Florida Law Review

Volume 28 | Issue 3 Article 6

March 1967

Judicial Notice: Rule 201 of the Federal Rules of Evidence

Carla N. Neeley

JUDICIAL NOTICE: RULE 201 OF THE FEDERAL RULES OF EVIDENCE

> The doctrine of Judicial Notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of today. . . . The principle is an instrument of usefulness hitherto unimagined by judges. Let them make liberal use of it; and thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings.[1]
>
> Wigmore

Two often cited propositions have influenced extensively the development of the law of evidence. The first is that while questions of law are determined by the judge, questions of fact are solely within the province of the jury.[2] The second is that inherent in the adversary system is the duty of the parties to make known the facts.[3] In certain situations, however, the judge will make the necessary factual determination, excusing or prohibiting a party from the burden or privilege of establishing formal proof.[4] The acceptance by a court of the truth of certain facts without the introduction of evidence is called judicial notice.[5]

The doctrine of judicial notice[6] has as its foremost goals the promotion

---

1. 5 J. WIGMORE, EVIDENCE §2583 (2d ed. 1923).

2. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §328 (2d ed. 1972).

3. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 273 (1944).

This note deals exclusively with judicial notice of facts; judicial notice of law is outside its scope. The proposition that a judge is bound to know the common and statutory law of his own jurisdiction has led to the idea that judges must judicially note the law of their own forums. In addition, foreign law and the forum's own administrative law and municipal ordinances have been incorporated into the concept of judicial notice. The emerging view is that "the manner in which the law is insinuated into the judicial process is not so much a problem of evidence as it is a concern better handled within the context of the rules pertaining to procedure." C. MCCORMICK, *supra* note 2, §328. *See* FED. R. CIV. P. 44.1; FED. R. CRIM. P. 26.1. However, some state codes continue to treat judicial notice of law as an evidence question. *See, e.g.*, PROP. FLA. R. EVID. 90.201-.202; KAN. STAT. ANN. §60-409 (1964). *See generally* Keeffe, Landis, & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 672-88 (1950); Comment, *Judicial Notice — Law of Sister State*, 19 BAYLOR L. REV. 112 (1967); Comment, *Judicial Notice — Florida's New Look at Municipal Ordinances*, 25 U. FLA. L. REV. 811 (1973).

4. *See, e.g.*, Charles Boldt Co. v. Turner Bros., 199 F. 139, 144 (7th Cir. 1912); Missouri Util. Co. v. City of California, 14 F. Supp. 613, 614 (W.D. Mo. 1936) ("Judicial notice supplies facts which otherwise must be proved. . . .").

5. "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." 5 J. WIGMORE, *supra* note 1, §2567. *See* Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303, 307 (7th Cir. 1956) ("Judicial notice is merely a substitute for the conventional method of taking evidence to establish facts."); *In re* Malcom, 129 F.2d 529, 533 (C.C.P.A. 1942) ("The process of taking judicial notice . . . merely relieves the party from offering evidence because the matter is one which the judge either knows, or can easily discover."); Geer v. Birmingham, 88 F. Supp. 189, 228 (N.D. Iowa 1950).

6. The concept of judicial notice is believed to have originated from the medieval idea that judges were men of great knowledge. Judicial notice was a fiction that "reminded" the judge of facts he was already presumed to know. Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922). Bracton expressed the underlying principle in 1222 when he stated that

of trial expedience and the prevention of flagrant error.[7] Judicial notice operates as a timesaving device by eliminating the need for introduction of evidence to prove noticed facts.[8] Error is prevented by prohibiting an adversary from challenging patently indisputable matters.[9] In view of the need to alleviate crowded court calendars and to preserve the integrity of the judicial system, it is essential that judicial notice be used to its fullest extent.

Legal writers have consistently advocated an extensive use of judicial notice.[10] Judges, on the other hand, have generally approached the doctrine with caution.[11] The courts' reluctance to take judicial notice has been attributed to various factors, including the diversity of facts that may be noticed,[12] fear of reversal by an appellate court,[13] indefinite statutes,[14] and a lack of understanding by judges of the concept.[15] However, the controversy

---

"ea que manifesta sunt, non indigent provacione" ("that which is obvious need not be proved"). 2 Bracton's N.B., Case 194 (1222) (marginal notation). This principle was applied in 1302. Y.B. 30 & 31 Edw. I (RS) 256-59 (1302). The scope of the doctrine was examined first by Bentham in his nineteenth century treatise on evidence. 6 WORKS OF JEREMY BENTHAM 276-78 (J. Bowring ed. 1962). The term "judicial notice" was first employed the following year. T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 400 (2d ed. 1828). *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 277-79 (1898).

7. McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 805-06 (1961). *See also* Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 CORNELL L.Q. 210 (1967).

8. "The basic objective of a good system of judicial notice should be to achieve the maximum possible convenience that is consistent with procedural fairness. Proving facts with evidence takes time and effort. Noticing facts is simpler, easier, and more convenient. Both the court and the parties benefit from the increased efficiency when a court notices facts and thereby makes proof of them unnecessary." Davis, *Judicial Notice*, 1969 L. & SOC. ORDER 513, 515.

9. "In any system designed to adjust relations between members of a society, the applicable law ought not to be allowed to vary with the diligence and skill of counsel, and a decision contrary to what is accepted as indisputable fact in that society cannot be justified. In an adversary system such as ours . . . it is particularly important that the court prevent a party from presenting a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men." Morgan, *supra* note 3, at 273.

10. *See* C. MCCORMICK, *supra* note 2, §328; J. THAYER, *supra* note 6, at 309; Keeffe, Landis, & Shaad, *supra* note 3, at 665.

11. *See, e.g.*, Makos v. Prince, 64 So. 2d 670, 673 (Fla. 1953) ("The established rule in respect to judicial notice is that it should be exercised with great caution.") English v. Old Am. Ins. Co., 426 S.W.2d 33, 41 (Mo. 1968) ("Judicial notice must be exercised cautiously, and if there is any doubt to the notoriety of such fact, judicial recognition of it must be declined.").

12. As noted by Wigmore, judges may notice many facts that they cannot be required to notice by general rules made in advance; furthermore, the doctrine permits notice of facts in a specific case even though no general rule for the whole class of cases would be appropriate. 5 J. WIGMORE, *supra* note 1, §2583.

13. Keeffe, Landis, & Shaad, *supra* note 3, at 665-66.

14. Kongsgaard, *Judicial Notice and the California Evidence Code*, 18 HASTINGS L.J. 117, 118-19 (1966).

15. Keeffe, Landis, & Shaad, *supra* note 3, at 666.

that has surrounded judicial notice[16] and the possibilities for abuse[17] have probably been the primary considerations behind the courts' hesitancy to employ the doctrine.

Since judicial notice in the federal courts has until recently been governed by the common law, the caution with which judges have approached the doctrine has no doubt impeded expansion of its use. The codification of the concept of judicial notice in Rule 201[18] of the new Federal Rules of Evidence[19] is therefore important to the development of the law of judicial notice.

---

16. *Cf.* Bush, *Judicial Notice of Adjudicative Facts*, 23 FED. INS. COUN. Q. 14, 20 (1973).

17. *See* Morgan, *supra* note 3, at 292-93. *See, e.g.*, Mills v. Denver Tramway Corp., 155 F.2d 808, 811 (10th Cir. 1946) (court judicially noticed that there is not "a streetcar in the world that is being operated on the thoroughfares of any city that is not equipped with some warning device.").

18. FED. R. EVID. 201 provides:

"RULE 201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A judge or court may take judicial notice, whether requested or not.

(d) When mandatory. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

19. The Federal Rules of Evidence were promulgated pursuant to the power of the Supreme Court to "prescribe, by general rules, the forms of process, writs, pleadings, and the practice and procedure" for criminal and civil proceedings in the federal courts. 18 U.S.C. §§3402, 3771, 3772 (1958); 28 U.S.C. §§2071-2073 (1970). The Rules were formulated over a period of seven years by a distinguished panel that included judges, law professors, and practitioners. The Advisory Committee was chaired by Albert Jenner and the Reporter was Professor Edward Cleary. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 n.3 (1973); PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161 (1969); REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315 (1971). The Rules were approved by the Supreme Court on November 20, 1972, Order, 56 F.R.D. 183 (1972), and were to become effective unless vetoed by Congress within 90 days. However, Congress, in order to evaluate more fully the proposed rules, enacted legislation to require express congressional approval before the Rules could become effective. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. The Rules were finally approved by Congress on January 15, 1975, Act of January 15, 1975, Pub. L. No. 93-595, 88 Stat. 1926, and became effective on July 1, 1975. *See generally A Discussion of the Proposed Federal Rules of Evidence*, 48 F.R.D. 39 (1969); Green, *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1 (1969); Schwartz, *The Proposed Federal Rules of Evidence: An Introduction and Critique*, 38 U. CIN. L. REV. 449 (1969); *Symposium: Proposed Federal Rules of Evidence*, 1969 L. & SOC. ORDER 509.

Rule 201 should increase the use of judicial notice because it will alleviate the fears of judges by resolving some of the controversies and by providing procedural safeguards to prevent abuse of the doctrine.[20] For example, the rule firmly settles the long-standing Morgan-Wigmore dispute over whether facts judicially noticed must be indisputable and whether evidence in disproof of noticed facts is admissible.[21] The position taken by the rule in favor of indisputability[22] and conclusiveness[23] of judicially noticed facts is supplemented by substantial procedural safeguards to assure fairness to the parties.[24]

Although it solves some problems, new controversies concerning judicial notice may be generated by some of the rule's provisions, such as the limitation of the rule's scope to adjudicative facts.[25] In a bold departure from existing judicial practices, the rule distinguishes between adjudicative facts — facts concerning the immediate parties[26] — and legislative facts — facts used by the judge to determine law or policy.[27] Although the reasons for this distinction are persuasive, the difficulty in distinguishing the two in some instances may lead to confusion and inconsistency concerning the scope of the rule. Furthermore, the failure to provide for judicial notice of legislative facts leaves a significant number of noticed facts outside the rule's coverage.[28] The exemption of legislative facts from codification may restrict the role of judicial notice by discouraging notice of these facts.

This note examines the impact of Rule 201 on the law of judicial notice. After evaluating the rule's resolution of the Morgan-Wigmore controversy, it examines the infrequently litigated but important question concerning the conclusiveness of judicially noticed facts in criminal cases. The note then explores in detail the distinction between adjudicative and legislative facts, suggesting an approach for distinguishing these facts in unclear cases and emphasizing the need for codification of judicial notice of legislative facts. Finally, it briefly surveys judicial notice in the states, noting the probable impact of Rule 201 on state evidence law.

---

20. Bush, *supra* note 16, at 20; Hefflinger, *Proposed Rule Broadens Scope of Judicial Notice*, 53 NEB. L. REV. 333, 345-46 (1974).

21. *Compare* Morgan, *supra* note 3, at 274, 285 (judicially noticed facts must be indisputable and evidence to the contrary is inadmissible) *with* 5 J. WIGMORE, *supra* note 1, §2567 (disputable facts may be judicially noticed and disputed by evidence). See text accompanying notes 37-42 *infra*.

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

23. FED. R. EVID. 201(g).

24. FED. R. EVID. 201(e).

25. FED. R. EVID. 201(a). *See* Davis, *supra* note 8, at 525-27. For a unique suggestion on the codification of judicial notice, see Roberts, *Judicial Notice: An Exercise in Exorcism*, 19 N.Y.L.F. 745, 758 (1974): "In fact, none of the evidence casebooks used today contain a single adjudicative fact example that cannot be rationalized just as easily on relevancy grounds. Bluntly put, the greatest advantage along the lines of codifying evidence would be by deleting at once even the rump of judicial notice still surviving in the proposed Federal Rules or in other rules of evidence."

26. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

27. *Id.*

28. Davis, *supra* note 8, at 525-27. See text accompanying notes 198-202 *infra*.

INDISPUTABILITY AND CONCLUSIVENESS OF JUDICIALLY NOTICED FACTS

Two interrelated issues have long remained undecided in the law of judicial notice. The first area of debate concerns whether facts judicially noticed must be indisputable.[29] The second area of disagreement relates to the admissibility of evidence to disprove judicially noticed facts. In general, while proponents of the disputable approach favor admissibility of evidence in disproof,[30] advocates of the indisputable view argue that judicially noticed facts should be accepted as conclusive.[31]

The Federal Rules of Evidence resolved the long-standing controversy for civil actions in the federal courts in favor of indisputability and conclusiveness.[32] Rule 201(b) provides that a judicially noticed fact must be a fact not subject to reasonable dispute in that it is either generally known in the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[33] Rule 201(g) requires that in civil cases[34] the court instruct the jury to accept as conclusive any judicially noticed fact.[35]

The Morgan-Wigmore Controversy

The disagreement as to the disputability and the conclusiveness of

29. The terms "disputable" and "indisputable" are used inconsistently throughout writings on judicial notice. For example, the term "disputable" is used not only to refer to the nature of a particular fact but also to imply that challenge of the particular fact will not be permitted. This note employs the term "indisputable" when referring to the nature of the fact; to say that a fact is indisputable means that its truth or falsity is beyond question and could not be disputed even if the procedure for challenge were available.

30. *See, e.g.*, J. THAYER, *supra* note 6, at 308; 5 J. WIGMORE, *supra* note 1, §2567; Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 94 (R. Pound ed. 1964).

31. *See, e.g.*, J. MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 174 (1947); Keeffe, Landis, & Shaad, *supra* note 3, at 668; McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 321-22 (1952); McNaughton, *supra* note 7, at 780; Morgan, *The Law of Evidence 1941-1945*, 59 HARV. L. REV. 481, 482-87 (1946).

While the majority of commentators advocate acceptance of the views of either Morgan or Wigmore, others have developed their own proposals for the effect of judicial notice. *See, e.g.*, Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 540 (1968) (the scope of judicial notice should vary according to the function being performed by the judge when notice is taken). One writer has even suggested that it makes no difference which view is accepted, that the only difference between the two views is the time when rebuttal evidence is received. Note, *Judicial Notice and Rebutting Evidence*, 56 DICK. L. REV. 464, 466 (1952).

32. The Morgan-Wigmore controversy, however, remains undecided in the states. *See, e.g.*, Andrews v. Masse, R.I. , , 341 A.2d 30, 33 n.7 (1975) (explicitly refusing to take a position in the controversy). For a discussion of the states' treatment of the Morgan-Wigmore controversy, see text accompanying notes 208-210 *infra*.

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

34. For a discussion of the effect of judicially noticed facts in criminal cases, see text accompanying notes 70-72 *infra*.

35. FED. R. EVID. 201(g). This approach is identical to the approach taken by the Model Code and the Uniform Rules. MODEL CODE EVID. 801, 802, 805; UNIFORM RULES OF EVIDENCE 9 [hereinafter cited as UNIF. R. EVID.].

judicially noticed facts is traditionally stated in terms of the Morgan-Wigmore controversy.[36] The positions taken by the opposing authorities to this dispute emanate from their views of the purposes of judicial notice.

Wigmore regarded judicial notice as a time-saving device to eliminate the necessity of formal proof in instances in which dispute is unlikely.[37] Under this approach, both disputable and indisputable facts may properly be judicially noticed.[38] A judicially noticed fact is not conclusive, but rather is subject to rebuttal evidence offered by the opponent.[39] Since contrary evidence is permitted, judicial notice under this view operates like a presumption. As stated by Thayer:

> Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima facie* recognition 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.[40]

In Morgan's theory, the primary role of judicial notice is to "prevent a party from presenting a moot issue or inducing a false result by disputing what in the existing state of society is demonstrably indisputable among reasonable men."[41] Thus, under this approach, only indisputable facts are proper subjects for judicial notice. Since taking judicial notice is limited to indisputable matters, "it must follow that no evidence to the contrary is admissible."[42]

It is not surprising that representatives of both sides of the Morgan-Wigmore controversy contend that the weight of existing case law supports their views. Professor Davis stated that the rule's adoption of the Morgan approach will entail a "drastic change in judicial practices."[43] On the other hand, the Advisory Committee that promulgated the federal rule, in reference to the indisputability requirement, spoke of the "tradition . . . of caution in requiring that the matter be beyond reasonable controversy."[44] With respect to the admissibility of evidence in disproof of judicially noticed facts, the Advisory Committee recognized the division among the commentators but gave no indication that it considered the approach it adopted to be a

---

36. McNaughton, *supra* note 7, at 779: "Professor Morgan and Dean Wigmore stand at opposite poles in the argument over judicial notice."

37. 5 J. WIGMORE, *supra* note 1, §2583. As noted by Professor Davis, both Thayer and Wigmore placed great emphasis on the usefulness of judicial notice. Davis, *supra* note 8, at 519-20.

38. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 446 (2d Cir. 1945); Meredith v. Fair, 202 F. Supp. 224, 227 (S.D. Miss. 1962).

39. 5 J. WIGMORE, *supra* note 1, §2567. *See In re* Bowling Green Milling Co., 132 F.2d 279, 283-84 (6th Cir. 1942); Mathieson Chem. Corp. v. United States, 179 Ct. Cl. 368, 372 n.2 (1967); Application of Knapp-Monarch Co., 296 F.2d 230, 232 (C.C.P.A. 1961).

40. J. THAYER, *supra* note 6, at 308-09.

41. Morgan, *supra* note 3, at 273.

42. *Id.* at 279.

43. Davis, *supra* note 8, at 523.

44. Advisory Committee Note, 56 F.R.D. 183, 204 (1972) [hereinafter cited as Adv. Comm. Note].

dramatic departure from existing case law.[45] Perhaps the most accurate statement of the positions taken by the courts is that the cases are in "cloudy confusion."[46]

Evaluation of the Resolution

The Advisory Committee pointed out three disadvantages of the Wigmore approach. The Committee first criticized the disputable view because it places the opponent and the proponent of a judicially noticed fact in unequal positions.[47] Taking judicial notice relieves a party from the burden of introducing evidence to prove the fact noticed.[48] If the opponent is permitted to dispute the noticed fact, the court is faced with two alternatives. First, it may prevent the proponent from introducing any evidence to support the noticed fact. This course, however, is unfair to the proponent because it precludes rebuttal of evidence submitted by the opponent to undermine the noticed fact. If the court alternatively permits the introduction of evidence to support the noticed fact, the initial taking of judicial notice is defeated.[49] Rule 201 solves this dilemma by permitting both parties to argue the propriety of taking judicial notice before the judge[50] but prohibits the parties at trial from offering evidence concerning the noticed fact.

The Wigmore approach was next criticized for defeating the reasons for judicial notice.[51] The Committee, however, failed to explain its view of the purposes of judicial notice. As noted earlier, both sides of the controversy emphasize different purposes of judicial notice.[52] Judicial notice, however, has two equally important functions: the prevention of error and the conservation of time. Both sides guard against flagrant error by permitting notice of indisputable matters. Each side has traditionally criticized the other for lack of judicial economy. While the Morgan approach is faulted

45. *Id.* at 206-07.

46. McNaughton, *supra* note 7, at 795-96. *Compare* Seebach v. United States, 262 F. 885, 888 (8th Cir. 1919) *with In re* Bowling Green Milling Co., 132 F.2d 279, 283-84 (6th Cir. 1942). For the most part, courts seem to avoid taking a position in the controversy. *See, e.g.*, TWA v. Hughes, 308 F. Supp. 679, 684 (S.D.N.Y. 1969), *rev'd on other grounds*, 409 U.S. 363 (1973) (after setting forth the views of both Morgan and Wigmore, the court stated that because the present case involved a default judgment, it did "not have to resolve the debate among the scholars concerning the taking of judicial notice during trial.").

47. Adv. Comm. Note, at 207.

48. *See, e.g.*, Missouri Util. Co. v. City of California, 14 F. Supp. 613, 614 (W.D. Mo. 1936); *In re* Malcom, 129 F.2d 529, 533 (C.C.P.A. 1942).

49. "What of the case where a court holds there is no right to offer evidence of facts judicially noticed, but permits the opponent to dispute the matter? In such a case the doctrine would not rise even to the dignity of a presumption. Should not the proponent then also have the right to offer evidence disputing the opponent, and if the court permits this, what happens to the doctrine of judicial notice?" Keeffe, Landis, & Shaad, *supra* note 3, at 668.

50. FED. R. EVID. 201(e).

51. Adv. Comm. Note, at 207.

52. *Compare* 5 J. WIGMORE, *supra* note 1, §2583 (stressing the timesaving aspects of judicial notice) *with* Morgan, *supra* note 3, at 273 (considering the prevention of flagrant error as the primary function of judicial notice).

for the time-consuming requirement of proof for facts that, although not indisputable, are unlikely to be challenged,[53] the Wigmore view is criticized for wasting time by permitting the opponent to dispute with evidence judicially noticed facts.[54] It would be difficult, if not impossible, to determine which approach actually saves more time.

The Committee finally rejected the Wigmore approach because it affects "the substantive law to an extent and in ways largely unforeseeable."[55] Although the meaning of this statement is unclear, the Committee was perhaps referring to the fact that the Wigmore approach permits judicial notice of disputable facts that are not likely to be challenged. This policy of the Wigmore approach not only runs counter to the premise that debatable issues are to be resolved by the jury but also presents the problem of the effect of judicial notice on a fact that is disputable but uncontroverted.[56]

The shortcomings of the Morgan approach have been fully articulated during the course of the controversy by the proponents of Wigmore's view. The Morgan approach is criticized for prohibiting judicial notice of matters that, although not indisputable, are unlikely to be challenged.[57] However,

53. *See* Davis, *supra* note 8, at 517.

54. Comment, *Judicial Notice and Presumptions Under the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 135, 140 (1969).

55. Adv. Comm. Note, at 207.

56. A further objection to the Wigmore approach is that it entangles the law of judicial notice with the law of presumptions but fails to provide guidelines as to the effect of the presumption and as to the burden of rebuttal. Keefe, Landis, & Shaad, *supra* note 3, at 668. As noted by Professor Morgan, to enmesh the problems of judicial notice in the language of presumptions would be "to open another legal Pandora's box." Morgan, *supra* note 3, at 286.

However, it has been suggested that presumptions and judicial notice are closely related because "both are highly debated areas of evidence, and both have the general effect of saving court time by procedurally giving weight to established truths or probabilities." Comment, *supra* note 54, at 135. *Cf.* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 163-164 n.204 (1973) (judicial notice should not be conclusive in criminal cases; the article advocates the need for provisions concerning the effect of judicial notice on the sufficiency of the prosecution's case to go to the jury and for jury instructions; these provisions should be similar to provisions for presumptions in criminal cases).

57. *See, e.g.*, Davis, *supra* note 8, at 520, expressed the view that Rule 201 "rejects the convenient system that courts often use of assuming all facts that are unlikely to be challenged, taking care to state those that might possibly be erroneously assumed, while keeping the door open to challenge." It is questionable whether enough facts fall within this described class to make such a distinction worthwhile, particularly in light of the caution with which the courts have traditionally approached the doctrine of judicial notice.

In considering objections to the Wigmore approach, it should be emphasized that Rule 201 applies only to adjudicative facts — those which concern the immediate parties. The rule does not cover judicial notice of legislative facts, which are used by the judge to evaluate questions of law or policy. For a detailed discussion of adjudicative and legislative facts, see text accompanying notes 107-172 *infra*. Two of the three principal proponents of the Wigmore approach, Thayer and Wigmore, did not have in mind the distinction between adjudicative and legislative facts. Davis, *supra* note 8, at 519. Thus, their position that judicial notice is properly taken of disputable facts and that evidence in disproof is admissible is perhaps primarily explained by a justifiable desire to prevent a severe limitation of judicial notice of what are now termed legislative facts. Thus, Davis is the sole major advocate of judicial notice of disputable, adjudicative facts.

since the doctrine of judicial notice is an exception to the general rule that questions of fact are solely within the province of the jury,[58] taking notice of disputable matters can infringe on the role of the jury at trial. Reconciling the traditional division between the judge and jury and realizing the time-saving function of judicial notice can best be accomplished by limiting judicial notice to truly indisputable facts while reserving debatable issues for the jury.

The Morgan approach is also criticized for defeating the time-saving function of judicial notice by requiring the judge to ascertain whether a fact is truly indisputable.[59] Despite this additional requirement, courts adopting the Morgan theory apparently have not encountered difficulties in applying the indisputability standard.[60] In determining indisputability, courts have generally considered factors such as "the nature of the subject, the issue involved, and the apparent justice of the case."[61] It is doubtful that federal courts previously operating under the Wigmore approach will find it difficult to apply similar criteria to the facts at hand.[62]

---

58. See text accompanying note 2 *supra*.

59. Comment, *supra* note 54, at 142 ("indisputable" is a term extremely difficult to define). *See* Slovenko, *Judicial Notice and Indisputables*, 10 CLEV.-MAR. L. REV. 170, 173 (1961) (the legal distinction between disputability and indisputability is scientifically and philosophically naïvé).

60. *See, e.g.*, Utah Constr. Co. v. Berg, 68 Ariz. 285, 290-92, 205 P.2d 367, 370-71 (1949) (listing several facts that the court determined were not indisputable); Phelps Dodge Corp. v. Ford, 68 Ariz. 190, 196-97, 203 P.2d 633, 638 (1949) (discussing the meaning of indisputability).

61. Hunter v. New York, O & W Ry. Co., 116 N.Y. 615, 621, 23 N.E. 9, 10 (1889). The court in TWA v. Hughes, 308 F. Supp. 679 (S.D.N.Y. 1969), *rev'd on other grounds*, 409 U.S. 363 (1973), applied these factors when considering a request for judicial notice of facts in orders of the CAB and from material in CAB files. In determining that the facts were not indisputable, the court noted: "Each of these factors counts against noticing the proposition offered by defendants. First, the subject of the proposition is not scientific, historical, geographic or statistical matter of the kind courts are most willing to notice. Instead it is a garden variety proposition about who did what, when, and where. Second, the facts which defendants wish judicially noticed in this litigation would be relevant to the central issue of liability under the antitrust laws. The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice. Third, the apparent justice of the case in the posture of a default based upon wilful refusal to appear for deposition requires me to resolve all doubts against defendants." *Id.* at 684. *See also* Note, *Judicial Notice After Default: A Semantical Maze*, 37 J. AIR L. 109 (1971).

62. Rule 201 does not merely require indisputability. A judicially noticed fact must be indisputable in that it is generally known in the jurisdiction of the trial court, *see* Varcoe v. Lee, 180 Cal. 338, 346, 181 P. 223, 226 (1919) (what is generally known in one jurisdiction may not be generally known in another), or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* United States v. Carpenters Local 169, 457 F.2d 210, 214 n.7 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972) (judicial notice of statistics in the United States Bureau of Census Reports); Owens-Ill. Glass Co. v. American Coastal Lines, Inc., 222 F. Supp. 923, 927 (S.D.N.Y. 1963) (judicial notice of standard financial book of reference); Colonial Metals Co. v. United States, 494 F.2d 1355, 1360 (Ct. Cl. 1974) (judicial notice of quotations of the price of copper from trade papers). *See also* Davis, *supra* note 8, at 529-30 (focus should be on the degree of indisputability of the noticed facts rather than on the accuracy of the sources).

The Advisory Committee rejected the previously employed standard of "propositions of common knowledge" because it believed such propositions inappropriate for judicial

Proponents of the Wigmore approach also contend that the inadmissibility of evidence to disprove judicially noticed facts is contrary to views expressed by the United States Supreme Court in *Ohio Bell Telephone Co. v. Public Utilities Commission.*[63] In that case, the Public Utilities Commission, without revealing the sources consulted, had taken judicial notice of various facts outside the record as indicative of market trends. The judicially noticed facts were used to assess the value of Ohio Bell's property in order to compute the company's excess earnings for a period of years. The Supreme Court held that the facts, which indicated a decline in values, were not proper subjects for judicial notice.[64] Moreover, even if the facts had been proper subjects for judicial notice, the procedure followed by the Commission did not meet due process requirements because it not only failed to reveal the sources consulted but also denied the company an opportunity to challenge the noticed facts.[65] Importantly, the facts at issue were noticed by the Public Utilities Commission, which served as both judge and jury. Thus, the Supreme Court's emphasis on the importance of notice and an opportunity to be heard does not mandate an opportunity to present rebuttal evidence to a jury; instead, it indicates the Supreme Court's concern that the opponent be afforded fundamental procedural safeguards when judicial notice is taken.

The need for adequate procedural safeguards is reflected in Rule 201(e), which permits a party to request an opportunity to be heard on the propriety of taking judicial notice and on the nature of the matter noticed. Although no formal notice scheme is contemplated by the rule,[66] the opponent may receive notice by service with a copy of another party's request for judicial notice pursuant to subdivision (d). Alternatively, the judge may inform the opponent of his intention to take judicial notice. If no advance notice is received, Rule 201(e) permits the opponent to request a hearing after judicial notice has been taken.

The settlement of the long debated Morgan-Wigmore controversy promotes the achievement of uniformity within the federal court system, which is one of the primary reasons for codification. Following the views of Morgan, subdivisions (b), (e), (g) combine to produce an approach to indisputability and conclusiveness that will successfully avoid the difficulties encountered in Wigmore's theory. The position taken by the federal rule not only effectuates the purposes of judicial notice but also upholds the traditional division between the judge and jury.

Effect of Judicial Notice in Criminal Cases

As noted above, advocates of the indisputable view generally have argued

---

notice. Adv. Comm. Note, at 205-06. *See also* Comment, *The Binding Effect of Judicial Notice Under the Common Knowledge Test*, 21 Baylor L. Rev. 208 (1969).

63. 301 U.S. 292 (1937). *See* Davis *supra* note 8, at 519.

64. 301 U.S. at 302.

65. *Id. See* Chubbs v. City of New York, 324 F. Supp. 1183, 1188 (E.D.N.Y. 1971) (citing the proposed federal rule, the court emphasized the importance of giving a party an opportunity to dispute before judicial notice is taken).

66. Adv. Comm. Note, at 206.

that judicially noticed facts be accepted as conclusive, while proponents of the disputable approach have favored admissibility of evidence in disproof.[67] Codification of Morgan's indisputable theory may require special considerations concerning the effect of judicial notice in criminal cases.

Rule 201(g) as originally formulated by the Advisory Committee required the judge to instruct the jury to accept as established any judicially noticed facts without regard to the nature of the proceeding.[68] This approach is historically consistent with the development of judicial notice since courts have failed generally to differentiate between civil and criminal cases.[69]

In 1974 the House Committee on the Judiciary amended Rule 201 to distinguish between civil and criminal proceedings.[70] In the Committee's view, a mandatory jury instruction to accept judicially noticed facts as established in criminal cases was "contrary to the spirit of the Sixth Amendment."[71] The rule now requires the court in criminal cases to instruct the jury that it may, at its option, accept as conclusive any fact judicially noticed.[72]

At the Trial Level

The approach taken by Rule 201(g) regarding jury instructions in criminal cases makes a departure from at least some existing judicial theory. Courts

---

67. See text accompanying notes 37-42 *supra*.

68. Order, 56 F.R.D. 183, 201 (1972) [hereinafter cited as Order].

69. *See, e.g.*, United States v. Quinones, 516 F.2d 1309 (1st Cir. 1975); Jordan v. United States, 345 F.2d 302 (10th Cir. 1965). *See* Hefflinger, *Proposed Rule Broadens Scope of Judicial Notice*, 53 NEB. L. REV. 333, 337 (1974). Furthermore, neither the Model Code nor the Uniform Rules distinguish between civil and criminal cases. MODEL CODE EVID. 805; UNIF. R. EVID. 11. The Uniform Rules were amended in 1974, but still do not distinguish between civil and criminal cases.

70. H.R. 5463, 93d Cong., 2d Sess. 2222 (1974).

71. H.R. 650, 93d Cong., 2d Sess. 7080 (1974).

The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. The taking of judicial notice in criminal cases may violate other provisions of the sixth amendment besides the right to a jury trial. The sixth amendment also provides the criminal defendant with the right to be confronted with the witnesses and evidence against him. U.S. CONST. amend. VI. *See* People v. Matula, 336 P.2d 1000, 1011, *rev'd on other grounds*, 52 Cal. 2d 591, 342 P.2d 252 (1959) (judicial notice in a criminal case deprived the defendant not only of the right to a trial by jury but also of the right "to be informed of the evidence against him so that he may counter, question, explain, or be heard in opposition to it").

72. *Fed. R. Evid.* 201(g). *See generally* Farley, *Instructions to Juries — Their Role in the Judicial Process*, 42 YALE L.J. 194 (1932); Orfield, *Judicial Notice in Federal Criminal Procedure*, 31 FORDHAM L. REV. 503 (1963); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

The seventh amendment guarantees the right to trial by jury in civil cases that concern rights and remedies that were generally known and enforced at common law. U.S. CONST. amend. VII; Kohl v. United States, 91 U.S. 367 (1875). In civil cases where the seventh amendment right to a jury trial is involved, debatable questions of fact are to be determined by the jury. *See, e.g.*, Hunt v. Bradshaw, 251 F.2d 103, 108 (4th Cir. 1958). *See* Comment, *supra* note 31, at 541-42. Thus, a discussion of the role of judicial notice in criminal cases is also applicable to civil cases concerning debatable issues of fact.

often judicially notice facts in criminal cases without reference to the sixth amendment right to trial by jury. In these cases, the propriety of a jury instruction to accept judicially noticed facts as conclusive depends on the court's view of whether noticed facts may be controverted by rebuttal evidence. Courts accepting Morgan's indisputable position uphold mandatory jury instructions on the rationale that facts judicially noticed are not subject to challenge by opposing evidence.[73] Any possible conflict with the sixth amendment is avoided in jurisdictions adopting the Wigmore approach because evidence contradicting judicially noticed facts is admissible whether the proceeding is civil or criminal.[74]

Few courts have directly confronted the question whether a jury instruction to accept facts judicially noticed as conclusive violates the right to a jury trial in criminal cases.[75] Courts addressing the issue have arrived at opposite conclusions. In *State v. Lawrence*,[76] the defendant was convicted of grand larceny, which was defined as the taking of property valued in excess of $50. Evidence was offered at trial to show that the property involved was a three-year-old automobile in excellent condition. On appeal, the defendant objected to the trial judge's instruction to the jury that the value of the automobile was greater than $50. Recognizing the value of the car as being

---

73. *See, e.g.*, People v. Mayes, 113 Cal. 618, 45 P. 860 (1896). In *Mayes*, the court considered the propriety of the trial judge's instruction to the jury that, as a matter of judicial knowledge, the moon rose at 10:57 on the night the crime was committed. On appeal, the defendant assigned as error the jury instruction and offered affidavits to prove that the moon rose at 10:35 p.m. The court's finding that the jury instruction was proper was based on the general principle that facts judicially noticed were not subject to rebuttal by opposing evidence. *Id.* at 625, 45 P. at 862.

74. *See, e.g.*, State v. Duranleau, 99 N.H. 30, 104 A.2d 519 (1954). In *Duranleau* the defendant was convicted of operating a motor vehicle on a public highway while under the influence of alcohol. The trial judge had taken judicial notice that the road on which the defendant was driving was a public highway. Although the court found that the nature of the road was a proper subject for judicial notice, it nevertheless remanded the case to allow the defendant an opportunity to dispute the noticed fact. *Id.* at 32, 104 A.2d at 521. The decision was based on the court's acceptance of the Wigmore approach, which permits an opposing party to challenge judicially noticed facts. *Id. Accord*, State v. Miller, 102 N.H. 260, 262, 154 A.2d 699, 701 (1959); State v. Day, 101 N.H. 289, 290-91, 140 A.2d 571, 572 (1958).

Other criminal cases that have upheld the defendant's right to contradict judicially noticed facts without reference to the sixth amendment include State v. Burley, 523 S.W.2d 575, 579 (Mo. App. 1975) (judicial notice of the fact that a man can walk a mile in 15 minutes did not foreclose rebuttal); Sumpter v. State, Ind. , , 306 N.E.2d 95, 99 (1974) (judicial notice of defendant's sex was not conclusive); State v. Tomanelli, 153 Conn. 365, 368-69, 216 A.2d 625, 628 (1966) (defendant could dispute the judicially noticed fact that radar was an accurate method of speed determination).

75. Various reasons have been offered to explain the infrequency with which this issue has arisen. One writer has suggested: "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." Comment, *The Presently Expanding Concept Of Judicial Notice*, 13 VILL. L. REV. 528, 546 (1968).

76. 120 Utah 323, 234 P.2d 600 (1951).

a proper subject for judicial notice, the Utah supreme court admitted that there was no logic to the thought that a jury would find the car to be worth less than $50.[77] Nevertheless, the court held that jury instruction on the value of the car violated a state constitutional provision guaranteeing accused persons the right to a jury trial.[78] The decision was based on the court's conception of the role of the jury in criminal proceedings.

> [U]nder our jury system, it is traditional that in criminal cases juries can, and sometimes do, make findings which are not based on logic, nor even common sense. No matter how positive the evidence of a man's guilt may be, the jury may find him not guilty and no court has any power to do anything about it.[79]

The *Lawrence* court found the invasion of the jury's province particularly troublesome because the fact noticed constituted an essential element of the offense charged.[80]

A contrary result was reached in *Gold v. United States*,[81] in which the defendant was convicted for knowingly using an interstate carrier to transport an obscene film. At trial, judicial notice was taken of the fact that United Airlines was a common carrier engaged in interstate commerce, and the jury was instructed to accept the noticed fact as conclusive. Although the trial judge had previously informed the parties of his intention to take judicial notice, the defendant had not offered to dispute the fact that the airline company was engaged in interstate commerce. On appeal, the defendant contended that a court could not take judicial notice of a fact constituting an element of the crime charged. In holding that the jury instruction was proper, the *Gold* court was primarily influenced by two factors: the indisputability of the noticed fact and the provision of adequate

---

77. *Id.* at 330, 234 P.2d at 603. It should be noted that Utah is a jurisdiction that follows the Wigmore view that matters may be judicially noticed if they are not likely to be disputed and that an opposing party may offer contradictory evidence. *Id.* at 328-29, 234 P.2d at 602. However, this court apparently considers the fact noticed to be indisputable. Therefore its discussion of constitutional principles is relevant to the indisputable approach adopted by the Federal Rules.

78. *Id.* at 331, 234 P.2d at 603. The judgment of the lower court was reversed, and the case was remanded for a new trial at which the state would be permitted to submit evidence of the value of the automobile. The court found that the "reversal of a conviction at the instance of the defendant, and subsequent remand of the case for a new trial does not constitute" placing "the defendant twice in jeopardy to entitle him to go free." *Id.* at 332, 234 P.2d at 604. *But see* United States v. Blattel, 340 F. Supp. 1140, 1143 (N.D. Iowa 1972) (government failed to prove two elements of the offense charged and defendant was acquitted).

79. 120 Utah at 330, 234 P.2d at 603. *See* State v. Taylor, 132 N.J. Super. 386, 392, 333 A.2d 592, 595 (1974) (in a non-jury criminal larceny case, the trial court properly took judicial notice of the indisputable fact that the property involved was of some value).

80. "If a court can take one important element of an offense from the jury and determine the facts for them because such fact seems plain enough to him, then which element cannot be similarly taken away, and where would the process stop?" 120 Utah at 330-31, 234 P.2d at 603.

81. 378 F.2d 588 (9th Cir. 1967).

procedural safeguards.[82] Based on these considerations, the court concluded that a reversal would be "formalistic and useless."[83] The *Gold* court's conception of the jury's role in criminal cases was narrower than that of the *Lawrence* court.

> The defendant in a criminal case has a constitutional right that the jury, regardless of the evidence against him, may acquit him. But he does not have the right that a jury should be free, in its deliberations, to decide that the earth is flat.[84]

The *Gold* court agreed with the *Lawrence* court's conclusion that juries are entitled to find contrary to logic or common sense. It differed from the *Lawrence* court, however, in determining that the right to trial by jury does not extend to indisputable matters. Although the jury could determine that the defendant was not guilty of knowingly using an interstate carrier to transport an obscene film, it was not free to find that United Airlines was not a carrier engaged in interstate commerce.

The *Gold* approach is consistent with the sixth amendment right to a jury trial.[85] Since judicially noticed facts take the place of evidence, the taking of judicial notice in *Gold* merely excused the state from having to submit proof that United Airlines was a carrier in interstate commerce. The *Gold* court explicitly upheld the defendant's right to a jury acquittal regardless of the evidence against him. In addition, the instruction to the jury to accept the noticed fact as established does not restrict the jury in its exercise of jury nullification. Under this doctrine, a jury can set aside instructions of the judge and reach a verdict of acquittal based on its own conscience.[86]

---

82. *Id.* The importance of procedural safeguards in a criminal case was emphasized in United States v. Blattel, 340 F. Supp. 1140 (N.D. Iowa 1972), in which the court refused to take judicial notice on a motion for acquittal. *Gold* was distinguished because "[t]here the defendant had an opportunity to present information which might bear on the propriety of noticing the fact, or upon the truth of the matter to be noticed." *Id.* at 1142. Other cases that stress the importance of procedural safeguards before judicial notice is taken in a criminal case include: Fringer v. Venema, 26 Wis. 2d 366, 132 N.W.2d 565, 569-70 (1965): People v. Matula, 336 P.2d 1000, 1013, *rev'd on other grounds*, 52 Cal. 2d 591, 342 P.2d 252 (1959).

83. 378 F.2d at 590.

84. *Id.*

85. *See* United States v. Alvarado, 519 F.2d 1133 (5th Cir. 1975). In *Alvarado* the defendant was convicted of conspiracy to possess with intent to distribute marijuana. On appeal, the defendant objected to the district court's judicial notice of the location and other physical aspects of the checkpoint where the defendant had been arrested. Citing Federal Rule 201, the *Alvarado* court stated: "Clearly the trial judge was warranted in taking judicial notice of immutable geographic and physical facts . . . . This facility of accepting what was plainly true could not abridge any Sixth Amendment right to confront witnesses." *Id.* at 1135. *See also* State v. Lawrence, 120 Utah 323, 336, 234 P.2d 600, 606 (1951) (Wolfe, C.J., dissenting) ("There is no constitutional provision which prohibits the trial judge from taking judicial notice in a criminal case of a fact, sufficiently notorious."). *But see* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L.J. 125, 163-65 (1973) (approving the distinction between civil and criminal cases).

86. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Cal. L. Rev. 168, 168 (1972). The doctrine of jury nullification is considered by some commentators to be essential

Thus, the jury in *Gold* was free to disregard any instruction and acquit the defendant if it believed that the criminal statute was unjust or felt that the statute should not be applied to the particular defendant.[87]

In determining the propriety of instructing the jury to accept judicially noticed facts as conclusive in criminal trials, adherence to constitutional principles is, of course, the overriding consideration. Since the *Gold* instruction does not violate the right to trial by jury, this approach is further justified by its consistency with the basic purposes of judicial notice. One reason for judicial notice in an adversary system is to prevent parties from inducing false results by contradicting indisputable matters.[88] Juries should similarly be restrained from reaching flagrantly erroneous results. This is particularly true in cases like *Gold,* in which the defendant did not attempt to contradict the judicially noticed fact. To permit a jury to find contrary to an indisputable fact is to invite a loss of public confidence in the criminal justice system.[89] Furthermore, the *Gold* approach promotes trial convenience and expedience by obviating the need for formal proof of necessary elements of a crime when such elements are appropriate subjects for judicial notice.

Rule 201 requires consideration of the two factors influencing the decision in *Gold*: indisputability and notice to the parties. Subdivision (b) requires facts judicially noticed to be indisputable. The possibility of a court's noticing a disputable fact is substantially lessened by the procedural safeguards mandated by subdivision (e). A criminal defendant is entitled to an opportunity to be heard as to the propriety of taking judicial notice. If, after hearing the defendant's opposing views, the judge determines that a fact is subject to reasonable dispute, judicial notice will not be taken and both parties will be permitted to present evidence to the jury. On the other hand, if the matter is truly indisputable, the judge may instruct the jury to accept it as conclusive without any infringement on the defendant's right to a jury trial.[90]

Since the jury instruction now required by Rule 201(g) is not constitutionally mandated, the position expressed in the rule should be rejected in favor of an approach that better accomplishes the purposes of judicial notice.

---

to maintaining the legitimacy of the judicial system. *Id.* at 183. *See generally* Comment, *Jury Nullification and the Pro Se Defense: The Impact of* Dougherty v. United States, 21 U. KAN. L. REV. 47 (1972); Note, *Jury Nullification: The Forgotten Right,* 7 N. ENG. L. REV. 105 (1971).

87. United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

88. Morgan, *supra* note 3, at 269, 273.

89. For a comparison of judicial notice and judges' comment on the evidence and a suggestion that both "serve . . . to maintain [the] . . . prestige for justice," see State v. Lawrence, 120 Utah 323, 336-37, 234 P.2d 600, 606 (1951) (Wolfe, C.J., dissenting).

90. "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 indisputable fact. This is particularly true if the fact is not specifically at issue." Comment, *supra* note 75, at 543-44. The Advisory Committee was in agreement when it discussed Rule 201(g) as originally formulated without regard to the nature of the proceeding: "Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases." Adv. Comm. Note, at 207.

Subdivision (g) should be amended to require the judge to instruct the jury to accept as established any judicially noticed facts without differentiation between civil and criminal trials.[91]

At the Appellate Level

In a criminal prosecution, the government is charged with the burden of proving each material element of the offense charged.[92] At trial, when facts relating to essential elements of the offense are indisputable, it is immaterial whether they are presented to the jury by formal proof or by judicial notice. At the appellate level,[93] however, judicial notice of such facts may violate a criminal defendant's right to have each element of the crime considered by the jury.

In *People v. Matula*,[94] the defendant was convicted of perjury for giving false testimony before an investigative committee. The court determined that although materiality was a question of law, facts relating to the element of materiality were within the province of the jury.[95] Since facts relating to

91. Rule 201 applies only to indisputable adjudicative facts that concern the immediate parties. Since legislative facts are beyond the scope of the rule, judicial notice may properly be taken of disputable legislative facts. While adjudicative facts are predominantly facts appropriately considered by a jury, legislative facts are usually employed by the court to determine questions of law, which are to be decided by the judge alone. "Nevertheless . . . 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. In such cases, it is arguable that until the jury determines the truth of the facts, the court should not utilize the facts to make new law." Comment, *supra* note 75, at 544-45. For an example of judicial notice of a legislative fact in a criminal case, see Jordan v. United States, 345 F.2d 302, 304 (10th Cir. 1965) (judicial notice taken that heroin was a derivative of opium and therefore a narcotic within the meaning of a statute).

92. Gordon v. State, 86 Fla. 255, 256, 97 So. 428, 429 (1923). *See* F. WHARTON, CRIMINAL EVIDENCE §16 (12th ed. 1955).

93. A discussion concerning the constitutional limitations on judicial notice at the appellate level in criminal trials also relates to judicial notice on a motion to acquit. For example, in United States v. Blattel, 340 F. Supp. 1140 (N.D. Iowa 1972), the defendant was convicted by a jury of wiretapping. The defendant moved for acquittal based on the fact that the government had failed to offer evidence at trial to prove two essential elements of the offense. The court denied the government's request that facts proving the two elements be judicially noticed, noting that the request would have been appropriate at trial but was not cognizable on appeal. "Because of plaintiff's belated request, the court is of the view that to take judicial notice of the requested facts . . . would be unfair, even though they may be true." *Id.* at 1142. A state court reached a similar result in State v. Main, 94 R.I. 338, 344, 180 A.2d 814, 817 (1962), in which it was held that a trial judge, in considering a motion to direct a verdict of acquittal, may not resort to judicial notice "to establish the existence of material facts which could not be found by a jury on the evidence contained in the record." The dissenting justice in *Main* argued that facts of common knowledge could be judicially noticed on a motion for acquittal because such facts could have been used by the jury to reach its verdict. *Id.* at 349, 180 A.2d at 820.

94. 336 P.2d 1000, 1014, *rev'd on other grounds*, 52 Cal. 2d 591, 342 P.2d 252 (1959).

95. *Id.* at 1010.

the materiality of the defendant's testimony before the committee had not been submitted to the jury, the case was reversed and a new trial granted.[96] Next, the court considered a request by the prosecution that the committee proceedings be judicially noticed to prove materiality. In denying the request, the court did not consider whether the facts were indisputable, nor did it consider whether an opportunity to dispute the facts at the appellate level would satisfy the procedural safeguards needed before judicial notice is taken at the trial level. Rather, the *Matula* court expressed the view that taking of judicial notice at the appellate level "runs counter to the constitutional rights of [a] defendant to have the facts relating to an essential element of the crime passed on by a jury. . . ."[97]

In contrast to the approach taken by the California court in *Matula*, federal appellate courts have judicially noticed facts without reference to the right to a jury trial.[98] In *United States v. Mauro*,[99] the defendant appealed a conviction of conspiracy to possess and dispose of the property of a national bank. Although at trial the government had proved the defendant's possession of cashiers' checks of the First National City Bank, it had offered no evidence to show that the First National City Bank was a national bank. The *Mauro* court unhesitatingly took judicial notice that the bank was a national bank[100] without considering any constitutional limitations. In *Ross v. United States*,[101] the court was called on to determine whether the evidence sustained the jury's verdict of obstructing the mails. In upholding the defendant's conviction, the court judicially noticed that social security checks are mailed out with written instructions to return them to the sender if the addressee is deceased.[102]

Both the *Maruo* and *Ross* courts applied a practical approach to judicial notice at the appellate level. While in *Mauro* judicial notice was taken of an

---

96. The *Matula* court's decision to grant a new trial was subsequently reversed by the California supreme court, People v. Matula, 52 Cal. 2d 591, 342 P.2d 252 (1959). Although the supreme court agreed with the district that factual questions were to be determined by a jury, it nevertheless deemed a new trial unnecessary because the challenged jury instruction was not prejudicial. *Id.* at 596, 342 P.2d at 256. The jury instruction was not prejudicial error because there was "no reasonable probability that the jury would have reached a different verdict had the materiality instruction required them to find first that the transcript accurately reflected the committee proceedings." *Id.* at 600, 342 P.2d at 257-58. However, this reversal is poor precedent today because the determination of no prejudicial error was based on the standard employed in nonconstitutional cases rather than on the much stricter standard for constitutional cases, which requires that the error be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). See notes 105, 106 *infra*.

97. 336 P.2d at 1014.

98. *See* Hefflinger, *supra* note 69, at 338.

99. 501 F.2d 45 (2d Cir. 1974).

100. *Id.* at 49. *Compare* Byers v. United States, 175 F.2d 654, 656 (10th Cir. 1949) (court took judicial notice of the fact that a bank with the word "national" in its title is one organized under the laws of the United States) *with* King v. United States, 426 F.2d 278, 279 (9th Cir. 1970) (court refused to judicially notice that a branch of the Bank of America was a national bank).

101. 374 F.2d 97 (8th Cir. 1967).

102. *Id.* at 103.

essential element of the offense charged, in *Ross* the court judicially noticed a fact to aid its decision as to the sufficiency of the evidence to support the jury's verdict. Apparently, neither court deemed a remand for a jury's consideration necessary for a fair trial. Indeed, the facts noticed in both cases were indisputable facts that would have been appropriate for notice at the trial level under both Morgan's and Wigmore's theories.

Rule 201(f) codifies the generally accepted notion that judicial notice may be taken at any stage of the proceeding, whether in the trial court or on appeal.[103] The approach taken by the *Mauro* and *Ross* courts is consistent with this subdivision. The fact remains, however, that the government in a criminal prosecution must prove each element of the offense charged. As demonstrated by *Matula*, judicial notice of an essential element of a crime at the appellate level may deprive a criminal defendant of the right to jury trial.[104] To avoid this problem, Rule 201(f) should be amended to provide that in criminal cases an appellate court may take judicial notice of facts relating to elements of the offense charged only if the government's failure to prove such facts at trial constituted harmless error.[105]

Under the harmless error doctrine, even a constitutional error does not require reversal if the appellate court determines that the error was harmless beyond a reasonable doubt.[106] In cases like *Mauro* and *Ross*, where failure to prove the elements at trial was clearly harmless error, judicial notice at the appellate level would prevent the waste of judicial resources and time required by an unnecessary reversal.

Adjudicative and Legislative Facts

The concept of categorizing judicially noticed facts as adjudicative or

---

103. *See, e.g.*, Hunter v. New York, O & W Ry. Co., 116 N.Y. 615, 23 N.E. 9 (1889). *See* Keeffe, Landis, & Shaad, *supra* note 3, at 671 (appellate courts frequently employ the doctrine of judicial notice). It is usually said to be within the court's discretion whether notice is appropriate at the appellate level. *See, e.g.*, Olin Mathieson Chem. Corp. v. United States, 179 Ct. Cl. 368, 373 n.2 (1967) (matters should not be judicially noticed at the appellate level where they would raise controversies not presented by the trial record).

104. The *Matula* court cautioned that although "a departure from established recognized legal procedure may appear in an individual case to adequately serve the ends of justice, judicial approval of such a practice could only constitute a dangerous inroad into an orderly system of justice which protects the constitutional rights of the accused." 336 P.2d at 1014.

105. Under the harmless error doctrine, a conviction will not be reversed for errors or defects that did not affect the substantial rights of the parties. The purpose of the doctrine is "to preserve appellate review as a check on arbitrary action or essential unfairness but at the same time to make the judicial process perform its function without permitting loopholes to exist for the benefit of men who have been fairly convicted." Herrick, Underhill's Criminal Evidence §3 (6th ed. 1973).

106. Chapman v. California, 386 U.S. 18 (1967). The standard for determining the presence of harmless constitutional error is a very strict one, requiring that the error be proved harmless beyond a reasonable doubt. *Id.* The test for nonconstitutional error is whether there is a reasonable possibility that the error or defect might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).

legislative was introduced by Professor Davis in 1942.[107] Although the idea of classifying judicially noticed facts has been widely accepted by legal writers,[108] the concept has previously received little judicial recognition.[109] Federal Rule 201, however, adopts the distinction between adjudicative and legislative facts. The rule's application is expressly limited by subdivision (a) to adjudicative facts.[110] Legislative facts are not mentioned in the rule, and the Advisory Committee's Note on subdivision (a) makes it clear that they are excluded from the rule's scope.[111] Thus, the common law approach developed by the federal courts will continue to govern judicial notice of legislative facts.

Definitions

A starting point for analyzing the nature of a particular fact is Professor Davis' functional definitions of adjudicative and legislative facts. The Advisory Committee adopted the following statement on adjudicative facts:

> When a court or agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . . Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.[112]

---

107. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

108. *See, e.g.*, C. MCCORMICK, *supra* note 2, §328; McNaughton, *supra* note 7, at 787-88; Comment, *supra* note 75, at 533. See also 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §15.03 (1958); Davis, *A System of Judicial Notice Based on Fairness and Convenience* in PERSPECTIVES OF LAW 69 (R. Pound ed. 1964).

109. Some courts, however, have recognized the distinction between adjudicative and legislative facts. *See, e.g.*, Hahn v. Gottlieb, 430 F.2d 1243, 1248 (1st Cir. 1970); Hunt Oil Co. v. FPC, 424 F.2d 982, 985 (5th Cir. 1970); Marine Space Enclosures v. Federal Maritime Comm'n, 420 F.2d 577, 589-90 (D.C. Cir. 1969); American Airlines v. CAB, 359 F.2d 624, 633 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §7.05 (3d ed. 1972).

110. FED. R. EVID. 210(a).

111. Adv. Comm. Note, at 202.

112. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955). For example, in Tasby v. Peek, 396 F. Supp. 952 (W.D. Ark. 1975), a client brought an action against his former court appointed attorney for damages allegedly arising out of a defense to a kidnapping charge employed by the attorney. The court dismissed the complaint because the action was barred by a three-year statute of limitations. After stating that the complaint was filed on June 3, 1974, the court took judicial notice that the verdict finding the plaintiff guilty of kidnapping was entered on March 27, 1970, more than three years before the complaint was filed. The court further judicially noticed that the defendant's services for the plaintiff terminated on October 12, 1970, when another attorney was appointed to represent the plaintiff. *Id.* at 955. The facts noticed by the *Tasby* court were adjudicative because they concerned the immediate parties and answered the questions "who did what" and "when."

Legislative facts are defined as follows:

> When a court or agency develops law or policy, it is acting legislatively; the courts have developed the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts. . . . Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties.[113]

These definitions emphasize two related considerations – the function performed by the court and the relationship of the facts noticed to the immediate parties.

An understanding of the distinction between adjudicative and legislative facts clarifies the close interrelationships between the various subdivisions of Rule 201. Limiting the scope of the rule to adjudicative facts does not diminish the significance of the resolution of the Morgan-Wigmore controversy for federal court actions because the controversy has implicitly centered on judicial notice of adjudicative facts.[114] Since they relate to the immediate parties, adjudicative facts may or may not be indisputable. In contrast, legislative facts are often disputable because their determination is frequently based on sociological, economic, moral, and political data that are subject

---

113. Davis, *supra* note 112, at 952. "Judicial notice of [legislative] facts occurs when a judge is faced with the task of creating law, by deciding upon the constitutional validity of a statute, or the interpretation or restriction of a common law rule, upon grounds of policy, and the policy is thought to hinge upon social, economic, political or scientific facts." C. MCCORMICK, *supra* note 2, §328.

For example, in Stanton v. Stanton, 421 U.S. 7 (1975), the plaintiff, a divorced widow seeking support payments accruing after her daughter reached 18, challenged the constitutionality of a Utah statute extending the period of minority for males to age 21 and for females to age 18. Defending the sex-based classification, the state of Utah stressed the importance of education for males since it enabled them to fulfill their primary responsibility to provide a home. Females were distinguished because they mature and marry earlier. Holding the statute unconstitutional, the Supreme Court determined that parental support for the attainment of education was as important for females as for males. *Id.* at 14-16. In reaching this conclusion the Court judicially noticed "the presence of women in business, in the professions, in government and in all walks of life where education is a desirable . . . antecedent." *Id.* at 15. The fact noticed was not adjudicative because it had no particular significance to the immediate parties. In making this general observation about current social conditions, the Court was performing a legislative function, *i.e.*, it was considering factors relevant to the formulation of a statute setting the age of majority. The fact was legislative because it aided the Court in exercising its judgment as to whether the state's justification constituted a rational basis for the discrimination. *See* Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 323, 325 (1971): "It used to be fashionable for judges to say that they never 'made' law, but only 'found' pre-existent law and applied it to new facts. Few appellate judges talk that way today . . . . It would be easy to cite . . . hundreds of areas in which our common law courts, as the interests and needs of society changed, have moved the law away from old positions to newer ones that better fit society's new interests and needs."

114. Even Professor Morgan, the most persuasive advocate of the indisputable approach, recognized the importance of allowing the judge freedom of investigation when he is determining the content or applicability of the law. Morgan, *supra* note 3, at 270.

to various interpretations.[115] Thus, applying the indisputability standard of subdivision (b) to legislative facts would essentially prevent their judicial notice.[116] By confining the scope of Rule 201 to adjudicative facts, the Committee was able to adopt the more popular indisputable approach without restricting the usefulness of judicial notice of legislative facts to determine law and policy.[117]

The requirement of subdivision (g) that the judge in civil cases instruct the jury to accept judicially noticed facts as conclusive is a corollary to the indisputability standard established by subdivision (b).[118] The jury instruction is required because adjudicative facts relating to the immediate parties are the types of facts that normally go to the jury in a jury case. Even in criminal cases, a provision for a jury instruction as to the effect of legislative facts would be unnecessary because the determination of facts used by the judge in his reasoning process are not within the jury's province.

Distinguishing Between Adjudicative and Legislative Facts

Since the scope of Rule 201 is limited to adjudicative facts, its application changes traditional judicial practice by necessitating a threshold determination of whether the fact to be noticed is adjudicative or legislative.[119] While some facts are readily classified as adjudicative or legislative, the distinction is not always a simple one.[120] The court confronted with the problem of distinguishing the two may find it helpful to consider the reasons underlying the distinction.

The purposes of distinguishing between adjudicative and legislative facts are related to the function performed by the court and the relationship of the facts noticed to the immediate parties. Thus, the basic distinction between adjudicative and legislative facts involves two important considerations — fairness to the parties and flexibility for the judge in the reasoning process.[121]

---

115. C. McCORMICK, *supra* note 2, §331. *See generally* Kohn, *Social Psychological Data, Legislative Fact, and Constitutional Law*, 29 GEO. WASH. L. REV. 136 (1960).

116. Adv. Comm. Note, at 203.

117. The importance of judicial notice of legislative facts to the development of the common law cannot be overemphasized. "[J]udge-made law would stop growing if judges, in thinking about questions of law and policy were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly . . . within the domain of the indisputable.' Facts most needed in thinking about different problems of law and policy have a way of being outside the domain of the clearly indisputable." Davis, *supra* note 30, at 82.

118. *Cf.* Comment, *Judicial Notice in the Proposed Federal Rules of Evidence*, 1969 WASH. U.L.Q. 453, 457.

119. *Id.* at 456.

120. *Cf.* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 161 (1973) ("Although the distinction between these two types of fact may often be elusive, the basic difference is illustrated easily.").

121. "The ultimate principle is that extra-record facts should be assumed whenever it is convenient to assume them, except that convenience should always yield to the requirement of procedural fairness that parties have an opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." Davis, *supra* note 8, at 515.

If adjudicative facts are at issue, the paramount consideration is the relationship of the noticed fact to the parties. Facts relating to the immediate parties should not be determined without affording the parties an opportunity to know and to dispute what may be unfavorable to them.[122] Rule 201 recognizes the importance of party input into judicial notice of adjudicative facts not only by requiring that such facts be indisputable but also by providing various procedural safeguards before notice is taken of adjudicative facts. Where adjudicative facts are concerned, considerations of fairness to the parties outweigh the expedient resolution of the issues made possible by the court's assumption of disputable adjudicative facts.

On the other hand, when performing a legislative function such as determining questions of law and policy, the judge should be unrestricted in his investigation and conclusion.[123] For this reason, findings of adjudicative facts must be supported by evidence, but findings of legislative facts need not, and sometimes cannot, be supported by evidence.[124] "In conducting a process of judicial reasoning . . . not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency is imputed to judges . . . as part of their necessary mental outfit."[125] Judicial notice of legislative facts is often nothing more than a formalized treatment of the assumptions used in the judicial reasoning process.[126] While the parties may assist the judge in finding legislative facts, the judge is free to reject data presented by the parties and to make an independent investigation.[127] If legislative facts are at issue, fair-

122. Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 301-02 (1937). The purpose behind this requirement is "that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts." K. DAVIS, *supra* note 109, §7.03.

123. Morgan, *supra* note 3, at 270. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-14 (1921).

124. K. DAVIS, *supra* note 109, §15.03. In the 1965 term, the Supreme Court went outside the record in almost one-half of its cases. The use of secondary sources was particularly pronounced in constitutional cases. Most of the secondary sources were cited as authority for legislative facts rather than for facts concerning the particular controversy at issue. The most frequently cited secondary sources were law review articles and legal treatises. Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term*, 57 GEO. WASH. L. REV. 55, 80 (1968).

125. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 279-80 (1898). The fine line between formal notice of a legislative fact and the general process of legal reasoning is also found in jury determinations. The elementary processes of understanding and reasoning, the beliefs, assumptions, and preconceptions that a juror brings to the trial are usually not expressed in any formal way. This similarly "elusive" process is referred to as "jury notice." McNaughton, *supra* note 7, at 789-90.

126. "Whereabout in the law does the doctrine of judicial notice belong? Wherever the process of reasoning has a place, and that is everywhere. Not peculiarly in the law of evidence . . . . The subject of judicial notice, then, belongs to the general topic of legal *or Legitimate Business Practice?*, 51 CALIF. L. REV. 232, 233 (1963).

127. "In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive

ness to the parties, who have no particularized knowledge to contribute, may properly be considered secondary to the judge's need for flexibility in the reasoning process.

Davis and Cleary: A Case Study of the Difficulty of Distinguishing Adjudicative and Legislative Facts

Although some facts are easily classified as adjudicative or legislative, the distinction is not always made without difficulty. Rule 201(a) will require the development of a body of interpretive case law before the distinction between adjudicative and legislative facts emerges as a clearly defined concept.[128] Since Rule 201(a) adopts a new approach, the majority of prior judicial notice cases will be of little value.[129] Legal texts will not be a significant aid in making the distinction in unclear cases because text writers tend to choose the most clear-cut examples to illustrate the different types of facts.

The Advisory Committee did not anticipate any difficulty in distinguishing between adjudicative and legislative facts. The Note on subdivision (a) merely sets forth Professor Davis' definition.[130] This definition, however, may be interpreted to reach different results when applied to the same set of facts. This proposition is illustrated by a disagreement between Professor Davis, the originator of the distinction, and Professor Cleary, the Reporter for the Federal Rules, as to whether the facts judicially noticed in *SEC v. Capital Gains Research Bureau*[131] were adjudicative or legislative.

---

data or rest content with what he has or what the parties present. He may reach a conclusion in accord with the overwhelming weight of available data or against it." Morgan, *supra* note 3, at 270. *See also* Currie, *Appellate Courts' Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 50; Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395 (1965); Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948).

128. It is uncommon for a newly pronounced rule to require a body of interpretative case law to fully define its meaning. For example, the Federal Rules of Civil Procedure permit joinder of parties defendant when there is asserted against them "a right to relief . . . arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." FED. R. CIV. P. 20(a). The exact meaning of the phrases "series of transactions" and "common question of law or fact" was left for judicial determination in cases. *See* Poster v. Central Gulf S.S. Corp., 25 F.R.D. 18 (E.D. Pa. 1960); McNeil v. American Export Lines, Inc., 166 F. Supp. 427 (E.D. Pa. 1958). As noted by the Florida Law Revision Council, "[a]n evidence code cannot provide a clear answer to every question that may arise, and the courts will still be left with the job of interstitial development; but a code can provide the basic structure of the law of evidence." FLORIDA LAW REVISION COUNCIL, PRELIMINARY DRAFT—EVIDENCE CODE—JUDICIAL NOTICE (1973).

129. Indeed, there is an indication that cases decided after the effective date of the Federal Rules have avoided the adjudicative-legislative distinction. Of the six cases that have cited the new rule, only one has dealt with the distinction. Houser v. State, Wash. , , 540 P.2d 412, 414 (1975).

130. Adv. Comm. Note, at 204.

131. 375 U.S. 180 (1963).

In *Capital Gains* the Securities and Exchange Commission sought an injunction compelling an investment adviser to disclose to clients the practice of "scalping" – making a profit by trading on the market effect of recommendations to purchase or sell securities. Affirming the district court,[132] the Second Circuit held that the defendant's practice did not constitute a "fraud" within the meaning of the Investment Advisers Act of 1940 because there was no showing that the defendant's activity influenced the market price.[133] In reaching this conclusion, the court noted that the idea that a small advisory service could artificially stimulate the market by its recommendations was "wholly speculative and . . . at variance with common sense."[134] The Supreme Court reversed, holding that the practice of "scalping" constituted a "fraud" within the meaning of the Act.[135] Disagreeing with the lower courts as to the defendant's ability to influence the market price, the Court noted that:

> An adviser who, like respondents, secretly trades on the market effect of his own recommendation may be motivated . . . to recommend a given security not because of its potential for long-run price increase (which would profit the client), but because of its potential for short-run price increase in response to anticipated activity from the recommendation (which would profit the adviser).[136]

A footnote[137] to this statement cited a law review note stating that investment advisers' recommendations may significantly influence market prices.[138]

Professors Davis and Cleary have expressed contrary opinions as to whether the facts in the law review note concerning the effects of investment advisers' recommendations were adjudicative or legislative. In Davis' view the Court cited the article for the proposition that the defendant secretly traded on the market effect of his own recommendation.[139] The facts were adjudicative since they concerned "whether defendants could or did influence the market price . . . ."[140] On the other hand, Cleary stated that the case "involved consulting non-evidence materials as an aid in determining whether a particular disclosure sought to be compelled fell within the provisions of a statute – a legislative rather than an adjudicative fact in the Committee's view."[141]

The difference of opinion may result from the fact that the two experts were not referring to the same proposition. Davis made it clear that in his view the noticed facts were used by the Court to support its reference to the

---

132. SEC v. Capital Gains Research Bureau, 191 F. Supp. 897 (S.D.N.Y. 1961).

133. SEC v. Capital Gains Research Bureau, 300 F.2d 745 (2d Cir. 1961), *aff'd on rehearing*, 306 F.2d 606 (2d Cir. 1962).

134. 300 F.2d at 748.

135. 375 U.S. 180 (1963).

136. *Id.* at 196.

137. *Id.* at 196 n.49.

138. Note, *Securities Regulation: Stock Scalping by the Investment Adviser: Fraud or Legitimate Business Practice?*, 51 CALIF. L. REV. 232, 233 (1963).

139. Davis, *supra* note 8, at 521.

140. *Id.*

141. Cleary, *Symposium*, 1969 L. & SOC. ORDER 509, 510 (Foreward).

defendant's secret trading on the market effects of his own recommendations. Cleary, however, seemed to refer to the case as a whole[142] or at least to the Court's entire footnoted sentence. Cleary's possible rationale is that the Court felt disclosure necessary to prevent the fraudulent effects of any conflicts of interest between the adviser and his clients. Thus, the Court might have used the fact that an adviser could influence the market price to illustrate the potential for a conflict of interest.

If, however, Davis and Cleary were referring to the same proposition, Cleary's conclusion that the noticed fact was legislative might indicate an intention on behalf of the Advisory Committee to define facts as adjudicative only when they clearly and explicitly apply to the immediate parties. Under this view, the facts noticed in *Capital Gains* would be considered legislative because they were general remarks about the ability of market advisers to influence market prices. A further indication that the Advisory Committee contemplated a restrictive interpretation of the definition of adjudicative facts is its statement that Rule 201 operates within the "*relatively narrow area* of adjudicative facts."[143]

Suggested Approach for Making the Distinction in Unclear Cases

As noted earlier, the primary considerations in distinguishing adjudicative and legislative facts are whether the facts concern the immediate parties and whether the judge is performing an adjudicative or legislative function. Usually, the judge performs an adjudicative function by noticing facts concerning the immediate parties and a legislative function when noticing generalized propositions. However, there are instances in which the judge employs generalized propositions when performing an adjudicative function; conversely, the judge might notice facts concerning the immediate parties when he is performing a legislative function.

The Advisory Committee pointed out the distinction between adjudicative facts and legislative facts used to assess or appraise adjudicative facts.[144] To illustrate this distinction, the Committee referred to a pair of Illinois cases involving the sufficiency of evidence to establish venue. In *People v. Strook*,[145] testimony that a crime was committed at 7956 South Chicago Avenue was found insufficient to establish venue in Chicago because the court refused to take judicial notice that the street address was located in Chicago.[146] The refusal to take judicial notice was based on the court's observation that streets of the same name may be located in different cities.[147] In the second case, *People v. Pride*,[148] the same court acknowledged a departure from earlier

142. In *Capital Gains* the Supreme Court made extensive use of legislative facts. For example, in explaining the common law definition of "fraud," the Court cited not only an equity treatise but also a private letter. 375 U.S. at 193 n.41.

143. Adv. Comm. Note, at 207 (emphasis added).

144. Adv. Comm. Note, at 203-04.

145. 347 Ill. 460, 179 N.E. 821 (1932).

146. *Id.* at 465-66, 179 N.E. at 822-23.

147. *Id.* at 466, 179 N.E. at 823.

148. 16 Ill. 2d 82, 87-88, 156 N.E.2d 551, 554-55 (1959). *Accord*, Orman v. State, Ind. App. , , 332 N.E.2d 818, 819 (1975).

holdings and determined that evidence of a crime's commission at 8900 South Anthony Avenue was sufficient to establish venue in Chicago. To reach this conclusion, the *Pride* court judicially noticed the common practice of omitting the name of a city when referring to local addresses.[149]

In the Committee's view, the fact not noticed in *Strook* — that a particular street address was located in Chicago — was adjudicative, whereas the fact noticed in *Pride* — the common practice of omitting the name of a city — was a legislative fact used to assess the adjudicative facts of the case.[150] While it may be true that in *Pride* the court was employing judicial notice as a part of its reasoning process to justify a departure from earlier cases, it is nevertheless apparent that the facts in both cases would ultimately be used to answer the same question — where did the defendant commit the offense charged. In *Strook* the court refused to take judicial notice that a street address was located in Chicago and held that the evidence was not sufficient to establish venue. In *Pride* the court did not take judicial notice that a street address was located in Chicago but held that the evidence was sufficient to establish venue by judicially noticing the common practice of omitting the name of a city when referring to local addresses. Thus, it seems that a court may avoid noticing a particular fact about the immediate parties by noticing a more general fact and subsequently applying it to answer the same question that the adjudicative fact not noticed would have been used to answer. The court is using a general proposition, which is seemingly considered legislative by the Advisory Committee, although performing the arguably adjudicative function of determining where an immediate party committed a particular act.

The likelihood that judicially noticed facts will be deemed legislative facts that are utilized to assess adjudicative facts is enhanced by the tendency of the courts to notice general facts rather than particular facts.[151] Consequently, general facts will frequently be used to deduce specific facts relating to the immediate parties.[152] For example, one court[153] judicially noticed generalized propositions from a standardized table of stopping distances to determine that the defendant could not have stopped her car in time to avoid striking a child who suddenly darted in front of her car. The same court,[154] however, refused to permit judicial notice of precise stopping

149. 16 Ill. 2d at 88, 156 N.E.2d at 554-55.

150. Adv. Comm. Note, at 203-04.

151. "A court is more willing to notice a general than a specific fact, as for example, the approximate time of the normal period of human gestation, but not the precise maximum and minimum limits." C. McCORMICK, *supra* note 2, §328.

152. Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 533 (1968).

153. Ennis v. Dupree, 262 N.C. 224, 229, 136 S.E.2d 702, 706 (1964). *See* Wise v. George C. Rothwell, Inc., 382 F. Supp. 563, 568 n.10 (D. Del. 1974) (judicial notice taken of average perception reaction and stopping distances to determine whether defendant could have avoided collision with plaintiff's tractor-trailer). *See also* Comment, *Judicial Notice — Disputability and Appellate Practice Regarding Judicial Notice of Stopping Distances*, 38 MO. L. REV. 678 (1973).

154. Hughes v. Vestal, 264 N.C. 500, 506, 142 S.E.2d 361, 366 (1965). The *Hughes* court distinguished Ennis v. Dupree, 262 N.C. 224, 136 S.E.2d 702 (1964) in the following manner:

distances from the same table. Thus, judicial notice that an average car traveling 55 miles per hour could be stopped within 211 feet would not be taken to prove that the plaintiff, who had stopped within 230 feet, was traveling in excess of 55 miles per hour.[155] In the Committee's view, while the general facts noticed in the former case were legislative facts used to assess the adjudicative facts, the specific fact not noticed in the latter case was a true adjudicative fact.[156] In both cases the judicially noticed facts were used to answer questions concerning the actions of the immediate parties — an adjudicative function.

Thus, in some cases, it is not only difficult to ascertain whether a general fact relates to the immediate parties, but it is also difficult to decide whether the judge is performing an adjudicative or legislative function.[157] In such cases, to determine whether a particular fact is adjudicative and thus within the scope of Rule 201, it may be helpful to analyze the facts by employing an approach that emphasizes the likelihood of a party's having specialized knowledge concerning the noticed facts as applied to the particular case.[158]

"It is true that this Court has in a few cases made casual reference to stopping-distance tables. The references were rhetorical and illustrative rather than judicial notice to support decision." 264 N.C. at 507, 142 S.E.2d at 366 (citations omitted). A court's characterization of the way in which a particular fact was used may be helpful in determining whether that fact was adjudicative or legislative. It is clear, however, that a fact used in a "rhetorical and illustrative" way may nevertheless relate to the immediate parties.

155. 264 N.C. at 503, 142 S.E.2d at 365-66.

156. Adv. Comm. Note, at 204.

157. The same facts may be adjudicative in one case but legislative in another case. For example, in Texas v. EPA, 499 F.2d 289, 315 (5th Cir. 1974), the court took judicial notice of current inflationary trends to determine whether the EPA had acted arbitrarily or capriciously in denying an extension for the implementation of quality air standards. In this case, the facts relating to economic conditions were adjudicative because they concerned the motive or intent of an immediate party. In contrast, the court in Johnson v. Penrod Drilling Co., 510 F.2d 234, 236 (5th Cir. 1975), judicially noticed inflationary trends in the nation's economy to determine that the possible future rate of inflation should not be included in a present rule for calculating future damages. In *Johnson* the facts relating to economic conditions were legislative because they were used by the court in exercising its discretion whether to change a common law rule.

Similarly, facts relating to economic conditions used to assess the reasonableness of damages or settlements are legislative. *See* Huddell v. Levin, 395 F. Supp. 64, 82 (D.N.J. 1975); Helfand v. New America Fund, Inc., 64 F.R.D. 86, 92 (1974). However, at least one court has apparently reached an opposite conclusion. Considering an award of pre-judgment interest, the court in Fox v. Kane-Miller Corp., 398 F. Supp. 609, 651 (D. Md. 1975), cited Rule 201 as authority for judicial notice of the recent decline in the purchasing value of the dollar.

158. The approach suggested is very similar to the method used to determine whether an evidentiary hearing should be afforded in connection with action by an administrative agency. In this area the principle that has evolved is that "a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts . . . ." K. DAVIS, *supra* note 109, §7.03. Illustrative of this principle is a statement by the Second Circuit Court of Appeals in WBEN v. United States, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968): "Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when . . . a new policy is based upon the general

For example, in *Essex County Preservation Ass'n v. Campbell*,[159] a conservation group brought an action against federal and state officials to enjoin a highway widening project. In evaluating the claims of the conservation group, the court took judicial notice of the fact that "any increase in the size of a highway is bound to have some deleterious effect on the environment."[160] Professor Davis might label this an adjudicative fact since it was used by the court to ascertain whether the defendant's proposed action would harm the environment. In contrast, the Advisory Committee would probably consider it a legislative fact used to appraise the adjudicative facts because of its general nature. Under the suggested approach, the court would ask whether the federal and state officials have any particular knowledge relating to the fact noticed. For example, the officials might be able to show that the proposed project would have at most a minimal impact on the environment or that pressing needs for a wider highway outweighed any alleged harm to the surrounding area. Since the function being performed by the judge in taking judicial notice is unclear, the fact should be deemed adjudicative because the party adversely affected has a particularized knowledge concerning the fact noticed.[161] The procedural safeguards required by Rule 201(e) would ensure an opportunity to present those facts to the court.

Courts may judicially notice facts about the immediate parties when performing a legislative function. In *Ponce v. Housing Authority*,[162] tenants sought an injunction against an assessment of rent increases at low-rent farm labor housing projects. After finding an infringement of the tenants' property rights, the *Ponce* court determined that the tenants were entitled to a hearing on the amount of the assessment.[163] In deciding what procedural safeguards were required at the hearing, the court took judicial notice of the fact that "farm labor families, as a class, receive substantially less income than is received by the average American family."[164] Using this fact, the court reasoned that a rise in the cost of housing would have a severe impact on the tenants; therefore, substantial safeguards were warranted.[165] The fact judicially noticed was clearly legislative because it was used by the court to exercise its discretion in determining its chosen course of action. It did not concern the immediate parties or their actions, nor was it a fact that would normally go to the jury.

---

characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them." *See* K. DAVIS, *supra* note 109, §7.03. *Compare* Londoner v. Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

159. 399 F. Supp. 208 (D. Mass. 1975).

160. *Id.* at 211.

161. Contrast the situation in *Campbell* with a case in which officials challenged the validity of a statute requiring the preparation of an environmental impact statement before the commencement of a highway widening project. In the latter case, the parties would have no special knowledge of the validity of the statute and the same fact would be clearly legislative.

162. 389 F. Supp. 635 (E.D. Cal. 1975).

163. *Id.* at 649.

164. *Id.*

165. *Id.*

In contrast, the court in *Collins v. Vitek*[166] noticed a fact concerning the immediate parties to determine what procedural safeguards were to be afforded a state prisoner challenging disciplinary action taken against him by prison officials. The plaintiff contended that he was entitled to a review board comprised of different persons than those who had composed the disciplinary board that had passed sentence on him. In determining that an impartial review board was not necessary for due process, the court took judicial notice of the small size of the prison staff, a fact that would make review impossible by officials totally uninvolved in any phase of the disciplinary process.[167] Thus, in exercising a legislative function by determining what procedural safeguards were mandated by due process, the *Collins* court judicially noticed a fact concerning an immediate party. In such ambiguous cases, the fact should be treated as adjudicative and therefore within the scope of Rule 201. Considerations of fairness to the parties in assuring that the fact noticed is indisputable outweigh any needs of the judge for flexibility in the judicial reasoning process.

In contrast to facts that are difficult to classify as either adjudicative or legislative, some facts are properly classified as both adjudicative and legislative.[168] For example, in *Powell v. Texas*,[169] the Supreme Court was called on to determine the constitutionality of punishing chronic alcoholics for intoxication in a public place. The Court resorted to various extra-record facts to determine the current views of the medical profession concerning whether alcoholism was a disease. The facts noticed were adjudicative in that they were used to determine whether the defendant Powell was afflicted with a disease.[170] In addition, however, the same facts were used in a legislative sense to determine whether "as a matter of medical science alcoholism was so clearly a disease that a constitutional principle should be developed to prohibit punishment for alcoholism."[171]

---

166. 375 F. Supp. 856 (D.N.H. 1974).

167. *Id.* at 862.

168. "Just as some questions have to be regarded as mixed questions of law and fact and can be so regarded without destroying the necessary and useful distinction between law and fact, so some facts have to be regarded as mixed adjudicative and legislative facts without destroying the necessary and useful distinction between adjudicative and legislative facts." K. DAVIS, *supra* note 109, §15.04. Thus, even though a court finds that a fact is legislative, it must still examine the fact in light of the case as a whole to determine whether the fact is also adjudicative.

169. 392 U.S. 514 (1968).

170. K. DAVIS, *supra* note 109, §15.03.

171. *Id.* A similar problem may arise when a court takes judicial notice of the prior records of a case currently before the court. For example, in Alexander v. HEW, 392 F. Supp. 1 (N.D. Ill. 1975), a plaintiff who had brought two previous actions claiming a denial of civil rights petitioned the court for permission to institute a third party complaint. In determining whether to permit the third party complaint, the court took judicial notice of dismissals in the previous actions as proof that the plaintiff had been given a full opportunity to litigate her grievances. The fact of the prior action was in one sense legislative because it was used by the judge to determine what course of action to take. However, the fact was also adjudicative because it related to the actions of an immediate party. In Alexander the need for notice and an opportunity to be heard was particularly evident because the two prior actions that caused the judge to deny the third party

When the same facts are both adjudicative and legislative, those facts should be treated as adjudicative for purposes of judicial notice. To do otherwise would deprive a party of the procedural safeguards to which he is entitled under Rule 201.

Thus, the adjudicative or legislative nature of a particular fact determines whether judicial notice of that fact is within the scope of Rule 201. If the fact to be noticed is governed by the federal rule, it must be indisputable and is not subject to challenge. Furthermore, judicial notice of adjudicative facts must be accompanied by important procedural safeguards for the parties' protection.

In summary, there are at least three situations in which the applicability of Rule 201 is uncertain. First, if the judge employs general propositions to assess the adjudicative facts of the case, it is difficult to determine whether he is performing an adjudicative or legislative function. Second, the judge

---

complaint were both subject to question because of actions taken by the magistrates in those cases. *See also* United States v. Walters, 510 F.2d 887, 890 n.4 (3d Cir. 1975) (judicial notice taken of briefs and petitions filed in state courts to determine whether plaintiff had exhausted his state remedies); Samuel v. University of Pittsburgh, 506 F.2d 355, 360 n.12 (3d Cir. 1974) (judicial notice taken of district court docket to determine that a hearing on damages was held on a particular day).

Closely related to judicial notice of the prior record of the same case is judicial notice of the records of previous cases. "The doctrine that the record of a previous case may be judicially noticed is deeply established, and the doctrine seems to be used irrespective of the legislative or adjudicative character of the facts." Davis, *supra* note 8, at 523-24 n.38. It is not known to what extent Rule 201 will change this existing practice. However, it is clear that facts relating to the records of previous cases are capable of classification as adjudicative or legislative. For example, in Insurance Co. of N. America v. National Steel Serv. Center, Inc., 391 F. Supp. 512, 518 (N.D. W. Va. 1975), the court judicially noticed the records of prior litigation to determine the extent of the insurance company's knowledge of the circumstances underlying the workmen's compensation coverage of an injured worker. The facts were adjudicative because they related to the motive or intent of an immediate party. *See also* United States v. M.P.M., Inc., 397 F. Supp. 78, 103 (D. Colo. 1975) (judicial notice taken of six prior actions to determine that the government's institution of the current proceeding was not an abuse of prosecutorial discretion); Oburn v. Shapp, 393 F. Supp. 561, 565 (E.D. Pa. 1975) (judicial notice taken of consent decree in a prior action to determine whether state police academy discriminated in its hiring practices).

In contrast, the court in Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 429 (N.D. Miss. 1974), judicially noticed the many prior contract actions to determine the enforceability vel non of contracts for the advance or forward sale of cotton fiber. The facts noticed were legislative because they were used by the court in determining what course of action to take. *See also* Moeck v. Zajackowski, 385 F. Supp. 463, 466 (W.D. Wis. 1974) (judicial notice taken of hundreds of prior cases filed by inmates of state prisons to determine that a warden could not interfere with the plaintiff's right to appear at trial); Yelverton v. Driggers, 370 F. Supp. 612, 617 (M.D. Ala. 1974) (judicial notice taken of prior cases establishing the existence of impediments to black political participation in the state to determine whether a reapportionment plan was unconstitutional).

Whether judicially noticed facts relating to prior records of current cases and of previous cases should be classified as adjudicative or legislative for purposes of Rule 201 is a question that needs to be resolved. In a recent survey by the author of federal cases decided in 1974 and 1975 in which the taking of judicial notice was explicitly acknowledged, 21% (15 out of 71) involved the type of facts discussed above. The need for procedural safeguards in cases in which such facts are adjudicative indicates that these cases should come within the scope of Rule 201.

may use facts concerning the immediate parties when performing a legislative function. Third, the same facts may be used in both an adjudicative and a legislative manner.

When the distinction between adjudicative and legislative facts is unclear, the primary reasons for the distinction — fairness to the parties and flexibility for the judge in the reasoning process — once more become key considerations. In uncertain cases, the best approach is that fairness to the parties should be the overriding consideration. Despite any indication by the Advisory Committee to the contrary, if it can be shown that a party has a particularized knowledge to contribute to the ascertainment of the propriety of taking judicial notice, then the fact should be deemed adjudicative.

THE NEED TO CODIFY JUDICIAL NOTICE OF LEGISLATIVE FACTS

The failure to include legislative facts within the scope of Rule 201 presents the issue of whether judicial notice of these facts is susceptible to codification. There are three approaches to the question whether legislative facts should be included in a rule governing judicial notice. The first approach makes no distinction between adjudicative and legislative facts. This approach is represented by codifications formulated prior to the Federal Rules of Evidence, including the Model Code of Evidence,[172] the Uniform Rules of Evidence,[173] and some state codes.[174] The second and prevailing view, exemplified by Rule 201, limits any attempt at codification to adjudicative facts.[175] The third approach, advocated by Davis, suggests that both adjudicative and legislative facts be included in a rule on judicial notice with different requirements and procedures afforded each.[176]

The scope of Rule 201 is limited to adjudicative facts. The Advisory Committee's Note on subdivision (a) explained that the rationale confining the rule's regulation to adjudicative facts relates to the differences between adjudicative and legislative facts.[177] In the Committee's view the particular nature of legislative facts renders them inappropriate for codification for three main reasons. First, the rule's requirement that facts noticed be indisputable would eliminate judicial notice of legislative facts if they were

---

172. MODEL CODE EVID. 801, 802.

173. UNIF. R. EVID. 9. The Uniform Rules of Evidence were amended in 1974. The Rules now distinguish between adjudicative and legislative facts. UNIF. R. EVID. 201(a).

174. *See, e.g.*, CAL. EVID. CODE §§450-60 (West 1968); KAN. STAT. ANN. §§60-401 to -470 (1964).

175. "Whatever the ultimate doctrinal synthesis of judicial notice of adjudicative facts comes to be, a viable formulation of rules laying down a similarly rigid procedural etiquette with regard to legislative facts has not proved feasible. Given the current recognition that nonadjudicative facts are inextricably part and parcel of the law formulation process in a policy-oriented jurisprudence, there may be no need to formulate a distinctly judicial notice-captioned procedure with regard to nonadjudicative facts . . . . [W]hatever rules govern the submission of law in the litigation process have already preempted the nonadjudicative field and made unnecessary separate treatment thereof within the context of judicial notice." C. MCCORMICK, *supra* note 2, §334.

176. *See* Davis, *supra* note 8, at 525-27.

177. Adv. Comm. Note, at 202.

included in the scope of the rule since legislative facts are seldom indisputable.[178] Second, "any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs"[179] are deemed inappropriate where legislative facts are concerned. Third, "any requirement of formal findings at any level"[180] of judicial notice of legislative facts was considered inappropriate by the Advisory Committee.

Although the Committee explained why adjudicative and legislative facts cannot be treated identically in a judicial notice rule, it does not offer a satisfactory justification for the complete exclusion of legislative facts from Rule 201.[181] The distinction must be made between a subject that is truly "inappropriate" for codification and one that is either difficult to codify or capable of being codified only in the most general language. It is true that application of the indisputability standard of Rule 201(b) to legislative facts would severely restrict their judicial notice. Judges consistently take judicial notice of disputable legislative facts.[182] The appropriate solution would be to permit notice of legislative facts if the court believes them, whether or not they are subject to reasonable dispute.[183] Rule 201 should be amended to include judicial notice of legislative facts. The provisions governing notice of legislative facts should be in accordance with existing judicial practices — permitting judicial notice of disputable legislative facts, requiring minimal procedural safeguards, and calling for formal findings when the fact noticed is critical to the resolution of the controversy.[184]

The inclusion of legislative facts in Rule 201 would ensure the provision of adequate procedural safeguards when legislative facts are noticed. Although recognizing the value of procedural safeguards by incorporating them into Rule 201, the Advisory Committee nevertheless stated that formal notice requirements are unnecessary for judicial notice of legislative facts. The Committee did acknowledge that present practice often affords an opportunity to be heard and to exchange briefs. The fact that some notice is presently given indicates both the desirability and the need[185] for some safeguards. To avoid unduly limiting the judge's need for flexibility in the reasoning process, safeguards afforded for judicial notice of legislative facts should be less rigid

178. *Id.* at 203.

179. *Id.*

180. *Id.*

181. Davis, *supra* note 8, at 526.

182. *See, e.g.*, Mogul v. G.M.C., 391 F. Supp. 1305, 1313 (E.D. Pa. 1975) (judicial notice taken of the fact that Cadillac did not constitute an independent product market despite compelling argument by the plaintiff to the contrary); Application of Watson, 517 F.2d 465, 474-75 (C.C.P.A. 1975) (judicial notice taken of an FDA order concerning the toxic effects of a particular substance notwithstanding the court's recognition of an affidavit showing that the substance had no adverse effects).

183. Davis, *supra* note 8, at 527.

184. *Id.*

185. One court has indicated that the failure to notify a party of judicial notice of a legislative fact may deprive the party of his right to argue the legal effect of the noticed fact on appeal. People v. Matula, 336 P.2d 1000, *rev'd on other grounds*, 52 Cal. 2d 591, 342 P.2d 252 (1959).

than those provided for notice of adjudicative facts. A satisfactory solution would be to require notice when the judge reasonably believes that challenge is a substantial possibility.[186] Furthermore, permitting the parties to submit information relating to legislative facts would guard against judicial error by supplying the judge with additional information with which to evaluate the propriety of taking judicial notice.

The Advisory Committee believed that requiring formal findings of judicial notice of legislative facts at any level was inappropriate.[187] Noting that the Committee's view was contradictory to existing practices, Professor Davis has stated that courts usually identify findings of legislative facts that significantly affect their decision.[188] The problem with his conclusion is the impossibility of assessing the number of decisions made without explicit statement of findings of legislative facts.[189] Since existing practice is really unascertainable, the important question is whether it is a good policy to require formal findings of legislative facts. While the value of formal findings of peripheral legislative facts may be minimal, there surely are benefits to be derived from formal findings of critical legislative facts. The modern trend is for judges to be explicit in stating reasons for policy decisions.[190] Requiring the court to identify significant legislative facts affecting their decision would be a major step in promoting candor in the courts.[191]

---

186. Davis, *supra* note 8, at 527.

187. Adv. Comm. Note, at 203. See text accompanying note 180 *supra.*

188. Davis, *supra* note 8, at 526.

189. *Cf.* K. DAVIS, *supra* note 109, §15.03: "A most vital observation is that the difference between appearing to stay within the record and frankly acknowledging resort to extra-record sources for legislative facts is usually only a difference in the degree of articulation of grounds for decision. If all judgment has a factual basis only a part of which comes from the record, the judge or administrative officer who fully explains the process of arriving at his decision will appear to go beyond the record, but the judge or officer who merely announces conclusions will appear to stay within the record."

190. C. MCCORMICK, *supra* note 2, §331. "The discussion surrounding recent Supreme Court decisions has often included references to an assumed tendency of the judges to rely upon authority other than 'accepted sources of law.' Critics of current decision have pointed to the use of unconventional authority as a significant proof of the present Court's departure from the approved pathways of its predecessors. Supporters have maintained that Supreme Court Justices have always been influenced by considerations of social values and desirability of results, and that the Court is merely recognizing this fact and exploring these considerations openly." Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term,* 57 GEO. WASH. L.J. 55 (1968). *See also* Newland, *Legal Periodicals and the United States Supreme Court,* 7 KAN. L. REV. 477 (1959); Scurlock, *Scholarship and the Courts,* 32 U. MO.-KAN. CITY L. REV. 228 (1964).

191. One writer has listed as a primary factor contributing to a general lack of confidence in the judicial system the "tendency of judges to go outside the briefs, record, and argument of counsel to inform themselves about the case at bar." Miller, *Public Confidence in the Judiciary: Some Notes and Reflections,* 35 LAW & CONTEMP. PROB. 69, 86 (1970). This problem would be somewhat alleviated if judges were required to reveal outside sources for central legislative facts.

When the judge finds legislative facts, he is performing the same function that the legislature performs. However, the legislature is a large, diverse body representing many segments of the society. In contrast, the judge is an individual who must indicate his responsiveness to the needs of society. "[T]he judge who writes an opinion has the task of reflecting the

Inclusion of legislative facts in Rule 201 would effectuate full codification of the basic concept of judicial notice. Existing practice indicates that decisions on judicial notice involve three variables:[192] the extent to which the facts noticed are adjudicative or legislative, the extent to which the facts noticed are disputable or indisputable, and the extent to which the facts noticed are critical or peripheral to the controversy.[193] Judicial notice of an adjudicative fact central to the controversy may require indisputability. On the other hand, judicial notice is often taken of disputable, peripheral legislative facts.[194] "A rule that leaves out of account one of the essential variables that [is] intrinsic to the problem and that the courts in fact use cannot be a sound solution of the basic problem of judicial notice."[195]

The new Federal Rules of Evidence attempt to codify the existing law of evidence by changing what is unsatisfactory[196] to promote uniformity in the federal courts. The Committee apparently did not find the existing practices of judicially noticing legislative facts unsatisfactory because, although it failed to set forth explicit guidelines, its apparent intention was continued use of these practices by federal judges.[197] The result is a satisfactory, but uncodified, body of law.

What part of the law remains uncodified? It has been suggested that at least 75 percent of judicial notice cases involve legislative facts.[198] A recent survey, however, indicates that the figure of 75 percent is too high.[199] In a

---

outlines of the debate, to show that he is aware of the different voices and that his thought processes have traveled through an inner debate prior to determination." Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395, 397-98 (1965). A judge should reveal central legislative facts that influence his thought process when reaching a decision. *See also* Akehurst, *Statements of Reasons for Judicial and Administrative Decisions*, 33 MODERN L. REV. 154 (1970).

192. Davis, *supra* note 8, at 515, 527.

193. *See, e.g.*, TWA v. Hughes, 308 F. Supp. 679, 684 (S.D.N.Y. 1969), *rev'd on other grounds*, 409 U.S. 363 (1973) ("The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice.").

Closely related to the distinction between central and peripheral facts is the distinction between ultimate and non-ultimate facts. Courts are more willing to notice facts that would not be determinative of the case. C. MCCORMICK, *supra* note 2, §328. *But see* Brown v. Board of Educ., 347 U.S. 483 (1954) (judicial notice of the legislative fact that racially segregated schools cannot be equal because of the creation of a feeling of inferiority within the minority was determinative of the case).

194. *See, e.g.*, United States v. Houghton, 388 F. Supp. 773, 775 (N.D. Tex. 1975) (in an essentially unnecessary account of the defendant's life history, the court took judicial notice of the fact that "it is almost impossible for a man of ordinary means to support two major vices at the same time.").

195. Davis, *supra* note 8, at 527.

196. *Id.* at 525.

197. *Id.*

198. *Id.* at 525-26.

199. The disparity in the results of the two surveys may evolve from the nature of the surveys themselves. Professor Davis' conclusion that 75% of judicial notice cases involve legislative facts was based on a random sampling of 28 Supreme Court cases. Davis, *supra* note 8, at 525. The cases in Davis' survey are cited in 2 *K. Davis*, ADMINISTRATIVE LAW TREATISE §15.08 (Supp. 1965). In contrast, a more recent survey by the author included 71 federal court cases decided during a two-year period in which the taking of judicial notice

survey of all federal cases decided in 1974 and 1975[200] in which the taking of judicial notice was explicitly acknowledged, while 61 percent of the cases involved judicial notice of adjudicative facts,[201] 39 percent involved notice of legislative facts.[202] Since a rule can be formulated with appropriate pro-

---

was explicitly mentioned. Furthermore, the different results may stem from the nature of cases decided by the Supreme Court as opposed to those of the federal district courts, which constituted a majority of cases in the recent survey.

In the recent survey, the distinction between adjudicative and legislative facts was made pursuant to the approach suggested in the preceding section, in which facts in unclear cases were deemed adjudicative if it was likely that the parties had a particularized knowledge to contribute.

200. The survey included all federal cases decided in 1974 and all 1975 cases reported as of Feb. 1, 1976.

201. Stradley v. Cortez, 518 F.2d 488, 494 n.8 (3d Cir. 1975); Board of Trustees v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975); United States *ex rel.* Geisler v. Walters, 510 F.2d 887, 890 n.4 (3d Cir. 1975); Elliott v. Michael James, Inc., 507 F.2d 1179, 1185-86 (D.C. Cir. 1975); Merrill Trust Co. v. Bradford, 507 F.2d 467, 469 (5th Cir. 1974); Samuel v. University of Pittsburgh, 506 F.2d 355, 360 (3d Cir. 1974); Sierra Club v. Callaway, 499 F.2d 982, 989 (5th Cir. 1974); Texas v. EPA, 499 F.2d 289, 315 (5th Cir. 1974); Sholars v. Matter, 491 F.2d 279, 281 n.8 (9th Cir. 1974), *cert. denied*, 419 U.S. 970 (1975); Dells, Inc. v. Mundt, 400 F. Supp. 1293, 1296 (S.D.N.Y. 1975); Lefkovits v. Board of Elections, 400 F. Supp. 1005, 1007 n.1 (N.D. Ill. 1975); Sierra Club v. Morton, 400 F. Supp. 610, 633 (N.D. Cal. 1975); Washington Mobilization Comm'n v. Cullinane, 400 F. Supp. 186, 198 n.23 (D.D.C. 1975); Essex County Preservation Ass'n v. Campbell, 399 F. Supp. 208, 211 (D. Mass. 1975); Bradshaw v. Oklahoma, 398 F. Supp. 838, 845 (E.D. Okla. 1975); Government Employees, Local 1858 v. Callaway, 398 F. Supp. 176, 195 (N.D. Ala. 1975); United States v. M.P.M., Inc., 397 F. Supp. 78, 103 (D. Colo. 1975); Tasby v. Peek, 396 F. Supp. 952, 955 (W.D. Ark. 1975); Aiple Towing Co., Inc. v. MV Tri-W, 396 F. Supp. 943, 947 (E.D. La. 1975); Ross v. Brown, 396 F. Supp. 192, 195 n.2 (E.D. Tex. 1975); Hanback v. Seaboard Coastline R.R., 396 F. Supp. 80, 89 (D.S.C. 1975); Evans v. S.S. Kresge Co., 394 F. Supp. 817, 837-38 n.19 (W.D. Pa. 1975); Oburn v. Shapp, 393 F. Supp. 561, 565 (E.D. Pa.), *aff'd*, 521 F.2d 142 (3d Cir. 1975); Alexander v. HEW, 392 F. Supp. 1, 2 (N.D. Ill. 1975); Insurance Co. of N. America v. National Steel Serv. Center, Inc., 391 F. Supp. 512, 518 (N.D. W. Va. 1975); *In re* Copeland, 391 F. Supp. 134, 138 (D. Del. 1975); Nixon v. Sampson, 389 F. Supp. 107, 155 n.124 (D.D.C. 1975); Iberian Tankers Co. v. Gates Constr. Co., 388 F. Supp. 1190, 1192 (S.D.N.Y. 1975); United States v. Houghton, 388 F. Supp. 773, 775 (N.D. Tex. 1975); Mobil Oil Corp. v. TVA, 387 F. Supp. 498, 500 n.1 (N.D. Ala. 1974); Clark v. Anderson, 387 F. Supp. 404, 406 (E.D. Okla. 1974); Times Newspapers, Ltd. v. McDonnell Douglas Corp., 387 F. Supp. 189, 193 n.3 (C.D. Cal. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 382 F. Supp. 999, 1013 (E.D. Pa. 1974); Wise v. George Rothwell, Inc., 382 F. Supp. 563, 568 n.10 (D. Del. 1974), *aff'd*, 513 F.2d 627 (1975); Conley v. Southern Import Sales, Inc., 382 F. Supp. 121, 124 (M.D. Ala. 1974); Smith v. Vowell, 379 F. Supp. 139, 143 (W.D. Tex), *aff'd*, 504 F.2d 759 (1974); Blanning v. Tisch, 378 F. Supp. 1058, 1060 (E.D. Pa. 1974); Rankin v. Christian, 376 F. Supp. 1258, 1260 (D.V.I. 1974); Collins v. Vitek, 375 F. Supp. 856, 862 (D.N.H. 1974); Davis v. Avco Corp., 371 F. Supp. 782, 789 (N.D. Ohio 1974); United States v. Sioux Nation of Indians, 518 F.2d 1298, 1299 (Ct. Cl. 1975); McNamara Constr. Co. v. United States, 509 F.2d 1166, 1168 (Ct. Cl. 1975); Application of Yardley, 493 F.2d 1389, 1393 (C.C.P.A. 1974).

202. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); Trade Banner Line, Inc. v. Caribbean Steamship Co., 521 F.2d 229, 230 (5th Cir. 1975); Zweibon v. Mitchell, 516 F.2d 594, 644 n.138 (D.C. Cir. 1975); Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 544 (D.C. Cir. 1975); Johnson v. Penrod Drilling Co., 510 F.2d 234, 236 (5th Cir. 1975); Mid-America Transp. Co., Inc. v. National Marine Service, Inc., 497 F.2d 776, 780 (8th Cir. 1974); EEOC v. Local 638, 401 F. Supp. 467, 481 (S.D.N.Y. 1975); Dillard v. Pitchess, 399 F. Supp. 1225,

visions for judicial notice of both adjudicative and legislative facts, there is no justification for the exclusion of legislative facts from a rule that purports to codify the law of judicial notice.

RULE 201 AND STATE EVIDENCE LAW

Although Rule 201 applies only to proceedings in the federal courts, the federal rule can be expected to influence state evidence law in two principle ways. First, state courts faced with judicial notice problems may look to the federal rule for guidance. Second, the promulgation of the Federal Rules of Evidence may encourage codification of state judicial notice principles patterned on the federal model.

Common Law

The great majority of state evidence law is uncodified and therefore controlled by law principles developed by state courts. There is wide disparity among the states in regard to the various aspects of judicial notice. For example, the states disagree as to the indisputability and conclusiveness of judicially noticed facts. Although some states adhere to Morgan's theory that noticed facts must be indisputable and are not subject to challenge by rebuttal evidence,[203] many states follow the opposite approach expressed by Wigmore.[204] In some instances, courts of the same state have followed different theories.[205] However, even though as a general rule no explicit distinction is

---

1235 nn. 3 & 4 (C.D. Cal. 1975); Fox v. Kane-Miller Corp., 398 F. Supp. 609, 651 (D. Md. 1975); Population Servs. Int'l v. Wilson, 398 F. Supp. 321, 332-33 (S.D.N.Y. 1975), *U.S. appeal pend'g*; Happy Inv. Group v. Lakeworld Properties, Inc., 396 F. Supp. 175, 183 n.6 (N.D. Cal. 1975); Huddell v. Levin, 395 F. Supp. 64, 82 (D.N.J. 1975); National Car Rental Systems, Inc., v. Council Wholesale Distribs., Inc., 393 F. Supp. 1128, 1134 (M.D. Ga. 1974); Mogul v. G.M.C., 391 F. Supp. 1305, 1313 (E.D. Pa. 1975); Ponce v. Housing Authority, 389 F. Supp. 635, 649 (E.D. Cal. 1975); Illinois Produce Int'l, Inc. v. Reliance Ins. Co., 388 F. Supp. 29, 35 (N.D. Ill. 1975); Fano v. Meachum, 387 F. Supp. 664, 667 (D. Mass.), *aff'd*, 520 F.2d 374, *cert. granted*, 96 S. Ct. 444 (1975); Moeck v. Zajackowski, 385 F. Supp. 463, 466 (W.D. Wis. 1974); Fortin v. Darlington Little League, Inc., 376 F. Supp. 473, 479 (D.R.I. 1974), *rev'd on other grounds*, 514 F.2d 344 (1st Cir. 1975); Colby College v. Colby College-N.H., 374 F. Supp. 1141, 1146 (D.N.H. 1974), *vacated*, 508 F.2d 804 (1st Cir. 1975); Aikens v. Abel, 373 F. Supp. 425, 435 (W.D. Pa. 1974); Yelverton v. Driggers, 370 F. Supp, 612, 617 (M.D. Ala. 1974); McHugh v. Carlton, 369 F. Supp. 1271, 1274 (D.S.C. 1974); Williams v. TWA, 369 F. Supp. 797, 802 n.3 (S.D.N.Y. 1974), *aff'd*, 509 F.2d 942 (1975); Cone Mills Corp. v. Hurdle, 369 F. Supp. 426, 429 (N.D. Miss. 1974); Helfand v. New America Fund, Inc., 64 F.R.D. 86, 92 (1974), *vacated*, 521 F.2d 153 (3d Cir. 1975); Colonial Metals Co. v. United States, 494 F.2d 1355, 1360 (Ct. Cl. 1974).

203. *See, e.g.*, 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); Commonwealth v. Marzynski, 149 Mass. 68, 72, 21 N.E. 228, 229 (1889); Soyland v. Farmers Mut. Fire Ins. Co., 71 S.D. 522, 26 N.W.2d 696, 699 (1947).

204. *See, e.g.*, Board of Comm'rs v. Radley, 134 Kan. 704, 708-09, 8 P.2d 386, 388 (1932); Macht v. Hecht, Co., 191 Md. 98, 102, 59 A.2d 754, 756 (1948); Scheufler v. Continental Life Ins. Co., 350 Mo. 886, 896, 169 S.W.2d 359, 365 (1943); Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 598, 119 S.W. 565, 569 (1909); Morrison v. Thomas, 481 S.W.2d 605, 605 (Mo. App. 1972). *See* McNaughton, *supra* note 7, at 796 n.3.

205. *Compare* Nicketta v. National Tea Co., 338 Ill. App. 159, 162, 87 N.E.2d 30,

made between civil and criminal cases,[206] the states are almost uniform in allowing rebuttal of judicially noticed facts in criminal cases.[207] While some states have recognized the difference between adjudicative and legislative facts,[208] most have treated judicially noticed facts without regard to their adjudicative or legislative nature.

Because of its recent enactment, it is perhaps too early to assess the impact of Rule 201 on state decisional law. Nevertheless, there are recent indications that state courts faced with judicial notice problems will look to the federal rule for guidelines. The supreme court of Washington recently relied on Rule 201 to support its decision to uphold judicial notice of a legislative fact.[209] Following the rationale of the Advisory Committee, the court observed that the "restrictive rules governing notice are not applicable to factual findings that simply supply premises in the process of legal reasoning."[210] Thus, judicial notice was appropriately taken of studies that contained data supporting statutory age discrimination against those under age 21, even though the studies concededly were not sources of indisputable accuracy.[211]

In addition, a recent Rhode Island case relied on Rule 201(g) to buttress its decision that the permanence of an injury was improperly judicially noticed.[212] The court did not decide whether the permanence of an injury was a proper subject for judicial notice,[213] nor did it attempt to resolve the Morgan-Wigmore controversy.[214] Rather, the procedure was improper because the jury was not informed of the contemplated taking of judicial notice. Citing Rule 201(g), the court stated that whenever a trial judge deems it "appropriate to take judicial notice of a certain scientific fact and accordingly intends that a jury properly consider it . . . he must at least communicate that fact and those intentions to the jury."[215]

State Evidence Codes

Three states codified their evidence law before the appearance of the Federal Rules of Evidence.[216] These early codifications were for the most

31 (1949) (matters judicially noticed are indisputable) *with* People v. Krall, 29 Ill. App. 3d 86, 87-88, 329 N.E.2d 441, 442 (1975) (matters judicially noticed may be rebutted by testimony at trial).

206. *But see* State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951).

207. *See, e.g.*, State v. Tomanelli, 153 Conn. 365, 216 A.2d 625 (1966); People v. Krall, 29 Ill. App. 3d 86, 329 N.E.2d 441 (1975); Sumpter v. State, Ind. , , 306 N.E.2d 95, *appeal dismissed*, 419 U.S. 811 (1974); State v. Miller, 102 N.H. 260, 154 A.2d 699 (1959).

208. *See, e.g.*, Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 495-96, 204 N.E.2d 504, 509 (1965); Lorland Civic Ass'n v. DiMatteo, 10 Mich. App. 129, 135-36, 157 N.W.2d 1, 5 (1968). *See* K. DAVIS, *supra* note 109, §7.03 n.10.

209. Houser v. State, Wash. , , 540 P.2d 412, 414 (1975).

210. *Id. See* C. MCCORMICK, *supra* note 2, §334.

211. Wash. at , 540 P.2d at 414-15.

212. Andrews v. Masse, R.I. , 341 A.2d 30 (1975).

213. *Id.* at , 341 A.2d at 32 n.6.

214. *Id.* at , 341 A.2d at 33 n.7.

215. *Id.*

216. CAL. EVID. CODE §§1-1605 (West 1968); KAN. STAT. ANN. §§60-401 to -470 (1964); N.J.R. EVID. 9-12 (1976).

part patterned on the Model Code and the Uniform Rules. The codes of California,[217] Kansas,[218] and New Jersey[219] require that judicially noticed facts be indisputable. None of the codes distinguish between adjudicative and legislative facts[220] or between civil and criminal cases.

The promulgation of the Federal Rules of Evidence has encouraged renewed interest in the codification of state evidence rules.[221] Since the appearance of the first draft of the Federal Rules, four additional states have enacted evidence codes,[222] and at least three others are considering codification.[223] The judicial notice rules of both New Mexico and Wisconsin are identical to Rule 201[224] with the exception that no special provision is made for the jury instruction in criminal cases. The Nevada code requires indisputability for judicially noticed facts[225] but makes no distinction between adjudicative and legislative facts.

Florida's Evidence Code

The transition from common law to codified treatment of judicial notice often entails a significant change in existing judicial practices. For example, while many states have traditionally permitted challenge of disputable judicially noticed facts,[226] the current trend in codification is to require indisputability and conclusiveness.[227] Furthermore, it is a common practice among the states to adopt only portions of a federal model, rejecting other portions in favor of provisions of their own choosing.[228] For instance, a state

---

217. CAL. EVID. CODE §§451, 452 (West 1968).

218. KAN. STAT. ANN. §60-409 (1964).

219. N.J.R. EVID. 9 (1976). In some instances, the requirements of the state codes are substantially more stringent than the corresponding federal provisions. For example, Rule 201 generally requires that the judge instruct the jury in civil cases to accept judicially noticed facts as conclusive. In contrast, the New Jersey code provides that on request the judge shall "(a) instruct the trier of fact to accept a matter judicially noticed; (b) indicate for the record the matter noticed; and (c) indicate the source of his information." N.J.R. EVID. 11 (1976).

220. *See* Kongsgaard, *Judicial Notice and the California Evidence Code*, 18 HASTINGS L.J. 117, 135-36 (1966).

221. Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 FLA. STATE U.L. REV. 681 (1974).

222. NEV. REV. STAT. §§74.130-.170 (1973); N.M. STAT. ANN. §§20-4-101 to -1102 (Supp. 1973); WIS. STAT. ANN. §901-11 (1975).

223. The three states are Maine, Nebraska, and North Dakota. Ehrhardt, *supra* note 221, at 681 n.7.

224. N.M. STAT. ANN. §20-4-201 (Supp. 1973); WIS. STAT. ANN. §902.01(7) (1975). The Nevada code contains no provision for jury instructions.

225. NEV. REV. STAT. §47.130 (1973).

226. *See, e.g.*, Macht v. Hecht, 191 Md. 98, 102, 59 A.2d 754, 756 (1948).

227. *See, e.g.*, FED. R. EVID. 201(b), (g).

228. This phenomenon occurs in all areas of the law. For example, the recent revision of Florida's probate law was stimulated in part by the promulgation of the Uniform Probate Code. Although a committee studying the revision "approved in principle the UPC," the Florida Probate Code as subsequently enacted derived 61 out of 185 sections from the UPC, some with substantial changes. Fenn & Koren, *The 1974 Florida Probate Code — A Marriage of Convenience*, 27 U. FLA. L. REV. 1, 2-3 (1974).

might adopt the indisputability standard of Rule 201(b) but fail to implement the distinction between adjudicative and legislative facts mandated by subdivision (a). The difficulties that arise when a state changes existing judicial practices by partially adopting a federal model is illustrated by recent developments in Florida.

There are only four Florida cases pertaining to the effect of judicial notice. In two early cases, one concerning a legislative journal[229] and the other dealing with a record of extradition,[230] the Florida supreme court expressed the view that matters judicially noticed were conclusive and that any contradictory evidence was properly rejected.[231]

In 1953, however, the supreme court took the opposite view in *Makos v. Prince*.[232] In *Makos* a county resolution that set different hours of sale of alcoholic beverages for one part of the county was challenged by liquor dealers as arbitrary and discriminatory. The trial judge took judicial notice that the area in question was socially and economically different from the rest of the county and found the classification reasonable. The plaintiffs were subsequently denied a rehearing in which they offered to contradict the noticed facts. Holding that the plaintiffs should have been permitted to dispute the noticed facts,[233] the Florida supreme court accepted the Wigmore approach to the indisputability controversy.

The *Makos* court made no reference to the distinction between adjudicative and legislative facts, although such a distinction would have been valid. The two earlier cases were clearly examples of adjudicative facts. In contrast, the facts noticed in *Makos* were legislative because they were used to determine the validity of the resolution and hinged on social and economic conditions.[234] Instead, the court distinguished the two prior cases on the narrow grounds that they involved official records as opposed to matters of common knowledge.[235] That the rule was intended to be applied to both adjudicative and legislative facts is supported by a later district court decision[236] in which judicial notice was taken of the nonnavigability of a creek, an adjudicative fact. The district court relied on *Makos* to determine that a party should have been afforded an opportunity to challenge the noticed fact.[237]

A codification of Florida's evidence law formulated by the Florida Law Revision Council[238] was recently enacted by the Florida legislature. The

229. State v. Thompson, 121 Fla. 561, 164 So. 192 (1935).

230. Schriver v. Tucker, 42 So. 2d 707 (Fla. 1949).

231. State v. Thompson, 121 Fla. 561, 572, 164 So. 192, 197 (1935) (concurring opinion) ("Judicial notice not only supplies the want of evidence to establish the fact judicially noticed, but necessarily precludes all attempts to proffer contradictory evidence to refute what the court holds that it must judicially know. . . .").

232. 64 So. 2d 670 (Fla. 1953).

233. *Id.* at 673.

234. See C. McCORMICK, *supra* note 2, §§328, 331.

235. 64 So. 2d at 673.

236. Nielsen v. Carney Groves, Inc., 159 So. 2d 489 (2d D.C.A. Fla. 1964).

237. *Id.* at 491.

238. FLORIDA LAW REVISION COUNCIL, PRELIMINARY WORKING DRAFT — EVIDENCE CODE — JUDICIAL NOTICE (1973).

proposed rule on judicial notice[239] illustrates one of the problems created when a state partially adopts a federal rule but substitutes its own provisions for the rejected federal portions.

Federal Rule 201 limits the taking of judicial notice to indisputable facts. Only adjudicative facts come within its regulation, leaving legislative facts to be noticed in accordance with existing case law. Like Rule 201, the Florida rule requires indisputability for facts judicially noticed.[240] In addition, breaking with existing case law, the rule prohibits the introduction of evidence to dispute judicially noticed facts, the judge being required to instruct the jury to accept as a fact any matter judicially noticed.[241] However, unlike Federal Rule 201, the Florida rule fails to distinguish between adjudicative and legislative facts.

Since legislative facts are largely disputable, the requirement of indisputability essentially eliminates their judicial notice. As it now stands, the Florida rule leaves a judge with two equally untenable alternatives. He may judicially notice disputable legislative facts without specifically acknowledging that he has done so. This solution, however, not only would deprive the parties of any procedural safeguards but also would discourage candor in opinion writing. Alternatively, a judge may refrain from judicial notice of disputable legislative facts; however, the failure to notice legislative facts would severely limit the judicial reasoning process.[242]

To avoid severely limiting judicial notice of legislative facts, the Florida rule should be amended to provide separate treatment of legislative facts. Another possible alternative would be to follow the federal rule in limiting the scope of codification to adjudicative facts. Under this approach, judicial notice of legislative facts would be governed by existing case law, which does not require indisputability.

Thus, recent case law, evidence codes, and proposed codifications indicate that Rule 201 will have a significant impact on state evidence law of judicial notice. In looking to the federal rule for guidance, however, the states should be aware of the interrelating aspects of the various subdivisions of the federal rule, taking care not to defeat the purpose of one subdivision by excluding or modifying another. If Rule 201 receives favorable recognition in future application in the federal courts, many states may adopt the rule verbatim. This would be a significant step toward uniformity of state evidence law.

CONCLUSION

Rule 201 should expand the role of judicial notice in the federal judicial

239. PROP. FLA. R. EVID. 90.201-.207.

240. PROP. FLA. R. EVID. 90.202.

241. PROP. FLA. R. EVID. 90.206.

242. One commentator has suggested that application of the indisputable standard to legislative facts "would create a rule impossible of administration and, if literally applied, totally destructive of our judicial system. The approach . . . shows a basic misconception of the judicial function and a simplistic belief that nothing even resembling a legislative function should be tolerated on the part of a court." Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 162-63.