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Brigham Young University Journal of Public Law

Volume 19 | Issue 1 Article 6

3-1-2004

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Andrew Franklin Peterson, *Ten Years of Pena: Revisiting the Utah Mixed Question Standard of Appellate Review*, 19 BYU J. Pub. L. 261 (2004).

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Ten Years of *Pena*: Revisiting the Utah Mixed Question Standard of Appellate Review

Andrew Franklin Peterson[*]

I. Introduction

In 1994, the Utah Supreme Court issued *State v. Pena*.[1] That landmark opinion became the basic "analytic framework for determining the extent to which an appellate court should grant discretion to a trial court's application of law to the facts of a case,"[2] otherwise known as mixed questions of fact and law. The hallmark of *Pena* may be its use of two distinct metaphors—the "pasture of discretion" and the "spectrum of discretion."[3] As a result of the discretion analysis, however, the *Pena* framework not only applies to mixed questions of fact and law but also defines the power of appellate courts to review all trial court decisions.[4] Thus, *Pena*'s framework is ubiquitous in Utah law and is cited perhaps more often than any other Utah case.[5] At the same time, however, I am unaware of any other jurisdiction that uses a similar framework for addressing the question of "how closely [appellate courts] should scrutinize"[6] trial courts' decisions. Given *Pena*'s singularity in the universe of appellate law and its universal application in Utah, one may justifiably ask whether ten years of application have proved its wisdom and practical viability.

This Note will first explain *Pena*'s analytical framework within the

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This comment is an extension of a lecture, "Utah Standards of Review," given in part by the author at the Utah State Bar Appellate Section CLE Seminar, February 6, 2004, Utah State Bar Law and Justice Center, Salt Lake City, Utah.

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1. *See* State v. Pena, 869 P.2d 932 (Utah 1994).

2. James E. Berchtold, Development, *Recent Developments in Utah Case Law: A New Analytic Framework for Determining Standards of Appellate Review*, 1995 UTAH L. REV. 278, 278.

3. Justice Michael J. Wilkins of the Utah Supreme Court uses the term "sliding scale of scrutiny" to describe the *Pena* framework. Justice Michael J. Wilkins et. al, *A "Primer" in Utah State Appellate Practice*, 2000 UTAH L. REV. 111, 129.

4. *See generally Pena*, 869 P.2d at 932.

5. As of June 23, 2004, a Lexis search indicated that *Pena* had been cited in more than three hundred subsequent cases.

6. *Pena*, 869 P.2d at 937.

context of appellate challenges to trial court decisions. It will then challenge both the framework itself and the use of its metaphors. This challenge stems principally from theoretical problems within the framework, and secondarily from the difficulty, if not the impossibility, of practical application in subsequent case law. This Note will then discuss a workable alternative framework for analyzing mixed questions. Finally, it will discuss practical considerations for the appellate advocate who presents a mixed question to an appellate court in Utah.

II. BACKGROUND: *PENA*'S THEORY

Pena stands as the most definitive statement on Utah theory of appellate standards of review. The central question in appellate standards of review, according to *Pena*, is what level of scrutiny to apply to trial court decisions:

> [I]t is our role as an appellate court to define what the law is, and we never defer to any degree to a trial court on that count. That statement does not, however, tell us much about how closely we should scrutinize the application of a statement of legal principle to a specific set of facts. Yet this is a critical question, for at bottom, what a legal principle means in reality can often be determined only by considering how its general terms are given sharp definition through their application to a series of specific fact situations. Determining what the law is actually involves an inductive process as much as a deductive one. The governing legal standard is as often derived by abstraction from specific applications as it is defined in the abstract and then applied to specific situations.[7]

Pena goes on to describe a "spectrum of discretion" that appellate courts grant to trial courts, "running from 'de novo' [review] on the one hand to 'broad discretion' on the other."[8] The court defines discretion as the ability of "trial court[s] to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal."[9]

7. *Id.*
8. *Id.*
9. *Id.*

A. A Spectrum of Discretion

In general, appellate courts review legal conclusions "de novo"[10] and factual questions with broad deference to the trial court.[11] Those two positions occupy the polar ends of the discretion spectrum under the *Pena* framework.[12] Application of the respective standards of review for fact and law issues is relatively simple because appellate courts are the final arbiters of legal issues,[13] and the rules of civil and appellate procedure provide straightforward procedural mechanisms for review of findings of fact.[14] Thus, at the two ends of the discretion spectrum, standard of review analysis poses little problem.

In the middle of that spectrum, where mixed questions of fact and law are found, lies the more difficult problem—that is, "does the legal standard . . . grant any discretion to the trial judge in applying that standard to a set of facts?"[15] In other words, a "mixed question involves . . . 'the determination of whether a given set of facts comes within the reach of a given rule of law.'"[16] These inquiries are often fact intensive to varying degrees and, thus, may fall anywhere along the discretion spectrum.[17] *Pena* identifies, and subsequent cases have expanded, a litany of issues that should be analyzed as mixed questions where the appellate court allows the trial court a greater or lesser amount of discretion in applying the law to the facts.[18]

B. The Pasture Metaphor

Aside from the spectrum metaphor, *Pena* uses the metaphor of a pasture to describe the bounds of the trial court's discretion.[19]

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10. *See* Armed Forces Ins. Exch. v. Harrison, 70 P.3d 35, 39 (Utah 2003).

11. *See* State v. Daniels, 40 P.3d 611, 617 (Utah 2002).

12. *See Pena*, 869 P.2d at 935-36; Judge Norman H. Jackson, *Utah Standards of Appellate Review: Revised*, 12 UTAH BAR J. 8, 12 (1999).

13. *See* Mariemont Corp. v. White City Water Improvement Dist., 958 P.2d 222, 223 (Utah 1998); MacKay v. Hardy, 896 P.2d 626, 630-31 (Utah 1995).

14. *See* UTAH R. APP. P. 24(a)(9) (setting forth marshaling requirement to challenge fact finding); UTAH R. CIV. P. 52(a) (setting forth appellate court deference and clearly erroneous standard for reviewing fact finding). *See also* Ryan D. Tenney, *The Utah Marshalling Requirement: An Overview*, 17 UTAH BAR J. 22 (2004).

15. *Pena*, 869 P.2d at 937.

16. State v. Hansen, 63 P.3d 650, 659 n.3 (Utah 2002) (quoting *Pena*, 869 P.2d at 936).

17. *See Pena*, 869 P.2d at 937-38.

18. *See id.* at 938; Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998); Cassidy v. Salt Lake County Fire Civil Serv. Council, 976 P.2d 607, 613 (Utah Ct. App. 1999).

19. *See Pena*, 869 P.2d at 937-38 (borrowing the pasture metaphor from an article by Professor Maurice Rosenberg); *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

To the extent that a trial judge's pasture is small because he or she is fenced in closely by the appellate courts and given little room to roam in applying a stated legal principle to facts, the operative standard of review approximates what can be described as "de novo." That is, the appellate court closely and regularly redetermines the legal effect of specific facts. But to the extent that the pasture is large, the trial judge has considerable freedom in applying a legal principle to the facts, freedom to make decisions which appellate judges might not make themselves ab initio but will not reverse—in effect, creating the freedom to be wrong without incurring reversal. Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted.

As can be imagined, the real amount of pasture permitted a trial judge will vary depending on the legal issue, although the terminology we use to describe the operative standard of review does not begin to reflect the many shades of this variance. The best we can do is to recognize that such a spectrum of discretion exists and that the closeness of appellate review of the application of law to fact actually runs the entire length of the spectrum.[20]

C. Considerations Influencing the Degree of Discretion

Mixed questions generally involve subjects about which the law cannot create a single, authoritative statement of principle. According to *Pena*, there are three reasons that justify granting a greater degree of discretion to the trial court in its application of the law to the facts: (1) there are some areas of law where "the facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out;"[21] (2) sometimes "the legal principle . . . to be applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative;"[22] and (3) often "the trial judge has observed 'facts,' such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts."[23]

There are some considerations that warrant *narrower* allocation of discretion by the appellate court to the trial court in its application of the

20. *Pena*, 869 P.2d at 937-38.
21. *Id.* at 939.
22. *Id.*
23. *Id.*

law to the facts. For example, the Utah Supreme Court determined that while there were varying fact patterns that would be relevant to determinations of voluntariness of consent, they were not so unmanageable in their variety as to outweigh the interest in having uniform legal rules regarding consent to search, given the substantial Fourth Amendment interests lost as a result of such consents.[24]

Thus, the more important the rights at stake, the more likely the appellate court will more closely fence in the trial court's permitted range of discretion. Another "factor weighing against broad discretion is whether there are reasons of policy that require standard uniformity among trial courts addressing the question."[25]

The supreme court has also granted *broader* discretion to trial court application of law to facts in cases involving merely procedural or statutory rights as opposed to fundamental rights. For example, in *Platts v. Parents Helping Parents*, the supreme court explained that the Utah Medical Malpractice Act, by its own terms, gives the trial court some discretion in applying the statutory definition of healthcare provider to the particular facts of the case.[26] In that case, the supreme court granted broad discretion to the trial court in deciding whether the particular facts of the case fit the statutory definition.[27] It is noteworthy that even if the defendant in *Platts* had not been classified under the statute as a healthcare provider, the defendant would nevertheless have been entitled to protections and remedies under general tort law and civil procedure. Thus, the procedural and statutory rights at stake in *Platts* appear less important than the rights at stake in *State v. Thurman*,[28] where determining the voluntariness of consent results either in the availability or the waiver of fundamental constitutional rights.[29]

The range of discretion permitted to trial courts from issue to issue is meant to be fluid, with appellate courts giving more discretion where they think it is warranted and less where the contours of the law are more clearly defined.[30] Further, precisely how much discretion is warranted is impossible to define even with a given issue like that in *Pena*. In that case, the issue was whether the facts of the case gave rise to reasonable suspicion of criminal activity.[31] The *Pena* court stated, "Precisely how much discretion [the trial court has] we cannot say, but we would not

24. *Id.* (citing State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993)).
25. Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998).
26. *See* 947 P.2d 658, 662 (Utah 1997).
27. *See id.* at 663.
28. *See generally* State v. Thurman, 846 P.2d 1256 (Utah 1993).
29. *See id.* at 1271 (weighing defendant's waiver of Fourth Amendment rights).
30. *See* State v. Pena, 869 P.2d 932, 937-38 (Utah 1994).
31. *See id.* at 934-35.

anticipate a close, de novo review."[32] The court further provided, "The best we can do is to recognize that such a spectrum of discretion exists and that the closeness of appellate review of the application of law to fact actually runs the entire length of this spectrum."[33] Thus, stating a single standard of review for mixed questions does not begin to account for the wide variance in amounts of discretion applicable from issue to issue. "If we were to try," the *Pena* court opined, "it is likely that the resulting case law would be confusing and inconsistent."[34] Thus, rather than stating a single standard of appellate review for mixed questions of law and fact, the Utah Supreme Court has provided a flexible framework that allows appellate courts to fence in or expand the trial court's available discretionary space after the fact.[35]

III. CRITICISM OF *PENA*

Although *Pena*'s theory of a sliding spectrum of discretion may appear elegant and simple at first reading, in theory and practice it is anything but. After ten years of application, appellate courts have been unable to come to terms with a framework that contains no standards and provides no guidance regarding the proper amount of discretion to afford trial courts. Instead, the mixed question standard of review often ends up being nothing more than a correctness review for legal determinations and a clear error review for factual determinations. For example, in *Drake v. Industrial Commission*, after stating it was following the *Pena* analytical scheme, the supreme court said that it reviews the empirical facts for clear error but that it would review whether those facts qualify the plaintiff for workers' compensation benefits under a particular rule for correctness.[36] A host of cases have approached mixed questions in a virtually identical way, giving no practical effect to *Pena*'s spectrum of discretion approach.[37]

32. *Id.* at 939.

33. *Id.* at 938.

34. *Id.* at 940.

35. *See generally* Jackson, *supra* note 12, at 24-26 (providing a thorough list and analysis of examples of mixed questions).

36. *See* 939 P.2d 177, 181-82 (Utah 1997).

37. *See, e.g.*, State v. Daniels, 40 P.3d 611, 617 (Utah 2002) ("We have stated, as a general rule, that we review . . . mixed questions as determinations of law for correctness."); Woodhaven Apartments v. Washington, 942 P.2d 918, 925-26 (Utah 1997) (setting forth *Pena* mixed question standard, but resolving mixed question as a matter of law); State *ex rel*. M.C. v. State, 82 P.3d 1159, 1163 (Utah Ct. App. 2003) (quoting *In re* G.B., 53 P.3d 963, 963 (Utah Ct. App. 2002) (citing *In re* C.B., 989 P.2d 76 (Utah Ct. App. 1999)) ("'[W]e review the juvenile court's [factual] findings for clear error and its conclusions of law for correctness, affording the court some discretion in applying the law to the facts.'"); Walker v. Hansen, 74 P.3d 635, 638 (Utah Ct. App. 2003) (citing *Pena*, 869 P.2d at 935-36) ("Whether the judgment should be reduced to reflect the payment of PIP or no-fault

This approach raises an important question: If the supreme court is so committed to a nuanced and flexible framework for apportioning varying degrees of discretion to trial courts for mixed questions, why do the applications of this standard of review often revert to the more rigid, but clearly defined, standards of correctness and clear error? I submit that a few basic fatal theoretical problems make *Pena*'s framework untenable. These theoretical problems leave the courts no option but to apply the remaining available standards while at the same time giving lip service to *Pena*.

A. Theoretical Problems

First, the statement of the mixed question standard of review is itself flawed. *Pena* states, "[T]here is really a third category—the application of law to fact or, stated more fully, the determination of whether a given set of facts comes within the reach of a given rule of law."[38] "[T]his standard of review grants a measure of discretion to the trial court because of the variability of the factual settings."[39] This explanation demonstrates a fundamental misunderstanding of the character and principles of stare decisis, the rule of law, and the common law in general. Courts *never* construe rules of law in the abstract without applying them to facts. All legal principles apply to a variety of factual settings. Under *Pena*'s formulation, then, it should be impossible to state any legal principles with certainty "because of the variability of the factual settings."[40]

Under the common law, it is in the application of law to facts that the rules of law gain expression and contour. It is the application of law that gives birth to rules in the first place. Facts by themselves have no legal significance, and law without application has no shape or form and is, therefore, meaningless. Further, under the rule of law, it is not up to the judge to decide if facts come within the reach of a given rule—rather, the rule itself contains the seeds of its own application. A rule of law already contains within its statement of principle the framework for determining what facts come within its reach.

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insurance is a mixed question of law and fact. We review the factual finding for clear error and the legal conclusions for correctness."); Kaysville City v. Mulcahy, 943 P.2d 231, 233 (Utah Ct. App. 1997) (indicating "whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewable nondeferentially for correctness"); State v. McDonald, 922 P.2d 776, 780-81 (Utah Ct. App. 1996) (holding that the mixed question of whether right to counsel was waived knowingly and intelligently is reviewed for correctness but that appellate courts afford "reasonable measure of discretion" to the trial court because the issue is highly fact dependent).

38. *Pena*, 869 P.2d at 936.

39. *Id.* at 941.

40. *Id.*

For example, the Utah Supreme Court "has defined seduction as 'the offense of inducing a woman to consent to unlawful sexual intercourse, by enticements which overcome her scruples' and as an act involving 'some undue influence, artifice, deceit, fraud, or . . . some promise to induce the plaintiff to surrender her chastity and virtue.'"[41] This rule of law contains within it sufficient bounds to determine whether any given set of facts constitutes seduction. If any of the terms are unclear, other precedent may be consulted to define them. Most, if not all, rules of law are structured this way. Thus, it is the rules themselves, as expressed over time through application in particular cases, that determine what sets of facts come within their reach.

However, *Pena*'s framework, in greater or lesser degree, leaves to judges to decide what facts tend toward legal significance. Where the *Pena* framework refuses, by its own terms, to give a definite formulation of the bounds of that discretion,[42] the rule of law runs an even greater danger of becoming subject to the particular personalities of individual judges. This is true not only at the trial level but also at the appellate level where judges are free to review so-called discretionary rulings with the rigor of "something less than de novo [review]."[43] It is axiomatic that such a standardless jurisprudence subject to individual personality bears no place in our version of the rule of law.

The supreme court expressed its reasons for refusing to define beforehand how much discretion to give the trial court in particular issues as follows: "If we were to try, it is likely that the resulting case law would be confusing and inconsistent."[44] "The best we can do is to recognize that such a spectrum of discretion exists and that the closeness of appellate review of the application of law to fact actually runs the entire length of this spectrum."[45] Thus, the supreme court made a determination that rather than trying to pronounce a rule of law that *might* cause inconsistent results it will, instead, avoid stating the principles of law and *undoubtedly* reach inconsistent results. The court will then try to sort out the inconsistencies after the fact. This is not "[t]he best we can do."[46] Such a standardless approach itself causes "the resulting case law . . . [to] be confusing and inconsistent."[47] In fact, by the time *Pena* was decided, the Utah Court of Appeals had already set

41. Hodges v. Howell, 4 P.3d 803, 805 (Utah Ct. App. 2000) (quoting Bowers v. Carter, 202 P. 1093, 1094-95 (Utah 1921)).

42. *See Pena*, 869 P.2d at 939.

43. *Id.* at 940.

44. *Id.*

45. *Id.* at 938.

46. *Id.*

47. *Id.* at 940.

forth a workable framework for deciding mixed questions.[48] The details of this approach will be discussed below as a recommendation to the Utah Supreme Court.[49] For now, it is sufficient to point out that this approach existed, that it offered a level of nuance and sophistication that successfully accomplished everything *Pena* unsuccessfully attempted, and that the Utah Supreme Court in *Pena* ignored it completely.

B. Practical Problems

Because rules of law easily and often define the parameters of their own application, we must ask: What is the real reason that Utah appellate courts refuse to define "how closely . . . [they will] scrutinize the application of a statement of legal principle to a specific set of facts"?[50] One answer to this question may be found in the difficulty appellate courts have in quantifying discretion. They use various formulations to express graded levels of discretion such as "a measure of discretion"[51] and "something less than de novo [review]."[52] These phrases attempt to quantify an unquantifiable concept. The pasture metaphor is appealing as a way of illustrating the fact that a judge may "reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal."[53] However, the metaphor inescapably breaks down when an appellate court attempts to give it practical expression by verbalizing graded levels of discretion. The various formulations of greater or lesser degrees of discretion become meaningless because one cannot measure discretion the way one can measure a pasture. Furthermore, as the cases subsequent to *Pena* demonstrate, the discretion formulations end up as mere surplusage, irrelevant to the actual appellate review.[54] The spectrum of discretion metaphor also breaks down because it necessarily implies that, at least at the margins, there is a similarity of essence between law and fact and a similarity of essence between fact and discretion. Such an implication makes no sense. Law is one thing, fact is another, and sometimes law itself gives the trial court discretion

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48. *See* State v. Rochell, 850 P.2d 480, 484-87 (Utah Ct. App. 1993) (Bench, J., concurring).

49. *See infra* Part IV.

50. *Pena*, 869 P.2d at 937.

51. State v. Honie, 57 P.3d 977, 994 (Utah 2002).

52. *Pena*, 869 P.2d at 940.

53. *Id.* at 937. This statement ought to be the touchstone of review of discretionary rulings. However, as my analysis and recommendations below will show, issues granting trial court's true discretion should be fewer in number than current case law provides.

54. *See, e.g.*, State v. Daniels, 40 P.3d 611, 617 (Utah 2002); *In re* M.C., 82 P.3d 1159, 1163 (Utah Ct. App. 2003); Woodhaven Apartments. v. Washington, 942 P.2d 918, 925-26 (Utah 1997); Walker v. Hansen, 74 P.3d 635, 638 (Utah Ct. App. 2003); Kaysville City v. Mulcahy, 943 P.2d 231, 233 (Utah Ct. App. 1997); State v. McDonald, 922 P.2d 776, 780-81 (Utah Ct. App. 1996).

that is essentially something else.

The Utah Supreme Court has recognized the impossibility of quantifying discretion: "Of course, the attempt to differentiate between degrees of discretion in any meaningful way is impossible because discretion is not quantifiable. Nevertheless, standards stating different degrees of discretion do describe a mind set and influence appellate approaches to reviewing particular issues."[55] This attempt to justify the use of varying degrees of an unquantifiable concept simply underscores the argument that such a "mind set" runs the very real danger of exposing the rule of law to the individual personalities of judges. Such a "mind set . . . influence[s] appellate approaches" in unpredictable and far from transparent ways.[56]

The supreme court suggests that when important policy considerations are present in a given issue, they will outweigh the need for trial court discretion and will require uniformity and closer appellate review.[57] One may legitimately ask what, under our judicial system, could be more important than "the interest in having uniform legal rules"[58] governing the amount of discretion available to a trial court in the context of *any* issue? In a common law system, how can the courts perform their function under a regime of uncertain boundaries? Shouldn't this always "outweigh" the problem of the "varying fact patterns that would be relevant to [discretionary] determinations"?[59] Aren't there *always* "reasons of policy that require standard uniformity among trial courts addressing [*every*] question"?[60]

For example, in *State v. Perry*, the Utah Court of Appeals considered how much discretion to give trial courts in cases of alleged ineffective assistance of counsel.[61] Following *Pena*'s framework, it concluded that such questions should be reviewed more closely than questions of reasonable suspicion.[62] Judge Russell W. Bench, in a concurring opinion, stated:

> No one has really articulated why we review some mixed questions more searchingly than others. I seriously doubt that anyone can. By definition, mixed questions are all fact sensitive and many also involve constitutional questions. It is inconsistent and confusing for us to

55. State v. Doporto, 935 P.2d 484, 490 n.3 (Utah 1997).
56. *Id.*
57. *See Pena*, 869 P.2d at 939; Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998).
58. *Pena*, 869 P.2d at 939.
59. *Id.*
60. *Jeffs*, 970 P.2d at 1244.
61. *See* State v. Perry, 899 P.2d 1232 (Utah Ct. App. 1995).
62. *See id.* at 1239.

> review most questions under a deferential standard, but not all.[63]

This statement points to the impossibility of defining workable and uniform standards for apportioning discretion or, as *Pena* described it, for "fix[ing] allocation of power and responsibility between the trial and appellate courts"[64] when the courts become committed to a shifting spectrum of discretion model.

IV. RECOMMENDATIONS

Pena was never a workable analytic framework for approaching mixed questions of law and fact. Utah courts thus should abandon the spectrum of discretion model for approaching that standard of review. Instead, Utah courts should adopt the approach used by the Tenth Circuit for reviewing mixed questions of fact and law: "We review mixed questions under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles."[65] This is the perfect solution, granting deference to the trial court where deference is due—namely, where factual matters are concerned, since trial courts are experts at finding facts and appellate courts are not. The clearly erroneous standard of review for factual matters

> represents a fixed allocation of power[66] and responsibility between the trial and appellate courts that is grounded in our distinct and unchanging institutional competencies regarding questions of fact. Because there is no inherent policy component in fact determinations, it will never be appropriate for an appellate court to overturn a trial court's factual determinations when they have substantial record support.[67]

The clearly erroneous standard of review thus permits the trial judge

63. *Id.* at 1245 (Bench, J., concurring).

64. *Pena*, 869 P.2d at 939.

65. Armstrong v. Comm'r, 15 F.3d 970, 973 (10th Cir. 1994).

66. This stands as perhaps the most glaring indictment of *Pena*'s own framework. While the clearly erroneous standard of review certainly "represents a fixed allocation of power and responsibility between the trial and appellate courts that is grounded in our distinct and unchanging institutional competencies," *Pena*, 869 P.2d at 939, *Pena*'s shifting spectrum of discretion framework blurs the "allocation of power" by rendering impossible the task of deciphering just what kind of discretion a trial judge has. *Id*. Thus, *Pena* pollutes the otherwise stable "allocation of power" between trial courts and appellate courts by subjecting trial courts to review according to the transient whims of appellate judges. *Id*.

67. *Id*.

proper "grazing space" in issues that truly allow him or her to "reach one of several possible conclusions . . . without risking reversal."[68] Further, this approach ultimately requires appellate courts to outline the contours of the law, thus satisfying the fundamental values of stare decisis and the rule of law.

While this approach preserves the fact/law distinction, it has been called "wooden" in its application.[69] Utah courts thus treat this approach as unsophisticated, lacking sufficient nuance to realistically apportion appropriate discretion to trial courts where trial courts are in an advantaged position.[70] As mentioned above, nearly a year before *Pena* the Utah Court of Appeals explained how this framework is, at the same time, a workable and a nuanced way to analyze mixed questions of law and fact.[71] In *State v. Rochell*, the majority opinion "implie[d] that . . . [the court of appeals] review[s] the trial court's finding of reasonable suspicion for correctness."[72] Judge Bench, in a concurring opinion criticizing the majority, defined the two separate spheres of fact and law and explained how the two spheres relate to each other.[73] Appellate courts owe broad discretion to trial courts as factfinders because of their superior position to weigh evidence and to assess credibility.[74]

In recognizing the discretion properly allocated to trial courts, Judge Bench asserted that findings of fact have "two possible prongs of attack: a legal prong, and an evidentiary prong,"[75] because "'[a] trial court's finding is clearly erroneous if it is without adequate evidentiary support in the record *or if it is induced by an erroneous view of the law*.'"[76] The possibility of erroneous views of law inducing clearly erroneous findings stands at the center of this approach. Further, understanding the nature of that possibility provides appellate courts with the ability to properly separate the "distinct and unchanging institutional competencies regarding questions of fact"[77] between trial courts and appellate courts:

> Legal guidelines circumscribe a trial court's traditionally broad factfinding discretion when the court finds an ultimate fact. These

68. *Id.* at 937.

69. *See id.*, at 938; State v. Perry, 899 P.2d 1232, 1243 (Utah Ct. App. 1995) (Bench, J., concurring).

70. *See generally Pena,* 869 P.2d 932.

71. *See* State v. Rochell, 850 P.2d 480, 484-87 (Utah Ct. App. 1993) (Bench, J., concurring).

72. *Id.* at 484.

73. *See id.* at 484-87.

74. *See id.*

75. *Id.* at 485.

76. *Id.* (quoting State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990) (emphasis added)).

77. State v. Pena, 869 P.2d 932, 939 (Utah 1994).

> guidelines create a *field of inquiry* within which a trial court must make its finding. If a trial court's finding of ultimate fact is made in violation of these legal guidelines, it is "induced by an erroneous view of the law." When an ultimate finding of fact is made in violation of a legal guideline, we correct it under a correction-of-error standard of review.[78]

The field of inquiry approach accomplishes the goals set forth in *Pena* of determining how much discretion to afford a trial court[79] and accounting for the varying sets of facts that may come within a particular rule's reach.[80] It accomplishes these goals because it allows appellate courts to inform a trial court's factfinding efforts by defining what considerations have legal significance under a given rule. At the same time, however, this approach preserves the distinction of essence between fact and law, requires appellate courts to define precisely what the law is, and permits appellate courts to review truly legal issues de novo:

> When a legal principle guides the factfinder, the factfinder's task differs from the finding of a basic or historical fact because "*the field of inquiry has limits defined, or capable of definition, by legal principle and judicial discussion*." In other words, the factfinder is not allowed to wander about picking just any old fact it finds persuasive or conclusive; rather, the factfinder must remain within a specific field of inquiry defined by the law and consider factual issues required by the law to be considered.
>
> An example may be helpful in understanding this concept. When a factfinder must determine whether a person has committed a crime, it is not allowed to decide arbitrarily what constitutes the offense. Rather, the factfinder must consider the elements of the crime as defined by the law. Furthermore, the factfinder is not allowed to base its decision on irrelevant factors such as the defendant's race, religion, prior bad acts, etc. The law therefore creates a field of inquiry within which the factfinder must function. The ultimate factual finding that the defendant did, or did not, commit the crime charged is a factual determination,

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78. *Rochell*, 850 P.2d at 485 (Bench, J., concurring) (internal citations omitted) (emphasis added). *See also* State v. White, 856 P.2d 656, 659 (Utah Ct. App. 1993) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987) ("[I]f we find the trial court failed to evaluate the significance of uncontroverted facts, or facts as the court found them, in terms of relevant principles developed through precedent, we may review the trial court's conclusion of reasonableness under a correction-of-error standard, deciding that this conclusion was 'induced by an erroneous view of the law.")).

79. *See Pena*, 869 P.2d at 937.

80. *See id.* at 939.

> "guided" by the law. To such findings we defer, so long as the factfinder remained within a properly defined *field of inquiry*.[81]

In re B.T.D. provides an excellent example of how this approach could work in practice.[82] In *B.T.D.*, a district court made a finding that a mother consented under duress to the adoption of her children.[83] The Utah Court of Appeals stated, "Whether duress existed and was sufficient to void consent is a mixed question of law and fact . . . ."[84] To find duress, the district court relied on an outdated list of factors.[85] On appeal, the Utah Court of Appeals reversed the district court's finding of duress, ruling as a matter of law that the finding was clearly erroneous.[86] The court of appeals set forth the factors that district courts are legally bound to consider when making a finding of duress[87] and remanded the case for further proceedings.[88] The court of appeals did not discuss whether the mixed question at issue permitted the district court a measure of discretion in applying the legal standard to the facts and, instead, focused on whether the district court used correct legal principles while making findings of fact. In that case, the district court used an entirely obsolete legal test to determine whether, as a matter of fact, the mother consented to the adoption under duress; but even if it

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81. *Rochell*, 850 P.2d at 485 n.3 (Bench, J., concurring) (emphasis added) (quoting State v. Richardson, 843 P.2d 517, 521-22 n.3 (Utah Ct. App. 1992) (Bench, J., concurring); *cf. Pena*, 869 P.2d at 939 ("[T]he facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out.").

82. *See* 68 P.3d 1021, 1025-26 (Utah Ct. App. 2003).

83. *See id.* at 1026.

84. *See id.* at 1024.

85. *See id*. at 1026. The district court articulated the following legal standard for making duress findings:

> Utah cases are in line with other jurisdictions in holding that where most of the circumstances surrounding the signing of consent point to duress and undue influence, the court will allow revocation of consent. [D.P. v. Social Services, 431 P.2d 547 (Utah 1967)]. Persuasion alone, intense emotion at the time of signing alone, misunderstanding about the finality of consent alone, financial or marital difficulties or promises alone, and even being medicated at the time of signing alone is not enough to justify setting aside the consent. Each case must be decided on its own facts, and all of the circumstances surrounding the signing of consent must converge to show that the consent was given under duress and undue influence. See [D.P., 431 P.2d at 551]; [In re Adoption of Infant Anonymous, 760 P.2d 916 (Utah Ct. App. 1988)]; [In re Adoption of D., 122 Utah 525, 252 P.2d 223, 227 (Utah 1953)].''

Id. (alterations in original).

86. *See id.*

87. *See id.* The court of appeals relied on the following legal standard for making findings of duress: "Under . . . [the correct] legal standard, a 'contract is voidable by the victim' '[i]f . . . assent is induced [(1)] by an improper threat [(2)] by the other party [(3)] that leaves the victim no reasonable alternative.'" *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (alterations in original)). *See also* Andreini v. Hultgren, 860 P.2d 916, 921 (Utah 1993) (adopting the Restatement's view of duress).

88. *See id.*

used the correct, or nearly correct, test, the court of appeals could have reviewed that test as a matter of law to determine whether the district court's duress finding stayed within the proper field of inquiry. While *B.T.D.* does not expressly follow the fields of inquiry approach, it correctly demonstrates the relationship between law and fact. It further demonstrates the clarity and simplicity such an approach would provide appellate courts.

At the time the supreme court issued *Pena*, the court of appeals had issued a number of cases that utilized the field of inquiry approach.[89] The Utah Supreme Court should abandon the *Pena* approach and adopt the fields of inquiry approach. The practical result would likely be the wholesale abandonment of the idea of mixed questions and the elimination of mixed questions from the categories of appellate standards of review. To do so would provide a workable framework for appellate courts and trial courts alike, clearly defining the limits of trial court discretion and the closeness of appellate review. It would further serve the purpose of providing transparency and consistency in the appellate process. The fields of inquiry approach, in short, would conform Utah law more closely to the values and ideals of stare decisis and the rule of law.

V. CONSIDERATIONS FOR APPELLATE PRACTICE

Despite the *Pena* framework's theoretical and practical pitfalls for approaching mixed questions, it remains the law in Utah. Thus, practitioners seeking reversal on appeal must continue to grapple with *Pena*. This comment suggests two practical considerations that appellate practitioners may find useful.

A. Pena *is Complicated, Subtle, and Flexible*

The most important thing a practitioner can do is to become intimately familiar with *Pena* and its progeny. The *Pena* framework itself can allow practitioners considerable latitude in articulating the appropriate level of appellate scrutiny for a given mixed question. Thus, a practitioner should never assume that the case law to date absolutely pigeon-holes his or her present case into a strict category of discretionary appellate review. Furthermore, without a good handle on *Pena*'s

89. *See* State v. Harmon, 854 P.2d 1037, 1040 n.2 (Utah Ct. App. 1993); State v. Rochell, 850 P.2d 480, 485 n.3 (Utah Ct. App. 1993) (Bench, J., concurring); State v. Barnhart, 850 P.2d 473, 475 (Utah Ct. App. 1993); State v. Richardson, 843 P.2d 517, 521 n.3 (Utah Ct. App. 1992) (Bench, J., concurring).

spectrum of discretion framework, practitioners will find their research very difficult. The sheer variety of, and seeming contradictions among, the statements of the applicable standard of review will bewilder practitioners.

A careful appellate practitioner can capitalize on the difficulty of approaching this standard of review to the profound benefit of his or her clients. By its very nature under the *Pena* framework, mixed question discretion is fluid. The bounds of the trial judge's discretion are changeable. This is because the appellate court has already made a determination that there are too many varying factual settings where a particular legal standard may apply to make a definitive statement of the law.[90] This means that the bounds of trial courts' discretion will be fenced in a little more or sometimes expanded each time a novel factual scenario arises. "Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted."[91]

For the practitioner, this means there will often be a good argument to be made that the trial court ought to have more or less discretion than was given to other trial courts in other cases. Unless the case at bar is exactly like a previous case—an unlikely scenario, since the Utah appellate courts are devoutly convinced of the hopeless variety of such factual scenarios—then the scope of a trial judge's discretion is always in question.

B. How to Achieve Broader or Narrower Appellate Review

Arguments that substantial rights are at stake may help to narrow the amount of discretion permitted the trial court. In *State v. Thurman,*[92] for example, the Utah Supreme Court determined:

> [W]hile there were varying fact patterns that would be relevant to determinations of voluntariness of consent, they were not so unmanageable in their variety as to outweigh the interest in having uniform legal rules regarding consent to search, given the substantial Fourth Amendment interests lost as a result of such consents.[93]

90. *See* State v. Pena, 869 P.2d 932, 939 (Utah 1994).

91. *Pena*, 869 P.2d at 938. I have an unsubstantiated suspicion that more often the discretion will tend to diminish over time as appellate courts determine that more and more trial court rulings fall outside the allotted discretion.

92. *See* 846 P.2d 1256 (Utah 1993).

93. *Pena*, 869 P.2d at 939 (citing State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993)).

Thus, the supreme court did not grant broad discretion in that context.

The converse would also seem true— an argument that merely procedural or less fundamental statutory rights are at stake may help in defining the scope of discretion more broadly. As already noted in *Platts v. Parents Helping Parents*, the supreme court granted very broad deference to a trial court's application of the statutory definition of "health care provider" to the facts of the case.[94] The procedural and statutory rights at stake in *Platts* appear less important than the rights at stake in *Thurman*, where a determination of the issue of the voluntariness of consent results either in the availability or the waiver of fundamental constitutional rights. Thus, a practitioner should always preliminarily consider the particular issue in the present case and ask whether, in a broad public policy sense, the courts should be "comfortable in more closely defining the law by fencing off a part of the pasture previously available"[95] or whether they should less closely define the law by opening a part of the pasture previously unavailable.

VI. CONCLUSION

Pena has proved through critical examination and historical application, to needlessly confuse the already complex question of trial court discretion. Utah courts should explicitly abandon the framework as it seems they may have already implicitly done. Instead, the Utah Supreme Court should adopt the long-forgotten, but well-advised, approach formulated in the early 1990s by the Utah Court of Appeals. That approach uses the metaphor of fields of inquiry to describe the way in which rules of law inform and guide a trial court's fact finding efforts. Until they do, practitioners may legitimately continue to capitalize on *Pena*'s uncertainties. Artful advocacy and characterization of rights as being more or less fundamental may prove an effective tool to achieve victory on appellate review of mixed questions.[96]

94. *See* 947 P.2d 658, 662-63 (Utah 1997).

95. *Pena*, 869 P.2d at 938.

96. The author would like to recognize three people for their assistance in the writing of this Note. Judge Norman H. Jackson provided invaluable personalized mentoring in appellate law and a solid theoretical foundation in Utah standards of appellate review. Derek Kearl and Jamie Williams both provided much needed editing and technical assistance and served as sounding boards to help the development of the theory of this Note. Many thanks.