor to the rich, in point of justice.

11. That popular or court applause, or distaste, have no influence upon any thing I do in point of distribution of justice.

12. Not be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice.

13. If in criminals it be measuring cast, to incline to mercy and acquittal.

14. In criminals, that consist merely in words when no more harm ensues, moderation is no injustice.

15. In criminals of blood, if the fact be evident, severity is justice.

16. To abhor all private solicitations, of what kind soever, and by whomever, in matters depending.

17. To charge my servants; 1st, not to interpose in any business whatsoever; 2d, not to take more than their known fees; 3rd, not to give any undue precedence to causes; 4th, not to recommend counsel.

18. To be short and sparing at meals, that I be fitter for business.<sup>92</sup>

Embodied in this inventory of fundamental admonitions,

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<sup>92</sup> *Id.* (denoting the eighteen rules for judicial guidance set forth by Sir Matthew Hale in the mid-1600s).

which was drafted for judges more than three centuries ago, are the roots of today's codes of judicial conduct. Lord Hale highlights, among other things, the importance of judges remaining impartial; he cautions against deciding cases prematurely; and he speaks of applying the law regardless of popular applause or distaste.

For purposes more pertinent here, Lord Hale plants the seeds for the growth of modern prohibitions against *ex parte* communications by urging judges "[t]o abhor all private solicitations, of what kind soever, and by whomever, in matters depending."<sup>93</sup> The most obvious interpretation of "private solicitations" would surely include attempts to bribe a judge. However, it seems equally clear that "private solicitations" also includes various other, non-criminal modes of *ex parte* communications since the phrase is modified and its meaning is broadened by words such as "of what kind soever" and "all."

Although Lord Hale's rules for judicial guidance are less specific than the 1990 ABA Model Code of Judicial Conduct Canon 3B(7) dealing with *ex parte* communications,<sup>94</sup> his language contributes to the foundation of the strict contemporary rule that judicial decisions may not be based on any evidence, consideration, or influence outside the information and argument presented in court. Lord Hale's statements most likely gave birth to the significant statement in the ABA's Commentary following Canon 3B(7), which reads, "[a] judge must not independently investigate facts in a case and must consider only the evidence presented."<sup>95</sup>

Nevertheless, despite early written hints of a trend toward higher ethical ideals for the judiciary eventually escorting society to today's accepted norms of judicial behavior, America saw its first leading judges engaging in conduct which, if proven in 1998, would be deemed universally shocking. Similar behavior now would result in the offending judge's swift and certain removal from office or in a public censure at the very least. Examples of such conduct by Justices and Chief Justices of the United States Supreme Court include the Justices' accepting and answering *ex*

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<sup>93</sup> *Id.*

<sup>94</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (1990) ("A judge shall not initiate, permit, or consider *ex parte* communications . . . concerning a pending or impending proceeding . . .").

<sup>95</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) cmt. (1990).

*parte* communications; assisting Congress directly in drafting legislation; giving direct advice to the President; presiding over cases despite such flagrant conflicts of interest as having a financial interest in a party; presiding over cases in which a Justice had a financial stake; deciding the very cases which had been adjudicated by the same appellate justices when they had earlier sat in the lower court; and hearing cases wherein one of the lawyers was the brother, son, or brother-in-law of one of the Justices.<sup>96</sup>

During the mid-1800's in New York, the legal climate surrounding the New York Court of Appeals was apparently very different from the one we know today. The following passage from Judge Bronson's opinion in *Pierce v. Delamater*<sup>97</sup> reflects the legal atmosphere surrounding the New York Court of Appeals in 1847. The opinion concerned whether Judge Bronson should disqualify himself from deciding an appeal from a decision of the trial court which he had rendered when he presided over the same case at the trial level. Judge Bronson declared that

[t]here is nothing in the nature of the thing which makes it improper for a Judge to sit in review upon his own judgments. If he is what a judge ought to be—wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors—he is then the very best man to sit in review upon his own judgments. He will have the benefit of a double discussion. If right at the first, he will be confirmed in his opinion; and if wrong he will be quite as likely to find it out as any one else. But I need not labor to maintain a principle which has been fully established, by abrogating the disqualification in question, after it had formed a part of our fundamental law for

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<sup>96</sup> See generally G. EDWARD WHITE, *THE OLIVER HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 195-200 (MacMillan Publishing Co. 1988) (discussing questionable judicial behavior of Supreme Court Justices in the nineteenth century); Jack B. Weinstein, *Limits On Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 19-20 (1994); Sanford Levinson, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-1835*, 75 VA. L. REV. 1429, 1439-40 (1989) (book review) (giving examples of what might strike today's courts as "rather questionable judicial behavior").

<sup>97</sup> 1 N.Y. 17 (1847).

nearly three-fourths of a century. (Const. of 1777, Art. 32. Const. of 1821, Art. 5, [sec] 1.)

I am of the opinion that it is both my right and duty to take part in reviewing the decisions of the Supreme Court while I was a member of it, and shall act accordingly.<sup>98</sup>

It is inconceivable that a present day appellate court judge would ever assert what Judge Bronson articulately and dauntlessly wrote 150 years ago.<sup>99</sup> "A serious issue of public confidence would arise today if a trial judge could hear the appeal of a case he had presided over. This procedure should not be reinstated."<sup>100</sup>

In 1924, the American Bar Association ("ABA") promulgated the first Canons of Judicial Ethics in the association's then forty-seven year history. The ABA was prompted to do so, in part, by the misconduct of a judge following the professional baseball scandal of 1919, when the Chicago White Sox "threw" the World Series to its adversaries, the Cincinnati Reds.<sup>101</sup> In the wake of this notorious scandal, the leaders of organized baseball hired United States District Court Judge Kenesaw Mountain Landis as National Commissioner of Baseball at an annual salary of \$42,500 in addition to his regular judicial pay of \$7,500.<sup>102</sup> In 1921, the ABA censured Judge Landis for his misconduct in accepting the job as baseball commissioner and later wrote the 1924 ABA Canons of Judicial Ethics, the first formal national code of its kind.<sup>103</sup>

The 1924 ABA Canons of Judicial Ethics contains thirty-four separate sections, each devoted to a different aspect of behavior.<sup>104</sup> Canon 17, which deals with *ex parte* communications,

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<sup>98</sup> *Id.* at 18-19.

<sup>99</sup> The practice of a judge reviewing his own decisions is now legally unacceptable. See *Lowcher v. New York City Teacher's Retirement Sys.*, 429 N.E.2d 1167, 1169 (N.Y. 1981) (stating that "due process will not allow an administrative decision-maker to sit in review upon his own decisions").

<sup>100</sup> Weinstein, *supra* note 96, at 20.

<sup>101</sup> See Nancy L. Sholes, Note, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 382 n.21 (1992) (noting that prior to the "Black Sox" scandal in 1919, most members of the ABA did not feel that it was necessary to implement a code of ethics for judges similar to the Canons of Professional Ethics drafted to regulate the conduct of lawyers).

<sup>102</sup> *See id.*

<sup>103</sup> *See id.* at 381-82 ("The committee intended the canons to guide behavior rather than be an enforceable set of rules.").

<sup>104</sup> ABA CANONS OF JUDICIAL ETHICS (1924).

reads as follows:

[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 influence action should be made known to opposing counsel.<sup>105</sup>

Despite this language, disputes regarding the appropriateness of *ex parte* communications still arose. In the process of deciding *Arnstein v. Porter*<sup>106</sup> in 1946, a conflict erupted behind the scenes in the United States Court of Appeals for the Second Circuit between Judge Jerome N. Frank and Judge Charles E. Clark concerning whether Judge Clark's act of seeking *ex parte* advice from his friend, Professor Luther Noss, a Yale University music scholar, was ethically permissible.<sup>107</sup> The case involved a claim that the defendant plagiarized certain tunes that were allegedly first written by the plaintiff.<sup>108</sup> Judge Frank criticized Judge Clark's *ex parte* consultation with Professor Noss, stating that "[a]lthough in the old civilian practice the witnesses were heard in secret, at least each party knew who the witnesses were and was allowed to address interrogations to them."<sup>109</sup>

Later, Judge Clark seized an opportunity to "turn the tables" on Judge Frank, criticizing him for the same transgression. Judge Clark wrote:

"I do not believe our decision ought to be affected by somewhat uncertain quotations from experts consulted *ex parte*. It is hardly fair to the persons quoted . . . In *Arnstein v. Porter* of blessed memory I was roundly criticized for obtaining (for my own personal benefit) the exact views of a musical scholar of distinction. While I did not think the criticism well taken, I have since tried to avoid even the appearance of transgres-

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<sup>105</sup> ABA CANONS OF JUDICIAL ETHICS Canon 17 (1924).

<sup>106</sup> 154 F.2d 464 (2d Cir. 1946).

<sup>107</sup> MARVIN SCHICK, *LEARNED HAND'S COURT* 126 (Johns Hopkins Press 1970).

<sup>108</sup> See *Arnstein*, 154 F.2d at 467.

<sup>109</sup> SCHICK, *supra* note 107, at 128.

sion.”<sup>110</sup>

To this, Judge Frank replied:

“I never criticized (and don’t now) Charlie’s discussing the Arnstein case with a musical scholar. I didn’t object when Tom, a few years ago, sought Corbin’s advice. I don’t see why it’s wrong to get the views of Professor Moore about Rule questions. Of course, I shouldn’t—and haven’t purported to—report anything except his tentative reactions after he had talked with me alone. And I’ve suggested that all of us confer with him in such matters. In this case I referred to his tentative doubts in order to prove that my doubts were not frivolous.”<sup>111</sup>

Judge Frank went on to say:

“I have never cited, to my colleagues, the views on a legal question of Professors Moore, Sturges, Shulman, etc., expressed informally and to me alone, as in any way authoritative. I have suggested that such views indicate that a full discussion by members of the court with one or the other of them might be helpful . . . . It would seem then that my remarks in 1946 about your discussion with a musician as to an issue of fact did not deter you in 1951 from consulting Moore as to a question of ‘law’ and reporting his views to your colleagues. Nor can I see any reason why you shouldn’t have done so . . . . Far from objecting, I even urge that judges should seek for knowledge, not elsewhere easily available, from experts in whom they and the court as a whole may have confidence. This is, however, far from drawing in such experts as part of the argumentation against one’s brethren when the court is divided in its view. What I did in the Arnstein case . . . was exactly in accord with what I am urging, I acted in Arnstein before I knew there was any division and of course went no further as soon as it developed. I have felt deeply, therefore, that the criticism you made of me in that matter was entirely unjust and uncalled for.”

“In our recent cases you have relied upon opinions from elsewhere where we were at issue and as a means of beating down contentions, rather than of providing usable knowledge for the court. Further, it seems to me that you have not been fair either to the experts or to your colleagues, since you have gotten

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<sup>110</sup> *Id.* at 128-29. Arguing back and forth for several years, Judge Clark and Judge Frank could not free themselves of their disagreements on the issue of reliance on outside expertise. *See id.*

<sup>111</sup> *Id.* at 129.

offhand and curbstone or stairway opinions."<sup>112</sup>

The dialogue between these two judges reflects unsettled attitudes regarding such a fundamental aspect of the rules against *ex parte* communications, even among leaders of the judiciary as recently as fifty years ago. These written exchanges between two prominent jurists are perhaps even more surprising in light of the clear proscriptive language of Canon 17 of the 1924 ABA Canons of Judicial Ethics.

In 1972, the ABA revised its 1924 code. Canon 3A(4) of the 1972 Code of Judicial Conduct contains new language dealing with *ex parte* communications that more closely resembles the 1990 rules. Canon 3A(4) of the 1972 Code of Judicial Conduct reads as follows:

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.<sup>113</sup>

The Commentary following the 1972 version is completely silent on the issue posed by this paper.

The 1990 version of the ABA Code of Judicial Conduct sets forth *ex parte* rules in the most detail to date. Canon 3B(7) of the 1990 Code states:

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 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 concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain

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<sup>112</sup> *Id.* at 129 n.13.

<sup>113</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3A(4) (1972).

a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.<sup>114</sup>

The Commentary to Canon 3B(7) of the 1990 Code adds that "[a] judge must not independently investigate facts in a case and must consider only the evidence presented."<sup>115</sup> This comment, which is among the first of its kind promulgated by a rule-making body, seems to accomplish more than to cast some doubt as to whether a judge may engage in *sua sponte*, *ex parte* library research on scientific subjects during the decision-making process. One could persuasively argue that the Commentary and Canon flatly prohibit such research.

Accordingly, in order to reconcile Canon 3B(7)'s language with any suggested new approach expressly allowing *sua sponte*, *ex parte* research, it is critical to weave clear and carefully drawn limits on the extent of that research. Those parameters must be designed to avoid the obvious ethical perils occasioned by *ex parte* activity<sup>116</sup> since such activity, at least at first blush, seems

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<sup>114</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (1990).

<sup>115</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) cmt. (1990).

<sup>116</sup> One of the clearest and most bizarre examples of the dangers of utterly inappropriate *ex parte* activity by a juror may be found in *Redd v. LaGuardia Med. Group, P.C.*, N.Y. L.J., Mar. 15, 1996, at 25 (N.Y. Sup. Ct. 1996). In *Redd*, which involved a medical malpractice claim, a juror admitted that she was persuaded to find in the physician's favor, in part, because during the trial, she secretly went to a drug store to read the label on a bottle of Maalox in order to see which side of the case its

to be inconsistent with Canon 3B(7) and the accompanying commentary.

Furthermore, by dint of the 1990 ABA Code of Judicial Conduct Canon 3E(1)(a), a judge must disqualify himself or herself when "the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>117</sup> When a judge acquires scientific research data from a library, *ex parte*, he then becomes possessed of "personal knowledge of disputed evidentiary facts" and a question may arise as to whether at that point he or she may ethically preside.<sup>118</sup>

In 1912, in *Quong Wing v. Kirkendall*,<sup>119</sup> Justice Holmes expressed a view not uncommon among judges and lawyers that judges should not consider or look for facts beyond those presented by lawyers in their briefs or other written material.<sup>120</sup> Chief Justice Warren Burger and the seven member majority in *E.I. du Pont de Nemours & Company v. Collins*,<sup>121</sup> reemphasized that message by cautioning judges not to look for facts beyond those adduced by the lawyers.<sup>122</sup> Like-minded purists, who would permit only the lowest possible levels of judicial intrusion into the adversary process, would presumably oppose, or at least be reluctant to endorse, any suggested new rule that would allow judges leeway to engage in *sua sponte*, *ex parte* research in the course of the decision-making process.

#### IV. APPLICATION OF DUE PROCESS REQUIREMENTS AND ANALYSIS OF PRESENT STANDARDS AS EXPRESSED IN CONTEMPORARY RULES, CASES, AND LITERATURE

The concept of due process is an important aspect of the analysis of this article since it is inextricably interwoven with this article's core issue. Among our legal system's most fundamental and well-established underpinnings is the principle that parties to lawsuits must be accorded due process of law. In

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contents would support. *See id.* As a result of the juror's actions, the jury's verdict in favor of the defendant was vacated and a new trial was ordered. *See id.*

<sup>117</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(a) (1990).

<sup>118</sup> *Id.*

<sup>119</sup> 223 U.S. 59 (1912).

<sup>120</sup> *Id.* at 64.

<sup>121</sup> 432 U.S. 46 (1977).

<sup>122</sup> *Id.* at 57 (holding that no statute, rule, or decision authorized the lower court's reliance on data not tested by the means of the adversary process).

*Baldwin v. Hale*,<sup>123</sup> the Court, expressing the crux of procedural due process, stated that “[c]ommon justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence [sic].”<sup>124</sup> Moreover, this basic right to notice and an opportunity to be heard must be given “at a meaningful time and in a meaningful manner.”<sup>125</sup> If one were to propose that, while a case is *sub judice*, judges should be given license to explore written scientific research information, *sua sponte* and *ex parte*, it would be necessary to blend any such authority with settled notions of due process.

The condemnation of *ex parte* communications is designed to assure that a court will only consider evidence that the parties in an adversarial environment have had the opportunity to scrutinize, test, contradict, discredit, and correct.<sup>126</sup> The prohibition is also designed to maximize the likelihood that courts will render accurate and unbiased decisions based on a complete record on which an appellate court can rely in order to thoroughly review the matter.<sup>127</sup> Furthermore, this ban seeks to give litigants an

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<sup>123</sup> 68 U.S. 223 (1863).

<sup>124</sup> *Id.* at 233; see also *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (stating that “[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking”); *Pennoyer v. Neff*, 95 U.S. 714, 726 (1877) (holding that “[i]f, without personal service, judgments in personam, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression”), *overruled in part by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

<sup>125</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (asserting that notice is essential to a party being afforded an opportunity to be heard, which is “[t]he fundamental requisite of due process of law”).

<sup>126</sup> See *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 57 (1977) (holding that the lower court’s reliance on data that it requested from an outside source was improper because the data “had not been examined and tested by the traditional methods of the adversary process”); JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 6.01 (1990) (discussing the purpose of the ban on *ex parte* communications and noting that such communications “deprive the absent party of the right to respond and be heard”). Indeed, in advocating a broader use of judicial notice as an evidentiary device, legal scholars have recognized the importance of giving advance notice to an adversary when a party plans to advocate that the court judicially notice a fact urged as “undisputed” so that the adversary has an opportunity to challenge the claim of indisputability. See Arthur John Keeffe et al., *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 668 (1950).

<sup>127</sup> See generally SHAMAN, *supra* note 126, at § 6.01 (discussing the reasons behind the ban on *ex parte* communications).

opportunity to expose a witness's possible bias.<sup>128</sup> Judges who have ignored this legal and ethical stricture have either created reversible error, have been removed from a case, have been censured and criticized, or have been removed from office.<sup>129</sup>

Recognizing due process requirements, Canon 3B(7)(b) of the 1990 ABA Model Code of Judicial Conduct permits outside consultations with disinterested experts on the law only if notice is given to the parties.<sup>130</sup> However, this principle and its restrictions governing *ex parte* communications have been altered or refined by some states.

For example, the Illinois Legislature deleted Canon 3B(7)(b) in 1993, prohibiting all consultations by judges with outside legal

<sup>128</sup> See generally *id.* at § 6.07 (describing situations in which judges' *ex parte* communications with witnesses are improper).

<sup>129</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (stating that a judge's "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case") (citing *Berger v. United States*, 255 U.S. 22, 31 (1921)); *S.S. v. Wakefield*, 764 P.2d 70, 73-74 (Colo. 1988) (classifying the conduct of a judge in initiating an *ex parte* communication with a party concerning a pending proceeding as improper, but not so problematic as to require his removal since actual or apparent bias was not present); *In re Inquiry Concerning a Judge Richard E. Leon*, 440 So. 2d 1267, 1270 (Fla. 1983) (holding that a judge who engages in an improper *ex parte* communication should be removed from the bench); *Stivers v. Knox County Dept. of Pub. Welf.*, 482 N.E.2d 748, 749-51 (Ind. 1985) (establishing that a recusal or change of venue motion denied by a judge who has personal knowledge of a case over which he presides is cause for reversible error); *State v. Romano*, 662 P.2d 406, 407 (Wash. 1983) (holding that a judge committed reversible error when he received information about a defendant by way of an *ex parte* statement before sentencing); *In re Honorable Alan Hutchinson*, Pierce County Dist. Ct. No. 3, CJC No. 93-1652-F-47, 1995 WL 902265 at \*3 (Wash. Com. Jud. Cond. Feb. 3, 1995) (holding an *ex parte* investigation by a judge could result in the judge being censured); see also *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) (stating that a judge should recuse himself when he has personal knowledge of material facts in dispute); *State v. Leslie*, 666 P.2d 1072, 1073 (Ariz. 1983) (stating that if a judge disqualifies himself because of an *ex parte* investigation, whether a new trial shall be ordered is in the discretion of the successor); *In re Jordan*, 622 P.2d 297 (Or.), *clarified*, 624 P.2d 1074, 1075 (Or. 1981) (insinuating that the judge should have disqualified himself because the relationship between the judge and the defendant was more than casual); SHAMAN ET AL., *supra* note 126, at §§ 5.07 - 5.08 (discussing when a judge may conduct an *ex parte* proceeding and the remedies available to a litigant when a judge has unduly relied on such proceedings). However, remedial actions are not appropriate in every instance in which a judge is a party to an *ex parte* communication. See *Parrillo v. Parrillo*, 495 A.2d 683, 686 (R.I. 1985) (noting that where the merits of the case are not discussed, "conferences on housekeeping items show neither a prejudicial state of mind nor a denial of a fair hearing") (quoting *Cavanagh v. Cavanagh*, 375 A.2d 911, 918 (R.I. 1977)).

<sup>130</sup> MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7)(b) (1990).

experts, because it was believed that outside consultations with experts too closely resembled a previously abolished procedure of using masters in chancery.<sup>131</sup> Alabama, on the other hand, has allowed more flexibility to judges who consult with disinterested experts on the law. Canon 3 of the Alabama Rules of Judicial Ethics permits judges to "obtain the advice of a disinterested and impartial expert on the law applicable to a proceeding before him, provided, however, a judge should use discretion in such cases and, if the judge considers that justice would require it, and [sic] should give notice to the parties of the person consulted and the substance of the advice, and afford the parties a reasonable opportunity to respond."<sup>132</sup> The difference between the Alabama provision and the 1990 ABA version is that Alabama does not require a judge to notify the parties or attorneys of an outside consultation. This is decidedly at odds with the prevailing national view that detailed notification must be given to the parties, which is expressed in the vast majority of states' written ethics principles.<sup>133</sup> In Arizona, while the Arizona Code of Judicial Conduct Canon 3B(7)(b) appears not to require judges to notify the parties in a pending case when the judge has consulted with outside legal experts, its Commentary confirms that Arizona's policy remains consistent with the prevailing view—that is, a judge may only consult outside legal experts *ex parte* if the judge notifies the parties of the exchange, the substance of any advice received, and an opportunity to comment.<sup>134</sup> In contrast, Justice Denecke of the Oregon Supreme Court criticized *ex parte* communications altogether and has stated that "[e]x parte conversations or correspondence with experts, law teachers or otherwise, is unfair and can be misleading. The facts given may be incomplete or inaccurate, the problem can be incorrectly stated or other matters can be incorrectly stated."<sup>135</sup>

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<sup>131</sup> Generally, a master in chancery is an officer of the court who acts as an assistant to a judge and inquires into matters referred by the court; the master in chancery takes testimony, examines accounts, assesses damages, and then reports those findings to the referring court.

<sup>132</sup> CODE OF JUDICIAL CONDUCT OF ALABAMA Canon 3A(4).

<sup>133</sup> See *supra* note 130, and accompanying text.

<sup>134</sup> See CODE OF JUDICIAL CONDUCT OF ARIZONA Canon 3B(7) & commentary.

<sup>135</sup> Arno H. Denecke, *The Judiciary Needs Your Help Teachers*, 22 J. LEGAL EDUC. 197, 203 (1969) (discussing how law professors should be assisting the judiciary); see also Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 855-59 (1989) (arguing in favor of maintaining the prohibition against judges consulting with law professors regarding issues in pending cases).

In 1975, the American Bar Association Committee on Ethics and Professional Responsibility, in its Informal Opinion 1346, wrote that the strictures in Canon 3, concerning *ex parte* dialogue with outside experts on the law, apply with equal force if a judge consults law school research centers. This opinion strengthens the notion that all parties in a case must be given access to sources of a judge's knowledge gained during the course of a pending proceeding about the issues being litigated.<sup>136</sup> Similarly, under Canon 3A(4) of Louisiana's Code of Judicial Conduct, a judge may not "accept in any case briefs, documents or written communications intended or calculated to influence his [or her] action unless the contents are promptly made known to all parties."<sup>137</sup> This general language suggests that if a Louisiana judge, *sua sponte* and *ex parte*, ventures into a library or logs on the internet to read scientific research information relevant to a pending decision, the judge would be obligated to "promptly [notify] all parties" of anything found that will play a part in the lawsuit's outcome. The spirit of the Louisiana rule also seems to include a notice requirement regarding scientific literature discovered *sua sponte* and *ex parte* that will correspond with the rule's manifest objective to afford due process to all parties and to ensure the parties an opportunity to comment upon any relevant information that the judge has procured at any point during the pendency of the case.

One notion common to various states' rules is the following principle contained in the Commentary to Maryland's Code of Judicial Conduct Canon 3A(5): "The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding."<sup>138</sup> The recurring theme in all state codes of ethics is to limit a judge's exposure to *ex parte* communications during the pendency of a case<sup>139</sup> because any relevant information obtained extrajudicially has the inherent danger of conveying misinformation or creating bias on the part of the

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<sup>136</sup> ABA Committee on Ethics and Professional Responsibility, Informal Op. No. 1346 (1975).

<sup>137</sup> CODE OF JUDICIAL CONDUCT OF LOUISIANA Canon 3A(4) (1997).

<sup>138</sup> CODE OF JUDICIAL CONDUCT OF MARYLAND Canon 3 cmt. (1997).

<sup>139</sup> See *United States v. Grinnell Corp.*, 384 U.S. 563, 582-82 (1966) (stating that the rules concerning judicial disqualification do not require the recusal of a judge who forms an opinion about a case as the result of information acquired during and from within its proceedings).

judge—a bias to which the parties cannot react if they are oblivious to it. However, once a judge acquires information extrajudicially, thereby awakening a concomitant risk that she will be biased or influenced in favor of or against one party, it seems clear, logical, and fair that the obligation to disclose the information is born and recusal may be required.<sup>140</sup>

As noted earlier, in the codes of judicial conduct of many states,<sup>141</sup> the rules or commentaries provide that judges may not independently investigate facts in a case and must consider only the evidence presented at trial.<sup>142</sup> This precept does not, by its express terms, apply to written information obtained by the judge, *ex parte*, from published research data or scientific literature.<sup>143</sup> However, logic dictates that this principle also encompasses information in scientific and published research literature acquired by a judge, *sua sponte* and *ex parte*, during the pendency of a case, because the dangers posed by receiving such information—either secretly from a library or the internet, secretly from other persons, or secretly from independently investigating facts in some other way—are all the same. All methods can profoundly affect a judge's opinion and decision and can unquestionably deprive an unsuspecting litigant of the right to know what the judge has learned and an opportunity to respond and be heard.

Oregon's Code of Judicial Conduct Rule 2-102(D), through a catchall provision, requires a judge to "promptly disclose to the parties any communication not otherwise prohibited by this rule that will or reasonably may influence the outcome of any adversary proceeding."<sup>144</sup> That sentence captures the essence of the universal goal of contemporary state and federal judicial ethics codes on the subject of *ex parte* communications—that is, to assure all litigants procedural due process.

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<sup>140</sup> See *id.* at 583 (stating that a judge should disqualify himself when an extrajudicial source reveals information regarding the merits of the case); see also *Berger v. United States*, 255 U.S. 22, 31 (1921) (enforcing rules of disqualification where the risk of prejudice was clear by virtue of statements of the presiding trial judge revealing his misinformation and bias).

<sup>141</sup> See *supra* notes 130-40 and accompanying text (describing the ABA rules and some state rules concerning *ex parte* investigations).

<sup>142</sup> See ABA CODE OF JUDICIAL CONDUCT CANON 3 (1990).

<sup>143</sup> See *supra* notes 138-42 and accompanying text (suggesting some instances when *ex parte* communications are appropriate).

<sup>144</sup> CODE OF JUDICIAL CONDUCT OF OREGON Rule 2-102(D) (1997).

The Tennessee Judicial Ethics Committee, in opinion 97-1 dated January 29, 1997, was asked to consider whether the confidential financial information and pedigree data about parents, contained in a new computer system implemented by the Tennessee Department of Human Services to assist in enforcing child support payments, may be accessed, *ex parte*, by judges who hear and decide family law matters.<sup>145</sup> The committee held that judges may not acquire information in the manner described because "[j]udicial knowledge upon which a decision may be based is not the personal knowledge of the judge, but the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role."<sup>146</sup> The Committee cited the Tennessee Supreme Court's reasoning in *Vaughn v. Shelby Williams of Tennessee, Inc.*<sup>147</sup> In *Vaughn*, the court said:

It seems appropriate that when the trial judge becomes the source of information and when a decision is ultimately influenced by that information, the parties should have the opportunity to cross-examine in order to impeach the source of the evidence or otherwise persuade an impartial trier of fact that the court's observations are, for whatever reason, inaccurate, just as they would any other witness.<sup>148</sup>

Many state courts have encountered the issue of whether a judge's *sua sponte*, *ex parte* research has violated due process protections. In *Matter of Fuchsberg*,<sup>149</sup> an associate judge of the New York Court of Appeals, the State's highest court, was censured for consulting with law professors by showing them internal draft opinions concerning a pending case written by other Judges of the Court of Appeals. The judge did this without the consent of the authors and, probably more significantly, without notifying the attorneys or the parties to the lawsuit.<sup>150</sup> Moreover, in the court's subsequent official opinions published under his own name, Judge Fuchsberg inserted substantial portions of language that he had taken directly from the drafts secretly

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<sup>145</sup> Tennessee Judicial Ethics Committee, Op. 97-1 (1997). [UTL]

<sup>146</sup> See *State v. Hort*, 911 S.W. 2d 371, 377 (Tenn. Crim. App. 1995).

<sup>147</sup> 813 S.W.2d 132 (Tenn. 1991).

<sup>148</sup> *Id.* at 134.

<sup>149</sup> 426 N.Y.S.2d 639 (Ct. Jud. 1978) (per curiam).

<sup>150</sup> See *id.* at 646-47 (stating that a judge who consulted with law professors twelve different times has violated New York's Rules and Canons).

submitted to him by the law professors.<sup>151</sup> As a result of these and other transgressions, Judge Fuchsberg was publicly censured.<sup>152</sup> The decision condemning his conduct is relevant to the issue here because a similarity arguably exists between what he did and the act of a judge who, *sua sponte* and unbeknownst to the parties, reads and relies upon scientific research data in the course of deciding a case involving questions posed or answered by that research. In both instances, the risk of prejudice is great and the parties have no opportunity to challenge the data. In *The Matter of: The Hon. A'lan Hutchinson, Pierce County District Court No. 3*,<sup>153</sup> the Washington Commission on Judicial Conduct censured a judge for, among other things, "initiat[ing] an *ex parte*, independent factual investigation about gender reassignment surgery . . . without prior or contemporaneous notice to the petitioners."<sup>154</sup> The judge consulted with various medical societies and entities about the medical and legal issues involved in the case regarding the petitioners' name-change, which was commenced while petitioners were undergoing "gender reassignment therapy."<sup>155</sup> The judge then used the information acquired in the course of the legal proceedings.<sup>156</sup> For this *ex parte* activity and for other reasons, he was censured.<sup>157</sup> The same logic resulting in that sanction calls for reasonable but strict limits to be written into any new rule that permits judges to engage in *ex parte* searches for written scientific research data while a case is pending or impending.

One of the few writings that has directly touched on the central issue of this paper is entitled *Limits on Judges Learning, Speaking and Acting – Part I – Tentative First Thoughts: How Many Judges Learn*.<sup>158</sup> In that essay, United States District Court for the Eastern District of New York Judge Jack B. Weinstein raised a host of questions about the ethical implications of

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<sup>151</sup> See *id.* at 646.

<sup>152</sup> See *id.* at 648.

<sup>153</sup> CJC No. 93-1652-F-47, 1995 WL 902265 (Wash. Com. Jud. Cond. Feb. 3, 1995).

<sup>154</sup> *Id.* at \*1.

<sup>155</sup> *Id.*

<sup>156</sup> See *id.* at \*1-\*2.

<sup>157</sup> See *id.* at \*3-\*4.

<sup>158</sup> See Jack B. Weinstein, *Limits on Judges Learning: Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn?*, 36 ARIZ. L. REV. 539, 556-62 (1994) (discussing the topic of judicial ethics and how judges should learn about a particular subject).

judges acquiring information from a wide variety of sources, such as judicial and other conferences, seminars, and even private dinner table conversations with family members and friends.<sup>159</sup> He asserted that each informational environment has the potential to raise disquieting ethical issues.<sup>160</sup> He also urged, however, that despite these ethical concerns, judges must be permitted meaningful interaction with the outside world in order to constantly learn and expand intellectually.<sup>161</sup> Finally, he concluded that most types of extrajudicial contact can be ethically resolved without isolating judges from the ideas and information surrounding them.<sup>162</sup> Thus, he succinctly wrote: "[r]isk-for-risk, however, a thinking, informed judge is far less dangerous than one pickled in his own, ever-so-ethical views."<sup>163</sup>

In *United States v. Bonds*,<sup>164</sup> Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit expressed attitudes similar to those of Judge Weinstein. The issue in *Bonds* involved the admissibility of DNA evidence. The Government requested that Judge Boggs recuse himself from considering the appeal due to his attendance at educational conferences on the subject, his informal discussion of DNA with a scientist, and his familiarity with material on DNA.<sup>165</sup> In denying the motion for recusal, he wrote:

[W]e would all be required to cancel our subscriptions to law reviews and newspapers, let alone specialized journals of any sort . . . . To the extent that a judge remains interested at all in the events of society, a judge will inevitably be exposed to matters relating, in greater or lesser degree, to interesting areas of the law on which the judge may be called to rule. However, such general knowledge does not constitute extra-judicial

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<sup>159</sup> See *id.* (discussing different ethical violations according to judges)

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 543 (asserting that judges must be allowed and encouraged to acquire information of varying viewpoints to improve themselves and the entire judicial process); *id.* at 542-56 (explaining the various avenues through which judges may expand their knowledge, which include reading magazines, law review articles, newsletters, reports, advertisements, and attending training seminars and continuing education programs).

<sup>162</sup> See *id.* at 565 (advocating a judiciary which is not completely closed off from the world and suggesting safeguards to ensure a fair and impartial judiciary, including the encouragement of judges to acquire general knowledge from relatively neutral sources and the creation and funding of judicial education programs).

<sup>163</sup> *Id.* at 562.

<sup>164</sup> 18 F.3d 1327 (6th Cir. 1994).

<sup>165</sup> See *id.* at 1328-31 (delineating the history of the case).

knowledge of disputed evidentiary facts . . . Nor does past participation in conferences . . . even when that participation is recorded in print, indicate bias or extra-judicial knowledge, any more than the fact that a judge has written previous law review articles or opinions in a certain field.<sup>166</sup>

Although Judge Boggs' comments refer to knowledge of a contested issue acquired when a case is not pending or impending, his language implies that different considerations would influence this ethical consideration if a judge learned information about a contested issue, *ex parte*, while the case is pending or impending.

When Judge Weinstein's sage advice is pressed beyond its reasonable limits, a scenario similar to the one in *In re Bonin*<sup>167</sup> is likely to occur. In that case, the Chief Justice of the Massachusetts Superior Court was disciplined, in part, for attending a public meeting to raise funds for and otherwise support a group of homosexual defendants against whom criminal charges were pending in the superior court.<sup>168</sup> The principal speaker was Gore Vidal, whose lecture, entitled "Sex and Politics in Massachusetts," discussed in a critical and biased fashion the State's prosecution of these criminal charges. The court held that Justice Bonin should not have knowingly placed himself in a position in which he was likely to hear *ex parte* and partisan comments concerning pending cases.<sup>169</sup> The court stated that "[b]y his attendance at the meeting the Chief Justice . . . exposed himself to *ex parte* or one-sided statements and argumentation on matters before his court."<sup>170</sup>

The *Bonin* court addressed the difficult balance that judges must vigilantly maintain between being well-informed and appropriately involved in society and the countervailing obligation to remain detached from environments in which reasonable questions about their impartiality may arise.<sup>171</sup> This obligation

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<sup>166</sup> *Id.* at 1331.

<sup>167</sup> 378 N.E.2d 669 (Mass. 1978).

<sup>168</sup> *See id.* at 672-73 (outlining the charges and emphasizing that Chief Justice Brown knew or should have known that proceeds from ticket sales were used to support the defendant's case pending in the Superior Court).

<sup>169</sup> *See id.* at 672 (explaining the counts against the judge, particularly the fact that discussions that evening included criticism of the judicial process and discussion of the merits of the case and the fairness of the trial)

<sup>170</sup> *Id.* at 683.

<sup>171</sup> *See id.* at 682-83 (maintaining that the judge must take necessary steps "to avoid extrajudicial conduct . . . [which] would trench on matters pending in his

also includes the duty to avoid exposure to sources of relevant *ex parte* information pertaining to matters which they are deciding or which are impending.<sup>172</sup> Thus, the court said:

It was suggested during the proceedings that judges should not be deterred from informing themselves about contentious issues of social importance, and that judges are helped in their professional thought and judgment by acquainting themselves with ideas and feelings current in their communities. Hence, it was argued, the Chief Justice's attendance at the meeting . . . was not only not exceptionable but was commendable . . . . We agree emphatically that "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; he should not become isolated from the society in which he lives."<sup>173</sup>

The court, however, emphasized that a judge should not knowingly enter situations in which *ex parte* comments of others "trench on matters pending in his court."<sup>174</sup>

In an article analyzing the use of social science evidence at trial, Judge Joseph A. Colquitt emphasized that notice and an opportunity for challenging scientific evidence is critically important since our justice system relies principally on an adversarial exchange designed to act as a filtering process for incoming evidence, mostly by way of cross examination.<sup>175</sup> Judge Colquitt touched on the core issue of this article in the following excerpt and effectively articulated an important aspect of the debate:

What happens when the trial counsel fails to prove a fact that is materially relevant to the issues in the litigation? Without becoming too involved in the question, there are great differences of opinions about the proper role of the courts. Justice Holmes [in *Quong Wing v. Kirkendall*] felt that attorneys have a duty to furnish the court with all relevant facts. He believed that if attorneys deliberately fail to produce needed evidence, the court should not institute its own inquiry. There are, however, two

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court" while emphasizing, however, the undesirability of a judge's total isolation from the greater community).

<sup>172</sup> See *id.* at 682 (stating that the requirement that judges remain removed and neutral "is at the heart of the Code of Judicial Conduct").

<sup>173</sup> *Id.* at 683 (citation omitted).

<sup>174</sup> *Id.*

<sup>175</sup> See Joseph A. Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51, 69 (1988) (stating that the use of expert witnesses is the preferred method to present social evidence since it provides the opportunity for cross-examination on which the adversarial model of the American justice system relies so heavily).

opposing views of the 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 the courts have the ultimate responsibility to decide cases regardless of whether the appropriate issues are addressed by the litigants. In a typical automobile accident case, the first approach may be more appropriate; in a lawsuit involving public policy, statutory interpretation, or constitutional rights, however, the second approach may be more appropriate.<sup>176</sup>

Some members of the judiciary have suggested that judges should be allowed to exceed the limited boundaries drawn by most current judicial conduct codes.<sup>177</sup> For example, some recommendations provide that judges should, in certain situations, be empowered to consult with legal experts outside the parties' presence,<sup>178</sup> that judges should be permitted to call upon independent nonlegal experts not summoned as witnesses by the parties for advice,<sup>179</sup> or that appellate judges should be allowed to employ their own staff of scientific and technical experts to assist the court, *ex parte*, with complex issues of science and technology.<sup>180</sup> In other situations, judges have used special masters, public hearings, or interviews with victims to acquire information deemed relevant to a lawsuit.<sup>181</sup>

Differences of opinion exist regarding the extent to which judges may acquire *ex parte* information and the circumstances

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<sup>176</sup> *Id.* at 73-74 (citations omitted).

<sup>177</sup> See Harhut, *supra* note 13, at 695 (mentioning a survey which indicated that "[v]irtually all judges . . . felt that the quality of justice could be enhanced by allowing *ex parte* communication in certain situations").

<sup>178</sup> See Weinstein, *supra* note 158, at 563 (articulating the ability of a judge to "consult with a disinterested expert on the law," provided that parties are granted notice and an opportunity to respond).

<sup>179</sup> See FED. R. EVID. 706(a) (authorizing a judge to appoint expert witnesses, *sua sponte*, but requiring that full notice of the experts' findings be given to the parties and that an opportunity be available for the parties or the court to call the expert to testify subject to the right of cross-examination).

<sup>180</sup> See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 547-553 (1974) (noting the need for experts, masters and "aides" to assist the court in the decision-making process and proposing that appellate courts have an "aide" who would be available to advise a court so that it could better understand the record).

<sup>181</sup> See Weinstein, *supra* note 3, at 554-60 (explaining the traditional position which limits the amount of assistance that a judge can receive from external sources while emphasizing that both the complexity of mass tort litigation today and the increased responsibilities placed on the judiciary require a judge to have a complete understanding of a case in order to protect parties and to realize the far-reaching significance of the decision rendered).

under which they may do so while a case is pending or impending.<sup>182</sup> Notwithstanding, a consensus has developed that trial judges faced with difficult, complex issues of science ought to be allowed, and perhaps even encouraged, to seek scientific research and other information not supplied by the attorneys, particularly in cases that involve issues likely to have far-reaching impact. Such *sua sponte, ex parte* research should be allowed only if judicial exploration outside the record is subject to strict procedural controls designed to honor and protect the parties' due process rights.

A judge whose gaze does not lift from the well of the courtroom and the pages of the lawyer's brief may fail to see the full significance of the case at bar. In mass tort cases the social realities contextual to the details of the litigation bear on the utility of judicial decisions.<sup>183</sup>

#### V. RECOMMENDATION: MODIFICATION OF CURRENT ETHICS RULES

"A rigid conception of the judge as presiding passively and neutrally over an adversarial proceeding in which the litigants bear the whole burden of presentation is sometimes inaccurate and unwise."

*Hon. Jack B. Weinstein*<sup>184</sup>

As we near the twenty-first century and as science continues exploding into a kaleidoscope of limitless activity and heightened discovery, judges will find it increasingly demanding, if not overwhelming, to remain adequately informed in order to resolve the new, complex, momentous, and profound questions they will inevitably confront. Accordingly, the rules of judicial conduct should be refined and amended to enable judges to render decisions reflecting society's mature and informed judgment.<sup>185</sup> One

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<sup>182</sup> See Colquitt, *supra* note 175, at 73 (noting the existence of "great differences of opinion about the proper role of the courts"); see also Harhut, *supra* note 13, at 695 (summarizing the agreement among the majority of judges that the administration of justice could be improved by granting judges the ability to engage in *ex parte* communication, particularly when limited to questions of law).

<sup>183</sup> Weinstein, *supra* note 3, at 559 (citation omitted).

<sup>184</sup> *Id.* at 539 (citation omitted).

<sup>185</sup> See Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA

way to realize that goal is to allow judges, when they deem it necessary in lawsuits involving difficult questions of technological or social science, to look beyond evidence presented by the attorneys. Any such license must honor the parties' due process rights and must satisfactorily answer certain practical questions.<sup>186</sup>

To begin, any new rule must, by its terms, only affect a judge's independent research on an issue of science while a case involving that issue is actually pending or impending—that is, when the judge becomes aware that a case containing the issue is pending or will likely be brought before the court within a reasonable time. The central thesis of this article does not implicate the knowledge that a judge acquires prior to having a reason to believe that the newly-acquired data will affect the outcome of an actual case or controversy over which the judge will preside.<sup>187</sup>

Any proposed rule must also specify which scientific research materials that are outside of the court record that will come within the rule's purview. A new edict should apply to all relevant materials, including materials only tangentially connected to the issue in the case, but only if the judge believes in good faith that the materials' content is likely to have a significant impact on the outcome of the case.

Due process demands that parties be notified of all non-legal materials that were acquired during the pendency of the proceedings and that contain scientific research information not cited by the parties on which the judge intends to rely. Also, due process requires that the parties be given adequate time either to comment or to submit responses for the judge to review. The

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L. REV. 1011, 1028 (1990) (noting that the current Model Code of Judicial Conduct allows a court to secure a disinterested expert's advice as long as the court provides the parties with notice of the identity of the person consulted, the advice received, and an opportunity to be heard).

<sup>186</sup> See, e.g., Weinstein, *supra* note 3, at 557. Judge Weinstein disclosed that he made known to the parties any of his outside readings relevant to the issues in the Agent Orange cases by filing them and thereby making them available to the litigants. See *id.* The judge recognized that the parties may not have otherwise known of his meetings with a specialist in the Agent Orange hearings. see *id.*

<sup>187</sup> I have always made it a practice to inform lawyers in a pending case when I am familiar with a specific writing or theory relevant to an issue of science before me, and I invite them to comment or submit other data for me to read. However, I would not advocate making that practice a part of any ethics rule because it would be impossible to enforce in a manner that is beneficial to the parties and at the same time fair to judges.

rule should not apply to materials that do not play an appreciable role in the formation of the judge's conclusions.

The issue becomes increasingly complex when considering the proposal made by Monahan and Walker that courts should accord "well supported" scientific research a weight equal to legal precedent.<sup>188</sup> Such a suggestion is faulty, given the differences between case law and scientific research. For lawyers and judges, case law is an objective and easily identifiable body of knowledge void of ambiguity. Of course, the weight that a court gives to any legal precedent depends on the level and location of the court issuing the decision, the soundness of its reasoning, the similarity between the facts in the cited opinion and those in the case at bar and the frequency with which the precedent has been followed by other courts.<sup>189</sup> Comparatively, "well-supported" scientific research, notwithstanding Monahan and Walker's contrary contentions, is more subjective as a concept or as a body of knowledge. It is not unreasonable to suggest that most lawyers and judges would not normally feel qualified to determine whether scientific research is "well supported." This is likely to be especially troublesome for judges who have only minimal scientific training and experience. This problem was recognized by Monahan and Walker in their following statement:

Our confidence [in judges' ability to evaluate scientific research] is not without limits. Whether a judge can adequately evaluate social science research used as a social framework depends upon both the particular judge doing the evaluation and the particular piece of research being evaluated. Occasions may arise when the complexity of the research exceeds the ability of the judge to evaluate it intelligently.<sup>190</sup>

In order to treat "well supported" scientific research and

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<sup>188</sup> See *Social Authority*, *supra* note 13, at 478 (advancing the idea "that social science research, when used to create a legal rule, is more analogous to 'law' than to 'fact,' and hence should be treated much as courts treat legal precedent).

<sup>189</sup> See Walker & Monahan, *supra* note 58, at 590-91 (explaining the factors considered by courts when determining the importance of and effect given to legal precedent).

<sup>190</sup> *Id.* at 591 n.113. Walker and Monahan assert that "the risk of error is such that, as a last resort, some methods of providing assistance to the court in evaluating the research must be found." *Social Authority*, *supra* note 13, at 512; see generally *Social Authority*, *supra* note 13, at 508-12 (examining whether judges possess the requisite competence and ability to make determinations correctly based on complex research). Use of a court-appointed advisor is one method of providing assistance to the court in evaluating complex information acquired through research.

case law as equal forms of precedent, the justice system would have to create a reliable and relatively convenient procedure to determine which research material is indeed "well supported" and which is not. Plainly, to this writer at least, this determination must provide a meaningful opportunity for the participation of the parties in order to be consistent with due process requirements. The requirements of due process render it difficult, if not inherently impossible procedurally, to allow a judge's *ex parte* consideration of "well supported" scientific research to be treated with the same force and effect as a judge's routine *ex parte* consideration of case law.<sup>191</sup> Nevertheless, Monahan and Walker present a strong argument at some length in favor of allowing "social authority" and case law equal treatment as precedent.

However, after serving eighteen years on the bench, including a significant amount of involvement in judicial training and education, both as a student and as a faculty member, and after an additional eighteen years as a practicing lawyer and judicial law clerk involved almost daily in the court system, this writer is convinced that few judges possess the academic credentials or the necessary experience and training in scientific disciplines to separate competently high quality, intricate scientific research from research that is flawed. Judges, therefore, need the help of the lawyers and the expert witnesses that they summon, but they require this help in the context of, and in the confines of, the fact-finding strengths of the adversary system. This is so because the judge's decisions are often far-reaching and involve difficult and unfamiliar subjects requiring sophisticated knowledge. Finally, not only do these decisions sometimes have far reaching consequences, but they always directly affect the parties in a pending lawsuit. There is nothing to be gained by depriving parties of an opportunity to scrutinize and challenge any factual material that a judge will consider in arriving at a decision.

A judge should be given the discretion, as per protocol, 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

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<sup>191</sup> This writer is of the opinion that scientific research results which are mentioned in case law may be read *ex parte*. By inclusion in a legal opinion, the research information itself—without thereby necessarily being deemed reliable—has become a part of "case law" to which judges unquestionably have unfettered access.

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.

It is possible to permit *sua sponte* judicial journeys into the library or on the internet during the decision-making process while remaining faithful to due process standards and the spirit, language, and objectives of modern judicial conduct rules. That freedom can only enhance a judge's ability to understand complex technical or scientific issues. Such research is more efficient and less costly than requiring litigants to invite live experts to explain scientific theory, particularly if the need for such sophisticated input arises in courts located in remote geographical areas.

I propose that judicial ethics codes be amended to include the following provision:

A trial judge may, *sua sponte* and *ex parte*, search for and read research material and other literature, not presented or cited by the parties, concerning issues of science or technology directly applicable or relevant to a pending or impending proceeding before the judge; provided the judge gives notice to the parties of the material and literature consulted and, in a manner within the judge's discretion, affords them reasonable time to comment and submit other relevant material. This provision shall only apply to material found *ex parte* and on which the judge intends to rely for a decision about the admissibility of physical or social scientific and technological evidence in a case.

## VI. CONCLUSION

Whenever a complex question of science or technology emerges in litigation—one likely to have a far-reaching impact beyond the immediate interests of the parties—conscientious judges will be prone to seek more information, *sua sponte*, to add to their understanding. It is therefore imperative for modern society to include, within its governing rules structure, an ethically appropriate vehicle for judges to acquire, consider, and rely on that information. "The ethical problems . . . suggest the need for modifying the legal process to match the technological, economic, and sociological conditions of today. Fortunately, we have in our legal tradition strong foundations of fairness upon which

to remodel procedural, substantive, and ethical strictures."<sup>192</sup> The recommendations set forth in this article may, and should, be implemented in order to allow judges to reach beyond the record in certain situations while still protecting the due process rights of the parties.

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<sup>192</sup> Weinstein, *supra* note 3, at 471.

