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# JUDICIAL NOTICE: AN ESSAY CONCERNING HUMAN MISUNDERSTANDING

E.F. Roberts\*

Articles limning the law pertaining to judicial notice are legion, and the footnotes which have been cite checked by generations of law review editors must number in the thousands. These articles assume that reason, properly employed, produces correct answers. They assume that disagreements can be resolved by reason, because it is self-evident that any problem, once identified, can be solved. Reflected here are the presuppositions of lawyers brought up in the Western legal tradition.

What if one were to doubt that reason necessarily governed the behavior of lawyers? What if one doubted as well that all problems were susceptible to solution? If a radical disbelief were in order, would not this orientation render suspect the presentational methodology which has served to create the current conventional wisdom? In short, does not doubt demand recourse to new styles of discourse? Instead of articulating a series of objective propositions, after the style of geometry, this new discourse might suggest various subjective positions. Instead of believing that reason can prove one or another position true or false, this approach might accept the truth of each within its own milieu. A hundred flowers might bloom in the intellectual gardenplace, each as true and beautiful as the other.

## I.

Imagine for a moment a lawyer resident on Beacon Hill in Boston. He routinely tries important civil cases throughout the Northeast. He has managed to avoid involvement in politics and actually reads Trollope for relaxation. He is an intelligent person encased in what, given his reserve and grooming, amounts to a four piece suit. It is what he has to say about judicial notice that interests us. Harken now to the Brahmin's Tale:

You must understand that trials are bifurcated affairs in which the judge and a jury each has a role to play. It is the jury which decides the ultimate question of who wins the case. If I am representing the plaintiff, I have to convince the jury, through witnesses and exhibits, that my version of the dispute is more likely than not the right one. Yet we accept the verdicts of juries—these decisions which do not establish absolute truth—as the last word in any particular dispute. We do not go on having feuds between the

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plaintiff and the defendant. The system actually works to keep the peace, and we end with proper respect for the role of the jury.

We let juries answer the questions of fact: did the defendant do that then to the plaintiff? We can never be sure that the jury comes up with the objectively right answer, and maybe it is better that we do not pursue that line of inquiry too far. As lawyers we must simply understand that there are really two right answers to any question of fact put to a jury. If a case is properly sent to the jury, appellate courts will not interfere with its verdict. At least, they shouldn't.

You must also understand that most of the time spent by trial lawyers is invested in trying to persuade the judge. If it really is a jury case and it has two right answers, the trial lawyer realizes that the jury may accept either version of the truth. So there are motions to dismiss on the pleadings and motions for summary judgment and directed verdicts. Throughout the trial there are objections to evidence. All of these motions and objections raise questions of law that someone has to settle. That person is the judge, whose role it is to answer the questions of law that come up during any trial.

Pity the poor judge, however, because these questions of law have only one right answer. If an error is prejudicial, the judge who makes the error will be reversed when the party against whom he rules appeals. The judge is learned in the law, or as learned as are the rest of us, and he can usually find answers and avoid reversal. The jury, on the other hand, doesn't need to worry about getting reversed if the judge properly sent it the case to decide. We expect the jury to reason as well as most, but deep down we value their intuition. We expect them to discern which side is telling the most plausible version of the affair. Theirs is not to reason why, but to decide yes or no, or maybe not proven.

Reason, nonetheless, is at the heart of it. At a trial there sometimes arises a question of fact to which there is apparently one right answer. The jury has no business with most of these questions because they do not directly bear on the who did what to whom. Should we let into evidence, say, the results of a negative blood test in a hotly contested paternity case? Suppose the doctors and the professors of medicine are at each others' throats arguing about whether blood tests are a valid scientific indicator of non-paternity. It is clearly a jury's job to decide if the technician who administered the test did so properly. A judge can't tell the jury that it has to accept the results of the test as proof positive of nonpaternity if it should find that the test was administered the right way, when no one, much less the judge, knows whether the test is valid in principle. The judge can't tell the jury first to go ahead and decide whether the test is a valid mechanism in principle. The jury doesn't know anything about medicine. Allowing the jury to pass

judgment on science is ridiculous. So the judge can only refuse to let the results of the test into evidence.

We all know, of course, that the medical fraternity finally came to a consensus on the issue of blood testing for paternity. Even so, the judge still cannot let the jury pass on whether the testing principle is valid, even though the jury will hear the results of the test and size up for itself the credibility of the witnesses. The judge has to tell the jurors that, while it is up to them to decide whether the tests were administered correctly, they have to accept the reported results as proof positive of nonpaternity if they determine that the tests were properly administered. Here we have what appears to be a question of fact decided by the judge. Furthermore, it is a question of fact which has only one right answer: either the tests are accepted as valid in the medical community or they are not. The judge calls it a question of law because it has only one right answer.

Once the judge answers the question, the jury can't substitute its own answer for his. The question having only one right answer, it is like any other question of law. The judge has the last, in fact, the only word on it. We say that the judge knows the answer to this kind of question, and takes judicial notice of it. Certainly he doesn't know off the top of his head what each scientific community accepts as valid from one year to the next, but he can learn. You may be certain that the lawyers will make every effort to educate him. The sources of what we call indisputable accuracy will be there, believe me.

This process takes nothing away from the jury. The jury still decides the case in the ultimate analysis. If the jurors think that the defendant in a paternity case ought to pay up anyway, they can always find that the tests were not administered properly. You can concoct a case that turns on a question of fact to which there is only one right answer. Take, for example, a contract with a date on it which may be a Sunday. There is only one right, easily determined answer to a question about the date of a contract, but who has tried a contract case lately in a jurisdiction in which Sunday contracts are illegal?

Some judges would admit the results of a blood test long before the medical community had come to a consensus about the matter. They just can't wait. They have to be out on the cutting edge of change, whatever the subject involved. Then they will tell the jury that it has to accept the principle, which is better than letting the jury redecide the question. That is a discipline problem, not an intellectual one. Judges have no business jumping on bandwagons. Otherwise the judges run the risk that the trend they are relying on may suddenly shift in the other direction and, soon enough, they will have to take judicial notice of precisely the opposite of

what they said was indisputable last week. There may be two right answers to whether the principle behind blood tests is right or wrong, but if the scientific community comes down virtually en masse on one side of the question, then there is only one right answer and that consensus is easily ascertained in the current literature. Lawyers can't reasonably deny what science says is true. As I say, reason is at the heart of the matter.

Most of the instances in which a judge rules on a question of fact as if it is law can be treated as old fashioned mixed questions of fact and law. What, then, would become of judicial notice? Judges usually consider questions of fact when they are ruling on questions of law which have nothing to do with juries and evidence. In the old days, for example, the question arose whether a person who lived in Boston could maintain a trespass action against someone who came onto land in Northampton and started to cut down the trees. In England, trespass only protected possession. That didn't make much sense in America at a time when people here in Boston commonly owned pieces of land as far away as Northampton. The judges changed the common law rule because they filtered the problem through the factual context of the landholding patterns. A judge has to do this if the law is going to make any sense. The facts in this instance were not in dispute, however, since any reasonably intelligent person in the community might have been expected to know them.

Some judges think that whatever they have to say about the present state of society is right. They don't ask themselves whether the facts they notice are facts that every normal person in the community would regard as indisputable, or, if not, whether it is so regarded within the discrete expert community. They base decisions on facts that aren't necessarily so. This can only undermine the adherence to reason which is the hallmark for the whole system. Let me illustrate this.

Everyone knows that the old rule that a spouse can keep his or her partner from testifying about conversations between them has ceased to command much of a following. What if a spouse does offer to testify for the prosecution in a criminal case, and the judge follows the old rule, reasoning that he helps keep marriages intact? Isn't it a little late in the day of this marriage? And had the judge asked himself "Is this homegrown statement of sociology indisputable?", wouldn't he have run less of a risk of making a fool of himself?

Let judges stick to their law books and juries to their facts, and all will be well. A grey area between what is fact and what is law does exist. A line can be drawn down through that no man's land in a thrice if all you remember is that fact is law only when it has one correct answer.

II.

Attend now to the musings of a Texas born and bred lawyer who has tried a number of murder cases and some even more hotly contested election law cases. His is a string tie, not a bow one, and he sports boots despite his distaste for even the smell of horseflesh. Like his Brahmin brother, he wears the local uniform. Let us attend now to his views on the matter at hand:

I don't pretend to be a jurisprude, but I do know something about lawyering. Let me get to the heart of the matter at once. Facts need not be indisputable for a judge to take judicial notice of them. Take the case of someone who takes a Rolls Royce, and who is being prosecuted for larceny of goods worth more than a hundred dollars. At the end of the case, after both sides rest, someone notices that the prosecution has never put anyone on the stand to recite a litany to the effect that the Rolls is worth at least a hundred dollars. A judge with any sense will simply tell the jury that it can, if it so desires, find that the car is worth at least a hundred dollars. The judge gives the defense lawyer a nod, and at a bench conference tells him that the case would be put over until the next day if he wants time to prepare evidence that the car isn't worth that much. In short, the judge will use judicial notice to keep the show on the road.

I know that the Rolls might not be worth fifty cents. The worth of a Rolls Royce might not be a matter of common knowledge to rustic Texans. There isn't any blue book entry covering this particular Rolls which would make the figure ascertainable from a source of indisputable accuracy. Judicial notice does not have to be restricted to absolutely true facts. And that's the point. The judge can tell the jurors they may accept or reject the proposition that the Rolls is worth at least a hundred dollars. He doesn't have to order them to take it. In Texas, the trial is wrapped up and justice done.

Of course, appellate court judges cannot be restricted to knowing only facts that are indisputably true. That's not even an issue. Constitutionally, a legislature can only enact a law if it is calculated to achieve some police power, health, moral, safety, or general welfare objective. The question is not whether it is true or not that the law actually concerns such a goal, but only whether a rational legislature could conceivably think so. We do live in a world of judicial restraint in which these judgment calls belong to the legislature. The check-mate in the game is the next election. That whole affair was hashed out in the Thirties.

Constitutionality can't always depend on the ability of the state's lawyers to make a record demonstrating that facts exist which, if believed, show a public health or welfare problem. So a judge can take judicial notice that such facts do exist. If the judge finds them, that only proves they exist, so that point doesn't bear agonizing about. It is when the judge is unable to find the facts necessary to support the legislation, and the state's lawyers

haven't done their job, that the mass gets critical. I suppose at that point the court ought to strike down the statute.

In a sense, these legislative facts are constitutional facts, because their nonexistence suggests that a legislature has overstepped the bounds of its authority. But this sort of fact is even more a constitutional fact when the court is applying the equal protection clause. There was a lot of talk by the judges in the segregation cases about the negative impact segregation had on black school children. I am not sure that much, if any, of that talk was rooted in indisputable truth. As far as I am concerned, it is self-evident that you can't segregate races in public places in a free society that has a constitution like ours. I suppose the judges felt that they had to fill up their opinion with reasons, so their opinions would appear the products of deliberative reasoning. Judges can't say much without articulating propositions about factual conditions. Just take a marking pen and highlight all of the statements concerning facts that appear in any important opinion. If all of these propositions had to be indisputably true, then most of them would have to be struck out. Then you would find that judges can't "think" at all. The whole system would come falling down around our ears.

It is easy enough for a judge to look up the law in a book and pronounce the rule. But judges often need to make new rules. They must answer new problems and change the answers to old ones. They must produce reasoned opinions. I suspect that the people who insist on indisputably true facts want to constrain our judges in some old fashioned common law system rooted in strict notions of *stare decisis*. It's just a rehash of nineteenth century English ideas.

### III.

A Washington lawyer with a busy practice before the various administrative agencies of the federal government simply smiles when she hears the words *judicial notice*. Her bow tie and navy blue suit are nicely set off by the patent leather shoes of her uniform. Her dress code actually masks the fact that at home in Colorado she is a superb horsewoman and a crack shot. But the *Washingtonian* does have something to say:

Maybe talk of *judicial notice* and indisputable facts makes sense if you are going to try cases to a jury. It makes sense to me in a setting like Boston where they still would like to think that they were practicing law in London. I don't see that it makes much sense anywhere else. Certainly judges have never believed themselves to be restricted by a rule that requires them to notice only indisputable facts. Maybe you can find some pious talk in the cases, but I'm speaking about what judges do in fact, and not what some of them may say on occasion.

Frankly, I only hope that we never get a doctrine like judicial notice mixed up in administrative law practice. We don't have juries, but we have questions of fact. We not only have questions of fact, but our questions about facts may arise in front of an agency panel adjudicating or an agency panel legislating. Most of the boards and the lawyers practicing before the agencies are expert in their particular fields, so many of the questions can be decided without any need for evidence. We all have a common notion of the plausible state of affairs in the world we are regulating. We just work our way along through the proceedings with a lot of assumptions which last until someone cares to produce evidence to the contrary. The system works.

I have the impression that much of what administrative agencies do in fact is to legislate; this they do after Congress enacts the major policy postulates in the form of a big, vague, and sometimes incoherent statute. Courts may have deduced their common law canon, reasoning formally to justify their results. But legislating requires the legislature to take political and economic reality into account. They cannot deduce their results from any neat set of major propositions. They have to fill in the gaps between often conflicting propositions, themselves the result of political compromise and economic uncertainty. They have to explain their actions, so they give substantive reasons, which justify the rule. It is something like the difference between doing your geometry homework as a child and making a choice of a career as an adult. Both involve reasoning, but the first assumes *a priori* a right answer, while only history will tell whether the second answer makes any sense at all.

The very basis of substantive reasons justifying any administrative decision is rooted in economics and politics. I know of no way to establish the incontestable truth of any economic or political postulate, unless the statement is so banal as to amount to a tautology. I think that this same sort of reasoning appears when the courts make new law pertaining, say, to a woman's right to an abortion. There isn't any canon or principle from which to deduce an answer. The answers that substantive reasoning yields are not incontestable. They are just acceptable to a reasonable person.

The Supreme Court has been trying since World War II to adjust the Constitution to the needs of the upcoming twenty-first century—to make it work in an increasingly fragmented and complex society in which there are very few agreements about anything. The judges can no longer act like a priesthood and derive their new canons by way of formal deduction from one or two self-evident truths. They have, like disinterested super-legislators, to invent new rules based on the very simple notion that new rules are needed to make the system continue to work. All they can offer for reasons are the reasons why we need to warn persons under arrest of their rights; why free speech includes pornography; why candidates have a right



to spend all they want on their own election campaigns. I doubt that some of the Founding Fathers would have been at all pleased at their creature now. But so what? Isn't the whole point of law to keep the system afloat?

Let me try to illuminate the scene another way. When the common law began, the judges were clerics. They had to invent rules to make the King's law work. They did it as best they could, and the whole game became what commercial law is today. Get a commercial law problem and the Code is the alpha and omega of authority. The decisions actually are based on what makes economic and business sense, but the rationale for those decisions follow the deductive model. Thus what appears to be an objective right and wrong masks pragmatic implementation of the main thrust of the Code.

Commercial law is a wonderful field for persons who are still in love with the theory of the common law and *stare decisis*. The Constitution, however, is not the ideological equivalent of a commercial code. Congress can no longer legislate in any important area and produce anything as disciplined as a commercial code. The thrust of any code is to build a corral from which, like a finite number of pintos, the answers have to be withdrawn. The practice of constitutional law reminds me of a bunch of horse breeders let loose on the plains without a corral, and told to come back with a new strain of pony able to run the race of the future. There is no fixed line circumscribing their choice; there is no clear set of intellectual parameters. Choices have to be made from nowhere and justified, so to speak, in their own right. The result of a decision based on commercial law carries a presumptive legitimacy about it. The new constitutional decisions, products as they are of high plains breeding techniques, seem these days to be presumptively a set of bastards.

What I see is a world in which the Supreme Court as well as the Congress is engaged in legislating. The real difference between them now is which organ of government has the final say about policy decisions. Congress, for example, has complete charge over commerce; the Court over free speech and civil rights. They are staking out exclusive claims, which is a different approach than we have been used to. This exclusivity is the result of implicit bargaining: a live and let live trade-off of ultimate authority. It is a politician's world of domination and powers, and not an academic lawyer's world. Constitutional law in the typical law school is almost as useful as a course in theology, and, given the ideological bias of its practitioners, that is just about what it is.

In my world, of course, there is a real question about who makes policy, the Congress or the Executive. So, again, a battle for power goes on. Any number of laws enacted by the Congress are so vague that the administrator of them must actually make basic decisions involving the strategy as to how whole programs should be implemented. Of necessity the decisions have to

be explained, justified, and proved rational by reasons rooted in utility, and not deduced from any super-canon of authority.

All of us reason by citing, as if we were citing as true for all time and for all ages, statements which appear to make common sense. Add enough of these statements together and you have a reason either to act or not to act. I cannot vouchsafe that any one of the statements collected into the matrix which, taken as a whole, justifies the decision is true either in the sense of being known as such to everyone or being verifiable by recourse to readily available sources. I am almost certain that if one of these statements is too far off base, that fact will be revealed. The critics will soon enough let the world know. These critics, moreover, are legion, running the gamut from one's opponents to law students trying to write a note for publication.

In this sense, lawmaking is like making literature; the validity of the piece will soon be tested by its readers and its critics. Now no one reads Tolstoi and asks whether it is true that the times and not men make history; the only issue is whether the thesis is plausible. So it is with ninety percent, if not far more, of the ideas underlying any judicial or administrative decision. This suggests to me that trying to assemble some "rule" governing what facts decisionmakers can take into account serves no point at all. I do not fret about any formal rule grid affecting my practice of administrative law and I cannot see why any lawyers, no matter what their practice, should be any more concerned than I am.

#### IV.

The reader by now must be wondering when the author will come out of the intellectual closet and reveal which of these versions of judicial notice is the right one. But is there a right one? Let the reader take a moment off and fetch a piece of white typing or copier paper. Now place a penny on the center of the paper and, closing one eye, stare at it with the other. Without moving the eye, slowly move the penny in gentle steps toward the edge of the paper. At some point the eye will not see the penny and then, soon enough, the penny moved on a bit more, will reappear. There exists a circle out there which is not seen by the eye, but the brain is able to order our sight impressions to fill in this gap and create in our minds a solid picture of "reality."

Imagine now two adjoining parcels of land. On the left parcel a person has installed a solar collector, but rather near the boundary separating the two lots. On the right parcel a person has built a house, but rather near the same boundary. The house is placed so that the shade reaches to the far side of the solar collector, negating its utility. We have here the makings of a conflict.

Let us next imagine that somebody, let us say Theodore Ursus, is going to resolve this dispute over whether the house can be moved this close to the property line, given that the solar collector was installed first. How will Theodore Ursus view the scene? He may see the shadow cast over the collector by the house as an invasion or quasi-trespass onto the lot on the left, which, if not privileged, appears to be wrong. What, however, if our friend Theodore Ursus chooses to look at the same scene in terms of the right hand lot before the house was built? Now he will see a glidepath-like easement over the house lot claimed by the owner of the solar collector; a spatial piece of real property not bargained and paid for, but somehow acquired as of right because the collector came before the house. This cannot be, and there cannot be any legal wrong done by moving the house closer to the boundary.

Which image would come to his mind? Would the art of advocacy, if we were arguing for one of the parties to the controversy, involve creating the appropriate image in Theodore's mind's eye of the scene which will catalyze the verbal responses favorable to our position? More interesting still, will the picture Theodore Ursus chooses to see depend more upon his background than anything else? If one were trained and had practiced as an old fashioned property lawyer, the glidepath-like easement would strike one as an invasion of property rights. If one were involved in practice, or more likely administrative or legislative law work, where conservation was preeminent, one would see the shade on the solar collector side of the boundary as something socially unjustified and necessarily a wrong. Might not both responses be equally reasonable?

Posit that our friend Theodore Ursus decides the controversy and authors an opinion. Hornbook nuisance law will be rehearsed, but that law tends to revolve around a notion of reasonableness. The decision will necessitate some explanation of why reasonableness favors the result reached. For example: property cannot be developed unless certainty and stability obtain; property rights cannot turn on the issue of who first occupied the other's space either with shadow or an easement of light; a new system of zoning needs to be created by legislation; there is no nuisance involved.

*Au contraire*, the other side argues. Energy supplied from the sun is critical to the economic future of the country; people must be encouraged to use the sun; people who do so have to be protected; it is unreasonable to interfere with them; there is a nuisance. Lo and behold, whichever way Theodore Ursus decides the controversy, a series of propositions support his decision, propositions which may be encapsulated by headnote hunters as illustrations of judicial notice of facts. It is chance which seems to govern which particular set of these statements of fact are subjected to the niceties of judicial notice.

The idea that Theodore Ursus might see the case in one of two ways, and that his visualization would govern his decision, is not meant to be cynical or shocking. If the truth were known, our background and experiences create the way we each look at the world. Here may be an insight into the reason why persons have different constructions in their mind when they think about judicial notice. An ardent believer in common law trials does not visualize the juridical world in the same way as does an administrative lawyer dealing with the trials of workmens' compensation claims. Certainly an administrative lawyer dealing in rulemaking proceedings and representing affected industries or interest groups does not look at the law in the same way as either of the first two. Successful people believe in what works for them, and what works for each of these three when it comes to interpolating facts into the juridical framework might involve very different techniques, each adapted to the problem at hand. Each of the three tales we have related might very well be true because each is pragmatically sanctioned.

Yet one has to wonder whether the views expressed by our friend the Boston Brahmin are pragmatically sanctioned outside the walls of academe. One might even suspect that they are maintained precisely because they appear to be a jurisprudential pole star, so to speak, which is essential to the fulfillment of academics to take "the law" and reduce it to fixed propositions and procedures. Just as the mind fills in the blanks the eye does not actually see, so the mind seeks to reduce experience to a set of rules or propositions. The function of reason, after all, may be to dominate experience. Lawyers particularly seem to feel the need to establish an objective order, even in their own world: witness that ours is said by otherwise sensible people to be a government of laws and not of men. Still, the order in the universe may be in ourselves. Just as we may resist the idea that the universe may be governed by chance, we may resist the idea that judicial notice is an activity—an art of thinking, as it were—and not something done according to an exercise book containing objective rules.

Something of the same sort is involved in the evolution of rules governing the standards judges ought to employ when reviewing decisions made by administrative agencies. There inevitably follows a pigeon-holing of administrative decisionmaking into formal, informal, and adjudicative modes, and there simultaneously ensued an articulation of a hierarchy of judicial activity, ranging from the casual search for possible arbitrary behavior to a serious search for substantial evidence. At the same time the judges themselves gloss this material with their own notion that sometimes they should, in laid back fashion, give the administrators deference whilst in others they should look hard after the fashion of inquisitors into every nook and cranny of the administrative mind. Again, one suspects that the

actual practice does not proceed along the avenues prescribed in these formal rule grids and that, in the real world, the judges give each particular administrative decision the kind of review they think that it deserves. Their decisions about what are just desserts, however, are arrived at by interior hunches which are not articulated anywhere in their opinions. Indeed, we are met with a problem of prescribing the quality of criticism judges ought to give administrative decisions. Polar ends of critical awareness may be prescribed, but it is doubtful that anyone can prescribe according to any formula the precise rigor criticism should involve.

There is apparently a need felt by the law tribe to engage in fabricating these rule grids which suggest that both judicial notice and judicial review can be reduced somehow to a drill. But we are not dealing with gunnery practice. At this point the Boston Brahmin might smile and ask us to wonder whether we should not in fact increasingly concern ourselves with drill. He may concede that the common law is dead and that the future lies with administrative lawmaking. The paradox is, he may go on to suggest, that just as administrative practice has destroyed the illusion that judicial notice can be reduced to a drill, drill has to be restored if there is to be any control over the administrators and their peculiar decisionmaking processes. Reasoned decisionmaking might have been an ideal not always met in the common law world, but the ideal did act as a restraint upon the system itself. Reason, or at least the appearance of reason, however, necessitates a regularity in the decisionmaking process itself which, in turn, necessitates rules. Gunnery practice, suggests our friend, is necessary if the troops are not going to shoot at each other. A drill of sorts has to be imposed, at least as an ideal, in the emerging world of law within the administrative state if any sense of disciplined, disinterested decisionmaking is going to be a feature of this brave new world. It may well be that, at the moment, we do not have any answers to the judicial notice quandary, but our Brahmin friend might suggest that this only proves that we have not been asking the right questions.

At which point we come to an end of this exercise. To suggest that there are no answers is to court intellectual and moral suicide. It may not be out of place to suggest that we have yet to transcend our contemporary categories so that we might even begin to work our way out of the existential muddle. The fact of the matter is that Socrates did not go around like a marine drill sergeant shoving truth down the throats of his students. His lesson was that he did not know the answers to much of anything, and he challenged his contemporaries to prove that they knew much more. The problem with regard to judicial notice is that we do not know how to begin to fashion a doctrine about the subject suitable to these modern times. All of which may

## Judicial Notice

suggest that the whole subject of judicial notice over the next few years may be encapsulated in a simple formula and in a form peculiarly suited to law review environments: what ARE the questions we SHOULD be asking?