A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed on Appeal?

Brent E. Kidwell*

Introduction

The scene is familiar in federal district courts in the United States.[1] A criminal defendant, charged with a possessory offense, argues that he was illegally seized by law enforcement officers. The defendant asserts that the evidence discovered during the search following this illegal "seizure" is inadmissable to prove his guilt. The defendant argues that the exclusionary rule prevents the use of evidence discovered during an illegal search or seizure to prove the guilt of an accused.[2]

No single issue of a criminal trial is more important than the admissibility of evidence seized from a defendant if a defendant is charged with a possessory offense. If the evidence is inadmissable, the prosecution is generally unable to prove the elements of the charged crime. Conversely, the admission of evidence discovered during a police encounter with the defendant is often sufficient to convict the accused.[3] In criminal prosecutions, various constitutional and statutory provisions control the admissibility of evidence. The interaction between law enforcement and citizens is generally regulated by the Fourth Amendment.[4] The exclu-

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* J.D. Candidate, 1993, Indiana University School of Law—Indianapolis; A.B., 1990, Indiana University—Bloomington.

1. The scene is equally familiar in every state court. However, this Note is confined to an analysis of the standard of review applied by United States courts of appeal of federal district court determinations that a criminal defendant was "seized" within the meaning of the Fourth Amendment. Generally, state law is applied by state courts to determine the degree of deference afforded to lower court findings. It is important to note, however, that state court standards of review could be affected if the Supreme Court were to hold that the constitution guarantees a certain standard of review of Fourth Amendment determinations.

2. *See* Weeks v. United States, 232 U.S. 383 (1914). *See also infra* text accompanying note 22.

3. This is especially true if the charged crime is a possessory offense which includes actual possession of the item as an element of the crime. *See, e.g.*, 18 U.S.C. § 474 (1988) (possession of plates for purpose of counterfeiting obligations or securities); 18 U.S.C. § 1708 (1988) (possession of stolen mail); 21 U.S.C. § 841(a)(1) (1988) (possession of controlled substance with intent to distribute).

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S Const. amend. IV.

sionary rule, a judicially created remedy for violations of the Fourth Amendment,[5] prohibits evidence seized in violation of the Fourth Amendment from being used to prove a defendant's guilt.[6] Thus, establishing a defendant's innocence or guilt often depends on whether the law enforcement officers complied with the Fourth Amendment.

Criminal defendants frequently assert they were unlawfully "seized" during an encounter with law enforcement officers.[7] In evaluating this contention, the court must determine if a seizure occurred, and, if so, whether the seizure satisfied the requirements of the Fourth Amendment. If the police acted outside the scope of the Fourth Amendment, the defendant was illegally seized. Any evidence discovered during the search following this illegal seizure may not be used to prove the defendant's guilt.[8] These issues and arguments are generally raised in a pre-trial motion to suppress.

If a defendant loses the suppression motion and is ultimately convicted, the defendant may, on appeal, allege that the trial court's evidentiary ruling was erroneous. Often, the defendant will argue that the finding on the legality of the seizure was incorrect. The argument, on appeal, may focus on the correctness of the trial court's decision that the defendant was or was not "seized" during the encounter with law enforcement and, ultimately, whether that "seizure" was lawful.

At this point, a question arises. The appeals court must decide the applicable standard for reviewing the trial court's seizure findings. Some courts of appeal review the determination de novo; accordingly, the court independently evaluates the record and draws its own inferences from the facts without deferring to the trial court's findings. Other courts defer to the trial court's findings and will reverse those findings only if clearly erroneous. This division among the circuits exists, in large part, because the United States Supreme Court has failed to decide which standard is correct. A uniform standard of review does not exist for federal appeals courts to use to determine if a trial court correctly applied a vital guarantee of the Bill of Rights.

This inconsistency in federal criminal procedure prejudices both the accused and the government.[9] If an appeal of a trial court's seizure

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5. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (2d ed. 1987).

6. *See infra* text accompanying note 22.

7. *See infra* text accompanying note 13.

8. Most likely this is a search incident to the arrest. *See* Chimel v. California, 395 U.S. 752 (1969).

9. As indicated above, this inconsistency is also prevalent in the state judicial systems. The standards of review applied by state appellate courts when reviewing trial court seizure determinations varies. *See, e.g.,* People v. Williams, 756 P.2d 221 (Cal.

determination occurs in a circuit which reviews those determinations de novo, the appealing party will, in practical terms, receive a new hearing on the suppression motion. However, if that same trial court finding is appealed in a circuit which defers to the trial court's decision, that determination is practically irreversible because it is only altered if clearly erroneous. This variable treatment of parties to a criminal action is unpalatable in the federal judicial system.[10]

This Note first reviews Fourth Amendment law to provide a background for further discussion of the seizure issue. After considering the procedural posture in which a Fourth Amendment claim is raised, the relationship of the exclusionary rule to the Fourth Amendment is reviewed. This Note analyzes the seizure determination in light of the policy considerations which determine the appropriate standard of review. The distinction between law, fact, and ultimate fact is applied to the seizure issue to determine if a test exists from which an appropriate standard of review can be discerned. Further, the doctrine of constitutional fact will be explored as it relates to the Fourth Amendment considerations at issue in a seizure determination. The tests which evolve from these doctrines will be synthesized to create a framework for analyzing the seizure determination. Inherent in each analysis are considerations of judicial economy, efficiency, and fairness. Ultimately, this framework demonstrates that a trial court's seizure determination should receive limited review on appeal and only be disturbed if clear error exists.

I. Fourth Amendment Doctrine

A. "Seizure" Defined

Unreasonable searches and seizures of citizens are prohibited by the Fourth Amendment.[11] However, not all contacts between law enforcement

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1988) (de novo review); People v. Erskin, 285 N.W.2d 396 (Mich. Ct. App. 1979) (clearly erroneous); State v. Storvick, 428 N.W.2d 55 (Minn. 1988) (de novo review).

10. These variations are practically unable to encourage forum shopping in federal criminal actions. The general venue provision for criminal proceedings requires that "the prosecution shall be had in a district in which the offense was committed." Fed. R. Crim. P. 18. The defendant may move to transfer the proceeding to another district to avoid prejudice, Fed. R. Crim. P. 21(a), or for purposes of convenience pursuant to Fed. R. Crim. P. 21(b). The defendant is thus quite limited in selecting alternative forums, except, of course, the forum in which to initially commit the crime.

11. "We have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person." California v. Hodari D., 111 S. Ct. 1547, 1549 (1991) (quoting Henry v. United States, 361 U.S. 98, 100 (1959)).

For a general but thorough discussion of the Fourth Amendment, see Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1970).

officers and citizens are "seizures" which invoke the protection of the Fourth Amendment.[12] If a seizure occurs, the Fourth Amendment requires that it be reasonable.[13] In *Terry v. Ohio*[14] the Supreme Court held that a person is "seized" and the protections of the Fourth Amendment apply if "a police officer accosts an individual and restrains his freedom to walk away . . . ."[15] The Court later reaffirmed this standard and formulated an objective test in *United States v. Mendenhall*,[16] in which it held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[17] This test remains the yardstick against which police encounters with citizens are measured to determine if a seizure occurred and the Fourth Amendment applies.[18]

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12. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

13. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

14. 392 U.S. 1 (1968). The facts of *Terry*, now famous, are instructive of the factors which the Supreme Court considers in determining that a defendant is seized. A police officer approached the defendant and two other men after observing their actions for some time. Upon approaching the men, the officer asked for identification. One suspect responded with a mumble, causing the officer to physically grab Terry, spin him around, and pat-down the outside of his clothing. The Court stated, "In this case there can be no question, then, that Officer McFadden 'seized' petitioner . . . when he took hold of him and patted down the outer surfaces of his clothing." *Id.* at 19.

15. *Id.* at 16.

16. 446 U.S. 544 (1980). This case involved an airport stop of a person who matched a "drug courier profile." Such profiles are used by many law enforcement narcotics units to identify likely drug couriers. Here, federal drug agents approached the defendant in an airport concourse, identified themselves and asked to see the defendant's identification. The facts in this case indicated to the Court that the defendant was not "seized" during the encounter with law enforcement officers. The Court stated that:

> The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.

Id. at 555.

17. *Id.* at 554 (footnote omitted). The general use of "reasonableness" tests is heavily criticized. *See* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173 (1988) (criticizing the Supreme Court for foregoing categorical rules and objective tests and resorting instead to "reasonableness" and "balancing" tests).

18. This standard was announced in the plurality opinion of *Mendenhall*, written by Justice Stewart, in which only one other Justice joined. However, in the subsequent case of Florida v. Royer, 460 U.S. 491 (1983), a majority of the court adopted this reasonable person test (plurality of four justices and Justice Blackmun's dissent). For cases

Under this test, a court must analyze the factual circumstances of the encounter with law enforcement. In *Mendenhall*, the Supreme Court listed several facts which support the finding that a seizure occurred: the presence of several police officers, the display of weapons by the officers, physical touching of the suspect, and the use of language or a tone of voice by law enforcement which indicates the suspect may not leave.[19] These factors substantiate the inference that a reasonable person would not have felt free to leave. Subsequent cases have identified other police actions which support a finding that a citizen was seized.[20] However, the Court repeatedly emphasizes that the facts of each encounter must be independently scrutinized when the objective *Mendenhall* test is applied.[21]

B. The Exclusionary Rule

Evidence procured by the police as a result of an unlawful search of a suspect is inadmissable to prove the guilt of the suspect in a later trial.[22] This rule is not constitutionally required, but rather is a judicially created remedy for violation of a defendant's constitutional rights.[23] Evidence seized during a search following an illegal seizure violates the Fourth Amendment and falls within the scope of the exclusionary rule's

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following *Mendenhall* which applied this reasonable person standard, see generally California v. Hodari D., 111 S. Ct. 1541, 1550-51 (1991); Michigan v. Chesternut, 486 U.S. 567, 573 (1988) ("The Court has since embraced [the Mendenhall] test."); INS v. Delgado, 466 U.S. 210, 215 (1984).

19. *Mendenhall*, 446 U.S. at 554.

20. *See* Florida v. Royer, 460 U.S. 491 (1983) (seizure occurred when police stopped defendant in an airport, identified themselves as narcotics agents, asked for, examined, and retained airline ticket, and asked defendant to follow them to police room without indicating he was free to leave.); Michigan v. Summers, 452 U.S. 692 (1981) (police stopping defendant as leaving house for which search warrant issued and requiring defendant to return to house while search conducted was seizure); Brown v. Texas, 443 U.S. 47 (1979) (police officer exiting his vehicle and detaining defendant to identify defendant and explain defendant's reason for being in location was a seizure).

21. *See* Michigan v. Chesternut, 486 U.S. 567, 573-74 (1988).

22. Weeks v. United States, 232 U.S. 383, 393 (1914). ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value. . . ."). *Accord* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (extending exclusionary rule to indirect as well as direct products of illegal invasions of privacy). For a general discussion of the exclusionary rule and its many permutations, see generally LAFAVE, *supra* note 5, § 1.1.

23. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

remedy.[24] If the evidence is a fruit of an illegal seizure, the evidence may not be used by the prosecution to prove the defendant's guilt of the crime charged.[25]

C. Procedural Exclusion of Evidence

Criminal procedure in the federal courts is governed by the Federal Rules of Criminal Procedure.[26] Under these rules, "[a] motion to suppress evidence may be made in the court of the district of trial."[27] A motion to suppress evidence must be raised prior to trial.[28] Failure to raise the issue before trial is considered a waiver and prevents the issue from being raised at a later time.[29] If a search or seizure was conducted pursuant to a warrant, the defendant has the burden to prove the warrant

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24. See Wong Sun v. United States, 371 U.S. 471 (1963), in which the question was stated as "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting from JAMES MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

Several exceptions to the exclusionary rule exist, including the doctrines of attenuated fruits, the good faith exception, and purged taint. *See generally* LAFAVE, *supra* note 5, §§ 1.3, 11.4.

25. Though not considered here, a party who claims that his Fourth Amendment rights were violated must also have standing to bring such a claim. *See* Jones v. United States, 362 U.S. 257 (1960). For the purposes of this discussion, whether a defendant who seeks to suppress evidence which he possessed either on his person or in his effects has standing to raise Fourth Amendment issues is assumed. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980) (standing exists when defendant has a reasonable expectation of privacy in the intruded area and such is invaded); Rakas v. Illinois, 439 U.S. 128 (1978). *See generally* LAFAVE, *supra* note 5, § 11.3.

26. FED. R. CRIM. P. 1.

27. FED. R. CRIM. P. 41(f). A Motion for Return of Property, FED. R. CRIM. P. 41(e), works similarly to a motion to suppress, to petition the court to prevent evidence from being admitted at trial. The difference between the two motions is that the former applies to all evidence, even contraband, while the latter only applies to evidence which the person "is entitled to lawful possession of." *Id.*

28. FED. R. CRIM. P. 12(b)(3). The motion is required before trial to eliminate issues of police conduct, not related to the guilt or innocence of the defendant, from the main trial. FED. R. CRIM. P. 12 advisory committee's notes to 1974 Amendment.

29. *See generally* LAFAVE, *supra* note 5, § 11.1. The exception to this rule arises when matters appear during trial which indicate that an unconstitutional seizure occurred and that the pre-trial ruling may have been erroneous. *See* Gouled v. United States, 255 U.S. 298 (1921). The language in *Gouled* has been interpreted to impose a duty on the trial court judge to reconsider the ruling on suppression motion if "matters appearing at trial may cast reasonable doubt on the pretrial ruling." Rouse v. United States, 359 F.2d 1014, 1016 (D.C. Cir. 1966) (footnote omitted). *See also* United States v. Raddatz, 447 U.S. 667, 678 n.6 (1980).

or the execution of the warrant was defective.[30] If the police act without a warrant, the government has the burden to prove the search comported with the Fourth Amendment.[31] To determine if the evidence should be suppressed, the parties call witnesses, submit evidence, and engage in oral argument before the court.[32] In the federal courts, the judge may hear the motion or refer such to a federal magistrate.[33]

The defendant may not appeal an adverse ruling on the motion to suppress until a final judgement is rendered on the charges.[34] If convicted, the defendant may assert on appeal that the trial court erred in denying the motion to suppress and incorrectly admitted the challenged evidence. If the appeals court finds that the trial court did err, and that this error was not harmless and affected the verdict, the conviction may be reversed.[35] The prosecution, pursuant to statutory authorization,[36] may

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30. Franks v. Delaware, 438 U.S. 154, 171 (1978) ("There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant."). *See generally* Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

31. United States v. Matlock, 415 U.S. 164 (1974); *See generally* LAFAVE, *supra* note 5, § 10.3; Saltzburg, *supra* note 30.

32. The Federal Rules of Evidence control the presentation of evidence at a suppression hearing. These rules are not necessarily as precisely or inflexibly applied during this hearing as during a trial to prove guilt. *Matlock*, 415 U.S. at 173-74.

33. Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A) (1988). The system of review established for judicial oversight of the magistrate's determination is relevant to the standard of review issue. This Act requires that the magistrate's findings be reviewed de novo by the district judge upon a party's objection to those findings. 28 U.S.C. §636(b)(1) (1988). Thus, a magistrate's determination of the seizure question receives a de novo review by the federal judge.

34. DiBella v. United States, 369 U.S. 121 (1962). The Court found that the motion to suppress was not severable from the primary criminal trial and was not interlocutory in nature. *Id.* Allowing interlocutory appeal of such an order, stated the court, would "entail serious disruption to the conduct of a criminal trial." *Id.* at 129 (footnote omitted). This rule rests upon the broader doctrine of collateral orders. *See generally* 3 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 678 (1982).

35. FED. R. CRIM. P. 52(a), which states that "[A]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Even if the error is not harmless, the appeals court is not required to reverse the verdict. If the error concerns the admission of evidence, the court must decide if that evidence had a sufficient bearing upon the total evidentiary picture to require reversal. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6 (1985).

36. 18 U.S.C. § 3731 (1988). This statute states, in relevant portion:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Id.

immediately appeal an order granting the suppression motion and excluding evidence.[37]

In a criminal proceeding, at least one basis of appeal usually concerns an evidentiary issue. Often the error is based on the trial court's denial of a motion to suppress. If the inadmissability of the evidence is predicated on a search incident to an illegal seizure, the appeals court must review the trial court's findings of whether the defendant was "seized" within the meaning of the Fourth Amendment. To begin the analysis, the appeals court must first decide what standard of review should be applied to determine if the trial court's finding that the defendant was "seized" is correct.

II. Current Standards of Review

The United States courts of appeal are divided on the appropriate standard of review to apply when reviewing a trial court's determination that a defendant was "seized." Two circuits review the determination de novo; other circuits defer to the trial court finding and only reverse if the decision is clearly erroneous.[38]

A. "De Novo" Review

A de novo review[39] of the trial court's seizure finding is applied by at least two appeals courts.[40] Use of this standard is usually supported by reference to the constitutional issues which a trial court is required to address. Accordingly, the Court of Appeals for the District of Columbia Circuit held that:

> [T]he soundest of jurisprudential considerations compel appellate courts not to shirk their responsibility independently to apply

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37. If an interlocutory appeal of an adverse suppression order was not available to the prosecution, they would be required, as is the defendant, to wait until an adverse judgment, i.e. an acquittal, was delivered before appealing the suppression decision. The Fifth Amendment prohibits placing a defendant in double jeopardy and prevents the government from appealing an acquittal. United States v. Scott, 437 U.S. 82 (1978). Therefore, without an interlocutory appeal, the government would be unable to ever seek review of an adverse decision on a suppression motion. *See generally* LaFave, *supra* note 5, § 11.7(b).

38. Three courts of appeals have not unequivocally spoken as to the proper standard. These include the United States court of appeals for the Third, Tenth, and Eleventh Circuits.

39. A de novo review requires no deference to the lower court and allows a wholly independent and complete finding by an appeals court. *See* Jack H. Friedenthal et al., Civil Procedure § 13.4 at 600-01 (1985).

40. *See* United States v. Montilla, 928 F.2d 583 (2d Cir. 1991); United States v. Maragh, 894 F.2d 415 (D.C. Cir. 1990).

> important constitutional standards. In the Fourth Amendment context, as in the First Amendment setting, appellate judges have 'a constitutional responsibility that cannot be delegated to the trier of fact.'. . . *De Novo* review helps to ensure 'consistent application.'[41]

This rationale assumes that the seizure issue is a question of law which is traditionally afforded no deference upon appeal.[42] However, it seems that the D.C. Circuit extends this argument in finding that the seizure question is not only a question of law, but a question of constitutional law, making a de novo review even more important.[43]

Although the injection of the constitutional issue affects the discussion, the de novo standard could stand as easily upon the premise that the seizure issue is simply a question of law. Under traditional jurisprudence, a de novo review is conducted whenever a question of law, constitutional or otherwise, is reviewed on appeal.[44] The Second Circuit avoids the constitutional issue while still finding that the seizure question is one of law.[45] After reviewing *Mendenhall's* "reasonable person" standard for determining whether a defendant is seized, the court stated that, "[s]uch an objective inquiry pointedly eschews consideration of intent and involves an essentially legal assessment of whether the particular circumstances would warrant the belief that a person has been detained."[46] With only an "essentially legal assessment" to conduct, the Second Circuit finds no factual determinations by the district court which require deference. Thus, a de novo review is completely appropriate.

B. "Clearly Erroneous"

Seven courts of appeals[47] reverse the trial court's decision that a defendant was or was not "seized" only if that decision was clearly

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41. *Maragh*, 894 F.2d at 418 (quoting Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 501 (1984)).

42. *Id.* As in the circuits that follow the clearly erroneous standard, the dissent in *Maragh* argued that the seizure question is one of fact and should be afforded deference on appeal. *Id.* at 420-21 (Mikva, J., dissenting).

43. *Id.* at 418.

44. *See infra* text accompanying note 99.

45. United States v. Montilla, 928 F.2d 583, 587-88 (2d Cir. 1991).

46. *Id.* The court continued by observing that "the Supreme Court's own practice suggests strongly that it views the seizure issue as a legal question." *Id.* at 588. Compare with this statement the conclusion of the Eighth Circuit, after extensive analysis of Supreme Court opinions, that the Court has not stated or applied a consistent standard of review. United States v. McKines, 933 F.2d 1412, 1419-20 (8th Cir. 1991).

47. *See* United States v. McKines, 933 F.2d 1412 (8th Cir. 1991); United States v. Valdiosera-Godinez, 932 F.2d 1093 (5th Cir. 1991); United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991); United States v. Gordon, 895 F.2d 932 (4th Cir. 1990); United States v. Collis, 699 F.2d 832 (6th Cir. 1983); United States v. Black, 675 F.2d 129 (7th Cir. 1982); United States v. Patino, 649 F.2d 724 (9th Cir. 1981).

erroneous.[48] The use of this standard is traditionally supported by the rationale expressed by the Ninth Circuit:

> The determination of when [a contact between a citizen and the police] constitutes a seizure within the meaning of the fourth amendment depends upon the facts and circumstances of each case. Proper deference must be given to the district judge who heard the testimony of the officer, his tone of voice and inflection, and who observed the officers conduct on the stand, his appearance and mannerisms. The district judge also observed the defendant in the courtroom. He is in the best position to evaluate the impression the defendant had when approached by the officers . . . . We cannot say that the finding of the district judge . . . was clearly erroneous.[49]

This can be restated as a simple syllogism: Major premise—whether a person was seized is a question of fact; minor premise—a trial court's factual determinations are deferred to on appeal; conclusion—the trial court's seizure determination should be deferred to on appeal. This logic, however, begs the question of the soundness of the major premise of whether the seizure issue is truly a factual determination.[50]

C. Supreme Court Hints

Two observations are apparent following a close analysis of the decisions of the courts of appeals. First, the Supreme Court has not unequivocally indicated which standard of review should be applied.[51] Second, advocates of each standard believe that the Supreme Court has

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48. A trial court's finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). For a detailed analysis of this standard of review, see text accompanying note 93 *infra*.

49. *Patino*, 649 F.2d at 728. *See also McKines*, 933 F.2d at 1419-21, in which, after a thoughtful and thorough discussion of the policies and precedent underlying the issue, the Eighth Circuit held that the seizure issue was a question of fact and was reviewed for clear error on appeal.

50. Dissenting opinions in appeals courts which adopted this deferential standard often argue this exact point. *See, e.g., Black*, 675 F.2d at 138-39 (Swygert, J., dissenting) ("The factual findings . . . are not in dispute. The only issue is whether these facts constitute a Fourth Amendment seizure. This is a question of law and the standard of review, therefore, is not clearly erroneous.").

51. *See McKines*, 933 F.2d at 1419 ("This sort of inquiry is simply not fruitful, for it does not appear that the Supreme Court has decided the question."); *Montilla*, F.2d at 588 ("Although the Supreme Court has not spoken unequivocally on this subject. . . .").

adopted or would adopt their position and can find language supporting their view in Supreme Court decisions.[52] These two observations provide little help in determining the appropriate standard of review. In fact, they serve only to return us to our starting point, to analyze the competing standards in light of policy considerations and precedent and to make an independent determination based on merit.

However, an analysis of the Supreme Court opinions which have reviewed lower court determinations that a seizure did or did not occur is instructive. The values which the Court articulates in each review, explicitly or implicitly, assist in establishing an analytical framework to evaluate the standard of review. After *Terry v. Ohio*, the Court reviewed several lower court seizure determinations. In each decision, the Court seemingly deferred to the trial court's finding.[53] However, the *Terry* holding is not the primary test now used to determine whether a citizen was seized. Rather, the *Mendenhall* objective test is applied by the courts. Thus, *Mendenhall* and its progeny are more indicative of the current considerations regarding any standard of review.

Since the *Mendenhall* decision in 1980, the Supreme Court has reviewed at least five lower court seizure determinations.[54] In each case, the Court commented indirectly as to the scope of review applied. In *Mendenhall*, the plurality opinion stated that "the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to determine."[55] This comment seems to suggest that the seizure standard is one of mixed law and fact and is to be reviewed de novo.[56] Similarly, after explaining the holding of the lower court on the "seizure" issue, the Court stated in *Florida v. Royer*[57] that "[t]he question before us is whether the record warrants that conclusion."[58] Several

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52. *See McKines*, 933 F.2d at 1418.

53. *See, e.g.*, Brown v. Texas, 443 U.S. 47, 49 (1979) (where defendant was convicted for failing to identify self as required by state statute after being "lawfully stopped," court accepted without review that "the County Court necessarily found as a matter of fact that the officers 'lawfully stopped' appellant."). *See also* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Sibron v. New York, 392 U.S. 40 (1968) (decided the same day as *Terry*).

54. *See* Florida v. Bostick, 111 S. Ct. 2382 (1991); California v. Hodari D., 111 S. Ct. 1547 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); INS v. Delgado, 466 U.S. 210 (1984); Florida v. Royer, 460 U.S. 491 (1983).

55. *Mendenhall*, 446 U.S. at 551 n.5. (Stewart, J., concurring). This opinion was joined only by Justice Rehnquist (now Chief Justice).

56. Justice White's dissent in *Mendenhall* chastises the plurality for even considering whether a seizure had occurred because such a determination is "a fact-bound question with a totality-of-circumstances assessment that is best left in the first instance to the trial court. . . ." *Mendenhall*, 446 U.S. at 569-70.

57. 460 U.S. 491 (1983).

58. *Id.* at 501. This ambiguous phrase could indicate a clearly erroneous standard

years later, in *Michigan v. Chesternut*,[59] the Court refused to adopt a bright-line test to indicate when a seizure occurs, deciding instead to "adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure."[60] This statement suggests that the issue is a factual one, traditionally receiving a deferential standard of review. The Court continued the post-*Terry* trend of expounding their ability to review de novo the findings of a lower court. In each case, the Court does not explicitly indicate that any degree of deference will be given to the trial court's findings. Instead, the Court implicitly indicates that a de novo review will occur.

Even more instructive than the Court's explicit statements regarding the scope of its review is the extent of the review in which it actually engaged. In each post-*Mendenhall* case, the Court carefully examined the facts contained in the record, ostensibly to draw its own, independent factual inferences to which to apply the *Mendenhall* test.[61] In *Michigan v. Chesternut*[62] the Court determined that no seizure occurred because: "The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement."[63] The *Chesternut* language suggests that the presence of these facts would have persuaded the Court that a seizure had occurred.[64] In

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of review especially given the deference inherent in a review of a trial record to determine if such "warrants" the trial court's decision.

59. 486 U.S. 567 (1988).

60. *Id.* at 573. After restating the *Mendenhall* "reasonable person" test, the Court held that "[after] [a]pplying the Court's test to the facts of this case, we conclude that respondent was not seized . . . ." *Id.* at 574. Conspicuously absent from the Court's discussion is any mention of the findings of the trial court or their impact upon the scope of review.

61. *See* Florida v. Royer, 460 U.S. at 501 (After carefully reviewing the facts of the defendant's contact with the law enforcement officers, the court found that "[t]hese circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'") (citations omitted). *See also* INS v. Delgado, 466 U.S. 210, 218-19 (1983).

62. 486 U.S. 567 (1988).

63. *Id.* at 575.

64. In this case, the Court reviewed a Michigan Court of Appeal's holding which applied a clearly erroneous standard of review to the trial court. Michigan v. Chesternut, 403 N.W.2d 74, 75 (Mich. Ct. App. 1986). If the Supreme Court was itself using such a standard, the detailed review of the facts would be unnecessary to justify their reversal of the state court. Rather than engage in supposing hypothetical facts which would indicate a seizure occurred, the Court, in deferring to the trial court, would simply review the record to determine whether the facts present in the record supported the trial court's

the two most recent decisions reviewing lower court seizure determinations, the Court continued to emphasize the controlling nature of its independent inferences from the facts. In *California v. Hodari D.*,[65] the Court reversed a state appeals court ruling which found that a seizure had occurred because of the absence of a single fact during the police encounter.[66] In *Florida v. Bostick*,[67] the Court refused to address the issue of whether the defendant was seized when insufficient facts existed for the Supreme Court to review the decision. Instead, the Court remanded the cases to the state court to determine the facts and to apply those facts to the standard which the Supreme Court devised.[68]

Combining the explicit statements of the Court with its close scrutiny of the record, it seems that the Supreme Court considers a seizure determination a question of fact, but reviews the trial court's factual findings de novo. If such a conclusion is accepted, an incongruity emerges which merits further investigation and explanation.[69] Regardless, the only consistent, clear, and articulated conclusion to be drawn from Supreme Court decisions is that the applicable standard of review has yet to be determined.

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finding. If insufficient support existed, the Court could find the lower court's holding clearly erroneous and reverse. *See* United States v. U.S. Gypsum Co., 333 U.S. 364 (1948). Here, however, the Court analyzed in reverse and found the facts which would allow it to find a seizure occurred were absent, thus indicating a de novo review.

65. 111 S. Ct. 1547 (1991).

66. *Id.* at 1552. The single fact absent from the record was the defendant's submission to the police order: "In sum . . . since [the defendant] did not comply with that injunction he was not seized until he was tackled." *Id.* The court based this holding on the decision in Brower v. Inyo County, 489 U.S. 593 (1989), in which the Court found no seizure occurred during a vehicle chase because the defendant failed to stop. Thus, the singular fact of not succumbing to the order of the police was dispositive in both cases as to the seizure determination.

67. 111 S. Ct. 2382 (1991).

68. *Id.* at 1552. At least two inferences are possible from this action. First, because the Court had available the record of the proceedings below on which they relied for factual information concerning the police encounter, it would seem the Court could have reviewed the record de novo to draw its own inferences on which to base a seizure determination. The Court instead chose to remand the case. This action suggests that the Court does rely upon and defer to the trial court's factual findings. Second, and alternatively, the Supreme Court might have remanded the case to allow the state courts to apply the new legal standard, a standard different than the one on which the lower courts based their holding, to the factual situation presented in the case. Accordingly, it is very likely that the Court implies nothing from the remand except its own sense of judicial economy and fairness.

69. The incongruity is the de novo review of a trial court's factual determination. The traditional rule has always been, except for a limited number of exceptions, that an appeals court defers to a trial court's factual findings and reverses only if clear error is present. *See* Anderson v. Bessemer City, 470 U.S. 564 (1985).

III. The Law-Fact Distinction and Standards of Review

The division of labor in the federal judicial system is determined, in large part, by a conclusory labelling of issues as factual or legal in nature.[70] The applicable standard of review is a statement by an appellate court indicating which level of the judicial system is granted primary authority to resolve the issue.[71] The scope of decisionary power exercised by each level of the system over any given legal dispute is determined by this labelling practice.[72] Thus, the determination that the seizure issue is one of fact or law depends upon considerations of policy. These policy factors are often dispositive of the scope of review regardless of the factual or legal nature of the issue. However, limited exceptions to the fact/law labels have been created in the area of constitutional rights.

A. Law v. Fact

In general, American courts adhere to a well-defined pattern of jurisprudence.[73] First, the pertinent facts are determined; second, the law relevant to the dispute is established; and, last, the law is applied to the facts to result in a legal determination of the rights of the parties.[74] These steps in the process are not necessarily as independent of each other as first appears. For example, to determine which facts are relevant, the applicable law must be ascertained, while the applicable law depends on which facts are found to exist.[75] This process of circular reasoning demonstrates that the distinction between law and fact is not as clear as suggested.

The exact delineation of what portions of the legal process are "fact" and which portions are questions of "law" is often confusing.[76] A "fact," as used in the judicial process, has been defined in a number of ways.[77] Perhaps the clearest definition is that a fact tends to answer

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70. *See* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 93 (1944).

71. *Id.*

72. *Id.*

73. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 374 (tent. ed. 1958).

74. *Id.* at 374-75.

75. Hart & Sacks, *supra* note 73, at 375. "[T]his three-fold process is [not] a simple step-one, step-two, step-three process. . . . [T]he law determines what facts are relevant while at the same time the facts determine what law is relevant." *Id.*

76. *See generally* Stephen A. Weiner, *The Civil Non Jury Trial and the Law-Fact Distinction*, 55 Cal. L. Rev. 1020 (1967).

77. Facts have been defined as the "determination and statement of the relevant characteristics of the particular matter before the judge." Hart & Sacks, *supra* note 73, at 375. "A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place." Black's Law Dictionary 591 (6th ed. 1990).

the questions of who did what, when, where, how, why, or with what intent.[78] Conversely, determinations of "law" have been defined as "fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*."[79] The final step in the adjudicative process, that of applying the law to the facts, results in a finding of "ultimate fact."[80] An ultimate fact, often labelled an issue of mixed fact and law,[81] is not merely a distinguishable category of fact, but rather a third category requiring a different analysis to discern the applicable standard of review.[82]

The Supreme Court has struggled to clearly establish the difference between law and fact on several occasions, but without much success.[83] The Court avoids establishing a bright-line definition. Instead, it dictates on a case-by-case basis which parts of a cause of action are fact and

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78. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

79. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 n.3 (1986).

The Supreme Court has defined facts "in the sense of a recital of external events and the credibility of their narrators. . . ." Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)).

In determining law, the judge is "formulating a proposition which affects not only the case before him but all others that fall within its terms." HART & SACKS, *supra* note 74, at 374-75. "Law is a principle . . . Law is conceived . . . Law is a rule of duty. . . ." BLACK'S LAW DICTIONARY 592 (6th Ed. 1990).

80. *See* Stern, *supra* note 70 at 93 (discussion of interaction of facts, law and ultimate facts). Yet another category of "fact" exists, that of "constitutional fact." These are facts crucial to determining whether a certain constitutional right is implicated. *See infra* text accompanying note 94.

81. A mixed question of law and fact is one in which:

> [T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

82. FED. R. CIV. P. 52(a) "does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 286. *Cf.* Louis, *supra* note 79. Professor Louis believes that ultimate facts are not a separate category but rather are facts which are reviewed de novo or for clear error depending upon their tendency to be more like law or more like facts.

83. In Pullman-Standard v. Swint, 456 U.S. 273 (1982), the Supreme Court "noted the vexing nature of the distinction between questions of fact and questions of law." *Id.* at 288. *See also* Anderson v. Bessemer City, 470 U.S. 564 (1985); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

which are law.[84] As yet, no distinction expounded by the Court serves as an absolute guide to lower courts in the struggle to divide facts from law.[85]

B. Standards of Review and Policy Considerations

On appeal, a party will allege that an error occurred in the lower court requiring an alteration of the lower court's judgment. The intensity and extent of review in which the appellate court may engage depends upon the nature of the alleged error.[86] Generally, an appellate court may reverse a trial court's factual findings only if those findings are clearly erroneous.[87] An error of law, however, allows the appellate court to substitute its judgement for the decision of the trial court via a de novo review.[88] If a mixed question of law and fact exists, a different analysis, requiring a balancing of policy considerations, is applied to determine the scope of review.[89] These well-established rules define the scope of appellate review based on whether the alleged trial court error was one of "fact" or "law."[90]

A crucial point must be made at this juncture. Identifying a trial court decision as one of fact, law, or both is not a mechanical process ultimately compelling a standard of review. Behind these distinctions lie a large body of policy considerations supporting each corresponding

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84. *See, e.g., Pullman-Standard*, 456 U.S. at 287-88 (issue of intentional discrimination is a pure question of fact). The Supreme Court has framed the law-fact distinction as a matter of common sense, holding that the clearly erroneous standard should apply whenever the finding in question is based on the "fact-finding tribunal's experience with the mainsprings of human conduct . . . ." Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

85. As one appellate court judge warns: "'[l]aw' and 'fact' do not in legal discourse denote pre-existing things; they express policy-grounded legal conclusions." Weidner v. Thieret, 866 F.2d 958, 961 (7th Cir. 1989) (Posner, J.).

86. FRIEDENTHAL ET AL., *supra* note 39, § 13.4.

87. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961). *See generally* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (1971).

88. *Mississippi Valley Generating Co.*, 364 U.S. at 526. *See generally* WRIGHT & MILLER, *supra* note 87, § 2588.

89. Pierce v. Underwood, 487 U.S. 552, 559-60 (1988).

90. These rules are more than common law precepts of judicial procedure. It has been held that FED. R. CIV. P. 52(a) will be applied to the findings of a judge in criminal cases on issues other than the guilt of the defendant. Campbell v. United States, 373 U.S. 487 (1963). This rule states that "[f]indings of fact shall not be set aside unless clearly erroneous . . . ." FED. R. CIV. P. 52(a). Undoubtedly, this rule has established a principle which affects all aspects of the appellate process. *See generally* WRIGHT & MILLER, *supra* note 87, § 2573.

review standard.[91] These considerations are the forces that propel the labelling of an issue as fact or law and which results in the application of a standard of review.[92]

1. Pure Facts and Reviewing for Clear Error.—Requiring the presence of clear error before reversing a trial court finding severely limits the scope of appellate review.[93] This limit is justifiedly applied to factual findings for several reasons.[94] The most persuasive rationale for applying this limited review is the special expertise which the trial court has in judging the credibility of the witnesses, analyzing the demeanor of the parties, and weighing the evidence.[95] A second reason for this deference is a consideration of judicial economy and the proper role of the trial courts vis-a-vis appeals courts.

Federal courts are faced with an ever increasing work load, causing the efficiency of the system to become an important concern. This concern is often manifested in judicial policy determinations allocating labor between the trial and appellate courts.[96] Thus, appellate courts are more willing to grant trial courts greater discretion in judicial decisions regarding facts. This results in a limited appellate review of trial court

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91. As stated by the Supreme Court, determinations of standards of review "reflect an accommodation of the respective institutional advantages of trial and appellate courts." Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991).

92. At least one court of appeals agrees fully with this statement. In United States v. McConney, 728 F.2d 1195 (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, stated:

> The appropriate standard of review for a district judge's application of law to fact may be determined . . . by reference to the sound principles which underlie the settled rules of appellate review. . . . If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to de novo review. *Thus, in each case, the pivotal question is do the concerns of judicial administration favor the district court or do they favor the appellate court.*

Id. at 1202 (emphasis added).

93. As stated by the Supreme Court, "review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception." Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

94. *See generally* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

95. *See* Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844 (1982); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). *See generally* WRIGHT & MILLER, *supra* note 87, § 2586.

96. *See* Louis, *supra* note 79.

determinations.[97] One method of achieving this limit is to classify a trial court finding as one of fact and to apply the clearly erroneous standard of review.[98]

2. Pure Law and Reviewing De Novo.—Determinations of law are reviewed de novo on appeal.[99] The legal conclusions of the trial court receive no deference from an appeals court conducting a de novo review.[100] This broad reassessment of the lower court decision results from the stated role of an appeals court to determine the law.[101] Unlike questions of fact, the appeals court is in as good of position as the trial court to determine the applicable law.[102] Further, de novo review of legal questions promotes consistency and predictability in application of correct legal principles to similar factual conditions.[103] In this respect, the appeals courts exert supervisory power over the application of law by the lower courts.

3. Mixed Questions of Law and Fact.—Unlike questions of pure fact or law, the presence of a mixed question of law and fact does not automatically and consistently dictate a standard of review on appeal. In fact, the Supreme Court has determined that mixed questions require an extensive analysis to determine the applicable standard:

> We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as

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97. This concern for efficiency is evident in recent opinions. In Anderson v. Bessemer City, 470 U.S. 564 (1985), the Supreme Court reversed an appeals court decision to review de novo a factual finding of the trial court which did not involve a credibility determination. Finding that the appeals court misinterpreted FED. R. CIV. P. 52(a), and should have reviewed for clear error, the Court stated: "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources." 470 U.S. at 574.

98. However, even if a finding is classified as fact, there are exceptions to the clearly erroneous review requirement. The doctrine of constitutional fact is one example. *See infra* text accompanying notes 137-38.

99. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961).

100. *Id.* at 524.

101. Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 510-11 (1983).

102. This equality of review of questions of law should be contrasted with review of factual determinations, where the Supreme Court has found:

> It seems entirely reasonable to expect, therefore, that appellate judges will continue to defer to the judgment of trial judges who are "on the scene". . . and that they will not inexorably reach the same conclusion on a cold record at the appellate stage that they might if any one of them had been sitting as a trial judge.

Oregon v. Kennedy, 456 U.S. 667, 676 n.7 (1982) (quoting Gori v. United States, 367 U.S. 364, 368 (1961)).

103. *See* FRIEDENTHAL ET AL., *supra* note 39, § 13.4 at 601.

> questions of law or of fact for purposes of appellate review, that sometimes the decision "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[104]

When confronted with a mixed question of law and fact, an appeals court should defer to the trial court's findings "when it appears that the district court is better positioned than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[105] Once a given issue is identified as a mixed question of law and fact, the appellate court must evaluate the policy concerns which underlie the different standards of review; the standard which best serves the underlying policy consideration is applied. This is the analysis required to determine the proper standard to review a seizure finding.

C. Application to "Seizure" Determinations

The law-fact distinction assists in determining which standard to apply when reviewing a trial court's finding that a criminal defendant was "seized" during an encounter with law enforcement officers. A two-step analysis determines if the law-fact distinction applies to dictate the standard of review for a particular issue. First, it must be decided into which category, law, fact, or mixed law and fact, a trial court's "seizure" determination falls. Second, the underlying policies which support the standard of review applied to the particular category are analyzed to see if they are appropriate and applicable to the seizure issue.

Although this discussion may imply that the factors are, or should be, considered in this order, no such implication is intended. Rather, as the discussion above fairly indicates, identifying an issue as one of fact or law is a result-oriented process. In fact, the category of mixed fact and law is most likely a result of judicial unhappiness with any categorization process that requires the application of rigid standards of review. Accordingly, the middle category honestly depicts the actual reasoning and analysis used to determine the standard of review: a weighing of competing policy considerations.

1. Characteristics of a Seizure Determination.—The *Mendenhall* test is applied by a court to determine whether a person was seized for purposes of the Fourth Amendment.[106] The test is objective and requires

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104. Pierce v. Underwood, 487 U.S. 552, 559-60 (1985) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

105. Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991).

106. See *supra* text accompanying note 16.

a court to determine if a reasonable person, in similar circumstances as the defendant, would have felt free to leave the presence of the law enforcement officers.[107] The analysis involved in applying this test, as well as the similarity of the *Mendenhall* standard to other objective tests employed by courts, assists to determine whether the seizure finding is one of fact, law, or mixed law and fact.

A three-step analysis is applied to determine if a seizure occurred. The initial step is to establish the legal principle which guides the analysis. This is the traditional pure determination of law. Little doubt exists that an appeals court would review de novo a trial court's attempt to alter the seizure test or to apply a standard inconsistent with the *Mendenhall* test. Second, the circumstances which existed during the defendant's encounter with the police are ascertained. These findings of who, what, when, where, and why are the typical findings of fact by the trial court. These findings, being devoid of any legal principle, are reviewed under the clearly erroneous standard. Finally, these facts, after being entered into the *Mendenhall* equation, are evaluated to determine whether a reasonable person would have felt free to leave under the circumstances confronting the defendant. This application of the law to the facts is a finding of ultimate fact, or mixed law and fact. The key to establishing the applicable standard of review is to determine which of these steps is crucial to a seizure finding. The character of that step indicates the characterization of the seizure finding as one of law, fact, or a mixed question of law and fact.

During a motion to suppress evidence, the trial court will usually conduct a hearing where witnesses testify, evidence is introduced, and affidavits are presented.[108] The court evaluates this evidence and finds the facts existing at the time of the encounter. However, no seizure finding occurs until the trial court applies the *Mendenhall* test to these facts. If the trial court finds the facts satisfy the test, a seizure occurred. But for the application of the law to the facts, no seizure occurred. Thus, this critical step in the seizure determination is the application of the law to the facts. This conclusion is supported by the concurring

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107. United States v. Mendenhall, 446 U.S. 554, 554 (1980). A more recent case reinforces the objective nature of the seizure test: "Mendenhall establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." California v. Hodari D., 111 S. Ct. 1547, 1551 (1991).

108. When reviewing a trial court's suppression decision, an appeals court will usually consider not only the testimony received during the pre-trial motion, but will also consider relevant testimony and evidence which arose at trial. Carroll v. United States, 267 U.S. 132, 162 (1925).

opinion of Justice Powell in *INS v. Delgado*,[109] in which he stated that determining whether a defendant was seized "turns on a difficult characterization of fact and law. . . ."[110]

The characterization of this critical step of the *Mendenhall* test determines the overall nature and characterization of the seizure finding. The application of law to fact is considered a mixed question of law and fact. Accordingly, under this analysis, the seizure determination is one of mixed law and fact and subscribes to neither of the established principles of review for pure fact or pure law. Instead, the correct standard of review depends upon a balancing of the underlying policy considerations of each standard vis-a-vis the seizure issue.

2. Policy Considerations and the Seizure Determination .—The policies supporting the application of both a clearly erroneous and de novo standard of review are present in a seizure determination.[111] However, the issue is whether the policy considerations supporting one standard outweigh those supporting the application of the alternative standard.[112] Essentially, the question resolves into one of fairness, efficiency, and judicial economy.

The Supreme Court and lower courts continually characterize the seizure determination as fact intensive.[113] In *INS v. Delgado*, the Court restated the *Mendenhall* test: "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[114] Thus, the duty of the trial court is to determine the facts by closely analyzing the citizen-police encounter and the surrounding circumstances. The objective test is then applied to these facts. This analysis is normally conducted in a pre-trial hearing on a motion to suppress.[115] The assessment of witness credibility is a task peculiarly suited for a trial court judge, who is able to observe the demeanor, reactions, and conduct of the witness.[116] The appellate court, able only to review the trial court proceedings from a written record,

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109. 466 U.S. 210, 221 (1984).

110. *Id.* at 221.

111. If both sets of policy considerations were not present, it is doubtful that a dispute would exist among the circuits over which standard to apply.

112. This is essentially the balancing test indicated by Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991).

113. "Given that the one consistent, dominant theme in each of the Supreme Court's cases applying the *Mendenhall* test is the Court's emphasis on the fact-intensive nature of the inquiry. . . ." United States v. McKines, 933 F.2d 1412, 1420 (8th Cir. 1991).

114. 466 U.S. at 215.

115. *See supra* text accompanying note 25.

116. *See* Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

is deprived of this advantage in assessing credibility.[117] Because of this handicap, a large amount of judicial time and resources is wasted when an appeals court attempts to review credibility and fact issues de novo. Further, the process of assessing facts from a cold written record is unfair to the litigants. Accordingly, judicial economy and fairness require the deferential principles underlying a clearly erroneous standard of review.[118]

Two arguments generally support the application of a de novo review, one based on fairness and the other based on judicial efficiency.[119] First is the necessity of an accurate and consistent application of the *Mendenhall* test to ensure fairness to litigants. This goal is only achieved with broad appellate court scrutiny.[120] The second argument, judicial efficiency, turns on the notion that appellate courts cannot "shirk their responsibility independently to apply important constitutional standards."[121] Because an important function of an appeals court is to determine what the law is, and because a seizure finding is inherently fact-sensitive, it is presumed that those courts are better and more efficient in applying Fourth Amendment law to relevant factual situations.[122] Further, the appeals court traditionally supervises application of correct legal principles by trial courts. These arguments indicate a broad review of the trial court seizure finding is warranted. The principles which support de novo review protect the application of a vital legal principle to factual findings.

The principles which support de novo review and those that support a clearly erroneous review are both indicated by the seizure issue. However, the salient issue to determine is which principles are most relevant to the seizure issue. The persuasiveness of these principles is weighed against the opposing values to determine which standard of review to apply.

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117. *Id.* at 574-75.

118. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), in which the Court, in discussing sanctions under FED. R. CIV. P. 11 stated: "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependant legal standard. . . ." 110 S. Ct. at 2459.

119. *See generally* United States v. McKines, 933 F.2d at 1422. Although stating only one reason exists supporting de novo review, the discussion in which the court engages is logically more clear if considered as two separate policy grounds.

120. Limited appellate review could allow moderate deviations in the application of the *Mendenhall* test to particular facts. These deviations, if not extreme, may not rise to the level of clear error and allow appellate court reversal.

121. United States v. Maragh, 894 F.2d 415, 418 (D.C. Cir. 1990) (analysis of the District of Columbia Circuit upon adopting a de novo review of a trial court's seizure determination).

122. This principle, especially as applied to constitutional rights, is discussed separately and more fully *infra* at text accompanying note 132.

3. Other Objective Tests and Relevant Characteristics.—Another analytical tool which assists in determining the standard of review to apply to a seizure finding is analogous objective tests developed to scrutinize the action and interaction of persons in our society. The standards of review applied to these other objective tests are instructive in determining the proper review of the objective seizure test.

The most prevalent objective test employed by the judicial system is that used to determine negligence.[123] This test requires a court to determine if a person alleged to be negligent acted as a reasonable person would under similar circumstances.[124] As in a seizure determination, a finding of negligence is a mixed question of law and fact.[125] The legal question is whether a duty exists, and if so, what the content of that duty is; the factual issue is whether the defendant breached that duty.[126] When the facts are applied to this legal duty, a mixed question of law and fact is answered. A finding of negligence is subject to deferential review for clear error.[127]

Even more closely related to the seizure determination is the question of when property is considered abandoned for purposes of the Fourth Amendment.[128] If property is abandoned, all privacy interests in the property are lost and the Fourth Amendment does not apply to a search or seizure thereof.[129] To determine if the property was abandoned, the trial court must ascertain the intent of the person who abandoned the property by examining the objective manifestations of that intent.[130] A

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123. The objective nature of the negligence test and its relevance to the standard of review applicable to a seizure determination was discussed by the Eighth Circuit in United States v. McKines, 933 F.2d at 1421.

124. *See* RESTATEMENT (SECOND) OF TORTS § 291 (1965):

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Id.

125. *See* McAllister v. United States, 348 U.S. 19 (1954).

126. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 35 (5th ed. 1984).

127. *McAllister*, 348 U.S. at 20.

128. The objective nature of the abandonment test was discussed by Judge Mikva in dissenting from the District of Columbia Circuit's decision to adopt a de novo standard of review for the seizure issue. United States v. Maragh, 894 F.2d 415, 423 (D.C. Cir. 1990) (Mikva, J., dissenting).

129. *See* Abel v. United States, 362 U.S. 217 (1960). *See also* Katz v. United States, 389 U.S. 347 (1967) (scope of Fourth Amendment protection extends only where legitimate expectation of privacy by individual exists).

130. *Abel*, 362 U.S. at 240-41.

trial court's finding on the abandoned property issue is reviewed for clear error by the appeals court.[131]

Other objective tests applied by trial courts, in both criminal and civil areas, are reviewed deferentially on appeal.[132] These analogies are illustrative, but not dispositive. These questions of mixed law and fact are afforded certain standards of review based upon an analysis of the competing policy considerations. The fact that they are objective tests does not logically require the conclusion that all objective tests be reviewed deferentially. Rather, policy considerations must be analyzed and applied to the specific legal issue to determine whether the "district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[133] Regardless, the standards applied to these legal issues by courts are illustrative of the underlying values the courts find present in objective rules and assist in analyzing the standard applicable to the *Mendenhall* rule.

IV. Constitutional Fact

A. Doctrine

In *Bose Corp. v. Consumers Union of United States, Inc.*,[134] the Supreme Court defined and applied the doctrine of constitutional fact as related to First Amendment rights. In *Bose Corp.*, the Court found that a determination of "actual malice" in a defamation action was indeed a question of fact but that an appellate court nonetheless had a duty to review the trial court's determination de novo.[135] Because such a finding of fact depends upon a sound construction of constitutional

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131. United States v. Kendall, 655 F.2d 199, 203 (9th Cir. 1981), *cert. denied sub nom.*, Akers v. United States, 455 U.S. 941 (1982).

132. Another area in which the courts have adopted an objective test is the determination of whether a criminal defendant's confession was voluntary or the product of coercion under the Due Process Clause of the Fifth or Fourteenth Amendment. *See* Culombe v. Connecticut, 367 U.S. 568 (1961). However, most appellate courts review the trial court's determination on this issue de novo. *See* Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988); Miller v. Fenton 796 F.2d 598, 601 (3d Cir. 1986). For a criticism of standards that advocate a clearly erroneous review for the voluntariness of confessions, *see generally* Note, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. Chi. L. Rev. 141 (1990).

133. Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

134. 466 U.S. 485 (1984).

135. *Id.* at 510-11 ("The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact.").

principles, no deference is given to the trial court's factual determinations.[136] If this doctrine extends beyond the First Amendment and affects the application of other Bill of Rights guarantees, the standard of review for a Fourth Amendment seizure determination may also be altered.

1. Constitutional Duty.—The Supreme Court has indicated that appeals courts have a constitutional duty to review de novo a lower court factual determination if that fact is appropriately a "constitutional fact".[137] In *Bose Corp.*, the Court stated:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.[138]

Once a factual determination is found to invoke the constitutional fact doctrine, an appellate court loses discretion to defer to the trial court. However, this duty only attaches if a constitutional fact is being adjudicated. Thus, the initial query is whether the relevant fact determinations are of a constitutional nature sufficient to invoke application of the doctrine.

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136. *Id.* at 509-10. *See also* Time, Inc. v. Pape, 401 U.S. 279 (1971). In *Time*, the Court stated that constitutional inquiries "are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.'" *Id.* at 284 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

137. *Bose Corp.*, 466 U.S. at 501. In Roth v. United States, 354 U.S. 476 (1957), the Court discussed a lower court finding that a particular matter was obscene. Justice Harlan, for the majority, stated:

> Since [obscenity] standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves. *I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts . . . has labeled the questioned matter as 'obscene,'* for . . . the question . . . involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."

Id. at 497-98 (first emphasis added).

See also Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C. L. Rev. 311, 323-24 (1969) (supporting the existence of a constitutional duty to review de novo constitutional facts). *But see* Monaghan, *supra* note 78, at 264-71 (stating that the question of which standard of review to apply to a constitutional fact issue is a matter of judicial discretion).

138. *Bose Corp.*, 466 U.S. at 510-11.

2. Constitutional Fact Defined.—The Supreme Court has not articulated an extremely clear definition of a constitutional fact. Instead, the Court reviews de novo the factual findings in "cases in which there is a claim of denial of rights under the Federal Constitution."[139] Under this analysis, the nature of the substantive law or principle in question, not the facts, determines whether the doctrine applies.[140] In *Bose Corp.*, the Court was again confronted with defining a test to determine when an appellate court must engage in de novo review of lower court factual findings. The Court discussed the application of the doctrine to First Amendment issues and found "[w]hen the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance."[141] Broadly read, this holding requires de novo review of any action based upon an interpretation of a constitutional principle.

Thus, a constitutional fact is any fact which is a predicate finding to the application of a constitutional principle. Under the rule of *Bose Corp.* a trial court's role as fact-finder is jeopardized because of the multiple constitutional issues to which the doctrine would apply. This broad application is not, however, evident in the Court's review of every constitutional right. Instead, the Court has been selective in applying the doctrine to only particular constitutional principles.

3. Scope of Application.—The *Bose Corp.* holding concerned First Amendment rights. However, the Court has applied a de novo review to trial court ultimate factual determinations when other constitutional rights are in issue.[142] Among the rights afforded broad review are the

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139. *Id.* at 509 (quoting Time, Inc. v. Pape, 401 U.S. 279, 284 (1971)).

140. The substantive law underlying a case often determines whether a particular finding is one of fact or one of law. *See Bose Corp.*, 466 U.S. at 501 n.17 (indicating that at some point a particular finding becomes one of law rather than fact and "[w]here that line is drawn varies according to the nature of the substantive law at issue."). It seems quite logical that whether a factual determination requires application of the constitutional fact doctrine depends upon a similar characture of the underlying legal principles.

141. *Bose Corp.*, 466 U.S. at 503.

142. In Baumgartner v. United States, 322 U.S. 665 (1944), the Court gave a broad indication of the type of constitutional issue which may merit a non-deferential review of the facts:

> Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.

Id. at 671.

voluntariness of a confession under the Fifth Amendment[143] and equal protection clause claims.[144] Thus, a trial court's determination of a varied group of constitutional rights receives no deference on appellate review. Though many rights require de novo appellate review, not every principle of the Constitution requires such exhaustive appellate scrutiny. Instead, the courts selectively determine which rights require the close appellate supervision afforded by the constitutional fact doctrine.[145] Factual findings related to constitutional rights which do not require de novo review include a magistrate's finding that probable cause to issue a search warrant exists,[146] the decision that an object is obscene,[147] and, in some instances, interpretations of the Fourteenth Amendment's Equal Protection Clause.[148] These examples indicate that courts classify constitutional rights as constitutional facts sometimes, but not others.[149] Thus, before this doctrine can be applied to a Fourth Amendment seizure determination, a rule of analysis must be distilled that determines when an appellate court may undertake a full review of the trial court's actions.

4. Policy Basis.—Crucial to applying the constitutional fact doctrine is an understanding of the policies supporting its use. Although the doctrine is greatly criticized,[150] certain judicial policies are favorably

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143. *See* Payne v. Arkansas, 356 U.S. 560, 562 (1958) ("[W]here the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious.").

144. *See* Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954) (These cases "opened up vast areas of substantive constitutional fact litigation."). Louis, *supra* note 79, at 1031 n.287. *But see* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (clearly erroneous review applied to equal protection challenge of public school segregation).

145. Although not necessarily a constitutional right, the Supreme Court has determined that causes of action which challenge activity under the commerce clause, U.S. CONST. art. I, § 8, receive a limited review for clear error. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983).

146. *See* Illinois v. Gates, 462 U.S. 213 (1983) (reviewing court must uphold magistrate's probable cause determination if "substantial basis" exists for that conclusion).

147. *See* Miller v. California, 413 U.S. 15, 24-25 (1973) (the determination that an object is obscene is reviewed deferentially on appeal).

148. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534-37 (1979) (application of equal protection clause to challenge segregation of public schools reviewed for clear error).

149. It is also apparent that a rational rule indicating when the constitutional fact doctrine applies to a particular right has yet to be announced. *See* Monaghan, *supra* note 78, at 264-71.

150. *See, e.g.,* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 520 (1984) (Rehnquist, J., dissenting) ("I cannot join the majority's sanctioning of factual second-guessing by appellate courts."). *See generally* Monaghan, *supra* note 78, at 264-76.

served by its application. Among those policies served are the consistent application of constitutional law,[151] the protection of vital constitutional values,[152] and the special duty of the appellate courts to supervise a trial court's application of constitutional principles to the facts.[153] The factors weighing against the application of the constitutional fact doctrine are also numerous and persuasive. These include the necessity of maintaining a proper balance of judicial power between the trial and appellate courts, overburdening the appellate courts by requiring frequent de novo reviews, and the trial court's expertise in making findings of facts. If these values are collected, applied, and measured against the particular constitutional right at issue, a framework for analyzing and determining whether to apply the doctrine emerges.

5. When Applied.—A leading scholar argues that the constitutional fact doctrine should apply, and a de novo review be conducted, in two situations.[154] First, a trial court's factual findings should not receive deference if possible judicial systemic bias threatens the litigant.[155] Second, an appeals court may review a trial court's factual findings de novo if there exists a "perceived need for case-by-case development of constitutional norms."[156] The second application of the doctrine is supported by the Supreme Court's opinion in *Bose Corp.*[157] Professor Monaghan's test simplifies the otherwise complex doctrine of constitutional fact. However, such simplicity disregards the multiple policy factors which should be considered whenever the balance of power between trial courts and appeals courts is subject to such a monumental shift as occurs when the constitutional fact doctrine is applied to an issue. While the test is useful in the evaluation, it is not dispositive in determining when to

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151. *See* Roth v. United States, 354 U.S. 476, 497-98 (1957) ("Since those [constitutional] standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which the appellate courts must make for themselves.").

152. *Bose Corp.*, 466 U.S. at 502. ("[T]he constitutional values protected by the [constitutional fact doctrine] make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.").

153. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) ("This court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.").

154. Monaghan, *supra* note 78, at 271.

155. *Id.* at 272.

156. *Id.* at 273. This rule is most closely associated with the values of the constitutional fact doctrine articulated above. *See supra* text accompanying note 133. However, it should be noted that, in general, Professor Monaghan disfavors the constitutional fact doctrine and believes that both of the situations mentioned are protected by traditional standard of review doctrine. *See* Monaghan, *supra* note 78, at 264-71.

157. 466 U.S. 485, 508-11 (1984).

apply the doctrine. The Monaghan test gives sufficient weight to one policy consideration that supports the application of the doctrine, but fails to consider the competing considerations.

As mentioned above, the Supreme Court has not stated a rule which dictates when the doctrine is applied. The absence of such a clear rule might indicate that the Court does not desire to establish a bright line to guide the lower courts. Instead, the prudential concerns relevant to an application of a deferential standard of review to factual findings should be evaluated. This analysis seems more consistent with precedent.[158]

Thus, if a constitutional rule is in question, and that rule requires close appellate scrutiny in its development and application, a presumption in favor of applying the constitutional fact doctrine is created. However, this finding does not end the analysis. Each other policy rationale, both supporting and denying application of the constitutional fact doctrine, should be analyzed and weighed. If the policies which compel an appeals court to retain power and control over the constitutional issue outweigh the systemic concerns of the judiciary, the doctrine is applied.[159] Accordingly, trial court factual[160] determinations which directly implicate, invoke, or require the application of the constitutional principle receive no deference when reviewed by an appellate court.[161]

B. Application to "Seizure" Determinations

The similarity between the policies which determine the application of the constitutional fact doctrine and those which divide issues of law from issue of fact are not necessarily coincidental or surprising.[162] Also

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158. Arguably, *Bose Corp.* was an example of the Court weighing the requirements of FED. R. CIV. P. 52(a) and its clearly erroneous standard of review with the grave constitutional ramifications of a trial court's factual findings in defamation actions. *See Bose Corp.*, 466 U.S. 500-01. In *Bose Corp.*, the Court stated:

> One might therefore assume that the cases in which the appellate courts have a duty to exercise independent review are merely those in which the presumption that the trial court's ruling is correct is particularly weak. *The difference between the two rules, however, is much more than a mere matter of degree.*

Id. (emphasis added).

159. Here, "systemic concerns" refers to those considerations discussed supra which militate against applying the doctrine of constitutional fact. Among them, the concepts of judicial efficiency, economy, and fairness to the parties are crucial.

160. Of course the legal determinations, i.e. what the actual constitutional rule is, certainly receives no deference due to the long established role of the appeals court to review de novo the legal findings of the trial court.

161. Thus, if the constitutional fact doctrine is applied to an issue, all facets of the determination receive a de novo review. The legal determinations, the factual findings, and the application of the facts to the law would all fall within the realm of a full appellate review.

162. *See supra* text accompanying note 93.

unsurprising is that those policies which favor application of the doctrine also favor treating a mixed question of law and fact as a question of law to be reviewed de novo by an appeals court.[163] As a result, the balancing which determines if the doctrine of constitutional fact applies to a seizure determination is similar to the analysis that determines the standard of review applied to a mixed question of law and fact.[164]

1. Doctrinal Inefficiency and Seizure Findings.—The most compelling factor supporting application of the constitutional fact doctrine is the consistency and fairness derived from continuing appellate scrutiny, resulting in consistent application of a certain constitutional norm.[165] Weighed against this value is the cost to the judicial system, in terms of efficiency and economy, of shifting power away from the trial courts in favor of the appellate level. Further, any resulting unfairness to the litigants by having an appeals court determine the facts from the record rather than live proceedings militates against the application of the doctrine.[166]

The seizure determination has consistently been labelled a fact intensive inquiry by the courts.[167] The absence or presence of a single fact often determines if a Fourth Amendment seizure occurred.[168] Further, at this late date in the development of the role of the trial court, it is presumed that these front-line tribunals are more capable of accurately determining the facts than appellate courts. Any shifting of fact-finding duties away from the trial court, especially if the legal issue is fact sensitive, creates inefficiency in the administration of the judicial system. Such a power shift disturbs the traditional role of the trial courts vis-a-vis appellate courts and thrusts the duty of fact-finding on the level of the judiciary most inappropriately designed to determine facts.

2. Prejudice, Unfairness, and Constitutional Facts.—Another critical consideration is the close relationship between a finding of guilt or

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163. This statement is not exactly correct. The weighing process does not decide that a mixed question of law and fact is to be treated as one or the other in the application of a standard of review. As stated supra, mixed questions are a category among themselves and require the application of a distinct, separate analysis to determine the applicable standard of review. *See supra* text accompanying note 92.

164. *See supra* text accompanying note 92.

165. Inherent in this statement are the considerations of consistent application of constitutional law, protection of vital constitutional values, and the special duty of the appellate courts to supervise lower court application of constitutional principles.

166. *See supra* text accompanying notes 136-39.

167. *See, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 573 (1988) ("[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.").

168. *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547 (1991).

innocence of a criminal defendant and the admissibility of evidence. The admissibility of evidence often depends upon the legality of the encounter between the defendant and law enforcement. Under such circumstances, the Fourth Amendment may determine, in practical terms, the guilt or innocence of the defendant. Assuming the correctness of this premise, that trial courts are the most capable fact-finders in the judicial system, and, given that the seizure determination is fact intensive, fairness requires that the duty of determining the facts, and thus "seizures," remain in the trial court. If trial courts are more capable of accurately determining the facts than appellate courts, it necessarily follows that the probability an appellate court will make incorrect findings is higher than the possibility of error in the trial court. Thus, with de novo review both parties to a criminal action are forced to rely on the level of the judicial system most likely to err in factual analysis. These facts determine, probably, the issue which decides the guilt or innocence of the criminal defendant. Especially in criminal actions, fairness to the defendant requires that the level of the judicial system most likely to correctly determine an issue be given that responsibility.

3. Counterweight: Consistent Constitutional Judications.—The competing value of consistent and correct application of constitutional principles must be weighed against these considerations of efficiency, economy, and fairness. A citizen is seized by the police if a reasonable person, in view of all the circumstances, would have believed he was not free to leave. If the seizure occurred, and probable cause to "seize" the person was absent, the Fourth Amendment was violated. Whether a seizure occurred and the legality of the seizure are the constitutional principles applied in the seizure issue. It may be assumed that de novo review of these principles increases the likelihood of their consistent and correct application.[169] However, the true issue is whether the marginal benefits derived from this increase in consistency outweigh the costs to both the litigants and judicial system in terms of lost economy, efficiency, and fairness resulting from a de novo review of factual findings.

The objective test used to determine whether a seizure occurred has existed, in essentially identical form, since *Mendenhall* was decided in 1980. In the twelve years since this decision, numerous trial courts have applied this test to determine if a citizen's encounter with law enforcement officers resulted in a Fourth Amendment seizure. At this point, it seems unlikely that the marginal benefits of continued de novo review by the

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169. *But see* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2460 (1990) (stating that "some variation in the application of a standard based on reasonableness is inevitable. 'Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'").

appeals courts outweigh the costs incurred by the judicial system and the litigants.[170] Also, considering the increasing caseload of both the appellate and trial courts, every opportunity should be taken to more efficiently allocate work between the levels of the judicial system.

4. A Balancing Act.—Efficiency alone does not allow the courts to compromise the application of vital constitutional rights. However, these rights seem to be adequately protected by the traditional allocation of labor between trial and appellate courts resulting from the application of traditional standards of review. Under this approach, an appeals court still reviews de novo the legal determinations of the trial court to ensure the correct principles of law are applied. More importantly, the appeals court retains the ability to review the seizure determination for clear error. The risk of a marginal loss of consistency in the application of constitutional principles, which might result from limiting review of the seizure issue to clear error, does not outweigh the prudential concerns of the judiciary or the risk of prejudice to the litigants if a de novo review is allowed.

V. Conclusion

A. Policy Considerations Dispositive

This discussion stressed the relative unimportance of attempting to conclusory label the seizure issue to assist in determining what standard of review should be applied upon appeal. Whether the issue is called a factual finding, a legal determination, or a constitutional fact, the only principled analysis in which the courts may engage is one that carefully considers the policy values sought to be protected under the Fourth Amendment. The result of this analysis indicates that the litigants, the judicial system, and the Fourth Amendment are best served by limiting the scope of appellate review of a trial court's seizure determination to one of clear error.

B. An Unnecessary Distinction

Although the law-fact distinction and the doctrine of constitutional fact were discussed separately, it is arguable whether a separate and distinct analysis is advised or whether the doctrine of constitutional fact is merely a sub-category, or a consideration, when determining the

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170. This may be evidenced by a majority of the courts of appeals adopting a clearly erroneous standard of review for the seizure issue. Though counting the circuits on each side of a question never determines the wisest judicial policy, the numbers are indicative of a trend in jurisprudential thought.

standard of review to apply to a mixed question of law and fact. As noted, those same prudential concerns which indicate that a mixed question should receive de novo review also support the application of the doctrine and accordingly the application of the de novo review. The better analysis, possibly, is to consider that a Constitutional principle is being determined as a factor which may indicate that a mixed question should receive de novo review. Considering the voluminous criticism of the constitutional fact doctrine which exists, along with the complexities involved in separately analyzing a given issue under this doctrine, it may be most efficient and wise for the courts to collapse the doctrine into the mixed question standard of review framework. If a mixed question requires the adjudication of a vital constitutional principle which the appeals courts are unwilling to relinquish to the trial courts, the scales would be tilted greatly towards a de novo review of the mixed question.

C. Fairness, Efficiency, and Economy

Regardless of how the standard of review is discerned, the most important concern is that the fundamental considerations of fairness, efficiency, and economy are the underlying values which dictate the result. When a trial court's determination that a defendant was, or was not "seized" in terms of the Fourth Amendment is reviewed on appeal, these concerns compel a review limited to clear error.