

Appellate Issues



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The Call of the Real

By David J. Perlman

Needless to say, judicial decisions are never made in a vacuum. “The judicial mind is not a *tabula rasa*,” as Judge Richard A. Posner wrote.¹ An understanding of how things work in any number of dimensions – socially, psychologically, commercially, technically, medically, scientifically, to name a few – underlies every decision and legal argument. The thoughtful, inquiring

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Protecting the Appeal from “Truthy” Amici Facts: Strategies for Embattled Party Counsel

By Gaëtan Gerville-Réache & Conor B. Dugan

There is something remarkable about the ease with which third parties can invade litigation on appeal as a “friend of the court” and introduce new facts to influence the court’s decision. In the trial court, the rules of evidence and adversarial process empower the parties to exercise considerable control over what information

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Editor’s Note

“All too often, the facts that are important to a sensible decision are missing from the briefs, and indeed from the judicial record” Judge Richard A. Posner wrote in *Reflections on Judging*¹. “The Appellate Record: Adequate or Not?” is the theme of this *Appellate Issues*.

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mind naturally reaches for a breadth of information, and empirical knowledge is a necessary aspect of modern legal reasoning, even if it runs counter to the expectation of a limited record. The roots of the appeal to empirical fact lie in a philosophical shift, a change in outlook, that occurred nearly 150 years ago and that resonates still. William James, instrumental in setting it in motion, called the seismic shift “pragmatism.”

Peirce and James

James credited his friend Charles Sanders Peirce with the initial expression of pragmatism.² In his 1878 essay “How to Make Our Ideas Clear,” Peirce observed that the purpose of thought is to serve as a basis for action.³ Recognizing that his labels were simplifications, Peirce identified thoughts as leading to “beliefs,” which, in turn, form “habits of action.” “Beliefs” and “habits of action” might include what today are referred to as “conditioning” and its manifestations in action as well as our more conscious, deliberate inclinations.

In any event, Peirce proposed that ideas are distinct, one from another, not by their differing verbiage or form of expression but by the differing impact they have in action, consequences, effect, practice — that is, in the world of fact. “...The whole function of thought is to produce habits of action,” he wrote, “and that whatever there is connected with a thought, but irrelevant to its purpose [of producing habits of action], is an accretion to it, but no part of it...”⁴

“Thus,” he concluded, “we come down to what is tangible and conceivably practical as the root of every real distinction of thought, no matter

how subtle it may be; and there is no distinction in meaning so fine as to consist in anything but a possible difference of practice.”⁵

Peirce, in effect, located meaning in results; the meaning of thought lies in the actions it produces and the real world consequences of those actions. And from here, it’s a short step, if a step at all, to locating the validity or truth of an idea in consequences.

Carrying Peirce’s perceptions much further, James coined a metaphoric shorthand, referring to the value of an idea — and the words that express an idea — as their “cash-value:”

...You cannot look at any such word as closing your quest. You must bring out of each word its practical cash-value, set it at work within the stream of your experience. It appears less as a solution, then, than as a program for more work....⁶

Ideas — and the words that convey them — are not self-validating by their own internal logic. Nor can we verify them by presupposing an independent structure, for that, too, would be just another idea. As James continued, italicizing for emphasis, as he habitually did:

*Theories thus become instruments, not answers to enigmas, in which we can rest. We don’t lie back upon them, we move forward, and, on occasion, make nature over again by their aid.*⁷

Our theories act upon the world, sometimes altering it, thereby manifesting their significance. And the consequences of such actions, in turn, remake our theories, at least if we remain atten-

tive to consequences. A theory, then, is a component in a dynamic interplay with fact.

The Boston Clubs

Although James highlighted Pierce's 1878 essay, the seeds for pragmatism were planted earlier. In an unpublished paper, Peirce referred to what he called "The Metaphysical Club." It was a club of eight members, meeting in Cambridge, Massachusetts. Three were lawyers. It was also a club heavily weighted with luminary genius. There were Peirce, James, philosopher John Fiske, philosopher Francis Ellingwood Abbot, and philosopher, mathematician and astronomer Chauncey Wright. The lawyers were Joseph Banks Warner, Nicholas St. John Green, and Oliver Wendell Holmes, Jr.⁸

First meeting in 1872, The Metaphysical Club was a successor to a no less brilliant consortium convening in the late 1860's. Here, too, lawyers were well represented; they were Holmes, John Ropes, John Gray, Moorfeld Story, and Arthur Sedgewick. John Fiske and William James joined the Tuesday night dinner meetings. Also present were novelists William Dean Howells and James' brother, Henry James. And there was a place at the table for another Henry, Henry Adams.

As Louis Menand wrote in a spellbinding intellectual history, "The Metaphysical Club memorialized by Peirce was ... one of many places where Cambridge intellectuals got together. Its members knew each other from other gatherings. And they all knew Chauncey Wright."⁹

And, at the center of this seismic shift, as the attendance list suggests, was the law.

Professor Green

One of the leading lights was then Harvard Law Professor Nicholas St. John Green. Peirce, who credited Green as an influence, referred to him as "a skillful lawyer and a learned one."¹⁰ Green rejected the prevailing idea that legal terms, in Menand's words, "refer to something immutable and determinate."¹¹ In Green's view, the terms of the law are not fixed. They have no absolute referent. They are not things themselves, unchanging over time. Rather, they derive meaning from their application. They are "instruments" in the Jamesian sense.

Darwin understood the concept of "specie" in the same way. It isn't a thing, a phenomenon, a condition fixed in nature but a social construct that aids our understanding of nature; for if species were absolute and fixed, how could new ones evolve?

James described scientific theories similarly:

"... [Scientific investigators] have become accustomed to the notion that no theory is absolutely a transcript of reality, but that any one of them [i.e. scientific laws or theories] may from some point of view be useful. Their great use is to summarize old facts and lead to new ones. They are only a man-made language, a conceptual shorthand, as some one calls them, in which we write our reports of nature; and languages, as is well known, tolerate much choice of expression and many dialects."¹²

Likewise, according to Green, the legal concept of proximate cause is not itself a fact or reality but a useful, manmade theory. To Green, a giv-

en effect has innumerable possible causes, depending on your perspective; indeed, even the distinction between cause and effect seems to melt away in his description:

There is no chain of causation consisting of determinate links ranged in order of proximity to the effect. They are rather mutually interwoven with themselves and the effect, as the meshes of a net are interwoven. As the existence of each adjoining mesh of the net is necessary for the existence of any particular mesh, so the presence of each and every surrounding circumstance, which taken by itself we may call a cause, is necessary for the production of the effect....¹³

We pull a single cause from the mesh and deem it proximate in order to attach liability in a particular case or genre of cases. Yet that doesn't render a designation of proximate cause arbitrary. The validity of a selection lies in the consequences of that selection; it depends, that is, on whether the consequences fulfill the underlying purposes of a given legal rule and the body of law as a whole. Whether a designation of proximate cause fulfills broader underlying purposes is determined by an act of interpretation. The field of interpretation would be masterfully illuminated in our era by legal philosopher Ronald Dworkin.

Ahead of his own time, Green suggested an approach to legal reasoning that Holmes was perfectly comfortable with but that many practitioners and jurists still hesitate to acknowledge — that is, reasoning from a result backward. “It is the merit of the common law,” Holmes wrote in 1870, “that it decides the case first and deter-

mines the principle afterwards.”¹⁴ Instinctively, we all know that it makes sense to posit an outcome to a case, conceive of an argument within the mode of legal discourse that would support the outcome, and then assess how well the argument works, perhaps comparing it to other prospective outcomes and arguments; as a practitioner faced with a client problem, there's not much else you can do. The assessment whether an argument works is, again, interpretive, an assessment of how prospective outcomes and supporting rationales fit together, and, ultimately, fit within broader legal and social practices. Quite properly, legal reasoning is “result oriented;” but it is “result oriented” in the pejorative sense only when the fit is awry.

Wendell Holmes

It was Holmes who illumined the law with the torch of pragmatism. The view that terms are not fixed and that consequence plays a role in reasoning is allied to his view that the law doesn't grow by logic; logic is just another piece in the toolkit: “The life of the law has not been logic: it has been experience.”¹⁵ In the same paragraph of *The Common Law*, Holmes disavowed a model of legal reasoning akin to a mathematical system that produces an objective result if only you supply data for the variables: the law “... cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

Sixteen years later, with the 1897 appearance of his essay “The Path of the Law,” Holmes expanded his view of legal reasoning, of both what it is and ought to be. Again, he identified as a “fallacy” “... the notion that the only force at work in the development of the law is log-

ic.”¹⁶ He did not mean that the law and legal decisions are irrational or unprincipled but that a legal result cannot be derived by logical deduction. The law cannot be “... worked out like mathematics from some general axioms of conduct.”¹⁷ Newton, again, explains only so much.

Holmes saw the law as complex in the same way as Green. You can frame a legal argument or decision as a syllogism, but inevitably something bubbles up to expose a blemish or birthmark on the major or minor premise. “You can give any conclusion logical form,” he wrote. “You can imply a condition in a contract. But why do you imply it? Is it because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement and therefore not capable of founding exact logical conclusions.”¹⁸

Put another way: “There is a concealed, half-conscious battle on the question of legislative policy, and if any one thinks it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper upique et ab omnibus*.”¹⁹

Legal doctrines allocate liability not because the doctrines are absolute or immutable, or correspond to anything absolute and immutable in the universe, or because they are inherently logical, but for underlying, sometimes unacknowledged, ends. This is so not because the law is a evasive or deceptive but because it’s part and parcel of a dynamic system — a system of changing fact, our changing perception and un-

derstanding of fact, and our changing actions in response to fact. The dynamic includes our using law to shape fact and our reshaping law in response to fact. “Theories thus become instruments.”

Holmes understood that the underlying, perhaps unacknowledged, but essential purpose to a legal doctrine will be newly revealed or conceived in time. He illustrated the dynamic of change when he discussed the role of tort law in the commercial and industrial reality of the Nineteenth Century, presaging in the same passage the economic analysis of law. Although the law of torts, he wrote, comes from

... The old days of isolated, ungeneralized wrongs ...[,] the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later, goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable the public should insure the safety of the work it uses.²⁰

That legal doctrines reflect underlying purposes and are subject to change does not make them unprincipled. Precisely the opposite is true. They change in order to remain principled. History — past applications of legal doctrine — serves as an aid to identifying a deeper still relevant purpose or principle, if any exists.

History must be part of the study [of law], because without it we cannot know

the precise scope of the rules which it is our business to know. It is part of the rational study, because it is the first step toward enlightened skepticism, that is, toward deliberate reconsideration of the worth of those rules.²¹

Perhaps Holmes' best description of applying the law to newly arising facts was metaphoric. When the legal artifact is exposed to the light of the present day, it might resemble a mythic monster. But you can examine its anatomy and determine if it can be refashioned to thrive again in the environment of present day fact, as we know it:

When you get the dragon out of the cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of law the black-letter man may be the man of the present, but the man of the future is the man of statistics and economics.²²

Thus, under Holmes' vision, the law is pulled along by utility, by the world of fact, statistics and economics. The black letter distillation gets you only so far, for legal doctrine is only one component in a dynamic exchange; it doesn't rise above or exist apart from an evolving cultural context. It's a Jamesian "theory" forever subject to reformulation to align itself with fact.

Simply because the law was once thus and such is insufficient reason for it to remain so; it must retain some present day relevance. As Holmes famously wrote, again in "The Path of the Law:"

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²³

The law, on its path, follows the facts. Principle is answerable to fact, no less than fact to principle. The law always remains open to skeptical questioning in light of what we come to know:

For more fundamental questions still await a better answer than that we do as our fathers have done. What have we better than a blind guess to show that the criminal law in its present form does more good than harm? ... Does punishment deter? Do we deal with criminals on proper principles?²⁴

The Brandeis Brief

On January 10, 1908, Louis D. Brandeis, Counsel for the State of Oregon, filed with the United States Supreme Court what has come to be known as the "Brandeis Brief." At issue in *Muller v. Oregon* was a statute limiting the working hours of women to no more than ten a day. Three years earlier, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court had declared unconstitutional a New York statute that prohibited employing bakers for more than 60 hours a week. While the Oregon attorney general's brief focused on legal authority, Brandeis focused on non-record facts. Yet, his facts had a place in a legal argument. They were intended to establish a reasonable ground for protecting women from a health risk posed by too many hours of work. The facts, the brief asserted, were "common

knowledge of which the Court could take judicial notice.”²⁵

And Brandeis served up a great variety of fact. His brief ranged from assertions about physical and physiological differences between men and women to claims about the impact of working women on children’s health, children’s emotional wellbeing, infant mortality, and even women’s morality. He presented the facts as excerpts or quotations from an array of sources and many facts were contestable. The sources tend to portray women as inferior to men or at least not up to the task in the same way as men. For example, women’s skeletal structure is such, according to one doctor, that they aren’t as suited to standing.²⁶ On the morality point, one source observed that “hard, slavish, overwork” in mills is “driving girls into saloons.”²⁷ But of course, from another vantage, the growing presence of working “girls” in saloons would be a sign of liberation, not moral degradation.

The brief blurred the distinction between commonly held beliefs that would support the legislation, even if contestable, and contentions of actual fact. Likewise, the Court’s opinion, discussing the brief and upholding the protective legislation, blurred a distinction between taking judicial notice of a commonly held belief and of actual facts. A hundred years later, we’d expect an argument on health effects to be entirely different in substance, research methodology, articulation, and presentation. And, today, it would be highly unlikely for a judicial decision to patronize women — to sound sexist, to apply a contemporary judgment — as *Muller v. Oregon*, 208 U.S. 412 (1908) does.

Yet the Brandeis Brief is correctly recognized

for paving the way for successors — briefs that focus almost entirely on extra-record facts about the state of the world that a court is called upon to accept. And at the same time, reading it today serves as a potent reminder of the complex dynamics of a changing world. Both fact and our perception of it are protean.

Professor Davis

Professor Kenneth Davis advanced judicial reliance on non-record facts in a series of articles beginning in 1942.²⁸ Davis drew the distinction between adjudicative and legislative facts, which, in turn, forms the basis for Federal Rule of Evidence 201, adopted with the other rules in 1975. While Rule 201 establishes a procedure for judicial notice of adjudicative fact, the realm of legislative fact remains unconstrained.

Reflecting Davis’ influence, the Advisory Committee Notes begin with a general description of the two sorts of facts. “Adjudicative facts are simply the facts of a particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.”²⁹ The notes later quote Davis’ more specific description of adjudicative facts as “... concerning the immediate parties — who did what, where, when, and with what motive or intent.”³⁰

In the end, legislative facts are anything that is not adjudicative that matters to a proceeding. For the description of legislative fact is so broad — having relevance to the legal reasoning in the formulation of a legal principle or ruling — that it seems impossible to demarcate a non-adjudicative category of fact that falls outside of

that description, except for facts beyond the pale of the relevant or rationally contestable.

Frequently referencing Davis, the Notes provide the rationale for unconstrained consideration of legislative facts; in essence, they posit that a judicial decision cannot be reached without factual presuppositions, even if the facts are contestable. “The judicial process cannot create every case from scratch, like Descartes, creating a world based on the postulate *Cogito, ergo sum*.”³¹ As practical matter, we’re well aware of limits; we can’t litigate everything. Budgets exist and efficiency counts. Also, as we’re aware, broader issues of fact may become known only as thinking unfolds, as a case ascends the appellate ladder, or a wider range of stakeholders foresee its ramifications. But even beyond practical considerations, the Notes point toward deeper conundrums: is it even theoretically possible to prove ever expanding concentric rings of implicated facts? Wouldn’t you need a starting factual premise? Wouldn’t that be contestable? Or if not, mightn’t it become so?

The Notes firmly avoid excluding general non-record facts from consideration or masquerading under a fiction that cases can be decided without them. Rather, they quote Davis for the Holmsian point that they’re essential: “What the law needs at its growing points is more, not less, thinking about the factual ingredients of problems of what the law ought to be”³²

Problems, Of Course

Of course, this category of fact raises problems. Perhaps the most disturbing fall under the general head of intellectual dishonesty. One might imagine a continuum of diminishing culpability. On one end is the intentionally deceptive

use of fact, extending to negligent error and ultimately to errors impossible to avoid due, for example, to the limits of human knowledge. Examples of intellectual dishonesty would include manufacturing a study for advocacy purposes and skewing it accordingly, unabashedly drawing conclusions from inadequate data, or relying on the discredited fringes of a discipline.

But while the inclusion of legislative facts may create occasions for dishonesty or error, it doesn’t reward or promote them, at least not in the case of judicial decisions. The source of both dishonesty and error lies not in an expanded opportunity but at another level — in a propensity to falsely shade a decision or argument or in an insufficient understanding of a factual matter. One check on intellectual dishonesty and error in judicial decisions remains public scrutiny, and not just by lawyers but by authorities in specialized fields. Correctives or checks on advocates remain what they are for other forms of distortion — opposing advocates or amici, and, of course, the court itself. Undoubtedly, inclusion of a greater range of sometimes specialized fact increases the intellectual demands of both lawyering and judging, but shaving away necessary or useful information is an inapt answer to that challenge.

Factual Ballast

Last term’s Obamacare case, *King v. Burrell*, is especially instructive on the role of legislative fact, for it affords an opportunity to contrast a judicial opinion that incorporates a wider field of fact with an opinion that excludes it.

Chief Justice Roberts’ majority opinion (joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagen) benefited from a range of

fact-oriented amicus briefs. The spectrum of voices providing factual ballast included hospitals and other health care providers, insurance companies, economists, the chronic and fatally ill, and organizations representing the diseased.

The legal issue was one of statutory interpretation. Respondents' position was that the phrase "Exchange created by the State" included exchanges created by the federal government for purposes of affording tax credits to individuals purchasing insurance on a federal exchange; the federal government had created backup exchanges, as the statute required, whenever a state opted not to create an exchange. Petitioners' position was that the phrase denied those purchasing insurance on a federal exchange the tax credits otherwise available to their state exchange counterparts.

The majority opinion's first sentence sets a theme concerning the design and purpose of the statute, which, in turn, is a foundation for the Court's interpretation. Specifically, it references interdependent statutory reforms and the statute's purpose: "The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance markets."³³ While that theme might be derived from the statute alone, it is strengthened, along with Court's interpretation of the disputed phrase, by the incorporation of fact. Ultimately, principles of statutory interpretation, the statute as a whole, and a related factual field work in concert to confer meaning on the phrase at issue. The principles of statutory interpretation might be considered tools in the Jamesian sense, while the statute as a whole and the real world facts

constitute the context in which the phrase must exist in the way that makes the most sense.

The Reality Of A Parable

The first section after the introduction provides the factual context. The Affordable Care Act "... grew out of a long history of failed health insurance reform."³⁴ Specifically, it describes state governments' earlier attempts to broaden insurance coverage using only two of The Affordable Care Act's interlocking reforms. These were a "guaranteed issue requirement," which barred insurers from denying coverage for health reasons, and a "community rating requirement," which barred insurers from charging higher premiums for like reasons. It then explains how this led to "adverse selection," people waiting until they got sick to buy insurance. That, in turn, led to higher premiums since fewer healthy people were paying premiums, which, in turn, led to more people postponing an insurance purchase. This was the economic "death spiral," which in turn, drove insurers from the market.³⁵

Two statutory requirements were missing: a penalty for those who failed to buy insurance and tax credits to ensure that certain people could afford the required insurance. Massachusetts added these components and the insurance system worked. Of course, it's the second component, the tax credits, that respondents' interpretation would retain and petitioners' would remove. To support these facts the opinion cites an insurance industry amicus brief, a economists' amicus brief, a study of the state insurance systems, and Congressional testimony on the state health insurance experience.³⁶

This background forms a factual parable, a true

story illustrating the real life consequences of each of the two possible interpretations of the statute. It demonstrates, in fact, not theory, how the components of the Affordable Care Act are integral and must exist and work together. At the same time, it happens to be the story of a pragmatic approach to a legal problem. First, one legal fix was attempted and it didn't achieve the intended objective, so it was tweaked, and then it did. Implicitly, it asks a pragmatic question: are we really prepared to say, now, at this moment, considering the federal statute and the case before us, that absolutely nothing was learned?

The Reality Of Legislation

The opinion returns to fact at a later point. It acknowledges that the statute's drafting was inartful, here and elsewhere. But it goes deeper, finding a touchstone beyond the face of the statute, in experiential fact. "Several features of the Act's passage contributed to that unfortunate reality."³⁷ It then identifies circumstances particular to this Act's passage that might have fostered drafting errors. Thus, it explains the "unfortunate reality" of inartful drafting by a larger reality, the shared, lived reality in which errors occur. This additional reach bolsters the interpretation not merely because it provides a reason for linguistic infelicity but because it taps another dimension, a dimension of experience that we're familiar with and understand; the interpretation is validated by more than legal technicalities. Here, a statute isn't the command of a disembodied, flawless sovereign but, in fact, the product of people under pressure.

The Reality Of Consequences

Finally, when it draws to its conclusion, the

opinion again finds a touchstone, among others, in factual ground, specifically in probable consequences — consequences reminiscent of the opening parable. It rejects the petitioners' interpretation because, if given effect, it would "destabilize the insurance markets" and "likely create the very 'death spirals' that Congress designed the Act to avoid."³⁸

The opinion concludes that, even in Petitioners' view, "... one of the Act's three major reforms — tax credits — would not apply. And a second major reform — the coverage requirement — would not apply in a meaningful way." For without the tax credits, the coverage requirement would apply to fewer individuals. "And it would be a *lot* fewer." On this point, the opinion provides statistics, citing an expert study and the economists' amicus brief. And, contributing to the death spiral, the opinion observes, would be increases in insurance premiums. The opinion again provides statistics supported by citations.³⁹

The inclusion of facts beyond the ordinary, party-specific record strengthens the interpretation. In short, the facts validate the interpretation while the interpretation accounts for a wider range of facts.

James' words bear a prophetic ring. They can be applied even to the intellectual act of interpretation: "You must bring out of each word its practical cash-value, set it at work within the stream of your experience."

The Literal Plane

By contrast, Justice Scalia's dissent (joined by Justices Thomas and Alito) excludes the factual context. Its horizon is narrow. Justice Scalia is

the leading proponent of an approach to statutory interpretation that elevates canons of construction to a set of rules, perhaps the exclusive set of rules, for understanding statutory language regardless of consequences. The dissent's approach is a form of literalism.

The dissent repeatedly focuses on an incongruity that inhabits the literal plane – the distinction between the statutory words “Exchange established by the State” and the words as the statute might have been written but wasn't, “Exchange established by the State or the federal government.” While the majority opinion answers the dissent's points on the dissent's terms, the dissent avoids answering the majority on its terms. Instead, it circles back to its own literal-level starting point that the words “Exchange established by the State” cannot bear a meaning more directly expressible in different words.

Noteworthy here is the single moment when the dissent at least glances in the direction of the legislative facts the majority had incorporated in its opinion:

The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements “would destabilize the individual insurance market.” If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says.⁴⁰ [Citation omitted.]

Under this view, the facts don't count as an interpretive aid. Interpretation stops at the literal

surface. If there's an incongruity between a single, literal reading of the words and a broader experiential context, the latter plays no role in conferring meaning. The incongruity is labeled a “flaw” and we're stopped in our tracks. Interpretation is drawn up short. Flaws are for Congress to fix.

A Refusal to Interpret

Certainly, the constitutional principle of separation of powers is potential interpretive material that might weigh in favor of a legislative solution, but the dissent fails to bring that principle to bear, particularly against the majority's facts. On this score, the dissent says that the court can't “rescue Congress from its drafting errors” except to correct “misprints.”⁴¹ Later it says, “it is up to Congress to design laws with care....”⁴² By proceeding with the interpretation, in the dissent's view, the majority “... both aggrandizes judicial power and encourages congressional lassitude.”⁴³ But these are pronouncements – pronouncements mainly about draftsmanship – not constitutional arguments. They fail as justifications for bringing interpretation to a halt, declining the interpretive aid of related facts, and remaining on a literal plane.

The dissent incorporates general statements of principle on separation of powers (“...ours is government of laws and not of men...”⁴⁴), but they're platitudinous precisely because it refuses to account for fact. One avenue for justifying that it's Congress' job to solve the problem is the familiar one of returning to the literal incongruity the dissent originally identified. But this is not a separation of powers argument. It's a repetition of stopping short the interpretation – i.e. proclaiming that this is a “flaw” or “error”

or “whatever” that courts simply don’t deal with further. It’s not a constitutional reason for halting at the very point where facts might be considered, and then, at that very moment in the interpretive endeavor, passing the problem to Congress.

The other avenue is virtually identical, just a little more elaborate. The dissent proposes that the exclusion of tax credits on federal exchanges may have been intentional.⁴⁵ And of course, if Congress purposefully denied tax credits to people purchasing on federal exchanges and that creates a problem, then Congress should fix the problem.

But the tripping point here is that the context relied upon to suggest that the denial of tax credits was purposeful is merely the literal context of statutory language. Determining Congressional intent from only a literal context cannot, for starters, justify on separation of powers grounds not accounting for the legislative facts the majority raises. For it’s circular to conclude that separation of powers precludes utilizing the majority’s legislative facts for purposes of determining Congressional intent when the very same separation of powers argument is itself based on locating Congressional intent by going no further than the literal level. In the end, separation of powers is not brought into play as a reason not to fully incorporate legislative facts, including those the majority raises, into an interpretation.

Similarly, it is not brought into play to justify the dissent’s bigger step, the one it really aspires to take, the conclusion not simply that legislative facts are beyond judicial evaluation but that it’s for Congress to fix whatever statutory flaw

exists. For the only way that separation of powers could justify that conclusion would be for the dissent to plunge into the same pool of facts as the majority, see what the facts say about Congressional intent on the disputed phrase, and then determine that the facts as a whole convey a message contrary to what the majority found. In other words, the dissent must dive to at least the same interpretive depth as the opposing side, inquire within evidentiary and empirical parameters at least as encompassing, to reach a contrary conclusion of adequate validity to defeat the majority’s.

Again, James’ words carry the prophetic ring: “You cannot look on any such word as closing your quest.” Clinging to the literal becomes a refusal to interpret.

The House of Mirrors

By excluding the larger, factual context — reality, one might say — the canons of construction inevitably become a house of mirrors. The dissent assumes, for example, that if “Exchange established by the State” can be interpreted in the tax credit section to have a meaning rewriteable as “Exchange established by the State or federal government,” then every statutory occurrence of the first must be replaced with the second, and once you do that, the statute makes no sense; therefore, the reasoning goes, “Exchange established by the State” cannot have the same meaning as “Exchange established by the State or Federal government” in the tax credit provision.⁴⁶ The dissent makes a similar move with the word “such.” It argues “such” can’t bear the meaning the majority would attribute to it in the provision requiring the Secretary of Health and Human Services to

establish “such exchange” because then a like phrase in the election clause of the Constitution, “such Regulations,” wouldn’t make sense.⁴⁷

But interpretation, and the majority’s interpretation in particular, doesn’t mandate that words and phrases retain absolute semantic equivalence across all contexts. Such a requirement and all the bugaboos it might generate are solely of the dissent’s own creation. The majority’s answer to the dissent-imagined anomalies is that context counts; in a specific response, the majority quotes a Justice Scalia opinion from the prior term as a canon tiebreaker: “the presumption of consistent usage readily yields to context.”⁴⁸ But the majority’s overarching point, beyond any face-offs of opposing canons — the point that allows the majority to reach a conclusion that “Exchange established by a State” can encompass a federally operated exchange “at least for purposes of the tax credits”⁴⁹ — is that context in all of its dimensions counts. The phrase, the sentence, the statute, the purpose of the statute, and the legislative facts shedding light on the statute, they’re all part of a contextual universe available to confer meaning.

Language itself works in just that way, conferring meaning by context. Jonathan Swift happened to sketch a satirical cartoon of the impulse to nail meaning beyond the vagaries of freely flowing contexts; in *Gulliver’s Travels*, the learned men at the University of Legado carried around knapsacks full of things; that way, they could communicate by reaching for concrete things, avoiding the trouble of slippery words. Despite the insights of Peirce and James and the Boston luminaries, the reification of words re-enters legal reasoning through literalism. One

doorway, as Judge Posner has observed, is a reliance on dictionaries to solve problems of legal interpretation. “Dictionary definitions are acontextual,” he wrote, “but the meaning of words and sentences depends critically on context, including background understandings.”⁵⁰

Ultimately, a stack of definitions is no better than a sack of things. Neither is language. Ironically, dictionaries themselves recognize that words find their semantic running legs in use. In his monumental English dictionary, Samuel Johnson offered source citations, and in a later edition, quotes, a practice the Oxford English Dictionary and other Johnsonian descendants have followed ever since. Dictionary definitions are merely summaries, descriptions, or approximations of context-dependent meaning. And when it comes to legal interpretation — that is, formulating an argument, decision, or legal rule that arises from, and is expected to impact, a world beyond a fabric of texts — context encompasses a factual, not just the textual, setting.

A Claim Relinquished

Narrowing the interpretive focus to a closed universe of canons and text offers no compensating gain in objectivity. Chief Justice Roberts’ majority opinion demonstrates this slyly by repeatedly citing Justice Scalia’s opinions when invoking canons of construction. In other words, the canons can work the other way, too.

But the dissent itself inadvertently relinquishes any claim to a superior grip on objectivity or validity. To refute the majority, the dissent is again impelled to cast a momentary glance beyond canons and text. The majority had noted that the unavailability of tax credits on federal exchanges would cause a whole new set of stat-

utory anomalies. When the dissent counters, it's as if an image flashes in the house of mirrors but the self-reflection is missed:

Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions lined up perfectly with each other.⁵¹

Indeed, the majority's point exactly. But the majority went one better for going further. It found an interpretive fit with the larger reality of fact. For one, it recognized specific, fact-based circumstances that contributed to the "unfortunate reality" of "mismatches" in the text actually before the Court. But more significantly, it saw the relevance in similar health care statutes that had, in fact, failed without a tax credit. And then, it derived meaning from authoritative fact-based assessments that the Affordable Care Act would likewise fail without a tax credit. The majority embraced fact. The dissent retreated.

On the Path of the Law

The law is ill served by entrenchment behind a redoubt of canons. Likewise, by repair to the scholarly garret of history only to pull up the ladder. Self-imposed myopia is a failed discipline.

The particular facts of a case are inextricably embedded in a still larger world. The law attains continuing relevance only by remaining open to that sometimes elusive, changeable environment of fact.

On the path of the law, we may be carried to the edge. We may be challenged. But we can stay attentive. And if we do, perhaps we'll hear a

call sounding from afar, "distinct and definite as never before."⁵²

It's the call of the real.

¹ Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), 272.

² William James, "Philosophical Conceptions and Practical Results," in *The Heart of William James*, ed. by Robert Richardson (Cambridge: Harvard University Press, 2010), 186-187. ("Philosophical Conceptions and Practical Results was an address delivered at the Philosophical Union, Berkeley, California on August 26, 1898); William James, "What Pragmatism Means," in *William James: Writings 1902-1910*, ed. by Bruce Kulick (The Library of America, 1987), 506.

³ Charles S. Peirce, "How to Make Our Ideas Clear," *Popular Science Monthly* 12 (January 1878): 286-302 (<http://www.peirce.org/writings/p119.html>).

⁴ Ibid.

⁵ Ibid.

⁶ James, "What Pragmatism Means," in *William James: Writings 1902-1910*, 509.

⁷ Ibid., 509-510.

⁸ See Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001), 201-232.

⁹ Ibid., 216.

¹⁰ Ibid., 201.

¹¹ Ibid., 223.

¹² James, "What Pragmatism Means," in *William James: Writings 1902-1910*, 511.

¹³ Louis Menand, *The Metaphysical Club*, 224, citing Nicholas St. John Green, "Proximate and Remote Cause" (1870), *Essay and Notes on the Law of Torts and Crime* (Menasha, Wis. George Banta, 1933), 13, 15.

¹⁴ Oliver Wendell Holmes, Jr., "Codes and the Arrangement of Law," *American Law Review* 5:1 (1870) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995) Vol. 1, 212.

- ¹⁵ Oliver Wendell Holmes, Jr., *The Common Law* (1881) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995) Vol. 3, 115.
- ¹⁶ Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* 10:457 (1897) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (1995) Vol. 3, 396.
- ¹⁷ *Ibid.*
- ¹⁸ *Ibid.*, 397
- ¹⁹ *Ibid.*
- ²⁰ *Ibid.*, 397-398
- ²¹ *Ibid.*, 399.
- ²² *Ibid.*
- ²³ *Ibid.*
- ²⁴ *Ibid.*, 400.
- ²⁵ Louis D. Brandeis, “Brief of Defendant in Error,” *Muller v. Oregon*, 208 U.S. 412 (1908), 10. (The Brandeis Brief is available at: <http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety>)
- ²⁶ *Ibid.*, 19-20.
- ²⁷ *Ibid.*, 45.
- ²⁸ Fed. R. Ev., 201, Advisory Committee Notes, citing “An Approach to Problems of Evidence in the Administrative Process,” *Harvard Law Review*, 55:364, 404-407 (1942).
- ²⁹ Fed. R. Ev., 201, Advisory Committee Notes.
- ³⁰ *Ibid.*, citing 2 *Administrative Law Treatise*, 353 (1958)
- ³¹ *Ibid.*
- ³² *Ibid.*, quoting Davis, “A System of Judicial Notice Based on Fairness and Convenience” in *Perspectives of Law* (1964), 83.
- ³³ *King v. Burrell*, 576 U.S. ____, (2015) slip op., majority opinion, 1.
- ³⁴ *Ibid.*, 2.
- ³⁵ *Ibid.*, 2-4.
- ³⁶ *Ibid.*
- ³⁷ *Ibid.*, 14.
- ³⁸ *Ibid.*, 15-18.
- ³⁹ *Ibid.*
- ⁴⁰ *Ibid.*, dissent, 14.
- ⁴¹ *Ibid.*, 17.
- ⁴² *Ibid.*, 19.
- ⁴³ *Ibid.*, 20.
- ⁴⁴ *Ibid.*, 18.
- ⁴⁵ *Ibid.*, 17-18.
- ⁴⁶ *Ibid.*, 6-7. (“Equating ‘establishment by the State’ with establishment by the Federal Government makes nonsense of other parts of the act.”)
- ⁴⁷ *Ibid.*, 7-8.
- ⁴⁸ *Ibid.*, majority opinion, note 3, 15-16.
- ⁴⁹ *Ibid.*, 13.
- ⁵⁰ Posner, 180
- ⁵¹ *King v. Burrell*, dissent at 9.
- ⁵² Jack London, *The Call of the Wild* (New York: Dover, 1990), 54.

...Continued from page 1: **Protecting the Appeal from “Truthy” Amici Facts: Strategies for Embattled Party Counsel**

will enter the record. Procedures abound for challenging unreliable information—e.g., discovery, motions in limine, *Daubert* hearings, objections—and trial courts are expected to play the gatekeeper and filter out the chaff. But then after that record becomes fixed on appeal, appellate courts will often allow amici curiae to create a new record—with new data, statistics, testimonials, and scientific research—to assist the appellate court in its “legislative fact-finding.”¹

The court’s interest in new evidence relevant to its lawmaking creates opportunities for amici, but it presents a conundrum for party counsel. Unlike the trial courts, appellate courts rarely if ever provide a formal adversarial process for challenging questionable amici facts, and the rules of evidence that would lend teeth to the process do not apply. The trial court’s rigorous evidence-testing mechanisms are not available to filter out unreliable amici information, even though fashioning sound legal principles that govern all future cases is surely as important as making correct factual determinations in the instant case, if not more so.

Certainly, many amicus briefs are relatively innocuous on this front. The typical brief that merely retraces legal reasoning of the supported party or that offers undisputed or uncontroversial contextual information is of no concern here. The true concern—for party counsel at least—is the amicus who provides specious information at the eleventh hour that is likely to resonate with the court and influence its rule-making. This article offers some strategies for

striking back, despite the lack of formal procedures for doing so.

Appreciating the trend toward increased reliance on amici for legislative fact-finding

The power of amicus briefs to influence our highest court has been known for some time.² Indeed, 15 years ago, Professors Joseph Kearney and Thomas Merrill observed in an important article that the rise of the amicus curiae represented a “major transformation in Supreme Court practice” over the course of the 20th Century. Whereas in the early part of the 20th Century, amicus briefs were filed in “only about 10% of the Court’s cases,” by the end of the century, “one or more amicus briefs” were being “filed in 85% of the Court’s argued cases.” Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 (2000). The rare case became the one without an amicus brief. This trend has only accelerated in the 15 years since Kearney and Merrill wrote their seminal article. Just two terms ago, over 1,000 amicus briefs were filed—the all-time record. Word has gotten around that amicus briefs can make a difference.

If social proof is not enough, the justices of our highest court have expressly confirmed the potential influence of amici. For instance, while still on the Court, Justice Sandra Day O’Connor noted the importance of amicus briefs in tax and intellectual property cases. Tony Mauro, “Bench Pressed: A Pair of High Court Justices Offer Advocates Advice About the Proliferation of Amicus Briefs,” *The American Lawyer*, vol. 27,

p. 83, March 2005. Justice Breyer has stated that amicus “briefs play an important role in educating judges on potentially relevant technical matters . . . and thereby helping to improve the quality of our decisions.” “Justice Breyer Calls for Experts to Aid Courts in Complex Cases,” *N.Y. Times*, Feb. 17, 1998, at A17. Then-Judge Alito noted in an opinion granting a motion to file an amicus brief that “[e]ven when a party is very well represented, an amicus may provide important assistance to the court.” *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002).

The praise has not been unqualified. While acknowledging that amicus briefs might “sometimes try to fill empirical gaps,” Judge Posner has criticized them as mere “advocacy documents, not subject to peer review or other processes for verification.” Richard A. Posner, *Foreword: A Political Court*, 119 *Harv. L. Rev.* 31, 48 (2005). Indeed, in one case in which he denied a motion to file amicus briefs, Judge Posner wrote that “the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.” *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003). Perhaps he is saying that “friend of the court” is at times a misnomer.

The fact remains that the United States Supreme Court has often relied on amicus briefs to support significant factual issues. On this point, Professor Allison Orr Larsen of William and Mary has done yeoman’s work. In an important and, at times, sobering article in a recent issue of the *Virginia Law Review*, Professor Larsen lays out the frequent reliance of the United States Supreme Court on facts brought to its attention

by amici. See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 *Va. L. Rev.* 1757 (2014). Her article details some of the problems caused by this reliance and also offers some systematic and structural changes that might help safeguard the Court from “bad” facts. Though our focus here is on working within the existing system and structure, we gratefully rely upon Professor Larsen’s article for many of the useful illustrations below.

Two well-known instances are the majority opinion in the University of Michigan Law School affirmative action case, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and the majority opinion in the partial-birth abortion case, *Gonzales v. Carhart*, 550 U.S. 124 (2007). In the former, Justice O’Connor, writing for the Court, said that the “Law School’s claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. . . [N]umerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” *Grutter*, 539 U.S. at 330 (quoting Brief for American Educational Research Association et al. as Amici Curiae 3). Referencing a testimonial amicus brief, Justice Kennedy wrote in *Carhart* that he could “find no reliable data to measure the phenomenon, [but] it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” 550 U.S. at 159 (citing Brief for Sandra Cano, et al., as Amici Curiae in No. 05–380, pp. 22–24).

Professor Larsen's article supplies a host of other cases where the Supreme Court has turned to these briefs to support minor and major points in its legislative fact-finding.³ In analyzing the Supreme Court's 417 opinions (majority, dissents, and concurrences) in the five years from 2008 through 2013, Professor Larsen found that they contained a total of 606 citations to amicus briefs and slightly over 20% of those citations—124 total—were citations in support of legislative facts. Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1778.

One explanation for the court's increased interest in amicus briefs that judges now recognize the need for a broad perspective to discern good policy. As Oliver Wendell Holmes, Jr. famously wrote in *The Common Law*: "The life of the law has not been logic; it has been experience." Perhaps in this age of increased cultural self-awareness and greater faith in social science, the judiciary is less willing to rely on its own limited, subjective, and outdated experience as the exclusive lodestar. Perhaps it finds the support of subject-matter experts reassuring. Rightly so. But at the same time, the court risks undermining the public's respect for those policy decisions if it relies on ill-founded amici facts for support.

Identifying the weaknesses in an amicus brief's legislative facts

Professor Larsen identifies some recurring foundational defects in amici briefs. First is the amicus brief that cites to some source that is either on file with the author or not publicly available. One of the most striking examples that Larsen gives is that of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). There, the question present-

ed was "whether the Due Process Clause of the Fourteenth Amendment was violated when" a state supreme court justice refused to recuse himself from hearing a case that involved a corporate party whose president had donated millions of dollars to support the justice's election—much of it in the form of independent expenditures. 556 U.S. at 872. The corporate party prevailed in the state supreme court on a 3-2 vote. But the United States Supreme Court held that the failure to recuse *did* violate due process. In his dissent, Chief Justice Roberts cited an amicus brief for the proposition that independent expenditures might actually harm a candidate. *Id.* at 901 (citing Brief for Conference of Chief Justices as Amicus Curiae 27, n.50 (which, in turn, cited various "examples of judicial elections in which independent expenditures backfired and hurt the candidate's campaign"). As Larsen points out, the "amicus brief cites a law review article for the fact, which, in turn, cites an e-mail from a state judge that is only 'on file with the author.'" Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1785.

Another problem with amicus facts is what one might term the navel-gazing or self-referential brief. This sort of brief relies upon an amicus's own research for support. The Supreme Court has relied on such *amicus* briefs. For instance, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8, 10 (2010), the court examined whether a federal statute which "makes it a federal crime to 'knowingly provid[e] material support or resources to a foreign terrorist organization,'" violated the First Amendment and was unconstitutionally vague. The court held that it did not violate the First Amendment and was not unconstitutionally vague and supported its hold-

ing with the observation that money raised for charitable purposes had been redirected for terrorist activities. To support this assertion, the court relied, in part, upon an amicus brief filed by the Anti-Defamation League (ADF). *See id.* at 32 (citing Brief for Anti-Defamation League as Amicus Curiae 19–29 (describing fundraising activities by the PKK, LTTE, and Hamas)). As Larsen notes, the ADF brief’s “principal support for this claim comes from a series of ‘fact sheets’ that it authored and published on [ADF’s] own website.” Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1793.

A related category is the amicus brief containing research that seems to have been manufactured for litigation. In *Kirtsaeng v. John Wiley and Sons, Inc.*, 133 S. Ct. 1351 (2013), the court addressed whether the “first sale doctrine” in copyright law—the doctrine that a copyright owner has the right to control only on the first sale of his copyrighted work—is geographically limited. The majority opinion cites the American Library Association’s brief for the fact that “library collections contain at least 200 million books published abroad,” to underscore the need to apply the first sale doctrine abroad. *Id.* at 1354–55. As Larsen notes, that amicus brief cites to a blog post written by a person who works at the Online Computer Library Center, a worldwide library cooperative organization. The blog post notes that it was written in response to a request “to provide an estimate on the number of books held by US libraries that were published outside of the United States.” The blog “ceased to exist” after the litigation ended. Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1792.

Though certain factual assertions would not

withstand scrutiny in a trial court, they could be entirely accurate. Or perhaps, as in *Kirtsaeng*, the general point is so undebatable, and the factual accuracy of the details so inconsequential, that nobody really cares. However, these examples do illustrate two points: One, the cited support for an amici’s legislative facts should not be accepted at face value. Two, appellate counsel cannot expect the appellate court to ignore an amici’s dubious assertions when they go unchallenged.

Strategies for challenging factual assertions in an amicus brief

Appellate counsel face two potential difficulties in effectively challenging the factual assertions of amici. The first is procedural: the appellate courts often lack formal procedures for objecting to or responding to an amicus brief. The obvious solution is to file a motion for leave to file a responsive brief, but there is a risk it might be denied. We suggest some tactics below for persuading the court to grant the motion. The second challenge is that the normal rules of evidence do not apply; in other words, there are no formal rules governing what sort of evidence or bald factual assertions amici can introduce, as long as they pertain to legislative facts. *See, e.g.*, Fed. R. Evid. 201(a) (governing judicial notice of an “adjudicative fact only, not legislative fact”). As we explain below, that obstacle is overcome by leveraging the principles that undergird well-established evidentiary rules and procedures.

Short of taking the drastic, usually unwelcomed, and routinely ineffective measure of filing a motion to strike, the only other defensive procedure available to appellate counsel is to file a responsive brief. Sometimes the court

rules provide an opportunity to respond in the regular briefing schedule, by setting the amicus brief deadline before the deadline for filing the appellee's principal brief or the appellant's reply brief. *See, e.g.*, Sup. Ct. R. 37(3)(a). At other times, the **amicus** brief is not due until after the deadline for briefing has passed. *Compare* Sup. Ct. R. 37(2)(a) (requiring the amicus brief in support of the petitioner to be filed within 30 days after the case is placed on the docket) and Sup. Ct. R. 15(3) (requiring the brief in opposition to a petition for a writ of certiorari to be filed within 30 days after the case is placed on the docket); *see also* Mich. Ct. R. 7.306(D)(1). In the latter case, the problem may be resolved by motion. Many appellate courts have a relatively liberal motion practice and the power to grant leave to file a response to an amicus brief.

Though the trial court's procedures for evidence testing do not apply here, the underlying principles of fairness and truth-seeking still do. Those principles should be brought to bear in the motion for leave. Fairness calls for parties to be given an opportunity to respond when amici make controversial factual assertions that could influence the rule of law and, consequently, the outcome of the case. Moreover, the court should want notice that important amici facts are incorrect or unreliable for the sake of developing the correct rule of law. If anything, amici need to know that their factual assertions are subject to challenge, as this keeps them honest. Disallowing a response allows amici to become ploys for raising ostensibly compelling arguments that do not withstand scrutiny.

Of course, the most important element in persuading the court to grant the motion is the

merits of the response brief itself. To that end, why not, again, evoke the ethos of the trial court's evidentiary rules? Though the rules themselves do not apply, the concerns they embody certainly do. Those concerns are three fold: relevance, reliability, and fairness. For the appellate court to take notice of an amici fact, it should be relevant to the rule of law at issue, the source should be reliable, and the source should be fairly available for scrutiny.

The best way to undermine the credibility of the amicus brief is to attack the reliability of the brief's factual assertions. Reliability generally boils down to two issues: verifiability and credibility. If the amicus does not cite any supporting authority or the cited authority is inaccessible, then information cannot be verified. *Caper-ton* provides a good example, where the ultimate source for the point that independent expenditures can backfire was an email from a state judge locked away in a professor's desk drawer. 556 U.S. at 901. On the other hand, if the source is verifiable but biased, or lacks relevant subject-matter expertise, then the information lacks credibility. An argument could be made that the Anti-Defamation League's self-referential point in *Holder*, 561 U.S. at 32, lacked credibility because it was based on ADLD's own work. Appellate courts will normally avoid relying on information if they realize it comes from unverifiable or incredible sources.

Apart from the lack of opportunity to respond, fairness is less of an issue in the context of legislative fact-finding. However, there is a fairness argument to be made when the source of information is not accessible. For instance, in federal court, the parties are entitled to the disclosure of

evidence the other side intends to rely upon before it is submitted to the trial court, as this provides the other side an opportunity to examine it and prepare a response. By analogy, it is unfair for amici to cite sources that are not publicly available or attached to their brief, as this unfairly shields the source from the scrutiny of the parties and the court.

As for the principle of relevance, we advise against troubling the court with a responsive brief to object on that basis alone. If the facts are not relevant, one can expect an appellate court to ignore them. Whether a motion is required or not, the dignity of a response should be reserved for those factual assertions that are damaging to your client's position. Irrelevant facts are not. That said, if you will be challenging the amicus brief on the basis of unreliability, then it does not hurt to briefly make the point on relevance as well (perhaps in a footnote).

Final recommendations for deciding when and how to bring a challenge

In evaluating whether to object to an amicus brief's factual assertions, the first question is whether the point is sufficiently damaging to your client's case to warrant a response. If so, then the second question is whether a persuasive argument can be made that the court should ignore it. There is no formula for answering the first question. The issue is case and brief specific. It is important to recognize that filing a response to an adverse amicus brief will undoubtedly highlight the damaging points in that brief for the court. It may also bring to light weaknesses in briefs of supporting amici. But sticking one's head in the sand (or hoping the court will) may not be the best strategy either.

The best strategy is to have experienced appellate counsel involved when making this judgment call.

In answering the second question, consider using the rules of evidence as a starting point. Every rule of evidence reflects one of the fundamental concerns above. Hearsay, for instance, is usually excluded because the information cannot be verified, as the source is unavailable. Proper qualifications are required to be admitted as an expert to ensure a certain degree of credibility. You can use the rules as a framework for spotting weaknesses in the amici's facts and sources. But just remember that the rules of evidence themselves are not the standard for deciding whether to object. A far lower standard applies to legislative facts. A social sciences survey might technically fail the hearsay test; but that alone does not make citation to it objectionable. And challenging it in a response brief will only bring it to the court's attention.

Finally, keep the response timely and short. Exposing a few egregious examples of the amicus using self-referential sources or making unverifiable claims tends to discredit the whole brief. Because the amicus has no meaningful opportunity to respond, there is no need to knock every ball out of the park once you are a few points ahead. Moreover, when seeking leave to file the response, a lengthy brief will only discourage the court from granting the motion. And in any event, nitpicking every flaw in the brief only gives the brief more credit than it is due.

¹"Legislative facts" are those facts which have no relevance to the particular case but "which have relevance to

legal reasoning and the lawmaking process,” such as in “the formulation of a legal principle or ruling by a judge or court.” Fed. R. Evid. 201 (Notes of Advisory Committee on Proposed Rules subdivision (a)).

² Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 828 (2000) (“As the number of amicus submissions has soared, so have the citations and quotations of amicus briefs found in the Justices’ opinions.”); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 175, 1777 (2014) (“Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void.”); Anthony J. Franze and R. Reeves Anderson, “Justices Are Paying More Attention to Amicus Briefs,” Nat’l L. J. (Sept. 8, 2014) (stating that 2012-2013 term saw a “record-breaking 1,001 [amicus] briefs” filed and that 2013-2014 saw just over 800 amicus briefs filed).

³ See, e.g., *Williams v. Illinois*, 132 S. Ct. 2221, 2244 (2012) (citing Brief for New York County District Attorney’s Office et al. as Amici Curiae 6 for the proposition that often numerous “technicians work on each DNA profile”); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (citing Brief for National Association of Social Workers et al. as Amici Curiae 6-14 for the reasonableness of expectation of privacy of an adolescent); *Graham v. Florida*, 560 U.S. 48, 68, (2010) (citing Brief for American Medical Association et al. as Amici Curiae 16-24; Brief for American Psychological Association et al. as Amici Curiae 22-27 for proposition that “parts of the brain involved in behavior control continue to mature through late adolescence”).

...Continued from page 1: **Editor’s Note**

It’s a theme that’s attracting increasing attention. One driver, to be sure, is Judge Posner, both his commentary and his opinions. But his writing is the product of still other, underlying forces prompting consideration of the constraints the record does or does not, should or shouldn’t, place on legal analysis.

These underlying pressures are multiple and inter-related. They include the increasing factual complexity of the world from which disputes arise (as Judge Posner observed in *Reflections on Judging*); the fingertip availability of an infinitude of fact, accessible to the parties, the court, and a scrutinizing public as well; the growth of factual information itself and of methods of factual analysis; a greater awareness of appellate decisions and of their potential impact, spurred by the increasing efficiency of Internet communication; and a general pragmatic awareness,

arising from people’s own endeavors in business and daily life, that decision-making is fact oriented.

What is more, the question of how the record should constrain judicial determinations touches on tensions that lie at the very heart of the judicial system. On the one hand, there’s an impulse to restrict the field of view to a closed universe. As a practical matter, everything can’t be litigated and re-litigated. Litigation would go nowhere if the resource of accessible evidence and argument remained boundless. Likewise, it would go nowhere if appeals were de novo repetitions of the trial; not only would the initial trial become a mere dress rehearsal but successive trials would be an economic catastrophe. Finality at both the trial and appellate level is achieved only by imposing limits.

In addition, a concern for fairness supports re-

strictions. The adversarial process presumes that the validity of a proposition is affirmed by subjecting it to rebuttal. So there's an expectation that whatever one side raises the other should have a chance to counter. Similarly, there's an expectation that parties should have a chance to respond to adverse matter newly raised by a judge; for what's the source of judicial validity if not the adversarial test? So fairness supports excluding matter if there was no rebuttal opportunity.

On the other hand, there's an abiding impulse to get things right and render a correct, or at least, the best, decision. Inevitably, the interest in getting things right is an incentive for more information, whether it's an undisclosed or newly administered DNA test or sociological and psychological data on whether the death penalty deters.

In addition, apart from inevitable errors that can misdirect a proceeding from what is factually or legally correct, the adversarial process suffers from an inherent defect, which, in turn, finds its cure by enlarging the field of available information. It might be called the "either/or defect."

In essence, the adversarial process strives to cram a multi-dimensional, nuanced world into an either/or dichotomy fueled by self-interest. Yet there's no assurance that any aspect of a case is necessarily as either the plaintiff or the defendant portrays it. The plaintiff can argue A and the defendant can argue B. But reality may well be neither. It could be C. Or it might be something that resembles A but with a bit more of the A-like qualities or of A's verifying supports — AA. C and AA could be points of fact

or law. But in either case, since neither was raised, neither would be included in the appellate case — unless there's a way of bringing them in.

The articles in this issue examine such tensions from varying perspectives.

In my contribution, "The Call of the Real," I trace an intellectual line through William James and Oliver Wendell Holmes, Jr., among others, arguing that the still resonate philosophical outlook known as "pragmatism" compels legal reasoning to remain open to non-record legislative facts. I conclude with an analysis of the majority and dissenting opinions in *King v. Burrell*.

Gaëtan Gerville-Réache and Conor B. Dugan, in "Protecting the Record from 'Truthy' Amici Facts: Strategies for Embattled Party Counsel," offer advice on how a party can counter non-record facts raised by opposing amici; in the process, they provide an historical perspective on the use of legislative facts and insightful examples of legislative fact abused.

Devin C. Dolive's and E. Travis Ramey's "Appellate Judicial Notice in a 'Google Earth' World" is a thoroughly researched study of judicial notice at the appellate level. They, too, examine history. They consider current use of the Internet and criticisms leveled against it. They conclude with recommendations to advance the goals of both fairness and correctness.

In "Judges and the Internet: Does the Record Still Matter?" John J. Bursch discusses the growing prevalence of judicial use of the Internet to access non-record facts, concluding with advice for preventing this sua sponte judicial reliance from taking an unfavorable turn.

D. Alicia Hickock discusses knotty, cutting-edge conundrums in her widely researched “As a Matter of Fact ... Why Such Controversy Over Legislative Fact-Finding?” Is a lower court bound by a higher court’s outcome-determinative finding on a matter of legislative fact? What if the finding is wrong? Or what if the finding becomes wrong in time because both the realm of fact and our understanding of it are in constant flux? And does a legislature’s finding take precedence if it’s at issue in a constitutional challenge?

Ellie Nieberger’s “Judicial Notice of Adjudicative and Nonadjudicative Facts” is a useful, practitioner’s overview of judicial notice under Federal Rule of Evidence 201 and related issues, such as appellate review of a trial court’s judicial notice.

In “Improved Accuracy through Improved Accuracy: Rule 10(e) and the Record on Appeal,” Nancy M. Olson explores making corrections or modifications to the record under Rule of Appellate Procedure 10(e).

“A Tale of Two Records” by Robert S. Shafer and Martin A. Kastin is the story of two cases before two state supreme courts on virtually identical records on parallel theories of liability with over \$1 billion at stake. Yet the outcomes and opinions in each are entirely different with one court invoking non-record factual matter to which it lends a particularly disturbing shade.

In “You Fight or You Die: When Bending the Knee at Trial Costs You the Throne,” Brian K. Keller relies on his experience as Deputy Director of the Navy’s Appellate Division to identify types of cases vulnerable to record inadequacies because of a failure of appellate counsel to par-

ticipate at the trial court level.

Howard J. Bashman discusses the legal side of an inadequate record: the impulse, if not the judicial obligation, to get a point of law right even though it wasn’t argued before the trial court. In the process, “Raising New Issues on Appeal: The Legal Aspect of the Record on Appeal” describes useful circuit court exceptions to the waiver rule.

“Red Tie Guy: a True Story of the Overpowering Influence of Facts Outside the Record” is the issue’s coda. Wendy McGuire Coates unearthed this gem from the mine of real life interviews. It’s a reminder of the range of influential phenomena that seep through the boundaries of the record and established procedure. It’s also a reminder that, for better or worse, both advocacy and judicial decision-making are distinctly human endeavors not easily reducible to a set of formal rules.

To stretch oneself beyond the practiced literary mode of the legal brief is rewarding. You become more limber and adept as a writer. You acquire a deeper understanding of the law. At the same time, it’s challenging work. There’s no single correct way. You might start without a clear view of where you’ll finish. But in the end, the benefit extends to a community of readers and echoes beyond.

I wish to thank each of the contributors for sticking with the task and sharing a piece of their mind.

David J. Perlman, Editor

¹ Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), 131.

Appellate Judicial Notice in a "Google Earth" World

By Devin C. Dolive & E. Travis Ramey

By the time a case reaches appeal, practitioners tend to think of the "record" as closed. For more than two centuries, though, American appellate courts have been using the concept of judicial notice to expand the "record" before them, whether expressly or impliedly. In recent years, the role of appellate judicial notice has grown.

The proliferation of information-technology has driven this recent growth, but the temptation for appellate courts to go outside the "record" has always been present. Appellate judges are legal generalists, and appellate judges may need background information that attorneys—often specialists—have omitted from the briefs on appeal. What has changed in recent years is that the sum of all human knowledge (or a near approximation of it) is now a few mouse clicks (or taps on a tablet computer or smart phone) away. It is hard to blame appellate judges from making use of information that is now, literally, at their fingertips. It is even harder to blame their cohorts of law clerks and staff attorneys, often recent law graduates and for whom the "information superhighway" may be more like a neighborhood street.¹

As a result, appellate courts' use of judicial notice will probably continue to increase. Pragmatically, that may be a good thing. Appellate courts can realize the benefits of judicial notice—efficiency and accuracy—just as well as trial courts can. If a subject is truly appropriate for judicial notice, there is no increased efficien-

cy in remanding the matter so as to permit the trial court to take judicial notice and send up a new "record" on appeal.

To the extent the use of judicial notice by appellate courts is problematic, it is not a new problem. Further, if there is a problem, it is not judicial notice itself. Instead, the problem (if any) is its proliferation without safeguards to ensure a fair, adversarial process under which the parties have a meaningful ability to challenge facts judicially noticed on appeal. Therefore, the solution is not to eliminate, or even curb, appellate courts' ability to use judicial notice. Instead, the solution is transparency and the creation of sound procedural safeguards.

The historical use of judicial notice.

"[G]oing outside of the record and outside of the submissions of the parties to locate the facts necessary to support an opinion" is hardly breaking new ground.² State appellate courts have been taking judicial notice of facts since at least 1807.³ Federal appellate courts have been doing so since at least 1822.⁴ Treatises from as early as 1824 discuss judicial notice of indisputable facts.⁵ By the early 20th century, the Supreme Court was willing to rely on extrajudicial sources of sociological and scientific information as "matters of general knowledge" to assist in upholding an Oregon statute limiting the hours women could work.⁶ Indeed, the Court also relied heavily on similar facts in one of its most famous decisions—*Brown v. Board of Education of Topeka, Kansas*.⁷

Thus, appellate courts can and do take judicial notice of facts that have substantive impact.⁸ They also sometimes decline to do so. That is, appellate courts sometimes instead exercise their discretion and refuse to take judicial notice of matters that were not presented to the trial court.⁹

Under the common law, judicial notice allowed judges (both at the trial court level and on appeal) to take notice of facts that were either obvious or verifiable.¹⁰ Sources of this information have included "almanacs, government documents, dictionaries, maps, and judicial records,"¹¹ and judges were able to rely on these compendiums of shared common knowledge in lieu of their own personal knowledge.

Commentators have numbered and categorized the types of information subject to judicial notice differently.¹² However, by the mid-20th century, many began to break the information available to judges into three broad categories¹³: (1) adjudicative facts, which are the facts that apply to the particular case¹⁴; (2) legislative facts, which include all facts relevant "to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body"¹⁵; and (3) the non-evidence facts used in every case—common facts about how the world works, such as the existence of gravity or the basic rules of arithmetic.¹⁶

At the trial court level, Federal Rule of Evidence 201 has codified much of the historical common law of judicial notice. The Rule allows courts,

either on their own or at the request of a party,¹⁷ to take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."¹⁸ Thus, by its own terms, Rule 201 allows judicial notice only of adjudicative facts.¹⁹

The Internet and the need for new procedural guidance on the use of judicial notice in appellate courts.

As early as May 1996, two state appellate judges cited to Internet sources.²⁰ Less than one month later, Justice David Souter cited to an Internet source in a published decision.²¹ The following year, eleven federal appellate decisions cited to Internet sources.²² By 2001, the number of federal appellate decisions citing Internet sources ballooned to 109.²³ By comparison, a search of 2014 federal appellate decisions for the search term "http" yields at least 616 decisions citing to Internet sources.²⁴

Commentators quickly noticed that appellate courts were increasingly using Internet sources as a basis for taking judicial notice of facts.²⁵ They also quickly appreciated the potential problems that could result from this activity.²⁶ Early criticisms centered on the impermanence of online sources, problems with obtaining cited sources due to access restrictions or inaccurate citation, and the failure of appellate courts to establish that online sources were truly authoritative before using them as a basis for judicial

notice.²⁷ Later commentators have criticized both the rise of independent factual research and the lasting structural implications for the adversarial nature of the appellate process.²⁸

Those criticisms have not, however, been unanimous. Other commentators have found much to like in the increased use of the Internet and judicial notice by appellate judges.²⁹ These commentators have defended appellate judicial notice as "a vital adjudicative device for advancing appellate decisions on the merits."³⁰ They have also asserted that appellate courts most often use judicial notice "to correct procedural defects and clarify post judgment developments."³¹ Indeed, segments of the appellate judiciary, with Seventh Circuit Judge Richard Posner most vocal, are increasingly performing their own factual research to provide themselves with the legislative facts and background information attorneys often omit and that those judges feel are often necessary to understand cases.³² Posner has criticized attorneys for failing to provide those necessary facts, which he has said leaves judges "scrambling for background information."³³ He has also criticized the factual record that results from the adversarial system. Because the parties try to control the information given to the decision-maker, Posner states that many judges "distrust the fact finding process," feel the facts are "too pinched," and assume that most witnesses, including expert witnesses, are biased.³⁴ As a result, Posner, at least, may also be willing to go beyond the traditional divide between legislative and adjudicative facts—researching facts he feels he needs to understand a particu-

lar transaction or a particular set of facts.³⁵

What has been pretty much unanimous are calls for additional guidance, including procedural rules to govern appellate judicial notice and the need to preserve electronic sources.³⁶ To the extent appellate judges are following Posner's lead, and are basing their decisions on their own independent factual research,³⁷ the need for rules to govern appellate judicial notice and use of Internet resources becomes all the more important.

There is nothing new under the sun, and that includes appellate judicial notice.³⁸

Some commentators (perhaps justifiably) fear that the ease of electronic research is leading appellate courts to engage in factual research that goes beyond the traditional bounds of "legislative fact"³⁹ or judicial notice. These commentators argue that, when appellate courts take judicial notice without being prodded by a party to do so or include facts that may be more appropriately categorized as adjudicative, the courts deprive the parties of the opportunity to challenge the fact finding in which the appellate court has engaged.⁴⁰

However, those same arguments also weigh against allowing appellate courts to conduct independent legal research. Indeed, the English common law tradition forbade judges from considering legal sources the parties did not cite because it "would unfairly allow judges to rely on sources whose interpretation the parties had no opportunity to dispute. If judges could only use a legal authority raised by one of the parties

to an appeal, the opposing party could not complain that it had no opportunity to distinguish the authority, or offer an opposing interpretation of its legal significance."⁴¹

American courts have never really followed this traditional common law rule. American judges have long conducted their own legal research, and attorneys have long known that it is the advocate's job to conduct thorough legal research to locate any authorities the judge might rely on—and argue the client's case accordingly. Were it otherwise, the process would not be any fairer. Indeed, Rules of Professional Conduct require attorneys to disclose controlling legal authorities known to be adverse to their client's position.⁴² If courts did not conduct their own legal research, attorneys could comply with their professional responsibilities by remaining ignorant of controlling law. In contrast, when courts conduct their own legal research, parties with meritorious arguments are less likely to lose simply because their attorney failed to cite the right authority.

In short, modern commentators have not seriously objected to appellate judges conducting their own *legal* research. If, in conducting their own research, the courts misunderstand or misuse legal authorities, parties may raise those issues in requests for rehearing. The same principle can also apply when appellate judge conduct their own *factual* research. When extended to *factual* research, the problem is not necessarily the principle itself but the practical means of documenting and determining *what* factual re-

search the court has performed on its own.

To the extent appellate judges are taking judicial notice of only facts that are truly indisputable—the same type of geographic, historical, and scientific facts that have historically been the subjects of judicial notice—the medium through which the court obtains those facts is irrelevant. Whether the information is obtained from an almanac⁴³ or a website operated by the United States Naval Observatory, the time at which the sun rose on a particular date remains indisputable. Whether geographic facts come from government records, Google Earth, or Mapquest, they remain immutable facts. In the same vein, when appellate courts use electronic sources to locate judicial records, to obtain official government documents, to research the usage and definitions of words, to learn scientific facts, or determine commonly known facts, those courts are simply applying historical judicial-notice principles in the new context of the Internet. All that has changed is that appellate courts now have ready access to more information than ever before.

Procedural safeguards and judicial transparency can protect parties from "runaway" judicial notice.

The alternative to allowing the continued and even increasing use of judicial notice by appellate courts is to require remand to the trial court every time a necessary (but indisputable fact) is missing from the record. However, doing so will frustrate one of the purposes of judicial notice—efficiency. The better option is for appel-

late courts to take the necessary steps to preserve the integrity of the judicial-notice process.

Appellate courts should adopt procedures for retaining cited Internet sources for future reference.

A primary criticism of the use of Internet sources, even when not used as a basis for judicial notice, is their impermanency.⁴⁴ There are various Internet archive services, but technology has yet to make as certain that cited Internet sources are as locatable as comparable non-electronic sources—dictionaries, almanacs, etc. As such, the risk is that a source cited in an appellate decision may be unavailable to another judge or attorney reading that decision only days after it has been issued.

This need not be an insurmountable obstacle. The easiest way to combat the impermanence of the Internet is for appellate courts to adopt procedural rules requiring retention of all Internet materials cited in decisions or orders. The Judicial Conference of the United States recommended adoption of similar policies in July 2009,⁴⁵ and some of the federal appellate courts have adopted them.⁴⁶

Appellate courts should develop standards for taking judicial notice of Internet materials and strictly adhere to them.

The pervasive nature of the Internet may call for the adoption of a new judicial notice framework. The purpose of any such new framework⁴⁷ would be to "increase predictability and consistency in judicial rulings and ensure that

courts taking judicial notice of online sources adhere to the requirements of Rule 201."⁴⁸ One proposed framework would require judges considering an online source to examine whether it displays: "(1) knowledge of the subject matter, (2) independence from relevant bias, and (3) incentive to ensure accuracy." By applying those three factors, only Internet sources "whose accuracy cannot be reasonably questioned"⁴⁹ would be sufficient to form a basis for judicial notice. Although this framework was apparently developed with trial courts in mind, it could apply equally to appellate courts.

A note is required as to the first and third factors. The first factor requires judges to examine the expertise of the author of the Internet source.⁵⁰ Applying that factor, websites sponsored by expert organizations—NASA, the National Oceanic and Atmospheric Administration, the Mayo Clinic—are likely to convey accurate expert information.⁵¹ A private "Geocities" webpage on cockfighting is significantly less likely to do so.⁵² The third factor takes into account the incentives of the party posting the information on the Internet. As one commentator noted: "Taking the time to collect and post accurate information is an arduous task. Those websites that are more likely to invest the resources to get information right are sites that will suffer consequences when the information they disseminate is inaccurate."⁵³ For example, Internet sources such as Google Maps, weather.com, and maqquest.com have a monetary incentive to provide accurate information.⁵⁴

Other Internet sources may have other, non-monetary incentives to do the same.

When appellate courts use facts from Internet sources as adjudicative facts, they should explicitly take judicial notice of those facts.

Judge Posner (arguably the *de facto* leader of those advocating for broader use of Internet sources and appellate judicial notice) uses Internet research to overcome his limitations as a legal generalist and attorneys' tendency to leave out necessary background.⁵⁵ Although Posner acknowledges that others criticize him for doing so, he argues "that the lawyers should do the Web research and spare me the bother. The Web is an incredible compendium of data and a potentially invaluable resource for lawyers and judges that is being underutilized."⁵⁶ Posner contends that his research is proper because he does not cross the line into adjudicative facts; instead, he asserts that his research is limited to items properly categorized as legislative facts and background facts.⁵⁷ He contends that attorneys are not entitled to control the flow of legislative and background information to judges by limiting the record, and that there is nothing wrong with judges augmenting the record with non-adjudicative factual research.⁵⁸

Some critics contend that that Posner's research exceeds the traditional boundary of legislative facts.⁵⁹ Under this argument, Posner's use of facts outside the record might be appropriately categorized as, at least, quasi-adjudicative.

However, the answer to this criticism is not for appellate judges to stop doing research (as Pos-

ner feels he needs to do to better perform his judicial duties). Instead, the answer is for appellate judges to be transparent about *when* they are using facts they obtained from outside the record and about *where* those facts come from.

When appellate judges use facts gleaned from their independent Internet research as adjudicative facts, they should take judicial notice of them, preserving the parties' ability to challenge judicially-noticed facts. Even when appellate courts conclude they are using independently located facts as non-adjudicative facts, being upfront and disclosing that a "fact" comes from independent Internet research instead of the record will preserve the parties' ability to challenge that conclusion. That is, parties will retain the ability to argue that the court has used the fact as an adjudicative fact *without* taking judicial notice. Further, the parties will be able to argue that the appellate court should not take judicial notice of that fact.

In short, transparency blunts many of the arguments against the independent Internet research.

Appellate courts should adopt procedures to allow parties to challenge the propriety of judicially noticing facts.

When a federal district court decides to take judicial notice of a fact, Rule 201 protects the parties' right to be heard on the issue.⁶⁰ Although federal appellate courts often cite to Rule 201 as the basis for their power to take judicial notice of facts,⁶¹ the Federal Rules of Appellate Procedure do not correspondingly protect that right.

As a result, if an appellate court decides to take judicial notice of a fact after oral argument or does so in a case where the court does not hold oral argument, the parties are left with no avenue other than petitioning for rehearing to challenge the propriety of taking judicial notice.⁶² The lack of appropriate procedural safeguards in the post-briefing and post-argument phase potentially creates questions regarding the fairness of appellate judicial notice.⁶³ At a minimum, appellate courts should act to preserve parties' ability to use requests for rehearing to challenge the courts' uses of judicial notice.

An even better procedure might be something similar to a "show cause" order. That is, appellate courts could adopt new rules that require notice to the parties that the court is considering taking judicial notice of certain facts based upon certain sources. The parties could then have a limited time period (perhaps fourteen days) to respond with arguments as to why the court should or should not take judicial notice of those facts. The Eleventh Circuit has already adopted a similar procedure for instances in which it believes it may lack jurisdiction.⁶⁴

Such a procedure might cause an appellate attorney, receiving such a notice months after oral argument, to panic, but it is better than learning that court has cited the "wrong" Internet source only *after* the decision is released. Such a procedure would preserve the adversarial nature of the proceeding, would allow parties to challenge judicial notice *before* the court issues any decision, and would answer the call of commen-

tators for procedural rules governing judicial notice in the appellate courts.

Conclusion

Judicial notice in the appellate courts in nothing new. However, with the advent of the Internet and now tablet computers and smart phones putting the "information superhighway" at ready fingertips twenty-four hours a day, the use of appellate judicial notice – whether called such or not – is likely to increase. The remedy (if one is needed) is not to stop the use of new information-technologies or change two centuries of American legal practice allowing appellate judges to conduct their own research (under certain circumstances). Instead, the remedy is to ensure that there is transparency and that the adversarial process is preserved under a framework that maximizes the efficient and accurate disposition of appeals.

¹ In the 1990s, the Internet was sometimes rhetorically referred to as the "information superhighway." The term may have been introduced to the public by then-vice president Al Gore. See Jonathan H. Blavin & I. Glenn Cohen, Note, *Gore, Gibson and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 269 & n.22 (2002).

² See Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 55 (2013).

³ See *Hart v. Bodley*, 3 Ky. 98, 105–06 (1807) ("The court, however, feel[s] no hesitation in declaring that transactions and objects which necessarily connect themselves with and form a part of the general history or geography of the country, ought to be taken notice of without particular evidence proving their notoriety.").

⁴ See *Watts v. Lindsey's Heirs*, 20 U.S. 158, 161 (1822) ("The Ohio and Little Miami Rivers, from general history, the one having been used before, at, and since the time when these entries were made, as the great highway in

going from the eastern to the western country, and each of them having been referred to in general laws, and designated as boundaries of certain districts of country, we consider must be deemed and taken as being identified and notorious, without further proof.").

⁵ See Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. UNIV. L. REV. 1137, 1142, n.24 (2014).

⁶ See *Muller v. Oregon*, 208 U.S. 412, 419–20 and n.† (1908).

⁷ See 347 U.S. 483, 494 & n.11 (1954) (citing articles of "modern authority" on "psychological knowledge").

⁸ See, e.g., *Great N. Ry. Co. v. Weeks*, 297 U.S. 135, 149 (1936) (taking judicial notice of the collapse in property values that occurred during the great depression); *Boston Prop. Exch. Transfer Co. v. Iantosca*, 720 F.3d 1, 11 n.9 (1st Cir. 2013); *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1282 & n.17 (11th Cir. 2012) (citing Fed. R. Evid. 201 and taking judicial notice of stock prices in an ERISA stock-drop case); *Pugh v. Tribune Co.*, 521 F.3d 686, 691 (7th Cir. 2008) (taking judicial notice of stock prices).

⁹ See Dorothy F. Easley, *Judicial Notice on Appeal: A History Lesson in Recent Trends*, FLA. B.J., Dec. 2010, at 47 [hereinafter "Easley, A History Lesson"].

¹⁰ See Bellin & Ferguson, *supra* note 5 at 1143–44.

¹¹ *Id.* at 1145.

¹² See *id.* at 1147–52 (listing six categories of information subject to judicial notice).

¹³ See Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69 (1964); Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404–07 (1942).

¹⁴ See FED. R. EVID. 201 advisory committee's note to 1972 proposed rule.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See FED. R. EVID. 201(c).

¹⁸ FED. R. EVID. 201(b).

¹⁹ See FED. R. EVID. 201(a).

²⁰ See *Cummings v. X-Ray Assocs. of N.M., P.C.*, 918 P.2d 1321, 1326 (N.M. 1996); *Wishnatsky v. Bergquist*, 550 N.W.2d 394, 404 (N.D. 1996).

²¹ See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 777 n.4 (1996) (Souter, J., concurring).

²² See Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 448 (2002).

²³ *Id.*

²⁴ To reach that result, the authors searched an online database of all federal appellate decisions for the term "http" (with relevant expanders) and limited the dates to the 2014 calendar year.

²⁵ See Barger, *supra* note 23 at 431.

²⁶ See *id.* at 432–33.

²⁷ See *id.* at 431–45; see also generally Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link*, 15 Yale J.L. & Tech. 273 (2012).

²⁸ See generally Schauer, *supra* note 2.

²⁹ See Easley, *A History Lesson*, *supra* note 9, at 45; Dorothy F. Easley, *Judicial Notice on Appeal: Why All the Fuss?*, FLA. B.J., May 2006, at 40 [hereinafter "Easley, Why all the Fuss?"].

³⁰ Easley, *Why All the Fuss?*, *supra* note 30, at 43.

³¹ Easley, *A History Lesson*, *supra* note 9, at 47.

³² See Schauer, *supra* note 29, at 58.

³³ *Report on the Chicago Sessions*, THE APP. ADVOC. (Am. Acad. of App. Law.), 2014 Issue 2, at 12.

³⁴ *Id.*

³⁵ See Schauer, *supra* note 9, at 59.

³⁶ See Bellin & Ferguson, *supra* note 5, at 1167–74; Schauer, *supra* note 2, at 61–65; Easley, *A History Lesson*, *supra* note 9, at 47–48; Easley, *Why all the Fuss?*, *supra* note 30, at 42–43; Barger, *supra* note 23, at 446–47.

³⁷ Suffice to say, not all appellate judges agree with Posner's approach. See, e.g., *Rowe v. Gibson*, --- F.3d ---, No. 14-3316, 2015 WL 4934970 (7th Cir. Aug. 19, 2015). In this case, Judge Posner's opinion cited a wide variety of Inter-

net sources, purportedly to gain an understanding of the medical condition claimed by the appellant, a *pro se* prisoner who had been denied the ability to obtain a medical expert during the district court proceedings. Judge Ilana Rovner concurred with Judge Posner's opinion but wrote a concurring opinion in which she noted that the decision to remand the case did not require any Internet research or departure from the record. *See id.*, 2015 WL 4934970, at *13-14 (Rovner, J., concurring). Judge David Hamilton dissented in part from and went as far as to include the following heading in his dissent: "How Reliable is Our Research?" *See id.*, 2015 WL 4934970, at *21-21 (Hamilton, J., dissenting in part).

³⁸ *See* Ecclesiastes 1:9.

³⁹ *See* Schauer, *supra* note 2, at 59–60.

⁴⁰ *See id.* at 56–66.

⁴¹ *Id.* at 53.

⁴² *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2013).

⁴³ For an interesting anecdote about judicial notice, an almanac, and Abraham Lincoln, see Easley, *Why all the Fuss?*, *supra* note 30, at 40.

⁴⁴ *See* Barger, *supra* note 23, at 438–43.

⁴⁵ *See Internet Materials in Opinions: Citation and Hyperlinking*, THE THIRD BRANCH (July 2009), available at http://federalevidence.com/pdf/2009/12-Dec/3dBRANCH_7_2009.pdf.

⁴⁶ *See, e.g.*, Liebler & Liebert, *supra* note 28, at 300 ("The U.S. Supreme Court retains a print copy of the cited Internet materials with the Clerk of Court's case file."); 11TH CIR. R. 36 I.O.P. 10 ("When an opinion of the court includes a citation to materials available on a website, the writing judge will send a copy of the cited internet materials to the clerk for placement in the case file and in a separate file to be permanently maintained by the clerk for this purpose. A footnote in the opinion will reference the availability of the internet materials in the case file.")

⁴⁷ *See generally* Bellin & Ferguson, *supra* note 5.

⁴⁸ *Id.* at 1167.

⁴⁹ *See* FED. R. EVID. 201(b)(2).

⁵⁰ *See* Bellin & Ferguson, *supra* note 5, at 1168.

⁵¹ *See id.*

⁵² *See* United States v. Land, Winston Cty., 221 F.3d 1194, 1196 n.4 (11th Cir. 2000) (citing a private "Geocities" website for the proposition that forty-seven states had banned cockfighting, but that it remained legal in Oklahoma, Louisiana, and parts of New Mexico).

⁵³ *See* Bellin & Ferguson, *supra* note 5, at 1170.

⁵⁴ *See id.* at 1170–71.

⁵⁵ *See* Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views*, 51 Duq. L. Rev. 3, 11 (2013); *Report on the Chicago Sessions*, *supra* note 34.

⁵⁶ *See* Posner, *supra* note 55.

⁵⁷ *See id.* at 12–13.

⁵⁸ *See id.* at 12.

⁵⁹ *See id.* at 58–59.

⁶⁰ *See* FED. R. EVID. 201(e).

⁶¹ *See, e.g.*, Massachusetts v. Westcott, 431 U.S. 322, 323 n.2 (1977) (per curiam); Castro v. Cty. of Los Angeles, No. 12-56829, 2015 WL 4731366, at *19 n.2 (9th Cir. Aug. 11, 2015); United States v. Freeman, 763 F.3d 322, 346 n.11 (3d Cir. 2014); N.Y. Times Co. v. U.S. Dep't of Justice, 756 F.3d 100, 110 n.8 (2d Cir. 2014).

⁶² *See, e.g.*, FED. R. APP. P. 40(a)(2).

⁶³ *See* Schauer, *supra* note 2, at 65.

⁶⁴ *See* 11TH CIR. R. 31-1(d).

Judges and the Internet: Does the Record Still Matter?

By John J. Bursch

U.S. Supreme Court advocate Kannon Shanmugam recently observed that the “Supreme Court has the same problem that the rest of us do: figuring out how to distinguish between real facts and Internet facts.” Seeking Facts, Justices Settle for What Briefs Tell Them, *The New York Times* (Sept. 1, 2014), available at www.nytimes.com/2014/09/02/us/politics/the-dubious-sources-of-some-supreme-court-facts.html. Lending support to this point, an in-depth 2012 study collected over 100 examples of factual authorities noted in recent U.S. Supreme Court decisions that could not be found anywhere in the record, the party briefs, or even the *amici* briefs. Allison Larsen, *Fact Finding*, 98 Va. L. Rev. 1255 (2012). It is certainly possible that all of these authorities came from the Court’s independent library research (research that would raise its own questions). But it is far more likely that the facts were discovered using the Internet.

Of course, the use of Internet “facts” is not limited to the United States Supreme Court. The practice is becoming more pervasive at every level of the state and federal judiciary. As a disgruntled California Supreme Court Justice noted in a dissent penned more than a decade ago: “[W]e could have waited for a case that raised these questions on an adequate record. Instead, the majority, rush[ed] to judgment after conducting an embarrassing Google.com search for information outside the record.” *People v. Mar*, 52 P.3d 95, 116 (Cal. 2002) (Brown, J., dissenting).

For appellate lawyers who preach the importance of staying within the trial-court record, this practice development is troubling, raising many questions that have no clear answers. In one New York case, an appellate-panel majority criticized a trial court for “initiating its own investigation into the facts [using the Web] when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint.” *NYC Med. & Neurodiagnostic, P.C. v. Republic Western Ins.*, 8 Misc. 3d 33, 38, 798 N.Y.S.2d 309 (App. Term 2004). But the dissent took the complete opposite view, endorsing the trial court’s use of Internet facts as proper because doing so was akin to taking judicial notice of public-record matters. *Id.* at 38-40 (Pesce, P.J., dissenting).

One might expect that such a thorny issue would be resolved by rules of judicial conduct. Unfortunately, such rules only raise more questions. Canon 2.09(C) of the American Bar Association’s Model Code of Judicial Conduct states that “a judge shall not independently investigate facts in a case.” Comment 6 to this Canon specifically addresses online research: “The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”

These are useful starting points for evaluating judicial use of the Internet to look beyond a trial-court record. But their vagueness leaves numerous questions unanswered. Are Internet facts ever so authoritative that a court should take judicial notice of them anyway, such as facts published on an official government web-

site? Does it matter whether it is a party or the court that discovered the evidence? Is background information out of bounds, or only dispositive facts? What if the facts are presented in an *amicus* brief?

Fortunately, Federal Rule of Evidence 201 is more helpful. It allows a court to take judicial notice of a fact that is “not subject to reasonable dispute” either because the fact is “generally known within the territorial jurisdiction of the trial court” or is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” By its terms, the Rule governs “only judicial notice of adjudicative facts, and does not preclude judicial notice of legislative facts.”

Internet “facts” can be judged through these lenses, and courts that have done so have started to draw the contours of acceptable practice based on the website providing the facts. In *Gent v. CUNA Mutual Insurance Society*, 611 F.3d 79, 84 n.5 (1st Cir. 2010), for example, the First Circuit took judicial notice of general facts regarding Lyme disease on a Centers for Disease Control website, concluding these were facts “not subject to reasonable dispute.” State appellate courts have similarly taken judicial notice of facts presented on websites hosted by the American Board of Emergency Medicine, *Oken v. Williams*, 23 So.3d 140, 148 n.2 (Fla. Dist. Ct. App. 2009), the Blood-Horse Stallion Register, *Moore v. Landes*, 2006 WL 2919064 (Ky. Ct. App. 2006), and the Michigan Offender Tracking Information System, *People v. Djonaj*, 2010 WL 3063673 (Mich. Ct. App. 2010). Other courts have approved judicial notice of online map programs, like MapQuest and Google Maps.

E.g., *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007); *Rindfleisch v. Gentiva Health Sys.*, 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010), *but see Commonwealth v. Brown*, 839 A.2d 433, 435-36 (Pa. Super. Ct. 2003) (reaching the opposite conclusion). Still other courts approve use of the Internet to confirm a judge’s intuition on a “matter[] of common knowledge,” such as the proposition that “not all rain hats are alike.” *United States v. Bari*, 599 F.3d 176, 180 (3d Cir. 2010).

Conversely, most federal courts have discouraged reliance on websites like Wikipedia, which calls itself an “encyclopedia” but readily admits that articles may be “heavily unbalanced,” or “in a bad state.” *Badasa v. Mukasey*, 540 F.3d 909, 910-11 (8th Cir. 2008). *Accord, e.g., Campbell v. Sec’y of Health & Human Servs.*, 69 Fed. Cl. 775, 781 (Fed. Cl. 2006) (Wikipedia website includes “a pervasive and, for our purposes, disturbing set of disclaimers”); *but see Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012) (opinion cites a Wikipedia article regarding YouTube); *United States v. Ford*, 683 F.3d 761, 768 (7th Cir. 2012) (same, citing a DNA profiling article). And state appellate courts have rejected what appear to be authoritative websites, absent proof of these sites’ reliability and accuracy. *E.g., People v. Schilke*, 2005 WL 1027039 (Mich. Ct. App. 2005) (Microsoft); *NYC Med.*, 8 Misc. 3d at 38 (official website of the New York State Department of Insurance); *Powers v. Halpin*, 2007 WL 1196527 (Ky. Ct. App. 2007) (Consumer Electronic Association website). The most suspect of all possible sources is a website created or maintained by a party to the litigation, *e.g., Koenig v. USA Hockey, Inc.*, 2010 WL 4783042 (S.D. Ohio 2010), unless it is a website

being used *against* its author, e.g., *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218 (10th Cir. 2007) (declining corporation's argument that the employment data on its own website was unreliable).

In addition to the reliability of a particular website, the right to notice and an opportunity to be heard are baked into Federal Rule of Evidence 201: "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Fed. R. Evid. 201(d).

Thus, in *Kiniti-Wairimu v. Holder*, 312 Fed. App'x 907, 2009 WL 430439 (9th Cir. 2009), the Ninth Circuit concluded that an immigration judge violated a Kenyan citizen's due process when the judge made an adverse credibility determination based on Internet research of the Kenyan citizen's family circumstances. And in *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 648-49 (7th Cir. 2011), the court held that judicial notice of the Consumer Price Index was appropriate for the purpose of calculating attorney fees, but that doing so without adequate notice "deprived plaintiff of an opportunity to contest the application of the CPA or to argue for a particular manner of applying it to the present case."

Yet even with adequate notice to the opposing party, an appellate court may be reluctant to take judicial notice of Internet facts that were not presented to the trial court. In *F&G Research, Inc. v. Paten Wireless Technology, Inc.*, 2007 WL 2992480 (Fed. Cir. Oct. 15, 2007), for example, the district court dismissed a complaint for

lack of personal jurisdiction over the defendants. When the plaintiff asked the Federal Circuit to take judicial notice of defendants' websites, which demonstrated that defendants conducted business in the jurisdiction, the appellate panel declined on grounds that will look very familiar to the appellate bar: "Even if the information on the companies' websites qualifies as information from a source whose accuracy cannot reasonably be questioned, the problem with that information is that it was not offered to the district court, and that court therefore was not able to make a determination as to its relevance and weight." But this is by no means a hard and fast rule.

In sum, when considering the appropriateness of Internet facts, advocates and the courts can use Federal Rule of Evidence 201 to draw lines based on reliability, the importance of the asserted fact, and the opponent's ability to respond. Still, these lines beg the question: why do appellate courts feel compelled to look outside the record for Internet facts in the first place? The Seventh Circuit's Judge Posner says the answer is simple. It is lawyers' failure "to answer questions that are likely to occur to appellate judges bothered by gaps in lawyers' narrative of a case." Elizabeth G. Thornburg, *The Lure of the Internet and the Limits on Judicial Fact Research*, 38 *Litigation* 41 (Summer/Fall 2012), quoting Richard A. Posner, *Appellate Judges and Internet Research* (unpublished manuscript dated Mar. 26, 2011).

So if you're an appellate advocate, the course is clear. If there are holes in your story narrative, you must fill them, or the appellate court may do it for you. You can fill those holes with In-

Internet facts, but be careful how you do so:

Demonstrate in your briefing the authenticity and accuracy of your sources.

Ask the appellate court to take judicial notice of facts that are important to a ruling in your favor.

Give your opponent an opportunity to respond. (For example, do not raise Internet facts for the first time in a reply brief unless willing to let the other side file a supplemental responsive brief.)

Explain how the Internet facts are not adjudicative, but rather are simply for background and context.

And justify why the result on appeal is not affected by a party's failure to introduce the Internet facts in the trial-court proceedings below.

At the end of the day, the use of Internet facts is very much a gray area. Cite them with caution; ignore them at your peril.

As a Matter of Fact...Why Such Controversy Over Legislative Fact-Finding?

By D. Alicia Hickock

Everyone knows that an appellate court reviews questions of law *de novo* and questions of fact and credibility with much greater deference toward the factfinder, the judge or jury listening to the testimony, appraising the witnesses, and hearing the nuances of discussions about documents. Those facts, are, however, *adjudicative* facts – the facts that are in dispute between the parties and about the parties. All lines become blurred when the conversation turns to *legislative* facts, the social or scientific framework into which the adjudicative facts fit. At least in part this blurring is because there are four different groups of persons that perceive themselves (or are perceived by others) to be proper legislative

factfinders. Because the line between adjudicative facts and legislative facts is itself unclear, a trial court might, for example, find that a defendant's behavior was consistent with schizophrenia, that experts diagnosed the defendant with schizophrenia, that schizophrenia impacts judgment, and that schizophrenia reduces culpability. While the first two facts are adjudicative, the other two are legislative and law-applied-to fact. An appellate court reviewing that decision might consider itself bound by the first two facts but free to re-examine the latter two. Ultimately, the United States Supreme Court would accept or reject or rework that judgment. But during the time that that case is winding its way through the courts, Congress or a state legislature might be drawing its own

conclusions whether schizophrenia should be a defense to a crime requiring knowledge and intent or whether a schizophrenic's sentence should be reduced. And at some point, the legislature's decision in that regard will be challenged in a court that will also have before it the Supreme Court's observations on the question – and the parties' competing expert opinions on the same point. Who "prevails" is an ongoing battle, captured in dialogues between majorities and dissents.

Jurists From Two Courts of Appeals Face Off

For example, in *Frank v. Walker*, Judge Easterbrook, writing for a unanimous panel, reversed a district court decision invalidating Wisconsin's Voter ID law, finding that "the district court's findings do not justify an outcome different from *Crawford* [*v. Marion County Election Board*, 553 U.S. 181 (2008)]." 768 F.3d 744, 745 (7th Cir. 2014), *cert. denied*, __ U.S. __, 135 S. Ct. 1551 (2015). The panel found that the three reasons the district court articulated for distinguishing *Crawford* had all been argued to the United States Supreme Court in *Crawford*, and the Court had rejected them. *Id.* at 745-47. It also found that the claimed hardship was mitigated by Wisconsin's regulations. *Id.* at 747. And it found that there were no findings made by the district court about the effect of the law during the February 2012 primary when it was in force, nor in the other states that have a Voter ID law. *Id.*

The Court of Appeals for the Seventh Circuit observed:

One problem with relying on these findings is that the first of them – the conclusion that voter impersonation is rare if

not nonexistent – is identical to a finding made in the Indiana litigation. The district judge in Indiana found that there had never been a documented instance of voter-impersonation fraud in that state. The Supreme Court recited this finding, yet found it inadequate to conclude that the statute does not serve any purpose. That's because the Supreme Court thought that a photo ID requirement has other benefits; it deters fraud (so that a low frequency stays low); it promotes accurate record keeping (so that people who have moved after the date of registration do not vote in the wrong precinct); it promotes voter confidence. The Court took the last of these as almost self-evidently true. And the need for documentation such as a birth certificate to get a photo ID suggests another benefit: it will prevent some people who should not have registered (because they are too young or not citizens) from voting when they are unable to get a qualifying photo ID. Wisconsin allows registration on election day, and a photo ID can help to verify (or refute) representations a person makes when trying to register.

The dissenting Justices were not impressed by the benefits their colleagues touted. Justice Souter (joined by Justice Ginsburg) heaped scorn on them, deeming them unsubstantiated and at any event too modest to justify an appreciable burden. In this litigation, plaintiffs produced the testimony of a political scientist who agrees with Justice Souter, and the district judge found as a fact that

the majority of the Supreme Court was wrong about benefits such as better record keeping and promoting public confidence. Maybe that testimony will eventually persuade the Justices themselves, but in our hierarchical judicial system a district court cannot declare a statute unconstitutional just because he thinks (with or without the support of a political scientist) that the dissent was right and the majority wrong.

To put this in legalese, whether a photo ID requirement promotes public confidence in the electoral system is a “legislative fact”—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state. Judges call the latter propositions “adjudicative facts.” On matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court.

Id. at 749-50 (internal citations omitted). A judge asked for rehearing *en banc*, and there were five votes in favor of rehearing. Because there were also five votes against it, the vote for rehearing failed. Judge Posner wrote the dissent from the denial of rehearing *en banc* and expressly challenged his colleagues’ perspective on legislative facts:

The panel is not troubled by the absence of evidence. It deems the supposed beneficial effect of photo ID requirements on public confidence in the electoral system “a legislative fact”—a proposition about the state of the world,” and asserts that

“on matters of legislative fact, courts accept the findings of legislatures and judges of the lower courts must accept findings by the Supreme Court.” In so saying, the panel conjures up a fact-free cocoon in which to lodge the federal judiciary. As there is no evidence that voter impersonation fraud is a problem, how can the fact that a legislature says it’s a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials? If the Supreme Court once thought that requiring photo identification increases public confidence in elections, and experience and academic study since shows that the Court was mistaken, do we do a favor to the Court—do we increase public confidence in elections—by making the mistake a premise of our decision? Pressed to its logical extreme the panel’s interpretation of and deference to legislative facts would require upholding a photo ID voter law even if it were uncontested that the law eliminated no fraud but did depress turnout significantly.

The concept of a legislative fact comes into its own when there is no reason to believe that certain facts pertinent to a case vary from locality to locality, or from person to person; a typical definition of legislative facts is broad, general facts that are not unique to a particular case and provide therefore an appropriate basis for legislation of general application. For example, black lung disease (pneumoconiosis) is either a progressive

disease, like asbestosis, or it is not. Nothing supports the idea that it is progressive for Miner A and halts for Miner B.

Even legislative facts are not sacrosanct, though “those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’ And anyway voter fraud, voter habits, voter disenfranchisement are not legislative facts, owing to the great variance across and even within states in the administration of elections. Some states have small enough populations, or at least some of their voting precincts have small enough populations, that poll workers are likely to know personally every voter who shows up at the polls to vote. No one is going to tell the poll worker that he or she is someone else, because it would be pointless. Other states, or areas, are populous, urban, and impersonal. The poll workers in a precinct in Manhattan probably have never laid eyes on most of the voters who show up at election time. The likelihood of other forms of voter fraud similarly depends on how a locality conducts its elections. We learned (if we didn't already know) at the time of *Bush v. Gore* that every locality in the country conducts elections in its own way—voting machines, paper ballots, computer punchcards, whatever—a situation unsuited to the application of the concept of legislative fact.

The panel says that “after a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge [in fact every federal judge other than at least five Supreme Court Justices *en bloc*] cannot say as a ‘fact’ that they do not, even if 20 political scientists disagree with the Supreme Court.” Does the Supreme Court *really* want the lower courts to throw a cloak of infallibility around its factual errors of yore? Shall it be said of judges as it was said of the Bourbon kings of France that they learned nothing and forgot nothing?

Frank v. Walker, 773 F.3d 783, 795-96 (7th Cir. 2014) (Posner, J., dissenting) (citations omitted).¹

Decades earlier, in a different case on different issues, a similar debate occurred. In that case, a panel of the Court of Appeals for the Third Circuit, with Judge Sloviter authoring the majority opinion, joined by Judge Pollak sitting by designation, disagreed with Judge Weis, the dissenter. *N.J. Citizen Action v. Edison Twp*, 797 F.2d 1250 (3d Cir. 1986). There, the question was whether an ordinance restricting evening canvassing could be upheld. The dissent would have looked at “constitutional facts” found by a prior panel to determine that the ordinance would prevent crime, protect privacy, and permit alternate communication. *Id.* at 1259. Resisting, the majority observed:

A “constitutional fact” should not be defined, as the dissent suggests, as “unproven (and often unprovable) generalizations that . . . are sometimes little more than assumptions or widely-held

beliefs [and] which do not have the definiteness associated with narrative facts.” Instead, a constitutional fact is more properly defined as a fact whose “determination is decisive of constitutional rights.” The assumptions in the Supreme Court cases about a possible nexus between crime and canvassing were hardly determinative of constitutional rights, since in both cases the Supreme Court held that the regulations at issue violated the canvassers’ constitutional rights.

In general, “constitutional litigation demands fact analysis of the most particularized kind.” In the First Amendment area especially, the Supreme Court has stressed the need for “a particularized inquiry into the nature of the interests at stake.” It is questionable whether “assumptions and widely-held beliefs” have a role to play in such an analysis. . . . [In the prior case] that meager record produced before that district court cannot be considered to have foreclosed all future litigation anywhere else in this circuit on this issue no matter how compelling the facts produced by the challengers of an ordinance. In any event, “where the legislative facts of the earlier case concerned only the immediate parties, generalized findings are entitled to less respect in later cases.”

* * *

We appreciate the intuitive impression, possibly unjustified in fact, that the presence of strangers on the street, particular-

ly in small communities, may augur a crime problem. This intuition may underlie the *PAJE* holding, since the court in *PAJE*, quoted from that portion of *Martin v. City of Struthers* where the Court stated: “In addition, burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. Crime prevention may thus be the purpose of regulatory ordinances.” Significantly, the ordinance in *Struthers* was nevertheless held unconstitutional by the Supreme Court.

Also, because a decision on whether the significant and legitimate legislative interests are served by an ordinance is dependent upon the facts adduced by the parties, we recognize the possibility of inconsistent results in the district courts, based upon the records in the particular case, until more general parameters are established. This is troublesome, not only because of the appearance of inconsistency but because it may also encourage, rather than discourage, litigation that is divisive to the community.

Nonetheless, an appellate court must take the record as it comes, and in this case, the record and the findings compel a different result than that reached in *PAJE* on whether the ordinance is precisely tailored to serve the legislative interests in deterring crime and protective priva-

cy.

Id. at 1259-60 (citations omitted). Judge Weis responded:

The constitutional facts supporting a rule or doctrine must necessarily carry precedential weight so that governments will be able to predict the validity of their regulatory actions. Thus, in large part the longevity of constitutional facts may be attributed to the doctrine of *stare decisis* and the important purposes that principle serves. The Supreme Court recently admonished that “any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged ‘to bring its opinions into agreement with experience and with facts newly ascertained.’” Clearly, in the Court’s view, reconsideration of constitutional facts in light of experience occurs in the deliberate process of overturning constitutional precedents.

A degree of generalization about the permissible range of governmental response to a given problem is necessary to avoid endless litigation of these issues. Once the courts have answered the question, municipalities should be able to rely on the constitutional fact that regulating canvassers is a legitimate measure for the prevention of crime. In *City of Renton v. Playtime Theatres, Inc.*, [475 U.S. 41, 51-52 (1986)], the Supreme Court used such an approach:

We hold that Renton was entitled to rely on the experiences of Seat-

tle and other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or to produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Although it concedes the need for stability and consistency, the majority has articulated an approach that will require municipalities to make fundamental policy decisions on an ad hoc basis.

This case presents a clear conflict on three constitutional facts -- whether these regulations will prevent crime, protect privacy, and leave open adequate alternative forms of communication. The conflicts between this case and *Pennsylvania Alliance* cannot and should not be reconciled by this panel; that is reserved for the full court.

Id. at 1268-69 (Weis, J., dissenting).

Legislative Fact-Finding is a Political Exercise.

These intra-circuit debates are accompanied by a related discussion in law reviews asking how courts should treat the findings of trial courts on legislative facts – or the subsets of such facts that are sometimes called sociological, social, or constitutional facts. See, e.g., Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 71 (Oct. 2011)

(urging that standing rules be liberalized so that judicial legislative fact-finding can be done through the adversarial process); Bryan Adamson, *Critical Error: Courts' Refusal To Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1 (Fall 2009) (arguing that it is doctrinally illogical to differentiate between constitutional fact-finding for actual malice (reviewed *de novo*) and intentional discrimination (reviewed for clear error under Federal Rule of Civil Procedure 52(a) and that intentional discrimination should be reviewed *de novo*); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1187-88 (October 2013) (noting that social facts are often confused with constitutional facts and arguing that social facts should be subject to Federal Rule of Civil Procedure 52(a) review, because trial courts are in the best position to find these facts (as opposed to appellate courts' conducting independent research or placing weight on the untested statistics or "facts" of *amici*) and further recommending remands if facts are missing); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 36 (Winter 2009) (arguing that courts should engage in independent review of legislative fact-finding when individual constitutional rights are at issue).

Most of the Courts of Appeals appear to come down on the side of showing little or no deference to a district court's finding of legislative facts. *E.g.*, *United States v. Singleton*, 29 F.3d 733, 740 (1st Cir. 1994) (no clear error review of legislative facts); *Landell v. Sorrell*, 382 F.3d 91, 135 n.24 (2d Cir. 2002), *rev'd and remanded sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006)

(applying *de novo* review of legislative facts); *In re Asbestos Litig.*, 829 F.2d 1233, 1252 n.11 (3d Cir. 1987) (Becker, J., concurring) (no clear error review of legislative facts because they are a "component of fashioning a rule of law"); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (clear error standard does not apply to trial court findings of legislative facts because it would encourage anomalous results); *United States v. Preston*, 751 F.3d 1008, 1020 (9th Cir. 2014) (applying *de novo* standard and relying on research not discussed at the trial level); *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 772 F.3d 1352, 1366-75 (11th Cir. 2014) (*de novo* review - supplemented by its own fact-finding).

From the above law review articles, it appears that the authors would like the final say about such facts to be allocated to whomever the writer trusts the most, or, perhaps, distrusts the least. Their perspective, as well as the dialogue between the jurists of the Courts of Appeals of the Third and Seventh Circuits, reflects, on the one, hand a deep-seated uneasiness about a record built from "facts" that do not come from a party's testimony or documents but that are instead the product of social scientists (or, as Judge Easterbrook observed, a "marketing consultant," *Frank*, 768 F.3d at 748). Moreover, such facts often reflect a moral perspective or judgment and are necessarily generalizations upon which more than one legal ruling is built.

But that is precisely what makes them so important as bipartisan roadmarks for legislators and later judicial decisions. As an example, in *Miller v. Alabama*, the United States Supreme Court drew upon its prior determinations that juveniles are different from adults in fundamen-

tal ways that matter when evaluating sentences such as life without parole or a death sentence: they are immature, reckless, impetuous – and not incorrigible. 567 U.S. ___, 132 S. Ct. 2455, 2465 (2012). The most famous example, of course, is *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the Supreme Court found that education could not be equal if it were separate.

In Bryan Adamson’s view in his *Critical Error* essay, legislative facts go even further than moral extrapolations, because they are, to some extent, predictive rather than descriptive (and, although he does not say so expressly, they are thus subjective rather than objective).

Legislative facts are relevant to formulating a legal principle or ruling. Legislative facts can inform a court’s legislative judgment or a law or policy, and they can be distinguished further as sociological, political, economic, scientific, or historical (as a body of knowledge). As distinguished from historical facts, legislative facts are predictions in the sense that they are less knowable. To draw an even finer point, legislative facts are “typically predictions about the relative importance of one factor in causing a complex phenomenon.”

Adamson, *supra* at 14.

The Legislatures’ Role is to Respond to Change: in One View Legislative Facts Improperly Constrain This Role; in Another, Legislative Facts Impose Constitutional Constraints.

In *Schuette v. Coalition to Defend Affirmative Ac-*

tion, __ U.S. ___, 134 S. Ct. 1623 (2014), the plurality concluded that “This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.” *Id.* at 1638. Earlier in the opinion, the plurality urged that universities in states other than California, Florida, or Washington, where state law has prohibited racial preferences in admissions “can and should draw on the most promising aspects of these race-neutral alternatives as they develop,” recognizing the value of innovation and experimentation that is upheld when states are allowed to respond to their perceptions of the conditions and needs of their states. *Id.* at 1630.

Of course, there are times when states do not innovate, but instead lag behind an emerging understanding of constitutional community values. *Brown* is certainly one example of that; *Coker v. Georgia*, 433 U.S. 584 (1977) (finding capital punishment an inappropriate penalty for rape) is another. *Roe v. Wade*, 410 U.S. 113 (1973) is yet another. There, the Supreme Court observed that viability was generally understood to be 28 weeks, though it could be as early as 24, and it was that understanding, coupled with the continuum of the mother’s interest and the state’s that gave rise to the determination that the state could prohibit only third trimester abortions. 410 U.S. 113, 163 (1973). Yet the *New England Journal of Medicine* recently published an article describing the variability among hospitals in treatment and viability of infants born as early as 22 weeks gestational age. Matthew A. Rysary, et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, *N Engl J Med* 2015; 372:1801-1811.

It is thus no surprise that Courts of Appeals –

and jurists within those courts – chafe at being bound by morally-tinged and generalized legislative facts – whether found by a district court, a legislature, or the United States Supreme Court (or the Court of Appeals *en banc*). The chafing is not helped by the fact that the rulings from the United States Supreme Court on the issue have not provided explicit guidance to the Courts of Appeals.

For example, the cases dealing with partial-birth abortion bans arose in part because partial birth abortions are performed during the second trimester, and lawmakers reacted to the incongruity accompanying that timing. But the district courts did not view legislative responses as innovation in the face of changed circumstances but as attempts to evade the findings of the United States Supreme Court in *Roe* and in the original partial-birth abortion ban case, *Stenberg v. Carhart*, 530 U.S. 914 (2000), in which the Supreme Court struck down Nebraska’s ban. When Congress enacted a ban on a specific type of partial-birth abortion, three of the Courts of Appeals found that the legislative facts foreordained the invalidity of Congress’s acts. Thus, when the case came to the Court of Appeals for the Eighth Circuit, it rejected the facts in the record of that case because there had been similar assertions that had been rejected in *Stenberg v. Carhart v. Gonzales*, 413 F.3d 791, 800 (8th Cir. 2005), *rev’d*, 550 U.S. 124 (2007). Likewise, the Court of Appeals for the Fourth Circuit found that *Stenberg* had been “based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a ‘partial birth abortion’ statute lacking a health

exception.” *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 625 (4th Cir. 2005), *vacated sub nom. Herring v. Richmond Med. Ctr. for Women*, 550 U.S. 901 (2007). Indeed, the Court of Appeals for the Eighth Circuit had observed that it was following the decision of the Court of Appeals for the Fourth Circuit. *Carhart*, 413 F.3d at 800-01; *see also A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (“[I]f the issue is one of legislative rather than adjudicative fact, it is unsound to say that, on records very similar in nature, [one] law could be valid . . . and [one] law invalid, just because different district judges reached different conclusions about the inferences to be drawn from the same body of statistical work.”). But in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court reversed the decision of the Court of Appeals for the Eighth Circuit, and in *Herring v. Richmond Medical Center for Women*, 550 U.S. 901 (2007) it vacated the decision of the Fourth Circuit Court of Appeals on the basis of *Gonzales* – *i.e.*, that a statute prohibiting the intentional performance of an intact dilation and evacuation, a specific form of partial-birth abortion, was neither vague nor overbroad, and that it did not impose an undue burden.

The Court of Appeals for the Second Circuit had taken a different perspective. It concluded that the *Stenberg* Court had removed from state and federal legislatures the ability to make a finding whether a health exception was necessary, but found that instead the United States Supreme Court had left it “to the challenger of the statute . . . to point to evidence of ‘substantial medical authority’ that supports the view that the procedure might sometimes be necessary to avoid risk to a woman’s health.” *Nat’l Abortion*

Fed'n v. Gonzales, 437 F.3d 278, 287 (2d Cir. 2006) vacated on further briefing following the decision in *Gonzales v. Carhart*, 224 F. App'x 88 (2d Cir. 2007). In other words, where the Courts of Appeals were quick to repudiate a legislative response to legislative facts, the United States Supreme Court respected Congress's role and decision. Interestingly, the Supreme Court in *Gonzales* reached its conclusion despite acknowledging that some recitations in the Act were at the time of its review inaccurate, and its observation that "[u]ncritical deference to Congress' factual findings in these cases is inappropriate." 550 U.S. at 165-66. These facts were, however, specific and objectively verifiable. *Id.* And they clearly did not undermine the deference of the United States Supreme Court to the legislature. Indeed, the Court in *Gonzales* went on to observe that an "Act is not invalid on its face where there is 'uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.'" *Id.* at 166-67.

The Court of Appeals for the Second Circuit appeared to suggest that a *district court* could develop a record on which to supersede the legislative facts relied on by the United States Supreme Court – a position with which Judge Posner appears to agree in *Frank*. Its rationale is similar to Brianne Gorod's *The Adversarial Myth*:

Even under ideal circumstances, there would be something troubling about the perpetuation of court decisions based on factual findings that have outlived their time and merit reexamination. It is particularly troubling when one remembers

that the original factual findings may have been based on virtually no evidence at all and whether they were based on evidence may have been due in large part to chance—that is, whether the particular parties that brought the first case raising those factual issues litigated the case well. To be sure, Supreme Court rulings can be overruled, but overruling occurs only in limited circumstances. It is unclear why factual findings should be held to such a high standard. It may be beneficial for legal precedents to enjoy a certain stability, but it is unclear why factual findings should be equally stable when the world they are describing may not be, and when new research inevitably provides a better and more precise understanding of the world.

Gorod, *supra*, at 65 (footnotes omitted).

Yet it is the role of the legislature to respond to current conditions and circumstances. And, as the United States Supreme Court explained in *Minnesota v. Clover Leaf Creamery Co.*, it is not the responsibility of a state to convince the court that the legislative judgments underlying a law were "correct"; accordingly, parties challenging a law may introduce evidence to show that legislation is irrational, but they cannot prevail if the question is debatable. 449 U.S. 456, 463-64 (1981) (banning plastic milk bottles). Surely the fact that the panel upheld Wisconsin's law, and the court of appeals was evenly divided about whether to rehear it showed that the question at issue was at least debatable. Indeed, the Court of Appeals for the Seventh Circuit has in other cases recognized that "it does not have latitude

to change a particular construction of the statute based on changing industrial realities where congressional intent to the contrary is absolutely clear, or where the Supreme Court has decreed that a particular reading of the statute is required, or both.” *Electromation v. NLRB*, 35 F.3d 1148, 1157 (7th Cir. 1994). In this regard, it is joined by the Courts of Appeals for the District of Columbia Circuit. See *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (recognizing that mixed questions of law and fact, those that are neither purely constitutional nor purely empirical, but implicating a judgment by Congress, are to be viewed deferentially, without “reweighing the evidence *de novo*.”). It is thus problematic to suggest that when conditions and circumstances do change, the legislature has its hands tied, but the district court does not. See *Nat’l Abortion Fed’n*, 437 F.3d at 287. The idea that a district court has an authority that neither a state or federal legislature does to respond to changed facts – which in any event may be just a changed perception of facts – is an affront to the deference that the separation of powers commands.

At Least When Scrutiny is Rational Basis, Deference Should Be Afforded to the Legislature

In the two cases discussed at the beginning, there were different claims giving rise to different standards of scrutiny. In *Frank*, an Equal Protection case, the case was subject to rational basis scrutiny. In *Edison Township*, in contrast, the Court of Appeals was addressing a First Amendment claim requiring “a particularized inquiry into the nature of the interests at stake.” 797 F.2d at 1259. Perhaps in such cases a court would be justified in viewing the legislative

facts with more skepticism. But that reasoning cannot hold true in a rational basis case. In *Vance v. Bradley*, (the case that Judge Posner discusses in saying in *Frank* that legislative facts need not always be followed and that the facts at issue were, in any event, not legislative) the United States Supreme Court explained that a defendant does not need to provide affirmative proof before a statute can be sustained; instead, “those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”

“The District Court’s responsibility for making ‘findings of fact’ certainly does not authorize it to resolve conflicts in the evidence against the legislature’s conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was ‘pure speculation.’”

Consequently, appellees were required to demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability. Appellees have not satisfied these requirements. They say that many overseas posts are as pleasant as those in the United States and that many people over age

60 are healthy and many younger people are not. But they admit that age does in fact take its toll, and that Congress could perhaps have rationally chosen age 70 as the cutoff. And we have noted the common-sense proposition that aging – almost by definition -- inevitably wears us all down. All appellees can say to this is that “[it] can be reasonably argued that, given modern societal facts,” those between age 60 and 70 are as reliable as those under age 60. But it is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute:

440 U.S. 93, 111-12 (1979) (citations omitted). This articulation of the role of deference owed to the legislature is in keeping with the respect for the separation of powers on which our entire system is founded. In a much earlier election regulation case, the United States Supreme Court observed, “[t]he judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases.” *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952).

The findings of the United States Supreme Court should be binding on all other courts. When legislators employ legislative facts that have been sanctioned by the United States Su-

preme Court, the deference owed by trial (and intermediate appellate) courts should be heightened when the question before the court is subject to rational basis scrutiny. This is a compelling reason for adopting the view of the *Frank* panel and deferring to the findings both of the United States Supreme Court and the legislature. Even where stricter scrutiny applies, the values of consistency and uniformity that find a voice in *stare decisis* need to carry great weight in the treatment of legislative facts. See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (recognizing that *stare decisis* ensures that the law “will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact”).

Indeed, even Justice Brandeis (in dissent in *Burnet v. Coronado Oil & Gas Co.*), while drawing a distinction between the precedential value of factual findings and legal determinations, argued that it was the *Supreme Court* that “must, in order to reach sound conclusions, feel free to bring *its* opinions into agreement with experience and with facts newly ascertained, so that *its* judicial authority may, as Mr. Chief Justice Taney said, ‘depend altogether on the force of the reasoning by which it is supported.’” 285 U.S. 393, 412-13 (1932) (Brandeis, J., dissenting) (emphasis added), *overruled in part by Helvering v. Mtn. Producers Corp.*, 303 U.S. 376 (1938). This is a far cry from encouraging every district court and Court of Appeals to redetermine such

facts for itself.

The reason that certain legislative facts are controversial is that persons (including scholars, political scientists and/or economists, and jurists) disagree about the proper legal resolution of the case and the view of the world that gets one there. For each judge or each panel to disregard the resolution of a higher (and particularly a nine-justice Supreme Court) would turn law into precisely the decisions based on “proclivities of individuals” that *Vasquez* recognized as inimical to the integrity of our constitutional system.

Judge Posner asked two questions in his dissent. Without “evidence that voter-impersonation fraud is a problem, how can the fact that a legislature says it’s a problem turn it into one? If the Wisconsin legislature says

witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?” *Frank*, 773 F.3d at 795. But the one does not follow the other. The second question would be subject to a different level of scrutiny and the burden on the legislature concomitantly greater than for the first question. In order to maintain the system that we have built, the answer to the first question has to be the one that the *Frank* panel gave: where a legislative fact is at issue, legislatures are entitled to rely on the findings of the United States Supreme Court, and all other federal courts should defer to both.

¹ In LEXIS, the dissent from rehearing appears instead as an appendix to the original opinion at 768 F.3d 744 (7th Cir. 2014).

Judicial Notice of Adjudicative and Nonadjudicative Facts

By *Ellie Neiberger*

Appellate courts are authorized to take judicial notice of facts on the same basis as trial courts. However, to preserve the distinct functions of trial and appellate courts, and the basic principles that appellate review is confined to the record and the issues raised below, appellate courts narrowly limit when they will take judicial notice of facts relating to the merits of a case. But these concerns are not implicated by facts that are only used for the purpose of determining questions of law. Indeed, determining questions of law is the primary function of ap-

pellate courts. Therefore, whether a court will take judicial notice for the first time on appeal largely turns on the type of fact at issue.

Judicial Notice of Adjudicative and Nonadjudicative Facts in General

When courts and practitioners refer to “facts” in the context of litigation, they usually mean the facts of the particular case—who did what, where, when, how, and with what motive or intent.¹ These facts, known as “adjudicative facts,” are those that the parties must establish to prevail on their claims or defenses.² General-

ly, adjudicative facts must be established through the introduction of evidence.³ Judicial notice is the exception. If a fact is judicially noticed, it is established as true without evidentiary proof.⁴

The federal rule on judicial notice—Rule 201 of the Federal Rules of Evidence—allows a court to assume the truth of an adjudicative fact if it is “not subject to reasonable dispute” because it is (1) “generally known within the territorial jurisdiction of the trial court” or (2) “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”⁵ Judicial notice may be taken on a party’s request or on the court’s own initiative; however, in both cases, the parties must be given an opportunity to be heard on the matter.⁶ By its express terms, Rule 201 only applies to adjudicative facts.⁷

But other types of facts come into play in judicial decisionmaking. These nonadjudicative facts come in two basic forms. First, hundreds of generalized background facts and assumptions are used in every case as an inherent part of the reasoning process.⁸ For example, “[w]hen a witness in an automobile accident case says ‘car,’ everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the ‘car’ is an automobile, not a railroad car.”⁹

The second type of nonadjudicative facts are legislative facts—facts relevant to questions of law and policy, “whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.”¹⁰ For example, in the context of interpreting a federal statute that makes any derivative of cocoa

leaves a controlled substance, the fact that cocaine hydrochloride derived from coca leaves is a legislative fact.¹¹ A fact’s status as adjudicative or legislative depends not on its nature (*e.g.*, where certain land is located), but on how the fact is used (whether it is used to determine what happened in the case or in interpreting the law).¹² Therefore, the same fact may be adjudicative in one context, and legislative in another.¹³

Although judicial notice of nonadjudicative facts is not addressed in Rule 201 (or any other federal rule), the rule does not foreclose courts from judicially noticing them. Quite the opposite, Rule 201 “was deliberately drafted to cover only a small fraction of material usually subsumed under the concept of ‘judicial notice.’”¹⁴ The advisory committee’s notes to Rule 201 state that, due to the role nonadjudicative facts play in formulating the law and in the overall reasoning process, it would be inappropriate and unworkable to subject them to substantive or procedural limitations on judicial notice.¹⁵ Nor have the courts established rules for judicial notice of nonadjudicative facts in case law. Therefore, judicial notice of nonadjudicative facts is largely unregulated.

As the advisory committee’s notes explain, it would be impossible to require courts to take judicial notice of each generalized background fact used in a case (such as the meaning of the word “car” in the example above) through a formal process.¹⁶ Moreover, because generalized background facts are used as a natural part of reasoning, reliance on them is rarely a conscious decision or expressly acknowledged. Therefore, it would be difficult to develop rules governing

judicial notice in this context.

Unlike generalized background facts, it would not be procedurally or logically impossible to regulate judicial notice of legislative facts. Instead, the lack of rules governing judicial notice of legislative facts arises from the idea that judges should not be restricted in what they may consider in determining questions of law and policy.¹⁷ Judges have a duty to determine the law, and, in doing so, may consider a wide variety of sources relevant to the issue, including sources other than the parties bring to their attention.¹⁸

It follows that, when courts create or apply common law principles or interpret statutory or constitutional provisions, they may take notice of social, economic, and political conditions; scientific and academic research; medical literature; data; and other sources and information—regardless of whether they are indisputable.¹⁹

For this reason, judicially-noticed legislative facts can have a determinative impact on the outcome of a case. For example, in *Hawkins v. United States*, 358 U.S. 74, 78 (1958), the Supreme Court upheld the continuing validity of the common law rule that spouses cannot be required to testify against each other on the basis that “[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage,” although there was no evidence of that fact in the record and it is not beyond dispute. In *Roe v. Wade*, 410 U.S. 113, 148–51 (1973), the Court relied on nonrecord scientific and medical data in formulating its decision.

Appellate Review of Trial Court Decisions to Take, or Not to Take, Judicial Notice

A trial court’s decision to take or not to take judicial notice of an adjudicative fact is reviewed for abuse of discretion.²⁰ If it is determined that the trial court abused its discretion in refusing to take judicial notice, the appellate court may simply take judicial notice of the fact itself.²¹ However, remand may be necessary where the jury’s function would be usurped due to inferences that may be drawn from the facts.²²

Because questions of law are reviewed *de novo*, a trial court decision to take judicial notice of legislative facts is not entitled to deference.

Judicial Notice of Adjudicative Facts for the First Time on Appeal

The law of judicial notice itself does not differ between trial and appellate courts. As discussed above, courts (including appellate courts) are generally free to take judicial notice of legislative facts. Additionally, Rule 201, on its face, allows appellate courts to take judicial notice of adjudicative facts on the same terms as trial courts.²³

Since legislative facts go to question of law, rather than evidentiary proofs required to be made at trial, appellate courts regularly take judicial notice of legislative facts in performing their law-making and law-interpreting functions. However, there is a tension between noticing adjudicative facts for the first time on appeal and the fundamental principal that appellate review is limited the evidentiary record before the trial court. Therefore, in practice, appellate courts limit when they will take judicial notice of adjudicative facts to preserve the trial

court's factfinding role.²⁴

Attempts to Cure Evidentiary Deficiencies or Improperly Put Nonrecord Facts Before the Court

Appellate courts categorically reject attempts to use judicial notice as a way to cure evidentiary shortcomings on the merits of the case.²⁵ This is particularly true where a party seeks judicial notice of material that was available when the case was before the trial court.²⁶ The statement of facts section of a brief must include citations to the record,²⁷ and it is improper to inject non-record adjudicative facts into an appeal by silently including them in a brief or appendix.²⁸

While a request for judicial notice may be made in the brief itself (for example, by including a footnote stating that the fact is not in the record and requesting that the court take judicial notice), if there is any doubt as to whether an adjudicative fact is the proper subject of judicial notice, the request should be made by a separate motion. If the motion is not decided before the brief is due, whether it is appropriate to include the nonrecord fact in the brief (with a statement that a request for judicial notice of the fact is pending) depends on the jurisdiction. For example, if the motion will be decided by the merits panel (rather than a motions panel), it is less likely that this would be considered improper.²⁹

Facts Affecting Jurisdiction

Counsel for the parties have a duty to bring facts showing that the court may no longer have jurisdiction to the court's attention without delay.³⁰ Therefore, it is appropriate for counsel to use nonrecord materials to establish that an appellate court lacks jurisdiction to hear a case,

and appellate courts regularly take judicial notice of such matters.

For example, in *New Mexico ex rel. Richardson*, 563 F.3d 603, 702 & nn.21-22 (10th Cir. 2009), the court took judicial notice of information on the U.S. Department of Fish & Wildlife's website and the minutes of the New Mexico State Resource Advisory Council stating that endangered birds had been released in the area at issue in the Endangered Species Act challenge in concluding that the issue was moot. In *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1171 (11th Cir. 2006), the court considered declarations that were filed for the first time on appeal on the issue of standing. The court explained that it was in the interest of justice and efficiency to consider the declarations because there were dispositive of the standing issue.³¹

Government Reports, Court Records, and Other Publications

An appellate court's willingness to take judicial notice of government reports, court record, and other publications often depends on whether they would provide adjudicative or legislative facts. As discussed above, the same facts may be legislative in one case, but adjudicative in another. Therefore, where these materials would be relevant to what happened in the particular dispute, judicial notice is significantly more limited. Where appellate courts agree to take judicial notice of publications containing adjudicative facts, it is most often in upholding the trial court's decision.³²

Appellate courts are generally willing to take notice of government reports, court records, and other publications that meet the indisputability standard under Rule 201 if it would not be un-

fair to the opposing party or usurp the trial court's factfinding authority.³³ Under this standard, it is appropriate to judicially notice adjudicative facts to fill in minor gaps in the record (as opposed to correcting material evidentiary deficiencies).³⁴ For example, in *Laborers' Pension Fund v. Blackmore Sewer Construction, Inc.*, 298 F.3d 600, 607 (7th Cir. 2002), the appellant argued that it was denied due process when the district court denied its request for an extension of time to respond to the appellee's motion for an order requiring a bank to turn over funds in the appellant's account. Attached to the motion was a copy of a response to a discovery request made to Suburban Bank regarding accounts held by the appellant.³⁵ The appellant contended that he needed additional time to conduct an investigation because the discovery response was signed by an agent of Harris Bank.³⁶ On appeal, the Seventh Circuit took judicial notice of the fact that Suburban Bank was a branch office owned by Harris Bank. The court explained that the ownership of banks is a matter of public record, it was "information about [the appellant's] own bank," the information could have been obtained by quick phone call or internet search, and there was no reason that the appellant's counsel couldn't have obtained the information "before raising this wholly irrelevant issue on appeal."³⁷

It is not uncommon for appellate courts to take judicial notice of judicial records in other judicial and administrative proceedings cases and agency proceedings.³⁸ "Judicial records are a source of 'reasonably indisputable accuracy' when they record some judicial action such as dismissing an action, granting a motion, or finding a fact" and they "may sometimes be proper-

ly noticed to show the acts of the parties or other actors in the litigation; e.g., that a complaint was filed, that return of service was made, or that stipulations were entered into."³⁹ But they typically will not take judicial notice of factfindings made by another court.⁴⁰ Appellate courts have also taken judicial notice of government files, including information on government websites. Newspaper articles may be judicially noticed to indicate what was in the public realm at the relevant time (but not for the truth of their contents).⁴²

However, because many appellate courts refuse to take judicial notice of an adjudicative fact that the trial court was not given an opportunity to consider, counsel should make every effort to seek judicial notice of adjudicative facts at the trial level.⁴³

¹ Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402, 404-07 (1942); FED. R. EVID. 201 advisory committee note.

² FED. R. EVID. 201 advisory committee note.

³ FED. R. EVID. 201(b).

⁴ FED. R. EVID. 201(f).

⁵ FED. R. EVID. 201(b).

⁶ FED. R. EVID. 201(c), (e).

⁷ FED. R. EVID. 201(a).

⁸ William B. Fisch, *Judicial Knowledge*, 34 AM. J. COMP. L. SUPP. 237, 238 (1996).

⁹ FED. R. EVID. 201 advisory committee note.

¹⁰ FED. R. EVID. 201 advisory committee note.

¹¹ *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

¹² *United States v. Bello*, 194 F.3d 18, 22 (1st Cir. 1999).

¹³ *Id.*

¹⁴ *Gould*, 536 F.2d at 219 (quoting 1 J. Weinstein, Evidence

P 201(01) (1975)).

¹⁵ FED. R. EVID. 201 advisory committee note.

¹⁶ *Id.*

¹⁷ FED. R. EVID. 201 advisory committee note. (citing Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270–271 (1944)).

¹⁸ *Id.*

¹⁹ 141 Federal Evidence § 2:12 (4th ed.).

²⁰ *Bello*, 194 F.3d at 23.

²¹ *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003); *United States v. Lavender*, 602 F.2d 639, 641 (4th Cir. 1979).

²² Aaron Bayer, *Judicial Notice on Appeal*, NAT'L L. J. (2003), available at <http://www.wiggin.com/4907>.

²³ FED. R. EVID. 201(d) (“The court may take judicial notice at any stage of the proceeding.”); FED. R. EVID. 201 advisory committee note. (judicial notice may be taken at any point in the case, “whether in the trial court or on appeal”).

²⁴ *Johnson v. Chater*, 108 F.3d 942, 946 (8th Cir. 1997) (refusing to take judicial notice of the weight of a gallon of gasoline because it would undermine lower tribunal’s factfinding authority); *In re Indian Palms Associates, Ltd.*, 61 F.3d 197, 205–06 (3d Cir. 1995) (judicial notice should not be taken on appeal where it would be unfair to the opposing party or undermine trial court’s factfinding function); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 966 (9th Cir. 2011) (“plaintiff may not cure her failure to present the trial court with facts sufficient to establish the validity of her claim by requesting that this court take judicial notice of such facts.”) (quoting *Jespersen v. Harrah's Operating Co.*, 44 F.3d 1104, 1110 (9th Cir. 2006) (en banc)).

²⁵ *In re Indian Palms Associates, Ltd.*, 61 F.3d at 205 (3d Cir. 1995) (“It is understood...that the facts relating to the merits of the case will be decided on the basis of evidence admitted into the trial record) (citation omitted); 21B Fed. Prac. & Proc. Evid. § 5110.1 (2d ed.).

²⁶ *E.g., Tamari v. Bache & Co. (Lebanon) S.A.L.*, 838 F.2d 904, 907 (7th Cir. 1988) (“A litigant cannot put in part of his case in the trial court and then, if he loses, put in the rest on appeal.”).

²⁷ FED. R. APP. P. 28(a)(4).

²⁸ *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 384 (11th Cir. 1991) (striking references to nonrecord facts included in brief).

²⁹ *Id.*

³⁰ *Arazonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (citations and quotations omitted).

³¹ *Id.*

³² Section 1983 Litig. Fed. Evidence, *Judicial Notice of Adjudicative and Legislative Facts*, § 5.04 (2015).

³³ *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 142 (1st Cir.1985); *Kennedy v. Edgar*, 556 N.E.2d 830 (Ill. App. Ct. 1990) (“[A] reviewing court may take judicial notice of facts or events not appearing in the record, which disclose no actual controversy exists between adverse parties.... However, a reviewing court will not take judicial notice of critical evidentiary material not presented in the court below, especially where the evidence may be significant in the proper determination of issues between the parties.”).

³⁴ 21B Fed. Prac. & Proc. Evid. § 5110.1 (2d ed.).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 607–08.

³⁸ *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011).

³⁹ *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012) (citations and quotations omitted).

⁴⁰ *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998).

⁴¹ *Nebraska v. EPA*, 331 F.3d 995, 999 n.3 (D.C. Cir. 2003).

⁴² *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (citing *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006)).

⁴³ 21B Fed. Prac. & Proc. Evid. § 5110.1 nn.30–33 (2d ed.) (citing cases).

Improved Adequacy through Improved Accuracy: Rule 10(e) and the Record on Appeal

By Nancy M. Olson

One source of record inadequacy is record inaccuracy. Although Federal Rule of Appellate Procedure 10(e) provides procedures by which to correct errors in, or omissions from, the record on appeal, litigants unfamiliar with the contours of the rule may miss an important opportunity to improve the adequacy of the record. This article explores Rule 10(e), including who has the authority to make a modification or correction to the record, the permissible types of modifications, and how to request such a modification.

Rule 10(e) provides three different paths for corrections or modifications to the record on appeal, depending upon the nature of the correction or modification sought:

- Rule 10(e)(1) provides that, where there is disagreement over whether the record on appeal “truly discloses what occurred in the district court,” the disagreement must be presented to, and resolved by, the district court;
- Rule 10(e)(2) addresses material omissions or misstatements in the record on appeal. If a material omission or misstatement occurs “by error or accident,” it may be corrected and a supplemental record may be certified in one of three ways: (a) by stipulation of the parties, (b) by the district court, or (c) by the court of appeals; and
- Rule 10(e)(3) concludes that any other question “as to the form or content of the

record must be presented to the court of appeals.”

Authority to Modify

Although a court of appeals can supplement the record under Rule 10(e)(2), it rarely does so. *Cross v. Hardy*, 632 F.3d 356, 358 n.1 (7th Cir. 2011) cert. granted, judgment rev'd on other grounds, 132 S. Ct. 490 (2011). Typically, the courts of appeals remand issues concerning supplementation or correction of the record on appeal to the district court to consider in the first instance. *Colbert v. Potter*, 471 F.3d 158, 166 (D.C. Cir. 2006). One court explained the difference in the district and appellate courts' roles under Rule 10(e) as follows:

A fair reading of Rule 10(e) reveals a scheme in which the district court is empowered to resolve those disputes which go to the accuracy of the record, but in which plenary power to decide questions as to the form of the appellate record and the scope of its contents is reserved to the court of appeals. This scheme is in accordance with sound judicial policy and common sense, since the district court is ill-equipped to decide fine points of appellate procedure and possesses special expertise only with respect to determinations as to what actually transpired in the proceedings before it.

Armstrong v. O'Connell, 408 F. Supp. 825, 826 (E.D. Wis. 1976). In other words, a party seeking to resolve a question of record accuracy should request that the issue be remanded to

the district court for resolution in the first instance (e.g., a conflict between the parties' recollection and what appears in the clerk's transcript). On the other hand, a party disputing the form or scope of the record on appeal should seek to have the matter resolved directly by the court of appeals (e.g., whether a document should be excluded from the record on appeal based on a ruling by the district court). As the *Armstrong* court noted, questions of factual accuracy may often blend into questions of legal significance; as a question leans toward a legal rather than factual dispute, it should be resolved by the appellate court.

Permissible Modifications

When the court of appeals remands a Rule 10(e) issue to the district court for resolution, or when a request is filed directly with the district court, litigants must understand what the rule does and does not allow the district court to do: the district court may resolve questions regarding accuracy of the existing record; the district court may not, however, consider *new* evidence and supplement the record with that evidence. See *United States v. Smith*, 493 F.2d 906, 907 (5th Cir. 1974).

Specifically, Rule 10(e) permits modifications to the record involving items that were considered at the time of the district court's ruling but were accidentally excluded from the official record. In that respect, "[t]he term error or accident in Rule 10(e) should be broadly interpreted to permit the record to be supplemented by any matter which is properly a part thereof. Omissions in the record may result from the error or inadvertence of the parties, the court reporter, the district court clerk or the judge." *Innovation*

Ventures, LLC v. Bhelliom Enterprises Corp., No. 09-13783, 2012 WL 6212690, at *1 (E.D. Mich. Dec. 13, 2012) (internal citation and quotation marks omitted).

Such errors and omissions amenable to correction under Rule 10(e) include, but are not limited to, requests to correct the record:

- To include missing testimony (e.g., transcript does not reflect everything that occurred as demonstrated by audio recording of proceeding), *U.S. v. Brika*, 416 F.3d 514 (6th Cir. 2005);
- To include language translations that were used in the trial court but omitted from the record on appeal, *Davila v. Corporacion De Puerto Rico Para La Difusion Publica*, 498 F.3d 9 (1st Cir. 2007);
- To correct jury instruction to reflect instruction actually given, *U.S. v. Zichettello*, 208 F.3d 72 (2d Cir. 2000).

After the district court resolves the dispute over accuracy, the court of appeals may review the findings for reasonableness. The findings generally are deemed conclusive absent a showing of intentional falsification or plain unreasonableness. *U.S. v. Mori*, 444 F.2d 240, 246 (5th Cir. 1971); see also *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 216 (6th Cir. 1992) (reviewing for abuse of discretion). Notably, if a district judge states that he or she does not recall a certain event or statement, typically the court of appeals will not disrupt that recollection. *Camps v. New York City Transit Authority*, 261 F.2d 320, 323 (2d Cir. 1958).

How to Request a Modification

When preparing your motion or application for

correction of the record on appeal, you should explain what is missing or incorrect in the record, the reason for the error or omission if known, the requested correction, and whether the other party stipulates or objects to your request. The motion should attach any available supporting documentation, including affidavits explaining the issue. Although Rule 10(e) does not impose a time limit upon requests for modification, any such request should be made as soon as possible after discovery of any error or omission.

As discussed above, the nature of the requested correction guides which court should decide the issue. If you seek to *resolve a difference in the record*, you must present the issue to the district court for resolution under Rule 10(e)(1). When faced with this type of dispute, before filing a motion in the district court, you should check the local rules in your jurisdiction to determine whether the better course of action would be to file a motion or application with the court of appeals asking that the request be remanded to the district court. One possible benefit to this approach would be to provide notice of the issue to the court of appeals, thereby allowing the court to postpone work on the appeal until the record has been corrected. However the request reaches the district court (direct filing or remand), if the court grants the motion, it will then certify a new portion of the record reflecting the correction and send it to the court of appeals. Under either scenario, the request should be made as soon as possible so as not to delay consideration of the appeal.

If you seek to *correct an undisputed omission or misstatement*, there are three options for certifying

a revised record: (1) submit a stipulation by the parties regarding the modification, (2) request remand to the district court for resolution, or (3) request resolution directly by the court of appeals. Practically speaking, although the court of appeals may accept the newly certified portion of the record by accepting the parties' stipulation (e.g., in the case of an obvious omission such as the accidental omission of one day of trial transcript from the record as it was forwarded to the court of appeals), or by considering and resolving the matter itself, the more that the request turns on knowledge of what occurred in the district court, the more likely the court of appeals is to remand the matter. A word of caution about proceeding by stipulation: notwithstanding the language of Rule 10(e)(2), it is a good idea to submit a stipulation alongside a request for court approval because some appellate courts likely will take the position that "[t]he parties to an appeal cannot bind the court to supplement the record no matter how plainly they both stipulate that supplementation is all right with them. The appellate court has the duty to make the decision to supplement or not to supplement." *Shahar v. Bowers*, 120 F.3d 211, 213 n.4 (11th Cir. 1997).

Finally, if you identify a correction that you deem critical to the appeal even though it pertains to material not considered by the district court, although this falls outside of the authority granted in Rule 10(e)(2), as a last resort, it should be noted that some appellate courts have acknowledged they have discretionary power to supplement the record with material not reviewed by the district court in "special circumstances." Before granting a rare exercise of that

discretion, courts of appeals will generally consider factors such as:

- (1) whether proper resolution of the case was beyond any dispute;
- (2) whether it would be inefficient to remand to the district court for review of additional facts;
- (3) whether the opposing party had notice of the existence of the disputed evidence;
- and (4) whether the case is before the court on a habeas corpus claim because federal appellate judges have unique powers in that context.

Sigler v. American Honda Motor Co., 532 F.3d 469, 477 (6th Cir. 2008) (internal quotation marks omitted); see also *Dickerson v. Alabama*, 667 F.2d 1364, 1367–68 (11th Cir. 1982); *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89 (3d Cir.1990).

In conclusion, when striving for accuracy of the record on appeal, litigants should become familiar with Rule 10(e) and use it as a tool, where appropriate, to provide the appellate court with a fulsome record and increase the likelihood of a fair and just outcome on appeal.

A Tale of Two Records

By Robert S. Shafer and Martin A. Kasten

Two recent cases by state supreme courts illustrate the different approaches that appellate courts may take in reviewing the record on appeal. In *Ortho-McNeil-Janssen Pharmaceuticals, Inc. v. State of Arkansas*,¹ the Arkansas Supreme Court reversed and dismissed a judgment for over \$1.2 billion in civil penalties against Janssen Pharmaceuticals, Inc. and reversed and remanded a separate penalty award for over \$11 million. Eleven months later, the South Carolina Supreme Court remitted civil penalties to \$34 million and \$101 million on essentially the same factual claims and affirmed. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*² With regard to the facts, the two opinions read like novels pulled from opposite ends of the bookshelf. One appellate court's notice of certain "hot facts" outside the record may have had something to do with it.

"What's the case about?" asked the litigation partner. "Well, there's this letter."

In November 2003, Janssen mailed an informational "Dear Doctor Letter" to thousands of health care providers nationwide. Its purpose was to inform doctors of an updated product label that had been approved by the Federal Food and Drug Administration for Janssen's atypical antipsychotic drug Risperdal as well as for other drugs of the same class. The updated label focused on glucose-related risk factors. The letter enclosed the updated label, but it also included the statement: "Although confirmatory research is still needed, a body of evidence from published peer-reviewed epidemiology research suggests that Risperdal is not associated with an increased risk of diabetes when compared to untreated patients or patients treated with conventional [i.e., not atypical] antipsychotics."

But in April 2004, the FDA sent a “Warning Letter” to Janssen stating that the Dear Doctor Letter was false or misleading in violation of the Federal Food, Drug, and Cosmetic Act.³ Among other reasons, the Warning Letter stated that Janssen’s Dear Doctor Letter had minimized the risk of hyperglycemia-related adverse events and misleadingly claimed that Risperdal was safer than other atypical antipsychotics. Janssen disputed the FDA’s position but agreed to send a corrective letter to the recipients of the Dear Doctor Letter. The corrective letter recited the FDA’s conclusions in the Warning Letter and quoted at length from the updated product label. Shortly thereafter, the FDA informed Janssen that it considered the matter closed.

Here come the states.

Represented by their Attorneys General, the States of South Carolina and Arkansas filed suit in their respective state courts seeking penalties under consumer protection statutes—in South Carolina, under the South Carolina Unfair Trade Practices Act,⁴ and in Arkansas, under the Arkansas Deceptive Trade Practices Act.⁵ The suits claimed that the Dear Doctor Letter was “unfair or deceptive” (South Carolina) and “unconscionable, false or deceptive” (Arkansas). Both states also alleged that for a period of years Janssen’s Risperdal product label was unfair, deceptive, or fraudulent because it minimized certain risk factors, including the risk of diabetes. In South Carolina, this independent labeling claim was brought under the state’s Unfair Trade Practices Act, and the same claim in Arkansas was brought under the state’s Medicaid Fraud False Claims Act.⁶

The two states presented substantially the same evidence at their respective trials. The evidence on the Dear Doctor Letter claim consisted primarily of the Warning Letter supported by expert testimony that Janssen’s statement in the Dear Doctor Letter about what the epidemiological literature suggested was false or misleading. On both the Dear Doctor Letter and labeling claims, the states presented evidence that Janssen sought to minimize the risk of diabetes in order to distinguish Risperdal from competing drugs and to maintain market share. Two juries found that the Dear Doctor Letter and the product label were the stuff of consumer fraud.

Defendant was the best of companies; Defendant was the worst of companies.

The Arkansas opinion begins with a fairly short and dispassionate recitation of the facts. To be sure, by reversing and dismissing the labeling claim for legal error⁷ and by reversing and remanding the Dear Doctor Letter claim for error in admitting the Warning Letter into evidence,⁸ the Arkansas Supreme Court could forego a detailed history of the case. After a nod to the admission of the state’s expert witness that Risperdal was a “godsend” and a “miracle drug,”⁹ the Court briefly recited the FDA’s decision in September 2003 to require a class label for all atypical antipsychotics. The Court then quoted at length from the Dear Doctor Letter, the Warning Letter, the corrective letter, and the FDA letter that closed the file. Whatever these long, quoted passages may have lost by way of reader attention, they more than made up for in objectivity.

As the opinion notes, the Arkansas jury returned separate general verdicts on each claim,

worded in the terms of the statutes. The Deceptive Trade Practices verdict referred to “any unconscionable, false or deceptive act or practice” with respect to the Dear Doctor Letter, and the Medicaid Fraud Act verdict to “any false statement or representation” with respect to the product label. Janssen challenged the sufficiency of the evidence with respect to elements of both claims, but the Supreme Court did not summarize the conduct that the jury had found to constitute fraud. Indeed, apart from the Court comparing the Dear Doctor Letter to the Warning Letter, it is difficult to tell what the State believed that Janssen had done wrong.

The South Carolina opinion paints a different picture. It recites evidence that Janssen marketed Risperdal as having lower metabolic risks than competing drugs while failing to disclose the results of purported studies that showed that such claims were untrue.¹⁰ It states that Janssen categorized risks in the product label so as to minimize their frequency and severity. It concludes that “[a]n objective review of the evidence and law bears out the State’s allegations that Janssen engaged in a systematic pattern of deceptive conduct.”¹¹

What is noteworthy about the South Carolina Supreme Court’s view of Janssen’s conduct is that the Court cannot be sure that the jury actually found it to be deceptive. The trial court denied Janssen’s request to query the jury separately on whether it had engaged in unfair or deceptive acts or practices. On appeal, the Supreme Court acknowledged that the standards for unfairness and deception are different. The former includes any act that is “offensive to public policy or ... immoral, unethical, or op-

pressive.”¹² The latter includes any act that “has a tendency to deceive.”¹³ Consequently, the jury may well have found that Janssen was liable for unethical business practices in marketing Risperdal and not for deception.

This observation is bolstered by evidence that Janssen’s conduct had no effect on the prescribing practices of doctors because—as the South Carolina Supreme Court acknowledged—“they knew the truth concerning the risks and side effects associated with Risperdal.”¹⁴ The Court could not fathom “why Janssen would go to such lengths to perpetuate and defend a lie” when “[t]he truth about the risks associated with atypical antipsychotics was well known.”¹⁵ The real question is why the Court was so convinced that Janssen was liable for deception when the jury did not necessarily so find.¹⁶

Scandals Everywhere

Whatever else may be said of the South Carolina Supreme Court’s belief that Janssen decided to embark on a fool’s errand of deception, it is noteworthy that the Court reached outside the record in two significant instances to cast a pall on Janssen.

First, the opinion quotes at length from a law review article about public access to clinical trial results, concluding that “[s]ome have expressed a growing concern regarding the ... industry’s reticence to disclose negative clinical data[.]”¹⁷ One thinks of the criminal defendant who hears the judge say at the sentencing hearing, “There’s been too much of this type of thing lately.” While a citation to a law review article to inform and support legal analysis is entirely legitimate, the Court focused on the article’s indictment of the industry as a whole in what

amounts to a *dehors-the-record* attack: “Over the past few years, *numerous scandals in the drug industry* illustrate that concealing unfavorable research results is far from an isolated practice [.]”¹⁸

Second, the opinion twice refers to a settlement agreement between Janssen and the U.S. Department of Justice that was concluded in November 2013—months after the South Carolina case was argued and submitted for decision. Both references note that Janssen agreed to pay more than \$2 billion to resolve civil and criminal claims involving Risperdal.¹⁹ Because the settlement agreement was not in the record and there was no testimony related to it, there was no context for evaluating the relationship between the South Carolina case and the DOJ claims. In fact, the DOJ settlement had no legal impact on the issues in South Carolina.

Sticking With The Record

Herein lies the danger of an appellate court going outside the record for facts that cannot be—or should not be—judicially noticed. Appellate judges being human, “bad act” narratives have a powerful appeal on the human psyche, particularly on the tendency to confirm one’s own initial perceptions of what a record contains or what a jury actually may have found. Just as it is still left to be proved “whether love lead fortune, or else fortune love,”²⁰ one is left to wonder whether a non-record source may have led to a decision, or the other way around.

Non-record facts may also have the effect of supercharging the appellate court’s description of the record evidence. After quoting the disputed sentence in the Dear Doctor Letter, in which Janssen stated what epidemiology research

“suggested” about Risperdal’s relative risk of causing diabetes compared to untreated patients and other medicines, the South Carolina Supreme Court announced: “To put it mildly, the ... [Dear Doctor Letter] contained false information.”²¹ With equal mildness, Janssen obviously believed that it had a defensible position on the Dear Doctor Letter, and in fact, the jury may not have believed that the Dear Doctor Letter was deceptive at all. One can hear the choir at the DOJ and in the academy saying: “There’s been too much of this type of thing lately.”

Of course, whether a non-record source is to be relied upon in an appellate opinion lies with the appellate court. Judicial restraint is the answer, but can counsel do anything to encourage the court to stay within the bounds of the record and—just as importantly—to review the evidence in the light of what can be known with certainty from the verdict? In a case like *Wilson*, where too many issues competed for appellate attention, the answer is probably not.

Even so, perhaps a focus on the verdict and a statement about what can and cannot be gleaned from it factually *without speculation* would be helpful. After all, in a world where good companies and good people find themselves accused of deception and worse, it is the jury to which we turn as the ultimate arbiter of truth. Their verdict, when supported by the evidence, should always remain the factual polestar of the record on appeal.

¹ 432 S.W.3d 563 (Ark. 2014).

² 2015 S.C. LEXIS 83 (S.C. Feb. 25, 2015).

³ 21 U.S.C. §§ 301-399f (2006 & Supp. V 2011).

⁴ S.C. Code Ann. §§ 39-5-10 to -180 (1985 & Supp. 2013).

⁵ Ark. Code Ann. §§ 4-88-101 to -115 (Repl. 2011 & Supp. 2013).

⁶ Ark. Code Ann. §§ 20-77-901 to -911 (Repl. 2014).

⁷ The Court held that the subsection of the Medicaid Fraud False Claims Act on which the labeling claim was based, Ark. Code Ann. § 20-77-902(8)(B), was inapplicable. *Ortho-McNeil-Janssen*, 432 S.W.3d at 570-74.

⁸ The Court held that the Warning Letter was inadmissible as hearsay under Rule 803(8)(iv) of the Arkansas Rules of Evidence and unduly prejudicial under Rule 403. *Id.* at 574-80.

⁹ *Id.* at 566.

¹⁰ The trial court excluded evidence that the FDA later agreed that Risperdal was differentiated from other atypical antipsychotics with regard to relative diabetes risk.

¹¹ *Wilson*, 2015 S.C. LEXIS 83, at *22; *see also id.* at *37 (stating that the record is “replete with evidence that ... Janssen’s conduct was unfair and deceptive”).

¹² *Id.* at *20, 39.

¹³ *Id.* at *39.

¹⁴ *Id.* at *34-35.

¹⁵ *Id.* at *65.

¹⁶ The record also contained findings by the trial court sitting as a factfinder in support of the penalty awards. A number of these findings focus on deception and potentially conflict with what the jury may actually have found. Although not attested in South Carolina law, some authority holds that it is permissible, albeit not favored, for a trial court to make findings contrary to the findings of a jury on the same record. *Baker v. Goldman Sachs & Co.*, 949 F. Supp. 2d 298, 307-08 (D. Mass. 2013) (applying Massachusetts law).

¹⁷ *Wilson*, 2015 S.C. LEXIS 83, at *7 (citing Christine D. Galbraith, *Dying to Know: A Demand for Genuine Public Access to Clinical Trial Results Data*, 78 Miss. L.J. 705 (2009) (“GALBRAITH”)).

¹⁸ *Id.* at *8 (quoting GALBRAITH at 710) (emphasis added).

¹⁹ *Id.* at *22 n.10, *71. The DOJ settlement involved other medicines and other companies in addition to Risperdal and Janssen.

²⁰ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

²¹ *Wilson*, 2015 S.C. LEXIS 83, at *16.

You Fight or You Die: When Bending the Knee at Trial Costs You the Iron Throne¹

By *Brian K. Keller*

Appellate attorneys are particularly skilled at crafting written and oral arguments that convey “the big picture” about a given issue of law. But sometimes even with these skills, appellate attorneys can’t save a case once it reaches appeal. Sometimes the only solution is intervention far earlier in the trial proceedings. This piece identifies seven occasions when trial proceedings often can be saved only by reaching out prior to appeal, working with trial attorneys on the nuances of appellate law, and actively shaping the

course of trial litigation. Failure of trial and appellate litigators to preemptively work together at trial in these instances is tantamount to “bending the knee,” to use a Game of Thrones aphorism: that is, giving up.

In these situations it’s incumbent on the appellate attorney to actively reach out to trial practitioners and explain why it is crucial to infuse appellate expertise into the trial proceedings. And it is equally the job of trial practitioners to work with appellate litigators to lay a path for success on appeal. Time and difficulty are ob-

stacles. But these costs pale with loss on appeal: taking a shaky or incomplete position at trial in these cases makes it more likely the trial judge will reach a similarly shaky conclusion. Reaching appeal with legal issues not “neatly tied up with a bow” can, in offices like mine, mean setting aside convictions of extremely serious crimes and uncomfortable Congressional and public scrutiny.²

At least three reasons make each of the seven situations, discussed below, particularly susceptible to appellate reversal. First, evolving and unstable areas of the law are, by definition, still waiting for that perfect appellate brief that brings together the correct mixture of disparate precedents; without this holistic understanding of the law, any two equally balanced appellate courts might reach vastly different results. Second, varying judicial philosophies on the bench further roil the waters and introduce uncertainty into the likely result. Finally, judicial workloads limit the work some appellate benches can perform trying to figure out why inadequately developed or incorrect litigation of an issue at trial diverges from the approach taken on appeal. All three of these reasons make resolution on prudential doctrines such as forfeiture and waiver more likely or generally introduce uncertainty into the possible result on appeal.

When this happens, convictions risk being overturned. Defendants’ lives—imprisonment, conviction—are thrown into uncertainty, as are the lives of the victims of their crimes. The results for civil litigants are equally uncertain, and property and money and lives are thrown into stasis while an uncertain appeal proceeds. It's in the interests of all parties to ensure the stage

for appellate litigation is fully set at the trial level.

New Statutes

New statutes pose clear dangers to all parties on appeal. Appellate advocates often notice that trial records are deficient even when long-standing statutes are at issue, despite the parties at trial, *in medias res*, having fought tooth and nail to “get it right” and avoid claims of ineffective assistance. It should thus be no surprise that trial litigation over new statutes—the statutes having been produced by legislative compromise at a nice distance from the courtroom—is a frequent cause of inadequacy in trial records.

The military has been the subject of numerous high-profile attempts to re-write its sex crimes statutes. Congress has rewritten the military rape and sex crimes statutes multiple times in less than a decade, including two major revisions in 2006 and 2012. Significant portions of the statutes having changed, much appellate litigation ensued, resulting in one provision of the statute being declared unconstitutional and another provision being deemed a “legal impossibility.” See *United States v. Prather*, 690 MK.J. 338, 343, 345 (C.A.A.F. 2011).

The 2012 revisions produced still more appellate litigation and public debate about whether the military sex crimes statutes should be changed yet again. See, e.g., *United States v. Pease*, No. 201400165, 2015 CCA LEXIS 286 (N-M. Ct. Crim. App. July 14, 2015); *United States v. Garcia*, No. 201400108, 2015 CCA LEXIS 207 (N-M. Ct. Crim. App. May 14, 2015); *United States v. Feldkamp*, No. 38493, 2015 CCA LEXIS 172 (A.

F. Ct. Crim. App. May 1, 2015). Earlier interjection by appellate attorneys into the trial process can predict and stave-off these foreseeable reversals by recommending appellate-proofed jury instructions, charging and indictment language, and assisting with the trial litigation of these first-impression interpretations of new statutory language. At minimum, it creates a consistent and common front for a party to the litigation that seamlessly transfers from trial to appeal.

A more familiar example of statutes causing litigation that begs earlier appellate intervention is the Religious Freedom Restoration Act (RFRA). Few federal circuits have resolved how to handle RFRA criminal defenses, and military courts are no exception. *See, e.g., United States v. Sterling*, No. 201400150 (N-M. Ct. Crim. App. Feb. 26, 2015), *appeal docketed*, No. 15-0510/MC (C.A.A.F. Apr. 24, 2015) (full disclosure: I am a counsel representing the United States on this case).

The earlier appellate counsel provide their expertise in trial proceedings in cases involving complex statutes and issues of first impression, the better the chance to shape the outcome on the back end, not least by forging a consistent continuum of approach to the legal issues. Appellate counsel bring to trial proceedings a unique ability to view cases as part of a holistic scheme and as potential landmark cases in the development of the law.

Disconnect Between the Executive and Legislature

A second area begging early intervention by appellate counsel are cases in which the Legislature and Executive leave unexpected “gaps” in

the law or rules—particularly when those gaps create uncertainty in the possible outcomes of a trial. One example of this in the military was the lack of a prescribed maximum punishment for certain crimes. Congress has delegated to the President the power to prescribe the maximum punishment for military crimes. But while Congress’ new sex crimes statute became effective in June 2012, the Executive Branch issued maximum punishments for those crimes in May 2013. In the interim, trial litigation ensued over what maximum punishment applied to sex crimes in the military: was it thirty years confinement—or thirty days? *See, e.g., United States v. Booker*, 72 M.J. 787 (N-M. Ct. Crim. App. 2013), *rev. denied sub nom United States v. Schaleger*, No. 15-0488/NA (C.A.A.F. May 26, 2015). My office filed a successful extraordinary writ, intervening in trial.

Appellate and trial attorneys that encounter similar “executive-legislative” gaps should consider “leaning forward” and requesting proactive resolution of potential appellate issues. Where a trial judge’s resolution of such a gap is a “usurpation of power,” the All Writs Act is a quick route to resolution of the gap and permits appellate counsel to develop arguments that may be otherwise tardy on direct appeal. But a quicker and more efficient route to resolving these issues is for appellate counsel to work with trial litigators before an ex writ becomes necessary; indeed, the high bar for ex writs made my office’s success in *Booker* by no means a foregone conclusion. A more direct route, helping the trial judge to “save face” and avoiding a claim of “usurpation of power,” is working alongside trial attorneys to file holistic pleadings that help the trial judge reach the

right result and make a good record to defend against an opposing party's later appeal.

Complex Areas of Science or Technology

A third example: when highly complex issues of technology arise in the trial court and are incompletely litigated and then proceed to an appellate court not expertly versed in that area of science or technology, appellate counsel often must "go back to square one" and craft a brief that methodically and accurately explains the technology to the court. This was the approach my office employed, albeit unsuccessfully, in *United States v. Tienter*, No. 201400205, 2014 CCA LEXIS 700 (N-M. Ct. Crim. App. Sep. 23, 2014).

The issue of digital fourth amendment search issues is still new and developing in military courts, as in many civilian courts. In *Tienter*, the trial litigation and pleadings were not focused on the three main issues that governed the appeal: (1) how files were stored on the cellphone, how the cellphone's contents were seized, and how the cellphone was searched; (2) how *ex ante* restrictions on search methodologies impact the search and whether *ex ante* restrictions are advisable, permissible, or required; and, (3) how the "plain view" doctrine works in a digital search context. Because the trial litigation had not worked out the internecine digital fourth amendment battles in the motions, the trial judge's ruling did not clearly answer any of these questions.

The first issue self-evidently required earlier intervention at trial by appellate counsel to ensure trial litigation made a clear and accurate record; only knowledge of the current issues facing ap-

pellate courts as to the Fourth Amendment implications of digital search and seizure would help produce such an appellate-proof record. But so did the second and third issues. Thus, where jurisprudential splits and still-developing and complex intersections of law and technology arise in cases like *Tienter*, appellate counsel should be on the *qui vive* and ready to leap into teamwork with trial counsel before the appeal even starts. Where the trial level pleadings thoroughly explore the questions the appellate courts will be asking, in an attempt to prevent reversal, to appellate-proof their opinions, and to reconcile circuit splits, reversal becomes less of a risk, or at worst, the risk becomes easier to gauge.

High Potential for Public Scrutiny or Bad Press

We all can think of cases where difficult decisions raise the specter of "optics" or "bad press," which might coax the appellate judiciary to leave the ultimate disposition of the case to another court or an executive actor. This fourth category of cases requires appellate litigators to work closely with trial litigators to ensure the trial record forecloses or narrows the appellate court's disposition options *before* appeal.

Examples are mental health issues of the appellant and death penalty cases. Once a record is docketed at the appellate court, any incompleteness or issues that appear to be "close calls" may operate to encourage appellate courts to decline to resolve those issues in favor of a remand to further develop the record. This simply results in further delay in the proceedings and provides the opportunity for additional gaps and errors to develop on the record. Moreover, giv-

en enough "passing the buck," the case may ultimately simply "die."

It is, of course, unethical to engage in frivolous litigation or litigation for the sole purpose of delay; but no one should forget that these delays, and the opportunity for more errors or gaps in the record—in these high profile cases—often favor one party. Airtight resolution of these issues at trial is necessary to head off the slow and painful death of such cases, which often come at great cost to one of the parties.

The "Legal Black Holes"

A fifth category of cases are "legal black holes," or unresolved schisms in appellate precedent that have already produced loud, vocal bouts of grumbling and head-scratching by appellate judges in opinions. See, e.g., *Oregon v. Bradshaw*, 462 U.S. 1039, 1048 (1983) (Powell, J., concurring, opining that *Bradshaw* should have been the opinion that clarified the confusion engendered by *Edwards v. Arizona*, 451 U.S. 477 (1981), but instead created more confusion). Military courts fell headlong into Justice Powell's quandary in *United States v. Hutchins*, 72 M.J. 294 (C.A.A.F. 2013), where, as Justice Powell predicted, the case was largely decided on the inquiry "as to who spoke first."

This, then, was a "legal black hole" case. The same dilemma split the Supreme Court into a plurality opinion in *Oregon v. Bradford*, a court divided in much the same way as the *Hutchins* court. Thus *Hutchins*, and cases like it, are fertile ground for trial litigants to pinpoint a jurisprudential dilemma at trial and to guide the trial judge to directly confront the issues ensnaring *Edwards* rulings for the past several decades. If judges hope that litigants' briefs and argu-

ments are not merely "ships passing in the night," then so too, appellate litigants must guide judges to confront the quagmire and force them to "pick a side." But this requires, again, appellate counsel getting involved closely with trial proceedings and guiding the prosecutors or defense counsel to squarely confront an appeal oriented understanding of persisting divides at the Supreme Court. Trial rulings that facially take stock of such plurality decisions and divides and that hedge bets by, for example, ruling on "both sides" of the divides—will be better positioned to survive appeal.

Complex Evidentiary Matters Straddling Different Rules or "Outside" the Rules of Evidence

Evidentiary issues of great complexity that at first glance "don't fit" into any one Rule of Evidence require the same sort of quick and early intervention by appellate counsel during trial. In *United States v. D.W.B.*, 74 M.J. 630 (N-M. Ct. Crim. App. 2015), the United States appealed a trial judge's ruling excluding all testimony by an alleged child victim of sexual abuse. The Navy-Marine Court of Criminal Appeals agreed with the trial judge's blanket exclusion of all trial testimony by the child because the child had previously met with a witness who specialized in "recovered memories."

Finding that the child did not remember the sexual assault until after the meeting with the recovered memory practitioner, the trial judge excluded the child's testimony under the equivalent to Fed. R. Evid. 702 as unreliable expert testimony. The jury never heard from either the child victim or the recovered memory practitioner. The appellate court affirmed, finding

that treating the child victim's testimony as scientific testimony met "fundamental fairness." Yet, at the same time, the appellate court explicitly acknowledged that "no specific rule of evidence dictates" the new test the jury applied to the alleged child victim's testimony.

The complexity of this issue—the evidentiary “stink” of the child having met with a “recovered memory” expert before clearly recalling the alleged crime, and the many unresolved and highly complex evidentiary issues involved—all contributed to this result. Had litigation at trial hewed more closely to the extant rules of evidence rather than the state caselaw and pre-*Daubert* caselaw that governed the trial litigation, shifting the appellate litigation away from those precedents would have proved easier.

Keep an eye out for evidentiary issues like this where trial judges idiosyncratically apply the rules of evidence and have difficulty choosing which rule of evidence to apply. Appellate litigants are most useful to the appellate court, and are most effective, when they intervene at the trial level to lay down battle lines that are then reprised by appellate litigants on appeal. When the path and strategy for resolving these tough appellate issues are set at trial, prevailing on appeal becomes more likely.

Prosecutorial Lack of Vigilance During Guilty Pleas

In numerous cases, military appellate courts have recently set aside guilty pleas because of an insufficient knowing and voluntary acknowledgment on the record by the accused that—while similar conduct may be constitutionally

protected—the factual basis of the accused's crimes merits no such constitutional protection. Recent cases include: *United States v. Moon*, 73 M.J. 382 (holding that plea to possession of non-pornographic nude images of children under 10 U.S.C. sec 934 requires a specific acknowledgment on the record by the accused that the conduct would be protected in civilian courts, but is not in the military because of the terminal element of 10 U.S.C. sec 934); *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (reversing due to failure of the trial judge to explain to the guilty-pleading accused the difference between sodomy that was constitutionally protected, and sodomy that under *Lawrence* could be legitimately punished).

The simple solution is for prosecutors to proactively "fill the gaps" at trial and before appeal. If prosecutors are even vaguely aware that constitutional protections may excuse the conduct in some circumstances, or if the judge is refusing to conduct a deeper plea inquiry requested by either the prosecution or defense, appellate attorneys, who both fight to preserve and overturn pleas of guilt on the basis of inadequate inquiry at the plea hearing, are a ready source of assistance. The prosecutor is the fail-safe; once an inadequate record reaches appellate attorneys, there is no simple solution. If the plea inquiry is deficient, the conviction will likely be overturned and a retrial or rehearing is the probable solution, along with wasted time, taxpayer money, possibly lost witnesses, and perhaps even an unexpected acquittal or lower sentence on retrial.

Conclusion

How do appellate and trial litigators put this

into practice? My office has experimented with many iterations of an “outreach” program to trial prosecutors over the past ten years. Several different initiatives have proven successful:

First, my appellate attorneys have created a “duty counsel” hotline, with phone, web page, and email contact options so that trial litigators quickly seek appellate assistance. One primary and one secondary duty counsel retain the duty for one week. Then the duties rotate to new counsel. We log advice given and questions received.

Second, we created a blog to routinely update trial attorneys on recent military, federal circuit, and Supreme Court precedent, as well as a short “bottom line” advice on how to make use of or adjust to the precedent at trial.

Third, my appellate attorneys travel at least twice a year to teach *ad hoc* outreach classes to trial litigators about the “trial-appeal intersection issues” — ex writs, remands, interlocutory appeals, and “protecting the record for appeal.” Prime time to proselytize the “seven areas” I discuss above.

Fourth, we teach formal classes to both brand new trial attorneys and experienced litigators at Naval Justice School in Newport, Rhode Island.

Finally, we have arranged hourlong quarterly phone briefs where our office attorneys each pick a topic or recent development and brief all trial prosecutors across the globe for five to ten minutes on that issue.

Each of these approaches increases the comfort level of trial litigators and encourages them to contact and ask questions of my appellate attorneys. In identifying the above seven areas of

concern, appellate attorneys need to be able to explain to trial litigators why forging a “joined at the hip” trial litigation strategy is of utmost importance. I would love it if you’d write or call me to tell me how you make this happen, and if it increases your success on appeal as I suspect it will.

¹ Thanks, George R.R. Martin, for creating a series involving battles and intrigue as pitched as those we see on the appellate bench. It’s great reading for appellate attorneys everywhere.

² This scrutiny is sometimes hard to easily answer. Despite top-notch staffing, the military prosecutorial process is a road still being paved: the system continues to mature, but is younger than the federal trial and appellate system that, starting in 1950, it has come to largely mirror. Conviction at court-martial means guilt of a Congressionally, statutorily defined crime, and results often in incarceration, sometimes for decades, and can result in death. Despite this, “chain of command” and “unity of effort” are not accurate descriptors of all military prosecutions. The military prosecutorial process is somewhat “Balkanized;” unlike prosecutions by attorney general offices in the states or the federal government, a military prosecution is the result of the efforts of a loose confederation of offices under different, often non-prosecutorial, commands. Trial and appellate offices in each of the military branches typically share no common “prosecutorial” authority directing prosecution and appellate efforts, as an attorney general would direct and coordinate civilian prosecutions and appeals. No common authority in practice requires that any one representative of the United States take the same litigation position as any other. Indeed, frequently they do not. Military prosecutions and appeals, and the docketing and software systems that support them, are not unlike American radios during Operation Allied Force in the Kosovo conflict: often broadcasting at different frequencies, and not to each other. But all these shortcomings are counterbalanced by the superior individuals who willingly volunteer to become officers and lawyers in the American military and who prosecute and defend military crimes.

Raising New Issues on Appeal: The Legal Aspect of the Record on Appeal

By Howard J. Bashman

When a case reaches appeal, the record ordinarily reflects not only the facts and evidence that the parties have placed before the trial court but also the legal issues and arguments that the parties presented. Because the appellate process tends to operate at a more relaxed pace than the typical trial court proceeding, and because attorneys handling an appeal thus have a greater opportunity to reflect on the legal arguments most likely to produce the client's desired results, it is not uncommon for attorneys taking or defending against an appeal to spot potentially meritorious issues or arguments that were not presented to the trial court.

Moreover, it is not uncommon — and indeed may be very good practice — for attorneys who focus predominantly on trial litigation to enlist a new set of eyes with appellate experience to assist or completely handle an appeal. Adding an attorney with appellate expertise who was not involved in the trial court proceeding may itself increase the possibility for recognizing new issues or arguments that could be brought up on appeal.

Cases too numerous to catalog have held that an appellate court will not consider a legal argument that was not squarely presented to the trial court or administrative tribunal below. *See, e.g., Reider v. Phillip Morris USA, Inc.*, 2015 WL 4256726 (11th Cir. July 15, 2015) (“An issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.”) (quoting *Walker v. Jones*, 10 F.3d

1569, 1572 (11th Cir. 1994)). Nevertheless, exceptions exist to the rule that issues not raised below are waived on appeal, and appellate judges themselves occasionally end up deciding cases on legal grounds not presented by the parties. As a result, perhaps attorneys handling an appeal should be more willing to address legal issues that appellate judges might view as relevant or dispositive, even if those issues had not been presented to the trial court.

The question of whether a party or appellate court may address issues or arguments not raised before the trial court first drew my interest more than 20 years ago, when Ninth Circuit Judge Alex Kozinski issued a dissent from the denial of rehearing en banc in *Elder v. Holloway*, 984 F.2d 991 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc). In that case, a three-judge Ninth Circuit panel had ruled that, in deciding whether a federal civil rights plaintiff could overcome a defendant's assertion of qualified immunity by showing that the federal rights infringed were clearly established at the time of the defendant's alleged transgression, the appellate court was limited to considering only the specific legal authorities that the parties cited to the trial court and the federal district judge cited in his opinion. *See Elder v. Holloway*, 975 F.2d 1388, 1396 (9th Cir. 1992) (holding that a court “has no obligation” to “come up with relevant law on its own” pertaining to the qualified immunity inquiry).

In his dissent from the Ninth Circuit's denial of en banc rehearing, Kozinski wrote that “[t]he

careful effort . . . to seek out and consider authorities not cited by the parties is entirely consistent with what I understand to be our role as judges.” 984 F.2d at 997. Kozinski also explained that “[d]etermining the law is, after all, a shared responsibility to be borne by the court and the litigants.” *Id.* at 999. Although Kozinski’s dissent did not cause the Ninth Circuit to grant rehearing en banc, it perhaps did help to persuade the U.S. Supreme Court to grant certiorari. In February of 1994, only a month and a half after oral argument, a unanimous U.S. Supreme Court reversed the three-judge Ninth Circuit panel’s decision, holding that “[a] court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own and other relevant precedent.” *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

To be sure, considering the qualified immunity inquiry on appeal to be in the nature of a closed-book exam, where the relevant precedents are limited to those cited by the parties and the trial judge below, is not precisely identical to an appellate court’s decision to limit its inquiry to the issues and legal arguments presented to the district court. But both of these approaches fall along the same continuum. The Ninth Circuit’s approach, which the Supreme Court very quickly declared to be impermissible, is simply a much more extreme, and hence impermissible, version of an appellate court’s general reluctance to decide appeals on a legal basis not squarely presented to the lower tribunal.

Aside from those specific legal necessities, such as existence of subject matter jurisdiction or presence of an actual Article III case or controversy, which can always be raised for the first

time on appeal, it came as a surprise to me that the frequently invoked unwillingness of federal appellate courts to consider newly raised arguments on appeal is not only discretionary but also is subject to several longstanding and fairly expansive exceptions.

The discretionary nature of the rule that an appellate court will not consider arguments not properly presented below is suggested through the sorts of wiggly words that various courts of appeal have used in explaining that they will not address legal arguments that were not first presented to the trial court. For example, in *Reider, supra*, the Eleventh Circuit explained that “issues raised for the first time on appeal are generally forfeited” 2015 WL 4256726, at *2 (emphasis added). In an earlier case, the Eleventh Circuit was even more strict, stating that “absent extraordinary circumstances” an argument raised for the first time on appeal will not be considered. *Kawa Orthodontics, LLP v. Secretary, U.S. Dep’t of the Treasury*, 773 F.3d 243, 246 (11th Cir. 2014). Similarly, both the Second and Eighth Circuits have describes as a “general rule” the proposition that arguments raised for the first time on appeal will not be considered. See *Bogle–Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *First Bank Investors’ Trust v. Tarkio College*, 129 F.3d 471, 477 (8th Cir. 1997).

In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Supreme Court explained that “[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.” *Id.* at 121. The Court in *Singleton* proceeded to offer two examples of when it might be proper for an

appellate court to resolve a legal issue not passed on below: (1) “where the proper resolution is beyond any doubt”; and (2) “where injustice might otherwise result.” *Id.* (internal quotations omitted).

The Second and Eighth Circuits have recognized an additional category of cases involving arguments not raised below that present “a question of law and there is no need for additional fact-finding.” *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005); *see also First Bank Investors’ Trust*, 129 F.3d at 477 (“We may, however, consider an issue for the first time on appeal when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case.”) (internal quotations omitted).

And the D.C. Circuit, in *Lesesne v. Doe*, 712 F.3d 584 (D.C. Cir. 2013), set forth an even more expansive list of circumstances when an appellate court may permissibly consider and resolve legal arguments that the parties did not present to the district court, and thus the district court did not address. Included on the D.C. Circuit’s list were arguments that can be described as presenting “a novel, important, and recurring question of federal law;” arguments that a particular statute is clearly inapplicable; straightforward legal issues that the opposing parties have fully addressed on appeal; and issues that are antecedent to the arguments that the parties did properly present to the district court. *Id.* at 589.

Moreover, numerous federal appellate courts have recognized that a party confronting an adversary’s newly raised arguments on appeal can itself waive the contention that its adversary has waived those arguments by failing to argue

waiver in response to the appellate court. *See, e.g., United States v. Prado*, 743 F.3d 248, 251 (7th Cir. 2014) (discussing the Seventh Circuit’s so-called “waived waiver” doctrine). As a result, a party that is contemplating whether to raise an argument on appeal that was neither presented to nor decided by the district court could reasonably decide that it may be worthwhile to do so, especially since many federal appellate courts may view it as proper to consider the argument so long as the opposing party does not argue waiver in response.

In a perfect world, the arguments needed to attain victory on appeal will all have been properly presented to and ruled on by the trial court. In the actual world in which we live, however, that unfortunately will not always be the case. Although federal appellate courts are no doubt ordinarily reluctant to consider and decide legal issues being raised for the first time on appeal, appellate courts certainly possess both the ability and the discretion to decide such issues on the merits.

When deciding whether to advance a new argument on appeal, one should consider if the argument can fairly be characterized as falling within one of the recognized exceptions to the federal appellate courts’ ordinary reluctance to consider newly raised arguments on appeal. Barring that, one should further consider the likelihood that the opposing party will fail to argue in response that the new argument should be deemed waived and, if so, whether the appellate court may view it appropriate to consider the merits of the argument under the so-called “waived waiver” doctrine.

Just as it can be very difficult to obtain an appellate court's consideration of facts or evidence that were not before the trial court when the decision under review issued, it ordinarily is equally difficult to obtain appellate consideration of an argument that was neither presented to nor decided by the trial court. However, as is the case with facts and evidence, exceptions to

the rule precluding the consideration of new legal arguments on appeal do exist. Knowing what these exceptions are will allow one to decide on a fully informed basis whether raising new legal arguments on appeal may be worthwhile in a particular case.

Red Tie Guy: A True Story of the Overpowering Influence of Facts Outside The Record

By Wendy McGuire Coats

It was the morning of oral argument and one of the clerks was at Starbucks picking up half a dozen coffee orders to take back to chambers. There was quite a line and when the clerk was finally ordering, the gentleman behind her started huffing with exasperation at the number of orders that she was placing, even through a "c'mon, seriously?" under his breath for good measure.

Now this Starbucks is the only coffee shop within six blocks of the courthouse. The clerk, her judge, and most of the court staff come here daily. They know pretty much everyone who works here and today was no exception. The clerk thanked the cashier by name, said good morning to the barista, and headed to the pick-up side of the counter to wait.

That's when she first really saw "Red Tie Guy." He kicked his leather bag across the floor towards the coffee pick up area and then dropped down a stack of papers and a Redweld folder topped with a brief right where the coffees were to be set for customers. He was a one-man ob-

stacle course between patrons and their coffee. The clerk's five coffees started to come out and she began the process of doctoring each order, fitting the cups with a lid, and getting them secure in the cardboard carrier. She noticed that the brief on top of "Red Tie Guys" stack was a brief on calendar before her judge later that morning.

And that's when he started yelling at the barista. He had taken a drink from a cup on the counter and then peppered the barista with questions about the milk, too much foam, not enough room, coffee tasting burnt and in the process spilled some on the brief and out came the expletives. The clerk looked over and saw the familiar drawing of a judge on the bench that the baristas put on her judge's coffee and said to Red Tie Guy, "I don't think that was your coffee." "How would you know?" he snapped. At the same time, the barista held up another cup labeled "Red Tie Guy" in black Sharpie and said, "Sir, I believe this one is yours."

Back in chambers, the clerk relayed her coffee-

run experience while the team reviewed the calendar, discussed key questions to be asked on each case, and considered the key points of tension surrounding issues in the various cases and known concerns held by the other judges on the panel.

Red Tie Guy's case was early in the calendar so the courtroom was full. As appellant he placed his documents at counsel table and proceeded to the lectern. Without waiting to hear from the court, he launched into his "May it please the court," to which he was interrupted immediately with, "I don't know. It sounds like you had an awful difficult time getting your coffee this morning."

Everything stopped. Counsel went mute. Everyone in the gallery looked up. The judges sat there, just staring blankly at counsel. Nobody

moved or breathed. Counsel started mumbling something about having a rough morning, shuffled his notes, and then somehow started talking himself back to his argument. The judges didn't ask any follow-up questions on the coffee incident but counsel never quite recovered the control or bravado that was on display when he strode into court.

At lunch that afternoon, the clerks and judge were reviewing the calendar and dividing-up the remaining tasks for each draft opinion when they got to the "coffee case." After the house-keeping items were taken care of, the judge leaned back in her chair, shook her head a bit and said, "Ok, the life-lesson take away here for you is: Don't be red tie guy. Ever."

Contributors

Howard J. Bashman is a nationally known attorney and appellate commentator whose practice focuses on appellate litigation at the Law Offices of Howard J. Bashman in Willow Grove, Pennsylvania. His blog, *How Appealing*, is hosted by Breaking Media and is regularly visited by U.S. Supreme Court justices and many other federal and state appellate judges, appellate lawyers, members of the news media, and other interested readers.

John Bursch is a former CAL Chair and co-chairs the Appellate & Supreme Court Practice at Warner Norcross & Judd LLP. John has argued 9 times in the U.S. Supreme Court and 18 times in the Michigan Supreme Court, and he is a member of the American Academy of Appellate Lawyers. He can be contacted through his website, https://www.wnj.com/Professionals/Attorneys/Bursch_John_J.

Based in Northern California, **Wendy McGuire Coats** of McGuire Coats LLP has a state and federal appellate practice in which she handles civil, criminal, juvenile, immigration, writs and appeals, and amicus matters. Wendy is a member of the Contra Costa County Bar Association's Board of Directors. She is a regular contributor to the ABA's Council of Appellate Lawyer's publication, *Appellate Issues*.

Devin Dolive is a partner in the commercial litigation and labor & employment practice groups at Burr & Forman LLP's Birmingham, Alabama office. He is admitted to practice in Alabama and Ohio and received his B.A., *summa cum laude*, from Amherst College and his J.D. from the University of Virginia School of Law.

Conor Dugan is senior counsel in the Appellate and Supreme Court Practice Group at Warner Norcross & Judd LLP in Grand Rapids, Michigan. Prior to returning home to Grand Rapids, he worked as an appellate litigator at the Department of Justice and in an appellate boutique in Washington D.C.

Gaëtan Gerville-Réache is a partner in the Appellate and Supreme Court Practice Group at Warner Norcross & Judd in Grand Rapids, Michigan. He currently serves on the governing Council for the State Bar of Michigan Appellate Practice Section and on the Executive Board for the ABA's Council of Appellate Lawyers. Gaëtan also is editor in chief for the One Court of Justice Blog, the leading blog analyzing Michigan's appellate courts, which can be found at <http://www.ocjblog.com>.

D. Alicia Hickok is the head Drinker Biddle's Appellate Practice team, and is a member of the CAL Executive Board. She handles appeals before both federal and state appellate courts. Alicia is an adjunct professor of Appellate Advocacy at the University of Pennsylvania Law School and serves as Deputy Counsel to the Pennsylvania Appellate Court Procedural Rules Committee. She regularly contributes to *Appellate Issues*.

Martin A. Kasten is a partner at FRIDAY, ELDREDGE & CLARK, LLP in Little Rock, Arkansas. He practices appellate law in Arkansas courts and in the Eighth Circuit and is a trial attorney who practices in Arkansas' state and federal courts. He was also privileged to be a member of the legal team that represented Janssen in the Arkansas litigation.

Brian K. Keller currently serves as the Deputy Director of the Appellate Government Division for the Department of the Navy, and represents the United States in cases before military appellate courts. He served as an active duty Marine Corps officer and judge advocate for nine years. The views presented here are his and do not necessarily represent the views of Department of Defense or its Components. He may be reached at (202) 685-7682 or by email at brian.k.keller@navy.mil.

Ellie Neiberger practices appellate advocacy and government litigation with the Bryant Miller Olive P.A., a Florida-based law firm with a 45-year history of serving public sector clients.

Nancy M. Olson is an Assistant United States Attorney in the District of Oregon. Before moving to Oregon she worked in private practice in southern California and also clerked for the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit. She writes for *Appellate Issues* solely in her personal capacity and any views expressed herein are her own, not that of the U.S. Attorney's Office or Department of Justice.

David J. Perlman is the Editor of *Appellate Issues* and a member of the Council of Appellate Lawyers Executive Board. He is a sole practitioner based in Philadelphia. He concentrates on appeals. He also consults with law firms. He has published more than twenty articles and presented on legal rhetoric and analysis. He can be reached at djp@davidjperlmanlaw.com.

Travis Ramey is an associate in the appellate practice group at Burr & Forman LLP. Before joining Burr & Forman, he clerked for the Honorable Edward E. Carnes of the United States Court of Appeals for the Eleventh Circuit.

Robert S. Shafer is a partner at FRIDAY, ELDREDGE & CLARK, LLP in Little Rock, Arkansas. He practices appellate law in Arkansas courts and in the Eighth Circuit, and he was privileged to be a member of the legal team that represented Janssen in the Arkansas litigation.

Appellate Issues seeks submissions for the next issue. It will feature coverage of the programs offered at the Appellate Judges Education Institute to be held in Washington, DC from November 12-15. Other submissions will also be accepted. Those interested in writing on the AJEI Summit or other subjects should contact David J. Perlman at djp@davidjperلمانlaw.com.



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Contact the ABA Judicial Division
321 N. Clark St. 19th floor
Chicago, IL 60654

**Appellate Judges Conference
Council of Appellate Lawyers**

Denise Jimenez
denise.jimenez@americanbar.org

Publications and Membership

Jo Ann Saringer
joann.saringer@americanbar.org

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