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ARTICLE

DO YOU WANT TO KNOW A SECRET? DO YOU PROMISE NOT TO TELL? WHOA OH OH:[*] JUDGES, OPINIONS, AND JUDICIAL NOTICE

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INTRODUCTION

The role of appellate courts in Indiana is defined partly by the authority they are granted to review cases and partly by the restraints imposed on that review. The Indiana Constitution provides that the supreme court, in part, "shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death shall be taken directly to the Supreme Court."[1] Similarly, the Indiana Constitution grants the court of appeals, in part, "appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to one appeal."[2] The exercise of this jurisdiction is restrained by the rule that trial courts decide issues based only upon the evidence that is properly before the court and appellate courts are bound by that record on

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1. IND. CONST., art. 7, § 4; *see also* IND. R. APP. P. 4.
2. IND. CONST., art. 7, § 6; *see also* IND. R. APP. P. 5.

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appeal and cannot consider matters outside the record.[3] This division of responsibility has been eloquently described:

> The warp and woof of the fabric of our judicial system which guarantee all citizens equal justice under the law depend upon the maintenance of a pattern of judicial responsibility, restraint, and an absolute and conscientious adherence to the rules governing our judicial tribunals at each level. The structure of our judicial system rests upon the solid foundation of our trial courts at every level of government. The keystone of justice in our system is the trial court, thus if it is to be accomplished under the law, it must be attained first at the trial court level. If the trial courts and the appellate tribunals will remain steadfast to the rules governing their respective duties and functions, substantial justice will be done insofar as human agencies are capable of its accomplishment.[4]

One of the rules which helps define the parameters of judicial responsibility and restraint is the doctrine of judicial notice. Judicial notice eliminates the need for the parties to prove certain facts.[5] As first embodied in Indiana common law and later in a formal evidentiary rule, Indiana courts at all levels are permitted to take judicial notice of facts "not subject to reasonable dispute" or that "can be accurately and readily determined" from reliable sources.[6] And yet, as noted repeatedly in state appellate decisions, Indiana appellate courts are not fact-finding courts,[7] and are supposed to decide cases on the trial court record alone.[8] Further, the Indiana Code of Judicial Conduct prohibits a judge from independently investigating facts, limiting consideration to "only the evidence presented and any facts that may be properly judicially noticed."[9] What, then, is

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3. Schaefer v. Kumar, 804 N.E.2d 184, 187 n.3 (Ind. Ct. App. 2004); *see also* Fox v. Ohio Valley Gas Corp., 204 N.E.2d 366, 369 (Ind. 1965) ("We are bound by the record and cannot go outside it to determine matters pertaining to the trial of these causes.").

4. Bailey v. Kain, 192 N.E.2d 486, 492 (1964).

5. *See*, *e.g.*, Orman v. State, 332 N.E.2d 818, 819 (Ind. Ct. App. 1975) (holding the evidence was sufficient to show a crime was committed in Crawfordsville, Indiana, and the court could take judicial notice that Crawfordsville is in Montgomery County; therefore, venue of the offense in Montgomery County was sufficiently proven).

6. IND. R. EVID. 201(a), (d); *see also* Troyer v. Troyer, 987 N.E.2d 1130, 1138 n.3 (Ind. Ct. App. 2013) (citation omitted) ("Indiana Evidence Rule 201[(d)] provides that '[j]udicial notice may be taken at any stage of the proceeding,' which includes appeals.").

7. *See*, *e.g.*, Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) ("It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction."); Hooker v. Norbu, 899 N.E.2d 655, 658 (Ind. Ct. App. 2008) ("[W]e observe that our review of a damages award is limited. We . . . will reverse an award only when it is not within the scope of the evidence before the factfinder.").

8. *See*, *e.g.*, Merrillville 2548, Inc. v. BMO Harris Bank N.A., 39 N.E.3d 382, 390 (Ind. Ct. App.) ("As a general rule, [the court of appeals] may not consider material that is not properly part of the record on appeal.").

9. IND. CODE OF JUDICIAL CONDUCT Rule 2.9(C). A thorough discussion of the interplay of

the proper use and function of judicial notice on appeal—if any?

This issue was recently brought to the forefront by a high-profile decision implicating judicial notice and independent judicial research. In 2015, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit authored an opinion in *Rowe v. Gibson*, which reversed the entry of summary judgment against a prisoner who brought § 1983 claims against prison administrators and employees of a prison medical services company for deliberate indifference to his medical needs.[10] In doing so, Judge Posner cited information publicly available on the Internet concerning the nature of the prisoner's medical condition,[11] the qualifications of the prison physician,[12] and the effects and use of medication to treat the condition.[13] Judge Posner acknowledged the court could not take judicial notice of the information under the current state of the law,[14] but he also denied using the research for anything other than "to underscore the existence of a genuine dispute of material fact created in the district court proceedings by entirely conventional evidence, namely [the prisoner's] purported pain."[15] He characterized the information gleaned from his research as falling "somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice."[16] Despite agreeing with the result in part, Judge David Hamilton vigorously opposed reversing summary judgment on the prisoner's claim regarding the timing of

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this rule of judicial conduct with the text and practical use of the evidentiary rule on judicial notice is outside the scope of this Article, but it should be noted that the comment to the judicial conduct rule states that the prohibition against independent investigation "extends to information available in all mediums, including electronic." *Id.* at 2.9(C) cmt. 6.

10. Rowe v. Gibson, 798 F.3d 622, 630 (7th Cir. 2015), *reh'g en banc denied*, No. 14-3316 (Dec. 7, 2015).

11. *Id.* at 623-24 (citing to websites for the National Institutes of Health, the Mayo Clinic, and WebMD for information regarding gastroesophageal reflux disease).

12. *Id.* at 625 (citing to websites for the American College of Preventive Medicine and Healthgrades).

13. *Id.* at 624-27 (citing to Wikipedia and websites for Boehringer Ingelheim—the manufacturer of over-the-counter drug Zantac—and Physicians' Desk Reference for information about ranitidine, the active ingredient in Zantac, which is used to treat esophagitis).

14. *Id.* at 629.

15. *Id.*; *see also id.* at 635 (Rovner, J., concurring) (stating her belief that the resolution of the case did not require any departure from the record because the prisoner's assertions of prolonged periods of extreme pain must be credited as the non-moving party: "[t]hat the [drug] manufacturer's website and other reputable medical web sites support the plausibility of his testimony merely illuminates the factual dispute that exists within the record as we received it; they are not necessary to the outcome.").

16. *Id.* at 628 (majority opinion). Judge Hamilton noted in his dissent that he is not opposed to "using careful research to provide context and background information to make court decisions more understandable," but believed, contrary to Judge Posner's assertions, that the majority was basing a decision on its own research on adjudicative facts. *Id.* at 638 (Hamilton, J., concurring in part and dissenting in part).

administering his medication, calling the reversal "unprecedented" and "clearly based" on Judge Posner's extra-record research.[17] Judge Hamilton characterized the opinion as becoming "Exhibit A" in the debate about "the propriety of and limits to independent factual research by appellate courts."[18] In fact, the defendants in *Rowe* filed a petition for rehearing en banc, arguing, in part, they were denied the right to be notified of, and confront, the independent factual research conducted by the court because they had no opportunity to review the Internet articles Judge Posner cited, to test their premises, or to present contrary authority.[19] With one judge not participating, the vote on whether to grant rehearing en banc was a tie, and therefore the petition was denied.[20] Judges Posner and Rovner, as members of the panel majority, noted the opinion should not be read to suggest "anything at all about the propriety of [I]nternet research" because "the record as [the court] received it supports the decision to remand the case."[21]

As *Rowe* demonstrates, and as the Indiana Court of Appeals has observed, "our information technology explosion has allowed our courts, as never before, to access reliable information that may aid in the just disposition of cases."[22] In an age when nearly every person carries a personal mini-computer at all times and thinks nothing of immediately running a search for any question that crosses her or his mind, the parameters of judicial notice are more important than ever before.[23] This Article provides an overview of judicial notice as a doctrine, how Indiana appellate courts have handled judicial notice in the past, how that informs the taking of judicial notice currently, and how courts could consider the use of judicial notice in the future.

I. The Doctrine of Judicial Notice

A. Federal Common Law

"Judicial notice has an ancient pedigree" dating back to the early to mid-1800s and some argue "the process of judges taking notice of undisputed facts

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17. *Id.* at 636.

18. *Id.* at 638. In return, Judge Posner included an appendix to the majority opinion in which he refuted Judge Hamilton's dissent point-by-point. *Id.* at 632-35 (majority opinion).

19. Defendants-Appellees' Petition for Rehearing En Banc at 5-7, Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015) (No. 14-3316), *available at* https://www.wiappellatelaw.com/wp-content/uploads/sites/12/2015/09/Rowe-petition.pdf [http://perma.cc/B2GA-Z5T6].

20. Order on Rehearing at 1, Rowe v. Gibson (7th Cir. 2015) (No. 14-3316), *available at* https://www.wiappellatelaw.com/wp-content/uploads/sites/12/2015/12/Rowe-order.pdf [http://perma.cc/LLE5-YL5K].

21. *Id.* at 2.

22. *In re* Paternity of P.R., 940 N.E.2d 346, 350 (Ind. Ct. App. 2010).

23. *See Rowe*, 798 F.3d at 638 ("The ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts.") (Hamilton, J., concurring in part and dissenting in part).

is likely as old as judging itself."[24] Generally, when a court takes judicial notice of a fact, it alleviates the need for the parties to prove the fact in court.[25]

> The object of this rule is to save time, labor, and expense in securing and introducing evidence on matters which are not ordinarily capable of dispute and are actually not bona fide disputed, and the tenor of which can safely be assumed from the tribunal's general knowledge or from slight research on its part . . . . It thus becomes a useful expedient for speeding trials and curing informalities. Initially arising as a means to soften strict pleading rules, in which the omission of a fact could result in the dismissal of a complaint, judicial notice became a useful shortcut in the ordinary course of trial.[26]

For example, a court could take judicial notice of what some might label as obvious facts: "That July 4 is the anniversary of the Declaration of Independence [and] that the distance between Chicago and New York is nearly 1000 miles."[27] In this sense, judicial notice—or at least the idea of it—makes litigation more efficient so long as the fact is not subject to debate. However, even the fact that the distance between Chicago and New York is nearly 1000 miles could be subject to debate depending on the context in which the court takes judicial notice. Specifically, the fact could be subject to debate depending on whether the distance travelled is by car, by boat, by plane, or by walking.

Due to its "ancient pedigree,"[28] judicial notice has not always been a formal evidentiary rule. For instance, appellate courts have long "considered the writings and studies of social science experts on legislative facts, with or without introduction into the record below, and with or without consideration by the trial court."[29] As case law developed in the early twentieth century, "several categories of fact were regularly judicially noticed, including geographic facts, scientific facts, historical facts, local facts, facts necessary to fulfill the judicial function . . . and a broader (and more contestable) category of facts that were 'commonly known.'"[30] But the case law during this period "provided few clear

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24. Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137, 1142-43 (2014).

25. Dorothy F. Easley, *Judicial Notice on Appeal: A History Lesson in Recent Trends*, FLA. B. J., Dec. 2010, at 45.

26. Bellin & Ferguson, *supra* note 24, at 1144 (internal citations and footnotes omitted).

27. 1 JOHN HENRY WIGMORE, A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 2135 (Little, Brown & Co. 1910).

28. Bellin & Ferguson, *supra* note 24, at 1142.

29. Easley, *supra* note 25, at 45; *see also* United States v. Leon, 468 U.S. 897, 907-08 (1984) (citing sociological field research); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 738-39 (1982) (citing sociological surveys); Ballew v. Georgia, 435 U.S. 223, 232-35 (1978) (citing psychological studies); United States v. Martinez-Fuerte, 428 U.S. 543, 543 (1976) (citing epidemiological and demographic research).

30. Bellin & Ferguson, *supra* note 24, at 1146-47 (internal citations and footnotes omitted); *see also* Varcoe v. Lee, 181 P. 223, 225 (Cal. 1919) (local); State Bd. of Pharmacy v. Matthews,

guidelines."[31] As a result, many courts took judicial notice of "commonly known" facts, when the generally accepted knowledge of the time was sometimes, in fact, wrong.[32] For example, in *Austin v. Tennessee*,[33] Austin challenged his conviction for violating a Tennessee statute criminalizing the sale of cigarettes.[34] In determining whether cigarettes were legitimate articles of commerce,[35] the Supreme Court of the United States noted,

> From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit, or other articles, the use of which is a menace to the health of the entire community.[36]

Today, it is commonly known tobacco is indeed a menace to the health of the community.[37]

Application of judicial notice became clearer in 1942 following Professor Kenneth Davis's scholarly article examining approaches to evidentiary problems in the administrative process.[38] In his article, Davis proposed separate categories for evidentiary facts:

> The rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case . . . When an agency finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency is performing an adjudicative function, and the facts may conveniently be called *adjudicative* facts. When an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be

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90 N.E. 966, 967 (N.Y. 1910) (medical); El Paso Elec. Ry. Co. v. Terrazas, 208 S.W. 387, 390 (Tex. Civ. App. 1919) (geographic); Sargent v. Lawrence, 40 S.W. 1075, 1076 (Tex. Civ. App. 1897) (historical).

31. Bellin & Ferguson, *supra* note 24, at 1146.

32. *Id.* at 1151-52.

33. 179 U.S. 343 (1900).

34. *Id.* at 344.

35. *Id.* at 344-45.

36. *Id.* at 345.

37. *See* Allison Zieve, *The FDA's Regulation of Tobacco Products*, 51 FOOD & DRUG L.J. 495, 499 (1996) ("Given the menace that nicotine-containing tobacco products pose to society . . . .").

38. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV 364, 367 (1942).

denominated *legislative* facts.[39]

In so doing, Davis made an important distinction: "[T]he traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts."[40] Thirty years later, Congress relied on Davis's distinction between adjudicative and legislative facts in enacting Federal Rule of Evidence 201.

B. Federal Rule of Evidence 201

In 1975, Congress enacted the Federal Rules of Evidence, and specifically, Rule 201 ("FRE 201"):

> **(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
>
> **(b) Kinds of Facts That May be Judicially Noticed**. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
>
> **(c) Taking Notice.** The court:
>
> (1) may take judicial notice on its own; or
>
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
>
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
>
> **(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
>
> **(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.[41]

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39. *Id.* at 402 (emphasis added).

40. *Id.* at 402-03.

41. FED. R. EVID. 201. FRE 201 has been amended only once since its enactment. *See* FED. R. EVID. 201 advisory committee's note on 2011 Amendments. In 2011, the Rule was amended for "stylistic" purposes, and the amendments were not intended to change any result in the ruling on the admissibility of evidence. *Id.*

Referencing Davis' terminology, the "rule governs judicial notice of an adjudicative fact only, not a legislative fact."[42] The Advisory Committee's Note to Rule 201(a) defines adjudicative facts as "the facts of the particular case," which are typically established through "the introduction of evidence, ordinarily consisting of the testimony of witnesses."[43] "Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses."[44] Or in plain English, "[w]hen a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts."[45]

FRE 201 does not address judicial notice of legislative facts. Legislative facts are governed by common law principles, and because they are not subject to FRE 201, a court relying upon a legislative fact need not give the parties an opportunity to be heard.[46] The Advisory Committee's Note to FRE 201(a) defines legislative facts as "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."[47] Stated differently,

> Legislative facts have been generally described as established truths, facts or pronouncements that do not change from case to case and are applied universally. For example, legislative facts are facts of which courts take particular notice when interpreting a statute or considering whether Congress has acted within its constitutional authority, such as legislative history and congressional committee reports. Similarly, historical facts, commercial practices, and social standards are frequently judicially noticed as legislative facts.[48]

Ultimately, the distinction between adjudicative and legislative facts is "not always readily apparent,"[49] with one commentator describing the difference as "baffling"[50] while another has stated,

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42. FED. R. EVID. 201.

43. FED. R. EVID. 201(a) advisory committee's note, subdiv. (a).

44. *Id.* (citation omitted). John Henry Wigmore described a fact that may be judicially noticed as being "so notorious in the community that the introduction of evidence would be unnecessary." WIGMORE, *supra* note 27, § 2120.

45. FED. R. EVID. 201(a) advisory committee's note, subdiv. (a) (citation omitted).

46. Kurtis A. Kemper, Annotation, *What Constitutes "Adjudicative Facts" Within Meaning of Rule 201 of Federal Rules of Evidence Concerning Judicial Notice of Adjudicative Facts*, 150 A.L.R. FED. 543 § 2[a] (1998); *see also* FED. R. EVID. 201(e).

47. FED. R. EVID. 201(a) advisory committee's note, subdiv. (a).

48. Kemper, *supra* note 46, § 2[a].

49. *Id.* § 2[b].

50. *Id.* (quoting Siderius v. M.V. Amilla, 880 F.2d 662, 666 (2d Cir. 1989)).

> [S]ome facts are clearly adjudicative, some are clearly legislative, some are probably one or probably the other but not clearly, and some seem impossible to classify. So the adjudicative or legislative character of facts is a variable, and other variables must also be taken into account the degree of doubt or certainty about the facts, and the degree of their bearing upon the controversy. When facts are clearly adjudicative, disputed, and critical, a party should be entitled to all the procedural protections of a trial. When facts are legislative, reasonably clear, and peripheral to the controversy, the tribunal may assume them without even mentioning them. The problem cases are those in which the three variables pull against each other.[51]

C. Indiana Evidence Rule 201

The Indiana Supreme Court did not adopt formal evidentiary rules, including any rule regarding judicial notice, until 1994. Prior to 1994, judicial notice in Indiana meant "the court will bring to its aid, without proof or evidence of the facts, its knowledge of the existence or nonexistence of such facts."[52] Also relying upon Davis's terminology, Indiana common law defined adjudicative facts as those that "are roughly the kind of facts that go to a jury in a jury case," including the questions of who did what, when, where, how, and why.[53] State common law did not define legislative facts, but much of the common law remained consistent with the federal common law. A court could only take judicial notice of facts that were "generally known or capable of accurate determination by resort to sources whose accuracy [could not] reasonably be questioned."[54] Indiana courts routinely took judicial notice of "commonly known" facts, including the location of county seats,[55] Indiana's Constitution and case law,[56] and the computation of time.[57] However, a court could not take judicial notice of facts based entirely on "the actual private knowledge of the judge," nor could a court take judicial notice "without disclosure at trial" and an

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51. KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 15.00-8, at 376 (Lawyers Coop. Publ'g Co. 1977).

52. Carter v. Neeley's Estate, 2 N.E.2d 221, 222 (Ind. Ct. App. 1936); *accord* City of Hammond v. Doody, 553 N.E.2d 196, 198 (Ind. Ct. App. 1990); Golver v. Ottinger, 400 N.E.2d 1212, 1214 (Ind. Ct. App. 1980).

53. Sumpter v. State, 340 N.E.2d 764, 767 n.3 (Ind. 1976) (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.03 (3d ed. 1972)).

54. *Doody*, 553 N.E.2d at 198. Also consistent with the federal common law was the notion that Indiana appellate courts should not take judicial notice of matters outside the record. *See id.*

55. *Id.* (citing Fitch v. City of Lawrenceburg, 12 N.E.2d 391 (Ind. Ct. App. 1938)).

56. *Id.* (citing State *ex rel.* McGonigle v. Madison Circuit Court, 193 N.E.2d 242 (Ind. 1963)).

57. *Id.* (citing State *ex rel.* Eleventh Dist. Republican Cent. Comm. v. Circuit Court, 167 N.E.2d 468 (Ind.1960)).

opportunity for a party to object.[58]

In 1994, the Indiana Supreme Court adopted Indiana Evidence Rule 201 ("IER 201"), which currently provides,

> **(a) Kinds of Facts That May Be Judicially Noticed**. The court may judicially notice:
>
> (1) a fact that:
>
> (A) is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction, or
>
> (B) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
>
> (2) the existence of:
>
> (A) published regulations of governmental agencies;
>
> (B) ordinances of municipalities; or
>
> (C) records of a court of this state.
>
> **(b) Kinds of Laws That May Be Judicially Noticed.** A court may judicially notice a law, which includes:
>
> (1) the decisional, constitutional, and public statutory law;
>
> (2) rules of court;
>
> (3) published regulations of governmental agencies;
>
> (4) codified ordinances of municipalities;
>
> (5) records of a court of this state; and
>
> (6) laws of other governmental subdivisions of the United States or any state, territory or other jurisdiction of the United States.
>
> **(c) Taking Notice.** The court:
>
> (1) may take judicial notice on its own; or
>
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
>
> **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
>
> **(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
>
> **(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as

58. Belcher v. Buesking, 371 N.E.2d 417, 420 (Ind. Ct. App. 1978).

conclusive.[59]

Although IER 201 is similar to the federal rule in several respects, Indiana did not just adopt FRE 201 wholesale. Neither rule, for instance, states specifically which courts may take judicial notice; rather the rules simply state a court may take judicial notice "at any stage of the proceedings."[60] Both rules provide an opportunity for a party to be heard on the issue upon a timely request, whether before or after judicial notice is taken.[61] And both rules provide for how to instruct a jury when judicial notice is taken.[62] However, where FRE 201 applies only to adjudicative facts, IER 201 does not make that distinction.[63] Therefore, although IER 201 includes a definition of adjudicative facts that may be judicially noticed that is roughly equivalent to that found in FRE 201,[64] IER 201's definition of facts that may be judicially noticed also includes legislative facts such as the existence of certain court records, municipal ordinances, and government regulations.[65] IER 201 further defines the kinds of laws that may judicially noticed.[66] IER 201 therefore applies when a court takes judicial notice without regard to whether the fact is adjudicative or legislative in nature.[67]

Legislative facts seem fairly straightforward and unlikely to be controversial, which is possibly why they are not subject to the requirements of the federal rule.[68] But Indiana's rule applies to even legislative facts.[69] In fact, prior to 2010,

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59. IND. R. EVID. 201.

60. FED. R. EVID. 201(d); IND. R. EVID. 201(d).

61. FED. R. EVID. 201(e); IND. R. EVID. 201(e).

62. FED. R. EVID. 201(f); IND. R. EVID. 201(f).

63. FED. R. EVID. 201(a).

64. *Compare* FED. R. EVID. 201(b), *with* IND. R. EVID. 201(a)(1).

65. IND. R. EVID. 201(a)(2).

66. IND. R. EVID. 201(b).

67. *Compare* FED. R. EVID. 201, *with* IND. R. EVID. 201; *see also* ROBERT LOWELL MILLER, JR., 12 INDIANA PRACTICE SERIES § 201.102 (3d ed. 2015).

68. In line with the federal rule, many states' evidence rules are specifically limited in scope to judicial notice of "adjudicative facts" only. *See* ALA. R. EVID. 201(a); ARIZ. R. EVID. 201(a); ARK. R. EVID. 201(a); COLO. R. EVID. 201; CONN. CODE OF EVID. § 2-1(a); IDAHO R. EVID. 201(a); ILL. R. EVID. 201(a); IOWA R. EVID. 5.201(a); KY. R. EVID. 201(a); ME. R. EVID. 201(a); MD. RULES 5-201(a); MINN. R. EVID. 201(a) (further limited to civil cases); MISS. R. EVID. 201(a); NEB. R. EVID. 27-201(1); N.M. R. EVID. 11-201(A); N.C. EVID. CODE 201(a); N.D. R. EVID. 201(a); OHIO R. EVID. 201(A); PA. R. EVID. 201(a); R.I. R. EVID. 201(a); S.C. R. EVID. 201(a); S.D. R. EVID. 19-19-201(a); UTAH R. EVID. 201(a); VT. R. EVID. 201(a); WASH. R. EVID. 201(a); WYO. R. EVID. 201(a).

Several states' rules include judicial notice of laws, but still limit the scope of judicial notice of facts to adjudicative facts only. *See* GA. CODE ANN. § 24-2-201 (2016); OKLA. STAT. tit. 12, § 2202 (2015); OR. REV. STAT. § 40.060 (2015); TENN. R. EVID. 201(a); TEX. R. EVID. 201(a); W. VA. R. EVID. 201(a); WIS. STAT. § 902.01 (2015).

69. Only a handful of other states do not limit their judicial notice rule to adjudicative facts only. *See* MONT. R. EVID. 201(a) ("This rule governs judicial notice of all facts."); N.H. R. EVID. 201(a) ("A court may take judicial notice of a fact.").

Indiana trial courts were unable to take judicial notice of any court record other than the records for the case at bar.[70] Only after Rule 201 was amended in 2010 to include "records of a court of this state"[71] as a law that may be judicially noticed was the "traditional limitation" on judicial notice of the record of another case abrogated to allow courts "to judicially notice records beyond those in the cases before them."[72] Nonetheless, Rule 201 says a court "*may* take judicial notice on its own,"[73] and appellate courts routinely do take judicial notice of legislative facts, usually without challenge.[74]

As a result of IER 201 not limiting its scope to adjudicative facts alone, IER 201's procedural safeguards are greater than those found in FRE 201. Specifically, it seems IER 201 places a greater emphasis on protecting a party's opportunity to be heard with respect to matters of judicial notice. These procedural safeguards seem inconsistent with allowing judicial notice to be taken at any stage of the proceedings, however, because the rule allows appellate courts to rely on matters outside the record and creates a greater risk that they will do so without giving the parties an opportunity to dispute the interpretation of those matters. As Davis observed, "No judge can think about law, policy, or discretion without using extrarecord facts."[75] But appellate proceedings are distinct from trial court proceedings insomuch that appellate courts are not fact-finding tribunals, are far-removed from evidentiary proceedings, and must not rely on matters outside the record, especially to fill evidentiary gaps. These concerns raise the question of whether appellate courts, given the nature of appellate proceedings in the context of IER 201, should be allowed to take judicial notice.

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70. *See In re* Paternity of Tompkins, 542 N.E.2d 1009, 1014 (Ind. Ct. App. 1989) ("A trial court may take judicial notice of the records of the case over which he is presiding, but he may not take notice of the records of another case, even if it involves the same parties with nearly identical issues."); *but see* Robbins v. State, 149 N.E. 726, 727 (1925) (noting the supreme court "can take notice of its own records in another case, either upon suggestion of counsel, or upon its own motion").

71. IND. R. EVID. 201(b)(5).

72. Mitchell v. State, 946 N.E.2d 640, 644 (Ind. Ct. App. 2011).

73. IND. R. EVID. 201(c)(1) (emphasis added).

74. *See, e.g.*, City of Indianapolis v. Armour, 946 N.E.2d 553, 562 n.10 (Ind. 2011) (taking judicial notice of minutes of public works committee meeting because they constitute the legislative history of an ordinance under consideration); J.K. v. T.C., 25 N.E.3d 179, 180 n.2 (Ind. Ct. App. 2015) (taking judicial notice of information from a statewide database of protective orders maintained by the Indiana Supreme Court); Eberle v. State, 942 N.E.2d 848, 856 (Ind. Ct. App. 2011) (taking judicial notice of geographical borders).

75. Kenneth Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1986).

II. HISTORICAL REVIEW OF INDIANA CASES

A. HIV/AIDS[76]

On June 5, 1981, the U.S. Centers for Disease Control and Prevention ("CDC") published a report describing five cases of a rare opportunistic lung infection in young, previously healthy, gay men residing in Los Angeles.[77] The Associated Press and the Los Angeles Times covered the report, and within days, medical professionals from across the United States flooded the CDC with reports of similar cases.[78] From June 1, 1981, to September 15, 1982, there were 593 reported cases of what CDC would later refer to as "AIDS," resulting in death in 41% of patients.[79] In 1982, the CDC issued a report recognizing cases of AIDS in women and heterosexual men and identifying the major routes of HIV transmission.[80] A 1983 CDC report stated there was no evidence that AIDS is "acquired through casual contact with AIDS patients or with persons in population groups with an increased incidence of AIDS."[81] By 1984, research groups in France and the United States identified the virus that causes AIDS, and the Food and Drug Administration ("FDA") licensed the first commercially available HIV test soon after.[82] The FDA approved the first antiretroviral drug in 1987,[83] and in 1988, the Indiana Court of Appeals decided *Stewart v. Stewart*.[84]

By 1988, there had been 82,362 reported cases of AIDS in the United States, resulting in 61,816 deaths.[85] Decided less than a decade after the first reported

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76. "HIV" refers to the human immunodeficiency virus. *A Timeline of HIV/AIDS*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline/ [http://perma.cc/6PQZ-XANC] (last visited Apr. 1, 2016). If left untreated, HIV causes a disease known as "AIDS," which stands for acquired immunodeficiency syndrome. *Id.* An individual who is HIV-positive will not necessarily develop AIDS, which is the final stage of an HIV infection. *Id.* AIDS occurs when an individual's immune system is severely damaged, making the individual vulnerable to opportunistic infections. *Id.*

77. *Id.*

78. *Id.*

79. *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 24, 1982), http://www.cdc.gov/mmwr/preview/mmwrhtml/00001163.htm [http://perma.cc/7UGP-MSWA] (defining AIDS "as a disease, at least moderately predictive of a defect in cell-mediated immunity, occurring in a person with no known cause for diminished resistance to that disease").

80. *Current Trends Update: Acquired Immunodeficiency Syndrome (AIDS)—United States*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 1983), http://www.cdc.gov/mmwr/preview/mmwrhtml/00000137.htm [http://perma.cc/VM73-VW9R] (identifying sex, intravenous drug use, and blood transfusions as routes for transmission).

81. *Id.*

82. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 79.

83. *Id.*

84. 521 N.E.2d 956 (Ind. Ct. App. 1988).

85. *Thirty Years of HIV/AIDS: Snapshots of an Epidemic*, AMFAR, http://www.amfar.org/thirty-years-of-hiv/aids-snapshots-of-an-epidemic/ [http://perma.cc/4FHW-QZQR] (last visited Apr.

cases, *Stewart* arose in the context of parental visitation. Thomas and Debra Stewart divorced in December 1985.[86] At the time of the dissolution, Thomas resided in Indiana and Debra resided in California.[87] Their two-year-old daughter resided with Debra in California.[88] The dissolution decree granted Thomas "reasonable visitation" with his daughter, "which was defined as being not less than two months of visitation during the summer while Debra lived outside the State of Indiana."[89] Less than a year later, in October 1986, Thomas filed a petition for emergency temporary custody while Debra was visiting Indiana.[90] The petition asserted the child "was not receiving adequate nourishment" and "was being given alcohol and narcotics."[91] Debra denied the allegations and filed a petition for modification of custody, alleging in relevant part that Thomas "led a homosexual lifestyle" and "was infected with the AIDS virus."[92]

The trial court conducted a hearing to resolve both petitions, which included testimony from two doctors—Thomas's personal physician and Dr. Charles Barrett, an epidemiologist with the Indiana State Board of Health.[93] Dr. Barrett had previously testified on behalf of Ryan White,[94] the child banned from attending public school in Kokomo, Indiana, following his HIV/AIDS diagnosis in 1984.[95] When asked if Thomas could infect anyone in his family, both doctors testified there had been no reported cases of HIV transmission through "everyday household contact."[96] On cross-examination both were asked whether it would be possible for Thomas to infect his daughter if he cut his finger while extracting one of her baby teeth.[97] Both admitted transmission would be theoretically possible in that case, but neither doctor was questioned regarding the *probability* of such transmission occurring.[98] No other medical evidence was presented by either party.[99]

The trial court ruled in favor of Debra, terminating Thomas's parental visitation rights entirely:

1, 2016).

86. *Stewart*, 521 N.E.2d at 958.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 963.

94. *Id.* at 963-64.

95. Dirk Johnson, *Ryan White Dies of AIDS at 18; His Struggle Helped Pierce Myths*, N.Y. TIMES (Apr. 9, 1990), http://www.nytimes.com/1990/04/09/obituaries/ryan-white-dies-of-aids-at-18-his-struggle-helped-pierce-myths.html [http://perma.cc/SB8J-BYR8]; *see also* White v. W. Sch. Corp., No. IP 85-1192-C (S.D. Ind. Aug. 23, 1985).

96. *Stewart*, 521 N.E.2d at 963-65.

97. *Id.*

98. *Id.*

99. *Id.* at 964.

> The court commented that Thomas had proven that he had AIDS and, under those circumstances, "even if there was a one percent chance that this child is going to contract it from him, I'm not going to expose her to it," and proceeded to terminate his visitation rights because of physical danger to the child.[100]

Thomas appealed, and the Indiana Court of Appeals reversed because the evidence did not support a complete termination of Thomas's visitation rights.[101]

A central issue on appeal was transmission of the HIV virus, *i.e.* whether Thomas was likely to transmit HIV to his daughter during visitation. Thomas, and the Indiana Civil Liberties Union as amicus curiae, submitted appendices containing "medical articles mentioned by the expert witnesses at trial and medical articles not mentioned by the experts at trial."[102] The court of appeals declined to consider any of these materials, concluding the medical facts contained therein were at that time subject to reasonable dispute:

> [W]e, in essence, are being asked to judicially note the specific methods by which AIDS is communicated. While we have no problem with noting that AIDS is a severe and communicable disease, we cannot judicially note the ways in which it is communicated. Research continues in an attempt to specify the methods of communication but the data is not all collected and the methods of communication are not so firmly established as to be beyond reasonable dispute. Taking judicial notice of the scientific and medical data contained in the articles would put us in the role of expert witnesses and thereby result in the expansion of judicial notice far beyond its intended scope. . . . [B]ecause of the continuing nature of AIDS research, the proper method of presenting medical information in the present case is through experts familiar with the disease and the current developments in research.[103]

Nonetheless, the court concluded the medical evidence available "at the time of trial" showed HIV is not transmitted through casual contact.[104] The court reversed and remanded, instructing the trial court to hear further medical evidence regarding HIV/AIDS and to fashion a new visitation order, which could not preclude visitation with Thomas solely on the basis of his HIV status.[105]

A few years later, in 1991, the Indiana Court of Appeals decided *R.E.G. v. L.M.G.*[106] R.E.G. appealed the trial court's division of property in the decree dissolving his marriage to L.M.G.[107] The Indiana Code creates a presumption

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100. *Id.* at 959.
101. *Id.* at 964-65.
102. *Id.* at 959 n.2.
103. *Id.*
104. *Id.* at 964.
105. *Id.* at 966.
106. 571 N.E.2d 298 (Ind. Ct. App. 1991).
107. *Id.* at 300.

"that an equal division of the marital property between the parties is just and reasonable."[108] If a trial court deviates from the presumptive fifty-fifty split, it must state reasons based on the evidence in its findings of fact.[109] In *R.E.G.*, the trial court awarded L.M.G. 60% of the marital estate based on a finding that R.E.G.'s sexual relationships with other men may have increased L.M.G.'s risk for developing HIV/AIDS.[110] Specifically, the trial court found R.E.G.'s actions "may result in the depletion of marital assets by increasing health care costs and decreasing [L.M.G.]'s ability to pursue economically productive activity should she become infected."[111]

The parties were married for nearly thirty years, and each worked continuously throughout the marriage.[112] When the petition for dissolution was filed in 1990, the net marital estate was worth almost $500,000, so L.M.G. received approximately $50,000 more than her presumptive half.[113] Neither R.E.G. nor L.M.G. had ever tested positive for HIV, and their last sexual encounter was in 1987.[114] R.E.G. appealed and the court of appeals reversed, holding the evidence did not justify an unequal division of the martial property.[115]

Nearly all of the "medical evidence" regarding the transmission of HIV was supplied by L.M.G.'s testimony. L.M.G., a nurse, testified that although she had been tested for HIV and the test was negative, "she was nevertheless afraid of developing AIDS because the blood test was not conclusive and the virus 'could show up at anytime.'"[116] According to L.M.G., HIV could lay dormant for up to ten years.[117] On appeal, R.E.G. and amici curiae[118] urged the court to take judicial notice of various government publications which indicated HIV is 99% detectable within three months.[119] R.E.G. argued he was unprepared to rebut L.M.G.'s "medical evidence" at the trial court level because he had been surprised by the injection of the issue into the case and further that the medical evidence regarding the transmission of HIV was no longer subject to reasonable dispute.[120] R.E.G. maintained there was no appreciable risk of L.M.G. contracting HIV from contact with him, given both had tested negative for HIV more than

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108. IND. CODE § 31-15-7-4 (2015) (effective July 1, 1997), *accord* IND. CODE § 31-1-11.5-11 (1996) (repealed).

109. *R.E.G.*, 571 N.E.2d at 301 (citing *In re* Marriage of Davidson, 540 N.E.2d 641 (Ind. Ct. App. 1989)).

110. *Id.* at 300.

111. *Id.* at 301.

112. *Id.* at 300.

113. *Id.* at 300-01.

114. *Id.* at 302.

115. *Id.* at 302-04.

116. *Id.* at 302.

117. *Id.*

118. The amici curiae included the Indiana Civil Liberties Union, Lambda Legal, and the National Lawyers Guild. *Id.* at 299.

119. *Id.* at 302.

120. *Id.*

two years after ending their sexual relationship.[121]

The court of appeals declined to take judicial notice of the government publications, but seemed to regard its reasoning in *Stewart* as outmoded:

> In *Stewart v. Stewart*, we refused to take judicial notice of medical literature regarding the methods of communication of AIDS because—at that time—the methods of communication were "not so firmly established as to be beyond reasonable dispute." We are tempted to retreat from this position because—as the amici curiae urges—one of the potential evils of the trial court's decision is to undermine sound public health policies necessary in the fight against AIDS by propagating misinformation about AIDS, encouraging discriminatory policies regarding persons infected with HIV or at risk for AIDS, and reinforcing the tendency of many persons at risk for HIV infection to remain underground. Nevertheless, we will refrain from taking judicial notice of facts outside the record because we can easily resolve this case without resort to judicial notice . . . .[122]

As for the merits of case, the court of appeals reasoned that "even if the wife's testimony should be regarded with the deference afforded to that of an expert witness," her testimony was insufficient to rebut the equal division presumption because it was "entirely conjecture or speculation."[123] L.M.G.'s case turned on medical evidence regarding the transmission of HIV, but her testimony fell short of the "reasonable scientific or medical certainty" required to establish a material fact.[124]

Finally, in 1998, the Indiana Court of Appeals decided *Dollar Inn, Inc. v. Slone*.[125] Dollar Inn appealed a jury verdict in favor of Patsy Slone for negligent infliction of emotional distress.[126] The case arose from an injury Slone sustained in 1988 while staying at a Dollar Inn.[127] Slone had been stabbed in the thumb by a hypodermic needle concealed inside a roll of toilet paper, and when a Dollar Inn employee came to Slone's room, the employee told Slone the needle probably belonged to an intravenous drug user.[128] Fearing exposure to blood-borne pathogens, Slone went to the hospital, where the examining physician instructed her to follow up with regular HIV tests "for perhaps as many as ten years."[129] Although Sloan never tested positive for HIV, she filed a complaint against Dollar Inn in 1990 for the mental distress she suffered as a result of her possible

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121. *Id.* at 302-03.

122. *Id.* at 303 (citations omitted).

123. *Id.*

124. *Id.* (quoting Strong v. State, 538 N.E.2d 924, 931 (Ind. 1989)).

125. 695 N.E.2d 185 (Ind. Ct. App. 1998).

126. *Id.* at 186, 188 & n.3.

127. *Id.* at 186.

128. *Id.*

129. *Id.*

exposure.[130] Seven years later, the case finally went to trial and the jury returned a verdict in Slone's favor.[131] Dollar Inn filed a motion to correct error and requested the trial court take judicial notice of certain medical evidence regarding the transmission of HIV.[132] Dollar Inn had not introduced any medical evidence at trial.[133] The trial court denied the motion to correct error without ruling on the judicial notice issue and Dollar Inn appealed.[134]

On appeal, Dollar Inn argued Slone was required to prove she was actually exposed to HIV and the trial court erred in denying Dollar Inn's motion for judgment on the evidence.[135] In a separate motion, Dollar Inn requested the court of appeals take judicial notice of the medical evidence presented to the trial court in its first request for judicial notice, after the trial had concluded.[136] The medical evidence concerned the low probability of becoming infected with HIV after a needlestick.[137] The court of appeals declined to take judicial notice of the materials—not because the information was subject to reasonable dispute, but rather because Dollar Inn was seeking to "fill the evidentiary gaps it created by failing to present this evidence, or request judicial notice, at trial."[138] Appellate review, by its very nature, is limited to "those matters contained in the record which were presented to and considered by the factfinder," the court explained.[139] Citing *Stewart*, the court held judicial notice could not be used to fill evidentiary gaps on appeal.[140] The court expressly reserved the question of whether IER 201 applies to appellate courts at all.[141]

B. Controlled Substances

Under Indiana law, a controlled substance is defined as "a drug, substance, or immediate precursor in schedule I, II, III, IV, or V."[142] The controlled substances listed in each schedule "are included by whatever official, common, usual, chemical, or trade name designated."[143] The schedules are highly technical and complex, however, and minor variants in chemical structure can alter the

130. *Id.* at 187.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 188.

136. *Id.* at 187 & n.1.

137. *Id.* at 190 n.7; *see generally* CTR. FOR DISEASE CONTROL & PREVENTION, EXPOSURE TO BLOOD: WHAT HEALTHCARE PERSONNEL NEED TO KNOW (July 2003), *available at* http://www.cdc.gov/HAI/pdfs/bbp/Exp_to_Blood.pdf [http://perma.cc/Q53N-XF9E] ("The average risk of HIV infection after a needlestick or cut exposure to HIV-infected blood is 0.3% . . . .").

138. *Dollar Inn, Inc.*, 695 N.E.2d at 187-88.

139. *Id.* at 188.

140. *Id.* (citing Stewart v. Stewart, 521 N.E.2d 956, 959 n.2 (Ind. Ct. App. 1988)).

141. *Id.* at 188 n.2.

142. IND. CODE § 35-48-1-9 (2015).

143. *Id.* § 35-48-2-2.

name of a substance without diminishing its psychotropic effects.[144] Against this backdrop, the applicability of judicial notice frequently arises in drug prosecutions.

In 1974, the Indiana Court of Appeals decided *White v. State*.[145] White appealed his conviction for possession of a narcotic drug, arguing the State failed to prove methadone[146] was a "narcotic drug" under state law.[147] At trial, a forensic chemist employed by the Indianapolis Police Department testified federal law classifies methadone as a narcotic drug,[148] and the State argued on appeal this testimony should have "alerted the trial court to judicially note" that methadone is also a narcotic drug under the Indiana Narcotic Drug Act ("Act").[149] In support of its argument, the State cited a regulation promulgated by the Indiana Board of Pharmacy, which purported to incorporate by reference "[a]ll rules and regulations of the United States government pertaining to narcotics."[150] The court of appeals agreed with White and reversed, holding the evidence was insufficient because the State failed to prove an essential element of the crime.[151]

The Act defined narcotic drugs as: (1) "the drugs specifically listed" in the Act, such as heroin or morphine; (2) "other non-enumerated drugs chemically identifiable with them"; and (3) "other similar drugs which may appear on a list issued by the Indiana Board of Pharmacy."[152] At the time of White's offense, state law had not yet defined methadone as a narcotic drug,[153] and the court held the regulation cited by the State failed to incorporate federal law validly because it did not specifically reference the statutory sections to be incorporated.[154] Because methadone was not specifically listed in the Act or in a list issued by the Indiana Board of Pharmacy, the State was required to submit extrinsic evidence

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144. *Cf.* Tiplick v. State, 43 N.E.3d 1259, 1261 (Ind. 2015) (discussing the difficulty of regulating "spice," given its seemingly limitless chemical analogs).

145. 316 N.E.2d 699 (Ind. Ct. App. 1974).

146. Methadone is a synthetic narcotic, which produces many of the same effects as heroin or morphine. *Drug Fact Sheet: Methadone*, DRUG ENFORCEMENT ADMIN., http://www.dea.gov/druginfo/drug_data_sheets/Methadone.pdf [http://perma.cc/S3JG-6V7Z] (last visited Apr. 1, 2016).

147. *White*, 316 N.E.2d at 700.

148. *Id.* at 700-01.

149. *Id.* at 701; IND. CODE § 35-24-1-1 to -27 (1971) (repealed 1973).

150. *White*, 316 N.E.2d at 701, 704.

151. *Id.* at 701.

152. *Id.* at 702.

153. White was arrested for possession of a narcotic drug in 1971. *Id.* at 700. In 1973, the Indiana General Assembly passed the Controlled Substances Act, which specifically listed methadone as a narcotic drug. *Id.* at 703 n.5 (citing IND. CODE § 35-24.1-2-6(c)(11) (1973) (repealed 1976)).

154. *Id.* at 704-05; *see also* Porod v. State, 878 N.E.2d 415 (Ind. Ct. App. 2007) (holding the State presented sufficient evidence to prove Ritalin is a legend drug under Indiana law because the statute defining "legend drug" validly incorporates by references a publication promulgated by a federal agency).

describing methadone's chemical properties.[155] The court of appeals concluded the State failed to do so and further noted, "The gap may not be closed by resort to the doctrine of judicial notice. . . . Evidentiary proof of an essential element of a crime may not be so easily eliminated."[156] The court concluded judicial notice is generally restricted to "matters of common public knowledge, . . . a description that does not apply to the chemistry of drugs."[157]

The Indiana Court of Appeals addressed a similar issue in 1991 in *Barnett v. State*.[158] Barnett was convicted of possession of a Schedule III controlled substance with intent to deliver based on his possession of tablets containing a mixture of codeine and acetaminophen.[159] The police found the tablets in an unaltered state, in a prescription bottle bearing a name other than the defendant's.[160] Codeine is a Schedule II controlled substance,[161] but when combined with a certain quantity of a nonnarcotic such as acetaminophen, codeine is a Schedule III controlled substance. Specifically, a mixture of "not more than 90 milligrams [of codeine] per dosage unit, with one (1) or more active, nonnarcotic ingredients in recognized therapeutic amounts" is classified as a Schedule III controlled substance .[162] At trial, a forensic chemist testified he conducted a chemical analysis of the tablets, the results of which indicated the tablets contained "Codeine, which is a controlled substance, and also present was a drug called Acetaminophen, which is not a controlled substance."[163] The State presented no additional evidence regarding the quantity of codeine in each tablet or whether the codeine was mixed with acetaminophen in a "recognized therapeutic amount[]."[164]

Barnett appealed his conviction and the court of appeals reversed, holding the State failed to prove an essential element of the offense by failing to prove the tablets contained a mixture of codeine and acetaminophen that is classified as a Schedule III controlled substance under state law.[165] Citing *White*, the court remarked, "Even if acetaminophen with codeine is recognized by chemists as a schedule III controlled substance, the State may not rely on the doctrine of judicial notice to meet its evidentiary burden regarding the drug's chemical composition and characteristics."[166]

In 2001, the Indiana Court of Appeals relied on *Barnett* to reverse a defendant's conviction for possession of chemical reagents or precursors with

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155. *White*, 316 N.E.2d at 703.
156. *Id.*
157. *Id.* at 704.
158. 579 N.E.2d 84 (Ind. Ct. App. 1991).
159. *Id.* at 85-86.
160. *Id.* at 86.
161. IND. CODE § 35-48-2-6(b)(1)(G) (2015).
162. *Id.* § 35-48-2-8(e)(2).
163. *Barnett*, 579 N.E.2d at 87 (citation omitted).
164. *Id.* (citing IND. CODE § 35-48-2-8(e)(2)).
165. *Id.*
166. *Id.* (citing White v. State, 316 N.E.2d 699, 703 (Ind. Ct. App. 1974)).

intent to manufacture methamphetamine.[167] Indiana Code section 35-48-4-14.5(e) prohibits a person from possessing, with intent to manufacture, two or more of the chemical reagents or precursors listed in subsection (a) of the same statute. The list includes items such as pseudoephedrine, anhydrous ammonia, hydrochloric acid, lithium, and organic solvents.[168] In *Dolkey v. State*, a search of the defendant's car revealed he possessed several boxes of pseudoephedrine tablets and a bottle of rubbing alcohol.[169] The State filed an information alleging Dolkey possessed "pseudoephedrine and rubbing alcohol (organic solvent)" with the intent to manufacture methamphetamine, and a jury found Dolkey guilty as charged.[170] On appeal, Dolkey argued the evidence was insufficient to support his conviction because "the State failed to establish that rubbing alcohol is an organic solvent and thus did not prove that he possessed two or more of the *enumerated* chemical reagents or precursors."[171] Dolkey did not deny that rubbing alcohol is an organic solvent; he merely argued the State failed to prove this.[172]

The court of appeals agreed with Dolkey and reversed for insufficient evidence.[173] Citing *Barnett*, the court concluded that because rubbing alcohol is not a substance specifically listed as a chemical reagent or precursor in Indiana Code section 35-48-4-14.5(a), the State was required to offer extrinsic evidence to prove that rubbing alcohol is an organic solvent.[174] The State did not produce such evidence and therefore failed to prove an essential element of the offense, the court explained.[175] As in *Barnett*, the court refused to use judicial notice to remedy the deficiency:

> In its appellate brief, the State cites a biochemistry text and cobbles together a series of dictionary definitions in a belated attempt to close this evidentiary barn door, but the horse escaped when the State rested its case at trial: "It is axiomatic that appellate review of the factfinder's assessment is limited to those matters contained in the record which were presented to and considered by the factfinder. On appeal, judicial notice may not be used to fill evidentiary gaps." *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 188 (Ind. Ct. App. 1998) (citations and internal quotation marks omitted), *trans. denied* (1999).[176]

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167. Dolkey v. State, 750 N.E.2d 460 (Ind. Ct. App. 2001).

168. IND. CODE § 35-48-4-14.5(a).

169. *Dolkey*, 750 N.E.2d at 461.

170. *Id.*

171. *Id.* (emphasis added).

172. Appellant's Brief, Dolkey v. State, 750 N.E.2d 460 (Ind. Ct. App. 2001) (No. 82D02-005-DF-00408), 2001 WL 35822208, at *15 ("It could be that rubbing alcohol is an organic solvent, but the State didn't *prove* this at Dolkey's trial . . . .").

173. *Dolkey*, 750 N.E.2d at 462.

174. *Id.* at 462 (citing Barnett v. State, 579 N.E.2d 84, 86 (Ind. Ct. App. 1991)).

175. *Id.*

176. *Id.*

The court of appeals revisited this topic in *Reemer v. State*[177] in 2004. Reemer was convicted of possession of precursors after police discovered 576 pills in his vehicle containing 17.28 grams of pseudoephedrine hydrochloride.[178] Police found the pills in an unaltered state, in the original "blister packs," but the "blister packs" were no longer in their original boxes.[179] At trial, the State offered into evidence the discarded labels on the nasal decongestant boxes that police observed Reemer deposit into a trashcan immediately prior to his arrest.[180] The labels on the boxes stated the tablets contained "pseudoephedrine hydrochloride."[181] Rather than submit the tablets for laboratory testing, the State introduced the packaging to prove the content of the tablets found in Reemer's possession.[182] Reemer objected, arguing the packaging constituted inadmissible hearsay.[183] The trial court overruled the objection and admitted the packaging under IER 803(17), which at that time provided "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations" are not excluded by the rule against hearsay.[184]

To obtain a conviction under Indiana Code section 35-48-4-14.5(b), the State was required to prove Reemer possessed more than ten grams of ephedrine or pseudoephedrine, or a salt or isomer of ephedrine or pseudoephedrine.[185] On appeal, Reemer argued the trial court erred by admitting the packaging under IER 803(17) and also that the evidence was insufficient to support his conviction because the State failed to introduce extrinsic evidence showing pseudoephedrine hydrochloride is a salt or an isomer of either ephedrine or pseudoephedrine.[186] The State maintained the packaging was properly admitted and that pseudoephedrine hydrochloride is, in fact, a salt of pseudoephedrine, citing case law from Washington state identifying pseudoephedrine hydrochloride as a salt of pseudoephedrine.[187] The court of appeals reversed on sufficiency grounds, relying on *White* and *Dolkey*, and did not address the hearsay issue.[188]

At the time of Reemer's offense, pseudoephedrine hydrochloride was not specifically listed as a precursor in Indiana Code section 35-48-4-14.5,[189] and the

177. 817 N.E.2d 626 (Ind. Ct. App. 2004), *rev'd*, 835 N.E.2d 1005 (Ind. 2005).

178. *Id.* at 628.

179. *Id.*

180. Reemer v. State, 835 N.E.2d 1005, 1007 (Ind. 2005).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* (quoting IND. R. EVID. 803(17) (2005)).

185. IND. CODE § 35-48-4-14.5(b) (2003).

186. *Reemer*, 835 N.E.2d at 1007, 1009-10.

187. Reemer v. State, 817 N.E.2d 626, 629-30 & n.5 (Ind. Ct. App. 2004), *rev'd*, 835 N.E.2d 1005 (Ind. 2005) (citing State v. Halsten, 33 P.3d 751 (Wash. Ct. App. 2001)).

188. *Id.* at 628-30, 630 n.6.

189. Pseudoephedrine hydrochloride was added to the list of chemical reagents and precursors in Indiana Codes section 35-48-4-14.5 in 2005.

State presented no extrinsic evidence showing that it fell within the statute's definition of a precursor.[190] The court stated it could not take judicial notice of the fact, relying on *White* for the proposition that judicial notice is restricted to "matters of common public knowledge,"[191] and on *Dolkey* for the proposition that judicial notice may not be used to fill evidentiary gaps on appeal.[192] As for the case decided by the Washington Court of Appeals, the court concluded the State's reliance was misplaced:

> First, in [*State v. Halsten*, 33 P.3d 751 (Wash. Ct. App. 2001)], the State produced expert testimony on that issue whereas, in this case, the State neglected to produce *any* evidence at trial that pseudoephedrine hydrochloride is a salt of pseudoephedrine. Second, the State attempts to import evidence from *Halsten* as a substitute for meeting its evidentiary burden in this case, but it ignores a fundamental premise of our judicial system, namely, the requirement that the State establish beyond a reasonable doubt all elements of the offense charged in every case it prosecutes. *There is a material difference between precedent and proof*.[193]

The Indiana Supreme Court granted transfer and reversed, holding (1) the labels of commercially marketed drugs fall under the hearsay exception provided by IER 803(17) and may be admitted to prove the composition of an over-the-counter or prescription drug found in an unaltered state;[194] and (2) that the State was not required to introduce extrinsic evidence to prove pseudoephedrine hydrochloride is a salt or isomer of ephedrine or pseudoephedrine.[195] As to the sufficiency issue, the court relied on its prior decision in *Sherelis v. State*.[196] In *Sherelis*, the defendant was convicted of dealing in cocaine after selling cocaine hydrochloride to undercover police officers.[197] The relevant statute provided,

> A person who;
> (1) Knowingly or intentionally manufactures or delivers cocaine

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190. *Reemer*, 817 N.E.2d at 629.

191. *Id.* at 629 n.4 (quoting White v. State, 316 N.E.2d at 704 (Ind. Ct. App. 1974) ("[J]udicial notice, as a general rule, is restricted to matters of common public knowledge, . . . a description that does not apply to the chemistry of drugs.")).

192. *Id.* at 629 (citing Dolkey v. State, 750 N.E.2d 460, 462 (Ind. Ct. App. 2001)).

193. *Id.* at 629-30 n.5 (emphasis added to last sentence) (citation omitted).

194. Reemer v. State, 835 N.E.2d 1005, 1009-10 (Ind. 2005).

195. *Id.* at 1010.

196. *Id.* (citing Sherelis v. State, 498 N.E.2d 973 (Ind. 1986)).

197. *Sherelis*, 498 N.E.2d at 974. Cocaine hydrochloride is cocaine in its powdered form, which may be snorted or injected. U.S. DEP'T OF JUSTICE & OFFICE OF INSPECTOR GEN., THE CIA-CONTRA-CRACK COCAINE CONTROVERSY: A REVIEW OF THE JUSTICE DEPARTMENT'S INVESTIGATIONS AND PROSECUTIONS app. B (1997), *available at* https://oig.justice.gov/special/9712/ [http://perma.cc/75PG-WBM7]. "Crack cocaine" is manufactured by dissolving cocaine hydrochloride in baking soda and water and boiling the solution until a solid substance precipitates. *Id.* The solid substance is removed and may be smoked when it is dry. *Id.*

> or a narcotic drug, pure or adulterated, classified in schedule I or II; or
>
> (2) Possesses, with intent to manufacture or deliver, cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II;
>
> commits dealing in cocaine or a narcotic drug . . . .[198]

On appeal, Sherelis argued the trial court erred in concluding cocaine hydrochloride is a Schedule I or II controlled substance.[199] Cocaine is listed in Schedule II as "cocaine(9041)."[200] The number following the word "cocaine" is the Drug Enforcement Agency Controlled Substances Code Number ("DEA number"), included "for identification purposes on certain certificates of registration."[201] The DEA number for cocaine is 9041, but cocaine hydrochloride has a separate DEA number (9042).[202] Sherelis argued (1) the separate DEA numbers meant "cocaine(9041)" could not possibly refer to cocaine hydrochloride, and (2) because cocaine hydrochloride was not specifically listed in Schedule I or II, it was not proscribed by the dealing in cocaine statute.[203] The Indiana Supreme Court disagreed, holding "cocaine(9041)" included cocaine hydrochloride because Indiana Code section 35-41-1-1 defines "cocaine" as "coca leaves and any salt, compound, or derivative of coca leaves, and any salt, compound, isomer, derivative, or preparation which is chemically equivalent or identical to any of these substances."[204]

Although *Sherelis* concerned an issue of statutory interpretation (rather than sufficiency of evidence),[205] the court in *Reemer* relied on *Sherelis* in holding the State was not required to introduce extrinsic evidence to prove pseudoephedrine hydrochloride is a salt or isomer of ephedrine or pseudoephedrine:

> The statute identifies "salts, isomers, or salts of isomers" of ephedrine and pseudoephedrine as equally prohibited substances. The definition of "pseudoephedrine hydrochloride" is "the naturally occurring isomer of ephedrine." *Stedman's Medical Dictionary* 1279 (25th ed. 1990). Because pseudoephedrine hydrochloride is an isomer of ephedrine, it is within the statutory list of chemical reagents or precursors in Indiana Code section 35-48-4-14.5. Interpretation of a statute is a question of law for this Court, and there is no requirement of evidence or proof of what a word in a statute means. The state provided sufficient evidence that

198. IND. CODE § 35-48-4-1 (1979).
199. *Sherelis*, 498 N.E.2d at 975.
200. IND. CODE § 35-48-2-6.
201. *Id.* § 35-48-2-2.
202. *Sherelis*, 498 N.E.2d at 975.
203. *Id.*
204. *Id.* at 975-76.
205. *See id.* at 975.

Reemer was in possession of this precursor to methamphetamine.[206]

The court further noted,

> One need not resort to a Medical Dictionary. "Ephedrine" is "a white crystalline alkaloid . . . often in the form of a salt (as the sulfate) chiefly in relieving hay fever, asthma, and nasal congestion." *Webster's Third New International Dictionary* 761 (Unabridged 1963). "Pseudo" is simply "a resemblance to, isomerism with, or relationship with (a specified compound)." *Id.* at 1829. Thus, "pseudoephedrine" is "a . . . crystalline alkaloid $C_{10}H_{15}NO$ occurring with ephedrine and isomeric with it." *Id.* at 1830. "Hydrochloride" is simply "a compound of hydrochloric acid—used esp. with the names of organic bases for convenience in naming salts." *Id.* at 1108. Thus, "[base compound] hydrochloride" is a salt of the base compound.[207]

The court did not state it was employing judicial notice, but *Reemer* has since been characterized as the Indiana Supreme Court taking notice of a medical dictionary definition. In *Smart v. State* in 2015, the Indiana Court of Appeals distinguished *Reemer* in holding the trial court erred by taking judicial notice that "methamphetamine" is a legend drug.[208] A legend drug is defined by Indiana Code section 25-26-14-7 as "any human drug required by federal law or regulation to be dispensed only by a prescription," and by section 16-18-2-199, in relevant part, as any drug listed in the "Prescription Drug Product List," as published in the Department of Health and Human Services' "Approved Drug Products with Therapeutic Equivalence Evaluations." Smart was convicted of possession of methamphetamine as well as unlawful possession of a syringe in violation of Indiana Code section 16-42-19-18, which at that time provided a person may not possess a syringe with the intent to inject a legend drug.[209]

Although Smart conceded "methamphetamine hydrochloride" is a legend drug,[210] he argued "methamphetamine" is not specifically listed under the Legend Drug Act and that the State failed to introduce any evidence proving the "methamphetamine" he admitted to injecting was the same as "methamphetamine hydrochloride."[211] The State established Smart's intent to use the syringe to inject "methamphetamine" by Smart's own admissions and a field test conducted on one of the syringes that indicated the presence of either methamphetamine or 3, 4-methylenedioxymethamphetamine ("MDMA") (also known as "ecstasy").[212] The State could not submit the syringe for forensic testing because the fluid in

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206. Reemer v. State, 835 N.E.2d 1005, 1010 (Ind. 2005).

207. *Id.* at 1010 n.8.

208. Smart v. State, 40 N.E.3d 963, 967-68 & n.1 (Ind. Ct. App. 2015), *trans. not sought.*

209. *Id.* at 965-66; IND. CODE § 16-42-19-18 (1993).

210. *Smart*, 30 N.E.3d at 967; *see* U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS (36th ed. 2016) (listing "methamphetamine hydrochloride" but not "methamphetamine").

211. *Smart*, 40 N.E.3d at 967-68.

212. *Id.* at 965-66.

the syringe was contaminated with blood or bodily fluids, the presence of which could damage the laboratory's instruments or degrade the controlled substances in the sample.[213] On appeal, the State maintained it is "apparent" methamphetamine hydrochloride is "simply the formal name for the drug" but did not cite any authority substantiating that claim.[214]

The court of appeals held the trial court erred by taking judicial notice because it could not say "whether the methamphetamine injected by Smart qualifies as methamphetamine hydrochloride is a fact 'not subject to reasonable dispute' or a fact that 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"[215] In so holding, the court of appeals dropped a footnote distinguishing *Reemer*:

> We acknowledge our supreme court's opinion in *Reemer v. State*. There, the State was required to show that the defendant possessed salts, isomers, or salts of isomers of ephedrine or pseudoephedrine in the context of a prosecution for possession of a precursor to methamphetamine. The State proved that the defendant had possessed pseudoephedrine hydrochloride. We reversed the defendant's conviction on appeal because the State had failed to demonstrate that pseudoephedrine hydrochloride was a salt, isomer, or salt of isomer of pseudoephedrine. Our supreme court took notice of a medical dictionary definition that pseudoephedrine hydrochloride is "the naturally occurring isomer of ephedrine." Consequently, our supreme court found that the evidence was sufficient to sustain the defendant's conviction for possession of a precursor to methamphetamine. This case is distinguishable from *Reemer*. Here, there was no evidence presented that the methamphetamine that Smart injected is the same as methamphetamine hydrochloride, *and medical dictionary definitions are not helpful in resolving this issue*.[216]

Merriam-Webster's Online Medical Dictionary defines "methamphetamine" as "an amine $C_{10}H_{15}N$ that is used medically in the form of its crystalline hydrochloride $C_{10}H_{15}N{\cdot}HCl$ especially to treat attention deficit disorder and obesity and that is often abused illicitly as a stimulant."[217] It defines "hydrochloride" as "a salt of hydrochloric acid with an organic base used especially as a vehicle for the administration of a drug."[218] Based on these definitions, it appears methamphetamine hydrochloride is a salt of

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213. *Id.* at 965.

214. Brief of Appellee, Smart v. State, 40 N.E.3d 963 (Ind. Ct. App. 2015) (No. 29A02-1412-CR-00887), 2015 WL 5073860, at *15.

215. *Smart*, 40 N.E.3d at 968 (quoting IND. R. EVID. 201(a)).

216. *Id.* at 968 n.1 (emphasis added) (citations omitted).

217. *Methamphetamine*, MERRIAM-WEBSTER, http://www.merriam-webster.com/medical/methamphetamine [http://perma.cc/HM7P-2PWP] (last visited Apr. 1, 2016).

218. *Hydrochloride*, MERRIAM-WEBSTER, http://www.merriam-webster.com/medical/hydrochloride [http://perma.cc/U3M5-TC3G] (last visited Feb. 23, 2016).

methamphetamine, but this information alone did not resolve whether Smart injected "methamphetamine" or "methamphetamine hydrochloride."[219] Had medical dictionary definitions been "helpful," the court of appeals seemed inclined to take judicial notice as the supreme court did in *Reemer*, but the question remains whether *Reemer*'s holding *requires* appellate courts to take judicial notice in this type of case—notwithstanding the language of IER 201(c), which states a court "*may* take judicial notice on its own," but "*must* take judicial notice if a party requests it and the court is supplied with the necessary information."[220]

C. Divorce

Indiana courts have also addressed the applicability of judicial notice in the context of divorce. In 2012, the Indiana Court of Appeals in *Banks v. Banks*[221] addressed a husband's request to take judicial notice of a decision by the Social Security Administration. Christine Banks and Timothy Banks divorced in 2000, at which time the trial court determined Christine was entitled to receive $500 per month as spousal maintenance "until further Order of the Court."[222] At the time of dissolution, Christine was unemployed, suffered from chronic kidney disease, and required ongoing dialysis treatments.[223] Timothy suffered from Crohn's disease, but he was able at the time of the divorce to work full time.[224]

Thereafter, in 2011, Timothy filed a motion to modify and reduce his maintenance obligation.[225] When the trial court held a hearing on the matter, Timothy offered evidence regarding his medical condition and current income:

> [O]n August 2, 2010, Timothy lost his job with Longhorn Steakhouse after exhausting all of his possible medical leave time under the Family and Medical Leave Act ("FMLA"), which he had used following surgery and a bowel resection because of his Crohn's disease. The Indiana

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219. *See generally* Buelna v. State, 20 N.E.3d 137, 143-44 (Ind. 2014) (describing the process of manufacturing methamphetamine and stating manufacturers generally do not leave methamphetamine in a liquid form but instead expose the liquid to hydrochloric gas to "salt out" the methamphetamine and create a final powder form).

220. IND. R. EVID. 201(c) (emphasis added).

221. 980 N.E.2d 423, 425-26 (Ind. Ct. App. 2012).

222. *Id.* at 425 (citation omitted). Indiana Code section 31-15-7-2 provides spousal maintenance in three situations. Relevant here,

> If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court may find that maintenance for the spouse is necessary during the period of incapacity, subject to further order of the court.

IND. CODE § 31-15-7-2(1) (2015).

223. *Banks*, 980 N.E.2d at 425.

224. *Id.*

225. *Id.*

> Department of Workforce Development subsequently found that Timothy was "[i]nvoluntarily unemployed due to a physical disability." A physician who examined Timothy in connection with the unemployment proceedings did find that he could return to work as of August 16, 2010, "with reasonable accommodation." However, as of September 2011, Timothy himself had no source of income, and he and his current wife had filed for Chapter 13 bankruptcy in May 2011. Between 2009 and 2010, Timothy and his current wife's household income had dropped from $69,840 to $43,439. There also was evidence presented at the hearing that Christine earned $8,504 from part-time employment in 2010, whereas she was earning nothing in 2000 at the time of the divorce. Finally, Timothy's attorney informed the trial court that he had applied for Social Security disability benefits, but no final resolution of that application had yet been reached.[226]

The trial court reduced Timothy's maintenance obligation on December 8, 2011, and Christine appealed.[227] The Social Security Administration issued its decision on April 20, 2012,[228] prior to the completion of the transcript for the appeal.[229] The SSA decision stated Timothy had been disabled since April 1, 2010, for the purposes of disability benefits.[230] Timothy included the decision in his appellee's appendix and requested the court of appeals take judicial notice of the decision.[231] Christine filed a motion to strike the decision from the record.[232] The court of appeals denied Christine's motion to strike, but also declined to resolve whether it could take judicial notice of the decision:

> Ordinarily, this court may not consider evidence outside the record presented to the trial court in resolving an appeal. *In re D.Q.*, 745 N.E.2d 904, 906 n.1 (Ind. Ct. App. 2001). Indiana Evidence Rule 201(f) does provide that "[j]udicial notice may be taken at any stage of the proceeding," which includes appeals. *CGC Enter. v. State Bd. of Tax Comm'rs*, 714 N.E.2d 801, 803 (Ind. Ct. Tax 1999). On the other hand, judicial notice may not be used on appeal to fill evidentiary gaps in the trial record. *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 188 (Ind. Ct. App. 1998), *trans. denied*; *but see Matter of American Biomaterials Corp.*, 954 F.2d 919, 922 (3rd Cir. 1992) (holding that an appellate court may "in a proper case take judicial notice of new developments not

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226. *Id.*

227. *Id.*

228. *Id.*

229. *See* Chronological Case Summary, Banks v. Banks, 980 N.E.2d 423 (Ind. Ct. App. 2012) (No. 45A03-1203-DR-96), *available at* https://public.courts.in.gov/mycase/#/vw/CaseSummary/yJ2Ijp7IkNhc2VUb2tlbiI6Ik9XUTBNekl5TmpFek1qSXdPalk1Tmpjek9UQXlaak09In19 [http://perma.cc/BK5X-KQK6].

230. *Banks*, 980 N.E.2d at 425-26.

231. *Id.* at 426.

232. *Id.* at 425.

> considered by the lower court"). Ultimately, although the SSA decision could be relevant to Timothy's claims on appeal, our scrutiny of the record actually presented to the trial court leaves us with sufficient information to affirm its decision. We need not definitively resolve whether we could or should take judicial notice of the SSA decision. However, because Timothy presents a colorable basis for taking judicial notice of the SSA decision, we decline to order that the pages of his appendix containing the order be stricken.[233]

The court recognized the inherent tension between the often cited holding of *Dollar Inn* and IER 201(f), but its opinion did not attempt to resolve the incongruity.

In 2013, another panel of the Indiana Court of Appeals in *Troyer v. Troyer*[234] declined to take judicial notice in a divorce case because the request was merely an attempt to fill evidentiary gaps on appeal. Both parties appealed the trial court's final dissolution decree.[235] One of issues the husband raised was whether the trial court abused its discretion in valuing and dividing the marital estate, which included the jewelry that he had given to his wife during their marriage.[236] During the proceedings, the parties disagreed on the valuation of the jewelry, but "neither party offered receipts for the jewelry purchased or a professional appraisal of the value of Wife's jewelry."[237] Instead, each party provided their own valuation of the jewelry.[238] The wife valued the jewelry at $1000, while the husband valued it at $13,500.[239] The trial court found the jewelry was worth only $1000.[240] The court of appeals held this valuation was not an abuse of discretion because

> Wife was confident enough in her $1000 valuation that she was willing to let Husband have the jewelry for a $1000 setoff. Husband, by contrast, was willing to take the jewelry if it was valued at $1000 but would not take it if he would be charged a setoff of $2000. Furthermore, Husband stated, "I don't know how much it's worth, it's in her possession." When asked if he had ever asked to have the jewelry appraised, Husband answered, "Not in this case." Husband agreed to let Wife have the jewelry only if he was credited with a set off of $13,000. When asked whether the $13,000 was based upon his valuation, Husband responded that the estimate was "[j]ust a complete guess."[241]
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> At some point during the final hearing on the dissolution, the wife admitted

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233. *Id.*
234. 987 N.E.2d 1130, 1138 n.3 (Ind. Ct. App. 2013).
235. *Id.* at 1133.
236. *Id.* at 1133, 1138.
237. *Id.* at 1138.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* (citations omitted).

that her husband "may have spent $13,000.00 on [the] jewelry."[242] On appeal, the husband requested the court of appeals "take judicial notice that prices for gold, diamonds, and other precious metals and stones have not depreciated in recent years."[243] Citing *Banks*, the court declined to do so,

> "Indiana Evidence Rule 201(f) provides that '[j]udicial notice may be taken at any stage of the proceeding,' which includes appeals." *Banks v. Banks*, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012). However, we have held that "judicial notice may not be used on appeal to fill evidentiary gaps in the trial record." *Id.* (quoting *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 188 (Ind. Ct. App. 1998), *trans. denied*). Here, Husband essentially is asking us to fill the evidentiary gaps he created by failing to present this evidence, or request judicial notice, at trial. This we will not do.[244]

While recognizing the plain language of IER 201(f), the court in *Troyer* refused to apply judicial notice for the purpose of filling evidentiary gaps created by the party's failure to present evidence at trial.[245]

III. Analysis, Problem, and Potential Solutions

As the discussion above demonstrates, even before the adoption of IER 201, Indiana's appellate courts were constrained by the requirement that judicially noticed facts "be generally known or capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned."[246] The enactment of a formal evidentiary rule governing judicial notice does not seem to have changed the traditional practices surrounding judicial notice in appellate courts. Despite at least one Indiana case, shortly after IER 201 was enacted, questioning whether it applied to appellate courts,[247] it seems to have quickly become generally accepted without any serious analysis or debate that the rule does apply to appellate courts and allows judicial notice to be taken for the first time on appeal.[248] But have we too easily accepted that the rule applies to appellate courts without giving due consideration to the rule itself and the ramifications of trying to apply it at the appellate level?

IER 201 does not specifically identify appellate courts as falling within its purview, referring only to "the court" or "a court."[249] IER 201 does, however,

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242. *Id.* at 1138 n.3 (citation omitted).

243. *Id.* (citation omitted).

244. *Id.*

245. *Id.*

246. Stewart v. Stewart, 521 N.E.2d 956, 959 n.2 (Ind. Ct. App. 1988).

247. Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 188 n.2 (Ind. Ct. App.. 1998).

248. Mayo v. State, 681 N.E.2d 689, 693 (Ind. 1997); CGC Enters. v. State Bd. of Tax Comm'rs, 714 N.E.2d 801, 803 (Ind. Tax Ct. 1999); *see also* Fed. R. Evid. 201 advisory's committee note, subdiv. (f) ("In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.").

249. Ind. R. Evid. 201(a), (c)-(f).

state that "the court" may take judicial notice "at any stage of the proceedings."[250] It is from this language that the inclusion of appellate courts is presumed.[251] But other language in the rule makes its applicability to appellate courts not quite so straightforward. Section (f) concerns how to instruct a jury when the court has taken judicial notice during the proceedings, which is clearly not an appellate function. Section (e) guarantees a party an opportunity to be heard, whether before or after judicial notice is taken. In a trial court proceeding, the parties and the court can and do meet face-to-face on numerous occasions. If a party requests a trial court take judicial notice, whether in open court or by written motion, the opposing party may easily respond and either party may easily request a hearing. If a trial court takes judicial notice on its own, it may do so in open court, subject to the parties' opportunity to be heard on the matter, or it may do so in a written order, subject to the parties' ability to seek reconsideration or error correction. In any event, the opportunity to be heard in the trial court is protected by the nature of trial court proceedings. Appellate courts, however, are not structured in the same way.[252] In an appellate proceeding, the court rarely sees the parties and then only through their attorneys. The parties are not privy to the deliberative process and know only what the court chooses to explain through its opinion. There is no true mechanism for providing an opportunity for the parties to be heard other than through their written briefs. And, as has been mentioned, appellate courts are not fact-finding courts and their role is limited to deciding cases on the record of proceedings below. Applying IER 201 to appellate courts and allowing judicial notice to be taken for the first time on appeal is in direct conflict with those traditional restraints on appellate review.

IER 201 also provides that the court "*must* take judicial notice if a party requests it and the court is supplied with the necessary information."[253] The cases discussed in Part II are particularly relevant to this provision of the rule. In *Stewart*, *R.E.G.*, and *Dollar Inn*, the appellants (and amici curiae in some cases) requested the appellate court take judicial notice of medical information supplied to the court regarding HIV/AIDS.[254] And yet, in all of those cases, the court declined to do so. *Stewart* and *R.E.G.* were decided before IER 201 was enacted and were subject only to the common law requirement that facts be generally known or capable of accurate determination from reliable sources. The court in *Stewart* determined the medical information submitted by Thomas was subject to reasonable dispute and therefore did not meet the requirements for judicial

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250. IND. R. EVID. 201(d).

251. *E.g.* Banks v. Banks, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012) ("Indiana Evidence Rule 201(f) provides that '[j]udicial notice may be taken at any stage of the proceeding,' which includes appeals.").

252. *See* MD. RULES 5-201(a) (stating provisions of the judicial notice rule regarding mandatory judicial notice, opportunity to be heard, and instructing the jury do not apply to the appellate courts in that state).

253. IND. R. EVID. 201(c)(2) (emphasis added).

254. *Supra* Part II.A.

notice.[255] Given the emotionally charged nature of the HIV/AIDS epidemic in its early years, it is perhaps unsurprising that the court was reluctant to give a judicial imprimatur to medical literature advocated by one side. Although unwilling to judicially notice the specific methods by which HIV could be transmitted, the court did observe the evidence was settled enough to support the conclusion it was not transmitted through casual contact and remanded for the *trial court* to hear further medical evidence rather than consider the medical evidence itself.[256] By the time *R.E.G.* was decided just a few years later, the medical research seemed to no longer be subject to reasonable dispute and yet the court still declined to take judicial notice of it, deciding the case instead on the basis that the evidence espousing an opposing viewpoint was speculative and thus need not be countered.[257] *Dollar Inn* was decided after IER 201 was enacted, but the court, noting it was unsure whether the rule applied on appeal, sidestepped that issue and did not weigh in on the substance of the medical evidence at all. Instead, the court determined it could not close an evidentiary gap by taking judicial notice of matters that were not first presented to the trial court.[258]

In the criminal cases discussed above, the defendants appealed their convictions, contending the State failed to meet its burden to prove guilt at the trial court stage.[259] Criminal defendants are constitutionally guaranteed that each essential element of the offense with which they are charged will be proven to the trier of fact beyond a reasonable doubt.[260] "The task of an appellate court with regard to the evidence adduced at trial is different from that of the trial judge or jury."[261]

> Thus, in a criminal case, the assessment of guilt beyond a reasonable doubt is a question of fact for the trial judge or jury, but the review of the trial level determination of guilt is a matter of law for the court on appeal. That is to say, the trier of fact must be convinced of a defendant's guilt beyond a reasonable doubt based upon the facts of the case. The reviewing court, however, need not be convinced of the defendant's guilt beyond a reasonable doubt. A reversal for insufficient evidence requires an appellate court to decide that, as a matter of law, no reasonable person could have found the defendant guilty on the basis of the evidence presented at trial.[262]

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255. Stewart v. Stewart, 521 N.E.2d 956, 964-66 (Ind. Ct. App. 1988).

256. *Id.* at 964, 966.

257. R.E.G. v. L.M.G., 571 N.E.2d 298, 303 (Ind. Ct. App. 1991).

258. Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 187-88 (Ind. Ct. App. 1998).

259. *Supra* Part II.B.

260. Blackmon v. State, 32 N.E.3d 1178, 1186 (Ind. Ct. App. 2015) (citing *In re* Winship, 397 U.S. 358, 361-64 (1970)).

261. Trotter v. State, 484 N.E.2d 604, 605 (Ind. Ct. App. 1985) (Buchanan, C.J., dissenting from denial of rehearing) (emphasis omitted).

262. *Id.*

In *White* and *Barnett*, decided prior to IER 201, and in *Dolkey*, decided after, each of the defendants contended on appeal the State had failed to prove an essential element of his crime at trial: the chemical composition of the drug he was convicted of possessing. Although as a matter of law, no reasonable person could find a defendant guilty of a crime when all the essential elements were not proven, the State sought to close this evidentiary gap by requesting the relevant facts (and in one case, law) be judicially noticed on appeal. The appellate court declined to take judicial notice in these cases because the State's obligation is to meet its evidentiary burden at trial and the appellate court's obligation is to consider only that evidence produced at trial. By contrast, in *Reemer*, the Indiana Supreme Court held the State had proven all the essential elements of the defendant's crime at trial, after consulting a medical dictionary to determine the specific fact at issue—that pseudoephedrine hydrochloride is an isomer of ephedrine.[263] The Indiana Court of Appeals acknowledged this decision in *Smart*, but held in that case that resorting to dictionary definitions alone did not resolve the factual issue left open by the State's evidence at trial.[264] A dictionary is presumably a source "whose accuracy cannot reasonably be questioned," but as *Smart* demonstrates, the chemical composition of a drug cannot always be "accurately and readily determined" using dictionary definitions alone.[265]

And finally, although a constitutional guarantee of proof beyond a reasonable doubt is not implicated in civil cases as it is in criminal cases, *Troyer* demonstrates that the burden to prove one's case at the trial court applies universally. Although judicial notice can be a useful tool in expediting litigation where appropriate, it remains incumbent upon the parties to prove their case at trial.

Appellate courts do not always abide by the mandatory language of IER 201(c)(2) when asked to take judicial notice and supplied with the necessary information because of the limited role an appellate court traditionally plays. *Banks* presented an interesting twist on a request for the court to take judicial notice for the first time on appeal. The appellee requested the appellate court take judicial notice of a separate court proceeding that was in progress at the time of the trial court proceedings but not resolved until after the appeal was initiated.[266] The Indiana Court of Appeals acknowledged IER 201(d) allows judicial notice at the appellate stage, but also noted the long line of authority prohibiting the use of judicial notice to fill evidentiary gaps on appeal by supplementing the record.[267] Ultimately, the court did not resolve that conundrum because the trial court record alone was sufficient to affirm the trial court decision in appellee's favor.[268] Other cases, however, have held that events occurring subsequent to the

263. Reemer v. State, 835 N.E.2d 1005, 1009-10 (Ind. 2005).

264. Smart v. State, 40 N.E.3d 963, 968 n.1 (Ind. Ct. App. 2015).

265. IND. R. EVID. 201(a)(1)(B).

266. Banks v. Banks, 980 N.E.2d 423, 425-26 (Ind. Ct. App. 2012).

267. *Id.* at 426.

268. *Id.*

trial court's decision and while a case is pending on appeal can be considered.[269]

An issue not touched on by any of these cases in which judicial notice was requested on appeal is the requirement in IER 201 that "[o]n timely request, a party is entitled to be heard."[270] Is requesting judicial notice for the first time on appeal a "timely request"? And is making a request for judicial notice in an appellate brief—with an opportunity for the opposing party to respond in its brief—being sufficiently "heard" about the propriety of judicial notice and the nature of the fact to be noticed? As it stands now, parties are not likely to know until an opinion is issued whether the appellate court has granted the request and taken judicial notice. Again, the suitability of the judicial notice rule for use by appellate courts is questionable considering the purpose and function of appellate courts.

The requirements of the rule pose sufficient difficulties when a party requests an appellate court take judicial notice and both parties are aware it is at issue; what happens when *no* party asks the court to take judicial notice of a particular fact? IER 201 also provides that a court *may* take judicial notice on its own.[271] As established above, the rule has been interpreted to mean appellate courts can take judicial notice for the first time on appeal based on the provisions of IER 201 that judicial notice may be taken without request,[272] at any stage of the proceedings,[273] and without notification to the parties beforehand so long as the party is given an opportunity to be heard afterward, if requested.[274] The practice and pitfalls of taking judicial notice sua sponte for the first time on appeal is illustrated by the two opinions in *Filter Specialists, Inc. v. Brooks*.[275] The court of appeals majority decision in *Filter Specialists* reversed as not supported by substantial evidence an agency decision that an employer had racially discriminated against two employees when terminating their employment.[276] In doing so, the court took judicial notice of a city's human rights ordinance prohibiting racial discrimination that was allegedly violated by the adverse employment action.[277] The employees alleging the ordinance had been violated had not introduced the ordinance into evidence in the agency proceeding below, and the employer asserted the agency's decision that it had discriminated on the basis of race could not stand because the employees had failed to prove the terms of the ordinance

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269. *See*, *e.g.*, Larkin v. State, 43 N.E.3d 1281, 1286-87 (Ind. Ct. App. 2015) (taking judicial notice of election results and finding on that basis the appellant's request for appointment of a special prosecutor was moot); *see also* TENN. R. APP. P. 14 (specifically allowing an appellate court, in its discretion, to consider post-judgment facts).

270. IND. R. EVID. 201(e).

271. IND. R. EVID. 201(c)(1).

272. *Id*.

273. IND. R. EVID. 201(d).

274. IND. R. EVID. 201(e).

275. 879 N.E.2d 558 (Ind. Ct. App. 2007), *rev'd*, 906 N.E.2d 835 (Ind. 2009).

276. *Id.* at 583.

277. *Id.* at 566.

and therefore failed to prove those terms were violated.[278] On appeal, the court noted IER 201 makes a local ordinance subject to judicial notice and allows a court to take judicial notice even if not requested, at any stage of the proceedings.[279] Moreover, the court acknowledged that IER 201 required an opportunity to be heard, but determined there was no danger of unfair prejudice to the employer because it was clearly aware of the ordinance and because the court ultimately ruled in the employer's favor.[280] The court did note that, had the result been different, the employer "would be allowed to put forth a good faith argument regarding the impropriety of this court taking judicial notice in a petition for rehearing."[281]

Judge Nancy Vaidik dissented from the majority's decision to reverse the agency decision, but also expressed concern about the majority taking judicial notice of the ordinance.[282] She agreed that IER 201 permits "uninvited judicial notice," but urged that appellate courts "do so only sparingly."[283]

> [I]f an appellate court opts to exercise its right of judicial notice absent a request from a party and the corresponding opportunity of the adverse party to voice its opposition, one of two situations will arise. Either we must be prepared to give the parties an opportunity to be heard on the issue after we have already handed down our appellate decision, which brings with it a host of procedural problems, or we must be prepared to deny litigants their right to be heard as granted by Evidence Rule 201(e). Both of these options are worrisome, and thus I believe that we should do what the majority has done today only in rare circumstances.[284]

In a footnote, the dissent elaborated on the "procedural problems" attendant to granting the parties an opportunity to be heard after an opinion is handed down.[285] Namely, such "opportunity to be heard" would necessarily have to come in the form of a petition for rehearing, in which the presenting of new claims or issues is prohibited.[286]

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278. *Id.*

279. *Id.*

280. *Id.* at 566 n.9.

281. *Id.* Although the supreme court ultimately affirmed the trial court decision that there was substantial evidence supporting the agency decision, with respect to the ordinance, the court noted the fact it was not introduced into evidence was immaterial because the ordinance merely provided authority for a local government to effectuate the state civil rights laws; it was the state law that was at issue. Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 845 (Ind. 2009).

282. *Filter Specialists, Inc.*, 879 N.E.2d at 583-84 (Vaidik, J., dissenting) (calling the majority's resolution of the employer's challenge to the recognition of a local law "problematic").

283. *Id.* at 584.

284. *Id.* at 584 (footnote omitted). The dissent ultimately believed judicial notice of the ordinance on appeal was unnecessary because it could be inferred that the agency was aware of the ordinance and took judicial notice of it. *Id.*

285. *Id.* at 584 n.23.

286. *Id.* at 584 & n.23. Judge Paul Mathias, concurring in the result in an unpublished

The foregoing presumes, of course, the appellate court is acting within the confines of IER 201, regardless of whether it is in fact an appropriate rule for appellate courts. Because IER 201 does not distinguish between adjudicative and legislative facts, virtually everything a court looks at outside of pleadings, testimony, and admitted evidence when deciding a case is subject to the requirements of the rule. Is there any gray area between what is available in the record and strict adherence to IER 201? In *Belcher v. Buesking*, the court of appeals noted that the "method of judicial reasoning cannot be hermetically sealed and shorn of common sense and ordinary experience," and therefore the judicial process "assumes that the participants bring with them a vast amount of everyday knowledge of facts in general which will help in the process of inferring ultimate conclusions."[287] In *Pigman v. Ameritech Publishing, Inc.*, the appellate court brought its "everyday knowledge of facts in general" to bear when considering whether summary judgment should have been granted against Pigman, who claimed API had breached an advertising contract when it omitted his listing from the Yellow Pages.[288] The court reversed summary judgment and remanded for trial on Pigman's claim.[289] In so doing, the court made certain statements about, among other things, the nature of the Yellow Pages and its use by and effectiveness for consumers and advertisers.[290] API petitioned for rehearing, arguing the court had taken judicial notice of matters outside the record without saying it was doing so and without giving it an opportunity to respond.[291] In ruling on the petition, the court acknowledged it "should exercise extreme caution in taking judicial notice of facts subject to proof."[292] However, the court denied taking judicial notice because "circumstances which merely place the legal issue . . . in context" are not of the sort that require the procedural protections of IER 201:

> [N]ot every circumstance related to the case presents a fact requiring evidentiary proof or judicial notice. Here, implicit in our holding was an

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memorandum decision, expressed similar concerns about taking judicial notice of the American Arbitration Association Rules for the first time on appeal without notice to either party: "[i]t is unclear to me how [the opportunity to be heard] portion of the rule is to be fulfilled where an appellate court *sua sponte* takes judicial notice of matter of which neither party has formally expressed any awareness." Preload, Inc. v. Hammond Water Works Dep't, No. 45A05-1201-PL-22, 2012 WL 3165329 at *5 (Ind. Ct. App. Aug. 6, 2012). Judge Mathias questioned whether the judicial notice taken by the court would be a proper ground for rehearing when a party may not generally raise an argument for the first time in such a petition, but noted that it was difficult to imagine a successful argument against judicial notice in this case, and concurred in result in the interest of judicial economy. *Id.*

287. Belcher v. Buesking, 371 N.E.2d 417, 420 (Ind. Ct. App. 1978).

288. Pigman v. Ameritech Publ'g, Inc., 641 N.E.2d 1026 (Ind. Ct. App. 1994), *reh'g denied*, 650 N.E.2d 67 (Ind. Ct. App. 1995).

289. *Id.* at 1035.

290. *Id.* at 1034-35.

291. Pigman v. Ameritech Publ'g, Inc., 650 N.E.2d 67, 69 (Ind. Ct. App. 1995).

292. *Id.* (citing Ritz v. Ind. & Ohio R.R., Inc., 632 N.E.2d 769, 775 (Ind. Ct. App. 1994)).

> awareness that in our society the telephone is ubiquitous and is the primary means of remote interactive communication. Such an awareness comes from life's experience, which forms the background and frame of reference for every judicial opinion.[293]

There is a difference, however, between *having* background (or, in the language of *Pigman*, an "awareness") and *getting* background. As stated in *Belcher*, it is presumed the trier of fact considering the facts of an automobile accident "will draw on his own experience as a driver, as an observer of traffic and even as one who may understand elementary physics."[294] In that regard, the parties take the judges as they find them and the court need not formally disclose every past experience that might inform a particular decision. Returning to where we started, like the court in *Pigman*, Judge Posner also denied taking judicial notice in *Rowe*. But unlike the court in *Pigman*, which had every day knowledge of phones and phone books, Judge Posner did not have background regarding the symptoms, care, and treatment of esophagitis. Rather, he turned to the Internet to gain that background.

Judicial notice on appeal places the parties in an untenable position: when the parties request judicial notice, appellate courts do not always take it even when the IER 201 suggests they must. On the other hand, when appellate courts take judicial notice sua sponte, the parties are not afforded a meaningful opportunity to be heard on the matter because they are not given advance notice and the rules regarding rehearing may work against the opportunity to be heard afterwards as well. Worse yet, because most appellate decisions are crafted behind closed doors—or at least behind doors closed to the parties—the parties may never know the court has taken judicial notice if the court does not disclose it in its opinion. The requirements of IER 201 are supposed to safeguard the reliability of judicially noticed facts.[295] It may fail to do this when it comes to judicial notice on appeal, however.

In sum, appellate courts do not always take judicial notice by the strict standards of IER 201, whether that is because the provisions of the rule are ill-suited for use by appellate courts or because of the nature of appellate decision-making itself. At least one state has adopted specific rules regarding the taking of judicial notice by a reviewing court.[296] California's appellate rules not only directly entitle a reviewing court to take judicial notice, they also empower it to take additional evidence, though such power is to be exercised sparingly.[297] But as long as Indiana has just one judicial notice rule applicable to all courts, appellate courts should take care to provide litigants the procedural protections embodied in the rule, by whatever means practicable.

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293. *Id.* (citing Belcher v. Buesking, 371 N.E.2d 417, 420 (Ind. Ct. App. 1978)).

294. *Belcher*, 371 N.E.2d at 420.

295. Haley v. State, 736 N.E.2d 1250, 1252-53 (Ind. Ct. App. 2000).

296. CAL. EVID. CODE § 459; CAL. R. CT. 8.252; *see also* KAN. REV. STAT. ANN. § 60-412 (West 2016); N.J. R. EVID. 202(b) (governing judicial notice in proceedings subsequent to trial and specifically allowing a reviewing court in its discretion to take judicial notice).

297. CAL. R. CT 8.252(c), advisory's committee cmts.

Perhaps the simple answer to stay true to the role of an appellate court is that appellate courts should not take judicial notice despite the apparent authority in IER 201 for them to do so. Taking judicial notice on appeal runs the risk of upsetting the balance of responsibility between trial and appellate courts. However, a blanket prohibition on judicial notice by appellate courts may be equally unworkable, as there are likely circumstances in which judicial notice by an appellate court is both appropriate and necessary. Because IER 201 is not ideally suited to governing the taking of judicial notice on appeal, appellate courts should be especially careful to observe its formalities and ensure the procedural fairness and reliability of information the rule seeks to provide.

For instance, if the appellate court is going to take judicial notice on its own, as IER 201(c)(1) allows it to do, it could provide the opportunity to be heard by notifying the parties while the case is pending and allowing the parties the opportunity to submit supplemental briefs on the matter to be judicially noticed before issuing the opinion. This mode of handling judicial notice for the first time on appeal might assure—or at least safeguard the opportunity for—a balanced presentation of information. However, this runs the risk of turning an appellate court into a fact-finding court. Alternatively, the case could be remanded to the trial court to allow further development of the trial record. The downside of providing advance notice is that it could slow down the appellate process and place an unanticipated burden—financial or otherwise—on the litigants.

If the appellate court does not notify the parties in advance that it is taking judicial notice, it should clearly spell out the basis for the judicially noticed fact, including the specific sources relied on.[298] When a court conducts its own research, it assumes primary responsibility for the accuracy and trustworthiness of its sources. Fully disclosing those sources in the opinion increases the likelihood of thorough research and consideration of the propriety of taking judicial notice. It would also increase transparency for the parties in the event they wish to be heard on the matter after the decision is handed down. To assure the parties have an opportunity to be heard after the fact would necessarily require relaxing the strictures on petitions for rehearing when a court has taken judicial notice sua sponte. Perhaps this would not be a drastic departure from accepted practice, as the rule is generally that a party must present all *known* arguments or claims to an appellate court before its decision is rendered and may not raise those arguments or claims on rehearing.[299] Where unrequested and unanticipated judicial notice raises a new argument or issue, the appellate court should be willing to entertain a petition for rehearing as a viable redress.[300]

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298. *See*, *e.g.*, J.K. v. T.C., 25 N.E.3d 179, 180 n.2 (Ind. Ct. App. 2015) (taking judicial notice of a record of a court obtained from the statewide protective order database maintained by the Indiana Supreme Court and giving the web address).

299. N. Ind. Commuter Transp. Dist. v. Chicago SouthShore & S. Bend R.R., 685 N.E.2d 680, 687 (Ind. 1997).

300. *Id.* (citing Herndon v. Georgia, 295 U.S. 441, 443-44 (1935)) ("Where a state court acts in an unanticipated way to deprive a party of the opportunity to make an argument or present a valid

Taking judicial notice for the first time on appeal can be "problematic,"[301] and should be done with "extreme caution"[302] and within the parameters of IER 201. And yet, it is so easy now for a court to research law or facts without even thinking about the propriety of doing so. Therefore, above all, appellate courts should be conscious and vigilant about considering any extra-record information, even if—perhaps especially if—the court thinks it is just gathering background information. Anytime an appellate court looks at something outside the record, it is taking judicial notice of a sort. It then becomes a question of disclosure and fairness to the parties. Judge Posner was quite forthright about his extra-record research in *Rowe* when he could have conducted all the same research in the privacy of his chambers and no one would have been the wiser if he hadn't included it in his opinion.[303] However strongly one disclaims using knowledge gained from such activity in deciding a case, once the genie is out of the bottle, there is no going back to knowing only what one knew before.

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defense based on the Federal Constitution, the issue is not waived for purposes of review by the Supreme Court of the United States.").

301. Filter Specialists, Inc. v. Brooks, 879 N.E.2d 558, 584 (Ind. Ct. App. 2007) (Vaidik, J., dissenting), *rev'd*, 906 N.E.2d 835 (Ind. 2009).

302. Pigman v. Ameritech Publ'g, Inc., 650 N.E.2d 67, 69 (Ind. Ct. App. 1995).

303. This is especially true because Judge Posner and Judge Rovner agreed the case could be decided on the record alone. Rowe v. Gibson, 798 F.3d 622, 629 (7th Cir. 2015), *reh'g en banc denied*, No. 14-3316 (Dec. 7, 2015); *id.* at 635 (Rovner, J., dissenting).