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# Preliminary Notes toward a Study of Judicial Notice

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## PRELIMINARY NOTES TOWARD A STUDY OF JUDICIAL NOTICE

E. F. Roberts†

*The author describes the common law as a "machine," with judges and lawyers as its working parts. He explains that its successful operation requires a kind of "intellectual adrenalin" in order to keep it responsive to its changing environment. This is the function of judicial notice. The author next examines the different views of judicial notice and points out that each is a reflection of the era in which it was created. He concludes that judicial notice is not a distinct doctrine like the hearsay rule, but rather is simply the art of thinking as practiced within the legal system.*

The theory of literary education as it was first formulated supposed that literature carried the self beyond the culture, that it induced or allowed the self to detach itself from its bondage to the idols of the Marketplace, the Tribe, the Theatre, and even of the Cave. Perhaps literature was once able to do this, or something near enough to it to satisfy the theory. But now we must ask whether this old intention has not been inverted, and whether literature does not, in fact, set up the old idols in new forms of its own contrivance.\*

I have two axes to grind, one adjective and the other substantive. Substantively I have some ideas about the subject of this symposium. Before getting to those, however, I have a procedural gripe about law review articles which in dreadful seriousness line up rules and march them around the parade ground to the rat-a-tat-tat of string citations. I suspect that if we are ever going to do something about this awful stuff called Evidence we are going to have to do some hard rethinking of first principles. Lest we fall victims to the rule syndrome, I suggest that we agree upon an "Evidence Teachers' Five Year Plan," during which we shall each adopt the informal essay as our medium, limit our pretentiousness to twenty-five pages and discuss only fundamentals. If we can get the forest back into our sights after having been lost in the trees since Bentham's time, then, perhaps, we shall be able to see what we are about. Thus, this article, at least in part, is a call to the barricades. Let us burn all ten volumes of Wigmore, rip up the Model Code, destroy the Uniform Rules, and start from scratch!<sup>1</sup>

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\* Trilling, *Beyond Culture* 232 (1965).

<sup>1</sup> Before burying ourselves any further in the accelerating mass of published law materials, it might not be a bad idea if we called a moratorium across the board for five years. Courts, for example, might limit themselves to thirty published opinions a year, with lower courts being forbidden to utter any written opinions whatsoever. Since the law reviews are supposedly meant to train students, I suppose we must put up with them. It would be nice, however, if they all agreed to mail only their one best number at the end of the year and consign the other three, five, or seven issues to the flames.

On the substantive side, my position is that Evidence, like ancient Gaul, is divided into three parts. First, there is an area of apparent progress involving the use of confessions and illegally obtained evidence. On my map this is the Province of Due Process. It is not really evidence, however; rather it is refined "cops and robbers" wherein the Supreme Court uses the principle of exclusion to regulate the behavior of the police outside the courthouse. Hearsay, the Dead-Man's Rule, Best Evidence, and Relevancy are subdivisions of the Province of Nit-Picking. This is the heartland of Evidence—the collection of crusty old axioms designed to regulate the conduct of opposing lawyers inside the courthouse. Last, there is the Province of Despair, itself subdivided into three parts: Burden of Proof, Presumption, and Judicial Notice. Like the first province, this is not really evidence because the syntax used actually disguises the inherent judicial process in which these rules are employed as tools with which to operate the law machine itself. It is the purpose of this article to explore this last obscurantism, though in so doing, the nature of the law machine itself must also be explored.

## I

## AN ABSTRACT OF THE COMMON LAW SYSTEM

Elsewhere in the pages of this *Quarterly* I have written of law as a set of verbal directional signals manipulated by judges and legislators bent on channeling human activities so as to maintain an orderly social structure.<sup>2</sup> Now I should add that by "legal system" I envisage three complementary phenomena: the law crowd, the law matrix, and the yearning for justice. By the law crowd I mean judges, lawyers, law professors, law review men, legislators, and lobbyists. The sun of the work-oriented activities of these people—that is, the total of their behavioral patterns—constitutes the physical dimensions of the legal system. The law matrix consists of the principles, rules, and canons believed by non-participants and by "C" students to constitute "law." Justice, at least in our society, is the notion that the law crowd applying the law matrix to a dispute or problem ought to come up with a "just decision," which really means that the non-participants feel that in the long run the "good guys" ought to triumph over the "bad guys." Therefore, the trick the law crowd must constantly perform is to settle disputes and order social activity within the terms of the law matrix, remembering that neither can their behavior stray too far from the commandments of that matrix nor can the commandments of the matrix itself vary too much from conventional wisdom, lest

<sup>2</sup> Roberts, "Natural Law Demythologized: A Functional Theory of Norms for a Revolutionary Epoch," 51 Cornell L.Q. 656 (1966).

justice appear not to have been done. The real truth in all this is that Justice cannot afford to be blind lest this delicate balancing act come a cropper, and the system's own charisma be destroyed.

#### A. *A Model of the Common Law System*

The common law can be looked upon as a machine, the working parts of which are judges and lawyers. The input of the machine is made up of the disputes among people at large, and the output is a series of solutions to those disputes. As a by-product, however, the machine produces "rules of law" which are stored in its memory bank and which determine how the machine will respond when a similar dispute is subsequently fed into it. Indeed, the rule-formulation function of the machine not only serves as a device to program the future behavioral patterns of the machine's constituent members, but also leads the people at large to accept the machine as the paramount dispute-settling device. This is so because the constituents of the machine itself appear to be bound by "the law" and are not seen as dispensing *ad hoc* solutions. In turn, "the law" has become a fundamental cultural artifact, and the people at large have come to accept or have been conditioned to accept "the law" as the arbiter of conflicting patterns of conduct. In the ultimate analysis, the machine operates in such a way that it institutionalizes its own behavioral patterns and, *qua* institution which is oracle of "the law," it has worked its way into the warp and woof of the society's behavioral patterns as the traditional dispute-settler and behavioral pattern programmer.

When new disputes are fed into the machine as grist for the dispute-settling function, three factors weigh upon the judges in a descending order of importance. Most important are the cultural, social, economic, and intellectual assumptions of the judges at the particular time; in short, their ideas about the society and its current needs control their reactions to a considerable degree. As judges are lawyers, the facts of the particular dispute are next in importance. Third is the body of legal doctrine stored in their own and counsels' memory, which is important because, the dispute being new, almost any result can be reached by carefully selecting the existing rule from which to draw an analogy.

At the output end of the machine, however, when the decision is announced, this priority is totally reversed. At this stage of the process the rule of law comes foremost and the opinion becomes a doctrinal dissertation of very high level or an abstraction. The decision, of course, will report the facts, but it will do so in a relatively cursory fashion. In the main, moreover, the intellectual "can't help," the assumptions of

the times, are simply ignored, thereby reducing them formally to something of subliminal significance.<sup>3</sup>

The result of this transvaluation of values means that when the *same* dispute arises in another era, it will be solved in a manner consistent with the legal doctrine now stored in the machine's memory-bank even though the cultural predisposition of the society may have evolved into a different code of "can't helps." This is so because the notion of *stare decisis* requires the machine to rely in the first instance upon its catalogue of pre-existing legal doctrine and, if rules governing the dispute are therein discovered, to apply them in resolving the current dispute notwithstanding the fact that the stored doctrine may have become an anachronism.

According to this reconstruction of the law in terms of a machine, the law machine serves its purpose because it has settled disputes and because its legal doctrines have ordered patterns of conduct. But the combination of its memory-bank and the concept of *stare decisis* threaten to give rise to an ever increasing increment of friction which might jeopardize the mechanism's efficacy simply because, internally programmed in terms of its own decided legal doctrine, it may steadily become less able to decide disputes and pattern social behavior in contemporary terms. Indeed, at some future point in time, the hard core of legal doctrine binding upon the machine itself will so divorce its output from the society's mores and belief canons that its results are no longer accepted as valid guidelines of conduct by the society. In short, the legal doctrine syndrome which made the machine socially acceptable in the first instance as an oracle of the tribe's right-ways may undergo a siege of intellectual hardening of the arteries, so much so that the machine is unable to correct itself, and the gap between doctrine and reality widens to the point that "the law" loses its charismatic flavor.<sup>4</sup>

Some kind of intellectual adrenalin must be fed into the machine to keep it aware of the changing environment around it. At the same time, since innumerable decisions throughout the society are premised on the rules thus far promulgated, the security implicit in *stare decisis* cannot completely be abolished. Somewhere in the system we must expect to locate an environmental barometer which reacts to changes therein and causes judges and lawyers to adjust their behavioral patterns accordingly.

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<sup>3</sup> See Green, "Tort Law Public Law in Disguise," 38 Texas L. Rev. 1 (1959).

<sup>4</sup> This, after all, is what happened in England and led to the recent announcement by the Lord Chancellor that henceforth the House of Lords would "depart from a previous decision when it appears right to do so" because "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law." The Times, July 27, 1966, p. 10, cols. 1-2.

Thus we must examine the procedural mores which govern the machine's internal behavior.

B. *The Procedural Matrix*

Any procedural system has behind it a set of *grundnorms* or, if you will, a postulational matrix. This matrix consists of a set of statements which are true propositions to the extent that they describe the actual conduct of judges and lawyers working at their trade. At the same time, judges and lawyers behave as they do because they believe these propositions are "true" in something of a Platonic sense. That is, the verbal or conceptual structure which describes their work-a-day behavioral patterns also serves to channel them because the participants have, in promulgating decisions pertaining to procedure, elevated the normative to a norm to which they then largely conform. Thus it is that the law crowd have become at one and the same time the manipulators and the prisoners of verbal forms.

1. *Fact and Law*. Elementary common-law pleading serves to illustrate this phenomenon. Suppose, for example, that Peter sued Daniel alleging that Daniel caused emotional harm to Peter by maliciously winking at him. Daniel could "demur," arguing that even if he did do it, the act was not actionable at law. In this instance the judge would decide whether the act, now assumed to have occurred, was tortious. Daniel, however, could choose to deny having done it, in which case the jury would have to decide whether the event ever occurred. The law crowd insists that the first option would raise a "question of law" whereas the second would raise one of "fact."

To the outsider, of course, while it is a question of fact whether or not Daniel did wink, it is also a question of fact whether, if the act did happen, the legal system provides a remedy. Anyone with common sense, after listening to Peter, Daniel, and any witnesses they have, might arrive at an answer as to the concrete historical existence of the alleged event. But it takes a peculiar mind, steeped in the folkways of the law, to wade through the morass of precedents and come up with an answer to the question of whether such conduct is presently actionable. Thus, while this question is actually one of fact, it is said to be one of "law" in order to describe the sociological fact that the judge fields the question because it is a technical one peculiarly within his competence to answer. The judge, presumably having his fair share of common sense, could also as easily as not decide whether the event occurred, but due to the accident of history this function has been traditionally consigned to the jury. The

crucial distinction between a question of law and a question of fact lies, therefore, in *who* answers the question.

However, in order to be accepted, the law in our milieu has to appear uniform. This requires that all judges come up with the same responses to any given question of law. In order to achieve a uniform set of responses, an ultimate appellate tribunal is assigned the task of formulating definitive responses binding on trial judges. As a result, a trial judge may be reversed should he come up with a wrong response to a question of law. Thus it is that a question of law is not merely a question which is answered by the judge rather than the jury, but it is one to which there is only *one right answer*.

On the other hand, men can always differ as to whether and how a particular event transpired. The past is always something of a mystery, and history remains more an art than a science. As it happens, people at large have come to accept a jury verdict as determinative of the controversy, so that the law crowd has seen fit to *reinforce* the sacrosanctity of such verdicts in their rubric: "Facts are not open on appeal." This reflects the rule that questions of fact are answered by the jury but, at the same time, points up the additional fact that, since the jury verdict settles once and for all whether Daniel winked at Peter, every question of fact has two right answers, namely, "yes" or "no." This will readily become apparent.

Obviously the jury can only function if Daniel denies Peter's allegations of fact so that the dispute comes to turn on a question of fact. It is equally obvious that, in order to settle the dispute, the jury must have data to consider. Rather than have judge and jury go to the countryside inquisitorial style, our tradition proceeds from a bias in favor of institutional inertia. It is up to Peter to come to the courthouse and present his case to the jury there, and since Peter disturbed the state of inertia by bringing the dispute into the institutional setting, the "burden of proof" is said to be upon him. This last bias in favor of inertia is probably rooted in the sociological fact that a series of jury verdicts for various Peters, without any data to justify them, would not gain public approval and would lead to the collapse of the whole system. Shorn of its usual trappings, this means that the onus is on Peter to make the jury deliberations seemly. Controls, therefore, are necessary if the proceedings are to merit popular acceptance.

The control device is rooted in the elementary truism that, granted the "fact" and "law" dichotomy, someone must determine initially whether a

particular question is one of fact or of law. This primary question is itself a question of law since uniformity in this regard is essential if the system is to function effectively. In order to reach the jury Peter must produce enough data upon which they could, if they believed him, conclude that Daniel did it. Thus, upon a motion by Daniel when Peter is through presenting his data, someone must decide whether the jury *could* find Peter's story to be true. The social acceptability of the whole system turning on this question, the appellate court must in this regard retain control over the trial court out of motives of sheer self-preservation. It follows, therefore, that it is a question of law for the judge whether Peter has produced enough data for the jury to respond to the factual question of whether Daniel did it. If deliberations would appear mere guesswork, Peter loses his suit as a matter of law. If it would appear that the jury had enough material on hand with which to find in Peter's favor, then, as a matter of law, a question of fact is open for the jury.

Granted that Peter's case is not dismissed out of hand, Daniel may choose to tell his side of the tale or abide by a jury verdict then and there. Even if he does nothing Daniel has not yet lost the case, because Peter still has not met all of his "burden of proof." He has, it is true, persuaded the judge that he is entitled to reach the jury; it remains to be seen whether his data has persuaded the jury of the relative truth of his assertions. As we have said, the concrete historical existence of the event described by Peter must in the nature of things remain beyond the pale of the absolute; thus the jurors are only asked to decide whether Peter's version is "true so far," that is, whether it is more probably true than not. If the jury is persuaded that the probabilities favor Peter's version, he wins; if they remain unpersuaded, or in a state where they can't decide either way, he loses.

2. *Fact Finding.* Who is to know whether Daniel did maliciously wink at Peter? The jury can listen to both of them, together with any witnesses they bring along, and then try to decide who, if anyone, is telling the truth or something reasonably proximate thereto. Did Sacco and Vanzetti do it? Was there another assassin at Dallas? We don't really know, but if we respect the tribunal which arrives at an answer to such questions, we are lured into believing that we know. At all costs, therefore, the tribunal must function in such a way that its determinations of questions of fact appear to be credible.

My own favorite method of trial is an ancient one wherein the defendant was dunked underwater at the moment his accuser's champion shot an arrow as far away from the scene as possible. The accused was

brought to the surface only when his champion had run after the arrow and had retrieved it. If the accused was dead, the gods had decreed his guilt. If he was alive he was palpably innocent and was not likely to spill the beans if he was not actually innocent. We all laugh now, of course, at this "irrational nonsense," but we ought to recall that at one time the natives believed in this device and, perforce, it worked to settle disputes. Granted that we believe in our system, and therefore it works; but is it really any more accurate in its results?

Our system certainly is more accurate in the sense that cases lacking data are not sent to the jury. As we have seen, Peter gets to the jury only if he produces enough data upon which reasonable men could conclude that the probabilities tend in his favor. In theory, at least, after all the data is collected the judge in a civil case can enter a verdict for him as a matter of law should the unique situation arise where no reasonable man could help but find in his favor. Given the usual situation where both sides have evidence, however, the question is sent to the jury. Since their deliberations are officially secret, we don't know whether they hashed things out or agreed among themselves to abide by the toss of a coin. The raw truth of the matter is that, since it is anybody's guess whether Peter's or Daniel's version is correct, it doesn't really matter whether the jurors toss a coin, so long as they don't advertise the fact since either answer is acceptable.<sup>5</sup> Their response is not inherently the right one; rather, we have been culturally conditioned to accept their response as the right one. In sum, therefore, our jury could be replaced by a coin toss without any measurable difference in results. That it cannot as a practical matter be so replaced is not an argument so much in favor of the system but an insight into our own conditioning which has brought us to accept these verdicts and a comment on the infirmities of civilization itself. In short, trials remain a perverse species of game and not a search for truth.

Seeing the law in terms of a machine oversimplifies things considerably. What with the jury considering the facts about the event which gave rise to the trial and the judge busy considering the tenor of the law as laid down in the books, no one seems charged with the duty to evaluate how rules of law reflect the environment in which the dispute occurs. If the charismatic quality essential to the law's own being depends

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<sup>5</sup> E.g., *Cheetham v. Piggly Wiggly Madison Co.*, 24 Wis. 2d 286, 290, 128 N.W.2d 400, 402 (1964): "When a jury verdict is attacked we inquire only whether there is any credible evidence that, under any reasonable view, supports the verdict."

If cigarette packages must carry a warning about cancer, the law schools ought to warn their customers that the law is not necessarily a pursuit of "Justice." One article which might be required reading and included in the LSAT test is Willcox, "Jerome Frank—A Great Jurist With Clear and Friendly Eyes," 7 *J. Indian L. Institute* 305 (1965).

upon the sensed correspondence between the law and the environment, however, it would appear that the determination of this question is the most important task of all. This, of necessity, brings us to the point at which we must examine the part played by judicial notice in these proceedings.

## II

### STRESS POINTS

Though in theory, at least, the judge answers questions of law and the jury questions of fact, there are still times at trial when the judge appears to be answering questions of fact. For example, suppose that in a paternity suit the putative father offers into evidence the results of a blood-test which proved negative. At first blush this appears to be a question of relevancy. Does a negative result tend to show his innocence? Apart from the credibility of the test-giver, this depends upon the validity of the principle that negative results illustrate non-paternity. Is this a valid scientific principle, or are these results no better than a soothsayer assaying the entrails of a rooster? Who then should decide whether in point of fact there is a valid principle behind these tests? This is not a question of what happened yesterday between the parties, but a question of the content of today's scientific truths. This is not a question which will brook a negative response or a series of different responses lest the tribunal appear a bit stupid in an epoch of science. In short, the judge is going to field this question.

But the judge in answering the question for the first time cannot resort to the law books. He has to dig through the medical lore, and he may listen to experts called by both sides. Thus, the question, while not one of the historical facts pertaining to the alleged event giving rise to the trial, is a question of fact in the sense that it is not answerable other than by investigating the contemporary conventional wisdom of the scientific community. Unfortunately, this particular question of fact has only one right answer. A theory is needed, therefore, to explain why it is decided as if it were a question of law. Out of this conundrum was born the doctrine of judicial notice which, rooted again in the preservation of the seemly, ordains that the judge shall decide questions of fact which are common knowledge in the community or to which one right answer is available from sources of indisputable accuracy.<sup>6</sup>

Once we formalize judicial notice, however, we have on hand the ingredients for a small ideological war. Suppose, for example, the judge in our hypothetical paternity suit let in the negative results after deciding

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<sup>6</sup> Uniform Rule of Evidence 9, 9A U.L.A. 599 (1965).

that the principle behind the tests was true. Plaintiff had managed to find an expert who had testified during these deliberations that the principle was as fallacious as Ptolemy's cosmology. At the close of trial plaintiff then asked the judge to instruct the jury that before they decide whether to believe the testimony that the test was correctly administered, they should first consider whether they believed in the test principle itself. "But I have already ruled on that," should be the judge's conditioned response, "and since it was a question of law it is no longer subject to debate." Why? Simply because if it was a question of law it had only one right answer, and, after all, it was a question of law in the first place simply because there was only one right answer.<sup>7</sup>

Still, situations can be imagined which do not generate this pat response. Suppose, for example, a defendant who is alleged to have absconded with someone else's Rolls Royce is on trial for grand larceny. After the district attorney rests his case the defense moves to dismiss because no evidence was ever introduced to show that the vehicle was worth fifty dollars or more, the *sine qua non* of grand larceny. "Denied," snaps the judge. "That is so obvious that I am now instructing the jury that they can find that the car was worth more than fifty dollars because it is common knowledge that, even reduced to a near wreck, a Rolls is worth that much." On appeal, of course, defendant has an argument: each element of a crime, particularly the historic question of the car's worth at the time of the crime, is a question for the jury and not for the judge. What result should we expect?

If we admit that this is a historical question, it would seem that the judge was wrong. If we consider, also, that his ruling on this as a matter of law immediately foreclosed debate, it does not seem quite cricket. Surely, a reversal is in order. Possibly, however, we shall encounter a new set of responses, to wit: "Judicial notice is a time-saving tool. If a fact seems obvious a proponent need not take time to proffer testimony; the judge will tell the jury they can find the fact to be so. This does not foreclose debate, however, and the opponent may, if he wishes, introduce contrary evidence." Thus, it would seem, there is another litany sung to judicial notice.<sup>8</sup>

If we scurry to the "authorities," we are not likely to come away satisfied. Thus we find in Wigmore:

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<sup>7</sup> See Morgan, "Judicial Notice," 57 Harv. L. Rev. 269, 279 (1944): "If taking judicial notice of a matter means that it is indisputable, it must follow that no evidence to the contrary is admissible."

<sup>8</sup> But see *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951). Interestingly enough, the fact that the car's worth was part of the concrete historical event being debated is the key to this case, not the intrinsic merit of either ideology of judicial notice.

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. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable.<sup>9</sup>

But if we are to accept the Uniform Rules we must believe that "if a matter [is] judicially noticed . . . [the judge] shall instruct the trier of the fact to accept as a fact the matter so noticed."<sup>10</sup> A fine kettle of fish, indeed; we must hope that the selfsame "authorities" can help us choose between these canons.

Thayer tells us that "taking judicial notice of a fact is merely presuming it, *i.e.*, assuming it until there is reason to think otherwise."<sup>11</sup> Morgan was aghast at the very thought of this: "It is fortunate that thus far the courts have not enmeshed problems of judicial notice in the language of presumptions; to do so would open another legal Pandora's box."<sup>12</sup> Indeed, Morgan makes the point that "if taking judicial notice of a matter means that it is indisputable, it must follow that no evidence to the contrary is admissible."<sup>13</sup> Following Morgan, McNaughton promised to exorcise the time-saving heresy from his version of Wigmore.<sup>14</sup> But more recently Davis has protested that "the convenient course is for the judge to assume the needed facts but to keep open the opportunity for a party to challenge them in the event the judge guesses wrong about the likelihood of challenge."<sup>15</sup> Intent on completing the full circle, Davis concluded that "Thayer gave a beautiful answer in a single sentence: '[T]aking judicial notice of a fact is merely presuming it, *i.e.*, assuming it until there shall be reason to think otherwise.'"<sup>16</sup>

If the "authorities" are involved in an intellectual cold war, what of the cases? Wigmore, of course, cited cases to support his version of the canon.<sup>17</sup> Morgan has undermined these.<sup>18</sup> In turn, McNaughton, after collecting nine pages of citations in fine print, concluded that the cases "are in cloudy confusion."<sup>19</sup> Davis responded: "But anyone who has the patience to read the cases McNaughton cites will find that the case law

<sup>9</sup> 9 Wigmore, Evidence § 2567a, at 535 (3d ed. 1940).

<sup>10</sup> Uniform Rule of Evidence 11.

<sup>11</sup> Thayer, A Preliminary Treatise on Evidence at the Common Law 309 (1898).

<sup>12</sup> Morgan, *supra* note 7, at 286.

<sup>13</sup> *Id.* at 279.

<sup>14</sup> McNaughton, "Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy," 14 Vand. L. Rev. 779, 805-06 (1961).

<sup>15</sup> Davis, "A System of Judicial Notice Based on Fairness and Convenience," in *Perspectives of Law* 81 (Pound ed. 1964).

<sup>16</sup> *Id.* at 78-79.

<sup>17</sup> See 9 Wigmore, *supra* note 9.

<sup>18</sup> Morgan, *supra* note 7, at 280-85.

<sup>19</sup> McNaughton, *supra* note 14, at 796.

is reasonably clear and consistent."<sup>20</sup> With McNaughton's citations in hand, the reader is invited to investigate the matter for himself.

Let us try a different approach and peruse a local practitioner's horn-book to see what items the courts do judicially notice in practice. Immediately we encounter a gem like: "Since its introduction in 1904, the hamburger has become one of the most popular menu items in the United States."<sup>21</sup> On reading the case,<sup>22</sup> we find a trial judge wrestling with a statute making it a crime to doctor meat, and trying to decide whether the defendants had violated it. The butcher who injected some blood into a quantity of hamburger said that he did not "process" it within the meaning of that word in the statute because, after all, he was an economically coerced automaton performing his boss' orders. His boss, however, insisted that he couldn't have processed it since he wasn't in the locale at the time. Who, then, did the legislature have in mind? The judge's reasoning, shorn of several pages of rhetoric, was relatively simple. Hamburger is the staple of everyone's diet even in our so-called affluent society, and doctoring it hurts us all. If we are serious about stopping the practice, we cannot play verbal games like this. Ergo, they both processed it.<sup>23</sup>

Observe, however, that the ubiquitousness of hamburgers was not a "fact" alleged in the pleadings. The relevancy of no offer of proof turned on this fact. The problem was, how shall I as judge read this statute? The real question then became, shall I as judge be hypertechnical about the "who" covered by this statute, or shall I really call a halt to this nonsense by figuratively hanging the lot of them? What we are reading, it turns out, is the judge's gloss put on his own reasoning process. If we are to believe, however, that this is an aspect of judicial notice because he cites some sociological facts in the process, then the whole supply of facts known to judges is the equivalent of the potential sum of judicially knowable facts. The difficulty with this assertion is that, rather than being too sweeping, it may actually fail to be inclusive enough.

Suppose now a case where a plaintiff, laden down with bundles, alights from an east-bound trolley car, walks around behind it, starts to cross the west-bound tracks without looking, and is hit by a west-bound car. At trial, cross-examination reveals plaintiff's inattentiveness. The motor-man insists that plaintiff never looked up, whereas he, the motorman, instantaneously applied the brakes and tried to avert catastrophe. Faced

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<sup>20</sup> Davis, *supra* note 15, at 88.

<sup>21</sup> Richardson, *Evidence* 30 (Prince ed. 1964).

<sup>22</sup> *People v. Enders*, 38 Misc. 2d 746, 237 N.Y.S.2d 879 (N.Y.C. Crim. Ct. 1963).

<sup>23</sup> *Id.* at 756-57, 237 N.Y.S.2d at 891-92.

with the likelihood of losing because of contributory negligence, the plaintiff at the close of trial asks for an instruction that, even if he was contributorily negligent, he is still entitled to win if by ringing his bell the motorman had the last clear chance to avert disaster. Believing that the doctrine doesn't apply when the plaintiff's negligence continues right up to the moment of impact, the trial judge disagrees and denies the request.

Consider now plaintiff's plight on appeal even if he points out an error in the judge's "law," *e.g.*, that last clear chance does apply in this situation. Granted the judge was wrong, this does not help plaintiff's case because there never was any evidence to sustain a finding by the jury that the west-bound trolley had a bell. The question really boils down then to whether the plaintiff ought to have another trial, and this depends on the likelihood that the trolley did have a bell. It should not surprise us if the appellate court grants him a new trial, including among its reasons in the opinion that "streetcars have bells." Again, the question arises as to whether this is really judicial notice.

If one takes the Uniform Rules seriously, these two cases present dire problems. While it may be common knowledge that hamburgers are staple fare, it is neither common knowledge nor verifiable information that this trolley at that time had a bell.<sup>24</sup> More serious than limiting judicial notice by definitions of what facts are subject to the doctrine, the Rules spell out a system of notice to the parties before judicial notice is to be taken.<sup>25</sup> In theory, at least, the trial judge should have allowed the defendants time to argue that hamburgers are sociologically *de minimis*, and the appellate court should have had argument on the proposition "All trolley cars are equipped with bells."<sup>26</sup>

The real trouble here is caused by that elementary dictum common among teachers of adjective law that, whereas the rules of substantive law spell out the guide lines for social behavior, the rules of procedural law spell out the guide lines for the law crowd's own behavior. The hearsay rule may, in fact, control how lawyers behave at trial. The difficulty is that *judicial* behavior requires more than black-letter law and a set of facts in the record; it also necessitates thinking. The formal system of judicial notice assumes that there are "facts" independent of those pertinent to the litigation-causing historical event which are within the competence of the judges and which can be isolated. Once these facts are isolated, a set of rules can, in theory, be devised which regularizes how

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<sup>24</sup> See Uniform Rule of Evidence 9.

<sup>25</sup> Uniform Rules of Evidence 10, 12.

<sup>26</sup> See *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (10th Cir. 1946).

judges handle judicial notice, now operationally a phenomenon distinct from the thinking aspect of the judicial process.

What are the causes of this intellectual disturbance? In the main they are most likely rooted in their holder's views about judges. The sceptics who feel that judges ought to be tied down by a formalized set of rules are in the Morgan camp. The "let's get on with it, the judges are practical chaps" scholars are in the Wigmore-Davis camp. Indeed one can counterpoint these attitudes rather easily. Thus, from Morgan we hear "There is danger of misuse and abuse of judicial notice."<sup>27</sup> From Davis, however, the refrain is different indeed:

The reason we allow judicial notice to be taken of extra-record facts is not to promote fairness but to promote convenience. Tribunals make factual assumptions because it is convenient to do so. Indeed, to fail to make factual assumptions would mean extreme inconvenience.<sup>28</sup>

Our cases so far, however, have not illustrated how judicial notice functions as a tool for informing appellate courts about the environment for which these courts fashion rules as order-fixing devices. It is now time to turn our attention to this facet of the problem. It is a fairly conventional historical fact that the early American courts modified the doctrines of English common law to suit the environment of the new republic. In 1827, for example, an Alabama court had before it the question whether an absent owner of a vacant parcel of land could maintain trespass *q.c.f.* against an interloper who had removed some trees. The "rule" put forth by the defendant seemed a foolproof defense, to wit, only someone in actual possession could maintain trespass. We find the court, however, allowing the action on the basis of "constructive" possession notwithstanding the "rule."

The situation of our country requires this modification of the English doctrine. In England, almost all the lands are occupied, but here, the proprietor often lives at a great distance from some of his lands which are not occupied by tenants, and unless they can maintain this action, they must be denied an important remedy for injuries to their property.<sup>29</sup>

Thus, sociological data was explicit in this opinion which, while promulgating new doctrine, painted the environmental picture which necessitated it.

This, however, is clearly an instance where the data, while affecting the outcome of the case, neither pertained to the history of the event giving rise to the lawsuit nor to the admissibility of evidence. What if in this case the plaintiff in his brief had used a pedestrian doctrinal approach

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<sup>27</sup> Morgan, *supra* note 7, at 292.

<sup>28</sup> Davis, *supra* note 15, at 93.

<sup>29</sup> Gillespie v. Dew, 1 Stew. 229, 230 (Ala. 1827).

and had simply cited several cases from other American states which had adopted the new rule, whereas the equally dull defendant had replied by citing English doctrine? If a judge should ask plaintiff's counsel "why" one rule is better suited to Alabama than the other, must not counsel leave his brief while addressing himself to the environment? While conditions in England may have been common knowledge to the then equivalent of the jet set, it is debatable whether it was common knowledge in Alabama. What were the then sources of indisputable accuracy about English landholding, sociologically speaking, as opposed to the doctrine of estates? Should the argument have been adjourned pending the filing of Brandeis briefs by both sides? It would appear that to ask these questions is to answer them: the court was willing to proceed on the basis of its own sense of the environmental picture without considering any complex matrix of rules governing judicial notice.

True enough, this was an Alabama case in 1827, long before thinking about judicial notice crystallized. The court simply didn't know any better. If the same question arose today, however, Morgan would have the court operate within Uniform Rules 9 through 12.<sup>30</sup> Davis protests that this is absurd on its face because, if environmental facts must be "true" the courts could not "think."<sup>31</sup> His example is *Hawkins v. United States*,<sup>32</sup> which, if it illustrates Davis' thesis, is well worth examining. In that case the question was whether a prostitute wife should have been allowed to testify against her husband over his objection when he was on trial for violating the Mann Act. The "rule" clearly called for a negative response, but, as in the Alabama case, the question was whether the rule should continue to apply. Mr. Justice Black decided that it should, because adverse testimony like this would destroy marriages and, after all, the rule had been created in order to foster marriages. Is it "true," however, that testimony like this would destroy marriages? Mr. Justice Stewart had his doubts and wanted data about the situation in those jurisdictions which had abolished the rule.<sup>33</sup> Thus, says Davis, since the "fact" here was

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<sup>30</sup> Morgan, *supra* note 7, at 289: "If the common law is to grow through adaptation to changing conditions by means of judicial decision, the device by which knowledge of the changed conditions becomes part of the court's working equipment is judicial notice." *Id.* at 293:

Consequently, protection to litigants should be provided (a) by furnishing them full opportunity to be heard in time to make their contentions effective and to make a record which will assure review by appellate tribunals, and (b) by using judicial notice only where the matter clearly falls within the domain of the indisputable.

<sup>31</sup> Davis, *supra* note 15, at 82: "My opinion is that judge-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.'"

<sup>32</sup> 358 U.S. 74 (1958).

<sup>33</sup> *Hawkins v. United States*, 358 U.S. 74, 81-83 (1958).

merely an assumption, a feeling for the situation, strict application of the Uniform Rules would forbid mention of the fact.

Let us follow along with Davis for a moment but apply Rules 9 through 12 in both cases, giving the parties notice of intended departure from the record. After reargument on the basis of Brandeis briefs, it would appear that the Alabama court in the trespass case could have had before it a rather clear-cut set of data illustrating the sociological facts about the occupation of land in England and Alabama. Upon reargument of the *Hawkins* case, however, it is questionable what data would be available. In all likelihood some scanty figures and more than enough diverse opinions of psychologists and marriage counselors would be the best that one could expect. In the face of no indisputably true fact, therefore, that Davis has a fairly strong argument in favor of his thesis that could merely rubber-stamp the accepted doctrine. It would appear, therefore, that Davis has a pretty strong argument in favor of his thesis that his is the thinking man's brand of judicial notice.

In examining earlier the possible motivations underlying the Morgan-Davis controversy, it was suggested that Morgan distrusted judges whereas Davis would let them have their head. The cases which gave rise to this hypothesis, however, concerned practical problems of handling disputes, whereas the last two cases we looked at concerned judges in their more magisterial role as promulgators of rules governing society at large. But the dispute between Morgan and Davis persists—Morgan again trying to hold the judges to the indisputable truth and Davis lobbying to let them have a go at their "can't helps." The same amateurish explanation in terms of their different attitudes toward judges again seems to suffice to explain their different approaches to judicial notice. When life can be reduced to such dime-store simplicity, however, it is a sure sign that the whole question cries out for reexamination.

### III

#### EXPLANATION OF THE MORGAN-DAVIS DISPUTE

##### A. *A Page of History*

Conventional wisdom has it that the test for the constitutionality of state health, morals, and welfare legislation, in terms of due process, is a twofold one. First, it must be determined whether the statute is designed to achieve an appropriate objective of the police power. Granting the aim is proper, the second question is whether the means adopted are an appropriate method of achieving that aim. Judges, however, are supposed to practice "judicial restraint;" that is, they are not

supposed to strike down a statute simply because they, if they had been legislators, would not have voted for it. The second question really is whether, in light of the data on hand, a legislature still subject to the intellectual etiquette of reason could do what it did.

Given this rather obvious homily, it may be instructive to look again at *Burns Baking Co. v. Bryan*,<sup>34</sup> a case decided by the Supreme Court in 1924. The Nebraska legislature had set out to stop what it apparently believed was a widespread fraud practiced in the baking industry. In those days unwrapped bread was sold by weight, in loaves of various sizes. A somewhat overweight pound loaf, however, might be puffy enough "to palm off"<sup>35</sup> on a retail customer as a pound and a half loaf. The answer was simplicity itself: the new statute required bakers to produce loaves of standard sizes to be based upon increments of the half pound, the bakers being allowed a margin of error of only two ounces in the pound. In theory, therefore, it would no longer be possible to mistake the several sizes of bread. The industry did not take kindly to the idea, however, and sued to enjoin enforcement of the reform measure, with the result that the litigation eventually found its way to the Supreme Court.

At trial the bakers had produced evidence concerning the scientific baking of bread, the tenor of which was that chemical reactions in the loaves after baking caused so much change in weight that it was impossible to come within two ounces of the pound. The Attorney General had pointed out that the mischief maker was merely moisture evaporating, and that by simply wrapping the bread in wax paper the bakers could easily control its shrinkage and expansion. This answer sufficed in the Nebraska courts, but it did not satisfy Mr. Justice Butler and a decisive majority of the Supreme Court. Indeed Butler waxed eloquent in reply:

It is a wholesome article of food, and . . . bakers have a right to furnish it to their customers. The lessening of weight of bread by evaporation during 24 hours after baking does not reduce its food value. It would be unreasonable to prevent unwrapped bread being furnished to those who want it in order technically to comply with a weight regulation . . .<sup>36</sup>

In short, Butler and most of his brethren would not have voted in favor of this statute.

Be that as it may, the question remained whether the measure was an unreasonable expedient in light of the widespread practice of deception. That issue was disposed of in a thrice:

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<sup>34</sup> 264 U.S. 504 (1924).

<sup>35</sup> The choice of words is by Mr. Justice Brandeis. *Burns Baking Co. v. Bryan*, 264 U.S. 504, 519 (1924) (dissenting opinion).

<sup>36</sup> *Burns Baking Co. v. Bryan*, 264 U.S. 504, 516 (1924).

There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf . . . and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.<sup>37</sup>

Once reasonableness was treated as a question of whether there was in fact a danger to be remedied, the state lost. In a real sense, therefore, the constitutionality of the measure, seemingly a question of law, came to turn on the ineptitude of the state's counsel in getting the requisite proof of the actual environment into the record at trial. More interesting still, perhaps, was Butler's refusal to credit the very possibility of monkeyshines among the entrepreneurial set at the bakery.

Whereas Butler had a crystal ball which illuminated the environment in Nebraska, Mr. Justice Brandeis filled his dissent with facts. First, however, he tried to render articulate what he saw were the ground rules for the decision-making process in this case.

With the wisdom of the legislation we have, of course, no concern.<sup>38</sup> But, under the due process clause as construed, we must determine whether the prohibition of excess weights can reasonably be deemed necessary . . . . The determination of these questions involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious.<sup>39</sup>

Then, in a marvellous illustration of the Brandeis-brief technique, the Justice recited page after page of data illustrating how widespread was the problem of shortweight and how, in light of the nation-wide experience, the statute here appeared a reasonable response to the environmental situation.

It might be objected, however, that if Justice Butler behaved rather arbitrarily in judicially noticing that no problem existed, Brandeis' painting in depth of the existential scene was equally arbitrary; if the existence of the danger was a pure question of fact, then both of them were trying the issue at the appellate level via judicial notice. Brandeis carefully treated this very point.

Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar

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<sup>37</sup> *Id.* at 517.

<sup>38</sup> Compare Mr. Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (dissenting opinion):

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. Needless to say, Holmes concurred with Brandeis in the instant case.

<sup>39</sup> *Burns Baking Co. v. Bryan*, supra note 35, at 519-20 (dissenting opinion).

legislation. . . . Of such events in our history . . . the Court should acquire knowledge, and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved. . . . There is in the record some evidence in conflict with it. The legislature and the lower courts have, doubtless, considered that. But with this conflicting evidence we have no concern. It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure . . . transcends the bounds of reason. . . .

To decide, as a fact, that the prohibition of excess weights is not necessary . . . is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review.<sup>40</sup>

In short, Brandeis did not judicially notice the “truth” of the situation but rather the existence of ample material about the purported existence of a real danger to justify as eminently reasonable the enactment in question.

It is old hat, of course, that the Holmes-Brandeis outlook expressed in *Burns* came to be law. Indeed, by 1944, the year Morgan published his masterpiece on judicial notice, the credo “judicial restraint” had become conventional wisdom among the enlightened members of the teaching fraternity. Observe, however, that the great controversy during the thirties had concerned whether the courts should seek to impose their nineteenth century brand of wisdom upon the Republic by striking down any reform legislation. Observe, moreover, that judges like Butler were not bashful at imposing on the law their own cracker-barrel ideas about life, thus indicating that judicial notice of everyday affairs could lead to disastrous results in the hands of an opinionated jurist. At the same time, when the issue in the due process cases came to turn upon the reasonableness of the legislative response in light of the existing data, judicial notice became a crucial device whereby the judges could be informed about that data, or, in the event counsel were inept, could inform themselves.

In addition, there was considerable evidence available that trial judges might arbitrarily invoke judicial notice to invade the province of fact finding.<sup>41</sup> In point of fact, Morgan was gloomy about the whole business of trials *per se*. Witness his review of a book on trial tactics:

In the light of . . . experience he accepts a trial for what it is—a game in which the contestants are not the litigants but their lawyers.

If only a reviewer could assert that this book is a guide not to the palaces of justice but to the red-light districts of the law! But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly. He has told it calmly, without pretense of shame, and (God save us!) without the slightest suspicion of its shamefulness.<sup>42</sup>

<sup>40</sup> *Id.* at 533-34.

<sup>41</sup> *Cf.* 9 Wigmore, *supra* note 9, § 2569, at 540 n.4.

<sup>42</sup> Goldstein, *Book Review*, 49 *Harv. L. Rev.* 1387, 1389 (1936).

Add to this the chagrin the intellectual community felt over the trial judge's handling of the Sacco-Vanzetti affair,<sup>43</sup> and the picture is complete.

It is interesting to re-read then Professor Frankfurter's words during the Sacco-Vanzetti controversy when he said:

All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism.<sup>44</sup>

How much better would it be, therefore, if the rules of procedure were better thought through and designed so as to eliminate the number of opportunities for judges to go wrong. Thus, it is submitted, out of an intellectual milieu in which judges were seen to act in a high-handed fashion and judicial notice had been seen to be sorely abused by them, Morgan was driven to create for judicial notice what we can fairly call a set of neutral principles to guide and, if necessary, to police the behavior of judges.<sup>45</sup>

Hence one can find in Morgan's classic article a set of basic postulates that he saw essential to our system of courts. The judge decided questions of law, the jury questions of fact. If a question of fact happened to be so well known as to be common knowledge, or the answer could be readily found in sources of indisputable accuracy, then reason and proper regard for the seemingly obligated the judge to take judicial notice of it. By definition, therefore, judicial notice was limited to the indisputable and only the indisputable. Hopefully this canon would, if universally accepted, cause judges to pause and reflect before they jumped. At the same time, because judges were limited to taking judicial notice only of the indisputable, logic dictated that once they did take notice, evidence to the contrary was out of the question. The very fact that the judge's ruling brooked no subsequent contradictory evidence also served as an additional factor to cause the judge to hesitate before abruptly ruling on the matter. Add to this the requirements for adequate notice, so that both

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<sup>43</sup> E.g., Joughin & Morgan, *The Legacy of Sacco and Vanzetti* 177 (1948):

Why keep this controversy alive? The most vulnerable spot in all the proceedings lay in the function and power of the trial judge in dealing with the motions for a new trial. Had [these motions] . . . been presented to an unprejudiced tribunal, it is highly probable that a new trial would have resulted.

<sup>44</sup> Frankfurter, *The Case of Sacco and Vanzetti* 108 (1927).

<sup>45</sup> Consider also Morgan's reaction to a more recent cause celebre.

And the entire nation has recently had a demonstration in the hearings of the McCarthy-Army controversy of the needless expenditure of time and money, as well as the injustice to participants and strangers, wrought in a proceeding, adversary in form, in which the presiding officer of the tribunal was unable or unwilling to enforce orderly procedure by confining the parties and witnesses to relevant material presented in a seemly manner.

Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 3-4 (1956).

sides could be heard on the question before any ruling was made at either the trial or appellate level, and one can see what a superb system of order Morgan had imposed upon the morass of judicial notice. It was *tour de force*, and the current Uniform Rules in this regard fairly reflect how, once rendered articulate, the Morgan remedy with time became the very embodiment of conventional wisdom.

Alpheus Mason had an interesting comment on this kind of approach, however, when he observed:

The doctrine of judicial "self restraint," like advocacy of "neutral principles," springs from the desire to eliminate or reduce to a minimum predilection and bias, likes and dislikes, in decision-making. Though highly commendable, neither is capable of realization, nor perhaps wholly desirable.<sup>46</sup>

Consider, for example, Mr. Justice Stone's dictum that, "for the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."<sup>47</sup> For our purposes this dictum nicely summarizes the whole mood of judicial restraint which came to dominate an era and in which the Morgan thesis thrived. Apply this dictum to *Brown v. Board of Education*,<sup>48</sup> however, and it is easy to appreciate Mason's reservation.

#### B. *A Piece of Contemporary Journalism*

Having studied and reflected upon the Thirties, we can get some feeling for the period and, perhaps, we can formulate an accurate description of those times. We cannot now form an accurate image of our own times because we are too caught up in the myriad events which comprise them. If, however, we are going to evaluate the Davis thesis, we are going to have to look at it in light of the times in which it was promulgated. Let us then recognize that, whereas any accurate delineation of the socio-economic and political picture of the here and now exceeds our capabilities, nonetheless we might catch the *Zeitgeist* if we dare take the plunge.

We might start by observing that "planning" has become one of our syndromes even in the private sector of the economy, although there it is apt to be called "rationalizing." For instance, Gardiner Means has suggested that prices are set to yield not the greatest profitable return, but a comfortable return which will not quite be great enough to tempt others to expend the effort to accumulate the capital necessary to launch a competitive enterprise.<sup>49</sup> At the same time the central government busies

<sup>46</sup> Mason, *The Supreme Court: Palladium of Freedom* 147 (1962).

<sup>47</sup> *United States v. Butler*, 297 U.S. 1, 79 (1936) (dictum).

<sup>48</sup> 347 U.S. 483 (1954).

<sup>49</sup> Means, *The Corporate Revolution in America*, 162-65 (Collier ed. 1962). In elementary terms this is easy to visualize. Let us suppose we can get 10 percent return on our current

itself manipulating taxes and its own spending so to encourage growth without untoward inflation.<sup>50</sup> In a very real way, as a matter of fact, the central government has become the largest single investor in the private sector, since it takes roughly fifty percent of the income thereof off the top in the form of taxes to finance its own activities.<sup>51</sup> In large measure, therefore, the wealthy corporations finance the central government, while the central government is committed to maintain an economy conducive to wealthy corporations.

This new society has become so complex that the man in the street cannot hope to formulate a grasp of it. In nineteenth century England it may have been possible to follow Hansard and take a position on some clear-cut issue, but in our complex society clear-cut issues are all but nonexistent because of the interdependent variables involved. Conventional wisdom now tends to be filtered through the particular group to which one belongs, be it the ACLU, ADA, the Birch Society, or CORE. Any consensus, therefore, is not so much the meeting of minds of the masses but the general agreement of these intermediate bodies. Ours, then, is an era of the collective, and the collectives' thinking is influenced in turn by the consensuses hammered out among them by federal and state executives. In large measure the constructive thinking which leads to the accommodations among these collectives is done not only in the governmental agencies and at the top echelons of these interest groups, but in the foundations and universities. We are on the verge of being ruled by consensuses arrived at among the leaders of these collectives, who themselves are on the verge of constituting themselves an interchangeable establishment: witness Ted Sorenson representing General Motors, McGeorge Bundy at the Ford Foundation, and Professor Haar in Washington.

In our era Stone's idea about using the ballot box to achieve change ignores the facts that the several collectives have cancelled each other out and that legislative change is possible only if the collectives can be brought together into a consensus presided over by the executive department. In point of fact it could be seriously argued that parliamentary

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investment but this 10 percent would not be enough to attract capital for investment in a potential competitor. Our task then is to manufacture enough of our product in light of demand so that our yield remains 10 percent. If demand increases so a price increase would return us 20 percent, we won't increase prices but will increase production because a 20 percent return would attract competition. If we can't get 10 percent because of decreased demand, our choice is to cut our return or our costs. The contemporary mania with cost accounting, etc., evidences which choice we will make in practice. Thus, notwithstanding the folklore of supply and demand, the job of the entrepreneurs here is to plan output in terms of optimum results.

<sup>50</sup> See Shonfield, *Modern Capitalism: The Changing Balance of Public and Private Power*, chs. 14, 15 (1965).

<sup>51</sup> See Berle, "Property, Production and Revolution," 65 *Colum. L. Rev.* 1, 8 (1965).

democracy is losing its significance in England, and that it is only as a check upon the executive that Congress remains significant in this country.<sup>52</sup>

If this sounds totally absurd, one should consider the situation at the local level. Urban renewal, for example, is not an on again, off again proposition. The investors, the building industry, the local public agencies, the federal authorities, and any number of people have become committed for the long haul. Long range planning is the key, and there is too much at stake to allow politics as usual. As a result we are seeing these plans assembled and run by consensus among the interested groups, with the result that, as a practical matter, the local elected council is rendered irrelevant. Classic notions of democracy have, in short, been replaced by executive government, the executive in its turn being successful only to the extent that its policies crystallize the consensus among the local collectives.<sup>53</sup>

The legislature, left to its own devices, has ceased to be an effective affirmative organ because it has lost the initiative in consensus building. Proposals which have not been reduced through the executive branch to solutions of conventional wisdom die on the vine. There has developed a gap in the system, therefore, whereby no instrumentality exists to effectuate felt needs which escape the consensus-building capacity of the executive. Into the breach have marched the courts, and in the last ten years any change outside the arena of consensus has been attributable to judicial legislation.

*Brown v. Board of Education*,<sup>54</sup> after all, is simply a convenient illustration of this phenomenon. Wechsler has, however, carefully pointed out

<sup>52</sup> Shonfield, *supra* note 50, at 336:

The Congressional system is indeed one of the very few examples of vital democratic control in the Western world today. The professionalism of the best committees and their whole apparatus for conducting a dialogue with the Administration on equal terms are the admiration of other countries, where the parliamentary process seems to penetrate less and less into the important activities of government.

See particularly pages 350-53.

<sup>53</sup> Plager & Handler, "The Politics of Planning for Urban Redevelopment: Strategies in the Manipulation of Public Law," 1966 Wis. L. Rev. 724, 772-73:

We have examined the decision-making process in five urban redevelopment efforts. . . .

All five efforts required the participation of the local legislative unit of government in the decision-making process. This participation is required by law and is designed to inject democratic values and some measure of disinterested planning expertise into the decision. In four of these efforts . . . the participation of the local legislature, as well as other groups in the community, was ritualistic and formal rather than genuine. By the time the projects were made "public," serious debate and decision making had been foreclosed. In these four efforts, the proponents of the projects were able to monopolize the available political and planning skills . . . . The locus of actual power rested on those able to command the two skills, and regardless of who actually wielded the power the decisions were managerial or bureaucratic, not democratic.

<sup>54</sup> 347 U.S. 483 (1954).

that that decision did not by itself overrule the separate-but-equal formula, but rather held that it had no place in public schools.<sup>55</sup> This was so because segregated schools could never be equal, as the very act of segregating branded the segregated children with a feeling of inferiority so deleterious that it would be impossible for them to obtain an equal education no matter how equal the facilities and the teachers. But this proposition is not an indisputable fact.<sup>56</sup> Even granting appropriate notice and opportunity to both sides to present information to the court, how could the court take "judicial notice" of such a proposition? Arguably, therefore, the Chief Justice's famous footnote and the propositions cited therein were not judicial notice but sheer rhetoric justifying a result.

If judicial notice includes propositions which are not necessarily indisputable, however, then no objection should be forthcoming. Judicial notice need only be expanded to include conventional wisdom, albeit arguably not indisputable data, and all is right with the world again. When appellate judges come to consider promulgating a new rule, therefore, the data upon which they base their reasoning need not be indisputable; it need be merely acceptably sound. Thus, by way of analogy to the due process cases, the propositions forming the basis for the judicial legislation need not be true; they need be only propositions a reasonable legislator could accept as likely to be true.

Viewed in this way, the Davis theory of judicial notice is just as much a product of the times as was the Morgan theory. Courts seen as super-legislatures must be allowed to roam far and wide and must at all costs not be inhibited by any requirement that the facts with which they deal must be either found in the record or attributable to common knowledge or sources of indisputable accuracy.<sup>57</sup> The law, in short, must be seen as a creative process and the rules of judicial notice recast to expedite this creativity.

Interestingly enough, the simple answer would appear to be: use the Morgan approach at trial when the law is clear and only the facts are in dispute, but shift to the Davis approach when ruling whether such

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<sup>55</sup> Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1, 32 (1959).

<sup>56</sup> *Id.* at 32-33. The Chief Justice cited a number of authorities, including Kenneth B. Clark. *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954). Clark himself answered the critics of his view. Clark, "The Desegregation Cases: Criticism of the Social Scientist's Role," 5 Vill. L. Rev. 224, 236-40 (1960). But see Van den Haag, "Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark," 6 Vill. L. Rev. 69 (1960).

<sup>57</sup> Thus Davis, *supra* note 15, at 83:

My opinion is that judge-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."

and such is the tenor of the law rule. Such an accommodation is imminent in the recent edition of a casebook that had been associated with Morgan in the past.<sup>58</sup> Davis might be willing to accept this answer applied to jury trials.<sup>59</sup> With a nonjury trial, however, Davis seems willing to let the judge trying a case like our trolley-car case assume that the trolley did have a gong so long as he then gave the defense opportunity to present evidence that it did not.<sup>60</sup> In nonjury trials, at least, academic distinctions between fact and law ought to be forgotten and the job expedited. In lieu of hidebound concepts, therefore, Davis envisages these trials as exercises by the judge of common sense, the only real principle being that he ought to be fair to the opponent if he does judicially notice a reasonable hypothesis, and allow room for debate if he is challenged.<sup>61</sup>

What is interesting about this is the fact that the judges are not to be disciplined by concepts but left pretty much to their own devices moderated only by a cricket morality. The "wreckers" then of the thirties have been transposed into the constructive "doers" of the sixties, and judicial notice, instead of being an intellectual fence, is now seen as an intellectual launching pad. But, if it is true that judicial notice as a working device is going to be defined differently in each generation, then we are left with the rather interesting conclusion that judicial notice is merely a contemporary gloss put on the judicial process from time to time, and we do not have a reliable theory which can stand on its own feet independently of current idols.

#### IV

##### THE REAL PROBLEM

Earlier we looked at *People v. Enders*,<sup>62</sup> the New York trial court opinion which led to an entry in a local hornbook to the effect that "Since its introduction in 1904, the hamburger has become one of the most

<sup>58</sup> Maguire, Weinstein, Chadbourn, & Mansfield, *Cases on Evidence* ch. 1 (5th ed. 1965). See also McCormick, *Evidence* § 329 (1954).

<sup>59</sup> Davis, *supra* note 15, at 94: "Nothing short of bringing facts into the record, so that an unabridged opportunity is allowed for cross-examination and for presentation of rebuttal evidence and argument, will suffice for disputed adjudicative facts *at the center of the controversy.*" [Emphasis added.]

<sup>60</sup> *Id.* at 80:

The judge should assume facts freely, stating them whenever a party may possibly want to challenge them; the judge will naturally go on assuming the noticed facts until he has reason to believe he should not do so, and he will allow presentation of evidence or argument to disprove the noticed facts, except when such a presentation seems to waste his time.

Compare this with the italicized portion in note 59 and the reader will realize that it is not entirely clear where Davis would draw the line.

<sup>61</sup> *Id.* at 94: "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 . . . ."

<sup>62</sup> 38 Misc. 2d 746, 237 N.Y.S.2d 879 (N.Y.C. Crim. Ct. 1963).

popular menu items in the United States." When we examined the case, however, this entry under judicial notice was questionable. Whence then did the judge's rhetoric, reinforcing and rationalizing his conclusion, come to merit an entry under "judicial notice?" No doubt Dean Prince was motivated by a sardonic sense of humor when he compiled this particular list, letting the list be a warning to the reader that judicial notice might not be a fixed doctrine at all. But others have taken this sort of statement seriously. For example, the persons who write headnotes for *West's New York Supplement* appended this as note fourteen to the same case:

That patriotic fervor engendered by two wars with Germany did not diminish demand for hamburger though some restaurants after World War I changed the name of hamburger steak to Salisbury steak and hamburger sandwich to Liberty sandwich was common knowledge.<sup>63</sup>

Once extracted, of course, this gem then appeared at face value in *Abbott's New York Digest*<sup>64</sup> and *West's General Digest*.<sup>65</sup>

In rhetoric, *Webster v. Blue Ship Tea Room, Inc.*<sup>66</sup> is quite reminiscent of *People v. Enders*. In this instance the plaintiff was eating a bowl of fish chowder in the defendant's restaurant when something stuck in his throat, which after two esophagoscopies, turned out to be a minute piece of fish bone. The plaintiff sued for breach of implied warranty and recovered a verdict which was set aside by the Supreme Judicial Court of Massachusetts because, rather than an impurity like a stone in a bowl of bean soup, miniscule fish bones are an integral part of fish chowder. The single headnote annexed to the regional Reporter's version of the case is to the point. What, however, if the *New York Supplement* crew had been assigned to the task of composing the headnotes? The following is a fair sample of what *inter alia* we might expect: "Chowder is an ancient dish preexisting even the 'appetites of our seamen and fishermen.'"<sup>67</sup> Or, "A namesake of the plaintiff, Daniel Webster, had a recipe for fish chowder which has survived into a number of modern cookbooks and in which the removal of fish bones is not mentioned at all."<sup>68</sup> Thus, we ought to pause when we reflect that, had this been done, it would have been fed into standard source books. The "law" appears, as a matter of fact, to be made in these instances by headnote writers. These unnecessary entries which glut our law books are caused by a failure to distinguish between when judicial notice as a defined device is involved and when the judge is merely using a gloss to render articulate his train of thought.

<sup>63</sup> Headnote, 237 N.Y.S.2d 879, 882.

<sup>64</sup> 9B *Abbott, New York Digest* 2d 149 (1964).

<sup>65</sup> 22 *General Digest* 3d 663 (1963).

<sup>66</sup> 347 Mass. 421, 198 N.E.2d 309 (1964).

<sup>67</sup> *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, —, 198 N.E.2d 309, 311 (1964).

<sup>68</sup> *Ibid.*

Why, however, should the headnote writers get themselves into this predicament? The real culprit is the illusion that the legal system does operate like the machine described earlier and that each of its component parts has well-defined dimensions and a precise function to perform. A judge programmed in terms of Morgan snaps his thinking into a judicial-notice frame of mind only when the litmus-paper-like rules now embodied in rule 9 turn red. Davis has begun to break away from this approach, but it is still revealing that he argues in favor of his own substitute "system" and that he seems willing to try to propound a more elaborate series of criteria. In a sense, therefore, the West crew, Morgan, and Davis are disputants, but they all belong to the same church in the sense that they operate within the same frame of reference.

The time is ripe, therefore, to take a different tack. Absurd as it sounds, judicial notice is not a distinct doctrine like the hearsay rule or best evidence; rather, judicial notice *is* the art of thinking as practiced within the legal system. Indeed, the fundamental error lies in teaching judicial notice as an aspect of Evidence. Instead, judicial-notice materials constitute the raw materials for a system of legal criticism in the same way that aesthetics are a tool of the literary critic. This is so because any legal system is just a maze of rules in a book until we install judges in office to preside over the actual running of the system. But the "law" does not in itself enable the judge to do any more than blindly follow rules in a book; from some source he must keep in tune with the environment and with society's sense of justice. If he is going to engage in social engineering, or even upset a too-outrageous jury result now and then, the system as depicted in our model would be too stultifying a frame. It is judicial notice, then, which stands for the judge's thinking about how he shall build social channels and settle disputes with the droll and in themselves impotent statements called "Rules of Law."

Teaching "judicial notice" tends to crystallize the thinking process into rules. Indeed, one must recall the old war cry of first year law teachers who bellow at hapless students, "Think like a lawyer!" But do lawyers think differently than any other well-honed human being? To reply that lawyers think like lawyers is not particularly helpful. The real key, perhaps, is that lawyers tend to respond to situations by cataloguing them in terms of their own parochial concepts. That is, they apply their own peculiar language to a given situation. The difficulty is that, in time, the law crowd become prisoners of their own language.

Before the realists cheer too loudly, however, there is much to be said for keeping the publicly articulated thinking of judges obscured in terms of "judicial notice." Consider again our trolley case. There plaintiff

missed the boat because his lawyer had not gone to trial on the last-clear-chance theory, and he could not complain if the trial judge failed to judicially notice that *this* trolley had a bell. Morganites would insist the court could not, because it was neither common knowledge nor readily ascertainable from any source of indisputable accuracy. At best Davis seems to equivocate. To say on appeal that this was error because "All trolleys have bells" is absurd; maybe most trolleys have them, but chances are there is an oddball trolley about. Still, to put the appellate opinion in terms of judicial notice justifies labelling this statement "law," thus making it a proper subject for appellate judges, and obfuscating the palpable fact that the appeal is being decided on its facts. In short, judicial notice, because it carries the trappings of seemingly opaque "law," can be used to disguise juridical operations which would, while just in themselves, detract from the system's charisma by revealing blunders, emotional responses, bias, and all the other human imperfections inherent in any human institution. To be blunt, this situation illustrates the judges giving the machine a good kick to make the result come out right, judicial notice being used to disguise this fact. Had a realist written the opinion the machine would obviously proclaim that a "tilt" had occurred.

*Brown v. Board of Education* again saw the Court talk in terms of law rules and supposedly indisputable propositions which were the proper subject matter for appellate judges. Admittedly the decision rested on the felt sense that segregation was a denial of equality. But since decisions couched in terms of "we feel" lack the sound of principled law, the language of law had to be used. The question is not merely one of deciding whether the court was "legislating" or whether the opinion as a legal essay hung together well. Rather, we must devise a technique for evaluating the quality of the Court's thinking, and, at the same time, work to immunize this technique from the shibboleths which identify the critic as an exponent of either the activist or restraint-oriented school.

Consider, for example, the vast amount of unstated propositions of judicial notice inherent in Judge Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>69</sup> Had that been the majority opinion and had the judge used phrases like "common knowledge" with which to trigger the appropriate Pavlovian responses, that case would be a classic in some evidence casebook. As it is, "enterprise liability" is being studied as an idea and being criticized in terms of itself.<sup>70</sup> This only serves to illustrate that judicial notice only disguises the broader problem of judicial think-

<sup>69</sup> 24 Cal. 2d 453, 150 P.2d 436 (1944).

<sup>70</sup> E.g., Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," 70 Yale L.J. 499 (1961); "Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight," 70 Yale L.J. 554 (1961).

ing and, when we do not get bogged down in the formalities of judicial notice, we can address ourselves to the soundness of the thinking process.

#### CONCLUSION

Our trouble is that we study torts, or labor law, or judicial notice; the art of thinking as practiced by judges is only an occasional sidelight. The lawyers who pride themselves on being the last "generalists" seem incapable of living up to their own image. If we do study the work of one court it is the Supreme Court, and even then the study is apt to specialize only on an aspect of that Court's work or to be a thinly disguised political analysis of the Court qua superlegislature. My own suggestion is that we turn our sights to one state court and follow it in all of its decisions for a period of time and try to render articulate the thinking processes inherent in its decisions. After dissecting its work over a period of time we will then, and only then, be able to address ourselves to a real study of judicial notice.