COMMENTS

THE IMPACT OF *ORNELAS V. UNITED STATES* ON THE APPELLATE STANDARD OF REVIEW FOR SEIZURE UNDER THE FOURTH AMENDMENT

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INTRODUCTION

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[1] This constitutional protection "governs all seizures of the person"[2] by a law enforcement officer and "requires that the seizure be reasonable."[3]

However, every encounter between law enforcement officers and citizens is not necessarily a seizure protected by the Fourth Amendment.[4] Under the Fourth Amendment, a seizure only occurs when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[5] Seizure does not occur "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business.'"[6] If a police/citizen encounter does not rise to the level of a seizure, the protections of the Fourth Amendment are not triggered,[7] and the police do not need objective justification for interacting with the citizen in this fashion.[8]

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[1] U.S. CONST. amend. IV.

[2] United States v. Mendenhall, 446 U.S. 544, 551 (1980) (plurality opinion).

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

[4] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (stating that some encounters between policemen and citizens do not involve a seizure).

[5] *Id.*

[6] Florida v. Bostick, 502 U.S. 429, 434 (1991) (citing California v. Hodari D., 499 U.S. 621, 628 (1991)).

[7] *See id.* (asserting that Fourth Amendment issues do not arise unless the police/citizen encounter "loses its consensual nature" and becomes a seizure).

[8] *See* United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (concluding that objective justification is not needed to justify contact between the police and a citizen so long as the individual citizen is free to walk away).

Although the determination of seizure plays an important role in Fourth Amendment jurisprudence, there is a circuit split about whether a trial court or appellate court bears sole responsibility for deciding this issue. The Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits all hold that trial courts are responsible for making this decision, and will only reverse when the decision is clearly erroneous. On the other hand, the First, Second, Third, Sixth, Ninth, Tenth, and D.C. Circuits all hold that appellate courts bear sole responsibility for deciding this issue and will review the trial court's decision de novo.

The source of this disagreement is that the determination of seizure is a mixed question of "fact and law"[9] and there is no consistent appellate standard of review for mixed questions of fact and law.[10] Some mixed questions are treated as matters of law that are reviewed de novo,[11] whereas others are treated as matters of fact that are reviewed for clear error.[12] The decision about which standard of appellate review applies usually depends 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."[13]

In this Comment, I will argue that the appropriate appellate standard of review for seizure should be de novo, and that appellate courts should not defer to a trial court's decision about whether a seizure occurred. My argument is based on the Supreme Court's reasoning in *Ornelas v. United States*, which offered three justifications for reviewing probable cause and reasonable suspicion determinations de novo.[14] All three of these reasons are equally applicable to determining whether a seizure occurred, so the appellate standard of review for seizure should also be de novo.[15]

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[9] INS v. Delgado, 466 U.S. 210, 221 (1984) (Powell, J., concurring).

[10] *See generally* Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) (discussing different appellate standards of review for mixed questions of law and fact).

[11] *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 136–37 (1999) (concluding that determination of whether the admissibility of hearsay statement violates the Confrontation Clause should be reviewed de novo).

[12] *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 563 (1988) (concluding that the determination of fees in Equal Access to Justice Act cases should be reviewed for clear error ("abuse of discretion")).

[13] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[14] 517 U.S. 690, 691, 697–700 (1996) (holding that appellate courts should review probable cause and reasonable suspicion determinations de novo).

[15] Some circuit courts have cited *Ornelas* as authority for reviewing seizure determinations de novo. *See, e.g.*, United States v. Williams, 413 F.3d 347, 351 (3d Cir. 2005). But the use of *Ornelas* as authority for de novo appellate review of seizure is controversial and this practice has generated a circuit split. *Compare* United States v. Mask, 330 F.3d 330, 334–35 (5th Cir. 2003) (arguing that *Ornelas* does not overrule prior circuit precedent that appellate review of seizure is for clear error), *with* United States v. Smith, 423 F.3d 25, 31 n.4 (1st Cir. 2005) (discussing the relevance of *Ornelas* to appellate review of seizure and relying on it to justify de novo review). Since *Ornelas* deals with probable cause and reasonable suspicion, and not seizure, it is doubtful

The first part of this Comment analyzes the various factors considered when determining the appropriate appellate standard of review. Section A examines the difference between the clearly erroneous and de novo standards of appellate review. Section B discusses the role of the fact/law distinction in determining whether an appellate court will use the clearly erroneous or de novo standard of review. Section C explores the difficulties presented by issues that are mixed questions of fact and law, and the absence of any unitary standard of appellate review for mixed questions of fact and law.

The second part of this Comment explores the concept of seizure under the Fourth Amendment and the circuit split over appellate review. Section A examines the two-part test employed by trial courts in determining whether a seizure has occurred, and the characterization of seizure as a mixed question of fact and law. Section B discusses the reasons offered by some circuit courts for applying the clearly erroneous standard in appellate review of seizure. Section C discusses the reasons offered by other circuit courts in support of de novo appellate review of seizure. Both sets of arguments are fairly plausible, and when considered in isolation, there appears to be little incentive to favor one over the other.

The third part of this Comment resolves this quandary by focusing on *Ornelas v. United States*, and the similarities between the concepts of seizure, probable cause, and reasonable suspicion. Section A examines the holding of *Ornelas*, and the three reasons offered by the Supreme Court for applying de novo appellate review to determinations of probable cause and reasonable suspicion. Although it is uncertain whether *Ornelas* is binding precedential authority with respect to seizure under the Fourth Amendment, Section B argues that similar reasons exist for using de novo appellate review for seizure.

I. DETERMINING THE APPROPRIATE APPELLATE STANDARD OF REVIEW

A. *Standards of Review*

If a criminal case reaches an appellate court and involves a dispute over whether an individual was seized for purposes of the Fourth Amendment, the first question raised is: What standard of review should be used in assessing the lower court's ruling?[16] The term

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that it serves as direct authority for using de novo appellate review for determinations of seizure. In this Comment, however, I shall not try to resolve the issue of whether *Ornelas* serves as direct authority for reviewing seizure de novo, but simply argue that the rationale employed by the Supreme Court in *Ornelas* is equally applicable to seizure.

[16] *See* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(c), at 436 (4th ed. 2004).

"standard of review" refers to the "level of deference that the appeals court will give to the findings"[17] and conclusions of the lower court.

Broadly speaking, there are four different standards of review employed in criminal appeals: clearly erroneous, substantial evidence, de novo, and abuse of discretion.[18] For this Comment, I will only focus on the standards of review relevant to the circuit split on Fourth Amendment seizure: clear error and de novo.

The clearly erroneous standard is well established as the appellate standard of review applied to the trial court's findings of fact in Fourth Amendment suppression motions.[19] Findings of fact are those that "generally respond to inquiries about who, when, what and where."[20] These findings are generally regarded as entailing the empirical—such as things, events, actions, or conditions happening, existing, or taking place—as well as the subjective—such as state of mind.[21]

A finding of fact 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."[22] If the evidence supports more than one conclusion, a choice between two permissible views is not clear error,[23] and an appellate court may not reject the trial court's findings simply because it might have "decided the case differently."[24]

The de novo standard applies to appellate review of the trial court's determinations of law.[25] Law consists of "those rules and standards of general application by which the state regulates human affairs."[26] These rules and standards should be "generally and uniformly applicable to all persons of like qualities and status and in like

[17] Martha S. Davis & Stevan Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 464 (1986).

[18] *See id.* at 466 (identifying the four standards of criminal appellate review).

[19] 6 LAFAVE, *supra* note 16, at 438.

[20] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

[21] Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 236 (1991) (discussing definitions of fact offered by academics).

[22] Pullman-Standard v. Swint, 456 U.S. 273, 285 n.14 (1982) (internal quotations omitted); *see also* Campbell v. United States, 373 U.S. 487, 493 (1963) (applying "clearly erroneous" standard of review to non-guilt findings of fact in criminal cases).

[23] *See* Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

[24] *Id.* at 573.

[25] *See* 6 LAFAVE, *supra* note 16, at 440 ("The second category concerns appellate review of the trial court's determinations of law . . . ."); *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947–49 (1995) (concluding that de novo standard of appellate review is appropriate for trial court's determination of law); Pierce v. Underwood, 487 U.S. 552, 558 (1988) (stating that questions of law are reviewable de novo).

[26] Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 901 (1943).

circumstances,"[27] and "'capable of being predicated in advance and which [being] so predicated, await proof of the facts necessary for their application.'"[28] Under this standard, the trial court's understanding of the law is not entitled to deference, and the appellate court considers the issue as if it had never been addressed by the trial court.[29]

The primary effect of these two different standards of review is to allocate "adjudicative decisional power and responsibility"[30] between the trial courts and the appellate courts. If the appellate court employs a deferential standard of appellate review, such as clear error, the trial court has primary decision-making power and will only be reversed if clearly in error. But if the issue is reviewed de novo, the appellate court bears primary decision-making power over that issue.

Accordingly, a decision about the appropriate appellate standard has an important effect in deciding which court will ultimately decide an issue. Unfortunately, there is no decisive rule for choosing the appropriate standard of review,[31] and there is substantial disagreement among the circuit courts over the appropriate standard of review for a variety of issues.[32] But the major factor that affects the appellate standard of review is the fact/law distinction.[33]

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[27] *Id.* at 904.

[28] Hofer, *supra* note 21, at 236–37 (quoting Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924)).

[29] *See, e.g.*, Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991) (stating that appellate courts should independently review trial courts' determinations of state law); *see also* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588 (2d ed. 1995) (discussing appellate review of conclusions of law); 6 LAFAVE, *supra* note 16, at 440 (stating that "determination by the lower court is not entitled to deference").

[30] 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, 997 (1986).

[31] Michael E. O'Neill, Note, *A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations*, 99 YALE L.J. 885, 895 (1990).

[32] *See, e.g.*, Lee, *supra* note 10 (discussing circuit splits over standard of reviews for mixed questions of law and fact).

[33] *See* Brent E. Kidwell, Note, *A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed on Appeal?*, 26 IND. L. REV. 117, 130 (1992) ("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."); Monaghan, *supra* note 20, at 234 ("[T]he categories of law and fact have traditionally served an important regulatory function in distributing authority among various decisionmakers in the legal system.").

B. The Fact/Law Distinction

The fact/law distinction is fundamental in the American legal system,[34] and can be traced to the Constitution.[35] Despite this pedigree, the distinction continues to puzzle the courts, and the Supreme Court often refers to the distinction as "elusive"[36] and "slippery,"[37] and as having a "vexing nature."[38] Furthermore, the Supreme Court has recognized that its decisions on the issue are not "entirely clear,"[39] and that there is no rule or principle that will "unerringly distinguish a factual finding from a legal conclusion."[40] This difficulty has led some commentators to reject the fact/law distinction and claim there is "no essential difference"[41] between the two categories and that these categories are "equally expansible and collapsible terms."[42]

Despite this difficulty, the basic fact/law distinction is reasonably clear,[43] and it is only problematic at the edges where the "concepts of fact and law run into one another to such a degree that it may be difficult or impossible to pull apart the factual and legal components."[44] These "mixed question[s] of law and fact"[45] are the most difficult with respect to the appropriate appellate standard of review and will be examined below.

More importantly, the fact/law distinction "does quite well in predicting how appellate courts will review trial level determinations of 'pure' law and 'pure' or historical fact."[46] If the issue being reviewed is classified as a finding of fact, the appellate court will review for "clear error."[47] If the trial court's judgment is classified as a conclusion, or question, of law, then appellate review is "de novo."[48]

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[34] *See generally* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003) (discussing the law-fact distinction and the different roles it plays in the legal system).

[35] *See* U.S. CONST. art. III, § 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . . ."); *id.* at amend. VII ("[N]o fact tried by a jury shall be otherwise reexamined . . . .").

[36] Miller v. Fenton, 474 U.S. 104, 113 (1985).

[37] Thompson v. Keohane, 516 U.S. 99, 111 (1995).

[38] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[39] Williams v. Taylor, 529 U.S. 362, 385 (2000) (plurality opinion).

[40] *Pullman-Standard*, 456 U.S. at 288.

[41] Allen & Pardo, *supra* note 34, at 1770.

[42] Monaghan, *supra* note 20, at 233 n.24.

[43] *See supra* Part B.

[44] 6 LAFAVE, *supra* note 16, at 442.

[45] *Pullman-Standard*, 456 U.S. at 288.

[46] Louis, *supra* note 30, at 1000.

[47] Pierce v. Underwood, 487 U.S. 552, 558 (1988); *see also* George A. Somerville, *Standards of Appellate Review*, *in* APPELLATE PRACTICE MANUAL 16, 23 (Priscilla Anne Schwab ed., 1992) (stating that most federal appellate courts apply the clearly erroneous standard when reviewing district courts' factual findings).

[48] *Pierce*, 487 U.S. at 558.

Deference to the trial court's findings of fact serves two primary policy objectives. First, it minimizes the risk of judicial error by assigning decision-making responsibility to the court that is best-suited to make the decision.

> [Deference to the trial court's findings of fact] minimizes the risk of judicial error by assigning primary responsibility for resolving factual disputes to the court in the "superior position" to evaluate and weigh the evidence—the trial court. . . . [It] emphasizes that the trial judge's opportunity to judge the accuracy of witnesses' recollections and make credibility determinations in cases in which live testimony is presented gives him a significant advantage over appellate judges in evaluating and weighing the evidence.[49]

Second, it conserves judicial resources because appellate courts are not required to engage in full-scale independent reviews of all aspects of the trial courts' judgments.

> Because under the clearly erroneous test, the reviewing court will affirm the trial court's determinations unless it "is left with the definite and firm conviction that a mistake has been committed," it is relieved of the burden of a full-scale independent review and evaluation of the evidence. Consequently, valuable appellate resources are conserved for those issues that appellate courts in turn are best situated to decide.[50]

Furthermore, these same policy objectives are satisfied by having appellate courts review trial courts' determinations of law de novo. First, the risk of judicial error is minimized because appellate courts are better suited than trial courts for deciding issues of law.

> Structurally, appellate courts have several advantages over trial courts in deciding questions of law. First, appellate judges are freer to concentrate on legal questions because they are not encumbered, as are trial judges, by the vital, but time-consuming, process of hearing evidence. Second, the judgment of at least three members of an appellate panel is brought to bear on every case. It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.[51]

Second, judicial resources are conserved because an appellate court's decision has precedential value and ensures the correct application of the law in future cases.

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[49] United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (internal citations omitted); *see also* 6 LAFAVE, *supra* note 16, at 440 (identifying *United States v. McConney* as the "leading case" on policy rationale for deferential appellate review).

[50] *McConney*, 728 F.2d at 1201.

[51] *Id.*

> De novo review of questions of law, however, is dictated by still another concern. Under the doctrine of stare decisis, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants. Rulings on factual issues, on the other hand, are generally of concern only to the immediate litigants. From the standpoint of sound judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law.[52]

Together, these policy considerations provide logical and complementary reasons for deferential clear error appellate review of facts, and non-deferential de novo appellate review of law. Trial courts are experts at finding out facts; therefore it makes sense to conserve appellate resources and decrease the risk of error by having appellate courts defer to the trial court's determinations in these areas.[53] Appellate courts, on the other hand, are experts in identifying and clarifying the law; therefore non-deferential review of a trial court's pronouncements of the law decreases the risk of error.[54]

Although the classification as fact or law determines whether an issue will be reviewed for clear error or de novo, not all issues can be classified so easily. One group of issues for which the appropriate standard of appellate review is particularly problematic is the group of mixed questions of fact and law. Since the determination of whether a seizure occurred is a mixed question of fact and law,[55] it is important to analyze the appropriate appellate standard of review for these types of questions. This standard will be discussed in the next section.

C. Problems of Mixed Questions of Fact and Law

Mixed questions of law and fact are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[56] The most widely recognized example of a mixed question is negligence, where the judge (or jury) is "not being asked to determine what happened or what the defendant did. It is being asked to determine whether the defendant's conduct was reasonable or fell below the invisible line of due care."[57] Another

[52] *Id.*

[53] *See* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 103–07 (2005) (analyzing standards of review in terms of judicial efficiency and institutional expertise).

[54] *Id.* at 105–06.

[55] 6 LAFAVE, *supra* note 16, at 446–48 (identifying seizure as a mixed question of fact and law).

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

[57] Warner, *supra* note 53, at 119.

example is probable cause, where the trial court is asked to determine whether the "known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[58]

As a general matter, there is substantial disagreement about whether mixed questions of fact and law are to be reviewed for clear error or de novo.[59] The problem is that there is no single rule governing appellate review of all mixed questions;[60] instead, courts look at each mixed question individually to determine the appropriate standard of appellate review.[61]

When deciding whether a particular mixed question warrants de novo or deferential review, the Supreme Court advocates looking at which institution is more competent and better suited to deciding the issue:

> We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as 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."[62]

Deferential review of questions of mixed law and fact is "warranted 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."[63]

Trial courts are better positioned to determine the facts involved in a particular situation because they have the advantage of hearing the evidence, observing the demeanor of witnesses, and judging credibility.[64] Therefore, when a mixed question of fact and law involves an "inquiry that is 'essentially factual,' . . . the concerns of judicial administration will favor the district court, and [then] the district

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[58] Ornelas v. United States, 517 U.S. 690, 696 (1996).

[59] *See generally* Warner, *supra* note 53, at 107–12 (discussing the circuit split over the appropriate appellate standard of review for mixed questions); Lee, *supra* note 10, *passim* (analyzing the arguments behind the circuit split over the appellate standard of review for mixed questions).

[60] *See* 6 LAFAVE, *supra* note 16, at 443 ("[T]here is no single rule governing all mixed questions of law and fact . . . ."); Warner, *supra* note 53, at 112 (concluding that the current "policy approach" towards mixed questions "works for some kinds of mixed questions but not others").

[61] *Compare* Pierce v. Underwood, 487 U.S. 552, 559–62 (1988) (holding that appellate review of mixed question concerning attorney's fees should be deferential), *with Ornelas*, 517 U.S. at 698 (holding that appellate review of probable cause is de novo).

[62] *Pierce*, 487 U.S. at 559–60 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

[63] Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991).

[64] *See* DeMarco v. United States, 415 U.S. 449, 450 n.* (1974) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts . . . ."); *see also* Heidi M. Westby, Comment, *Fourth Amendment Seizure: The Proper Standard for Appellate Review*, 18 WM. MITCHELL L. REV. 829, 836–37 (1992) (clarifying the functional role of trial and appellate courts).

court's determination *should be classified as one of fact* reviewable under the clearly erroneous standard."[65] In *Cooter & Gell v. Hartmax Corp.*, for example, the Court held the clear error standard is appropriate for reviewing attorney sanctions under Rule 11 of the Federal Rules of Civil Procedure because "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard."[66]

Appellate courts, on the other hand, are more competent at identifying and clarifying the law that has been used by the trial court in order to ensure that the decision is legally correct.[67] This advantage over trial courts comes from the ability of appellate judges to engage in "'extended reflection'"[68] about the law and the use of "multijudge panels . . . that permit reflective dialogue and collective judgment."[69] These institutional features allow appellate courts to reflect more fully about the legal concepts used and the values that "animate" the law.[70] Therefore, when a mixed question of fact and law primarily involves clarifying the law or ensuring the consistent application of the law, it will be better suited to de novo review by the appellate courts.[71] In *Lilly v. Virginia*, for example, the Court ruled that de novo review was appropriate for determining whether a declarant's out-of-court statement violates the Confrontation Clause because it is necessary for appellate courts to "'maintain control of, and to clarify, the legal principles'" governing Bill of Rights protections.[72]

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[65] United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984) (internal citations omitted) (emphasis added); *see also* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("We recognized that issue as essentially factual, subject to the clearly-erroneous rule."); Comm'r v. Duberstein, 363 U.S. 278, 289 (1960) ("The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements . . . confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.").

[66] 496 U.S. 384, 402 (1990).

[67] *See Salve Regina*, 499 U.S. at 232 ("Courts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy."); Westby, *supra* note 64, at 836–37 (stating that appellate courts are superior to trial courts in identifying the law and correcting errors in law).

[68] *Salve Regina*, 499 U.S. at 232 (quoting Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 923 (1989)).

[69] *Id.* (citation omitted).

[70] *McConney*, 728 F.2d at 1202 (stating that appellate courts are adept at identifying legal concepts and values that "animate" the law).

[71] *See* Lilly v. Virginia, 527 U.S. 116, 136–37 (1999) (plurality opinion) (Stevens, J.) (arguing that determination of whether admission of a witness's out-of-court statements violate the Confrontation Clause should be reviewed de novo because the question does not depend on "in-court demeanor" or "other factor[s] uniquely suited" to trial court determination); Ornelas v. United States, 517 U.S. 690, 697 (1996) (arguing that probable cause and reasonable suspicion should be subject to de novo review).

[72] 527 U.S. at 136 (citing *Ornelas*, 517 U.S. at 697).

The determination of whether a seizure occurred under the Fourth Amendment is a mixed question of fact and law.[73] Unfortunately, it is unclear whether the determination of what constitutes a seizure falls more within the institutional competence of the trial or appellate court. This issue will be examined in the next section by focusing on the arguments made by the circuit courts in favor of both standards of review.

II. SEIZURE UNDER THE FOURTH AMENDMENT

A. *Law Governing Fourth Amendment Seizure*

"The law regarding the seizure of persons is well developed."[74] However, every encounter between law enforcement officers and citizens is not a seizure for purposes of the Fourth Amendment.[75] Some encounters are voluntary and do not require protection by the Fourth Amendment. A voluntary encounter may turn into a seizure and trigger the Fourth Amendment, which will require officers to articulate reasonable suspicion or probable cause. Seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of [the] citizen."[76]

This general principle was adapted, by Justice Stewart in *United States v. Mendenhall*, into an objective test for determining whether a seizure has occurred and triggered the Fourth Amendment protections.[77] This test was eventually adopted by the Supreme Court in *INS v. Delgado*.[78]

Under this test, an individual is seized for Fourth Amendment purposes "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[79] If a situation is such that a reasonable person would not believe that she was free to leave, then this person is seized and the police must be able to articulate reasonable suspicion or probable cause for the seizure.

This "reasonable person" standard is objective, and does not depend on the citizen's subjective perceptions or the officer's subjective

[73] 6 LAFAVE, *supra* note 16, at 448 (identifying seizure as mixed question of fact and law).

[74] United States v. Mask, 330 F.3d 330, 336 (5th Cir. 2003).

[75] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[76] *Id.*

[77] 446 U.S. 544, 554 (1980) (plurality opinion) (Stewart, J.).

[78] 466 U.S. 210, 215 (1984).

[79] *Id.*; *see also* United States v. Drayton, 536 U.S. 194, 202 (2002) (summarizing reasonable person test); California v. Hodari D., 499 U.S. 621, 628 (1991) (using reasonable person test for seizure); Florida v. Bostick, 501 U.S. 429, 434 (1991) (same); Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (same).

intent, but only depends on what the officer's words and actions would convey to a reasonable and innocent person.[80] Therefore, a citizen subjectively may believe that she was not free to leave without actually being seized under the Fourth Amendment. All that matters is whether the officer's actions were such that a *reasonable* person would or would not believe that she was free to leave.

Once the trial court has identified the law governing the seizure determination, it conducts a two-part analysis to determine whether a seizure actually occurred.[81] First, the trial court establishes the facts and circumstances of the encounter between the citizen and the police officer. These facts become the findings of historical fact, and are established through the testimony of various witnesses and judgments about their credibility.

Second, the law is applied to these facts to determine whether the citizen was seized by the police at this particular time. This is a fact-intensive process under which the trial court must "consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter."[82]

If an appellate court reviews the first step of the trial court's analysis, then the standard of review is perfectly clear.[83] The lower court's findings of fact about the circumstances of the citizen-police encounter are reviewed "for clear error."[84]

The real problem occurs at the second step, with the trial court's ultimate determination that a seizure did or did not occur. When reviewing this determination, some circuit courts employ the clearly erroneous standard of review,[85] whereas others employ the de novo standard of review.[86] In Section B, I shall examine the arguments for the clearly erroneous standard, and in Section C, I will examine the arguments in favor of the de novo standard.

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[80] *Bostick*, 501 U.S. at 438; *Chesternut*, 486 U.S. at 574, 575 n.7.

[81] *See* Kidwell, *supra* note 33, at 136 (discussing the analysis conducted by a trial court to determine whether a Fourth Amendment seizure has occurred); *see also* 6 LAFAVE, *supra* note 16, at 442 (summarizing the process a trial court takes to resolve any Fourth Amendment motion to suppress).

[82] *Bostick*, 501 U.S. at 439.

[83] *See* 6 LAFAVE, *supra* note 16, at 442 (concluding that there is no conflict over standards to use for appellate review of findings of fact for any Fourth Amendment issue).

[84] United States v. Smith, 423 F.3d 25, 31 n.4 (1st Cir. 2005); *see also* Kidwell, *supra* note 33, at 136 ("These findings, being devoid of any legal principle, are reviewed under the clearly erroneous standard.").

[85] *See* cases cited *supra* notes 9–13.

[86] *See* cases cited *supra* notes 14–20.

B. Reasons that Appellate Review of Seizure Should Be the Clearly Erroneous Standard

There are two interdependent reasons usually offered to support the clearly erroneous standard. First, the clearly erroneous standard is appropriate because the determination of seizure under the *Mendenhall* test is so "fact-intensive . . . that the [trial] court's determination is essentially one of fact."[87]

This fact-intensive nature of seizure determinations is openly recognized by the Supreme Court. For example, in *Florida v. Bostick*, the Court explained:

> [I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.[88]

Furthermore:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes . . . [a seizure] will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.[89]

Since the determination of seizure is fact-intensive, imprecise, and depends on all of the circumstances surrounding the police-citizen encounter, a trial court is in the "best position to determine whether a seizure occurred."[90] A trial court considers all of the circumstances "by conducting an evidentiary hearing at which it must resolve conflicts in testimony and determine the credibility of witnesses."[91] Since the appropriate standard of review for mixed questions depends on the "respective institutional advantages of trial and appellate courts,"[92] the clearly erroneous standard seems warranted, and the

[87] United States v. McKines, 933 F.2d 1412, 1420 (8th Cir. 1991); *see also Smith*, 423 F.3d at 36 (Lynch, J., dissenting) ("The seizure determination is . . . quite heavily at the fact end of the spectrum."); United States v. Maragh, 894 F.2d 415, 421 (D.C. Cir. 1990) (Mikva, J., dissenting) ("Because a determination of whether a seizure has occurred is essentially a fact-based endeavor, appellate courts should not reverse the trial court's conclusion unless it is clearly erroneous.").

[88] 501 U.S. 429, 439 (1991).

[89] Michigan v. Chesternut, 486 U.S. 567, 573 (1988).

[90] *McKines*, 933 F.2d at 1422.

[91] *Id.* at 1421.

[92] Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991).

appellate court should defer to the trial court's determination of whether a seizure occurred.[93]

Second, de novo review appears to be "at odds"[94] with the Supreme Court's directive that there is no "bright-line rule"[95] for determining when a seizure occurred. Instead, in each individual case, the trial court is supposed to examine "'all of the circumstances surrounding the incident'"[96] to determine whether a Fourth Amendment seizure occurred.

The problem with de novo review is that appellate courts would attach "talismanic legal significance to those factual details which have recurred"[97] in some cases, and apply them to other similar cases. Appellate courts, by their very nature, look to prior precedents to investigate whether similar factual circumstances have occurred, and base their judgments on similarities or differences with these precedents. Over time, this focus on relevant similarities and differences would produce a set of factors that becomes dispositive in the determination of whether a seizure occurred.[98] But this produces the sort of "bright-line" test for determining when a seizure occurred that was specifically rejected by the Court in *Michigan v. Chesternut*.[99]

The need to focus on all of the factual circumstances surrounding a police-citizen encounter, and the rejection of any bright-line test, suggests that the trial court is in the best position for seizure determinations. The trial court can examine witnesses, observe their demeanors, and ultimately judge their credibility to conclude whether an objective person would think that she was free to leave. Accordingly, this suggests that clear error is the appropriate standard of review, and that the appellate court should defer to the trial court.

Together, both reasons provide a somewhat plausible rationale for using the clearly erroneous standard for appellate review.[100] Despite

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[93] *See supra* text accompanying notes 62–72 (discussing how appellate standard of review for mixed questions is often determined by which court is more competent to decide the question).

[94] *McKines*, 933 F.2d at 1422.

[95] Michigan v. Chesternut, 486 U.S. 567, 572 (1988); *see also* Florida v. Bostick, 501 U.S. 429, 439 (1991) (holding that per se rules are generally inappropriate for seizure determination).

[96] INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting United States v. Mendenhall, 446 U.S. 543, 554 (1980)).

[97] *McKines*, 933 F.2d at 1422 (citing United States v. Maragh, 894 F.2d 415, 420 (D.C. Cir. 1990) (Mikva, J., dissenting)).

[98] *See* United States v. Maragh, 894 F.2d 415, 424 (D.C. Cir. 1990) (discussing the trend towards finding certain factors more dispositive in determining seizure).

[99] *See Chesternut*, 486 U.S. at 572–74 (rejecting a bright-line test for determining seizure); *see also* United States v. Drayton, 536 U.S. 194, 203 (2002) (reversing appellate court for relying on prior precedent and focusing on one factor in determining that a seizure occurred); Florida v. Royer, 460 U.S. 491, 506 (1983) ("We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure . . . .").

[100] *See generally* Kidwell, *supra* note 33 (arguing that review of seizure should be clearly erroneous); Westby, *supra* note 64 (same).

this, some circuits have held that de novo is the correct standard of appellate review, and their arguments will be examined in the next section.

C. Reasons that Appellate Review of Seizure Should Be De Novo

There are three main reasons offered to support de novo review of seizure. First, despite never directly addressing the issue, the Supreme Court has "never deferred to the trier of fact regarding the question of seizure."[101] Instead, the Court acts like a trial court by analyzing "'all of the circumstances surrounding the incident'"[102] to determine whether a seizure occurred, and does not appear to defer to the trial court's judgment.

In *United States v. Drayton*, for example, the Supreme Court reversed an appellate court's ruling that a seizure occurred when police entered a bus to talk to an individual, and upheld the District Court's determination that a seizure did not occur.[103] In doing so, the Court did not mention the clearly erroneous standard, but simply asserted that there were "ample grounds" for the District Court's finding that a seizure did not occur.[104] After making this statement, however, the Court thoroughly analyzed the factual record and discussed prior Supreme Court seizure precedents to support its conclusion.[105] Although not dispositive, this close analysis of the factual record and discussion of prior precedent suggests that the "Court approached the issue of seizure as one of law . . . . [and] clearly engaged in de novo review . . . ."[106]

Second, the test for determining whether a seizure occurred is supposed to be an "'objective legal test.'"[107] The Supreme Court has emphasized that the test is imprecise and flexible, but it also "calls for *consistent application from one police encounter to the next*, regardless of the particular individual's response to the actions of the police."[108] This consistent application "allows the police to determine in ad-

[101] *Maragh*, 894 F.2d at 417.

[102] *McKines*, 933 F.2d at 1424 (quoting *Chesternut*, 486 U.S. at 572).

[103] 536 U.S. at 204–05.

[104] *Id.* at 204.

[105] *Id.* at 204–06.

[106] *McKines*, 933 F.2d at 1425 (Gibson, J., concurring) (inferring de novo review from a similar factual analysis in *California v. Hodari D.*, 499 U.S. 621 (1991)).

[107] *Id.* (quoting United States v. Maragh, 894 F.2d 415, 417 (D.C. Cir. 1990)); United States v. Montilla, 928 F.2d 583, 588 (2d Cir. 1991) (emphasizing that the test for determining seizure is objective); *Maragh*, 894 F.2d at 417 (same); *see also supra* text accompanying notes 77–82 (discussing the standard for determining seizure).

[108] Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (emphasis added).

vance whether the conduct contemplated will implicate the Fourth Amendment."[109]

Since appellate courts are better at clarifying the law,[110] de novo review would help "ensure consistent application" of this objective test.[111] This suggests that the appropriate standard of appellate review for seizure determinations should be de novo.[112]

Third, appellate courts have a "responsibility independently to apply important constitutional standards .... that cannot be delegated to the trier of fact."[113] Although not explicitly stated, this is an appeal to the Supreme Court's constitutional fact doctrine.[114] According to this doctrine, appellate courts have a constitutional duty to review de novo a lower court's factual findings in order to determine whether a constitutional standard has been violated.[115]

The precise scope of the constitutional fact doctrine is unclear, but not every constitutional issue receives heightened appellate scrutiny with respect to the factual findings.[116] Instead, courts selectively determine which rights require closer appellate supervision and which ones do not.[117] Factual findings in cases with First Amendment rights clearly receive heightened appellate scrutiny,[118] but factual findings related to the following constitutional rights do not: a magistrate's finding that probable cause to issue a search warrant exists;[119]

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[109] *Id.*

[110] *See supra* text accompanying notes 51-54; 67–70 (noting appellate courts are better at clarifying the law than trial courts).

[111] *Maragh*, 894 F.2d at 418.

[112] *See* Ornelas v. United States, 517 U.S. 690, 697–98 (1996) (arguing that the need for consistent application of an objective standard is a reason for de novo review); *infra* notes 122–38 and accompanying text (discussing *Ornelas*).

[113] *Maragh*, 894 F.2d at 418 (internal quotation marks omitted).

[114] *See generally* Adam Hoffman, Note, *Corralling Constitutional Fact:* De Novo *Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427 (2001) (discussing the constitutional fact doctrine); Kidwell, *supra* note 33, at 140–48 (discussing the constitutional fact doctrine and its application to the determination of Fourth Amendment seizure); Monaghan, *supra* note 20 (analyzing the constitutional fact doctrine).

[115] *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (holding that determination of actual malice in defamation action receives independent appellate review because it depends on the construction of a constitutional principle).

[116] *See* Hoffman, *supra* note 114 (discussing the scope of the constitutional fact doctrine); Kidwell, *supra* note 33, at 140–48 (same); Monaghan, *supra* note 20, at 264–71 (same).

[117] *See* Monaghan, *supra* note 20, at 266–67 (arguing that the Supreme Court is determining which constitutional rights are subject to close appellate review and which ones are not "on an ad hoc basis").

[118] *See, e.g.*, *Bose*, 466 U.S. at 511 ("The question . . . is not merely a question for the trier of fact. Judges . . . must independently decide whether the evidence in the record is sufficient . . . .").

[119] *See* Illinois v. Gates, 462 U.S. 213, 230–39 (1983) (holding that the determination of probable cause by magistrate is reviewed deferentially on appeal).

the decision that an object is obscene;[120] and, in some instances, interpretations of the Fourteenth Amendment's Equal Protection Clause.[121]

Despite this appeal to the constitutional fact doctrine, the Supreme Court has never held that whether a seizure occurred is a constitutional fact. Therefore, the applicability of this doctrine to support de novo review of Fourth Amendment seizure is uncertain, but it offers a viable reason for holding this position.

Together, these reasons provide a plausible rationale for de novo appellate review of seizure. And, when compared to the arguments for the clearly erroneous standard, the circuit split on this issue is understandable. There are good arguments for both sides, and there are no obvious flaws with any of these arguments. But the Supreme Court's decision that de novo review is the appropriate standard for appellate review of probable cause and reasonable suspicion has an important impact. Section III explores the reasoning behind this decision and argues that this reasoning is directly applicable to appellate review of seizure, and that de novo is therefore the appropriate standard.

III. *ORNELAS V. UNITED STATES* AND APPELLATE REVIEW OF SEIZURE

A. *Ornelas v. United States*

In *Ornelas v. United States*, the Supreme Court resolved a circuit split over the proper standard of appellate review for trial court dispositions of probable cause and reasonable suspicion.[122] Prior to *Ornelas*, the circuit courts disagreed over whether appellate review of probable cause or reasonable suspicion should be de novo or for clear error.[123] The Supreme Court resolved this dispute by holding that appellate review should be de novo.

In *Ornelas*, the Court presented the following standard for determining probable cause or reasonable suspicion:

> They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable

[120] *See* Miller v. California, 413 U.S. 15, 24–26 (1973) (holding that the determination that an object is obscene is reviewed deferentially on appeal).

[121] *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–37 (1979) (applying the clearly-erroneous standard when reviewing an equal protection challenge to segregation of public schools).

[122] 517 U.S. 690, 699 (1996) (holding that determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal).

[123] *Compare, e.g.*, United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992) (applying de novo review), *with* United States v. Spears, 965 F.2d 262, 268–71 (7th Cir. 1992) (employing clear error standard of review).

> and prudent men, not legal technicians, act. As such, the standards are not readily, or even usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not finely-tuned standards . . . . They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.[124]

When determining whether there is probable cause or reasonable suspicion for a stop or a search, the trial court employs the same two-step process used for assessing whether a seizure has occurred.[125] First, the court investigates the "events which occurred leading up to the stop or search."[126] These facts and events become the trial court's findings of historic fact, and the appropriate standard of appellate review of these findings is "for clear error."[127]

Second, the trial court must decide whether these facts, when "viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause"[128] for conducting the stop or search. As with seizure determinations, it was the appellate court's review of this step that sparked the circuit split over the appropriate standard of review. In resolving this controversy, the Supreme Court offered three reasons for de novo appellate review of the trial court's determination of probable cause and reasonable suspicion.

The first reason is the need for maintaining a unitary system of laws in which all criminal defendants are given the same protection.[129] The clearly erroneous standard is problematic with respect to this goal because two trial courts, presented with essentially similar facts, could draw completely different conclusions about whether "the facts are sufficient or insufficient to constitute probable cause."[130] This type of variability is "unacceptable" for Fourth Amendment jurisprudence, and there needs to be a unitary system of laws and protections.[131] De novo review helps eliminate this problem because decisions by appellate courts are binding on lower courts, and appellate

[124] *Ornelas*, 517 U.S. at 695–96 (internal citations and quotation marks omitted).

[125] *See supra* notes 81–82 and accompanying text (discussing the two-step process used by trial courts for assessing whether a seizure has occurred).

[126] *Ornelas*, 517 U.S. at 696.

[127] *Id.* at 699.

[128] *Id.* at 696.

[129] *Id.* at 697 (stating that deference to the trial court "would be inconsistent with the idea of a unitary system of law").

[130] *Id.*

[131] *Id.*

courts are better at researching precedents in order to try to eliminate inconsistencies.[132]

The second reason is that probable cause and reasonable suspicion are formless legal concepts that "acquire content only through application."[133] By this, the Court simply meant that there is no bright-line rule for determining the meaning of these concepts, but that they only acquire meaning by "application to the particular circumstances of a case."[134] With concepts like these, de novo review is necessary so that appellate courts can fulfill their "primary function as an expositor of law,"[135] and "maintain control of, and . . . clarify, the legal principles" that are involved.[136] If the appellate court deferred to the trial court's ruling, then it cannot explain or clarify the law unless the trial court made a clear error.

The third reason in favor of de novo review is that this form of review can promote the goal of having constitutionally desirable police practices. De novo review promotes this goal by unifying precedent and providing a defined "'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"[137] Unlike trial courts, appellate courts have the temperament and capacity to provide consistency, which is needed to develop clear rules that can be applied by law enforcement officers in order to avoid Fourth Amendment violations.[138] Hence, de novo review of reasonable suspicion and probable cause can help promote constitutionally desirable police practices.

Together, all three reasons are a powerful argument for de novo review, and elucidate the factors that the Supreme Court considers important in determining the appropriate appellate standard of review in the context of the Fourth Amendment. The next Section will demonstrate that each of these reasons is equally applicable to the determination of whether a seizure occurred. Appellate review of seizure should also be de novo.

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[132] *See supra* text accompanying notes 51–54 (discussing the institutional advantages of appellate courts with respect to matters of law).

[133] *Ornelas*, 517 U.S. at 697.

[134] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[135] *Id.*

[136] *Ornelas*, 517 U.S. at 697.

[137] *Id.* (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

[138] *See, e.g.*, Thompson v. Keohane, 516 U.S. 99, 115 (1995) ("[T]he law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.").

B. *Impact of* Ornelas v. United States *on the Appellate Review of Seizure*

The precedential value of *Ornelas v. United States* with respect to the appropriate standard of review for Fourth Amendment seizure is uncertain. Some circuits have cited *Ornelas* as authority, without any explanation, for holding that appellate review of seizure is de novo.[139] Others have argued that the *Ornelas* holding only applies to appellate review of probable cause and reasonable suspicion, and that the clearly erroneous standard is the correct appellate standard of review for seizure.[140]

In this Section, I will not address whether *Ornelas* is binding precedent with respect to the appellate standard of review for seizure, such that it can be read to overrule those circuits which apply the clearly erroneous standard.[141] Instead, I argue that the reasons offered in *Ornelas* to justify de novo review are equally applicable to appellate review of seizure, and provide a sound justification for de novo appellate review of whether a seizure occurred under the Fourth Amendment.

The first reason given in *Ornelas* for de novo review was that appellate review of probable cause and reasonable suspicion promoted a unitary system of laws that are consistently applied to all criminal defendants to ensure similar constitutional protections.[142] Deferential review poses a problem because two trial courts can rely on similar facts and reach different conclusions about whether a seizure occurred. This type of variability was deemed "unacceptable" for probable cause and reasonable suspicion, so it seems equally unacceptable with respect to seizure. Since appellate courts are better suited for creating a unitary system of laws, this suggests that de novo review is more appropriate.

One possible criticism is that uniformity in seizure determinations is impossible due to the "factual nature of the seizure test."[143] As discussed previously, the determination of seizure is a "fact-intensive" endeavor where the trial court examines all of the circumstances surrounding the police-citizen encounter to assess whether a reasonable

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[139] *See* United States v. Williams, 413 F.3d 347, 351 (3d Cir. 2005) (citing *Ornelas* to support de novo review of seizure); United States v. Smith, 423 F.3d 25, 31 n.4 (1st Cir. 2005) (referencing *Ornelas* to support de novo appellate review of seizure).

[140] *See* United States v. Mask, 330 F.3d 330, 335 (5th Cir. 2003) (holding that *Ornelas* does not address appellate standard of review for seizure and that seizure should be reviewed for clear error).

[141] *See supra* notes 9–13 (listing circuit courts that apply the clearly erroneous standard of review).

[142] *See supra* text accompanying note 129 (citing *Ornelas* for the proposition that de novo appellate review of probable cause and reasonable suspicion promotes a unitary system of laws).

[143] Westby, *supra* note 64, at 859.

person would have felt free to leave.[144] But, since there is endless variation in the facts and circumstances surrounding these types of cases, "[f]act bound resolutions cannot be made uniform through appellate review, de novo or otherwise."[145] Accordingly, any appellate court decision about a seizure will not have precedential value because "[i]t is inconceivable that a future case would contain identical facts."[146] Therefore, the desire for uniformity cannot justify de novo review because there is no uniformity to be had in this area of the law.

There are two problems with this criticism. First, while Justice Scalia made a similar objection in his dissent to *Ornelas*,[147] this objection was summarily dismissed by the majority.[148] Unless there is good reason to think that seizure is more fact-intensive than either probable cause or reasonable suspicion, this criticism is ineffective.

Second, despite the fact-intensive nature of seizure determinations, and the improbability of identical circumstances occurring, similar circumstances can reoccur, and uniformity and consistency are desirable for these circumstances. For example, in *Florida v. Bostick*, the Supreme Court found that the circumstances of a police-citizen encounter were "analytically indistinguishable" from the circumstances in *INS v. Delgado*[149] for seizure purposes, and relied on this prior precedent to find that no seizure occurred.[150] Since certain situations can reoccur, and appellate courts are better at ensuring uniformity in the law, this seems like a legitimate reason to support de novo appellate review of seizure under the Fourth Amendment.

Another reason offered in *Ornelas* to support de novo review was that probable cause and reasonable suspicion are formless concepts that only acquire content by being applied to different factual circumstances.[151] There is no bright-line rule for determining the meaning of probable cause or reasonable suspicion, and these concepts are

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[144] *See supra* text accompanying note 82 (discussing the fact-intensive nature of the seizure test).

[145] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

[146] Westby, *supra* note 64, at 860.

[147] *See* Ornelas v. United States, 517 U.S. 690, 703 (1996) (Scalia, J., dissenting) (arguing that probable cause and reasonable suspicion determinations are resistant to useful generalization).

[148] *See id.* at 698 (arguing that despite the fact-intensive multi-faceted probable cause and reasonable suspicion inquiries, there is precedential value in prior cases and good reason for de novo review).

[149] 466 U.S. 210, 218 (1984) (finding no seizure even though, at the time they were questioned, workers were not free to leave the building because of their employment obligations).

[150] Florida v. Bostick, 501 U.S. 429, 436 (1996) (relying on *Delgado* to find there is no seizure when the individual was restrained by a factor other than the police; in this case, he was on a bus at the time of the questioning).

[151] *See Ornelas*, 517 U.S. at 695–96.

extremely context-dependent, imprecise, and flexible.[152] As a result, de novo review ensures that appellate courts maintain their primary role of stating and clarifying the law and legal principles.

The concept of seizure also reflects this same flexibility and context-dependent features:

> The test [for seizure] is *necessarily imprecise* because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what 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.*[153]

Accordingly, de novo review would ensure that appellate courts were able to clarify and state the law concerning seizure under the Fourth Amendment.

One possible objection is that any form of de novo review is implausible because the standard for seizure is so flexible and fact-dependent that the Supreme Court has rejected any bright-line or *per se* rules for determining when a seizure has occurred.[154] But this objection is hard to reconcile with the adoption of de novo review for probable cause and reasonable suspicion. These concepts are also "not readily, or even usefully, reduced to a neat set of legal rules,"[155] but the *Ornelas* Court still thought they were amenable to de novo review. Unless seizure is more flexible or context-dependent than either of these two concepts, this objection is unsuccessful and does not provide a good reason to reject de novo appellate review of seizure.

The third reason offered in *Ornelas* to support de novo review of probable cause is that de novo review promotes constitutionally desirable police practices.[156] De novo review promotes this goal because the primary function of appellate courts is to clarify and unify the law,[157] and this type of clarity will create clearer standards that can guide police officers and help them avoid violating a citizen's Fourth Amendment rights.

This goal of promoting constitutionally desirable police practices is also an important goal for the law behind seizure:

> While the test [for seizure] is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it *calls for*

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[152] *Id.*

[153] Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (emphasis added); *see also supra* text accompanying notes 80–82 (discussing the objective standard for seizure).

[154] *See supra* note 99 and accompanying text.

[155] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[156] *See supra* text accompanying notes 137–38 (discussing the third reason offered to support de novo review of probable cause and reasonable suspicion).

[157] *See supra* text accompanying notes 51–54; 67–72 (discussing the institutional advantages of appellate courts).

> *consistent application from one police encounter to the next,* regardless of the particular individual's response to the actions of the police. The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—*allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.*[158]

Since one goal behind the objective standard for seizure is to provide rules that the police can use to guide their behavior, and de novo review promotes this goal, this is another good reason for de novo review of the trial court's determination of seizure.

CONCLUSION

In conclusion, the appellate standard of review for determining whether a seizure occurred should be de novo. Seizure determinations are mixed questions of fact and law, and the appropriate standard of review for mixed questions depends on which institution is more competent and better suited to deciding the issue.[159] With respect to seizure, the fact-intensive nature of this test has created a circuit split over whether a trial court or appellate court is best suited to deciding this issue. The Fourth, Fifth, Seventh, Eight, and Eleventh Circuits all hold that trial courts are better suited to deciding this issue, and that appellate review should only be for clear error.[160] But, the First, Second, Third, Sixth, Ninth, Tenth, and D.C. Circuits all hold that appellate courts are better suited to deciding this issue, and that appellate review should be de novo.[161]

Prior to *Ornelas v. United States,* there were plausible reasons in favor of both the clearly erroneous and the de novo standards of appellate review.[162] However, in light of the Supreme Court's reasoning and holding in *Ornelas,* de novo review seems much more appropriate. In *Ornelas,* the Supreme Court offered three reasons why the determination of probable cause and reasonable suspicion should be subject to de novo appellate review.[163] All three reasons are equally applicable to the determination of whether a seizure occurred for purposes of the Fourth Amendment.[164] Therefore, the determination

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[158] *Chesternut,* 486 U.S. at 574 (emphasis added).

[159] *See supra* Part I.A. (discussing different standards of review and mixed questions of fact and law).

[160] *See supra* notes 9–13 (listing cases that use the clearly erroneous standard).

[161] *See supra* notes 14–20 (listing cases that use the de novo standard).

[162] *See supra* Parts II.B–C (analyzing the arguments in favor of the clearly erroneous and de novo standards of appellate review).

[163] *See supra* Part III.A (discussing the three reasons why appellate review of probable cause and reasonable suspicion should be de novo).

[164] *See supra* Part III.B (arguing that the three reasons also apply to appellate review of whether a seizure occurred).

of whether a seizure occurred should also be subject to de novo appellate review.