Judicial Intervention in Evidence

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The Anglo-American law of evidence developed in response to the judiciary's need to ensure that only relevant information presented in a straightforward nonprejudicial manner reached a jury. When a case is tried to a judge alone, the rules of evidence are relaxed and a presumption arises that the judge has considered only admissible evidence in making a ruling. In contrast, when a judge presides over a jury trial, it is his duty to administer the rules of evidence to exclude evidence which might prevent a jury from reaching a just result. The rules of evidence have also come to serve another purpose. They are used to limit the role of the judge within the adversary system.

This note will consider the areas where judicial intervention in the presentation of evidence influences the trial process. The scope of a judge's authority in determining preliminary questions of admissibility of evidence will be examined, as well as the judge's ability to testify, to call and question witnesses, to take judicial notice, and to summarize and comment on evidence. The boundaries of these powers under current Illinois law will be explored. Where appropriate, comparison will be made with the Federal Rules of Evidence and proposals for change will be suggested.

Admissibility

Perhaps the major area of judicial influence on the trial process is the court's power to rule on admissibility of evidence. Preliminary questions of admissibility are determined by the court. The

1. J. Thayer, A Preliminary Treatise on Evidence at the Common Law 180 (1898) [hereinafter cited as Thayer].
3. Thayer, supra note 1, at 208.
4. While the exclusionary rules of evidence, i.e. the rules on hearsay and relevancy, filter the information which reaches the jury, most of the rules discussed in this note impose limitations on powers the judge might otherwise possess to intervene in the trial process.
5. The court's power to influence the result of a trial is not limited to the situations discussed in this note. For example, no mention has been made of the psychological influence of the judge's behavior on the jury, nor is the effect of granting a judgment n.o.v. discussed. See R. Lempert & S. Saltzburg, A Modern Approach to Evidence 1145 (1977) [hereinafter cited as Lempert & Saltzburg].
6. See generally Lempert & Saltzburg, supra note 5, at 1133-44.
7. Fed. R. Evid. 104(a); Proposed Ill. R. Evid 104(a); Lempert & Saltzburg, supra note 5, at 1133; H. Clark, 4 Callaghan's Illinois Evidence § 5.01, at 3 (1964). For examples of preliminary questions, see Hoch v. People, 219 Ill. 265, 279, 76 N.E. 356, 361 (1905) (the
judge may conditionally admit evidence subject to a motion to strike if other facts demonstrating its relevance are not introduced. If the other evidence is insufficient to establish the relevancy, the judge may withdraw the issue from the jury's consideration. If the evidence is conflicting, the issue goes to the jury. The judge is to instruct the jury to disregard the conditionally admitted fact if they do not find that the supporting evidence is proved. It is not necessary, however, for the jury to reach a unanimous verdict on this preliminary issue.

Generally, questions of law are for the court while questions of fact are reserved for the jury. Courts and commentators have, however, long recognized that at this preliminary stage the court may appropriately act as trier of both fact and law, even in a jury case.


While the competency of a witness is decided by the court, when the question is one of mental capacity, the trend has been toward allowing the witness to testify and then relying on the jury to weigh the credibility of the evidence. See E. CLEARY et. al., McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 62, at 140-41 (2d ed. 1972) [hereinafter cited as McCORMICK (2d ed.)]; 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 501 (3d ed. 1940 & Supp. 1977) [hereinafter cited as WIGMORE (3d ed.).] Therefore the failure of the trial court to hold a hearing to ascertain mental capacity where it is in question has been held not to be reversible error. People v. Brooks, 39 Ill. App. 3d 983, 350 N.E.2d 831, 823 (1976).

8. Rogers v. Brent, 10 Ill. 573, 587-89 (1849); Fed. R. Evid. 104(b); Proposed Ill. R. Evid. 104(b) (final draft). A request for an instruction to disregard may also be proper if the conditionally admitted evidence is not made relevant. See Caley v. Manicke, 29 Ill. App. 2d 323, 331, 173 N.E.2d 209, 213 (1961), rev'd on other grounds, 24 Ill. 2d 390, 182 N.E.2d 206 (1962); McCORMICK (2d ed.), supra note 7, at 134-35.

9. Rogers v. Brent, 10 Ill. 573, 588 (1849).

10. Fed. R. Evid. 104(b), Advisory Comm. Notes. This position is a departure from the traditional rule that the judge decides all questions of admissibility. See generally J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 104[02] at 104-18-20 (1976) [hereinafter cited as WEINSTEIN]. The current Illinois position on the question of submitting preliminary questions to the jury is unclear. It is also uncertain whether adoption of proposed Ill. R. Evid. 104(b), which is identical to the federal rule, would require Illinois courts to follow this procedure which is only mentioned in the federal committee notes and not in the text of the rule.


12. Id.


14. See THAYER, supra note 1, at 185: "In other words, there is not, and never was, any such thing in jury trials as an allotting of all questions of fact to the jury. The jury simply decides some questions of fact."; 9 WIGMORE, supra note 7, § 2550 at 501: "The admissibility of a given piece of evidence is for the judge to determine. . . . It follows that, so far as the admissibility in law depends on some incidental question of fact . . . this also is for the judge to determine, before he admits the evidence to the jury." [citing inter alia Hoch v. People, 219 Ill. 265, 76 N.E. 356 (1905); Miller v. Metzger, 16 Ill. 390 (1855)].
Therefore, in ruling on the admissibility of evidence, the judge may decide certain factual issues which the jury may later be asked to determine as well.15 In making these preliminary determinations of fact and law, it appears that the court should not be bound by any of the exclusionary rules of evidence,16 except those dealing with privilege.17 The theoretical justification for this policy is that a judge should not be subject to the exclusionary rules since they were developed to control the flow of information to the jury.18

If a judge does decide to hear evidence which would normally be excluded from the jury, he should consider whether to conduct the

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15. For example, in a condemnation proceeding, the court decides whether a prior offer to purchase should be admitted to aid in valuing the land. In ruling on the admissibility of this evidence, the judge reviews the circumstances surrounding the offer to determine if it was bona fide. If the judge concludes that the offer was not bona fide, any evidence as to the price offered will not be admitted. However, if the judge concludes that the circumstances surrounding the offer demonstrate its bona fides, the price offered will be admitted. The jury, in deciding whether the offered price reflects the true value of the land, may consider the same circumstances as did the judge in ruling on admissibility. Although the judge has admitted the evidence, the jury may still conclude that the price offered should be discounted or even disregarded in determining the land's value. Kankakee Park Dist. v. Heidenreich, 328 Ill. 198, 204, 159 N.E. 289, 292 (1927).

16. FED. R. EVID. 104(a); PROPOSED ILL. R. EVID. 104(a) (final draft); McCORMICK, supra note 7, § 121-25 n.91; 1 WEINSTEIN, supra note 10, §104[02] at 104-24-25; 5 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1385 at 87 (Chadbourn rev. 1974 & Supp. 1977).

But see Becker v. Quigg, 54 Ill. 390, 395 (1870) (judge should not have relied on affidavits for proof of title when witnesses could be called in).

17. Maguire & Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 YALE L.J. 1101, 1101-02 (1927); 1 WEINSTEIN, supra note 10, § 104[02] at 104-24-25. The reasons for the distinction between privileges and the other exclusionary rules is that the policy behind excluding privileged evidence is not to aid the jury in finding the truth (see text accompanying note 15 supra) but to protect the privileged relationships from the supposed ill effects of a breach of confidence. However, practical difficulties may arise in attempting to follow this policy too closely.

It is somewhat difficult to see how the admonition in Rule 104(a) [of the Federal Rules] that the court is "not bound by the rules of evidence except those with respect to privileges" can be followed in ruling on questions of privilege. Certainly, the common practice of requiring the disclosure of privileged documents to the court for examination in connection with questions of privilege appears contrary to this admonition.

C. BRITTON, FEDERAL RULES OF EVIDENCE 7 (Chi. Bar. Assoc. 1976) [citing 1 WEINSTEIN, supra note 10, § 104[4], at 104-28-29.]

18. See THAYER, supra note 1, at 509. "This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted into evidence." Advisory Comm. Notes, FED. R. EVID. 104(a). There has been little case law on this point, although it has received scholarly support. D. LOUSSELL & C. MUELLER, FEDERAL EVIDENCE § 35, at 267 nn.21 & 22 (1977 & Supp. 1978) [hereinafter cited as LOUSSELL & MUELLER]. See also 1 WIGMORE (3d ed.), supra note 7, § 4 at 21, & § 4B at 27 for a discussion of the history and policy of using exclusionary rules of evidence in administrative and other non-jury proceedings.
hearing outside the jury’s presence. Illinois law generally leaves this decision within the judge’s discretion. However, preliminary hearings on the voluntariness of a confession must be held away from the jury.

The approach taken in the federal and the proposed Illinois rules is that the hearing must be held away from the jury whenever the preliminary matter involves the admissibility of a confession or when the accused party is a witness and so requests. The latter provision, relating to the accused party as witness, has been criticized as being unnecessary for the protection of the rights of the accused. The provision has also been objected to since it may burden the judicial system through needless duplication of testi-

19. See LOUISELL & MUELLER, supra note 18, § 35 at 267.
20. Cf. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 228, 71 N.E. 863, 867 (1904) (affirming that the decision of whether or not to have the jury withdrawn while an offer of proof is made is within the discretion of the trial judge); cf. People v. Jackson, 98 Ill. App. 2d 97, 240 N.E.2d 364 (1968) (upholding conference in chambers to determine ruling on an objection); cf. Maxwell v. Habel, 92 Ill. App. 510, 512 (1900) (where in dictum the opinion notes that if the court feels an offer of proof will improperly influence the jury it may order the jury withdrawn).
21. People v. Rogers, 413 Ill. 554, 563, 110 N.E.2d 201, 205 (1953) (dictum); People v. Guido, 321 Ill. 397, 411, 152 N.E. 149, 152 (1926) (dictum); People v. Fox, 319 Ill. 606, 618, 150 N.E. 347, 351 (1925) (dictum); cf. People v. King, 22 Ill. App. 3d 66, 71, 316 N.E.2d 642, 646 (1974), rev’d on other grounds, 61 Ill. 2d 326, 335 N.E.2d 417 (1975) (hearing outside jury’s presence required for a determination of voluntariness of a statement to be used for impeachment purposes whether inculpatory or exculpatory). See also People v. Caldwell, 39 Ill. 2d 346, 351, 236 N.E.2d 706, 710 (1968) (failure to object in appropriate manner to admission of evidence waives right to special hearing on voluntariness); People v. Costello, 320 Ill. 79, 103, 150 N.E. 149, 152 (1926) (dictum); cf. People v. Fultz, 32 Ill. App. 3d 317, 334, 336 N.E.2d 288, 301 (1975). CONTRA McCORMICK (2d ed.), supra note 7, § 159 at 351 who suggests that in a bench trial the better practice would be to hold the hearing before a judge other than the trial judge.
22. Fed. R. Evid. 104(c) and PROPOSED ILL. R. EVID. 104(c) read: “Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.”
23. Hearings out of the presence of the jury are both time consuming and cumbersome. In many instances evidence given during such hearings must be repeated before the jury without adverse effect. . . . We think such a rigid rule is particularly unwise since the consequences of failing to accord an unqualified right to the defendant are not certain. For example, will this be plain error which produces a reversal? Must the defendant in every instance when a preliminary matter arises during the course of a trial expressly waive this right to testify out of the presence of the jury? . . . Whether to hold a hearing out of the presence of the jury depends on the posture of the evidence in each particular case. The determination to hold such a hearing is best left to the discretion of the judge.

mony. Yet, without the safeguard accorded by the federal rule, the accused might be reluctant to testify on preliminary matters. Giving the accused the option of whether or not to testify in front of the jury on preliminary matters seems most compatible with the principles underlying the fifth amendment and therefore Illinois should take a stand that is similar to the federal rule.

COMPETENCE OF JUDGE AS WITNESS

At common law it was within the judge's discretion to decide whether or not to disqualify himself as a witness. The only Illinois case to address the issue dealt with a post conviction hearing. In People v. Wilson, the Illinois Supreme Court held that a trial judge should have refused to preside over a post conviction hearing when it appeared that he would be called on to testify to an important matter. This decision seems to place Illinois among those states that permit a judge to testify as long as the subject of his testimony is not significant to the determination of the ultimate issue. This position may reflect a concern with the weight the jury will give to the judge's testimony. As long as the testimony is limited to a formal and undisputed issue there may be no prejudice if the jury gives the judge's testimony undue weight.

Other jurisdictions take a different view. They prohibit the presiding judge from ever taking the witness stand. The federal rules and the proposed Illinois Rules support this position. This absolute proscription seems preferable and should be adopted in Illinois since it would eliminate any impression of judicial partiality which might arise when the judge acts as a witness.

24. Id.
25. See 1 Weinstein, supra note 10, § 104(09) at 104-58. But Weinstein also suggests that the defendant should be encouraged to waive his right to a hearing away from the jury in order to avoid repetition of testimony as long as no prejudice will result. Id. at 104-59.
26. U.S. Const. amend. V.
27. McCormick (2d ed.), supra note 7, § 68 at 147.
29. McCormick (2d ed), supra note 7, § 68 at 147 n.76.
30. Those states which permit a judge to testify if the matter is not overly important distinguish between material disputed facts and formal undisputed facts. This distinction is not always easy to make. Id. § 68 at 147.
31. Id. § 68 at 147 n.76.
32. Id.; Fed. R. Evid. 605 reads: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."
33. Proposed Ill. R. Evid. 605 (final draft) is the same as Fed. R. Evid. 605. See note 32 supra.
POWER OF COURT TO CALL AND INTERROGATE WITNESSES

Under common law, the court had the power to call witnesses when justice required the witness to be present and neither party would call him. The court’s witness rule was invoked primarily to avoid the voucher rule, which prevented a party from impeaching and cross-examining his own witness. Even where the voucher rule is no longer in effect, the court’s witness rule serves a purpose when neither party wants to be associated in the jury’s mind with an unreliable witness.

In Illinois, the party requesting the court to call a witness must show why he cannot vouch for the witness’s veracity, that the witness could offer testimony which is relevant to the direct issues in controversy, and that a miscarriage of justice might otherwise occur if the testimony is not brought to the attention of the trier of fact.

Illinois law regarding the court’s power to call witnesses is still in the process of development. The procedure is used most frequently in criminal cases. The supreme court, in dicta, has stated that a judge may call only an eye-witness to a crime. The better approach, however, is that found in cases where the court permitted a judge to call any witness where neither party would vouch for the witness, yet the witness had knowledge of material facts which

34. McCormick (2d ed.), supra note 7, § 8 at 12-14; 3 Weinstein, supra note 10, § 614(01)
at 614-3.
35. At common law a party “vouches for the credibility of his witnesses” and therefore may not impeach them. The rationale for this rule is that a party chooses his own witnesses and therefore should not call on untrustworthy witness. Lempert & Saltzburg, supra note 5, at 269-70; McCormick (2d ed.), supra note 7, § 38 at 75. Both sources attack this rationale as unrealistic.
36. “[I]f a witness is so untrustworthy that his credibility must be attacked it would seem preferable to be able to refer to him as ‘the Court’s witness’ when addressing the jury.” D. Krupp, Federal Rules of Evidence 56 (Chi. Bar Assoc. 1976). See also Weinstein, supra note 10, § 614(02) at 614-5-6.
38. People v. Crump, 5 Ill. 2d 251, 125 N.E.2d 615 (1955). In some jurisdictions this power is used to allow the court to call impartial expert witnesses. McCormick (2d ed.), supra note 7, § 8 at 14. See generally, Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L. Rev. 1, 74-80 (1978) [hereinafter cited as Saltzburg]; Note, The Trial Judge’s Use of His Power to Call Witnesses - An Aid to Adversary Presentation, 51 Nw. U.L. Rev. 761, 764-67 (1957) [hereinafter cited as The Trial Judge’s Power to Call Witnesses].
would result in a miscarriage of justice if not presented.\textsuperscript{41}

Use of a court’s witness has been extended reluctantly to civil cases.\textsuperscript{42} The reasons for this reluctance are clearly set forth in \textit{Crespo v. John Hancock Mutual Life Insurance Co.}:

During the trial of a criminal case, both court and counsel endeavor to arrive at the truth and ascertain all circumstances giving rise to the commission of the alleged offense in a manner consistent with the fundamental rights of the accused . . . .

By way of contrast, in a civil action each side possesses differing interests in the controversy . . . . [T]he court should not unnecessarily interfere with the trial strategies devised by counsel, and wide latitude should be extended to the parties in deciding in what posture their case should be presented to the fact finder.\textsuperscript{43}

In accord with this philosophy, the court in a civil case should call a witness only if there is no alternative.\textsuperscript{44}

There are several reasons for restricting the use of court called witnesses in civil and criminal cases. A serious concern is that the procedure may be abused if it is utilized to introduce the witness’s prior inconsistent statements under the guise of impeachment.\textsuperscript{45} At common law, these statements are inadmissible for substantive purposes because they are hearsay.\textsuperscript{46} Yet is is well recognized that juries

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  \item \textsuperscript{42} People v. Smith, 59 Ill. App. 2d 279, 207 N.E.2d 169 (1965); \textit{cf. Crespo v. John Hancock Mut. Life Ins. Co., 41 Ill. App. 3d 506, 354 N.E.2d 381, 390 (1976) (recognizing possibility that court could call witness in civil case but that it was not suitable in case at bar.)}
  \item \textsuperscript{43} 41 Ill. App. 3d at 517-18, 354 N.E. 2d at 389-90.
  \item \textsuperscript{44} \textit{See, e.g.}, Martin v. Brennan, 54 Ill. App. 3d 421, 369 N.E.2d 601 (1977) where the court held that rather than making a witness a court’s witness, a co-plaintiff should be allowed to cross-examine a witness whose testimony would only be applied to the other plaintiff.
  \item \textsuperscript{45} The purpose of calling a court’s witness is to bring his testimony before the court for whatever probative value it might have. Although prior inconsistent statements made by the witness may be used to impeach his testimony, they should not be used as substantive evidence. People v. McKee, 39 Ill. 2d 265, 235 N.E.2d 625 (1965); People v. Robinson, 46 Ill. App. 3d 713, 361 N.E.2d 138 (1977); Crespo v. John Hancock Mut. Life Ins. Co., 41 Ill. App. 3d 506, 354 N.E.2d 381 (1976).
  \item \textsuperscript{46} \textit{McCormick} (2d ed.), \textit{supra} note 7, § 251 at 601.
\end{itemize}
are unlikely to distinguish between impeachment evidence and substantive evidence. When the court calls a witness, both parties may cross-examine that witness and therefore the opportunities for this misuse of the evidence are increased.

Another objection to extensive use of the court's power to call witnesses is that it encroaches on the traditional adversary system where each party is responsible for presenting its own witnesses. In addition, the jury may give undue weight to the testimony of a witness called by the court. Finally, a trial court which calls a witness in a criminal case may violate the due process clause if the resulting testimony helps the prosecution build its case.

The likelihood of a due process violation increases if the jurisdiction allows a party to impeach his own witness. In Illinois, a party can impeach his own occurrence witness upon a showing of good faith and surprise. Therefore, it should generally be unnecessary

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47. People v. Collins, 49 Ill. 2d 179, 194-95, 274 N.E.2d 77, 85 (1971); LEMPERT & SALZBURG, supra note 5, at 487. The giving of Illinois Pattern Jury Instruction 3.11 (criminal) has been held insufficient to clarify this distinction. People v. Chitwood, 36 Ill. App. 3d 1017, 1026, 344 N.E.2d 611, 619 (1976).


50. Id.; Saltzburg, supra note 38, at 66.

51. United States v. Karnes, 531 F.2d 214, 216-17 (4th Cir. 1976), noted in Comment, 89 Harv. L. Rev. 1906, 1907 (1976). In Karnes, the Fourth Circuit held that it was a violation of due process for the court to call two important prosecution witnesses without clearly informing the jury of the implications of the court-called witness procedure.

52. Where a party may impeach his own witness there is probably no reason for the court to call a witness, especially since the possible prejudice of having the jury assume that the witness's testimony is supported by the court outweighs any negligible benefits. To call a witness in these circumstances would be reversible error. Comment, 89 Harv. L. Rev. 1906, 1912 (1976).


In United States v. Karnes, the court held that it was unnecessary for the two witnesses to be called by the trial judge since they could have been impeached by the party which called them. 531 F.2d 214, 217 (4th Cir. 1976). The federal common law in effect at the time of the jury trial in Karnes is only slightly broader than current Illinois law. It required that the witness be hostile or give testimony inconsistent with his earlier statements before he could
for Illinois courts to call occurrence witnesses.55

The federal rules permit a judge to call a witness on his own motion or that of either party.56 Both sides are free to cross-examine this witness.57 Unlike current Illinois law,58 the federal rule has no guidelines for determining when a judge may call a witness. This federal position is consistent with the greater discretion traditionally granted to federal court judges.59

Another possible reason for the absence of guidelines in the federal provision is that under the federal rules any party can impeach any witness.60 This reduces the likelihood that parties will request the court to call witnesses in order to have the opportunity to impeach them and thereby introduce their prior inconsistent statements to the jury. Furthermore, the federal hearsay rule61 provides

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54. An argument could be made for the need to have the court call a witness when no party wants to be associated with that witness. See note 36 supra and accompanying text. If, however, the party is entitled to cross-examine and impeach his own witness it is probable that these acts will serve to alert the jury to the fact that the witness and the party calling him do not have an identity of interests. Saltzburg, supra note 38, at 70.

55. See generally Saltzburg, supra note 38, at 70. But see United States v. Leslie, 542 F.2d 285, 289 (5th Cir. 1976) (upholding the court's calling of witnesses under Federal Rule 607 even though the rule allows any party to impeach any witness); but cf. United States v. Karnes, 531 F.2d 214, 219 (4th Cir. 1976) (Russell, J., dissenting) (saying that the court has a duty to call important witnesses if the parties refuse.)

56. Fed. R. Evid 614(a) reads: "The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."

The proposed Illinois Rules of Evidence eliminated rule 614 entirely. The majority indicated that the scope of the court's discretion to call and question witnesses was best left to a case-by-case determination. PROPOSED ILL. R. Evid. 614, Comm. Comments (Final Draft). A minority felt that the federal rule should be adopted and that the failure to do so would possibly result in an undue curtailment of judicial authority. PROPOSED ILL. R. Evid. 614, Minority Discussion (Final Draft).


58. See text accompanying note 37 supra.

59. This discretion is particularly apparent in the area of the court's ability to sum up and comment on the evidence. See text accompanying note 162, infra. On the relationship between the judge's power to call and question witnesses and his power to sum up, see generally S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 125 (Supp. 1977 & Supp. 1978) [hereinafter cited as Saltzburg & Redden]; 3 Weinstein, supra note 10, § 614[01] at 614-3; The Trial Judge's Power to Call Witnesses, supra note 38, at 761-63.

60. Fed. R. Evid. 607 reads: "The credibility of a witness may be attacked by any party, including the party calling him." PROPOSED ILL. R. Evid. 607 requires a showing of surprise and affirmative damage unless the statements used to impeach are admissible substantively.

61. Fed. R. Evid. 801(d)(1)(A) provides that a prior inconsistent statement made under oath or in a deposition is not hearsay if the witness testifies and is subject to cross-examination. (Proposed Fed. R. Evid. 801(d)(1)(A) would have gone further and not even required that the prior statement be made under oath.) PROPOSED ILL. R. Evid. 801(d)(1)(A)(Final Draft) requires that the prior statement have been subject to cross-
that some of a witness's prior statements may be used substantively as well as for impeachment. Therefore it is no longer prejudicial to present these statements to the jury under the federal rules. Such statements are still hearsay in Illinois. Since the possibility of jury misuse of evidence persists, Illinois should not adopt the more liberal federal approach to court called witnesses without concomitant changes in the Illinois hearsay law.

An Illinois court has limited discretionary authority to question witnesses. The judge must not comment on the evidence or the credibility of witnesses and should try to avoid asking questions which would raise objections. Therefore, court questions are usually confined to inquiries "designed to elucidate a point, aid an embarrassed witness, or facilitate the progress of the trial." The judge's discretion in questioning witnesses may be more freely exercised when the case is tried without a jury.

Several Illinois cases hold that the failure of counsel to make a timely objection to a judge's question waives the error. However, the courts have not clearly established what constitutes a timely objection. In contrast, the federal rule clearly establishes when objections may be raised. This rule provides that objections to the calling or interrogation of witnesses may be made immediately or at the next available moment when the jury is absent. The advantages of this approach are twofold. First, it lessens the potential for


64. CLEARY, supra note 41, § 6.10 at 90; accord, S. GARD, ILLINOIS EVIDENCE MANUAL § 468 at 590 (1963 & Supp. 1978).

65. CLEARY, supra note 41, § 6.10 at 90. Cf. Adams v. Sane, 41 Ill. 2d 381, 386, 243 N.E.2d 233, 236 (1968) ("a trial judge is not required to sit mute even in a jury trial; he may ask questions to elicit the truth and clarify the issues").


68. FED. R. EVID. 614(c) reads: "Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present."
embarrassment which may occur when counsel objects to the judge’s questions when the jury is present. 9 Second, it clarifies counsel’s right to object 10 and assures that timely objection is made so that corrective measures may be taken. 2 Illinois should adopt guidelines similar to those found in the federal rule.

Judicial Notice

Judicial notice occurs when a judge accepts the truth of certain facts without requiring that the facts be formally proved. 2 Several problems must be confronted in determining whether judicial notice should be taken. These difficulties include defining the facts which are to be noticed, assuring the parties of adequate notice that judicial notice is being taken, and determining whether judicial notice of a fact should be treated as conclusive proof of that fact. The procedure is further complicated because the term judicial notice encompasses several different judicial functions. One use of judicial notice is sometimes referred to as “jury notice” or “background facts.” 72 Judges, like other people, bring into the courtroom certain

69. FED. R. EVID. 614(c), Advisory Comm. Notes.

  In the years that I was trying cases, on more than one occasion I found it necessary to object to an interrogation by the court, and on more than one occasion, I have had judges say to me, “You can’t object to my questions.” I know that we are divine, but we are not infallible. If our questions are objectionable, they must be objected to. There are a number of reviewing court decisions to the effect that if counsel fails to object to the court’s interrogation, error is waived.

71. FED. R. EVID. 614(c), Advisory Comm. Notes.

Another way this concept is often expressed is that “judges ought not to be more ignorant than the rest of mankind” or stated otherwise that “courts should at least know what everyone else knows.” Wheeler v. Aetna Cas. & Sur. Co., 11 Ill. App. 3d 841, 849, 298 N.E.2d 329, 334 (1973); accord, Owens v. Green, 400 Ill. 380, 81 N.E.2d 149 (1948); Theo. B. Robertson Prod’s Co. v. Nudelman, 389 Ill. 281, 59 N.E.2d 655 (1945).

Judicial notice can be taken at both the trial and appellate levels. Lempert & Saltzburg, supra note 5, at 911. “[T]he failure or even refusal of a trial court to take judicial notice of a fact does not prevent an appellate court from doing so.” Wheeler v. Aetna Cas. & Sur. Co., 11 Ill. App. 3d 841, 852, 298 N.E.2d 329, 337 (1973).

73. McNaughten, Judicial Notice - Excerpts Relating to the Morgan-Wigmore Controversy, 14 VAND. L. REV. 779, 789-90 (1961) [hereinafter cited as McNaughten]. For example, when judges or juries hear the word “car” they do not need evidence to prove “what a car is” or how it differs generally from a railroad car. FED. R. EVID. 201(a), Advisory Comm. Notes.
basic information which they apply in evaluating evidence. Without allowing for these basic assumptions, it would be nearly impossible to conduct a trial since every fact would have to be proved from the ground up. As long as these extra-record facts are either true or else irrelevant there is no need for the courts to acknowledge them. Therefore, courts rarely discuss this type of judicial notice.

The process by which a judge determines the law applicable to the facts of a case is another function of judicial notice. The laws of foreign jurisdictions as well as local ordinances were formerly considered questions of fact requiring presentation of evidence. These matters are now generally covered by statute. Illinois courts of original jurisdiction are required to take judicial notice of municipal and county ordinances within the territorial jurisdiction of the court. They must also take notice of public laws enacted by any state or territory of the United States. Each Illinois appellate court must take judicial notice of everything that the lower court was required to notice, including the rules of practice of the lower court.

74. The subject of judicial notice, then, belongs to the general topic of legal or judicial reasoning. It is, indeed, woven into the very texture of the judicial function. In conducting a process of judicial reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.

THAYER, supra note 1, at 279-80 (footnotes omitted).

75. FED. R. Evid. 201(a), Advisory Comm. Notes.

76. McNaughten, supra note 73, at 790.

77. MCCORMICK (2d ed.), supra note 7, § 335 at 776.

78. Id.

79. ILL. REV. STAT. ch. 51, § 48a (1977). However, when the contents of an ordinance is a material issue in the case, the ordinance must be properly presented to the court. Woods v. Village of LaGrange Park, 287 Ill. App. 201, 4 N.E. 2d 764 (1936).

If proposed Illinois rule 201 on judicial notice is adopted there might be some overlap between it and the existing statute. In any conflict between the legislative enactment and the judicially passed rule, it is uncertain which would prevail. See generally People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977); Note, The Bounds of Power: Judicial Rule-Making in Illinois, 10 Loy. Chi. L.J. 100 (1978).

Federal Rule 201, on which the Illinois rule is modelled, does not apply to judicial notice of law. The drafters of the federal rule believed that the subject was adequately and more appropriately covered by the laws on procedure. FED. R. Evid. 201, “Note on Judicial Notice of Law.” See generally MCCORMICK, (2d ed.) supra note 7, § 335 at 782.


81. ILL. REV. STAT. ch. 51, § 48b (1977). See generally H. Fins, Judicial Notice - The Illinois Anomaly, 7 J. MAR. J. OF PRAC. & PROC. 15 (1973) for a discussion of the disparity between the limitations imposed on trial courts as opposed to appellate courts and the anomaly of requiring Illinois courts to take notice of the laws of foreign states and not allowing them to notice other Illinois ordinances outside their jurisdiction. However, much of Fins’ argument has been rendered moot by the recent decision in People v. Davis, 65 Ill. 2d 157, 357 N.E.2d 792 (1976) which established the right of trial courts to take judicial notice of earlier proceedings in the same court. See note 96 infra. Davis appears to overrule People v.
addition, Illinois has adopted the Uniform Judicial Notice of Foreign Law Act, which requires courts to take notice of the common law and statutes of all states and territories of the United States.\(^2\) The law of foreign nations continues to be a question of fact, although one decided by the court.\(^3\)

Illinois courts may also take judicial notice of earlier proceedings in the same case.\(^4\) In addition, the courts may take notice of other proceedings which "involve the same parties and are determinative of the case sub judice."\(^5\)

The most common use of the term judicial notice is to describe the court's acceptance of the truth of a fact which would normally have to be proved by one of the parties.\(^6\) Two broad areas of knowledge are generally recognized as being suitable for this type of judi-

\(^{82}\) McKinlay, 367 Ill. 504, 11 N.E.2d 933 (1937); People v. Chicago & E. Ill. Ry., 336 Ill. 506, 168 N.E. 294 (1929) and other cases which held that the trial judge could only notice the record of proceedings in the case before the court.

\(^{83}\) ILL. REV. STAT. ch. 51, §§ 48g - 48n (1977). ILL. REV. STAT. ch. 51, §§ 48c - 48f constitutes the Uniform Proof of Statutes Act, which provides that any books or pamphlets published by the authority of the United States or any state, territory, or foreign jurisdiction shall be prima facie evidence of the statutes so published.

There is no comparable provision of the statute setting forth the basis for recognizing the common law of other jurisdictions. If there has been no decision by the highest court of the state, an intermediate appellate court decision must be followed at least if there is no conflicting decision. Moscov v. Mutual Life Ins. Co. of N.Y., 387 Ill. 378, 389, 56 N.E.2d 399, 404-05 (1944).

The National Conference on Uniform State Laws has promulgated new versions of these Uniform Acts since the passage of the federal rules of evidence. Sections 4.01-.04 (Determination of Foreign Law) of the Uniform Interstate and International Procedure Act supersedes the old Uniform Judicial Notice of Foreign Law Act. § 5.03 supersedes the Uniform Proof of Statutes Act.


\(^{85}\) In re Brown, 71 Ill. 2d 151, 155, 374 N.E.2d 209, 211 (1978); Ex rel. Caffey, 63 Ill. App. 3d 214, 216, 379 N.E.2d 884, 886 (1978) (dictum).

\(^{86}\) People v. Davis, 65 Ill. 2d 157, 161, 357 N.E.2d 792, 796 (1976) (trial court properly took notice of defendant's prior conviction before same court in separate proceeding where such fact was "capable of immediate and accurate demonstration by resort to sources of indisputable accuracy" and defendant did not deny the former conviction); accord, People v. Tucker, 44 Ill. App. 3d 583, 358 N.E.2d 729 (1976). See also Walsh v. Union Oil Co., 53 Ill. 2d 295, 291 N.E.2d 644 (1972) (in suit for royalties based on mineral rights, court should have noticed related proceedings in which plaintiff's title to deeds in question was declared void); Badger Mut. Ins. Co. v. Murry, 54 Ill. App. 3d 459, 370 N.E.2d 295 (1977) (in suit by insurance company seeking declaratory judgment that it did not have to defend insured, trial court properly looked at pleadings filed by injured party in separate case); Corboy, Has Illinois Adopted the Federal Rules of Evidence? Maybe Yes, Maybe No, 59 Chi. B. Rec. 141 (1977) [hereinafter cited as Corboy] (questioning whether holding in Davis will be narrowly construed).

\(^{86}\) See City of Chicago v. Williams, 254 Ill. 360, 364-65, 98 N.E. 666, 668 (1912).
cial notice. Facts widely known by reasonably intelligent people within the community constitute the first area. Illinois courts have long recognized that matters of general knowledge are appropriate for judicial notice. Within this category, the courts have noticed biological facts, traffic conditions, and geographic facts.

The second area of knowledge which may be judicially noticed comprises facts easily determined by “resort to sources of indisputable accuracy”. Until recently, the Illinois courts have limited the

87. MCCORMICK (2d ed.), supra note 7, § 328 at 758. The fact must be generally known but only within the jurisdiction. Ashland Sav. & Loan Ass'n v. Aetna Ins. Co., 18 Ill. App. 3d 70, 309 N.E.2d 293 (1973). The fact need not be known by the entire community but only by well informed people. 222 E. Chestnut St. Corp. v. Board of Appeals, 14 Ill. 2d 190, 152 N.E.2d 465 (1958).

88. See note 72 supra.

89. See, e.g., Klein v. Department of Registration & Educ., 412 Ill. 75, 105 N.E.2d 758 (1952) where the court recognized that the eyes of spectacle wearers continue to change and in fact may over a period of years return to normal.

While the basic facts of human conception are of general knowledge, where conception is claimed to have occurred in a manner “outside of common experience” an expert witness should be called. Adams v. Kite, 48 Ill. App. 3d 828, 363 N.E.2d 182 (1977).

90. It has been noticed that it is the custom to yield the right-of-way to funeral processions. Sundene v. Koppenhoefer, 343 Ill. App. 164, 98 N.E.2d 538 (1951). An appellate court has also had occasion to notice that excessively heavy vehicles will damage the roads and pose a threat to others who use the roads. People v. Linde, 341 Ill. 282, 173 N.E. 361 (1930).

91. The fact that 7856 S. Chicago Ave. is in Chicago was once held not to be a subject of judicial notice, People v. Strook, 347 Ill. 460, 179 N.E. 821 (1932). However, in the interests of efficiency it has since been held that notice can be taken of the practice of referring to streets without mentioning the city when a person is speaking of the city he is in at the time. People v. Pride, 16 Ill. 2d 82, 156 N.E.2d 551 (1959). Thus the practice of taking judicial notice of street addresses for venue purposes was established. One of the reasons given in Strook for not taking judicial notice was the court’s desire to protect the rights of the accused. The sensitivity of the Strook court on the issue of due process may be compared with the position of the Pride court, which stated that to take judicial notice “would be to protect an accused by the naivety of the court.” Id. at 89, 156 N.E.2d at 555.

Courts have also noticed the location of meetings of the general assembly, Owens v. Green, 400 Ill. 380, 81 N.E.2d 149 (1948) and where the first district courts are located, Nashlund v. Sabade, 39 Ill. App. 3d 139, 350 N.E.2d 90 (1976). An appellate court upheld a trial judge’s decision to notice that the 400 block of State St. in Chicago contains reputable department stores as well as a wide variety of places of entertainment some of which are frequented by servicemen and adults of all ages. People v. Biocic, 60 Ill. App. 2d 65, 224 N.E.2d 572 (1967). But cf. Sproul v. Springman, 316 Ill. 271, 147 N.E. 131 (1925) (court refused to notice whether the Kaskaskia River is a navigable stream).

92. MCCORMICK (2d ed.), supra note 7, § 328 at 758. Judicial notice of scientific facts can be used to establish the reliability of blood tests in determining paternity or intoxication, of radar, and of handwriting analysis. Id. at 763.

There may be an overlap between this category and that of general knowledge. Some scientific facts are so basic that they can be classified as items of general knowledge. Thus a court will notice that due to gravity a railroad car on a sloping track will move downhill unless properly braked. Woods v. N.W., C. & St. L. R.R., 339 Ill. App. 132, 88 N.E.2d 740 (1949), cert. denied, 340 U.S. 830 (1950).
application of judicial notice in this context to such facts as dates and irrefutable scientific facts. However, influenced by the federal rule on judicial notice, the Illinois Supreme Court has apparently extended judicial notice to all facts "capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy."

Generally, a judge may take judicial notice of facts of which he has no personal knowledge. He may use any information at his disposal or that which is presented by the parties in deciding whether or not to take notice of a fact. However, a judge may refuse to notice a fact if the party requesting the notice has not brought the necessary information to the court's attention.

93. See, e.g., Lange v. Massachusetts Mut. Life Ins. Co., 273 Ill. App. 356 (1934) where the court relied on a calendar in noticing that a certain date did not fall on a Saturday.


95. FED. R. EVID. 201(b) reads: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (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." PROPOSED ILL. R. EVID. 201(b) is identical.

96. People v. Davis, 65 Ill. 2d 157, 161, 357 N.E.2d 792, 796 (1976). It is not clear whether the holding in this case will be broadly construed. Although the court cited the text of the federal rule, it refused to adopt it, preferring to wait for the report of the Illinois Committee on Rules of Evidence. Given the subsequent inaction of the supreme court in regard to the proposed rules, it is possible that the case will be narrowly construed and limited to the fact situation it presented. The Davis decision has not been extended to a wide variety of situations. The cases which have relied on Davis have all been criminal matters. People v. Ford, 44 Ill. App. 3d 926, 358 N.E.2d 1274 (1976) and People v. Tucker, 44 Ill. App. 3d 583, 358 N.E.2d 729 (1976) both involved fact situations similar to Davis. In People v. Middleton, 43 Ill. App. 3d 1030, 357 N.E.2d 1238 (1976), the taking of judicial notice was also supported on non-Davis grounds. See also Corboy, supra note 85, at 141.

97. City of Rock Island v. Cuinely, 126 Ill. 408, 414, 18 N.E. 753, 757 (1888); THAYER, supra note 1, at 308.

98. City of Rock Island v. Cuinely, 126 Ill. 408, 414, 18 N.E. 753, 757 (1888); Nicketta v. National Tea Co., 338 Ill. App. 159, 162, 87 N.E.2d 30, 31 (1949); THAYER, supra note 1, at 308.


100. However, it is important to realize that a judge cannot use his own personal experience or knowledge in deciding a case unless that information is a proper subject for judicial notice. See Drovers Nat'l Bank of Chicago v. Great S.W. Fire Ins. Co., 55 Ill. App. 3d 953, 957, 371 N.E.2d 855, 858 (1977); McGurn v. Brotman, 25 Ill. App. 2d 294, 298, 167 N.E.2d 12, 14 (1960); People v. Burt, 257 Ill. App. 60, 63 (1930). Cf. People v. Gilbert, 68 Ill. 2d 252, 259, 369 N.E.2d 849, 852 (1977) where the court stated that a judge should not notice information gleaned from private experiments. But see Edward v. Peabody Coal Co., 121 Ill. App. 2d 298, 310, 257 N.E.2d 500, 506 (1970) (a trial judge may use his own experience in interpreting a matter of law when deciding a motion for judgment on the pleadings).

101. McCallister v. Keokuk & Hamilton Bridge Co., 287 Ill. 246, 122 N.E. 468 (1919); Town of Normal v. Witham, 91 Ill. App. 2d 262, 233 N.E.2d 576 (1968); Kabler v. Marchi,
Certain case law suggests that when a judge becomes aware of a fact suitable for judicial notice, he should not ignore it. In order to clarify this proposition, Illinois should adopt the approach taken in the federal and proposed Illinois rule on judicial notice. The rule makes judicial notice mandatory when a party requests it and provides the judge with the necessary information. All other decisions on whether to take judicial notice are left to the court's discretion. These provisions are desirable because they are consistent with objectives of procedural fairness and judicial economy.

Since it is generally agreed that the taking of judicial notice renders a matter indisputable, failure to provide the opposing party with adequate notice and an opportunity to be heard may be a denial of due process. Illinois courts have not confronted the issue of adequate notice. However, the Uniform Judicial Notice of Foreign Law includes a provision which requires that advance notice be given before a judge may take judicial notice of a foreign law. This provision might be considered as a model for all areas of judicial notice.

The federal and the proposed Illinois rules suggest an alternative approach to the due process problem. While the rule contains no formal provision for notification, it does permit an opposing party to request an opportunity to be heard. If the party has not received

103. FED. R. EVID. 201(d) and PROPOSED ILL. R. EVID. 201(d) (Final Draft) read: "A court shall take judicial notice if requested by a party and supplied with the necessary information."
104. FED. R. EVID. 201(c) and PROPOSED ILL. R. EVID. 201(c) (Final Draft) read: "A court may take judicial notice, whether requested or not."
105. See generally FED. R. EVID. 201(c)-201(d), Advisory Comm. Notes; CLEARY, supra note 41, § 3.7 at 45-46.
108. Id. § j reads:
Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.
109. CLEARY, supra note 41, § 3.7 at 46.
110. See FED. R. EVID. 201(e), Advisory Comm. Notes.
111. FED. R. EVID. 201(e) and PROPOSED ILL. R. EVID. 201(e) (Final Draft) read: "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
adequate prior notification, the hearing may be held after the judge has taken judicial notice.\textsuperscript{112}

It is unclear whether the federal rule or the Judicial Notice of Foreign Law Act provides the more efficient resolution of due process questions. If a judge is often forced to reconsider a judicially noticed fact because the opposing party did not receive prior notification, the court's time will have been wasted. On the other hand, the decision to take judicial notice is often uncontested.\textsuperscript{113} Therefore, a formal notification process may be unnecessary and time consuming.\textsuperscript{114}

Prior notification may be more essential in the area of judicial notice of foreign law. Without adequate notification, parties would not be prepared to conduct the trial on the basis of the laws of another jurisdiction. The federal rule may be more appropriate when considering judicial notice generally, since so many noticed facts are uncontested. Therefore, Illinois should consider adopting the federal approach in all areas not covered by the Uniform Act.

In any consideration of judicial notice a distinction must be drawn between legislative and adjudicative facts. Adjudicative facts relate to a specific case - "who did what, where, when, how, and with what motive."\textsuperscript{115} Legislative facts are those used by courts to create law or policy or to interpret statutes.\textsuperscript{116} The distinction between these two types of facts becomes important when considering two related areas of controversy surrounding the use of judicial notice.

There has been considerable debate as to whether judicial notice should be taken only of indisputable facts and whether evidence

\textsuperscript{112} Id.

\textsuperscript{113} See generally Davis, Judicial Notice, 55 Colum. L. Rev. 945, 947 (1955) [hereinafter cited as Davis, 55 Colum.].

\textsuperscript{114} Id.

\textsuperscript{115} Davis, 55 Colum., supra note 113, at 952. Two examples of adjudicative facts are the weekday in which a certain date fell, Lange v. Massachusetts Mut. Life Ins. Co., 273 Ill. App. 356 (1934) and the commercial environment around defendant's store in downtown Chicago, People v. Biocic, 80 Ill. App. 2d 65, 224 N.E.2d 572 (1967). Courts are fairly reluctant to notice most adjudicative facts because they tend to be important to the outcome of the trial. See Cleary, supra note 41, § 3.1 at 38.

\textsuperscript{116} Davis, 55 Colum., supra note 113, at 952. Examples of legislative facts are that densely populated cities present difficult problems which require special legislative solutions, Rincon v. License Appeal Comm'n, 62 Ill. App. 3d 600, 605, 378 N.E.2d 1281, 1286 (1978); that eyes continue to change, thus justifying the requirement that optometric records be preserved for three years, Klein v. Department of Registration and Educ., 412 Ill. 75, 80-81, 105 N.E.2d 758, 762 (1952) and that the damage to property and the danger caused by extra heavy vehicles using the roads supported reasonableness of the state's restrictions on such use, People v. Linde 341 Ill. 269, 275, 173 N.E. 361, 363 (1930).
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should be admitted to controvert a judicially noticed fact. Illinois currently takes the position that a fact which is the subject of judicial notice should be indisputable and no further evidence may be presented to controvert the fact. This point of view has the support of Professor Morgan. The opposing view is that judicial notice should be taken whenever it is convenient, and that parties should be given some opportunity to controvert the judicially noticed fact. The leading exponent of this position is Professor Davis.

It was Professor Davis who first developed the distinction between legislative and adjudicative facts. According to the Davis model of judicial notice this distinction is just one of three variables to be considered by the judge in deciding whether to take judicial notice. In addition to considering whether a fact is legislative or adjudicative, the court should also consider whether it is more or less disputable, and how critical it is to the determination of the controversy. These factors are also to be considered by the judge in deciding what type of hearing to hold on the propriety of taking judicial notice. In the case of a disputed adjudicative fact that is critical to the outcome, Davis feels that the parties should have the opportunity to present evidence to controvert noticed fact. On the other hand, he contends that a judge should be able to notice any legislative facts he believes to be true, provided that he offers the parties a chance to contest the taking of notice by informal oral

117. Sproul v. Springman, 316 Ill. 271, 279, 147 N.E. 131, 135 (1925); accord, Bowman Dairy Co. v. Lyons, 2 Ill. 2d 625, 2 N.E.2d 1 (1954).
119. Morgan, Judicial Notice, 57 HARV. L. REV. 269 (1944) [hereinafter cited as Morgan]. This position is also espoused by Professor McNaughten. See note 64 supra.
120. Davis, Judicial Notice, 1969 LAW & SOC. ORDER 509, 515 [hereinafter cited as Davis].
121. Id.; Davis, 55 COLUM., supra note 113. Professor Davis draws strong support from the writings of Professor Thayer and Wigmore. See generally THAYER, supra note 1, at 308-09; 9 WIGMORE (3d ed.), supra note 7, § 2567 at 535-36.
122. Davis, 55 COLUM., supra note 113, at 952.
123. Id.: The principal variables are (a) whether the facts are close to the center of the controversy between the parties or whether they are background facts at or near the periphery, (b) whether they are adjudicative or legislative facts, and (c) the degree of certainty or doubt - whether the facts are certainly indisputable, probably indisputable, probably debatable or certainly debatable.
124. Id.
125. The four possible types of hearings are: (1) a full trial; (2) presentation of argument and information before notice is taken; (3) argument after notice is taken; (4) no presentation. Davis, supra note 120, at 515.
126. Davis, 55 COLUM., supra note 113, at 984.
presentation or in writing.\textsuperscript{127}

The Davis approach stresses that judicial notice should be used as a tool to expedite the trial process.\textsuperscript{128} It recognizes that courts do occasionally take notice of disputable facts.\textsuperscript{129} Professor Morgan, on the other hand, argues that a fact once noticed should be indisputable,\textsuperscript{130} regardless of whether it is legislative or adjudicative.\textsuperscript{131} He believes that to allow judicial notice of disputable facts in the name of efficiency is to confuse it with rebuttable presumptions.\textsuperscript{132} He concedes, however, that the initial question of whether to notice a fact is subject to dispute.\textsuperscript{133} Therefore, the only real difference between the Morgan and Davis positions may lie in the determination of when a judicially noticeable fact may be disputed.\textsuperscript{134}

The drafters of Federal Rule 201 on judicial notice apparently tried to work a compromise between the Morgan and Davis theories. They adopted the Morgan position that facts should be virtually indisputable in order to be noticed\textsuperscript{135} but they limited application

\begin{itemize}
\item \textsuperscript{127} Davis, supra note 120, at 527. The type of hearing is discretionary with the judge.
\item \textsuperscript{128} Id. at 513. The objective of judicial notice should be “the achievement of the maximum of convenience that is consistent with procedural fairness.” Id. See Thayer, supra note 1, at 309.
\item \textsuperscript{129} Davis, supra note 120, at 519-23. See note 108 supra.
\item \textsuperscript{130} Morgan, supra note 119, at 279. Morgan cites cases where evidence contrary to a judicially noticed fact was not allowed. In those cases where the decision not to admit contrary evidence was overruled, the appellate courts had also determined that the facts involved were not proper material for judicial notice. Id. at 285. He maintains that “[t]here is not a single decision reversing, and it is believed not a single judicial expression disapproving, the action of a trial judge in rejecting evidence of a matter held by the appellate court to be a proper subject of judicial notice.” Id.
\item \textsuperscript{131} See id. at 284-86; McCormick (2d ed.), supra note 7, at 774 n.42.
\item \textsuperscript{132} Morgan, supra note 119, at 286.
\item \textsuperscript{133} Id. at 287.
\item \textsuperscript{134} See Weinstein, supra note 10, § 201[07] at 200-44-45 suggesting that it makes little difference whether evidence is allowed to dispute a judicially noticed fact or a hearing is held to determine whether a fact should be noticed as long as the jury is not included in the process.
\item \textsuperscript{135} Fed. R. Evid. 201(b). See note 95 supra for text of rule.
\end{itemize}
of the rule to adjudicative facts. The drafters acknowledged the Davis contention that some disputable facts may properly be the subject of judicial notice, but restricted such notice to facts within the legislative sphere. However, the drafters declined to adopt a provision which would regulate judicial notice of legislative facts because they felt it was an area which requires greater flexibility than a rule could provide.

It is uncertain whether the federal rule's reliance upon the distinction between legislative and adjudicative facts was an optimal resolution of the Morgan-Davis debate. While this distinction may be helpful when used in combination with the other facts suggested by Davis to determine whether judicial notice should be taken, it is unsuitable when used as a rigid guide to determine whether a fact falls within the scope of the federal or the proposed Illinois rule. In many instances, the distinction between legislative and adjudicative facts is difficult to draw and one fact may contain characteristics of both categories.

Once a court has determined that a fact is legislative and therefore outside the rule it has complete discretion in deciding whether to notice that fact. Judicial notice of a legislative fact may be determinative of the ultimate issue in a case. Thus whether a fact is legislative or adjudicative may become a critical issue under the

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136. FED. R. EVID. 201(g). Subsection (g) as drafted by the advisory committee did not distinguish between criminal and civil cases. However, the House of Representatives made the change because it felt that binding jury instructions would be in conflict with the spirit of the sixth amendment. H.R. REP. No. 650, 93rd Cong., 1st Sess. 6-7 (1973). See generally LOUISELL & MUELLER, supra note 18, § 60, at 495-96. Moore & Bendix, Congress, Evidence and Rulemaking, 84 YALE L.J. 9, 16 (1974) [hereinafter cited as Moore & Bendix]. The proposed Illinois rule again substitutes the words "may advise" for "shall instruct" in regard to criminal instructions. Proposed ILL. R. EVID. 201(g) (Final Draft).

137. FED. R. EVID. 201(a) and PROPOSED ILL. R. EVID. 201(a)(Final Draft) read: "This rule governs only judicial notice of adjudicative facts." Legislative and evaluative (background) facts are not subject to Rule 201. FED. R. EVID. 201(a), Advisory Comm. Notes. Neither is judicial notice of law governed by this rule. FED. R. EVID. 201, Advisory Comm. Notes.

138. Id.

139. Id.

140. See text accompanying notes 124 and 125 supra.

141. See LOUISELL & MUELLER, supra note 18, § 56, at 405-06, 410-14; SALTZBURG & REDDEN, supra note 38, at 61: "In fact, it may be necessary to remind Trial Judges that Davis' dichotomy may be a useful tool, but it is dangerous to use the tool as if it were a sharply honed device designed to split hairs."

142. For an example of judicial notice of legislative facts which went to the heart of the issue on trial see Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954) where the Supreme Court utilized extra-record sources to support its finding that separate education was inherently unequal.
federal and proposed Illinois rule on judicial notice. Yet under the rule this decision is made by the judge alone with no opportunity for the parties to be heard.\footnote{143}

On the other hand, the Morgan concept had been to restrict judicial discretion by only allowing indisputable facts to be noticed.\footnote{144} But the federal rule only applies this standard to adjudicative facts. By leaving judicial notice of legislative facts\footnote{145} unregulated, the rule may open the door to greater use and/or abuse of judicial discretion.\footnote{146}

Better control over judicial discretion may have been achieved by adoption of the Davis approach. This approach recognizes that courts do take judicial notice of disputable facts and provides guidelines to be used whenever notice is taken. Although these standards are broad, they at least provide a check on use of judicial discretion in taking judicial notice.\footnote{147}

If Illinois were to adopt the legislative-adjudicative distinction as it is used in the federal rules, the courts could be obliged to focus on a distinction which may be difficult to make and which would leave a large area of judicial notice unregulated. Rather than follow-

\begin{itemize}
\item \textbf{143.} Once the judge decides that a fact is legislative, he does not have to follow the procedure for a hearing set out in Federal Rule 201(e) and Proposed Illinois Rule 201(e). The parties may not even become aware that the judge has noticed a legislative fact until the decision has been handed down.

\item \textbf{144.} See Morgan, \textit{supra} note 119, at 292-94; Roberts, \textit{Judicial Notice: An Exercise in Exorcism}, 19 N.Y.L.F. 745, 752-54 (1974) [hereinafter cited as Roberts]. The article ties the Morgan view to a fear of judicial discretion dating back to the early New Deal days.

\item \textbf{145.} Davis, \textit{supra} note 120, at 525-26, concludes that three-quarters of judicially noticed facts are legislative. Roberts, \textit{supra} note 144, at 758, also minimizes the importance of adjudicative facts:

\begin{quote}
In fact, none of the evidence casebooks used today contain a single adjudicative fact example that cannot be rationalized just as easily on relevancy grounds. Bluntly put, the greatest advance along the lines of codifying evidence will be by deleting at once even the rump of judicial notice still surviving in the proposed Federal Rules or any other rules of evidence.
\end{quote}

\item \textbf{146.} Saltzburg \& Redden, \textit{supra} note 38, at 60:

\begin{quote}
The most serious problem with Rule 201 may be its total failure to address legislative facts. While we have no quarrel with either the basic distinction between adjudicative and legislative facts or with the need to treat them differently for purposes of judicial notice, we are greatly troubled by the Advisory Committee's Note that it is acceptable for courts to take judicial notice of material legislative facts without affording the parties an opportunity to be heard. . . .But when a Judge departs from the theories, evidence, and arguments of the parties to embrace a new approach we favor participation by the parties.
\end{quote}

\item \textbf{147.} See Thayer, \textit{supra} note 1 at 309: "This function [judicial notice] is indeed a delicate one; if it is too loosely or ignorantly exercised it may annul the principles of evidence and even of substantive law." [footnote omitted].
\end{itemize}
ing the federal code, Illinois should adopt a rule which applies the Davis approach. The courts should determine the factors to be considered in all cases where the judge must decide whether to take judicial notice. It would be unnecessary, however, to take the extreme view proposed by Davis that a judicially noticed fact may be controverted by the presentation of evidence at trial. Providing the opposing party with some opportunity for a hearing on the propriety of taking notice should be sufficient.

**JUDICIAL COMMENT**

The power of the court to comment on and sum up the evidence existed at common law. Beginning in the colonial period, a distrust of the judiciary developed which eventually led most states to change the common law so that judges would no longer have the right to comment on or sum up the evidence. In Illinois, as in most states, the trial judges have been divested of these powers.

The Illinois Supreme Court has upheld against a constitutional attack limitations prohibiting a judge from commenting on and summarizing the evidence. In *People v. Kelly*, the prosecution argued that these limitations constituted a deprivation of trial by jury. Trial by jury, they contended, meant trial as it was known at common law, where the judge took an active role in guiding the jury.

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148. Davis apparently does not envision that the parties will be able to contest a judicially noticed fact before the jury in a jury trial. See Weinstein, supra note 10, § 201[07] at 201-44.

149. Summary is used to describe the judge’s recital of the evidence. Comment is the power to express an opinion on the merit or weight of the evidence. Saltzburg, supra note 38, at 22. Although the power to sum up has been preserved separately from the power to comment in some states, see Wright, Instructions to the Jury: Summary Without Comment, 1954 Wash. U.L.Q. 177, 178 (hereinafter cited as Wright, Wash. U.L.Q.). The two powers tend to overlap and for most purposes can be discussed interchangeably. See Saltzburg, supra note 38, at 22; 1 Weinstein, supra note 10, § 107[02] at 107-23-24.

150. Wigmore (3d ed.), supra note 7, § 2551 at 503-05.

151. Weinstein, supra note 13, at § 107[01], at 107-12-13. In the colonial period judges were mistrusted as paid servants of the crown. Dislike of judges, who were often ill-trained laymen, continued in the early federal period. Beginning with a statute passed in North Carolina in 1796, the practice of limiting the judge’s powers to comment on and sum up the evidence spread through the states. Id.


154. 347 Ill. 221, 179 N.E. 898 (1932). See also People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934).
to an understanding of both the facts and the law of the case.\textsuperscript{155} Although the majority opinion in the case rejected this argument, a vigorous dissent suggests that the claim was not without merit.\textsuperscript{156}

The restriction on judicial comment is reflected in the well-defined limitations which have developed in regard to the giving of jury instructions. Under current Illinois law\textsuperscript{157} the judge's duty is to give clear instructions as to the law which is applicable to the facts of the case.\textsuperscript{158} These instructions must be in writing unless the parties consent to oral instructions.\textsuperscript{159} If an Illinois Pattern Jury Instruction fits the case, it must be given.\textsuperscript{160} The judge is not even to answer a question posed by the jury, if to do so would invade the jury's province of weighing the facts.\textsuperscript{161}

In contrast to the state courts, the federal judiciary continues to have the powers to comment on and sum up the evidence, at least in theory.\textsuperscript{162} In practice, however, federal judges are more likely to follow the example of the state judiciary.\textsuperscript{163} Perhaps because of their training under state law, federal judges rarely use their power to comment on the evidence, and summarize the evidence only slightly more often than their counterparts in those states which allow sum-

\textsuperscript{155} 347 Ill. at 224, 179 N.E. at 899.

\textsuperscript{156} People v. Kelly, 34 Ill. 221, 179 N.E. 898 (1932). De Young, J., also wrote a dissenting opinion in People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934).

\textsuperscript{157} Current Illinois law with regard to the giving of jury instructions continues unchanged from the 19th century. Wright, TEMP. L.Q., supra note 152, at 153-55. Although the 1933 Civil Practice Act made several changes directed at giving the judge greater freedom in preparing a charge to the jury, the reforms were quickly repealed. The most notable of these attempted reforms was that the instructions were to be in the form of a continuous narrative. In 1935, § 67 of the Act was restored to its original form and it is that version which is preserved today, with few changes. ILL. ANN. STAT. ch. 110, § 67 (Smith-Hurd, 1977) (Historical & Practice Note); Wright, TEMP. L.Q., supra note 152, at 154; Wright, WASH. U.L.Q., supra note 149, at 154.


\textsuperscript{159} ILL. REV. STAT. ch. 110, § 67(1) (1977). Written instructions are read aloud verbatim from a text prepared in advance. Wright, WASH. U.L.Q., supra note 149, at 183-85.

\textsuperscript{160} ILL. REV. STAT. ch. 110A, § 239 (1977).


\textsuperscript{163} 9 WIGMORE (3d ed.), supra note 7, § 2551 at 507.
mary but no comment. 164

There has been considerable national support among commentators and some practicing attorneys for a return to a more active role for state judges. 165 Those in favor of judicial comment tend to be influenced by the English trial process where the judge retains the full common law powers to comment on and summarize the evidence. The proponents of judicial comment argue that since the judge is the only impartial lawyer involved in the trial process, he should have a special role in guiding the untrained jury to the right conclusion. 166

However, there are equally strong policy arguments for continuing the status quo in the state courts. 167 The opponents of judicial comment appear less concerned with departures from the historical role of the judge and more concerned with protecting the American adversary system. 168 The most important features of the American system are that it provides the parties with a forum where they can be heard and it results in a decision based on the strength of the case as presented by adversaries. 169 Accordingly, the jury is viewed as an important safeguard against the possibility of too much judicial intervention. 170 The judge should therefore be limited to those methods of directing the trial which have minimal influence on the jury. 171 This view represents the current position of Illinois law, and a return to judicial comment should be avoided since it may interfere with the decision-making process of the jury.

CONCLUSION

Two themes dominate the discussion of judicial intervention. The first centers upon the judge, as the administrator of justice, playing an active role in the course of a trial. It is his duty to see that the

165. Thayer, supra note 1, at 188 n.2.; 1 Weinstein, supra note 10, § 107[01] at 107-19-20; 9 Wigmore, supra note 7, § 2551a at 509-17; Model Code of Evidence rule 8, Comment (1942) (reporting a study carried out in 1927 by The Commonwealth Fund which canvassed the opinions of 1565 attorneys). See generally Wright, Temp. L.Q., supra note 152, at 137-41. There is also a feeling that the federal judiciary should not continue to follow the restrictive position taken by the states. See 9 Wigmore, supra note 7, § 2551 at 508.
166. See Thayer, supra note 1, at 188 n.2; 9 Wigmore, supra note 7, § 2551 at 503.
168. See Saltzburg, supra note 38, at 34-46.
169. Id.
170. Id. at 13-19.
171. Id. at 19-21.
172. Id. at 46-52.
system works so that the right result is reached. As part of this function, the judge determines which evidence is admissible and which facts should be judicially noticed. He may also call and question witnesses and in some jurisdictions he may be expected to comment on and summarize the evidence for the jury.

In contradiction to this theme is the notion that the adversary system needs protection from the potentially overwhelming influence of the judiciary, especially in jury trials. In some instances, safeguarding the trial system requires a departure from common law traditions, such as where a presiding judge is prohibited from taking the witness stand or from commenting on the evidence. Other areas, such as judicial notice and calling and questioning of witnesses require that appropriate guidelines be formulated to control the exercise of judicial discretion.

While the federal system has tended to emphasize the role of the judge, Illinois has generally been more concerned with limiting judicial intervention in the adversary system. Although both positions have merit, protection of the adversary system and trial by jury seems to be the more democratic ideal.

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