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The Presently Expanding Concept of Judicial Notice

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COMMENTS

THE PRESENTLY EXPANDING CONCEPT
OF JUDICIAL NOTICE

TABLE OF CONTENTS

I. INTRODUCTION	530
II. SUBJECT MATTER AND SCOPE OF JUDICIAL NOTICE	531
<i>A. Matters Subject to Judicial Notice</i>	531
1. <i>Law</i>	531
2. <i>Fact</i>	532
<i>a. Common Knowledge v. Verifiable Certainty</i>	532
<i>b. Adjudicative v. Legislative</i>	533
<i>c. Specific v. General; Ultimate v. Non-Ultimate</i>	533
<i>B. Scope of Judicial Notice</i>	534
1. <i>The Morgan-Wigmore Dichotomy</i>	534
2. <i>The Functional Approach</i>	536
<i>a. Pre-trial</i>	536
<i>b. Trial</i>	537
<i>c. Judicial Legislation</i>	539
<i>d. Post-trial</i>	540
III. EFFECT OF JUDICIAL NOTICE ON CONSTITUTIONAL RIGHTS ..	541
<i>A. Right to Trial by Jury</i>	541
1. <i>Nature of the Right</i>	541
2. <i>Effect of Procedures on the Right</i>	542
<i>a. Disputables v. Indisputables</i>	542
<i>b. Notification</i>	543
<i>c. Common Knowledge v. Verifiable Certainty</i>	545
<i>B. Right to Confrontation</i>	546
1. <i>At Trial</i>	547
2. <i>Post-trial Disposition — Pre-sentence</i>	549

SPRING 1968]	COMMENTS	529
IV. THE EFFECT OF JUDICIAL NOTICE ON THE ADVERSARY SYSTEM...		551
<i>A. Nature of the System</i>		551
<i>B. Effect of Procedures on the System</i>		552
1. <i>Tacit Judicial Notice</i>		552
2. <i>Disputables v. Indisputables</i>		554
V. JUDICIAL NOTICE IN THE APPELLATE COURTS		556
<i>A. Review of Judicially Noticed Facts</i>		556
1. <i>Grounds</i>		556
2. <i>Scope</i>		557
<i>B. Original Judicial Notice</i>		559
VI. CONCLUSION		561

I. INTRODUCTION

Judicial notice may be defined generally as a court's acceptance of the truth of a matter without formal evidentiary proof.¹ The origins of the concept of judicial notice, though hazy, are thought to have arisen out of the medieval belief that the judge, as a "learned man" of the age, was skilled in each of the seven sciences; he had, or at least was presumed to have had, at his command, all the world's knowledge.² The fiction of judicial notice, therefore, was merely a means of reminding the judge of that which he was already presumed to know.³ As early as 1222, Bracton noted in the margin of one of his works that "*ea que manifesta sunt, non indigent probacione*" ("that which is obvious need not be proved"),⁴ and a yearbook printed in 1302 shows that this abstract, time-saving principle was by then being applied to concrete factual situations.⁵

The first discussion regarding the setting of boundaries within which a judge was permitted to pass on questions of fact without having received evidence on the issue did not appear until Bentham's early nineteenth century work on evidence.⁶ In describing the procedure as it then existed, Bentham stated that either party might ask the judge to assume, as proven fact, a specified matter which was notoriously true. The proponent was required to prove the fact only if the opposing party not only demanded that the matter be proved, but also was willing to declare, in good faith, that he personally disbelieved the fact.⁷

The purpose of the present discussion is to describe the concept of judicial notice as it now exists. Recent cases and contemporary commentary will be perused in order to gain an insight into current judicial and scholarly thought on the subject matter and scope of the concept at both the trial court and appellate court levels. A "functional approach" to the scope of judicial notice will be introduced and will serve as a focal point from which to analyze the effect of judicial notice on the right to trial by jury, the right to confrontation, and the adversary system. Finally, there will be a brief examination of the effect, present and potential, of judicial notice on judicial administration and the rules of evidence.

1. "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so." 9 J. WIGMORE, EVIDENCE § 2567(a) (3d ed. 1940) [hereinafter cited as WIGMORE].

2. Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 1 (1922).

3. *Id.*

4. McNaughton, *Judicial Notice — Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 783 (1961), citing 2 BRACTON'S N.B., case 194 (1222) (marginal notation) [hereinafter cited as McNaughton].

5. *Id.*, citing Y.B. 30 & 31 Edw. I (R.S.) 256-59 (1302).

6. J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 256-57 (1827). The term "judicial notice" does not appear in Bentham's treatise. It is first mentioned by Starkie in a work published the following year. T. STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 400 (2d ed. 1828). Starkie did not comment on the use of this phrase, but rather confined his comments to a recitation of Bentham's views.

7. This procedure appears to be more akin to that of a contemporary request for an admission than to the current procedure for taking judicial notice. See, e.g.,

II. SUBJECT MATTER AND SCOPE OF JUDICIAL NOTICE

Courts may take judicial notice of law as well as of fact. The rules regarding judicial notice of law will be set forth initially, followed by a presentation of the various means of sub-classifying the extra-record facts of which courts may take judicial notice. An examination of the traditional views regarding the procedures to be followed in taking, and the scope of, judicial notice will then be made. Finally, the scope of judicial notice will be scrutinized in light of the function being performed by the court when it takes notice of extra-record facts.

A. Matters Subject to Judicial Notice

1. Law

Courts will take judicial notice of the common law, statutory law, and a variety of governmental pronouncements in accordance with the rules of their particular jurisdiction.⁸ All courts will take judicial notice of the decisions and statutes of their own jurisdiction,⁹ and many will notice those of sister states as well.¹⁰ Originally, some jurisdictions held the determination of foreign law, that is, the law of a jurisdiction other than the forum, to be a question of fact for the jury, while others viewed it as a special type of factual question which the judge alone should decide.¹¹ The area is now generally governed by statutes,¹² some providing that judicial notice of foreign law is mandatory¹³ and others merely permitting such notice.¹⁴

8. See, e.g., UNIFORM RULE OF EVIDENCE 9 which provides in part:

- (1) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States. . . .
- (2) Judicial notice may be taken without request by a party, of (a) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state and (b) the laws of foreign countries. . . .

(emphasis added).

MODEL CODE OF EVIDENCE rule 801 (1942) places in the mandatory category only the common law and public statutes in force in the forum state. The laws of other states of the United States are left to the discretionary provisions of rule 802.

9. Keefe, Landis & Shadd, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 674 (1950) [hereinafter cited as Keefe]. For example, the Maryland Court of Appeals has declared:

The judge was clearly entitled to take judicial notice not only of the law with regard to the territorial jurisdiction of [the Police] Department but also that laws against lotteries and other forms of gambling are among those which it is the duty of that Department to enforce in Baltimore City.

Dean v. State, 205 Md. 274, 279, 107 A.2d 88, 90 (1954).

10. For a list of jurisdictions which take judicial notice of the laws of sister states see Keefe, *supra* note 9, at 684 nn.74 & 75.

11. Note, *Social and Economic Facts — Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692, 699 (1948).

12. Only Texas and Vermont have no statutory provisions. Keefe, *supra* note 9, at 683.

13. E.g., MASS. ANN. LAWS ch. 233, § 70 (1957).

14. E.g., N.Y. CIVIL RIGHTS LAW § 45(1)(b)(3) (McKinney 1963).

Twenty-nine states have adopted the Uniform Judicial Notice of Foreign Law Act.¹⁵ This act provides for mandatory judicial notice of the common law and statutes of other states,¹⁶ but specifies that the determination of the law of foreign countries, while an issue for the court, is not subject to judicial notice.¹⁷ This latter restriction seems unfortunate, especially in the instances of Canadian and English law, which the judge may easily research. A statute such as the New York Civil Practice Act which permits, but does not require, the court to judicially notice the law of a foreign country¹⁸ would appear to be far more desirable.

It has been suggested that the best means of according both a reasonable and uniform treatment for judicial notice of law would be a federal statute providing for mandatory notice of the law of sister states and permissive notice of the law of foreign countries.¹⁹

2. *Fact*²⁰

a. Common Knowledge v. Verifiable Certainty. — A fact cannot be properly judicially noticed unless it possesses some degree of certainty, and two tests are currently in use which attempt to define that degree. The first is the traditional test of whether the fact to be noticed is within the common knowledge of the community.²¹ However, there has been a modern trend away from this test and towards one which provides that a fact may be noticed if it is verifiably certain by reference to competent, authoritative sources.²²

15. AM. JUR. 2d, DESK BOOK, DOC. NO. 129 (Supp. 1966).

16. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 1.

17. UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT § 5.

18. N.Y. CIV. PRAC. §§ 4511(a)-(b) (McKinney 1963).

19. See Hartwig, *Congressional Enactment of Uniform Judicial Notice Act*, 40 MICH. L. REV. 174 (1941). In addition, see the model act suggested in Keefe, *supra* note 9, at 689.

20. It should be noted that courts are sometimes said to take judicial notice of "political facts." What is really meant is that they will receive information from another branch of the government whose findings are binding on the courts. See, e.g., *Lehigh Valley R.R. v. State of Russia*, 21 F.2d 396 (2d Cir. 1927) (holding that the court might not make an independent determination as to which Russian official should be recognized as the legitimate one, but must accept the state department's decision on the matter). See also J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN, J. MANSFIELD, *CASES AND MATERIALS ON EVIDENCE* 11 (5th ed. 1963) [hereinafter cited as MAGUIRE]; 9 WIGMORE § 2574; McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 312-13 (1952) [hereinafter cited as McCormick].

21. See, e.g., *Pacific Gas & Elec. Co. v. W. H. Hunt Estate Co.*, 49 Cal. 2d 565, 319 P.2d 1044 (1957) (water pipes sometimes break from accidental causes); *Portee v. Kronzek*, 194 Pa. Super. 193, 166 A.2d 328 (1960) (people visit taverns to meet friends).

22. See, e.g., *Fringer v. Venema*, 26 Wis. 2d 366, 132 N.W.2d 565, *rehearing denied and mandate corrected*, 26 Wis. 2d 366, 133 N.W.2d 809 (1965) (a bull must be older than six months to be capable of fertilizing fifteen heifers within five months); UNIFORM RULE OF EVIDENCE 9 entitled "Facts Which Must or May Be Judicially Noticed":

(1) Judicial notice shall be taken without request by a party . . . of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken without request by a party, of . . . (c) such

b. Adjudicative v. Legislative. — The facts of which courts take judicial notice are sometimes classified as either adjudicative or legislative. Adjudicative facts are facts about the particular parties to the controversy, their activities, their property, and their interests.²³ Facts which help answer who did what, when, where, why, how, and with what motive and intent are all adjudicative.²⁴ It is to these facts that the jury in a jury trial, or the judge in a non-jury trial, applies the existing law.²⁵ Legislative facts, on the other hand, are used exclusively by the judge when he is developing law and policy.²⁶ They are used not to discover the facts to which the law will be applied, but rather to discover and develop the law itself. Thus, when the judge is interpreting a statute,²⁷ or ruling on its constitutionality,²⁸ or creating new law to bridge gaps in existing doctrines,²⁹ the facts upon which he relies are termed legislative facts.³⁰

c. Specific v. General; Ultimate v. Non-Ultimate. — Adjudicative facts have at times been sub-classified into general and specific facts. The significance of this sub-classification is that courts will more readily take judicial notice of general than of specific facts.³¹ Notice may be taken of general facts which are well known to everyone, for example, that parking is a problem in most big cities,³² or of general facts less familiar to a layman, such as, that any car traveling at ten miles-per-hour may be stopped within thirty-five feet of the braking point.³³ By a process of syllogistic reasoning, such general propositions may be used to deduce a specific fact relating to the parties at hand, as for example, that since any car traveling at ten miles-per-hour may be stopped within thirty-five feet of the braking point, if defendant were traveling at ten miles-per-hour, and braked at point X, he could have stopped within thirty-five feet of point X.

territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (d) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

23. McCormick, *supra* note 20, at 315.

24. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) [hereinafter cited as Davis].

25. *Id.*

26. McCormick, *supra* note 20, at 315.

27. *See, e.g.*, Potts v. Coll, 140 F.2d 862 (D.C. Cir. 1944).

28. *See, e.g.*, Perez v. Lippold, 32 Cal. 711, 198 P.2d 17 (1948).

29. *See, e.g.*, Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

30. *See* MAGUIRE, *supra* note 20, at 9-10; Note, *supra* note 11, at 692.

The same facts may be legislative or adjudicative depending on their use. For example, in *United States v. Aluminum Co. of America*, 148 F.2d 416, 446 (2d Cir. 1945), the court took judicial notice of records of aluminum production compiled in the interim between its judgment and decree for the legislative purpose of fashioning the decree, but not for the adjudicative purpose of determining the correctness of the findings.

31. Compare *Equitable Trust Co. v. McComb*, 19 Del. Ch. 387, 168 A. 203 (1933), with *Commonwealth v. Kitchen*, 229 Mass. 7, 11 N.E.2d 482 (1937). *See* McCormick, *supra* note 20, at 297.

32. *See* *Radcliffe College v. City of Cambridge*, ___ Mass. ___, ___, 215 N.E.2d 892, 895 (1966).

33. *See* *Richardson v. Wendel*, 401 S.W.2d 455, 458 (Mo. 1966).

At times judicial notice of specific facts is taken directly, that is, without the initial step of establishing general facts which will form the premise for subsequent reasoning. Thus, a court, without formal introduction of evidence, could find that during a particular period there was little rainfall in the area where plaintiff's land was located³⁴ or that the particular area where an accident took place was a business district.³⁵

If the fact, whether general or specific, is necessary for either party to prove his case, it is termed an ultimate fact. Since courts will be less prone to judicially notice a fact which will be determinative of the outcome of the case,³⁶ it is important to distinguish between ultimate and non-ultimate (evidentiary) facts. The last example given could represent an ultimate fact — since defendant was charged with exceeding the speed limit set for a "business district," it was necessary to prove that he was driving in a business district at the time of the alleged violation. The former example, regarding the rainfall, could illustrate a non-ultimate fact³⁷ which, although not itself dispositive of the case, may prove useful in reasoning towards an ultimate fact. Thus, after noticing that there was little rainfall in the area where plaintiff's land was located, the court could conclude that the flooding complained of must have been caused by defendant's dam.

B. Scope of Judicial Notice

1. The Morgan-Wigmore Dichotomy

The scope of judicial notice of fact has been traditionally considered in the context of the Morgan-Wigmore, indisputable-disputable controversy.³⁸ On the one side, Professors Morgan and McNaughton³⁹ contend that the primary purpose of judicial notice is to prevent wasteful litigation of moot questions of fact.⁴⁰ Therefore, they maintain that judicial notice should be confined to indisputables, that is, those facts which are so notorious or so universally known or so easily and accurately verifiable that they cannot reasonably be disputed.⁴¹ They reason that since judicial

34. In *Union Pac. R.R. v. Irrigation Dist.*, 253 F. Supp. 251, 255 (D. Ore. 1966), the court first listed statistics on the recent rainfall in the area where defendant's canal was located and then took judicial notice of the fact that the canal was in an extremely arid region of the state.

35. See *Varcoe v. Lee*, 180 Cal. 338, 181 P. 223 (1919).

36. Cf. *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951) (lower court took notice that the value of the car allegedly stolen by the defendant was worth in excess of \$50.00, the amount required for a larceny conviction).

37. For examples of judicial notice of non-ultimate facts see *Datlof v. United States*, 252 F. Supp. 11, 23 (E.D. Pa. 1966) (Oct. 5, 1955 was a Wednesday); *Boles v. Cox*, 252 F. Supp. 173, 174 (E.D. Tenn. 1966) (two defendants were lawyers); *Koller v. W. E. Plechaty Co.*, 6 Ohio Misc. 57, 66, 216 N.E.2d 399, 406 (1965) (plaintiff was suffering pain).

38. See 2 CONRAD, *MODERN TRIAL EVIDENCE* § 986 (1956); Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *PERSPECTIVES OF LAW* 69 (1964).

39. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 279 (1944) [hereinafter cited as Morgan].

40. See McNaughton, *supra* note 4, at 779.

41. The situation as to disputed and disputable issues of fact is different. Neither judge nor jury is bound to have knowledge concerning disputable matters of fact; neither is permitted to make an independent investigation. Both must be content to use such material as is presented in the course of the proceeding.

notice, by their definition, applies only to indisputables, once such an indisputable proposition is properly noticed, it should not be allowed to be controverted.⁴² In other words, judicial notice is conclusive, so that in a jury trial, once a judge judicially notices a fact, he should give the jury binding instructions to find the fact as noticed,⁴³ and no evidence may be introduced in an effort to persuade the jury to make a finding contrary to the noticed fact. The parties may, however, present informal "information"⁴⁴ to the judge, before or after his ruling, in an effort to convince him that the fact is not indisputable.⁴⁵

On the other side of the dispute, Professors Wigmore and Thayer contend that a judge may notice facts unlikely to be challenged as well as those considered to be absolutely indisputable.⁴⁶ Under their definition, judicial notice operates in the way of a presumption.⁴⁷ Says Thayer:

Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima facie* recog-

42. See, e.g., *Verner v. Redman*, 77 Ariz. 310, 271 P.2d 468 (1954); *Stocker v. Boston & Me. R.R.*, 83 N.H. 401, 143 A. 68 (1928); *Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952). In the last cited case, the Pennsylvania supreme court refused to receive evidence that the Communist Party did not advocate the overthrow of the government by force and violence.

43. This position has been adopted by UNIFORM RULE OF EVIDENCE 11:

If a matter judicially noticed is other than the common law or constitution or public statutes of this state, the judge shall indicate for the record the matter which is judicially noticed and if the matter would otherwise have been for determination by a trier of fact other than the judge, he shall instruct the trier of fact to accept as a fact the matter so noticed.

44. Professor Davis makes the criticism that in a nonjury trial the distinction between the informal presentation of material on the issue of the propriety of taking notice, before or after the judge's ruling, permissible under the Morgan view, and the introduction of formal evidence to rebut a judicially noticed fact, not permitted by Morgan, may be tenuous, since the same person, the judge, receives both the "information" and "evidence." Davis, *supra* note 24, at 77-78 n.13. McNaughton admits that this criticism is valid, yet he insists that the differentiation between "information" and "evidence" be made. McNaughton, *supra* note 4, at 804 n.4.

45. See Morgan, *supra* note 39, at 287.

46. See Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 81 (1964).

Wigmore, in discussing the scope of judicial notice, states that facts which may be noticed include:

- (1) Matters which are actually so notorious to all that the production of evidence would be unnecessary;
- (2) Matters which the judicial function supposes the judge to be acquainted with, in theory at least;
- (3) Sundry matters not included under either of these heads; they are subject for the most part to the consideration that though they are neither actually notorious nor bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary.

9 WIGMORE, § 2571.

47. McNaughton argues contrarily, that the system of presumptions created by the Wigmore rationale lacks defined rules to guide its implementation. To point out the difficulties of its operation he asks: What showing will give rise to the presumption? Upon whom is the burden of rebuttal? What is the extent of this burden? McNaughton, *supra* note 4, at 783. Davis, in defending the Wigmore position, states that in order for a judge to take judicial notice of a fact he must merely believe that the fact seems to be true, and does not, in his judgment, require proof. Once so noticed, absent any reason to believe differently, it will be considered true. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 86 (1964).

nitition, leaving the matter still open to controversy. . . . In very many cases . . . taking judicial notice of a fact is merely presuming it, *i.e.*, assuming it until there shall be reason to think otherwise.⁴⁸

Under the Wigmore-Thayer approach, as under the Morgan approach, the parties may initially present information to the court to help it decide whether or not it should take judicial notice of the particular fact in question. If the judge decides to notice the fact, he will instruct the jury that they *may* find the noticed fact to be true even though no evidence has been introduced in its support. The opponent of the fact, at this point, has the option of producing material in an effort to convince the *judge* that he has decided incorrectly — that he should not have noticed the fact because the fact was not unlikely to be challenged. Having failed to dissuade the judge as to the propriety of taking notice, or not having attempted to do so, the opponent of the fact may yet introduce evidence directed at rebutting the presumption and persuading the *jury* to find that the noticed fact is not true.⁴⁹

2. *The Functional Approach*

A functional approach to both the classification and scope of judicial notice of fact should prove to be far more helpful than any of the above categorizations. It has been suggested that the primary policy consideration underlying the question of the scope of judicial notice is the division of authority between judge and jury.⁵⁰ Hence, the freedom of the court to take judicial notice should vary according to the function it is performing when it takes such notice.

a. Pre-trial. — In the exercise of his pre-trial duties, the judge frequently may have to consider a demurrer to a complaint or a motion for summary judgment. In ruling on a demurrer, the judge must decide whether the complaint itself states a cause of action.⁵¹ He is not concerned

48. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 308-09 (1898) [hereinafter cited as THAYER].

49. See, *e.g.*, Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 301-02 (1937); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Makos v. Prince, 64 So. 2d 670 (Fla. 1953); Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 169 S.W.2d 359 (1943); State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951).

Even in a so-called "disputables" jurisdiction, if the fact that is noticed is such that reasonable men could not find to the contrary, the judge may properly disallow argument to the contrary and give the jury binding instructions to find the fact as noticed. See p. 539 *infra*.

It has been said that "judges . . . necessarily use extra-record facts which are neither indisputable nor found in sources of indisputable accuracy," Davis, *supra* note 24, at 948-49, and this statement itself is uncontroversial. Hence, whenever "indisputables" jurisdictions are discussed in the remainder of this Comment, the reference is depicting the procedure followed by the jurisdiction; where the discussion is referring to facts which are literally indisputable, they will be referred to as such.

50. See 9 WIGMORE § 2567. This, of course, does not mean that in a nonjury trial, or in an appellate proceeding, there are no problems as to the proper scope of judicial notice. Such problems will be examined in detail in the ensuing discussion.

with whether the plaintiff might have stated a cause of action had other facts been alleged, but rather with whether the facts, as pleaded, are sufficient. It has been argued, therefore, that judicial notice cannot be applied to the construction of a pleading and that, in ruling upon a demurrer, while the court must take as true every fact well pleaded, it must assume no others.⁵² This broad contention has been rejected as a basis for completely prohibiting the use of judicial notice in ruling on a demurrer.⁵³ Judges have noticed facts both in upholding complaints⁵⁴ and in striking them as insufficient.⁵⁵ However, in light of the judge's limited function in ruling on a demurrer, there appear to be cogent reasons for urging a very limited use of judicial notice in this area.⁵⁶ A court, in ruling on a demurrer, should refrain from noticing any fact which is not literally indisputable and which the parties could not reasonably raise in further pleadings or on argument at trial.

Similar reasoning would support a demand for restricting the court's use of judicial notice in ruling on a motion for summary judgment. Here the judge's function is to examine the pleadings and accompanying affidavits of witnesses and upon finding no issues of fact, to render a final judgment on the law.⁵⁷ Although judicial notice has been used in connection with summary judgment motions,⁵⁸ the judge should, in practice, attempt to confine himself to the pleadings and affidavits before him,⁵⁹ except, again, for literal indisputables which are beyond the realm of being debatable issues at trial.

b. Trial. — At the trial level, the judge may have to rule on preliminary fact questions bearing upon the admissibility of evidence. For example, he might have to decide whether a confession was coerced, whether an original document is unavailable, or whether a witness is married to a party in the case or was the client of a particular attorney.⁶⁰ Such preliminary determinations are generally held to be within the prov-

52. See *People v. Oakland Water-Front Co.*, 118 Cal. 234, 50 P. 305, 308 (1897).

53. *Id.*

54. See, e.g., *De Baker v. Southern Cal. Ry.*, 106 Cal. 257, 39 P. 610 (1893); *Cole v. Segraves*, 88 Cal. 104, 25 P. 1109 (1891).

55. See, e.g., *People v. Oakland Water-Front Co.*, 118 Cal. 234, 50 P. 305 (1897); *Wilson v. Loew's, Inc.*, 142 Cal. App. 2d 126, 298 P.2d 126 (1956).

56. See, e.g., *Chavez v. Times-Mirror Co.*, 185 Cal. 20, 195 P. 666 (1921), a libel case in which the court took judicial notice that a certain person was a public defender, and not a judge, but refused to judicially notice plaintiff's knowledge of this fact.

57. For further explication of the procedure to be followed on a motion for summary judgment see F. JAMES, JR., *CIVIL PROCEDURE* § 6.18 (1965).

58. See, e.g., *Stafford v. Ware*, 187 Cal. App. 2d 227, 9 Cal. Rptr. 706 (1960), where the court, in considering a plea of *res judicata*, took judicial notice of the pleadings in another action in order to determine whether the issues were the same as those in the case before it.

59. In *American Universal Ins. Co. v. Ranson*, 59 Wash. 2d 811, 370 P.2d 867 (1962), the court refused to notice the findings made in another action before another department of the same court.

60. Cf. *Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 49 HARV. L. REV. 165, 167 (1929).

ince of the judge rather than the jury⁶¹ for several reasons, the primary one being to prevent overburdening the jury.⁶² In a prolonged trial, the jury might very well forget which evidence was admitted on the preliminary questions and which on the ultimate issues. Moreover, in the instance of evidence falling within an exclusionary rule, to ask the jury to strike a particular fact from their minds — for example, the existence of a confession — if they find certain other matters to be true — for example, that the confession was coerced — is to ask them to perform the most difficult type of mental gymnastics.⁶³ The preliminary questions, then, are concededly within the judge's realm, and there is no issue as to protecting any right of a party to have the jury decide such questions. Furthermore, the judge does not encounter the procedural limitations that he faces in ruling on a demurrer or a summary judgment motion. Therefore, the court should be permitted a broad use of judicial notice in making preliminary fact determinations.

Similarly, in ruling directly on the admissibility of evidence — for example, whether radar⁶⁴ or drunkometer readings⁶⁵ are reliable enough to be admissible — it is the function of the judge alone to decide all questions on the admissibility of evidence at the trial.⁶⁶ Since he is given broad discretion when making such decisions,⁶⁷ he should be permitted an expansive scope as to facts he may judicially notice.

In the function of finding adjudicative facts,⁶⁸ the primary concern is with the judge's powers and duties in instructing the jury and with his province as the factfinder in nonjury trials. When the judge instructs the jury he defines the relevant law and explains how it should be applied to the facts as found by the jury.⁶⁹ The jury is the factfinder and the

61. *Gorton v. Hadsell*, 9 Cush. 508 (Mass. 1852); Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927).

It should be noted that in some jurisdictions the trial judge will admit the evidence if he determines the preliminary fact question in favor of admissibility, but he will instruct the jury to disregard it unless it also decides the preliminary question in favor of admissibility. In other jurisdictions the trial judge has no duty to determine the preliminary question, and he may rule on it finally, or he may pass the entire question of admissibility to the jury. Still other jurisdictions go one step further by requiring that the judge admit the evidence whether or not he would have ruled it admissible. The jury is then instructed to decide the preliminary question of fact and to ignore the admitted evidence if it concludes that the evidence should have been excluded. See Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 175-89 (1929).

62. See Maguire & Epstein, *supra* note 61, at 393.

63. *Id.* at 392-93; Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 167 (1929).

64. *State v. Graham*, 322 S.W.2d 188 (Mo. 1959).

65. *State v. Miller*, 64 N.J. Super. 262, 165 A.2d 829 (1960).

66. "But it is the province of the judge, who presides at the trial, to decide all questions on the admissibility of evidence." *Gorton v. Hadsell*, 9 Cush. 508, 511 (Mass. 1852).

67. *Id.*

68. See p. 533 *supra*. It should be noted that this Comment is primarily concerned with the judge's function in finding facts or in instructing the jury. Thus, unless otherwise indicated, it will be assumed that the discussion is dealing with these functions.

judge the lawgiver.⁷⁰ When the court takes judicial notice of a fact, and instructs the jury that it must find the noticed fact to be true, the judge is engaging in factfinding. It follows that any such factfinding in a jury trial should be more limited than in a nonjury trial where the judge himself is the factfinder. In the latter instance, the judge need not be concerned with invading the province of the jury or with violating a party's right to trial by jury.⁷¹

By analogizing judicial notice to a summary judgment or a directed verdict, it may be argued that even in a jury trial the judge does not invade the jury's factfinding province when the fact he is noticing is indisputable or uncontroverted. Both a summary judgment and a directed verdict are based upon uncontroverted issues of fact. Theoretically, there are no facts at issue, and, therefore, neither a summary judgment nor a directed verdict usurps the jury's fact-finding function.⁷² Following this analogy, judicial notice of an uncontroverted fact should not be held to infringe upon the province of the jury.

c. Judicial Legislation. — Judges, at both the trial and the appellate levels, may also perform a legislative function, that is, create new law to supplement existing doctrines.⁷³ Courts necessarily must, and in fact do, make wide use of judicial notice when they are exercising their law-making function.⁷⁴ Like the legislature, the judge is guided by considerations of expediency and public policy grounded on various social, economic, political or scientific facts which are often generalized and statistical and far from indisputable.⁷⁵ To require formal proof of such underlying facts would be enormously expensive and time-consuming, and, moreover, would not be procedurally possible at the appellate level where most judicial legislation takes place.⁷⁶ In addition, since this legislative function is solely within the judge's province and discretion,⁷⁷ he should be allowed a broader range of judicial notice here than when he is employing judicial notice to find facts or instruct the jury.⁷⁸

70. See, e.g., *Pope v. United States*, 298 F.2d 507 (5th Cir. 1962); *State v. White*, 247 La. 19, 169 So. 2d 894 (1964).

71. For a complete discussion on the effect of judicial notice on the right to trial by jury see Part III *infra*.

72. See *Whitsell v. Alexander*, 229 F.2d 47 (7th Cir.), *cert. denied*, 351 U.S. 932 (1956).

73. See Note, *Social and Economic Facts — Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948).

74. See p. 533 *supra*.

75. See *McCormick*, *supra* note 20, at 315-16. Such facts, of course, fall within the legislative, rather than the adjudicative, category.

76. *Davis, A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69 (1964).

77. See Note, *supra* note 73.

78. Courts seen as super legislatures must be allowed to roam far and wide and must at all costs not be inhibited by any requirement that the facts with which they deal must be either found in the record or attributable to common knowledge or sources of indisputable accuracy. The law, in short, must be seen as a creative process and the rules of judicial notice recast to expedite this creativity.

d. Post-trial. — In dealing with post-trial matters, the function and authority of the judge varies according to the nature of the proceeding. The trial judge, for example, has a great deal of discretion in ruling upon motions for new trials.⁷⁹ The trial court's discretion must be given deference on appeal, and is not subject to reversal unless a clear abuse of discretion is shown.⁸⁰ Thus, in ruling on a motion for a new trial, it would appear that in order to properly fulfill its duties, the court can, and perhaps should, use judicial notice quite freely.

The judge also has broad discretionary powers in sentencing. Although the guilt or innocence of a defendant is determined by a jury, the imposition of the sentence is solely within the sound discretion of the judge,⁸¹ and, in the exercise of this discretion, he may use material completely dehors the record.⁸² Courts, therefore, have great latitude to judicially notice facts when sentencing a convicted defendant.

In ruling on motion for a directed verdict, however, the judge performs a very limited function and exercises very little discretion. Since the motion for a directed verdict is in the nature of a demurrer to the evidence, the moving party concedes the truth of his adversary's evidence.⁸³ In making a ruling, the judge is strictly limited to the adversary's evidence, and, seemingly, must make no separate and independent findings. Considering the boundaries within which the judge must act in ruling on a directed verdict motion, the scope of judicial notice should be concomitantly narrow.

Thus, while the traditional approaches of classifying and defining the scope of matters which are subject to judicial notice are helpful, the functional approach is offered as a more appropriate analytical tool. The scope of judicial notice of facts should vary according to the function the judge is performing when notice is taken. It should be narrow at the pre-trial level when he is deciding a motion for a summary judgment or a demurrer, but broader when, at trial, he is determining preliminary fact questions or ruling on the admissibility of evidence. His range of judicial notice should be more limited when he is instructing the jury as the factfinders than when he is making factual determinations in a nonjury trial. At the post-trial stage of the proceedings, his discretion in using judicial notice should be greater when ruling on motions for a new trial, or in sentencing a convicted defendant, than when he is considering a directed verdict motion. Finally, the judge's freedom to employ judicial notice should be broadest when he is performing a legislative function.

79. See *Osborne v. United States*, 351 F.2d 111 (8th Cir. 1965); *Commonwealth v. Brown*, 192 Pa. Super. 498, 162 A.2d 13 (1960).

80. See, e.g., *Morgan v. United States*, 301 F.2d 272 (9th Cir. 1962).

81. See, e.g., *Wilson v. United States*, 335 F.2d 982 (D.C. Cir. 1963); *Ex parte Gutierrez*, 82 Ariz. 21, 307 P.2d 914 (1957); *Commonwealth ex rel. Lockhart v. Myers*, 193 Pa. Super. 531, 165 A.2d 400 (1960).

82. See, e.g., *Williams v. New York*, 337 U.S. 241 (1949).

83. See, e.g., *Palmer v. Brown*, 127 Cal. App. 2d 44, 273 P.2d 306 (1954).

III. EFFECT OF JUDICIAL NOTICE ON CONSTITUTIONAL RIGHTS

A. *Right to Trial by Jury*

The traditional purpose of judicial notice has been to save the time of courts and litigants by avoiding the process of proof of obvious matters. Any reasoning process, including judicial reasoning, is incapacitated unless some things are assumed which have not been formally proved.⁸⁴ However, depending upon the phase of the proceedings in which it is being used, and upon the procedure employed, judicial notice may have the effect of removing issues of fact from the consideration of the jury which would ordinarily be within that body's province. In a very real sense, the function of the jury is usurped when some fact is judicially noticed which, but for the judicial notice, would be a matter for its determination. Therefore, the question arises as to whether judicial notice, in such instances, violates the right to trial by jury. It should be noted that this constitutional issue deals solely with the court's role in instructing the jury as to adjudicative facts; that is, the only concern is with those matters which are jury questions, a category which is limited to finding adjudicative facts.

Whether or not there is a violation of the right to trial by jury depends upon the degree of usurpation of the jury's fact-finding function. This, in turn, depends upon the procedure utilized by the court in noticing the fact and in instructing the jury. Thus, it becomes necessary to determine the effect these procedures have upon the right in question.

1. *Nature of the Right*

The sixth and seventh amendments to the United States Constitution guarantee the right to trial by jury in criminal and civil cases respectively.⁸⁵ The seventh amendment right to trial by jury is applicable only to the rights and remedies which were generally known and enforced at common law,⁸⁶ and these include all the procedures that were recognized as jury proceedings in the United States and England at the time the Constitution was adopted.⁸⁷ In cases in which a jury trial is guaranteed, the seventh amendment requires that questions of fact be decided by the jury,⁸⁸ but it

84. See THAYER, *supra* note 48, at 279.

85. U.S. CONST. amends. VI, VII. The sixth amendment guarantees the right to trial by jury in all criminal prosecutions. The seventh amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

86. *Kohn v. United States*, 91 U.S. 367 (1876); *Agwilines, Inc. v. NLRB*, 87 F.2d 146 (5th Cir. 1936).

87. *Patton v. United States*, 281 U.S. 276, 288 (1930); *Mutual Life Ins. Co. v. Green*, 37 F. Supp. 949 (W.D. Ky. 1941).

88. *United States v. Standard Oil Co.*, 24 F. Supp. 575 (W.D. Wis. 1938), *rev'd on other grounds sub nom., United States v. Socony Vacuum Oil Co.*, 310 U.S.

is particularly pertinent to a discussion of judicial notice that the requirement applies only to *debatable* issues of fact.⁸⁹

The sixth amendment right to trial by jury in criminal cases has been held to be so inviolable in our judicial system that it should be jealously preserved.⁹⁰ Nevertheless, a criminal defendant's right to trial by jury only extends to issues of fact which bear upon the determination of his guilt or innocence.⁹¹ This right implies that, on such issues, the evidence against the accused shall come from the witness stand so that he may have full judicial protection of his right to counsel, confrontation, and cross-examination.⁹²

The federal guarantees of jury trial apply only to courts of the United States and have not been made applicable to the states.⁹³ This is of little moment, however, since state constitutions confer a right to trial by jury which, in civil cases, is generally patterned after the seventh amendment.⁹⁴ Similarly, the state provisions applicable to criminal cases protect essentially the same rights as does the sixth amendment.⁹⁵

2. *Effect of Procedures on the Right*

a. Disputables v. Indisputables. — Under one procedure, as discussed earlier, a fact is not indisputable merely because it has been judicially noticed. Any party may contest the judicially noticed matter by introducing evidence to the contrary, and, while taking notice raises a presumption in favor of the noticed fact, the jury is not bound to find the fact as noticed. Under this approach, judicial notice cannot constitute a denial of the right to trial by jury. If the matter is actually debatable,⁹⁶ the parties may introduce evidence, and the ultimate factual determination is left to the jury.

A possible conflict with the right to trial by jury arises, however, in jurisdictions which hold that judicially noticed facts are indisputable, for in these jurisdictions the jury is given binding instructions to find the facts as noticed. The right to jury trial guarantees that the jury will determine *issues* of fact. If the fact which has been judicially noticed is not *literally* indisputable a factual dispute does exist. Removing the dispute from the jury's determination would be a denial of the right to trial by jury to any party who wished to introduce evidence that common knowledge is to the contrary or who could produce competent authority which

89. *E.g.*, *Hunt v. Bradshaw*, 251 F.2d 103, 108 (4th Cir. 1958).

90. *See, e.g.*, *Rees v. United States*, 95 F.2d 784 (4th Cir. 1938).

91. *See, e.g.*, *State v. Price*, 59 Wash. 2d 788, 370 P.2d 979 (1962).

92. *Turner v. Louisiana*, 379 U.S. 466 (1965).

93. In *Baker v. Utecht*, 161 F.2d 304 (8th Cir.), *cert. denied*, 331 U.S. 856, *cert. denied*, 332 U.S. 831 (1947), it was stated that the sixth amendment was not binding on the states; *Olesen v. Trust Co.*, 245 F.2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957), and *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963), reached the same conclusion with respect to the seventh amendment.

94. *See, e.g.*, FLA. CONST. Declaration of Right § 3; IDAHO CONST. art. I, § 7; PA. CONST. art. I, § 6.

96. *See* note 49 *supra*.

held otherwise than the authority which was used by the court to verify the noticed fact. Of course, if the noticed matter is unquestionably true, there is no issue of fact, and, since the right to trial by jury extends only to debatable issues of fact, there can be no denial of that right even in a so-called "indisputables" jurisdiction.

At least one jurisdiction following the "indisputables" theory has attempted to overcome the problem of infringement of the right to trial by jury by holding that even though judicial notice has been taken, it is not binding on the jury.⁹⁷ Under this procedure the right to trial by jury is preserved because the jury makes the ultimate factual determination. This solution, however, is only a sham, for when judicial notice is taken, the party opposing the noticed fact is afforded no opportunity to introduce evidence to controvert the matter. Therefore, although the jury is not given binding instructions, it has heard no evidence upon which to find other than as the court has noticed. To make a contrary finding, the jury must simply decide that the judge's common knowledge or verifying source is contrary to fact. Not only would such a finding be highly unlikely, but it could also give rise to a judgment notwithstanding the verdict. Furthermore, should the case be appealed, there would be no evidence on the record to support the jury's finding.⁹⁸

b. Notification. — Judicial notice must be taken of numerous facts during the course of any trial. Hence, courts are frequently faced with the question of whether or not to take judicial notice without first notifying the parties of its intent to do so.⁹⁹ Professor Davis, writing in a different context,¹⁰⁰ has suggested several variables upon which the court should base its answer to this question. Among these are: (1) "the degree of certainty or doubt — whether the facts are certainly indisputable, probably indisputable, probably debatable or certainly debatable"; and (2) "whether they are adjudicative or legislative facts."¹⁰¹ These variables can be used profitably as a point of reference from which to examine the effect lack of notification and opportunity to argue have on the right to trial by jury.

Obviously, it would be wastefully time-consuming, as well as unnecessary to the protection of the right to jury trial, for a court to notify the parties that it has judicially noticed, or is going to notice, a truly

97. See *McCarthy v. Industrial Comm'n*, 194 Wis. 198, 204, 215 N.W. 824, 826 (1927).

98. See Part V *infra* for a discussion of appellate review of judicially noticed matters.

99. The notification issue, of course, has particular pertinence in a "disputables" jurisdiction where, but for lack of notification, the parties might have been permitted to present evidence to the jury. However, failure to notify may have constitutional ramifications in an "indisputables" jurisdiction also if, through lack of notification, a party is denied the opportunity to present "information" to the judge regarding the propriety of noticing the fact in question. See note 102 *infra*.

100. See Davis, *supra* note 24, at 974-75, wherein the author criticizes the Uniform Rules of Evidence, the Model Code of Evidence, and the *Hoover Commission's Report on Legal Services and Procedure* provisions regarding notification.

indisputable fact.¹⁰² This is particularly true if the fact is not specifically at issue.¹⁰³ On the other hand, when a judge fails to notify the parties that he has taken judicial notice of a debatable fact which is at issue,¹⁰⁴ and that he intends to instruct the jury as to that fact, there may be denial of the right to trial by jury because the fact, having been predetermined by the judge, is effectively removed from the province of the jury. The Constitution requires that debatable issues of fact be decided by a jury, and where the parties have no notification that the fact has been determined by someone else, they have no opportunity to present their respective sides to the jury for a decision. The jury, as a practical matter, would be compelled to find as the judge instructed it, even absent binding instructions.

As has been discussed, the scope of judicial notice of legislative facts that the court notices in its law-making function is far broader than the scope of judicial notice of adjudicative facts that the court notices in its fact-finding function. Judicial notice of legislative facts was used extensively, for example, by the Circuit Court of Appeals for the District of Columbia in *Durham v. United States*.¹⁰⁵ There the court noticed the writings of many medico-legal writers when it established a new test for criminal responsibility. Judicial notice of legislative facts effectively determined the outcome, but the result was based on broad policy grounds, rather than on facts peculiar to the case. Even though the decision was made on policy grounds and was within the law-making function of the appellate court, the jury had no opportunity to consider and determine the truth of the legislative facts upon which the appellate decision was based. It must be recalled that in its fact-finding capacity at trial the jury's only function is to determine the relative merits of adjudicative facts and that in noticing legislative facts in his law-making capacity, the judge is performing a function which belongs to him alone. Nevertheless, it seems that when ultimate disposition of a case is dependent upon legislative facts, the right to trial by jury may effectively be denied unless the jury is permitted to determine the truth and authenticity of those legislative facts, particularly when the facts in question are subject to a great deal of dispute.¹⁰⁶ In such cases, it is arguable that until the jury deter-

102. While failure to notify under these circumstances does not violate the right to trial by jury, it does raise a question of procedural due process and the right to fair trial, a consideration which is beyond the scope of this Comment. It should be here noted, however, that in the administrative law context it has been held that the procedural due process requirements of fair play and fundamental fairness embodied in the Constitution include the right of the parties to notification and an opportunity to be heard. *See, e.g.,* *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274 (1924).

103. *See, e.g.,* *Stainback v. Mo Hok Ke Loc Po*, 336 U.S. 368, 375 (1949) (air carriage has brought Hawaii closer to the continent).

104. *See, e.g.,* *Currie v. Currie*, 180 So. 2d 89, 92 (La. 1965) (all persons who suffer from mental illness are not necessarily insane).

105. 214 F.2d 862 (D.C. Cir. 1954). *See also* *Davis*, *supra* note 24, at 953-54.

106. This situation also raises a procedural due process issue. *See* note 102 *supra*.

mines the truth of the facts, the court should not utilize the facts to make new law.

From the foregoing, it would appear that whether or not the parties should be notified that the court has noticed, or is contemplating noticing, a fact rests in the trial judge's sound discretion. In the exercise of his discretion, he should consider all of the factors heretofore discussed, particularly whether the fact to be noticed is truly indisputable.

c. Common Knowledge v. Verifiable Certainty. — Generally courts have refrained from finding that judicial notice violates the right to trial by jury. In jurisdictions which abide by the common knowledge test, the reasoning apparently is that the facts which are judicially noticed are so well known that they need not be treated as triable issues.¹⁰⁷ Since there is no real issue of fact, there cannot be a denial of the right to trial by jury.¹⁰⁸

The older test of judicially noticing only those facts within the common knowledge has been replaced, in many jurisdictions, by the test of noticing facts which are verifiably certain. In *Fringer v. Venema*,¹⁰⁹ for example, the court held that a judge, in his discretion, may take judicial notice of facts of verifiable certainty by reference to competent, authoritative sources. While *Fringer* is representative of the trend to expand the scope of judicial notice, it also has provided safeguards which should ensure the protection of the right to trial by jury. In that case, the trial court was reversed because it failed to notify the parties that judicial notice was being taken and failed to give them an opportunity to present any sources which might have controverted the sources which the court consulted. If the parties are notified and given an opportunity to present their own contrary sources to the jury their right to trial by jury cannot be said to have been violated, unless the judge has given an erroneous binding instruction to the jury.

The verifiable certainty test, in addition to presenting all of the hazards heretofore discussed regarding the right to trial by jury, raises other problems as well. The court is permitted to verify any fact by reference to competent, authoritative sources,¹¹⁰ but nowhere can there be found a definition of what constitutes competent or authoritative sources for purposes of verifying judicially noticed facts. It would seem that this determination is left wholly to the discretion of the trial judge. In certain fields, this would not be a difficult task. For example, to judicially notice the day of the week upon which a particular date fell, the court need only look to a calendar for the year in question.¹¹¹ In other fields, however, the task could be extremely difficult. A work by a Freudian

107. See, e.g., *Richaud v. American Metal Co.*, 246 U.S. 304 (1918); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159 (1909).

108. See *Olesen v. Trust Co.*, 245 F.2d 522 (7th Cir.), cert. denied, 355 U.S. 896 (1957).

109. 26 Wis. 2d 366, 132 N.W.2d 565 (1965).

110. See, e.g., *id.*

111. See, e.g., *id.*

psychiatrist, for example, might be considered competent and authoritative by many, but a neuropsychiatrist probably would not agree.¹¹² In areas like the latter, in order to preserve the right to trial by jury, the parties should be put to their proofs, and the final determination should be left with the jury.¹¹³ In effect, this solution is simply an exercise of wise discretion by the court, similar to that which the judge must exercise when deciding whether to notify the parties that he has noticed, or is contemplating noticing, a fact.¹¹⁴

Since taking judicial notice is wholly within the discretion of the court, a determination of whether it constitutes a violation of the right to trial by jury must be made on an ad hoc basis. It is important, however, to realize that judicial notice of any fact may result in a denial of the right to trial by jury. When a fact is debatable, notification should be given to the parties so that they have an opportunity to offer rebuttal evidence; facts disputable literally must not be made indisputable procedurally; caution must be exercised in distinguishing adjudicative facts, utilized in the fact-finding function, from legislative facts, employed in the law-making function, particularly in jurisdictions where the party against whom the fact is noticed has the opportunity to attempt to rebut adjudicative facts.

The direct question of whether judicial notice violates the right to trial by jury has arisen infrequently, if at all. Perhaps this results from the relative insignificance of the matters which have hitherto been judicially noticed; or because the judges have exercised their discretion with great restraint; or because many jurisdictions permit dispute of judicially noticed facts; or because certain jurisdictions which hold that judicially noticed facts are indisputable nevertheless permit the jury to find to the contrary. In any event, if the present trend to expand the concept of judicial notice continues, as seems likely, the courts must necessarily and zealously guard the right to trial by jury from any infringements which expansion of the concept may bring with it.

B. Right to Confrontation

The confrontation clause of the sixth amendment,¹¹⁵ applicable to the states through the fourteenth amendment,¹¹⁶ subject to certain exceptions,¹¹⁷ provides the criminally accused the absolute right to be confronted in the courtroom by the witnesses against him.¹¹⁸ The guarantee has the secondary advantage of enabling the judge and jury to gain

112. See J. ROBITSCHER, *PURSUIT OF AGREEMENT: PSYCHIATRY AND THE LAW* 22 (1966).

113. See *Schilling v. Bi-State Dev. Agency*, 414 S.W.2d 818 (Mo. 1967).

114. See p. 545 *supra*.

115. U.S. CONST. amend. VI.

116. *Pointer v. Texas*, 380 U.S. 400 (1965).

117. See *id.*; *Salinger v. United States*, 272 U.S. 542 (1926).

118. See, e.g., *Curtis v. Rives*, 123 F.2d 936 (D.C. Cir. 1941); *United States v. Angell*, 11 F. 3d (D.N.H. 1981).

more insight into a witness' testimony since they are able to observe his demeanor both on direct examination and under the pressure of cross-examination.¹¹⁹ The amendment extends to the testimony of witnesses who testify under oath or whose testimony or statements are in some way brought to the attention of the court and the jury at the trial.¹²⁰ Since all statements which are brought to the attention of the court must be scrutinized in relation to the right to confrontation, it is relevant to examine that right in relation to judicially noticed facts. The discussion in this section will be confined to the right to confrontation in relation to the finding of facts bearing upon the issue of innocence or guilt and to the post-trial disposition process.

1. *At Trial*

When a jury trial is waived, it is the function of the judge to find the facts bearing upon the accused's guilt or innocence; otherwise, this is the jury's function, and the judge is concerned only with facts bearing upon the sentence to be imposed.¹²¹ The purpose of the right to confrontation is to protect the accused's right of cross-examination,¹²² and confrontation enables the factfinder to have a more reliable basis upon which to find the relevant facts. Therefore, if a fact is judicially noticed — particularly where judicially noticed facts are procedurally indisputable or where no notification is given the accused that a fact has been judicially noticed — the accused has no opportunity for cross-examination, and his right to confrontation may effectively be denied.

There are, however, exceptions to the right to confrontation. "[I]t has been customarily held that the right of confrontation may not be invoked to exclude evidence otherwise admissible under well-established legitimate exceptions to the hearsay rule."¹²³ In this connection, it should be noted that new exceptions to the hearsay rule may be carved out "without violating constitutional rights, where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under long established exceptions to the hearsay rule."¹²⁴

Since many facts which are judicially noticed would also constitute "well-established legitimate exceptions to the hearsay rule" if offered into evidence, it follows that taking judicial notice of such facts would not

119. *State v. Lonergan*, 201 Or. 163, 269 P.2d 491 (1954).

120. *State v. James*, 76 N.M. 376, 415 P.2d 350 (1966).

121. See p. 545 *supra*.

122. *State v. James*, 76 N.M. 376, 415 P.2d 350 (1966).

123. *McDaniel v. United States*, 343 F.2d 785, 789 (5th Cir. 1965) (no violation of the right to confrontation where a document was admitted under the business records exception to the hearsay rule). Cf. *Matthews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954).

124. *Kay v. United States*, 255 F.2d 476, 480-81 (4th Cir. 1958) (admission of certificate of blood analysis did not deny the right to confrontation).

violate the right to confrontation.¹²⁵ Similarly, it would appear that taking judicial notice of matters which would constitute new exceptions to the hearsay rule would not be violative of the confrontation clause as long as there is an adequate basis for assuring their reliability and trustworthiness. However, where attempts to create new exceptions to the hearsay rule are contrary to the sound principles underlying the rule, that is, "the very principles [of necessity and trustworthiness] which must have been contemplated by the drafters of the Sixth Amendment," they are violative of the right to confrontation.¹²⁶ Thus, in *Pointer v. Texas*,¹²⁷ the Supreme Court held that the accused was denied his right to confrontation when a transcript of the testimony of a witness at the accused's preliminary hearing was introduced at the trial. The accused was not represented by counsel at the preliminary hearing, and for this reason the Court found that he was effectively denied his right to cross-examination.

While the Court held that there had been a denial of the right to confrontation in *Pointer*, it conceded that exceptions to the hearsay rule such as dying declarations and prior testimony where the accused is represented by counsel at the earlier proceeding are exceptions to the right to confrontation.¹²⁸ Thus, *Pointer* should be classified as a case in which the hearsay evidence involved did not constitute a well-established and legitimate exception to the hearsay rule; in addition, the evidence in question lacked the reliability and trustworthiness necessary to render it an exception to the right to confrontation.

A recent case dealing directly with the issue of whether taking judicial notice violates the right to confrontation is *Wansley v. Wilkerson*.¹²⁹ In a habeas corpus petition, the defendant alleged, *inter alia*, that he had been denied a speedy trial. The trial judge, however, in denying the petition, judicially noticed that the absence of a final conviction was the result of the defendant's own efforts and was not the result of any nefarious plan employed by the Commonwealth. The notice in this case was taken by a judge thoroughly familiar with the defendant's position and the various proceedings which the defendant had instituted. Therefore, the defendant's right to confrontation was not denied in this case any more than it would have been had the prior reported testimony showing the same facts been introduced under the well-established exception to the hearsay rule.

It seems, therefore, that, with respect to the right of confrontation, judicial notice can be treated analogously to the hearsay exceptions. As the concept of judicial notice expands, however, will it step beyond the analogy to the hearsay exceptions? "While the Sixth Amendment

125. See *Mattox v. United States*, 156 U.S. 237 (1895); *Mattox v. United States*, 146 U.S. 140 (1892).

126. *Matthews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954).

127. 380 U.S. 400 (1965).

128. *Id.* at 407.

129. 263 F. Supp. 54 (W.D. Va. 1967).

does not prevent creation of new exceptions to the hearsay rule based on real necessity and adequate guarantees of trustworthiness, it does embody those requirements as essential to all exceptions to the rule, present or future."¹³⁰ It would appear to follow that continued expansion of judicial notice would not violate the right to confrontation so long as it is kept within the same guidelines of necessity and trustworthiness.

2. *Post-trial Disposition — Pre-sentence*

Whether or not the criminal accused has a jury trial, it is the post-trial function of the court alone to determine the sentence, within statutory limits, based upon all the available facts.¹³¹ The issue to be discussed here is whether judicial notice of material contained in the pre-sentence report of a convicted defendant violates his right to confrontation.

The landmark case in the area, *Williams v. New York*,¹³² involved a defendant who had been convicted of first degree murder in New York. The jury had recommended that he be sentenced to life imprisonment. The trial judge, however, on the basis of a Probation Department Report, imposed the death sentence. The report included information that the petitioner had confessed to other crimes, was a menace to society, and had a morbid sexuality.¹³³ The petitioner appealed on the ground that the death sentence was imposed as a result of information supplied by witnesses whom he was given no opportunity to confront or cross-examine. In effect, the court judicially noticed extra-record matters in determining the petitioner's sentence. The United States Supreme Court, in affirming the petitioner's sentence, stated:

A sentencing judge . . . is not confined to the narrow issue of guilt. His task . . . is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.¹³⁴

Thus, the Court concluded not only that these extra-record facts could be considered by a sentencing judge, but intimated that courts should resort to them and rely upon them even though the defendant has not been permitted to test their accuracy.

In *Williams*, the Court stated that it would be proper to sentence the defendant to death on the basis of how his trial manner impressed the judge and reasoned that it was equally proper to impose the death sentence on the basis of a pre-sentence report.¹³⁵ A dissenting opinion disagreed

130. *Matthews v. United States*, 217 F.2d 409 (5th Cir. 1954).

131. *E.g.*, *Wilson v. United States*, 335 F.2d 982 (D.C. Cir. 1963); *State v. Adams*, 1 Ariz. App. 348, 403 P.2d 7 (1965).

132. 337 U.S. 241 (1949).

133. *Id.* at 244.

134. *Id.* at 247.

on the propriety of imposing the sentence on the latter basis because all of the evidence in the report was hearsay, and the evidence of other crimes was irrelevant.¹³⁶ The defendant's trial manner, upon which the Court stated the death sentence could be properly imposed, is traditionally acceptable demeanor evidence,¹³⁷ but the evidence in the pre-sentence report, as indicated by the dissent, is hearsay, and normally inadmissible. Therefore, the Supreme Court seemingly has recognized an exception to the right to confrontation when the sentencing judge judicially notices facts contained in a pre-sentence report.

There are several obvious dangers in judicially noticing facts in a pre-sentence report when the defendant has no opportunity to rebut the content of the report. Persons supplying information upon which the report is based may be biased against the defendant, or they may not know all the facts, or they may supply only selected facts. Moreover, in many instances, *Williams* being the ultimate example, the decision as to the punishment to be imposed may be at least as important, if not more important, than the determination of guilt or innocence. Hence, in evaluating the state of the law with respect to the constitutionality of judicially noticing pre-sentence reports, the words of one eminent jurist should be kept in mind:

[I]t seems . . . that a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel *with opportunity to rebut it*.¹³⁸

In conclusion, it seems that judicial notice in criminal cases is analogous to the well-established hearsay exceptions at least to the extent that neither has been treated as a denial of the right to confrontation. As in the question of whether judicial notice violates the right to trial by jury, there is little authority directly on point. Perhaps, again, the question is seldom raised because the matters heretofore judicially noticed have been relatively insignificant, or because so many jurisdictions allow dispute of judicially noticed facts. Nevertheless, as the concept of judicial notice expands, the problem may become more serious. In that event, courts must exercise the utmost caution before exercising their discretion in taking judicial notice.

The likelihood of violation of the right to confrontation seems greatest in the presently excepted area of sentencing and pre-sentence reports. However, in light of the specific right to confrontation protection accorded by *Pointer*, and the general extension of constitutional guarantees of criminal defendants, it is not inconceivable that the reversal of *Williams* is forthcoming.

136. *Id.* at 253-54 (dissenting opinion).

137. See, e.g., 3 WIGMORE § 946; 2 WIGMORE § 274.

IV. EFFECT OF JUDICIAL NOTICE ON THE ADVERSARY SYSTEM

A. Nature of the System

The American adversary system is grounded upon the theory that the fairest means of resolving controversies that may arise among the citizenry is to permit the parties themselves to initiate and present their disputes to an impartial tribunal by means of evidence that is subjected to the formal rules of admissibility and the safeguard of cross-examination.¹³⁹ It is thought that a partisan investigation and presentation by each adversary in furtherance of his self-interest is more likely to elicit the truth than a duty-motivated search and explanation by a court officer.¹⁴⁰ Moreover, the moral force of the court's decision will be enhanced if it is rendered by someone completely detached from the initiation and presentation of the case.¹⁴¹ As a result of the above considerations, in nineteenth century America, the judge was relegated to the passive role of an umpire, and any participation by him in the contest between the litigants was considered unwarranted interference.¹⁴²

The adversary system, however, like other human creations, has its inadequacies as well as its advantages. "It brings forth guile and concealment as well as truth. It presupposes equality of opportunity, means, and skill; but these are seldom evenly matched. It often degenerates into trial by combat with victory to the swift and strong rather than to the party in the right."¹⁴³

The acknowledgment of these inadequacies has led to a retreat from the adversary system in its strict form. The trend today is toward more judicial interaction and guidance.¹⁴⁴ Judges are taking the initiative in calling additional witnesses, ordering views, questioning witnesses, and making non-binding comments on the evidence.¹⁴⁵ Furthermore, while judicial notice has been a viable concept for many centuries, it is only in the past century that the potentiality of the concept as a trial tool has been recognized. If, however, the full potential of judicial notice is to be realized, it must be expanded even further in years to come. It is suggested that if the scope of judicial notice is broadened intelligently, the concept can preserve the benefits of the adversary system and, at the same time, mitigate against some of the inequities inherent in the system; that is, judicial notice, properly utilized, can allow the judge to actively participate in the litigation to further the discovery of the truth and the accomplishment of a just result — the ultimate objectives of the adversary system.

139. "The adversary system . . . presupposes . . . 'the principle of bilaterality' — that opportunity be given to both sides to investigate and to present proof and legal argument." F. JAMES, JR., CIVIL PROCEDURE 4 (1965).

140. *Id.* at 4-5.

141. *Id.*

142. See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in 29 ABA REP. 395, 405 (1906).

143. F. JAMES, JR., *supra* note 139, at 7; Pound, *supra* note 142, at 405.

144. See F. JAMES, JR., *supra* note 139, at 5-6.

It is the purpose of this section to examine the procedures for taking judicial notice heretofore discussed in an effort to discover and evaluate their effects on the adversary system.

B. Effect of Procedures on the System

1. Tacit Judicial Notice

Although it be agreed that the judge's employment of judicial notice is both proper and helpful, the question remains as to the propriety of tacit notice; that is, should the judge take notice of a matter without informing the parties that he is doing so. Keeping in mind that the primary function of judicial notice is to promote convenience,¹⁴⁶ the answer to this question depends, in part, upon the nature of the propositions being noticed and the point in time when notice is taken. However, in answering the question, consideration must be given to the need to retain those characteristics of the adversary system which promote the discovery of factual truths.

The judge should be permitted to tacitly notice matters which are widely known and accepted by all¹⁴⁷ — the meanings of common words, that it is dark at night, or that children grow. These matters are so widely accepted that neither party would want to dispute them, except for dilatory purposes. Hence, the judge's failure to notify the parties that he is taking judicial notice, and the consequent prevention of argument on the point, has little effect on the adversary system since notice and argument would be a needless gesture.

As previously noted, any process of reasoning necessitates the assumption of certain propositions which have not been proven.¹⁴⁸ In making such assumptions, the court is in reality taking judicial notice. For example, if it be established that an accident occurred at night, the court will not disregard this fact in determining the issue of how clearly the defendant could see the plaintiff, notwithstanding the defendant's failure to offer evidence that it is dark at night and that people cannot see as well in the dark as they can in the light. The judge will take tacit judicial notice of these commonly known facts.¹⁴⁹ To ask him to notify the parties of every such assumption would be unnecessarily time-consuming and a practical impossibility.¹⁵⁰ Furthermore, to permit or require the parties to offer formal proof in reference to such facts could serve no purpose other than to preserve the adversary system in its rigid, common law form, without enhancing the probabilities of discovering verifiable facts.

146. See *Nicketta v. National Tea Co.*, 338 Ill. App. 159, 161-62, 87 N.E.2d 30, 31 (1949). See also Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 93 (1964).

147. Davis, *supra* note 24, at 975.

148. THAYER, *supra* note 48, at 279.

149. See Davis, *supra* note 24, at 975. Of course the jury also makes tacit assumptions in its reasoning process. See, e.g., McCormick, *supra* note 20, at 299-300.

150. See Davis, *supra* note 24, at 979.

On the other hand, tacit judicial notice should not be taken of specific adjudicative facts. These are peculiarly within the knowledge of the parties themselves, generally close to the center of the controversy, and the very issues at which our adversary system should be aimed. Judicial notice of these facts may lead to the unjustified acceptance of "untested" facts, thereby undermining the moral force of the judgment.

Nor should legislative facts used in the law-making function be unqualifiedly subject to tacit judicial notice. It has been argued that the judge, in developing law and policy, should be given more freedom to use sources outside of the record without notifying the parties that he is doing so¹⁵¹ and that lack of notification is not unfair since the court may be in a much better position than the parties to conduct a full and adequate investigation of such legislative facts.¹⁵² However, in the context of the adversary system, other considerations strongly favor notification. First, the material outside of the record that is judicially noticed by the court in the process of laying down rules of law is necessarily not absolutely indisputable and at times is highly debatable.¹⁵³ Therefore, the parties should be afforded the opportunity of presenting their views on the matter to the judge in some manner — by brief, oral argument, or by supplying him with sources supporting their contentions. Secondly, since appellate courts most frequently engage in the law-making function, it is in these forums that judicial notice of legislative facts will most often be taken. If the court is one of last resort, and the judge first indicates that he has taken judicial notice when he hands down his opinion, the parties are effectively precluded from ever debating the matter noticed,¹⁵⁴ which matter, concededly, was debatable. Such a result is clearly inconsistent with the basic principles underlying the adversary system.

*Triangle Publications v. Rohrllich*¹⁵⁵ is illustrative of such a result. There the plaintiff claimed that its trademark for the magazine *Seventeen*, was infringed by the defendant's use of the name "Miss Seventeen" for its line of teenage underwear. Whether the two products were associated in the minds of teenage buyers could hardly be termed absolutely indisputable. The appellate judge, however, in order to "feed" the court's "judicial notice apparatus,"¹⁵⁶ conducted a random survey in which he questioned a number of teenagers and their mothers. As a result of this survey, he concluded that "no one could reasonably believe that any relation existed between plaintiff's magazine and defendants' girdles."¹⁵⁷ Since it was not learned that the judge had made such inquiries and had drawn such a conclusion until the court's opinion was delivered, the plaintiff was

151. See, e.g., *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1929); Currie, *Appellate Courts' Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 50.

152. Davis, *supra* note 24, at 964.

153. See p. 539 *supra*.

154. Morgan, *supra* note 49, at 293.

155. 167 F.2d 969 (2d Cir. 1948).

156. *Id.* at 970.

157. *Id.*

precluded from offering the results of any comparable poll he might have conducted.

2. *Disputables v. Indisputables*

If a judge does notify the parties that he is taking judicial notice, or is contemplating the same, three courses of action are then theoretically available. In some jurisdictions the parties are permitted to introduce evidence to persuade the jury¹⁵⁸ that the noticed fact is not true. For example, in *State v. Kincaid*,¹⁵⁹ the defendant was convicted of violating a statute which required the licensing of public dance halls located in communities of less than 500 inhabitants. The trial court had taken judicial notice of a national census listing Gold Hill, where defendant's establishment was located, as having a population of 442. In discussing how the defendant could have avoided the finding of the lower court, the appellate court stated that "it would have been competent for him to place upon the witness stand a qualified person who had ascertained the population of Gold Hill. *Judicial notice would not preclude the court from establishing the truth.*"¹⁶⁰

In *State v. Duranleau*,¹⁶¹ the question was whether a certain street was a public highway. The lower court took judicial notice of an ordinance which so characterized the street, but the appellate court remanded to give the opponent an opportunity to rebut the noticed fact. The court recognized that some jurisdictions hold a fact judicially noticed to be conclusively established, but felt that "fairness in trial practice demands that the opposing party have an opportunity to dispute it."¹⁶²

The taking of judicial notice in these "disputables" jurisdictions operates as a presumption in favor of the noticed fact, and although the presumption gives the proponent of the fact an initial advantage, the opposing party is not precluded from presenting his views to the jury, and the jury is not bound by this judicially noticed fact. Thus, in *Timson v. Manufacturers Coal & Coke Co.*,¹⁶³ a tort action, the trial court took judicial notice of the fact that all coal mines generate gas. The Missouri Court of Appeals held that the defendant should have been permitted to offer evidence to prove that his particular mine was not generating gas at the time of the accident. The court stated:

The fact that courts in the first place, and as making out a prima facie case, will take judicial notice of certain things does not preclude the opposite party from rebutting such prima facie case. . . . Judicially noticing facts, like many presumptions entertained by the courts, is but a rule of evidence; and, if the question is a disputable one, or can be disputed, evidence so disputing it is competent and should be admitted.¹⁶⁴

158. Reference in this section is to the jury alone, although the material is equally applicable to the judge as the factfinder in a nonjury trial.

159. 133 Or. 95, 285 P. 1105 (1930).

160. *Id.* at 104, 285 P. at 1108 (emphasis added).

161. 99 N.H. 30, 104 A.2d 519 (1954).

162. *Id.* at 32, 104 A.2d at 521.

163. 220 Mo. 380, 145 S.W.2d 1009 (1940).

164. *Id.* at 598, 119 S.W. at 569.

By allowing evidence to rebut the presumption, these jurisdictions have kept the adversary nature of the proceeding substantially intact and have ensured that judicially noticed facts can be tested by evidence opposing the propriety of their acceptance.

The second possible course of action is evidenced by jurisdictions in which once a fact is noticed and the parties so notified, no further argument to the jury is permitted, for the jury is given binding instructions regarding the judicially noticed fact. If the fact is truly indisputable, there could be no reasonable argument by the opponent of the matter, and the failure to allow such argument would not detract from the inherent reliability of the noticed proposition. However, if the fact is indisputable only because of the binding instructions, the refusal of the court to allow argument would be contrary to the underlying rationale of the adversary system. Therefore, in those jurisdictions which follow the view that judicial notice conclusively establishes a fact, the courts must exercise great care that the noticed facts are clearly beyond the realm of plausible debate. For example, the court in *Utah Const. Co. v. Berg*¹⁶⁵ held that the Arizona Industrial Commission should not have taken notice of the material in a published symposium where the introduction to the discussion in question admitted that the ideas expressed therein were not in agreement with accepted views. The court insisted that only indisputable and certain facts be noticed since notice dispenses with both proof of the fact and the opportunity to rebut it with evidence.¹⁶⁶ Logically, there could be no substantial rebuttal evidence to present to the jury when a fact is properly noticed since the existence of such evidence would have prevented the matter from being classified as indisputable in the first instance. As the court in *Nicketta v. National Tea Co.*¹⁶⁷ stated: "In a few cases it is said that the judge should have received evidence offered to show the opposite of what he declared to be a judicially noticed fact. What is meant is that the subject did not fall within the realm of judicial notice."¹⁶⁸

If, when contemplating the notice of a fact that is not indisputable, these jurisdictions were to allow neither rebuttal evidence before the jury, nor argument before the judge in a nonjury proceeding, they would be guilty of seriously undermining the basic precepts of the adversary system. The judge would be making a finding of fact on an arguable issue without allowing the parties to express their views or the bases therefor.

In many "indisputables" jurisdictions, although a party cannot present evidence to the jury to rebut a noticed fact, he can, having been notified that the judge intends to take notice, make an informal presentation before the judge in an attempt to convince him that the fact is not a proper subject for judicial notice — that it is not indisputably true. The

165. 68 Ariz. 285, 205 P.2d 367 (1949).

166. *Id.* at 291, 205 P.2d at 370. The court noted that this rule was applicable to judicial, as well as quasi-judicial, bodies. *Id.* See also *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 203 P.2d 633 (1949).

167. 338 Ill. App. 159, 87 N.E.2d 30 (1949).

168. *Id.* at 162, 87 N.E.2d at 31.

proponent of the fact may likewise offer information tending to show that the fact is indisputable. This third procedure for judicially noticing facts is illustrated by the *Nicketta* case. There, the trial court took judicial notice of the fact that a person cannot contract trichinosis from eating properly cooked pork. The defendant had presented this "information" to the trial judge, and, as the appellate court explained, the plaintiff had presented no contrary information. He had filed no affidavits, nor had he referred either the trial or appellate judge to any authority to attempt to convince him that the matter was not indisputably true and, therefore, not a proper subject of judicial notice, although it was clearly his option to do so.¹⁶⁹ This burden is more demanding than the regular in-court adversary proceeding since its object is not merely to convince the factfinder that the fact is true, but rather to convince the judge that the vast majority of rational men believe the fact to be true and, therefore, indisputable.¹⁷⁰ Nevertheless, by affording the parties the opportunity to participate in the proceeding, that for which the adversary system stands is not undermined.

Thus, regarding tacit judicial notice, it would appear that the fundamental principles of the adversary system are not violated if the noticed facts are beyond the realm of reasonable challenge. Furthermore, the benefits to be derived from the adversary system are not attenuated if, with respect to debatable facts, the parties are notified and given the opportunity to either introduce rebuttal evidence or present "information" to the court. However, if the court takes tacit notice of a disputable fact, or fails to offer an opportunity to formally or informally rebut such a fact, the principles of bilaterality and party-presentation inherent in our adversary system will be sacrificed. Hence, it would appear that expansion of the scope of judicial notice will not necessarily undermine the beneficial aspects of the adversary system provided that the courts, in their search for factual truths, afford the parties the opportunity to challenge "facts" that are not unequivocally true.

V. JUDICIAL NOTICE IN THE APPELLATE COURTS

A. Review of Judicially Noticed Facts

1. Grounds

Appellate review of matters judicially noticed at trial may take a variety of courses depending upon the jurisdiction's theory as to the scope of judicial notice and the procedures to be followed at trial. In a "disputables" jurisdiction, for example, if the trier of fact, notwithstanding the introduction of contrary evidence, finds the fact as noticed, the opponent of the fact may argue that the fact was not within the proper

169. "It is the judge's function to decide whether a matter is a subject of evidence or of judicial notice. The judge should be free to make for himself such investigation as he desires, but he should also be able to call upon the parties for assistance." *Id.* 170. See Morgan, *supra* note 39, at 286.

scope of judicial notice as defined by the jurisdiction.¹⁷¹ He will contend that the fact was not unlikely to be challenged, that the judge should have required proof of the matter, and that it was erroneous to have created a presumption in its favor by taking judicial notice. If the judge judicially notices a matter and permits evidence to the contrary and the jury finds against the noticed fact, the opponent of the fact would not appeal since the ultimate finding was in his favor, and the proponent of the fact could not appeal since the judge ruled in his favor when noticing the fact.

If the jurisdiction adheres to the "indisputables" view, the opponent of the fact may argue that the judge erred in noticing the fact because it was beyond the scope of judicial notice as defined by that jurisdiction — that is, that the fact is not literally indisputable.

Of course, a failure to adhere to the procedure adopted by the jurisdiction would be grounds for reversal on appeal. Thus, if rebuttal evidence is admitted in an "indisputables" jurisdiction,¹⁷² or is excluded in a "disputables" jurisdiction,¹⁷³ or if the court neglects to notify the parties that it is taking judicial notice in a jurisdiction which requires such notification,¹⁷⁴ the trial court's finding may be set aside.

2. Scope

From the standpoint of traditional review of findings of fact and decisions of law,¹⁷⁵ it would appear initially that since in taking judicial notice the judge is deciding a factual issue, his decision should be subject to the standard of review for questions of fact. The judicial machine, interested primarily in settling a particular dispute with finality, will usually be equally satisfied with either a yes or no answer to a factual proposition¹⁷⁶ and, consequently, an appellate tribunal will generally set aside only a "clearly erroneous" finding.¹⁷⁷ Questions of law, however, have but one right answer, uniformity being essential so that similar disputes may be similarly decided.¹⁷⁸ Questions of law, therefore, are fully reviewable, the appellate court not being bound at all by the conclusion

171. See *In re* Bowling Green Milling Co., 132 F.2d 279, 283 (6th Cir. 1942); 9 WIGMORE § 2567(c):

That the appellate tribunal is not concluded by the ruling of the trial Court, would seem clear. The appellate tribunal may re-examine the question of judicial notice, not only by reconsidering the information used by the trial Court, but also by considering additional information.

172. See *Verner v. Redman*, 77 Ariz. 310, 314, 217 P.2d 468, 470 (1954); *Utah Constr. Co. v. Berg*, 68 Ariz. 285, 291, 205 P.2d 367, 370 (1949); *Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 196, 203 P.2d 633, 638 (1949).

173. Unless, of course, the fact is literally indisputable. See note 49 *supra*.

174. See, e.g., *Fringer v. Vinema*, 26 Wis. 2d 366, 132 N.W.2d 565 (1965).

175. See generally Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944).

176. Roberts, *Preliminary Notes Toward A Study of Judicial Notice*, 52 CORNELL L.Q. 210, 211 (1966).

177. See, e.g., FED. R. CIV. P. 52(a):

In all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

reached below.¹⁷⁹ Questions of fact which are the subject of judicial notice, however, fall within a peculiar class, for although they are indeed questions of fact, they, like questions of law, can have but one correct answer. By definition they relate to matters of common knowledge or verifiable certainty, and the same factual propositions may arise in different actions involving different parties. Thus, as in questions of law, uniformity in these special fact questions is essential, and the judge's decision to notice, or not notice, a particular fact as true should, like his decisions on questions of law, be fully reviewable.¹⁸⁰

Policy considerations would also seem to mandate full review of the trial judge's judicial notice ruling. This conclusion can be derived by examining the usual arguments for limited review of facts and by noting that such arguments have no applicability to facts that are judicially noticed. For example, one of the reasons offered for limited review of fact questions is that factfinding is within the prerogative of the jury, and, therefore, the jury's finding should not be readily disturbed.¹⁸¹ Since the decision of whether or not to take judicial notice is within the judge's sole discretion, full review of the judicially noticed fact will not detract from the jury's fact-finding function.

Another reason asserted for limited review of facts is that the trier of fact hears the witnesses and views the evidence and consequently can better decide the issue than can the appellate court which has only a cold record before it.¹⁸² In taking judicial notice, however, the trial judge does not hear in-court witnesses nor does he receive formal evidence, and any "information" that may be offered to help him make his ruling may just as easily be presented to the appellate court. Similarly, since no formal evidence of record is presented to the trial court on facts judicially noticed, any argument that might be raised that findings of fact should not be disturbed because of the impracticality of searching through a long, involved trial record,¹⁸³ likewise has no bearing in the judicial notice situation.

Finally, it can be argued that the scope of appellate review of matters judicially noticed is, in reality, a moot issue since, regardless of the trial court's action, the appellate court may make its own determination of whether or not to notice a particular fact. Appellate courts can take judicial notice of anything that the trial court could have noticed.¹⁸⁴

179. *See, e.g.*, *Payne v. Winters*, 366 Pa. 299, 77 A.2d 407 (1951).

180. *See* Roberts, *supra* note 176, at 215-18.

181. F. JAMES, JR., *CIVIL PROCEDURE* § 11.13 (1965).

182. *See, e.g.*, *Pugh v. Cannon*, 266 Ala. 97, 94 So. 2d 386 (1957); *Hurst v. Bar* Rules Comm., 202 Ark. 1101, 155 S.W.2d 697 (1941).

183. *See, e.g.*, *Bradley v. Osborn*, 86 Cal. App. 2d 18, 194 P.2d 53 (1948).

184. An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. . . .

In fact a particularly salutary use of the principle of judicial notice is to sustain, on appeal, a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indis-

Therefore, an appellate court may view a matter as being within the scope of judicial notice and can take notice of it even though the lower court neglected or refused to do so.¹⁸⁵ On the other hand, if the lower court did take notice which was erroneous in the eyes of the appellate court, the appellate court can refuse to consider the fact as established for purposes of appeal.¹⁸⁶

Thus, it appears that there should be full review of judicially noticed facts whether the issue is viewed as a traditional law or fact question, or as a policy question, or as a question of the appellate court's scope of judicial notice in the first instance.

B. Original Judicial Notice

Because appellate courts are precluded from receiving evidence on the issues before them, they have made wide use of judicial notice, especially in noticing legislative facts in their law-making function.¹⁸⁷ For example, appellate courts have judicially noticed that purchasers are unlikely to be induced to mistake a nine and one-half or ten ounce loaf of bread for a one pound loaf,¹⁸⁸ that the children of racially mixed marriages are not inferior to their parents,¹⁸⁹ and that individual incentive to invent is lacking in organized research.¹⁹⁰ They have also relied on outside sources to determine a proper depreciation method¹⁹¹ and a revolutionary criminal insanity rule.¹⁹² In their fact-finding function, appellate courts have noticed, for example, that trolley cars have gongs¹⁹³ and that

putable and a matter of common knowledge and was probably assumed without strict proof for that very reason.

Varcoe v. Lee, 180 Cal. 338, 343-44, 181 P. 223, 225 (1919). See pp. 559-61 *infra*. See also note 171 *supra*.

185. See, e.g., *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 787, 30 Cal. Rptr. 668 (1963); UNIFORM RULE OF EVIDENCE 12(1); note 193 *infra*. *Contra*, *Sites v. Morgan*, 229 Or. 123, 366 P.2d 324 (1961); *Walton v. Stafford*, 14 App. Div. 310, 43 N.Y.S. 1049, *aff'd*, 162 N.Y. 558, 57 N.E. 92 (1897).

186. See *In re Bowling Green Milling Co.*, 132 F.2d 279, 283 (6th Cir. 1942).

187. *McCormick*, *supra* note 20, at 316.

188. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924).

189. *Perez v. Sharp*, 32 Cal. 2d 711, 720, 198 P.2d 17, 22 (1948).

190. *Potts v. Cole*, 140 F.2d 470, 476-77 (D.C. Cir. 1944). In *Potts* the court refused to give patents to a corporation for group-developed products since the policy behind patent grants is to foster individual initiative. This holding was based, in part, on congressional hearings that the court had judicially noticed.

191. *Massey Motor, Inc. v. United States*, 364 U.S. 92 (1960). Here, the Court relied on text writers and accounting experts' reports to help determine the proper method of depreciating the cars used in defendant's car rental business, which, when sold and replaced with newer models, still had substantial salvage value.

192. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). In *Durham* the court made innumerable references to psychiatric writings and reports, as well as to the Royal Commissioner's Report, to come to the conclusion that the M'Naghten right-wrong test of insanity was inadequate. For a more complete discussion of the *Durham* case see p. 544 *supra*.

193. *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (10th Cir. 1946). In this case the negligent plaintiff did not see the defendant's trolley approaching, and he was struck. The trial court refused to instruct the jury that the last clear chance doctrine would permit the plaintiff to recover if the jury found the defendant could have warned the plaintiff in time to avoid the accident. The refusal was on the ground that the plaintiff had failed to offer proof that the trolley had any warning device. The appellate court reversed, taking judicial notice of the fact that the trolley had

a bus terminal's restaurant is an integral part of the bus company's business.¹⁹⁴ Judicial notice has also been used in the review of a trial judge's rulings on the admissibility of evidence¹⁹⁵ and demurrers.¹⁹⁶

The procedure for taking judicial notice at the appellate level has been criticized because of the failure of many appellate courts to notify the parties of their intention to take notice or their refusal to afford the parties an opportunity to present contrary "information" and argument.¹⁹⁷ Fairness to the parties would seem to require an appellate court to give notification of its intent to take judicial notice, at least as to adjudicative facts which the court feels might reasonably be contested.¹⁹⁸ Notification may not be feasible as to legislative data, particularly when used by the court in its law-making function, but the possible injustice that could be engendered by lack of notification and opportunity to argue is made obvious by the following observations of Professor Morgan:

When the resort to judicial notice is first made manifest in the opinion of the court of last resort, it is usually too late to take corrective measures. In reading data garnered from text books and encyclopedias, and statistics taken from specified sources, set out in an opinion of a court of last resort, one often has a feeling that they might have been contradicted or modified or explained by diligent counsel aware that the court intended to use them.¹⁹⁹

Although the broad scope of judicial notice enjoyed by appellate courts has been a source of criticism,²⁰⁰ the fact remains that appellate courts do need to be informed of legislative facts, disputed though they may be, in order to pursue their role in developing law and policy. If these courts were restricted to literal indisputables, the process of judicial notice would be wholly inadequate.²⁰¹ This is particularly true where social

some warning device. It said that the trial court should have taken notice of that fact, even though the plaintiff had not requested it to do so.

194. *Boynton v. Virginia*, 364 U.S. 454 (1960). In *Boynton* the Court took judicial notice that a bus terminal restaurant was an integral part of the defendant's interstate bus service, and therefore fell under the commerce clause prohibition against discrimination by a carrier. The restaurant, which had maintained separate sections for blacks and whites, was a private concern, neither owned nor operated by the defendant bus company.

195. *E.g.*, *Hawkins v. United States*, 358 U.S. 74 (1958).

196. *See, e.g.*, *DeBaker v. Southern Cal. Ry.*, 106 Cal. 257, 39 P. 610 (1895); *Cole v. Seagraves*, 88 Cal. 103, 25 P. 1109 (1891).

197. *See Currie, Appellate Courts' Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 51-52; Morgan, *supra* note 39, at 293.

198. Currie, *supra* note 197, at 51.

199. Morgan, *supra* note 39, at 293.

200. *See, e.g.*, Currie, *supra* note 197, at 51-52.

201. Judicial notice, even if confined to indisputables, is usually adequate, however, in cases testing the constitutionality of statutes. Since the burden is on the attacker to show that there are no facts to justify the statute, his facts must, of necessity, be indisputable. Note, *Social and Economic Facts — Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692, 696 (1948). Some contend that judicial notice of facts may be used only to uphold a statute, but not in striking it down. *See Currie, supra* note 197, at 50-51. For a discussion of beyond-the-record discovery of "constitutional facts" see sources listed in Davis, *supra* note 24, at 959 n. 53. Note, *supra* at 693 n. 7.

and economic facts are concerned,²⁰² since these are rarely undisputed.²⁰³ On the other hand, if appellate courts are permitted to notice a broader scope of material, there exist problems of lack of regulation of the types of sources they may consult²⁰⁴ and of the thoroughness of their research,²⁰⁵ as well as the lack of provisions for some type of recording of the material relied upon.²⁰⁶

Thus, it has been shown that if a trial court notices matters beyond the scope of judicial notice as defined by its jurisdiction, or if it fails to abide by the procedures prescribed by its jurisdiction, an appellate court has grounds to reverse the trial court's finding. Moreover, the appellate court may fully review facts judicially noticed by the trial court.

Appellate courts may themselves notice facts in a fact-finding, as well as a law-making, capacity, although it is in the latter capacity that appellate courts are most active. While the possibility exists that an appellate court may abuse its discretion in taking judicial notice either by noticing facts clearly not within the scope of judicial notice or by neglecting to notify the parties that notice will be taken of a fact which the parties would have wished to debate, these contingencies can be avoided, for the most part, by the court exercising its discretion wisely and by according the parties the opportunity to challenge clearly conjectural legislative "facts." It has been suggested that the necessity for judicial notice at the appellate level be recognized²⁰⁷ and that appellate judges be provided with proper and effective machinery for so noticing.²⁰⁸ For example, it could be provided that the court may appoint a special master or expert in the area involved to fully investigate the matter in question, including a perusal of the record of the proceedings below, and make a report to the court.²⁰⁹ This report would serve the additional function of preserving a record of exactly what the appellate judge considered in making his ruling. The parties' rights as to notification could also be protected under this procedure by having the master furnish copies of his tentative report to each of the parties, and the master could hear any objections to its contents before he files it with the court.²¹⁰

VI. CONCLUSION

This Comment, thus far, has examined the various theories and approaches to judicial notice and has scrutinized the effect the procedures which have evolved from these theories and approaches have had on the right to trial by jury, the right to confrontation, and the adversary system.

202. See Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 7 (1922).

203. See Note, *supra* note 201, at 694.

204. See *Harris v. Pounds*, 183 Miss. 688, 695, 187 So. 891, 893 (1939).

205. Note, *supra* note 201, at 698.

206. *Id.*

207. *Id.* at 701.

208. *Id.* at 700-01; Currie, *supra* note 197, at 49.

209. See Currie, *supra* note 197, at 49.

In light of its expanding scope, however, a discussion of judicial notice would not be complete without also inquiring into its potential effect on two topics of contemporary concern — judicial administration and the rules of evidence.

Throughout the country, trial backlogs are plaguing our courts. The experience of the United States District Court for the Eastern District of Pennsylvania illustrates the scope of this problem. As of June 30, 1966, this court had a backlog of 6,686 cases, approximately 1,100 of which will go to trial.²¹¹ A procedure facilitating an increased rate of disposition of cases would not be a panacea for the backlog problem, but it would certainly aid in decreasing the backlog, even in the busier jurisdictions. Based on the affirmative duty placed on the courts to prevent delay,²¹² it appears that the courts would be remiss were they not to take judicial notice of facts which are literally indisputable. Indeed, notice of facts which are not clearly indisputable, but which are not likely to be challenged, would also speed litigation. In "disputables" jurisdictions, notice of such facts would not have a detrimental effect on constitutional rights²¹³ or on the trial process²¹⁴ and, therefore, the acceleration resulting from the elimination of time-consuming proof by at least one of the parties might well justify such notice. However, in an "indisputables" jurisdiction, taking notice of facts which are not literally indisputable can fall subject to constitutional condemnation. Therefore, sound judicial administration would seem to mandate universal adoption of the Wigmore-Thayer theory as to the scope of judicial notice of facts noticed by the court in its fact-finding function or in instructing the jury.

Judicial notice can also be an important tool for ensuring that evidentiary technicalities do not subvert the primary purpose of the rules of evidence — the exposure of the jury to relevant, probative, and competent facts in an effort to facilitate the rendition of a just verdict. As has been observed, laymen are of the belief that "justice follows too slow and tortuous a path in reaching its goal and . . . there is far too much reliance on what he [the layman] considers 'technicalities'."²¹⁵ These technicalities in fact can, and often do, cause the exclusion of competent evidence and increase the expense and delay attendant upon litigation.

Judicial notice can be utilized to obviate this problem in two ways. The first method involves judicial notice of the evidence itself. To the extent that judicial notice is taken of treatises, reports, and other reliable materials relevant to the facts in issue, the necessity would be eliminated for qualifying and examining expert witnesses and for the offering of proof supporting the facts. Moreover, such a practice would prevent the best

211. Comment, 13 VILL. L. REV. 137, 146 (1967).

212. See *id.* at 147.

213. See pp. 542-43; p. 547 *supra*.

214. See pp. 554-56 *supra*.

215. Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation in Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 207 (1962).

evidence and hearsay rules from causing the exclusion of competent evidence.

Secondly, judicial notice can be utilized to establish a fact which must be proven before certain evidence is admissible under one of the rules of evidence. For example, the court could take judicial notice of the qualifications of an author and admit his treatise into evidence under the learned treatise exception to the hearsay rule. This procedure would likewise eliminate the need to qualify the expert. Similarly, judicial notice of an underlying fact can be used to qualify testimony which would otherwise be subject to exclusion as lay opinion. A court, for example, could take judicial notice of the fact that consumption of a certain amount of alcohol will cause intoxication and, thereby, enable a witness to testify that the defendant was intoxicated since the witness saw the defendant consume the specified amount of alcohol.

Of course, the extent to which judicial notice is to be employed for these purposes should depend on the degree of certainty of the fact to be noticed and the jurisdiction's rules regarding rebuttal of judicially noticed facts. Furthermore, it would appear that justice could best be expedited by judicially noticing facts which are not likely to be challenged and by allowing rebuttal when a reasonable challenge does ensue.

The courts, for the most part, have not abused their discretion in taking judicial notice and, in fact should make more frequent use of this device. "[It is] . . . too often the failure of our courts to use judicial notice at all, rather than its misuse, that should cause public anxiety."²¹⁶ However, the courts must take care that substance is not sacrificed. Moreover, it is vital that the rights to trial by jury and confrontation, as well as the integrity of a workable adversary system, not be vitiated by judicial notice.

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216. Keefe, *supra* note 9, at 665.