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## The Decline of "The Record": A Comment on Posner

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# The Decline of “The Record”: A Comment on Posner

Frederick Schauer\*

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## I. INTRODUCTION

Judge Posner’s views about appellate advocacy and judicial decision-making are rich and complex, addressing numerous topics of interest and importance to lawyers and other judges.<sup>1</sup> His articulation of those views is candid and occasionally surprising, and I focus in this comment on one aspect of his views which may strike legal and judicial traditionalists as the most surprising of all—Judge Posner’s assertion, without embarrassment or seeming reluctance, that he consults factual sources not to be found in the record from the trial court, nor discussed or argued below, nor referenced in the briefs of the parties, nor mentioned in oral argument.<sup>2</sup> In engaging in his own factual research, Judge Posner is not alone. Justice Breyer appears to have been doing so for some years,<sup>3</sup> to the occasional consternation of his Supreme Court col-

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\* David and Mary Harrison Distinguished Professor of Law, University of Virginia, and Visiting Professor of Law, Columbia Law School. A much earlier version of this Essay was presented as the 62<sup>nd</sup> John Randolph Tucker Lecture at the Washington and Lee School of Law on February 8, 2011, and I am grateful for the comments and questions on that occasion.

1. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge’s Views*, 51 DUQ. L. REV. 3 (2013).

2. *Id.* at 11.

3. See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2767-79 (2011) (Breyer, J., dissenting); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803-19 (2007) (Breyer, J., dissenting); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137,

leagues.<sup>4</sup> And the phenomenon of independent research by appellate judges has become sufficiently widespread that it is beginning to generate academic commentary.<sup>5</sup> But Judge Posner is one of the first judges to describe and defend the practice,<sup>6</sup> and he has done so with typical candor and confidence. His remarks on his practice of independent appellate factual research and the larger phenomenon it exemplifies thus provides the ideal occasion to reflect on the practice, and on the way in which such research and its use, by taking appellate adjudication and opinion writing beyond the four corners of “the record,” tells us much about what appellate practice has been, is now, and may become in the future.

## II. THE TRADITIONAL PICTURE

Back in the day, “the record” rigidly circumscribed the limits of acceptable sources in arguments before and decisions by appellate courts. The handbooks from which law students learned the skills of advocacy stressed the impermissibility of citing non-obvious facts not found in the record,<sup>7</sup> whether in briefs or oral argument,

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142-43 (1999) (Breyer, J., for the Court); *United States v. Lopez*, 514 U.S. 549, 619-23, 631-44 (1995) (Breyer, J., dissenting). And see also Justice Breyer’s more general concerns about the difficulty of appellate court access to needed factual and scientific information, as expressed in *General Electric Co. v. Joiner*, 522 U.S. 136, 147 (1997) (Breyer, J., concurring); Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24 (1998); Stephen Breyer, Associate Justice, U.S. Supreme Court, Closing Address at Conference on DNA and the Criminal Justice System, John F. Kennedy School of Government, Harvard University (Nov. 21, 2000).

4. See, e.g., *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2739 n.8 (Scalia, J. for the Court).

5. E.g., A. Christopher Bryant, *The Empirical Judiciary*, 25 CONST. COMMENT. 467 (2008); Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263 (2007); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delagization of Law*, 29 J. LEGAL STUD. 495 (2000); Elizabeth Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008); see also Frederick Schauer, *The Dilemma of Ignorance*: *PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267. Relatedly, see Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F.L. REV. 197 (2000).

6. See also Judge Cathy Cochran, *Surfing the Web for a “Brandeis Brief”: The Internet and Judicial Use of Legislative Facts*, 70 TEX. B.J. 780 (2007).

7. “Use only the facts found in the record or facts of general knowledge, which are subject to ‘judicial notice.’” BOARD OF STUDENT ADVISERS, HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY: RESEARCH, WRITING, AND ARGUMENT 46 (Heather Leal, Syrena Case, Barbara Fiocco, Joe Gershman, Marc Goldstein, Dana Kirchman & Kim Stallings eds., 6th ed. 1996). The handbook does go on to say that “[o]ther information, like the conclusions of relevant sociological studies, can be used even though they are not part of the record as long as proper authority is cited.” *Id.* The relation between this qualification and the main rule is precisely what this Essay is about. But it is interesting that an earlier version of the same student handbook, although noting the use of sociological data

and novice moot court advocates were often the targets of stern "Where do you find that in the record, counselor?" rebukes by their judges if they dared contravene what was formerly thought of as among the most fundamental strictures of appellate argument.<sup>8</sup>

Although American appellate practice has long discouraged departures from the record, the English tradition, now weakening, was even stricter. Until relatively recently, English judges were prohibited or discouraged by widely-accepted custom from even doing their own *legal* research, being limited in their decisions to reliance on the cases and other authorities actually cited and argued by the parties.<sup>9</sup> For a judge to depart from the field of sources raised by the parties, it was thought, 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.<sup>10</sup>

The United States departed from this extreme version of appellate advocacy as chess match long ago, and for a judge, assisted by increasingly larger squads of law clerks, to use cases, statutes, or other legal materials not cited by the parties does not produce even the slightest raising of eyebrows. The party aggrieved by such practice, it seems to be thought, has no grounds for complaint, for the careful advocate will already have anticipated any argument or authority that the judge might locate.

The notion that judges may not do their own legal research has thus long been relegated to history. When we turn from law to facts, however, the situation is different. Facts are to be "found" by trial courts, and the task of appellate courts is to determine

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in *Brown v. Board of Education*, 347 U.S. 483 (1954), uses language that is far less permissive than the language in the 1996 edition. BOARD OF STUDENT ADVISERS, HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT IN THE AMES COMPETITION 36 (8th ed. 1965) (describing the use of social and economic data as constrained by the rules about "judicial notice of facts"). And see also JOHN T. GAUBATZ, THE MOOT COURT BOOK: A STUDENT GUIDE TO APPELLATE ADVOCACY 68 (1987), warning that the use of facts not in the record must be limited to facts about which a court can take "judicial notice."

8. See FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 252 (1967) ("[Y]ou depart from the record at your peril.").

9. See ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 102, 242 (1990).

10. Although written briefs are also a relatively recent addition to English practice, see *id.* at 243-44, the absence of time limits in appellate argument meant that opposing counsel would almost always have the opportunity to respond to any case or statute cited in argument by his or her opponent.

whether the trial court has properly applied the law to the facts found below. For a judge to go outside of the record in the search for additional facts, or for an advocate to encourage a judge to do so, has long been a cardinal taboo of American appellate practice.

### III. THE CONTEMPORARY CHALLENGE – BY POSNER AND OTHERS

Against the background of the traditional taboo against independent<sup>11</sup> appellate factual research, Judge Posner observes that his approach to judging in the hard cases that disproportionately feature in appellate litigation is to want “to get deep into the weeds,”<sup>12</sup> by which he means doing straightforwardly factual investigation to matters such as “why the transaction at issue was configured as it was,”<sup>13</sup> or, in “a criminal case, in which the defendant is accused of reckless endangerment by firing a gun into the air,”<sup>14</sup> or “such things as the height, occupancy, density, and proximity of surrounding buildings, the time of day or night, and pedestrian density within the range of the bullet.”<sup>15</sup> He wishes such matters were in the record, or were provided by the parties in briefs or argument, but, failing that, he unashamedly says that he includes in his opinions “facts drawn from Web research conducted by me or my law clerks.”<sup>16</sup> He acknowledges that this practice has subjected him to some criticism,<sup>17</sup> but emphasizes that it is a necessary component of the approach to judging that he here calls “realist”<sup>18</sup> and has in the past described as “pragmatist.”<sup>19</sup>

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11. I use “independent” to stress that the issue is largely focused on judges who do their own research, largely unaided by references in the trial record, in the briefs of the parties, and in oral argument, and which typically takes place after argument and thus after it is feasible under typical procedures for the parties to challenge or otherwise respond to the products of a judge’s research.

12. Posner, *supra* note 1, at 11.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* And see *Brim v. State*, 779 So. 2d 427, 430 (Fla. Dist. Ct. App. 2000), in which a judge opined that it was “inappropriate for the court to evaluate or determine the scientific acceptability of [DNA testing] principles and procedures by examining extra-record, nonlegal materials.”

18. Posner, *supra* note 1, at 11; see also RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

19. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); RICHARD A. POSNER, *THE PROBLEMATICS OF LEGAL AND MORAL THEORY* (1999).

## IV. ON WHAT IS NEW AND WHAT IS NOT

In going outside of the record and outside of the submissions of the parties to locate the facts necessary to support an opinion, Judge Posner is by no means breaking entirely new ground.<sup>20</sup> The Supreme Court's use of factual information in *Brown v. Board of Education*<sup>21</sup> is of course iconic, but the psychological studies referenced and seemingly relied upon by the Court<sup>22</sup> were both part of the proceedings below and discussed extensively in the NAACP's briefs before the Supreme Court,<sup>23</sup> rather than being the product of any of the Justices' own excavations.<sup>24</sup> And although the so-called Brandeis Brief is again part of the widespread understanding of the use by American appellate courts of non-legal social science data, it is important to remember that it was, after all, a *brief*, produced by a party and open to rebuttal by opposing parties.<sup>25</sup>

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20. See generally DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008).

21. 347 U.S. 483 (1954).

22. *Id.* at 494 n.11.

23. Brief for Appellants, *Brown v. Board of Education*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1952 WL 47265; Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, *Brown*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 48699.

24. Indeed, when John W. Davis, representing the boards of education, made reference at oral argument and in his briefs in the initial argument to various prominent figures warning of the dangers of too-quick desegregation of the schools, Thurgood Marshall, representing the plaintiffs, objected, arguing that factual information should be presented only at trial, where it could be subject to cross-examination. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-55 63 (Leon Friedman ed., 1969). Marshall's exchange with Justice Frankfurter on just this issue, *id.*, is especially fascinating because the psychological studies in *Brown* have, mistakenly, become the standard examples for the permissibility of original appellate use of non-legal information.

25. Moreover, Brandeis's brief in *Muller v. Oregon*, 208 U.S. 412 (1908), must be understood in the context of what today goes by the name of "rational basis" review. See *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring); *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). Brandeis's claim in *Muller* was not that restricting women's working hours to ten hours per day was necessarily correct, but only that Oregon's decision to do so was at least reasonable. Brandeis asked the Supreme Court to take judicial notice of the fact that there was "reasonable ground" for Oregon's decision. Brief for the Defendant in Error, *Muller*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605, at \*10. And thus the brief concluded that "it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day." *Id.* at \*113. Once we understand that the original Brandeis Brief used extensive quotations from numerous government reports and other public records only to demonstrate that the challenged legislation was neither irrational nor arbitrary, we can see that the purpose for which Brandeis used non-legal information and sources was in fact quite limited, and far more limited than has been subsequently appreciated.

Once we see both *Brown* and the Brandeis Brief in contexts more limited than what they are commonly taken to represent, we can appreciate that judicial factual inquiry into matters not argued below, not found in the appellate record or briefs, and not discussed at oral argument is indeed a relatively new phenomenon, fostered substantially by the ease of electronic research.<sup>26</sup> When the per curiam opinion in *Bush v. Gore*<sup>27</sup> drew on factual and social science information in articles found in the *Omaha World-Herald* and *AP Online*,<sup>28</sup> when Justice Stevens consulted works on the history of golf in *PGA Tour, Inc. v. Martin*,<sup>29</sup> and when Justice Breyer provided extensive social science references in *United States v. Lopez*<sup>30</sup> and again in *Brown v. Entertainment Merchants Ass'n*,<sup>31</sup> all were visibly exemplifying a practice that is largely, even if not entirely, a product of the new world of electronic access and electronic databases. Indeed, the very fact that Judge Posner refers to information on “the Web” rather than to non-legal information more generally shows that the phenomenon of original judicial research into matters and sources not in the record is becoming increasingly widespread largely because of the ease of access by judges.

## V. OF LEGISLATIVE AND ADJUDICATIVE FACTS

In seeking to minimize the extent to which the research he conducts and defends departs from traditional understandings of the role of the appellate judge, Judge Posner relies substantially on the well-known distinction between legislative and adjudicative facts.<sup>32</sup> Facts about the particular controversy —was it the de-

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26. See Richard B. Cappali, *Bringing Internet Information to Court: Of “Legislative Facts,”* 75 TEMPLE L. REV. 99 (2002); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1 (2009); Schauer & Wise, *supra* note 5.

27. 531 U.S. 98 (2000).

28. *Id.* at 103.

29. 532 U.S. 661, 683-85 (2001).

30. 514 U.S. 549, 631-44 (1995) (Breyer, J., dissenting).

31. 131 S. Ct. 2729, 2772-79 (2011) (Breyer, J., dissenting).

32. The distinction was created, labeled, and theorized by Kenneth Culp Davis. See KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.03 (1958); Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1 (1986); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). This distinction has now become the conventional wisdom. See, e.g., Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Peggy C. Davis, *There is a Book Out . . . : An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); Ann Woolhandler, *Rethinking the Judicial*

fendant who was seen in the vicinity of the bank ten minutes before the robbery?; was the plaintiff wearing a seat belt?; what was the distance between a group of protesters and the funeral they were protesting?; did the defendants in an antitrust case discuss prices when they met on such-and-such a day—have traditionally been understood to be beyond the range of permissible appellate independent research. These are the facts whose determination is for the trial court, whether by judge or jury, and are not to be determined or re-determined on appeal. For an appellate judge to go beyond the record and the findings below in order to investigate specific facts about the specific controversy, while not unheard of,<sup>33</sup> is widely understood to be an unacceptable breach of appellate court responsibility.<sup>34</sup>

Judge Posner purports to accept this limitation on appellate power, and thus relies on the venerable acceptability of appellate inquiry into legislative facts—facts not about the specific events in the litigation, but about the general and not case-specific facts that are relevant in the law-interpreting and law-making functions of appellate courts.<sup>35</sup> When the Supreme Court in *New York*

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*Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988). For a recent, comprehensive, and critical analysis, see FAIGMAN, *supra* note 20. See also Bryant, *supra* note 5 (reviewing FAIGMAN, *supra* note 20).

33. Perhaps the most prominent example and thus the most prominent exception to the general practice is Justice Breyer's dissenting opinion in *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 807-76 (2007) (Breyer, J., dissenting). In seeking to explain the "historical and factual context," *id.* at 804, of the very cases before the Court, Justice Breyer and his clerks engaged in extensive research about the history of school desegregation efforts in Louisville and Seattle. This research raises a host of questions. One is whether institutional public law litigation is sufficiently different from other litigation that Justice Breyer's researches in *Parents Involved* are distinguishable from an appellate judge who Googles the defendant in a criminal appeal in order to understand the historical and factual context of the defendant's behavior. See David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case*, 16 PROF. LAW. 2 (2005). Another is whether there is a difference between appellate research, even about the particular case, that relies on public sources, as contrasted with, for example, a hypothetical appellate judge who asked his or her law clerks to interview one of the parties or take pictures of a crime scene. And a third, which shall be discussed presently, is whether factual research about the history and context of a specific controversy is still different from factual research about what happened on the exact occasion that generated the litigation.

34. On the possibility that the now-routine obligation of independent factual review in constitutional cases, see *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Jacobellis v. Ohio*, 378 U.S. 184 (1964), is in some tension with the traditional aversion to appellate adjudicative fact-finding, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

35. See Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.



*Times Co. v. Sullivan*<sup>36</sup> made factual assumptions about press behavior under two different rules of liability in defamation cases, for example, the Court made a determination of legislative fact, just as Judge Cardozo did in *MacPherson v. Buick Motor Company*<sup>37</sup> in concluding that automobiles were inherently dangerous. Although the Internet, and, before that, NEXIS and other various on-line databases,<sup>38</sup> have made independent judicial research vastly more prevalent than in the past,<sup>39</sup> the basic idea of judges relying on non-legal information to support their law-interpreting and law-making activities is nothing new. Sometimes, as in *Sullivan*, the result is bare assertion, even if, as in that case, the bare assertion might possibly be mistaken.<sup>40</sup> And sometimes there is an actual reference to some external source.<sup>41</sup> But the phenomenon of reliance on external information to establish legislative facts has long been part of the appellate landscape. In this respect, therefore, Judge Posner's initially startling (to some) admission of going outside of the record to determine legislative facts necessary for legal interpretation and application may be rather more conventional than some of his (unnamed) critics suspect.

But although independent judicial research at the appellate level in order to provide the empirical support for law-making or rule-making is both well-accepted and the paradigmatic example of legislative facts,<sup>42</sup> Judge Posner appears to go beyond this understanding of legislative facts, especially when he explains that he often needs to do his own research in order to understand the nature of some particular complex transaction or other occur-

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36. 376 U.S. 254 (1964).

37. 111 N.E. 1050, 1053 (N.Y. 1916).

38. See Schauer & Wise, *supra* note 5.

39. See Larsen, *supra* note 5, at 1260 (documenting the increase).

40. The Supreme Court's assumption that increased risk of liability would produce decreased aggressive press reporting and commentary assumes, possibly incorrectly, the non-existence of strong professional norms among journalists, or the non-existence of strong consumer preferences for such content in a competitive press environment, either or both of which might lead publishers to absorb the costs of defamation liability rather than modify the content of their publications. See Frederick Schauer, *On the Relationship Between Press Law and Press Content*, in *FREEDOM OF THE PRESSES: THE FIRST AMENDMENT IN ACTION* 51 (Timothy Cook ed., 2005); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

41. As in, for example, the extensive use by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 445-56 (1966), of published information about police practices, and in *Lee v. Weisman*, 505 U.S. 577, 593-94 (1992), of studies supporting the susceptibility of adolescents to peer pressure.

42. See Michael Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1015 (1990); see also Robert Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988).

rence.<sup>43</sup> This research, however, does not fall easily on one side or another of the traditional divide between legislative and adjudicative facts. It is true that appellate courts remain loath to re-examine adjudicative facts as found by a trial court, and that appellate judges are equally loath to do research into this kind of facts.<sup>44</sup> An appellate court that upheld a trial judge's upward departure from the Federal Sentencing Guidelines on the basis of its own factual research into the defendant's seedy past, for example, would properly be criticized, as would an appellate court that overturned a lower court determination of medical malpractice on the basis of its own research into the defendant physician's high standing on a "Rate Your Doctor" website.<sup>45</sup> And at the opposite pole, appellate court research into the general social facts it needs to make a new rule of law seems well on the legislative side, which is why the causal relationship between a libel rule and press practices that the Supreme Court created in *Sullivan* seemed so appropriate.

In saying that he does general research in order to understand the facts of a specific case, however, Judge Posner seemingly identifies a new category of fact that is neither purely legislative nor purely adjudicative. In some sense it seems closest to Monahan and Walker's idea of social framework evidence, in which aggregate conclusions from social science research are used to suggest conclusions in particular cases.<sup>46</sup> But Monahan and Walker focus on trials, and do not address the question whether appellate courts should consider such evidence anew, nor therefore the question of what procedures appellate courts might employ in locating and using such evidence. Posner's discussion of his use of such information does appear less case-specific than even Justice Breyer's research in *Parents Involved*,<sup>47</sup> but it is more case-specific than the use of general information for the purpose of crafting generally applicable legal rules. And thus although the distinction between legislative and adjudicative facts is valuable in many

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43. See Posner, *supra* note 1, at 11-12.

44. See generally Tennant & Seal, *supra* note 33.

45. On the impermissibility of such case-specific extra-record research, see *American Prairie Construction Co. v. Hoich*, 560 F.3d 780, 796-98 (8th Cir. 2009), which invalidated the trial court's post-trial research into the status of an accountant. See also Thornburg, *supra* note 5.

46. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488-95 (1986); Walker & Monahan, *supra* note 32, at 569.

47. See note 33, *supra*.

contexts, it may help us less than Judge Posner believes in justifying the practice of independent appellate factual research done for the purpose of helping an appellate judge understand (and therefore reach a conclusion about) a particular transaction or a particular set of facts.

Yet although Judge Posner is arguably relying on a category of facts and factual research different from the paradigmatic use of legislative facts, the same concerns might apply to both. Some of these facts might well be contestable, and thus there emerges what might be called the due process worry, in a somewhat loose and non-technical sense of “due process.” This is the fear that judges who engage in post-argument independent research may be denying to those parties against whom the conclusions from that research are used the opportunity to present opposing facts or opposing interpretations, or just to argue that the research on which the judges relied is in some way unsound.<sup>48</sup> But there is a response to this fear as well, and thus Judge Posner, along with many predecessors, argues that appellate judges may rely on the concept of judicial notice in doing their own research and in using the products of that research to support their conclusions.

## VI. THE USES AND LIMITATIONS OF JUDICIAL NOTICE

Judge Posner follows a longstanding tradition in endorsing the use of judicial notice at the appellate as well as at the trial level.<sup>49</sup> More specifically, he and many before him rely on the principles of judicial notice to justify the use of unlitigated and unargued facts as part of appellate decision-making and appellate opinion-writing. A closer look at the principles of judicial notice, however, show those principles to have more limited application than Posner and others suggest.

The basic idea of judicial notice, an idea existing within the law of evidence and focused primarily on trials, is that it would be cumbersome, time-wasting, and simply stupid to require every fact necessary to a judgment to be presented through formal evidentiary procedures. If a law prohibits shooting birds within the boundaries of some park, and if it is established that the defend-

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48. Cf. *Singh v. Mukasey*, 533 F.2d 1103, 1107-08 (2008) (concluding that due process required an opportunity to rebut facts found in immigration hearing).

49. Although somewhat focused on Canada, a particularly thorough analysis is Elizabeth F. Judge, *Curious Judge: Judicial Notice of Facts, Independent Judicial Research, and the Impact of the Internet*, 2012 ANN. REV. CIVIL LITIG. 325.

ant shot a duck within those boundaries, we do not require the prosecutor to prove that a duck is a bird. The judge can take judicial notice of that fact, and the fact so noticed is as valid a component of a verdict as a fact found by the jury. Similarly, if it is prohibited to sell goods of a certain kind on Sundays, and if an uncontested receipt shows that a sale of the relevant good took place on July 8, 2012, the judge can take judicial notice of the fact that July 8, 2012, fell on a Sunday.

Under longstanding doctrine,<sup>50</sup> judicial notice is permissible in two different circumstances. One is when a fact is genuinely common knowledge.<sup>51</sup> Ducks being birds is such a fact, as is France being in Europe, a Rolls-Royce being worth more than one hundred dollars,<sup>52</sup> the world being round and not flat,<sup>53</sup> banks (at least in 1995) sending monthly statements to their customers,<sup>54</sup> and Florida having a substantial tourist industry.<sup>55</sup> In all of these cases, the judicially noticed fact is both widely known and incontrovertible, making proof of it pointless and time-wasting.

There are other facts that are not widely known but which are so definitively ascertainable that the same considerations apply.<sup>56</sup> The classic example is the day of the week on which a date occurs,<sup>57</sup> and there are many other facts not widely known but still ascertainable to a virtual certainty. Few of us know the value of  $\pi$  to twenty digits, but it is easy enough to look up, and there is no real dispute about the correctness of the answer that could be found in any number of standard sources. And thus here too judicial notice is appropriate, inasmuch as requiring a party to establish something like this through the formal methods of proof would place pointless burdens on an already over-burdened court system.

Although judicial notice is associated primarily with the trial process, appellate courts take judicial notice as well, and have

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50. See FED. R. EVID. 201.

51. FED. R. EVID. 201(b)(1).

52. See E.F. Roberts, *Judicial Notice: An Essay Concerning Human Misunderstanding*, 61 WASH. L. REV. 1435, 1439 (1986).

53. See 21B CHARLES ALLAN WRIGHT, KENNETH W. GRAHAM, JR., VICTOR JAMES GOLD & MICHAEL H. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* §5102.2 (2d ed. 2010).

54. *Kaggen v. I.R.S.*, 71 F.3d 1018, 1020 (2d Cir. 1995).

55. *State v. City of Miami Beach*, 234 So. 2d 103, 105 (Fla. 1970).

56. FED. R. EVID. 201(b)(2).

57. See, e.g., *Shenandoah Life Ins. Co. v. Harvey*, 242 F. Supp. 680, 682 (D. Md. 1965).

done so for generations.<sup>58</sup> But as soon as we move from trial to appeal, important procedural differences surface. At trial, judges typically take judicial notice of some fact upon request of a party, and give the opposing party a chance to object, typically on the ground that what one party may think of as beyond question may appear otherwise to an opponent.<sup>59</sup>

In the appellate process, however, such procedural safeguards are typically absent. Although an appellate judge at oral argument might ask counsel whether judicial notice of some fact is appropriate, and thus give a party an opportunity to object, far more commonly appellate judicial notice is rarely identified as such, and takes place after briefing and after oral argument. If a judge writing an opinion wants to take judicial notice of some fact, she simply does it, with neither notice to an opposing party nor the opportunity for that party to object.

In the context of the paradigmatic examples of judicial notice, this would not be much of a problem. The time consumed by giving opposing counsel the opportunity to be heard on the question whether July 8, 2012, fell on a Sunday would overwhelm the slight possibility that for facts of this type the judge had made a simple and correctible error. For the standard uses of judicial notice, distorting the appellate process to accommodate to the miniscule possibility of judicial blunder seems hardly worth the effort.

The problem, of course, is that the same could be said about judicial notice at trial. The seemingly cumbersome procedures of, for example, Rule 201 of the *Federal Rules of Evidence* would again hardly seem worth the effort if the worry were about straightforward mistakes with respect to the kind of straightforward facts towards which the entire doctrine of judicial notice is targeted. But Rule 201 and its compatriots exist precisely because what at times seems self-evident to one person will be debatable to another. This is not a post-modern claim about the inevitable contestability of fact. Rather, it is the observation that a common human characteristic is to see one's own truths as beyond question. And although it really is true that July 8, 2012, fell on a Sunday, and that Florida has a substantial tourist industry, other seemingly self-evident facts are often more open to question.

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58. See Dorothy F. Easley, *Judicial Notice on Appeal: A History Lesson in Recent Trends*, 84 FLA. B.J. 45, 45 (2010).

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

Consider again the Supreme Court's conclusion in *New York Times Co. v. Sullivan*<sup>60</sup> that the possibility of substantial civil liability would lead publishers to behave with caution. Although this is a causal claim and not a simple fact, it is certainly the kind of empirical claim that can be and has been the subject of judicial notice.<sup>61</sup> And although the Supreme Court in *Sullivan* did not use the words "judicial notice," taking judicial notice of a causal relationship not litigated below is essentially what the Court did. But here, unlike in other areas, what seems obvious may on closer inspection possibly not be so. Several prominent media figures claimed that *Sullivan*'s change in the libel liability rules would have no effect on their behavior, and this perception is consistent with the fact that many jurisdictions with substantially less press-protective libel regimes appear to have a public press every bit as aggressive as that existing in the United States after *Sullivan*.<sup>62</sup> And this seems to be the product of the fact that although publishers have preferences for cost-saving and liability-avoidance, they also have preferences for complying with certain professional norms and consumer preferences, all of which lead them to be willing to absorb the costs that the Court in *Sullivan* assumed they would not.

This of course is only one example, but there are many others. But the lesson of this example is not that appellate courts should not draw on facts not contained in the record. That would be impossible. The lesson is only that the idea of judicial notice may do far less work in justifying that practice than Judge Posner and others believe. When the Supreme Court drew on political science research as reported in the *Omaha World-Herald* to justify part of its conclusion in *Bush v. Gore*,<sup>63</sup> for example, it was not taking notice of a raw fact that was either common knowledge or definitely established and reported in a standard source. Rather, it was drawing on facts that, although likely true, would also likely have been at least partly contested had the matter been litigated at trial.

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60. 376 U.S. 254 (1964).

61. See, e.g., *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083-84 (5th Cir. 1973) (taking judicial notice of a causal relationship between asbestos exposure and various diseases); *Shimp v. N.J. Bell Tel. Co.*, 368 A.2d 408, 411 (N.J. Super. Ct. Ch. Div. 1976) (taking judicial notice of the disease-causing tendencies of cigarette smoking).

62. See note 38, *supra*.

63. 531 U.S. 98, 103 (2000).

The disputability of the seemingly indisputable has of course long been recognized in the judicial notice doctrine and literature,<sup>64</sup> which is why taking judicial notice is surrounded by more procedural safeguards than are necessary in routine exercises of judicial notice. But the very reason for those procedural safeguards suggests the problem with the judicial notice defense of independent appellate court factual research – often the conclusions of that research are obvious to the judge, but might not be to others, and might not be in fact. To put it more bluntly, that which appellate judges think is self-evidently right may be wrong. And without the procedural safeguards of the adversary trial or the traditional approach to judicial notice, the risks come without the most obvious approach to alleviating them.

It is thus telling that in the perceptive and valuable Advisory Committee Note to Rule 201 of the *Federal Rules of Evidence*, the Advisory Committee, in explaining in detail why Rule 201 applied only to adjudicative facts and not to legislative facts, described the process of determining legislative facts in terms of “judicial access” and not “judicial notice.”<sup>65</sup> Moreover, the Committee made clear that such judicial access to legislative facts should not be saddled by an indisputability requirement,<sup>66</sup> and it endorsed Professor Davis’s observation that judicial reliance on non-indisputable facts was essential to legal growth.<sup>67</sup>

In discussing this judicial access to legislative facts, the Advisory Committee also emphasized the procedural safeguards of a party’s “opportunity to hear and be heard”<sup>68</sup> as well as the safeguards of “exchanging briefs.”<sup>69</sup> And thus the issue is now clearer. If we assume, with Judge Posner, that we are talking about legislative and not adjudicative facts, then judicial notice is not the correct term, in part because many of the facts with which he is concerned do not meet the requirement of indisputability that is a prerequi-

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64. Cf. Jed Rakoff, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 4 (2012) (expressing concerns about the consequences of the lack of judicial competence about highly technical questions).

65. FED. R. EVID. 201 advisory committee’s note, in GEORGE FISHER, EVIDENCE 20, 22 (3d ed. Supp. 2013).

66. *Id.* at 22.

67. *Id.* at 20 (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69 (Roscoe Pound, Erwin N. Griswold, & Arthur E. Sutherland eds., 1964)); see also Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service*, 71 MINN. L. REV. 1 (1986); Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 948-49 (1955);

68. FED. R. EVID. 201 advisory committee’s note, *supra* note 65, at 22.

69. *Id.*

site for judicial notice, nor is their determination surrounded by procedural safeguards aimed at ensuring that that which some judge might think indisputable really is indisputable. But if we are not talking about judicial notice in the strict sense, and are thus acknowledging that judges may and should use even potentially disputable facts in the processes of making law and understanding the issues before them, then the existence (or not) of adversarial procedures of some form becomes especially important.

#### VII. CONCLUSION: FACT-FINDING ON APPEAL AND ITS PROCEDURAL COMPLICATIONS

It turns out, therefore, that Judge Posner's two chief justifications for independent appellate factual research may not do as much work for his conclusions as he supposes. Judicial notice, itself typically surrounded by procedural safeguards, has traditionally been reserved for a much narrower category of indisputable facts than the potentially more disputed ones that Judge Posner has in mind. And judicial research into and use of legislative facts may not only be different from the somewhat more case-focused facts that Judge Posner discusses, but itself may ordinarily involve many of the procedural safeguards that we associate with the appellate process in general.

What makes the issue distinct, therefore, is precisely the absence of procedural safeguards at the post-briefing and post-argument stage, the stage at which judges make their decisions and write their opinions. If judges are doing additional research at this point, if the wonders of modern technology make such research both easy and common, and if such research is used without an opportunity for serious input by the parties, then an even deeper question arises: what purpose would be served by notice and hearing with respect to such facts? One possibility is that the purpose would be entirely cosmetic, providing a degree of legitimation even if not much in the way of epistemic advantage. And another, the possibility that undergirds much of the adversary process generally, is that the judge who can hear all sides on relevant factual issues is likely to have access to more information and make better decisions than the judge whose only resources are his or her own and whose only check is the ability of self-criticism and self-challenge.

These questions of course go not only to independent appellate research, but also to the adversary system generally. What the new world of independent appellate factual research, a new world



quantitatively even if not otherwise, has required us to consider is just how much benefit is gained from adversarial procedures generally, what kind of benefit it is, whether it is as applicable in this context as to all of the other aspects of the legal process, and whether, in this context, the benefits are worth the costs.<sup>70</sup> Consideration of these issues must be left for other occasions, but Judge Posner's candor, as well as his insight, has helped us to start on what is likely to be an increasing important task of institutional design.

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70. On the possibility of remand, see Bryant, *supra* note 5, at 478-80.