

Judging During Crises: Can Judges Protect the Facts?

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With the advent of instantaneous information and the trend toward shrinking adherence to the truth, the conversation surrounding the ability of judges to conduct outside research into the matters before them is gaining urgency. In a “post-truth” world, the role that the judiciary plays in our democracy must shift from trier of fact to guardian of factual integrity. And to do this, the professional ethics rules assigned to the judiciary may need re-evaluation.

This Essay argues that the judiciary’s ambivalence to its role as fact finder must be overcome, and where appropriate, judges may be empowered to seek out supplemental information to be shared with the parties to better identify the truth at the center of the controversy. Further, in light of the many powers judges already possess to investigate the facts, including to elicit witness testimony, further expanding the courts’ powers to research the matters before them will not undermine the unbiased nature of the judiciary. It will, rather, strengthen previously sanctioned powers of investigation to better protect against the ever-shifting political tides keen to influence the judicial outcomes handed down from the court.

| | |
|---|-----|
| INTRODUCTION | 858 |
| I. DEFINING AND CATEGORIZING “FACT” | 861 |
| II. LEGAL AND ETHICAL RESTRAINTS ON JUDICIAL FACT | |
| INVESTIGATION | 864 |
| A. <i>The Federal Rules of Evidence and Other Legal</i> | |
| <i>Standards</i> | 864 |
| 1. FRE 201: Judicial Notice of Adjudicative Facts ... | 864 |
| 2. Judicial Notice of Legislative Facts | 865 |
| 3. Systemic Facts..... | 866 |
| 4. FRE Rules 614 and 706: Calling and Questioning | |
| Witnesses | 868 |
| B. <i>The Model Rules of Judicial Conduct</i> | 869 |
| III. DISCUSSION..... | 871 |

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CONCLUSION..... 876

INTRODUCTION

It has been said that we live in a uniquely divisive time. In the United States, everything seems politicized. The ability to engage in meaningful differences of opinion has evaporated. We have replaced it with partisan—nearly religious—adherence to extreme views. There is lying and bullying, executive and legislative dysfunction. There is protest, and there is violence. There is distrust and massive fear of “the other”—people of different colors, backgrounds, or nationalities.¹ Many causes have been cited, including technology’s unprecedented ability to grant universal and immediate access to information;² a “balkanized media”;³ and, of course, blind partisanship in the legislative⁴ and executive branches.⁵

Thinking about this Chicago Eight symposium has raised the question for me: Is this really so unique? Is this the first time in our nation’s history that we have been so divided (excluding the Civil War, of course)? What about the 1960s and 1970s and the political and cultural breakdown that ultimately played out in Judge Hoffman’s courtroom in the Chicago Eight case? “Fascists” versus “anarchists”? Lying, distrust, polarization, fear,

1. Examples of this phenomenon are well documented. *See, e.g.*, Eddie S. Glaude, Jr., *Don’t Let the Loud Bigots Distract You. America’s Real Problem with Race Cuts Far Deeper*, TIME (Sept. 6, 2018), <http://time.com/5388356/our-racist-soul/>; Richard J. Reddick, Commentary, *Existing While Black: Irrational Fear Is the New Breed of Racism*, FORTUNE (May 11, 2018), <http://fortune.com/2018/05/11/black-yale-student-napping-racism-childish-gambino-this-is-america/>.

2. *See, e.g.*, JACK FULLER, WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM ix, 2–3 (2010); MICHAEL BARTHEL, AMY MITCHELL & JESSE HOLCOMB, PEW RESEARCH CTR., MANY AMERICANS BELIEVE FAKE NEWS IS SOWING CONFUSION (2016), https://www.journalism.org/wp-content/uploads/sites/8/2016/12/PJ_2016.12.15_fake-news_FINAL.pdf; STANFORD HISTORY EDUC. GRP., EVALUATING INFORMATION: THE CORNERSTONE OF CIVIC ONLINE REASONING 4–5 (2016), <https://stacks.stanford.edu/file/druid:fv751yt5934/SHEG%20Evaluating%20Information%20Online.pdf>; Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), <https://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

3. *See* David Nakamura, *Media Critic Obama Is Worried that “Balkanized” Media Is Feeding Partisanship*, WASH. POST (Mar. 27, 2016), https://www.washingtonpost.com/politics/media-critic-obama-is-worried-that-balkanized-media-are-feeding-partisanship/2016/03/27/8c72b408-f1e3-11e5-89c3-a647f95e0_story.html.

4. *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85 (2015); M. Anthony Mills, *The Tragicomedy of Congressional Dysfunction*, REALCLEARPOLICY (June 8, 2018), https://www.realclearpolicy.com/articles/2018/06/08/the_tragicomedy_of_congressional_dysfunction_110664.html.

5. *See* BOB WOODWARD, FEAR: TRUMP IN THE WHITE HOUSE xxii (2018); Jamelle Bouie, *The Incapacitated President*, SLATE (Sept. 5, 2018, 5:34 PM), <https://slate.com/news-and-politics/2018/09/bob-woodwards-fear-trump-in-the-white-house-raises-the-specter-of-the-25th-amendment.html>.

violence, dysfunction?

Weren't we then "uniquely" divided, uniquely distrustful?⁶ If not, didn't we think we were? The executive branch was widely considered to be lying to the public about the Vietnam War,⁷ while the War led to substantial public disillusionment⁸ and congressional dissension.⁹ The truth was elusive. The government not only lied to the public about the War, it also conducted illegal surveillance on a wide and unregulated scale.¹⁰ And it lied about that too.¹¹ Public distrust was rampant. Mainstream culture hated and feared the counterculture and vice versa; the counterculture encouraged an ethos and lifestyle reviled by mainstream Americans who believed in traditional values. Counterculture enclaves grew; communities, like universities, divided.¹² Protests, active and peaceful, were frequent.¹³ There was talk but no listening; there was no meeting of the minds. Eventually, there was violence.¹⁴ These two sides—politically and culturally divided—met in Judge Hoffman's courtroom. Others in this symposium have written about the role of some judges during that time in protecting justice and Judge Hoffman's failure to do so.¹⁵

There are obvious differences between today and the 1960s–1970s—twenty-four-hour news and the internet, for example—but the sense of a national nervous breakdown seems similar. And then, as now, the courts were confronted with and tasked to resolve deeply important social and

6. Kimberly Brazier, *Social Change in the 1960s Timeline*, PREZI (June 5, 2013), <https://prezi.com/og7tczoxgma8/social-change-in-the-1960s-timeline/>; *1960s*, HIST., <https://www.history.com/topics/1960s> (last visited July 22, 2019) (“The 1960s were one of the most tumultuous and divisive decades in world history, marked by the civil rights movement, the Vietnam War and antiwar protests, political assassinations and the emerging ‘generation gap.’”).

7. Daniel Ellsberg, *Lying About Vietnam*, N.Y. TIMES (June 29, 2001), <https://www.nytimes.com/2001/06/29/opinion/lying-about-vietnam.html>.

8. *Vietnam War Protests*, HIST. (Feb. 22, 2010), <https://www.history.com/topics/vietnam-war/vietnam-war-protests>.

9. Julian E. Zeilzer, *How Congress Got Us Out of Vietnam*, AM. PROSPECT (Feb. 19, 2007), <http://prospect.org/article/how-congress-got-us-out-vietnam>.

10. *See* United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971); FRANK J. DONNER, *THE AGE OF SURVEILLANCE* (1980).

11. *See supra* note 10.

12. Lyle Denniston, *The Campus and the Vietnam War: Protest and Tragedy*, NAT'L CONST. CTR. (Sept. 26, 2017), <https://constitutioncenter.org/blog/the-campus-and-the-vietnam-war-protest-and-tragedy>; Daniel S. Levy, *Behind the Anti-War Protests That Swept America in 1968*, TIME (Jan. 19, 2018), <http://time.com/5106608/protest-1968/>.

13. *Lists of Protests Against the Vietnam War*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lists_of_protests_against_the_Vietnam_War (last updated June 26, 2019) [hereinafter *Protests Against the Vietnam War*].

14. Denniston, *supra* note 12; *Protests Against the Vietnam War*, *supra* note 13.

15. *See, e.g.*, Ellen Yaroshfsky, *Judge Damon Keith: The Judicial Antidote to Julius Hoffman*, 50 LOY. U. CHI. L.J. 989 (2019).

political issues. Then, as now, the battle for the truth raged. Today, of course, we are said to live in a “post-truth”¹⁶ world in which it has become acceptable to say there are “facts” and “alternative facts,”¹⁷ “news” and “fake news.”¹⁸ Truth has become subjective; a common understanding of reality is missing. In the time of the Chicago Eight, the lying, distrust, demonization, and fear permeated society, but at that point, some generally accepted, if tenuous, respect for reality remained. That no longer seems possible. We know some of what judges did to ensure justice in the 1960s and 1970s.¹⁹ Does the current incarnation of political upheaval and its challenges to factual truth require anything new from the courts?

This Essay addresses the question of what the courts can do in a so-called “post-truth” universe to protect the judicial system from “alternative” facts. It questions whether the traditionally passive, uninformed, referee role envisioned for a judge in the U.S. adversarial system is enough today. To protect the factual integrity of their decisions, should judges be permitted to take part in the investigation of the facts?

A good example of judicial fact investigation recently came to light when Justice Sotomayor looked at a website and referred to it during oral argument in *NIFLA v. Becerra*.²⁰ That case involved a challenge to a state rule requiring clinics that do not have doctors available to disclose that fact. Focusing on the claim that the clinics’ operating model lures women inside by pretending that they offer medical services, Justice Sotomayor indicated that she had looked at a clinic’s website, which showed “a woman on the home page with a uniform”²¹ and opined that these sites might well mislead a woman into “thinking she was about to see a doctor.”²² The reaction was swift. Justice Kennedy immediately scolded

16. “Post-truth” is defined as “circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.” *Post-truth*, OXFORD ONLINE DICTIONARY, <https://en.oxforddictionaries.com/definition/post-truth> (last visited July 22, 2019).

17. Eric Bradner, *Conway: Trump White House Offered ‘Alternative Facts’ on Crowd Size*, CNN (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts>.

18. Danielle Kurtzleben, *With ‘Fake News,’ Trump Moves from Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017, 8:27 PM), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language>.

19. For example, Judge Damon Keith entered an order requiring the government to disclose information about its wiretapping scheme. See Yaroshefsky, *supra* note 15, at 1001.

20. Transcript of Oral Argument at 18, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1140_o759.pdf [hereinafter *Becerra* Transcript].

21. *Id.*

22. Linda Greenhouse, *How Judges Know What They Know*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/opinion/supreme-court-judges-decisions.html>; see also *Becerra* Transcript, *supra* note 20, at 18 (statement of Sotomayor, J.) (“I looked at one [of the websites] . . . [and] a reasonable person could look at this website and think you’re giving medical

her for going outside the record²³ (although she did not—the website had been cited in an amicus brief),²⁴ and articles and analysis ensued.²⁵ But there are even better, if less notorious, cases of judges doing (or failing to do) independent factual investigation, with various results.²⁶

In Part I, this Essay first attempts to posit a working definition of “fact,” and to describe (and critique) the current analysis of what kinds of facts can be accepted into evidence without the traditional protections of the adversary process (so-called legislative facts) and what facts cannot (so-called adjudicative facts). It also introduces the notion of “systemic fact,” which is data accessible to the courts that arise from the judicial process itself.²⁷ Courts can and should use these sorts of facts to test the credibility of repeat government players either by traditional use of judicial notice or simply on notice to the parties. Part II analyzes the legal and ethical rules that govern the court’s fact-gathering authority. These include judicial fact-gathering powers recognized historically by common law and, since 1975, in the Federal Rules of Evidence: judicial notice, the court’s ability to call witnesses, and the court’s ability to question witnesses. Ethical constraints exist in the Model Code of Judicial Conduct, including Rule 2.9—the absolute ethical prohibition against independent fact investigation. Part III analyzes the reasons why the court’s proper role may include an expanded power to gather facts independently, on notice to the parties, the current need for the courts to do so, and any lessons to be drawn from the Chicago Eight and other examples of judging during the turmoil of the 1960s and 70s.

I. DEFINING AND CATEGORIZING “FACT”

At the outset, we need a working definition of “fact.” We seem to have lost a general understanding of what that means. Unfortunately, dictionary definitions are not particularly helpful, as they generally define “fact” by including adjectives that more or less beg the question. For

advice . . .”).

23. *Becerra* Transcript, *supra* note 20, at 22 (statement of Kennedy, J.).

24. Brief for Amici Curiae California Women’s Law Center et al. in Support of Respondents at 11, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140), 2018 WL 1156614.

25. See, e.g., Robert Barnes, *Supreme Court Rule: (Other) Justices Shouldn’t Conduct Independent Research*, WASH. POST (Mar. 25, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-rule-other-justices-shouldnt-conduct-independent-research/2018/03/25/7a4f790a-2ebd-11e8-b0b0-f706877db618_story.html; Greenhouse, *supra* note 22; Mark Sherman & Jessica Gresko, *Sotomayor Rapped for Surfing the Web*, U.S. NEWS: SUPREME CT. NOTEBOOK (Mar. 22, 2018), <https://www.usnews.com/news/best-states/california/articles/2018-03-22/supreme-court-notebook-sotomayor-rapped-for-surfing-the-web>.

26. See *infra* Part III.

27. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016).

example, Meriam Webster defines a fact as “something that has actual existence,” “an actual occurrence,” “a piece of information presented as having objective reality,” “the quality of being actual,” or “a thing done.”²⁸ A better definition may be “an actual thing or happening, which must be proved at trial by presentation of evidence and which is evaluated by the finder of fact (a jury in a jury trial, or by the judge if he/she sits without a jury).”²⁹ Certainly, in the law, a factual claim is one that can be, and is required to be, supported by evidence.³⁰ Another part of the definition might be that a fact is something that can be falsified, that is, tested as true or false with a “degree of detached certainty.”³¹ So, as a working definition of fact, we might use “information that must be supported by evidence and can be tested as true or false.”

Generally in our adversarial system, facts are presented in evidence by testimony or real proof offered by the parties and subject to adversarial testing. There are exceptions, of course, and one of them is a category of facts that may be admitted in evidence through judicial notice without the guarantees of adversarial testing. In 1942, Kenneth Culp Davis published a law review article that originally addressed the administrative adjudication process. He concluded that a court’s power to consider facts outside of the adversarial process has traditionally been analyzed by dividing the universe of fact in two. The first, “adjudicative facts,” were defined as the facts underlying a given controversy, the facts in the street, the behavior of the parties, the “whodunit facts.”³² Such facts are subject to high standards and strict rules of judicial notice, now contained in Rule 201 of the Federal Rules of Evidence.³³ As to adjudicative facts, only

28. *Fact*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/fact> (last visited July 22, 2019).

29. *Fact*, FREE DICTIONARY BY FARLEX, <https://legal-dictionary.thefreedictionary.com/fact> (last visited July 22, 2019).

30. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 185 n.42 (2018).

31. Saul M. Pilchen, *Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 378–40 (1984); Larsen, *supra* note 30, at 184–85 nn.40–42. It is worth pointing out here that we are not concerned as much with the definitional distinction between “law” and “fact” that is traditionally the focus of the law. Here we are concerned with arriving at a definition of objective, verifiable reality.

32. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365–66, 402–03 (1942); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1256 n.5, 1264–65 (2012).

33. FED. R. EVID. 201:

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court’s territorial jurisdiction; or

those that are indisputable, so well known locally as to be indisputable, or taken from an indisputably reliable source, can be noticed without the protections of the adversarial process. On the other hand are “legislative facts,” that is, facts that are not the subject of the conduct of the parties, that do not arise out of the individual controversy, that “transcend[] the particular dispute,”³⁴ and that are based on social, scientific, or cultural phenomena that occur apart from a given case. These are explicitly removed from the strictures of Rule 201. In fact, there are no limitations on a court’s power to consider those facts outside of the adversarial process, even if they are dispositive.³⁵ This was the case under the common law before the Federal Rules of Evidence were enacted.³⁶ They play a very significant role in the Supreme Court’s recent jurisprudence.³⁷

A recently identified category of fact has been termed “systemic fact.”³⁸ Although described as falling between the traditional dichotomy of adjudicative/legislative fact, these facts more closely fit into the category of legislative facts. Criminal courts have access to data that would provide a factual basis for much of their decision-making that they currently do not collect or use. Examples of such information would be information about actual police conduct in arrests and searches or interrogation; search warrant returns and results; inconsistent factual assertions by repeat actors; bail statistics (including reoffending or absconding); charging and overcharging patterns; and *Brady*

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

34. Larsen, *supra* note 32, at 1256–57; *see also* Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988).

35. Larsen, *supra* note 32, at 1258–59.

36. *See* FED. R. EVID. 201 advisory committee’s note to 1972 proposed rule subdivision (b) (“With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent.”).

37. *See infra* Part II.A.2.

38. This term was coined by Professor Andrew Manuel Crespo. *See* Crespo, *supra* note 27, at 2052 (“[S]ystemic facts look inward: they are facts about the criminal justice system itself, and about the institutional behavior of its key actors.”).

compliance.³⁹ These facts have not traditionally been subject to judicial notice; however, by way of judicial notice or otherwise, this category of facts certainly could be, and should be, used to protect the factual integrity of the courts' decisions. Courts could apply the same process to ensure the reliability of other institutional players in civil cases.

For the purpose of this Essay, then, this is our universe of facts.

II. LEGAL AND ETHICAL RESTRAINTS ON JUDICIAL FACT INVESTIGATION

A. *The Federal Rules of Evidence and Other Legal Standards*

1. FRE 201: Judicial Notice of Adjudicative Facts

FRE Rule 201 governs judicial notice of adjudicative facts. Before the Rules were adopted in 1975, judicial notice under the common law generally permitted a court to recognize objective, provable, or uncontested facts in order to promote judicial efficiency.⁴⁰ A narrow set of factual categories were regularly judicially noticed, including geographical, scientific, historical, and local facts or facts that were so well known in the locality or otherwise that they could be introduced without proof.⁴¹ Courts rarely exercised their powers of judicial notice under these standards, but analysis focused on the court's inherent knowledge of local facts rather than on the source of the information.⁴²

The Federal Rules did not follow this more realistic and flexible approach to judicial notice. Instead, Congress broadened the power to judicially notice facts to include facts that were essentially not disputable. Rule 201(b) provides that a court may take judicial notice of an adjudicative fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."⁴³ Although the types of facts to be judicially noticed are largely the same, the addition of subdivision (b)(2) shifts the focus from the knowledge of the judge to the source of the information. Under that subdivision, while the judge may have no knowledge of a given fact, it may be judicially noticed if an undisputable source is available.⁴⁴ Thus the relevance of facts found on the internet.

As to fairness and notice, subsection (c) permits a court to take judicial

39. *Id.* at 2088–89.

40. Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1143–44 (2014).

41. *Id.* at 1145–47.

42. *Id.* at 1146–51.

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

44. Bellin & Ferguson, *supra* note 40, at 1155.

notice on its own or requires the court to take judicial notice if a party requests it and gives the court the necessary information.⁴⁵ Subsection (d) permits judicial notice at any stage of a proceeding.⁴⁶ Subsection (e) provides that a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed on timely request.⁴⁷ If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.⁴⁸ Finally, subdivision (f) requires the court to instruct the jurors that they must accept the noticed fact as conclusive in a civil case.⁴⁹ In a criminal case, the jury may or may not accept the noticed fact as conclusive.⁵⁰

2. Judicial Notice of Legislative Facts

Although not subject to a federal rule, there is the well-established and virtually unlimited practice of permitting courts to consider so-called legislative facts.⁵¹ This information is often presented in amicus briefs, a practice that began with the so-called Brandeis brief,⁵² through which the Supreme Court was able to consider social, demographic, and other data that had not been presented on the record, and even for the first time on appeal.⁵³ But it is often the subject of “in-house” factual research.⁵⁴ The notion behind this concept is that the facts considered are essential to that part of the judicial decision-making process that involves policy. Historically, these legislative facts were unlikely to be contested. However, there is no requirement of indisputability or even reliability. The practice of taking judicial notice of legislative facts has become problematic, therefore, as factual claims made by amici have become both increasingly unreliable, based on inadequate expertise and unreliable sources, and increasingly partisan.⁵⁵ In this sense, facts have

45. FED. R. EVID. 201(c).

46. *Id.* 201(d).

47. *Id.* 201(e).

48. *Id.*

49. *Id.* 201(f).

50. *Id.*

51. Larsen, *supra* note 32, at 1258–59.

52. The original Brandeis brief was submitted by Justice Brandeis in *Muller v. State of Oregon*, 208 U.S. 412 (1908). It was submitted in support of a state law restricting the hours women could work; it contained two pages of argument followed by more than 100 pages of social science data and testimony by medical personnel and others about the impact of long work hours. In its decision, the Supreme Court relied on this data. *Id.* at 420.

53. For a thorough description of the current practice involving amicus briefs in the Supreme Court, see Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016).

54. Larsen, *supra* note 32, at 1278–90.

55. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1784–801 (2014).

been weaponized.⁵⁶ Despite these developments, there are and continue to be no restrictions on any court's power to entertain legislative facts outside of adversarial testing. This is true whether or not the facts are dispositive, and they often are.⁵⁷

Much has been written about the courts' apparent willingness to rely on such facts.⁵⁸ These facts come either from the Court's own in-house factual research⁵⁹ or from the now astounding number of amicus submissions the Court allows.⁶⁰ Justice Sotomayor's recent visit to the internet—to a website cited by one of the forty-three amicus briefs—added fuel to the existing controversy but was really nothing new.⁶¹ Much has also been written about the many cases in which legislative facts recognized and relied on by the Supreme Court have simply been wrong.⁶²

3. Systemic Facts

While criminal courts are charged with ensuring that the police and prosecutors comply with constitutional standards, they do so on what is essentially a case-by-case basis. This “transactional myopia” hinders their proper institutional role in regulating law enforcement behavior.⁶³ At the same time, ironically, these same courts have unique access to a broad range of information about the conduct of institutional repeat players in their own court records. Using the courts' own systemic facts would not only give the courts an institutional awareness that would enable them to better fulfill their role in constitutional criminal

56. *Id.* at 1767.

57. Professor Larsen reviewed 124 citations to amicus briefs for facts and identified 97 of them having been “used to answer . . . outcome-determinative questions.” *Id.* at 1782.

58. Over the last 50 years, the filing of amicus briefs has increased by 800 percent. *Id.* at 1758. During the Court's 2013 Term, 61 of 79 cases involved an amicus brief filed to supplement the factual record. *Id.* at 1762. Professor Larsen demonstrates that the Court's practice has resulted in its being “inundated with eleventh-hour, untested, advocacy-motivated claims of factual expertise.” *Id.* at 1757. These submissions frequently are based on studies the amicus has funded itself; nevertheless, the Court then cites to the amicus brief as authority for the fact, rather than to any underlying factual source, resulting in unreliable fact finding. *Id.* at 1764.

59. According to one source, “90 of the 120 most salient Supreme Court decisions from 2000 to 2010 contained at least one assertion of legislative fact supported by citation.” Larsen, *supra* note 32, at 1274. Of those, 77 percent contained at least one authority that was not present in the briefs. *Id.*

60. *Id.* at 1272.

61. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting) (chastising the majority for relying on legislative facts without any demonstration of reliability or adversarial testing).

62. See Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard to Find*, PROPUBLICA (Oct. 17, 2017, 8:00 AM), <https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find>.

63. Crespo, *supra* note 27. As discussed *supra*, Professor Crespo coined the term “systemic facts.” This section relies heavily on his seminal article.

supervision of law enforcement behavior, it also would help them ensure the factual integrity of their decisions.⁶⁴

Here are some examples. As to the police, criminal courts regulate the police primarily through the Fourth Amendment doctrine by which police must make a showing of probable cause to justify their conduct. To do so, the police must file affidavits supporting search warrants, returns on those search warrants, post-warrantless arrest affidavits, and, often, suppression hearing transcripts. These documents are then maintained in the court's digital repository, where they may be categorized and searched in many effective ways. Statements in such documents could be used for assessing the consistency of claims in subsequent documents, and their descriptive accuracy, as well as the credibility of repeat witnesses, and in assessing claims of predictive accuracy.⁶⁵

As to the prosecution, lack of information about what prosecutors are actually doing has been one basis for the courts' unwillingness to review the constitutionality of important exercises of prosecutorial discretion.⁶⁶ And although prosecutorial discretion on an office-wide basis may impact the results in a given case or the remedies, courts have been unwilling or unable to look at the conduct of prosecutors office-wide. In three areas, *Brady*,⁶⁷ *Batson*,⁶⁸ and *Armstrong*⁶⁹ (failure to disclose exculpatory information, race-based jury selection, and racially discriminatory charging), courts can keep records that would again be usable to assess the reliability and credibility of prosecutorial statements and the constitutionality of prosecutorial practices.⁷⁰

Professor Crespo suggests that courts could make public whatever systemic facts they have collected, which would make them available to public scrutiny and accessible to all litigants.⁷¹ Those litigants could then incorporate such information into their documents, making the systemic facts a matter of record.⁷² If that does not occur, "a judge might take judicial notice of her court's own systemic facts, after she has afforded

64. *Id.*

65. *Id.* at 2070–86.

66. *Id.* at 2086.

67. *Brady v. Maryland*, 373 U.S. 83 (1963).

68. *Batson v. Kentucky*, 476 U.S. 79 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400 (1991).

69. *United States v. Armstrong*, 517 U.S. 456 (1996).

70. Crespo, *supra* note 27, at 2087–101. For example, there are digitized *Brady* registries, so *Brady* materials are available across cases.

71. *Id.* at 2115.

72. Larsen, *supra* note 55, at 1757 ("The number of amicus curiae briefs filed at the Supreme Court is at an all-time high.") (citing Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 L. & SOC. INQUIRY 955, 956 (2007) ("In recent years, amici curiae have participated in over 80 percent of cases heard on the merits in the U.S. Supreme Court.")); *see also id.* at 1758, 1818.

the parties an opportunity to weigh in on the matter, which again would hardly be an unusual practice.”⁷³

This is correct, but judicial notice of systemic facts would not be “usual.” To be sure, courts may take judicial notice of their own records, that is, of the existence of certain documents and decisions and the dates and occurrence of proceedings in their own courts. But this practice has been inconsistent.⁷⁴ Nevertheless, the traditional judicial notice doctrine would permit judicial notice of the fact that certain inconsistent claims and statements contained in court submissions were made, that certain peremptory challenges were made, or that charges were brought. That would certainly allow courts to take judicial notice of most systemic facts for most purposes. The same powers would allow the courts to take judicial notice of statements by repeat players in pleadings or testimony in other cases, not for their truth, but for the fact that they were made.

4. FRE Rules 614 and 706: Calling and Questioning Witnesses

Interestingly, several provisions of the Federal Rules of Evidence beyond Rule 201 explicitly permit the court to investigate the facts. Rule 614(a) permits the court to call its own witnesses.⁷⁵ Rule 614(b) permits the court to question witnesses called by the parties.⁷⁶ Rule 614(c) gives the parties the power to object to the court’s calling or examining a witness.⁷⁷ The court clearly has the power to elicit evidence, subject only to the requirement that it do so impartially.⁷⁸ In addition, Rule 706(a) permits the court to call its own expert witnesses.⁷⁹ This power has not been widely exercised,⁸⁰ but when used is usually invoked by a court considering complex admissibility questions under *Daubert v. Merrell*

73. Crespo, *supra* note 27, at 2115–16.

74. *Id.* at 2052–53.

75. FED. R. EVID. 614(a) states, “Calling. The court may call a witness on its own or at a party’s request. Each party is entitled to cross-examine the witness.”

76. FED. R. EVID. 614(b) states, “Examining. The court may examine a witness regardless of who calls the witness.” See *Kentucky v. Stincer*, 482 U.S. 730 (1987) (recognizing broad authority to examine a witness).

77. FED. R. EVID. 614(c) states, “Objections. A party may object to the court’s calling or examining a witness either at that time or at the next opportunity when the jury is not present.”

78. *E.g.*, *United States v. Castner*, 50 F.3d 1267 (4th Cir. 1995); *United States v. Zhu*, 854 F.3d 247 (4th Cir. 2017); *United States v. Perez-Melis*, 882 F.3d 161 (5th Cir. 2018).

79. FED. R. EVID. 706(a) states,

Appointment Process. On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

80. See Bradford H. Charles, *Rule 706: An Underutilized Tool to Be Used When Partisan Experts Become “Hired Guns”*, 60 VILL. L. REV. 941 (2015); Stephanie Domitrovich, Mara L. Merlino & James T. Richardson, *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS 371 (2010).

*Dow Pharmaceuticals, Inc.*⁸¹

B. The Model Rules of Judicial Conduct

In the U.S. adversary system, the core duties of a judge are fairness and impartiality.⁸² This is recognized in many sections of the Model Rules of Judicial Conduct. Canon 2 provides, “A judge shall perform the duties of judicial office impartially, competently, and diligently.”⁸³ Rule 2.2 requires “Impartiality and Fairness”: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”⁸⁴ “Impartially” is defined to “mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”⁸⁵ Rule 1.2, “Promoting Confidence in the Judiciary” provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”⁸⁶

To ensure impartiality, certain types of *ex parte* communications are prohibited in Rule 2.9. Subsection (C) provides: “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”⁸⁷ Comment 6 explains that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”⁸⁸

81. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 116 (1995); Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 *DUKE L.J.* 1263 (2007).

82. MODEL CODE OF JUDICIAL CONDUCT Preamble (AM. BAR ASS’N 2011).

83. *Id.* at Canon 2.

84. *Id.* at r. 2.2.

85. *Id.* at Terminology.

86. *Id.* at r. 1.2.

87. *Id.* at r. 2.9(C).

88. *Id.* at r. 2.9 cmt. 6. Other parts of Rule 2.9 may be relevant as follows: Subdivision (A)(3) states that

[a] judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

Id. at r. 2.9(A)(3). Pursuant to Subdivision (A)(5), “A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.” *Id.* at r. 2.9(A)(5).

Additionally, Subdivision (A)(2) allows a judge to

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

This rule is seductively and surprisingly absolute: As to fact investigation, the court is simply barred. All facts, aside from what the law says may be judicially noticed, must come from the parties and be subject to adversarial testing. Comment 6 makes clear that this prohibition applies to facts available in any medium, including the internet.⁸⁹

This rule has two purposes. The first is to prevent a judge from becoming an unsworn witness against a party. Possibly more importantly, however, the rule works to protect the bedrock principle that a judge must be impartial.⁹⁰ Because investigating facts will inevitably work to the advantage of one party or another, it is inherently risky, even where the judge is only after objective truth. Decisions have been reversed where a sentencing judge “took it upon [himself]” to call the victim’s therapist;⁹¹ where a judge in a custody dispute called the children’s school to verify the truthfulness of the mother’s testimony;⁹² or where a trial judge denied a motion to dismiss based on whether the defendant corporation transacted business in New York after looking at the websites of the defendant, the defendant’s insurer, and the New York State Department of Insurance.⁹³ Significantly, however, the parties were not given an opportunity to respond to the court’s factual findings. Judges have been disciplined for similar conduct.⁹⁴

The internet may well have changed things; indeed, much has been written about the role of judges and the internet.⁹⁵ Obviously, the internet

Id. at r. 2.9(A)(2). Finally, Rule 2.5(A) requires that “[a] judge shall perform judicial and administrative duties, competently and diligently.” *Id.* at r. 2.5(A).

89. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 478 (2017) (discussing the impact of independent factual research by judges utilizing the internet).

90. In addition, Rule 2.2 Comment 1 explains that “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded.” MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 1 (AM. BAR ASS’N 2014). For an analysis of the rule and cases in which courts have been reversed or disciplined for independent fact investigation, see Cynthia Gray, *Independent Investigations*, JUD. CONDUCT REP., Summer 2012, at 1, 5.

91. *State v. McCrary*, 676 N.W.2d 116, 125–26 (S.D. 2004).

92. *Albert v. Rogers*, 57 So. 3d 233, 235–37 (Fla. Dist. Ct. App. 2011).

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

94. Gray, *supra* note 90, at 6–7 (reviewing cases wherein judges have been disciplined for conducting independent investigations).

95. See, e.g., Bellin & Ferguson, *supra* note 40 (arguing that internet access “allows judges and litigants to expand the use of judicial notice in ways that raise significant concerns about admissibility, reliability, and fair process”); Cheng, *supra* note 81, at 1266 (contending that judges should use online resources to conduct their own research); Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. REV. 125 (2014) (highlighting how judges can obtain information about a case in “just a few mouse clicks”); David B. Saxe, “Toxic” *Judicial Research*, N.Y. ST. B.A. J., September 2015, at 36 (surveying the scholarship).

provides unparalleled, even heretofore unimaginable, access to information that did not exist either during the 1960s and 70s or when the Federal Rules of Evidence were enacted. Some of the information is good (as in reliable) and some of it is bad (as in uninformed, inaccurate, biased, hateful, and the like). Has it changed the role of the judge?

The ABA would say no: Comment 6 specifically states that the prohibition against fact investigation “extends to information available in all mediums, including electronic.”⁹⁶ And, in Formal Opinion 478, the ABA stated that Rule 2.9 prohibits judicial “on-line independent fact-finding not tested by the adversary system.”⁹⁷

III. DISCUSSION

Does the traditional role of the judge in the adversarial process—that of passive, uninformed referee—work in today’s “post-truth” universe of alternative facts? Can the courts protect the integrity of their processes against the force of alternative facts? Does the internet change things?

These are trying times. This Essay suggests that the traditional, passive role of the U.S. judge may be inadequate to face the “post-truth” era presented. More engagement in the facts by trial-level judges may be required to protect the courts in a “post-truth” universe. Courts should be empowered in some circumstances to investigate and notice facts—on notice to the parties and with an opportunity to be heard—whenever the court is deciding a legal issue, for example, admissibility, summary judgment, or suppression. I am less comfortable when the judge is sitting as a fact finder, particularly in a criminal trial. In addition, courts must better use the tools they already have to guard against alternative facts—judicial notice, the power to call and question witnesses, and the power to call their own experts—and should be allowed to engage in fact investigation under limited circumstances to protect against alternative facts, unreliable “facts,” fake news, and the like. They should become active fact checkers, too, instead of overtly deferring to the legislature or covertly acting in deference to the government. In this respect, they have the power to collect and analyze assertions of repeat institutional players.

Federal district court judges, like Judge Hoffman and the other judges involved in the 1960s and 70s, may be the best suited to take on this role. As others have pointed out, they are at the forefront of important constitutional litigation, litigation that has become particularly fact-centric.⁹⁸ Evidence suggests that judges possess “a specialized form of

96. MODEL CODE OF JUDICIAL CONDUCT r. 2.9 cmt. 6 (AM. BAR ASS’N 2014).

97. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 478 (2017) (discussing “Independent Factual Research by Judges Via the Internet”).

98. Larsen, *supra* note 32, at 1308–09 (emphasizing “increased judicial reliance on legislative

cognitive perception”⁹⁹ that allows them to counteract the effect of alternative facts by focusing on the sources of so-called facts and to resist the kind of self-motivated reasoning that leads others to accept alternative facts as true.¹⁰⁰ In this sense, courts may be better at resisting alternative facts than, for example, the legislature.

Despite the absolute ethical prohibition against independent judicial access to the internet, in today’s world, technology’s “gift” of universal, free access to information must be considered. Indeed, courts are having a difficult time contending with this phenomenon in an effective way. Given the ubiquity of information but the ethical prohibition against accessing it, it is not surprising that the courts’ reaction has been described as “ambivalent.”¹⁰¹ Indeed, despite the clarity of the ethical rule, courts do seem to be taking advantage of the ease, efficiency, and ubiquity of the internet. And despite the high standards of Rule 201, and the variable reliability, authenticity, and admissibility issues surrounding information on the internet, courts have taken judicial notice of a variety of websites, including various government websites,¹⁰² Google Maps,¹⁰³ and even in some cases, Wikipedia,¹⁰⁴ to name a few.

In an interesting example of a strand of cases, *United States v. Bari* demonstrates the courts’ desire to rely on the internet but their hesitation in doing so.¹⁰⁵ In that case, the district court revoked Bari’s supervised release status after concluding that he had robbed a bank while on release.¹⁰⁶ The robber had worn a yellow rain hat, and a yellow rain hat was found in Bari’s landlord’s garage.¹⁰⁷ The court considered the hat “the strongest piece of evidence,” after doing a “Google Search” that

facts” in Supreme Court decisions).

99. Dan M. Kahan et al., “*Ideology*” or “*Situation Sense*”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 354–55 (2016).

100. *Id.* at 355.

101. Keele, *supra* note 95, at 126 (“Because judicial Internet use both offers significant benefits and poses substantial risks to our justice system, courts and commentators have displayed a remarkable ambivalence regarding the propriety of online research.”).

102. See *Askew v. Sec’y of Health & Human Servs.*, No. 10-767V, 2012 WL 2061804, at *5 (Fed. Cl. May 17, 2012) (judge took judicial notice of facts provided on a website maintained by the National Institute of Health); *Wells Fargo Bank, N.A. v. Favino*, No. 1:10 CV 571, 2011 WL 1256771, at *9 (N.D. Ohio Mar. 31, 2011) (taking judicial notice of the Office of the Comptroller of the Currency’s website recognizing that Wells Fargo Bank is a national bank); *Davis v. Nice*, No. 5:12 CV 1002, 2012 WL 3961236, at *1 n.1 (N.D. Ohio Sept. 10, 2012) (district court took judicial notice of a fact provided on the City of Akron Police Department website).

103. See *Bellin & Ferguson*, *supra* note 40, at 1162–63.

104. *Id.* at 1164 (although “[c]iting Wikipedia is as controversial as it is common” (quoting *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802, 807 (Utah Ct. App. 2012) (Voros, J., concurring))).

105. *United States v. Bari*, 599 F.3d 176, 181 (2d Cir. 2010).

106. *Id.* at 178.

107. *Id.*

indicated this particular kind of hat was not common.¹⁰⁸ The Second Circuit, noting the reduced evidentiary standards in parole revocation hearings (including Rule 201), explained that given the ease of access to the facts, a judge may conduct that sort of independent research to “confirm[] his intuition on a ‘matter[] of common knowledge.’”¹⁰⁹

Another similar example of the ambivalent use of the internet is presented by *Kourkounakis v. Dello Russo*,¹¹⁰ over which Judge Rakoff presided. In that case, the plaintiffs claimed medical malpractice in the performance of a Lasik procedure that allegedly worsened plaintiff’s vision so he could not perform daily tasks.¹¹¹ Judge Jed Rakoff’s law clerk conducted an internet search that revealed that the plaintiff’s expert appears to have been occupied sine [sic] 2000 as a managing partner at Galt Capital, an investment advisory firm, and does not appear to have practiced medicine since the mid-1990s, does not appear to have a valid medical license, never specialized or trained in ophthalmology, never performed or was accredited in LASIK, and never examined the plaintiff.¹¹²

Judge Rakoff informed the parties he would not use the information he had obtained from the internet, but he granted summary judgment for defendant.¹¹³

Judge Richard Posner, a well-known judicial pragmatist, has been a vocal advocate of broadening the powers of the federal courts to do independent internet research in both his scholarship and his decisions.¹¹⁴ In *Rowe v. Gibson*,¹¹⁵ the plaintiff, a state prisoner, brought a 1983 action against the prison based on a claim of deliberate indifference to his serious medical needs.¹¹⁶ The trial court had refused his request for the appointment of counsel and for the appointment of an expert.¹¹⁷ As a result, the petitioner proceeded pro se based entirely on his own testimony and on the allegations of his affidavit and complaint.¹¹⁸ The prison

108. *Id.*

109. *Id.* at 181 (second brackets in original).

110. *Kourkounakis v. Dello Russo*, No. 04 Civ. 0586 (JSR), 2005 U.S. Dist. LEXIS 8020 (S.D.N.Y. May 3, 2005).

111. *Id.* at *1.

112. *Id.* at *7.

113. *Id.*

114. See, e.g., RICHARD A. POSNER, REFLECTIONS ON JUDGING 139–48 (2013) (reviewing the benefits of independent judicial research to his decisions); Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge’s Views*, 51 DUQ. L. REV. 3, 11 (2013) (“The Web is an incredible compendium of data and a potentially invaluable resource for lawyers and judges that is being underutilized.”).

115. *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015).

116. *Id.* at 623.

117. *Id.* at 629–30.

118. *Id.* at 626–27.

presented extremely weak expert evidence of its own through one of the physicians who treated him but was not a specialist in the appropriate field.¹¹⁹ The prison moved for summary judgment, and the motion was granted.¹²⁰

On appeal, to resolve whether summary judgment was properly granted on the issue of whether the medical staff's treatment amounted to deliberate indifference, the court referred to the Mayo Clinic's website.¹²¹ In doing so, the court explicitly stated that it was not taking judicial notice of the contents of the website under Rule 201, recognizing the high standard for doing so that requires indisputable accuracy.¹²² The court explicitly recognized the high standard for judicial notice and the very low standard for admission of relevant evidence in an adversarial proceeding, and suggested it was operating somewhere in the middle.¹²³ The court stated that to refuse to entertain this evidence under the circumstances (i.e., the inability of the plaintiff to produce expert testimony and the weakness of the defendant's expert proof) would be to essentially "fetishize adversary procedure in a pure eighteenth-century form, given the inadequacy of the key defense witness."¹²⁴ "It is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."¹²⁵ In addition, the court explained that it was using the information gathered from the website "only to underscore the existence of a genuine dispute of material fact created . . . by entirely conventional evidence," not to create one.¹²⁶

Less controversial, perhaps, would be the Seventh Circuit's decision in *Gilles v. Blanchard*.¹²⁷ In that case, a challenge to a university's denial of permission to give a speech on the lawn of the school's library, Judge Posner accessed a map of the layout of the school's library and downloaded a satellite photograph of the campus.¹²⁸

It has been suggested that courts should be allowed to do *sua sponte* independent scientific or technical research when they are confronted with complicated scientific issues and can do so consistent with a judge's

119. *Id.* at 627.

120. *Id.* at 623.

121. *Id.* at 623–26.

122. *Id.* at 629.

123. *Id.*

124. *Id.*

125. *Id.* at 630. Judge Hamilton concurred in part and dissented in part. He refused to reverse the grant of summary judgment, which he characterized as "unprecedented, clearly based on 'evidence' this appellate court has found by its own internet research." *Id.* at 636.

126. *Id.* at 629.

127. *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007).

128. *Id.* at 468.

ethical role and the parties' due process rights.¹²⁹ Judge Jack B. Weinstein is a strong adherent of this view.¹³⁰ Presaging thoughts later expressed by Judge Posner, Judge Weinstein has said, "A rigid conception of the judge as presiding passively and neutrally over an adversarial proceeding in which the litigants bear the whole burden of presentation is sometimes inaccurate and unwise."¹³¹ As *Daubert* expanded the role of the courts in considering scientific evidence, and as research in these areas has exploded, courts are increasingly feeling pressure in their role as gatekeepers on a variety of unfamiliar subjects.¹³² There is also growing pressure to prevent against the influence of partisan, false, or junk science.¹³³ Ethical rules need to be changed to permit judges to learn what they need to know to render correct decisions.

To the extent that Model Code of Judicial Conduct Rule 2.9 serves to limit a judge's ability to investigate facts and bring them before the parties, the rule should be changed. Outside the Rule's *ex parte* context, there should no longer be an unequivocal bar to independent fact investigation though the internet or otherwise. As to questions of law, courts should have the power to investigate facts independently on notice to the parties and with an opportunity to be heard, whether the facts be characterized as adjudicative facts or as legislative facts. Independent fact investigation would be particularly appropriate (1) where the facts are used as background, to educate the judge on a complex issue, to confirm an intuition, or to fill gaps in the evidence on an issue the parties raised, or (2) where there is inequality in the ability of the parties to produce evidence on an important issue. Courts are already empowered to call their own witnesses, both lay and expert, and to question the parties' witnesses.¹³⁴ They are also uniquely positioned to investigate and

129. George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 293 (1998); see also Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 565 (1994).

130. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

131. *Id.* at 539.

132. Marlow, *supra* note 129, at 296–97.

133. See Larsen, *supra* note 30, at 190–91, 214 (discussing the weaponization of partisan facts and its impact on judicial decision-making); see also Rick Anderson, *The Fallibility of Forensic Science: Crime-Solving Tool Can Lead to Wrongful Convictions—and Belated Exonerations*, HUM. RTS. DEF. CTR.: CRIM. LEGAL NEWS (Dec. 14, 2018), <https://www.criminallegalnews.org/news/2018/dec/14/fallibility-forensic-science-crime-solving-tool-can-lead-wrongful-convictionsand-belated-exonerations/> (finding scientific evidence, whether unreliable, mistaken, invalid, fabricated, or biased, "is the second most common contributing factor to wrongful convictions").

134. FED. R. EVID. 706.

consider their own systemic facts, to take notice of the records of statements in other cases, and to hold the government accountable for inconsistencies and unreliability in its agents' assertions.

Taking cues from Judges Posner and Weinstein, but moving beyond their positions, there should be a middle road allowing judges to play a role in generating facts. Contrary to the rigidity of Rule 2.9, that role would be located somewhere between the strict standards of judicial notice and the loose standards for admissibility of relevant evidence: it would be an extension of the judge's power under the Federal Rules of Evidence to call witnesses and to question witnesses. In certain circumstances, a trial judge should be able to both investigate and present facts, on notice to the parties and with an opportunity to be heard. This would be proper whenever the court is deciding a legal issue, for example, admissibility, summary judgment, or suppression. Because of constitutional due process issues, it would not be appropriate when the judge is sitting as a fact finder in a criminal case.

The current crisis of confidence and social and political dysfunction and upheaval supports an expanded judicial role that would include fact investigation under certain circumstances, with notice to the parties and an opportunity to be heard. When social cohesion has so broken down that the definition of "truth" is subjective, the courts should be able to protect the integrity of their decisions and maintain the necessary respect for the judicial process.

The requirement of notice and opportunity to be heard is the same as that required before judicial notice may be taken under Rule 201, and it ensures the fairness that legal and ethical standards require. The reliability of any fact judicially presented can be tested. Courts can call witnesses, question witnesses, and take judicial notice *sua sponte*: a judge is allowed to exercise these powers so long as there is no demonstration of partiality or appearance of partiality. Exercise of these powers does not inherently endanger impartiality: even though the evidence presented with judicial assistance will inevitably help one side or the other, courts are permitted to produce evidence and question witnesses. The same standard should apply here—that is, whether a court's investigation of fact demonstrates partiality is a separate question as it is with a judge's questioning of a witness. As the cases discussed herein demonstrate, simply seeking and presenting additional information is not an indication of a lack of impartiality.

CONCLUSION

Lessons from the 1960s–70s and the Chicago Eight trial? Social and political crises are not new. Fifty years ago there was a period of serious social breakdown: divisions, politicization, polarization, and distrust.

Fifty years later we are experiencing it again, but with different contours and in the presence of the powerful force of technology. Now, as then, these social and political conflicts will play out in the courts. Now, as then, judges are charged with maintaining public confidence in the judicial system. To do so in the face of a “post-truth” world of alternative facts, courts must ensure the factual integrity of their decisions. Perhaps they should be more engaged in the process.