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Standards of Review: The Meaning of Words

Michael R. Bosse
University of Maine School of Law

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> Human reason has this peculiar fate that in one species of its knowledge it is burdened by questions which, as prescribed by the very nature of reason itself, it is not able to ignore, but which, as transcending all its powers, it is also not able to answer.[1]
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> — Immanuel Kant

> The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself.[2]
>
> — Oliver Wendell Holmes

I. INTRODUCTION

Standards of review are both theoretically and practically important, yet they often are ignored by both lawyers and judges.[3] They provide functional definitions of the advocate's scope of appeal,[4] the power of a reviewing court to rule on that appeal, and, depending

* Law Clerk for Justice Robert W. Clifford, Maine Supreme Judicial Court; J.D., University of Maine School of Law, 1996; B.A., Bates College, 1993. My thanks to Julie Brady, Justice Robert Clifford, Chip Mason, and Professor Melvyn Zarr for reading and editing drafts of this Article. Their assistance was invaluable.

1. IMMANUEL KANT, CRITIQUE OF PURE REASON at vii (Norman Kemp Smith trans., Macmillan & Co. 1965) (n.d.).

2. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

3. They are not ignored in legal scholarship, and several articles and books have canvassed the subject of standards of review. *See, e.g.*, FRANK M. COFFIN, ON APPEAL 266-67 (1994) (discussing abuse of discretion); Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377 (1984); Steven Alan Childress, *Standards of Review in Eleventh Circuit Civil Appeals*, 9 NOVA L.J. 257 (1985); Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988); Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231 (1991); Judge Norman H. Jackson, *Utah Standards of Appellate Review*, 7 UTAH B.J. 9 (1994); 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 (1986); Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1 (1958); Honorable John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409 (1981); Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1975); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

4. *See* Honorable J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, LAW & CONTEMP. PROBS., Spring 1984, at 1, 1.

upon the standard of review utilized, an influence on the outcome of an issue. Because they define the framework for an appeal and an appellate court's approach to certain issues, standards of review are important tools for both bench and bar.[5] The question of whether a trial court clearly erred or abused its discretion[6] is not the same determination as whether the court was simply wrong. By contrast, on a de novo review of an issue of law, the United States Supreme Court *could* unanimously reverse a unanimous en banc circuit court of appeal's ruling. A de novo standard of review allows a court to do precisely what it is not permitted to do when the standard of review is deferential. Standards of review are a fertile ground for advocacy.[7]

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5. Despite what some advocates might believe, standards of review can be extremely important to courts. In response to the government's failure to mention the standard of review in anything more than a soundbite in its brief, Judge Posner issued this response:

> We are not fetishistic about standards of appellate review. We acknowledge that there are more verbal formulas for the scope of appellate review (plenary or de novo, clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct, and maybe others) than there are distinctions actually capable of being drawn in the practice of appellate review. But even if, as we have sometimes heretically suggested, there are operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential, *that* distinction at least is a feasible, intelligible, and important one.

United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995) (citations omitted).

6. I have omitted from this Article any discussion of a trial court's discretion and appellate court determinations of abuse of that discretion. Although abuse of discretion is an important standard of review for the practitioner, the topic lends itself to separate treatment from the identification and labeling of issues as "factual" or "legal" and the consequent use of either a de novo or clear error standard.

7. *See* Sean T. Carnathan & Karen D. Kemble, *Hints on Writing Law Court Briefs From Some People Who Read Them*, 9 ME. B.J. 318, 319 (1994) (noting importance of identification and utilization of standards of review in briefs before the Law Court); John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, *in* APPELLATE ADVOCACY 63, 64 (Peter J. Carre et al. eds., 1981) (noting that the standard of review is the "measuring stick" for the appellate judge); W. Wendell Hall, *Standards of Appellate Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 867-68 (1990) ("Because the appropriate standard of review will control the outcome of an appeal, appellate practitioners must consider the standard of review with the same thoughtful consideration that they give to the facts and the substantive law."); Jeff Leavell, *Appellate Review: Choosing and Shaping the Proper Standard*, 60 WIS. B. BULL. 14, 15 (1987) ("[U]nderstanding the standards of review will permit the lawyer to advocate the standard most favorable to the lawyer's position."). Hall states:

> There is nothing to be gained by avoiding the standard of review. The appellate practitioner who ignores the standard loses credibility with the reviewing court. If an appellate practitioner does not identify the relevant standard and vigorously approach the standard in his brief, he leaves a void in his brief which will be filled by his adversary, the reviewing court, or the court's clerks.

Many practical reasons exist for an analysis and thorough study of standards of review. To understand and to know what standards of review apply is important to the practitioner in Maine for two reasons: first, to know whether an appeal is likely to be successful, and second, to argue that appeal.[8] The practitioner should spend more time arguing her choice for the standard of review in her brief. She should pay attention to precedent but also heed policy. Doing so will either expose areas for argument or counsel against an appeal. When a real question over a standard of review exists, and lawyers have done extensive analysis in their briefs, appellate courts should explicitly examine the various policy rationales and decide the appropriate standard of review to both encourage meritorious appeals and discourage appeals that stretch or distort the function of the reviewing court.

Standards of review are widely understood to be based on whether the issue "is" one of "fact" or "law."[9] If an issue is deemed

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Hall, *supra* at 868.

8. A Maine Supreme Judicial Court Justice has recently made this point. Justice Dana noted:

> In my former life, long after I took the appeal, I would send an associate to the library to look . . . [the standard of review] up. Waiting that long is usually a big mistake. It is better than never, but I would encourage all of you to fully understand the standard of review as early as possible—preferably before you decide to appeal . . . if you are representing a civil litigant whose chances of prevailing are one in four, and the client is going to have to pay you either way, at least the client ought to make an informed expenditure of its resources.

Honorable Howard H. Dana, Jr. & Honorable Andrew M. Mead, *Effective Trial and Appellate Advocacy Tips From the Bench*, 10 ME. B.J. 24, 26 (1995).

9. This dichotomy is reflected in Maine law. *See* Collins v. Trius, Inc., 663 A.2d 570, 572 (Me. 1995) (questions of law reviewed de novo); Lord v. Society for the Preservation of New England Antiquities, Inc., 639 A.2d 623, 624 (Me. 1994) (same). ME. R. CIV. P. 52(a) provides that factual findings will not be reversed unless they are clearly erroneous. The Maine Law Court has said:

> The essential impact of the "clearly erroneous" rule is that the trial judge's findings stand unless they clearly cannot be correct because there is *no* competent evidence to support them. An appellate court can reverse a finding of fact only where (1) there is no competent evidence in the record to support it, or (2) it is based on a clear misapprehension by the trial court of the meaning of the evidence, or (3) the force and effect of the evidence, taken as a total entity, rationally persuades to a certainty that the finding is so against the great preponderance of the believable evidence that it does not represent the truth and right of the case.

Harmon v. Emerson, 425 A.2d 978, 982 (Me. 1981). The Law Court explained long ago, however, the reasons why factual matter should be reviewed deferentially. The court has said:

> When the testimony is conflicting, the judge has an opportunity to form an opinion of the credibility of witnesses, not afforded to the full court. Often there are things passing before the eye of a trial judge that are not capable of being preserved in the record. A witness may appear badly upon the stand and well in the record.

one of "fact," a court generally will review it only for clear error. If an issue is deemed one of "law," a court will exercise a de novo review. This designation is critically important in cases when "facts" and "law" are intertwined because how issues are labeled can determine the outcome of the appeal. Commentators, academics, and students, however, have had considerable difficulty in drawing the respective boundaries of the designations of "fact" and "law." As one author noted, "At first blush, this distinction might seem self-evident, yet commentators have disputed for decades the boundaries of each, and noted their 'delusive simplicity.'"[10] Fact has been described as that which is "a question of the existence, reality, truth of something; of the *rei veritas*."[11] Another author has defined a finding of fact as "a determination by the court or the jury concerning facts averred by one party and denied by another."[12] Law, on the other hand, is "'that which is not fact,' or 'that which involves rules or principles.'"[13] The Ninth Circuit Court of Appeals has said that "[a] finding of fact, to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of human conduct'. [sic] A conclusion of law would be a conclusion based on [the] application of a legal standard."[14]

The premise of this Article is that metaphysical attempts to find the true essence of "fact" and "law" are misguided and have been perpetuated for far too long. What is at stake is not essence but characterization. The labels "fact" and "law" are attached to issues only after the policies underlying substantive law have influenced the appellate court to apply one standard of review or another. In this area of the law, Judge Posner, writing for the Seventh Circuit Court of Appeals, understands that the label is based on policy considerations: "'Law' and 'fact' do not in legal discourse denote pre-existing things; they express policy-grounded legal conclusions. We ought to ask what is gained and what lost by appellate second-guessing of a federal district judge's determination."[15] Other commenta-

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Young v. Witham, 75 Me. 536, 537 (1884). The court has also stated that "[t]he 'clearly erroneous' standard is not based merely on the trial court's ability to judge the demeanor and credibility of live witnesses, but also on a recognition of the trial court's particular expertise in fact finding and its proper institutional role." Casco Northern Bank v. JBI Assocs., 667 A.2d 856, 859 (Me. 1995) (citing *In re* Estate of Tully, 545 A.2d 1275, 1277-78 (Me. 1988)).

10. Hofer, *supra* note 3, at 235 (citing Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922)); *see also* A. LEO LEVIN ET AL., CASES ON CIVIL PROCEDURE 798 (1992) ("Determining the precise meaning and applicability of each of these terms is not without its difficulties.").

11. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 191 (1898), *quoted in* Hofer, *supra* note 3, at 236 (footnotes omitted).

12. Brennan, *supra* note 3, at 380.

13. Hofer, *supra* note 3, at 236.

14. Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962).

15. Weidner v. Thieret, 866 F.2d 958, 961 (7th Cir. 1989).

tors have observed this problem but have failed to provide a better alternative. One commentator stated:

> Our discussion of definitions has thus far taken us, it would seem, little way from a purely intuitive understanding of fact and law. Fact is empirical, it concerns itself with events occurring either in the real world or in the mind, and it is the fodder for the application of law. Law, on the other hand, consists of rules, standards, or principles determined in advance of their application. These definitions, it is submitted, offer insufficient guidance in determining which is which.[16]

The United States Supreme Court has concluded that "we [do not] yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion."[17] Judge Friendly once said, "[W]hat a court can determine better than a jury [is] perhaps about the only satisfactory criterion for distinguishing 'law' from 'fact.'"[18] Other authors have recognized the difficulty in discerning "fact" from "law." Their conclusions demonstrate that we should abandon the search for inherent characteristics of "fact" and "law" when thinking about and applying standards of review. Indeed, the failure to adequately define the inherent qualities of "fact" and "law" demonstrates that this labeling is merely a cover for policy arguments. The words themselves, "fact" and "law," mean much

16. Hofer, *supra* note 3, at 237; *see also* Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 236 (1991) ("After all, the labels 'law' and 'fact' often amount to little more than divisions of decision-making authority between judges and juries or between appellate courts and trial courts."); Cooper, *supra* note 3, at 645. "[T]he 'clearly erroneous' phrase has no intrinsic meaning. It is elastic, capacious, malleable, and above all variable. Because it means nothing, it can mean anything and everything that it ought to mean." *Id.* Cooper further states that "[t]he fundamental secret is out, and notoriously so. Characterization of an issue of law application as fact or law for purposes of identifying a formalized standard of review depends on the perceived need for review, not on the actual status of the issue." *Id.* at 660. Still another commentator notes:

> Some would insist that [difficulty in determining between fact and law] exists because the asserted distinction is fundamentally incoherent. The incoherence argument seems greatly overdrawn once it is recognized that any distinction posited between "law" and "fact" does not imply the existence of static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience.

Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) (footnotes omitted); *see also* James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890).

17. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). The United States Supreme Court also has said that "the proper characterization of a question as one of fact or law is sometimes slippery." Thompson v. Keohane, 116 S. Ct. 457, 464 (1995). In another case, the Court stated that it "has long noted the difficulty of distinguishing between legal and factual issues." Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 401 (1990).

18. United States v. J.B. Williams Co., 498 F.2d 414, 431 (2d Cir. 1974).

less than the rationales and arguments which give them their meaning.

As the case law and these authorities demonstrate, standards of review are not "discoverable" as a matter of the inherent, physical properties and propensities of "facts" and "law." They are "characterizations." Thus, the practitioner must examine and explore a deeper, more difficult, but also more interesting terrain. To navigate this terrain successfully, an advocate ideally should determine the standard of review before deciding to attempt an appeal. An appellate court also should utilize the standard of review to define its role in each case. When area for argumentation exists, both the court and the lawyers should understand, examine, and argue the competing policies for choosing one level of deference over another. The party seeking appellate review of an issue will want as little deference to the trial court's decision as possible. Therefore, the party will try to label the issue as one of "law."[19] The party who was successful in the trial court will try to have the appellate court give as much deference to the trial court's decision as possible by labeling the issue as one of "fact." When presented with such an issue, how should the appellate court decide which label to use? How can the parties effectively argue their choice of label? This Article suggests that policy reasons underlie the standard of review and choice of label and that the more effective advocate is the one who advances better and sounder policy reasons for a particular standard of review instead of arguing the metaphysics of the issues. Why we label, and not the labeling itself, demands our attention and energy.

Only at the margins is the labeling easy. Pure historical facts, such as what time of day the incident occurred, are easily labeled "fact." Pure legal issues, such as the definition of "proximate cause" in jury instructions, are easily labeled "law." There is, however, a vast middle ground of "mixed" questions of application of historical fact to legal standards. To survey the terrain of this middle ground, resort to the case law is essential.

The second part of this Article will explore some United States Supreme Court cases that discuss the standards of review and the policy reasons for assigning a certain level of deference to each of the issues presented. The goal in the second part of the Article will be to expose and examine the arguments for and against each possible standard of review. The United States Supreme Court has explicitly considered the application of different standards of review, and the serious advocate can discern several useful methods of argu-

19. *See* Brennan, *supra* note 3, at 408. Brennan notes that "one certainty is that counsel will use every argumentative tool available to classify an appealable issue as being a conclusion of law. While facts are not considered on appeal, review of a conclusion of law means a second hearing for at least part of an appellant's cause." *Id.*

mentation from these cases. Part III of this Article will analyze some Maine Law Court cases in which the standard of review was central to the decision of federal questions. A comparison between Law Court and United States Supreme Court cases will demonstrate that standard of review issues are debatable questions and certainly not ones for which consistent answers have always been given. Part IV will analyze three Law Court decisions on state law questions. These cases demonstrate that although policy rationales are not always articulated with clarity, they are implicitly present in the labeling of issues as those of "fact" or "law." Finally, Part V will offer some concluding observations on standards of review.[20]

II. UNITED STATES SUPREME COURT CASE LAW

The United States Supreme Court has explicitly considered the application of different standards of review for various issues. Often, the sole question on certiorari centers on choosing the standard of review. These cases demonstrate that argumentation of policy rationales lies behind the Court's decision to apply a certain level of deference in a particular case. Moreover, they expose areas and theories of argumentation for the advocate to utilize in future cases.

An instructive case to begin with is *Bose Corp. v. Consumers Union of United States, Inc.*[21] The basis for this case arose when the defendant, Consumers Union, published an article in *Consumer Reports* on brands of loudspeakers, including the plaintiff's, Bose.[22] Bose objected to a statement in a report that was critical of one of its models. The review stated in part:

> Worse, individual instruments heard through the *Bose* system seemed to grow to gigantic proportions and tended to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall to wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to soloists.[23]

Bose filed suit in federal district court contending that the defendant had disparaged its product.[24] The court conducted a nineteen-day bench trial, and the author of the article testified for six days about the speakers and his statement.[25] The United States District Court for the District of Massachusetts held that Bose had met the

20. This Article does not contain a laundry list of standards of review for particular issues, although such a list is theoretically possible. The creation of such a list, however, is inconsistent with the very premise of the Article, that standards of review are not indelible. Rather, they are indeed debatable and malleable subjects.

21. 466 U.S. 485 (1984).

22. *See id.* at 487-88.

23. *Id.* at 488.

24. *See id.*

25. *See id.* at 489, 495.

"actual malice" standard promulgated in *New York Times v. Sullivan*: the statement about the speakers was a false statement of fact, and Bose had satisfied its burden of showing that *Consumer Reports* had made the false statement with the knowledge that it was false or with reckless disregard for its truth or falsity.[26]

The United States Court of Appeals for the First Circuit reversed that determination.[27] This court decided that the district court's determination of "actual malice" should be reviewed de novo instead of under the clearly erroneous standard of Rule 52 of the Federal Rules of Civil Procedure.[28] Moreover, in reversing the plaintiff's judgment, the court held that although the defendants may have used imprecise language, such language "[did] not support an inference of actual malice."[29] On appeal to the United States Supreme Court, the sole question before the Court was whether the appellate court should have applied the clearly erroneous standard of Rule

26. *See id.* at 490-91; *see also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

27. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. at 492.

28. By way of example, Rule 52(a) of the Maine Rules of Civil Procedure states:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the Superior Court justice or, if an electronic recording was made in the District Court, the District Court judge, shall, upon the request of a party made as a motion within 5 days after notice of the decision, or may upon its own motion, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment if it differs from any judgment that may have been entered before such request was made; provided that, in every action for termination of parental rights, the court shall make findings of fact and state its conclusions of law thereon whether or not requested by a party. In granting or refusing interlocutory injunctions the court shall similarly on such request set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a referee, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 50(d).

ME. R. CIV. P. 52(a); *see also* FED. R. CIV. P. 52(a). Wright notes that "[p]robably no provision of the federal rules has been quoted and cited more often than the famous sentence in Rule 52(a) . . . ." CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 96, at 689 (5th ed. 1994); *see also* 1 RICHARD M. FIELD ET AL., MAINE CIVIL PRACTICE § 52.7 (2d ed. 1970) (discussing the application of the "clearly erroneous" test); Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 647 n.8 (1988) (listing articles discussing the history of Rule 52).

29. Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 197 (1st Cir. 1982).

52[30] to the determination of "actual malice," or whether the appellate court should have reviewed the determination de novo as a question of law.

On appeal, Bose argued that the appellate court had erred in applying a de novo standard to the issue of "actual malice."[31] Because a determination of "actual malice" depended on the credibility of the witnesses, a deferential standard of review should apply and thus, the trial judge's conclusion should be reinstated.[32] Consumers

30. Much has been written about the meaning of Rule 52, and the vessel of "clear erroneousness" conveys little until meaning fills it. One treatise states that "clear error" means that the "court's findings are presumptively correct." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585, at 565 (2d ed. 1995). One court has stated that the findings "come here well armed with the buckler and shield" of the rule. Machinery Rental, Inc. v. Herpel (*In re* Matter of Multiponics, Inc.), 622 F.2d 709, 723 (5th Cir. 1980); *see also* Horton v. U.S. Steel Corp., 286 F.2d 710, 713 (5th Cir. 1961). Another court, however, has issued a more comical interpretation. Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988) ("[T]he decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish."). The United States Supreme Court's definition is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The Court has concluded that "certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74. The United States Supreme Court has stated several times that the function of the court is not to review the evidence anew. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." Anderson v. City of Bessemer City, 470 U.S. at 573. The factfinder's choice between two permissible views of the evidence also cannot be clearly erroneous. *Id.* at 574. In another case, however, Judge Learned Hand stated:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945).

31. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. at 493.

32. In addition to the various United States Supreme Court pronouncements granting deference to the factfinder, commentators also have noted that the trial court's ability to determine the credibility of a witness is a compelling reason to grant the lower court a large measure of deference. *See* Brennan, *supra* note 3, at 397. The United States Supreme Court has said that "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."

Union, on the other hand, reminded the Court that when First Amendment issues arise in a case, the Court has said that the appellate court has an obligation to "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"[33] Thus, the policies that allow the trial judge to assess the demeanor of witnesses directly conflicted with the appellate court's power to police the right of people to speak freely.

The issue of "actual malice" is "inherently" neither an issue of "fact" nor "law." How it should be characterized involves a policy choice rooted in the substantive law. The United States Supreme Court concluded that the nature of an "actual malice" determination demanded that a de novo standard be applied.[34] The Court found itself stuck between the principle embodied in Rule 52 and the contrary principle established in the First Amendment area, and yet concluded that "[t]he conflict between the two rules is in some respects more apparent than real."[35] The Court analogized the determination of "actual malice" to other mixed legal determinations of exceptions to speech protected by the First Amendment.[36] The Court found that the circumstances underlying the creation and evolution of the *New York Times* rule demanded that judges, including those on the Supreme Court, "make sure that it is correctly applied."[37] Applying the de novo standard, the Court concluded that the choice of language, "though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella."[38]

Bose Corp. is an example of a judicial choice between policy considerations. The United States Supreme Court did not bury its analysis of the applicable standard of review in a confusing pronouncement that an issue of "fact" or "law" was involved. Instead, it acknowledged that such decisions depend, at their base, on a weighing of policy rationales. First, the majority opinion recog-

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Anderson v. City of Bessemer City, 470 U.S. at 574. Maine law is clear that matters regarding the credibility of witnesses are left to the factfinder. *See, e.g.*, State v. Doughty, 399 A.2d 1319, 1326 (Me. 1979) ("[I]t is the exclusive province of the factfinder, here the jury, to decide what credence should be given to the various witnesses and their testimony.").

33. Bose Corp. v. Consumers Union of United States, 466 U.S. at 499 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)). Commentators have given support to the idea that appellate courts should freely review conclusions of law. "[I]t is safe to say that an appellate court is not only entitled to review freely a lower court's conclusions of law, but has the duty to do so." Brennan, *supra* note 3, at 406-07.

34. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. at 511.

35. *Id.* at 499.

36. *See id.* at 504-05.

37. *Id.* at 502.

38. *Id.* at 513.

nized that differences in deference depend on the particular area of substantive law at issue. The Court stated that "[t]he requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others."[39] The Court, however, made clear that no deference applied when a de novo review was applied to an issue labeled as one of "law."

> Rule 52(a) applies to findings of fact, including those described as "ultimate facts" because they may determine the outcome of litigation. But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.[40]

Additionally, the Court properly questioned what should be labeled as a "fact":

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.[41]

Thus, the Court found that in weighing the policy reasons in favor of Rule 52's application against First Amendment values in this case, the constitutional values weighed more heavily.

Justice Rehnquist dissented. He found it ironic that the majority rejected the clearly erroneous rule for the "constitutional facts" at issue in determining the existence of "actual malice."[42] In his view, "actual malice" depended on "the *mens rea* of the author," and determining *mens rea* involved making "findings which appellate courts are simply ill-prepared to make in any context, including the First Amendment context."[43] He disagreed with the labeling in which the Court had engaged: "In my view the problem results from the Court's attempt to treat what is here, and in other contexts always has been, a pure question of fact, as something more than a

39. *Id.* at 500.
40. *Id.* at 501 (citations omitted).
41. *Id.* at 501 n.17.
42. *Id.* at 515 (Rehnquist, J., dissenting).
43. *Id.*

fact—a so-called 'constitutional fact.'"[44] Justice Rehnquist found it anomalous that:

> we have always felt perfectly at ease leaving state-of-mind determinations, such as the actual knowledge and recklessness determinations involved here, to triers of fact with only deferential appellate review—for example, in criminal cases where the burden of proving those facts is even greater than the "clear and convincing" standard applicable under *New York Times*.[45]

In Justice Rehnquist's view, the crux of the case was that a trial court had made a credibility determination. He concluded that he was "at a loss to see how appellate courts can even begin to make such determinations."[46] Justice Rehnquist found greater reliability in the findings the trial judges reached. Finally, Justice Rehnquist found that the de novo review would be completely inefficient because "the primary result of the Court's holding today will not be greater protection for First Amendment values, but rather only lessened confidence in the judgments of lower courts and more entirely factbound appeals."[47] Based on policy concerns argued by Bose Corporation, Justice Rehnquist would have chosen the label "fact" over "law."

A year later, the United States Supreme Court built on its standard of review jurisprudence. In *Miller v. Fenton*,[48] the defendant was under investigation for the killing of a seventeen-year-old girl. After the defendant signed a *Miranda* waiver form, a detective embarked on an hour-long interrogation session that included false reports to the defendant that the victim had just died, that the defendant had already been identified, and that blood stains had been found at the defendant's residence.[49] After more coaxing, Miller confessed to the crime.[50] The trial court denied the defendant's motion to suppress the evidence gained from the interrogation, and a jury subsequently found him guilty of murder.[51] The New Jersey Superior Court reversed the judgment because it concluded that the confession had been compelled in violation of due process.[52] The New Jersey Supreme Court, however, disagreed with the appeals court and determined that the confession was "voluntary" and was properly admitted in evidence.[53] The defendant then filed

44. *Id.* at 517.
45. *Id.*
46. *Id.* at 519.
47. *Id.* at 520.
48. 474 U.S. 104 (1985).
49. *See id.* at 106.
50. *See id.* at 107.
51. *See id.* at 108.
52. *See id.*
53. *See id.*

a habeas corpus petition in federal district court. The district court dismissed the case without a hearing, and the Court of Appeals for the Third Circuit affirmed.[54] In its view, 28 U.S.C. § 2254(d), which allows for a "factual" issue's presumed correctness,[55] applied to the determination of whether the confession was "voluntary." The Court granted certiorari on the question of whether the presumption of correctness of a "factual" determination applied to a state supreme court finding of "voluntariness." Obviously, "voluntariness" "is" a "mixed question" of application of historical facts to the due process standard. Thus, arguments derived from policy could determine whether "voluntariness" is a "factual" or "legal" issue.

The United States Supreme Court found that the federal courts should make an independent determination of whether the defendant's statements were "voluntary." The Court concluded that the case law before the passage of section 2254 demonstrated that the ultimate issue of voluntariness required an independent federal determination.[56] In its ruling, the Court expressed its understanding of the difficulty of determining when to label an issue "fact" or "law":

> Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times 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.[57]

In *Miller*, the Court decided that the better positioned judicial actor to conclude whether the confession was "voluntary" was the appellate court. One winning strategy for Miller was that the United States Supreme Court had said repeatedly before the enactment of the federal law that "voluntariness" was independently reviewed by the appellate court.[58] Miller could argue that because of the impor-

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54. *See id.* at 108-09.

55. *See id.* at 108. Title 28 U.S.C. § 2254(d) (1995) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct . . . .

Id.

56. *See* Miller v. Fenton, 474 U.S. at 110-12.

57. *Id.* at 113-14 (citation omitted).

58. *See id.* at 110. ("Without exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination.") (citations omitted).

tance of protecting due process rights, not unlike the First Amendment context of *Bose Corp.*, the appellate court should take a fresh look at the confession. Indeed, the Court said:

> [I]t is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.[59]

Moreover, the Court dismissed the principal contention that Bose had raised before—that credibility determinations were for the trial court. The Court concluded that the trial court was in a better position to deal with underlying factual questions such as the length and circumstances of the interrogation, *Miranda* warnings, and the like. The Court noted, however, that

> once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances, the confession was obtained in a manner consistent with the Constitution, the state-court judge is not in an appreciably better position than the federal habeas court to make that determination.[60]

Just last term, the United States Supreme Court again found occasion to discuss the merits of different levels of deference. In *Ornelas v. United States*,[61] the Court considered what standard of review should be used for determinations of probable cause to search, and articulable suspicion to stop a vehicle. Two persons consented to a search of their Oldsmobile in Milwaukee. One of the officers searched the interior and noticed that a panel above the passenger armrest was loose.[62] The officer testified that a screw in the door jam next to the panel was rusty, which indicated to him that the screw had been previously removed. Upon taking apart the panel, the officer found two kilograms of cocaine.[63] After an evidentiary hearing, a magistrate found as a matter of fact that there was no rust on the screw, and therefore, the officer did not have a sufficient basis to believe that the panel contained illegal drugs.[64] The magis-

59. *Id.* at 116 (citations omitted).

60. *Id.* at 117.

61. 116 S. Ct. 1657 (1996).

62. *See id.* at 1660.

63. *See id.*

64. *See id.*

trate, however, concluded that the officer would have found the drugs anyway with a drug-sniffing dog named Merlin.[65]

The district court, adopting a portion of the magistrate's recommendation, concluded that the officers had a reasonable articulable suspicion to believe that criminal activity had occurred based on the model, age, and source-state of the car, the fact that the defendants had checked into a motel without reservations, and the fact that a computer database listed both individuals as drug dealers; the court found that the suspicion ripened into probable cause when the officer found the loose panel.[66]

On appeal, the government argued that the officers' conclusion that they had a reasonable articulable suspicion and their determination of probable cause after finding the loose panel should be reviewed deferentially.[67] The defendants, attempting to have the court of appeals take a fresh look at the evidence, presumably argued for a de novo review of the determinations of articulable suspicion and probable cause. The Court of Appeals for the Seventh Circuit agreed with the government's position by reviewing the district judge's determinations deferentially and upholding the determination of probable cause as not clearly erroneous.[68] The United States Supreme Court granted certiorari to resolve a circuit court dispute over the standard of review.[69]

The United States Supreme Court noted that precise articulations of "probable cause" and "articulable suspicion" are impossible.[70] The Court found that the two major components of these findings were the historical facts leading to the stop and a decision about whether they amounted to a reasonable suspicion or probable cause.[71] The second component of the analysis, the Court found, was a mixed question of fact and law. Faced with a choice of applying either a clear error or de novo standard of review, the Court chose the latter.[72] First, the Court noted that varied results by lower courts would "be inconsistent with the idea of a unitary system of law."[73] Citing *Miller*, the Court concluded that "the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[74] Finally, the Court decided that a de novo review

65. *See id.* at 1659-60.
66. *See id.* at 1660.
67. *See id.*
68. *See id.* at 1660-61.
69. *See id.* at 1661.
70. *See id.*
71. *See id.* at 1661-62.
72. *See id.* at 1662.
73. *Id.*
74. *Id.* (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)).

would serve to provide officers with a better defined set of rules so that they might make a correct determination beforehand about the validity of the search or stop.[75] The Court held:

> As a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[76]

Ornelas clarifies that a finding of articulable suspicion or probable cause is one that is to be reviewed de novo as a "mixed" question, and the position garnering the majority endeavored to explain why that standard of review makes the process in the Fourth Amendment area work "better" than before. Labeling the question as one of "law," the United States Supreme Court retained authority to define the parameters of the legal concepts of "probable cause" and "articulable suspicion." With that authority comes an ability to provide both clarity and uniformity in the Fourth Amendment area. Striving to achieve both efficiency and fairness concerns, the Court chose not to leave these determinations to the individual, and perhaps inconsistent, decisions of federal trial judges.

Justice Scalia dissented and first noted that when a mixed question of fact and law exists, the Court applies a de novo or deferential standard "depending upon essentially practical considerations."[77] Justice Scalia concluded that the lower court, with its expertise and better familiarity with the issues and parties, would be better able to make the determination of probable cause or reasonable suspicion.[78] He found the "law-clarifying value" of a de novo review negligible because Fourth Amendment decisions are often fact-bound and do not serve as useful precedents.[79] Finally, Justice Scalia found contradiction in the Court's holding:

> In an apparent effort to reduce the unproductive burden today's decision imposes on appellate courts, or perhaps to salvage some of the trial court's superior familiarity with the facts that it has cast aside, the Court suggests that an appellate court should give "due weight" to a trial court's finding that an officer's inference of wrongdoing . . . was reasonable. The Court cannot have it both ways. This finding of "reasonableness" is precisely what it has told us the appellate court must

75. *See id.*
76. *Id.* at 1663.
77. *Id.* (Scalia, J., dissenting).
78. *See id.* at 1664.
79. *See id.* at 1665.

> review *de novo*; and in *de novo* review, the "weight due" to a trial court's finding is zero.[80]

In the majority's opinion, however, Justice Scalia was wrong. Efficiency concerns would be satisfied even if not every case turned on exactly identical facts.[81] Moreover, the inferences that the Court referred to in its holding could only be historical ones rather than legal ones. If that distinction is not drawn, the majority opinion makes no logical sense. When that distinction is drawn, however, the rationale is more sound; historical facts and inferences are given due weight, but determinations of probable cause or articulable suspicion, now labeled as "legal" issues, are to be reviewed without any deference whatsoever.

What is going on in these cases? The debate certainly is not whether, looking at the issue with either intuitive or analytical eyes, an issue is one of "fact" or "law." Instead, these three United States Supreme Court authorities provide compelling, if not conclusive, evidence that the decision to label something as "fact" or "law" is based essentially on policy considerations. Whether something was inherently "factual" or "legal" played no role in these decisions. Because policy rationales were involved, advocacy clearly had a role to play in these cases. Bringing forth arguments in favor of certain standards of review, each side was given the opportunity to advocate why a certain level of deference would make the legal system work in a "better" way. The answers to the policy debates are reflected in the majority opinions and their choice of how to label certain issues.

These cases are not exhaustive. Countless other cases for analysis may be found at any appellate level of state or federal courts. All courts label issues so that they may apply standards of review, whether explicitly or not. Moreover, the frequency with which judicial discussions include a substantive discussion of standards of review is directly correlated with the frequency with which the issue is briefed and argued by lawyers.

III. THE MAINE LAW COURT AND FEDERAL QUESTIONS

The Maine Law Court has been much less explicit about the policy reasons for labeling choices than the United States Supreme Court. The silence, however, certainly does not indicate that the policy decisions have not been made; they have been, but the policy choices must be drawn out of the cases. For instance, in the areas of the voluntariness of confessions and determinations of probable cause or articulable suspicion, the standards of review used by the United States Supreme Court and the Law Court directly conflict. This dichotomy, however, means only that the standard of review in

80. *Id.* at 1666 (citation omitted).
81. *See id.* at 1662-63.

some particular areas of law is debatable and, therefore, open to future legal argument.[82]

Two Law Court cases are instructive in the area of searches and seizures. In *State v. Dean*,[83] an officer spotted Dean's car while patrolling a dead-end road in a residential neighborhood at 11:00 p.m. The officer patrolled the area at the request of neighborhood property owners who had complained of acts of vandalism. Dean's driving was "unremarkable" and the only reason the officer stopped Dean was due to his presence at that "particular time and place."[84] The district court denied Dean's motion to suppress evidence as a result of the stop, concluding that the officer did not act in an arbitrary fashion. After the superior court vacated the decision, the State appealed to the Law Court. The State, seeking to secure a deferential review of the district court's conclusion, argued that the matter should be reviewed for clear error.[85] Dean did not argue that a de novo review was appropriate,[86] but clearly he should have. By doing so, he could have marshaled policy considerations like those advanced in *Ornelas*.

The Law Court held that the district court's "findings that the officer's suspicion was reasonable and the stop was justified [were] not clearly erroneous."[87] The Law Court's analysis began by noting that "[w]hether an officer had the necessary reasonable suspicion to warrant an investigatory stop is a question of fact, reviewed only for clear error."[88] In finding that the district court did not commit clear error, the Law Court stated that Dean "was driving through an uninhabited development site on a dead end street at 11:00 at night."[89] Finally, the Law Court also indicated that in finding no clear error, it was "[b]alancing the facts on which [the officer] relied to make the stop against Dean's right to be free from any arbitrary intrusions by the State . . . ."[90]

Justice Glassman was the sole dissenter. Her dissent, however, was not based on the choice of the standard of review. Instead, she concluded that the officer's suspicion was a mere hunch and that "[t]he constitutional right to be free from an illegal stop should not

82. This Article does not address what is, in my view, a large issue: whether standards of review are part of the substantive federal law binding on the states. For instance, if the United States Supreme Court decides that Fifth Amendment issues should be reviewed de novo on appeal, must the Law Court follow this directive?

83. 645 A.2d 634 (Me. 1995).

84. *See id.* at 634-35.

85. Brief for Appellant at 3, State v. Dean, 645 A.2d 634 (Me. 1995) (No. OXF-93-744).

86. Brief for Appellee, State v. Dean, 645 A.2d 634 (Me. 1995) (No. OXF-93-744).

87. State v. Dean, 645 A.2d at 637.

88. *Id.* at 635 (citing State v. Worster, 611 A.2d 979, 980 (Me. 1992)).

89. *Id.* at 636.

90. *Id.* at 637.

be abridged solely on the basis of the day of the week or time of day a car is being operated on a public way. Such arbitrariness is inconsistent with the protections afforded by the Fourth Amendment."[91] Thus, Justice Glassman believed that clear error existed in this case, and presumably would have decided the issue the same way had the determination been reviewed de novo. How many other justices would have joined the dissent's conclusion if the determination of articulable suspicion had not been reviewed under the extremely deferential standard of clear error? Would the Law Court have been persuaded if Dean had argued for a different standard of review? Would the denial of the motion to suppress still have been upheld? Because the issue was never raised, the Law Court's opinion did not address it.

The Law Court, however, does not apply a deferential standard of review in all investigatory stop cases. In *State v. Brown*,[92] an officer observed Brown making a turn in his vehicle. As he did so, both tires on the left side crossed over the yellow center line, then jerked to the right and struck the right fog line with the right front tire. Brown then steered back into the middle of the lane. In addition, the speed of the vehicle varied during this time. The district court granted Brown's motion to suppress the evidence, and the State appealed. The State, seeking now to avoid deferential review, labeled the issue as one of "law" that should be reviewed independently by the Law Court.[93] Brown sought deferential review of the determination of articulable suspicion.[94]

Although the Law Court recognized that it reviews for clear error a trial court's finding of whether a stop was justified by an objectively reasonable and articulable suspicion, the court concluded, without further discussion, that "[a] ruling on a motion to suppress based on undisputed facts, however, involves a legal conclusion that we independently review."[95] In effect, the Law Court said that although it labeled the issue as "factual" in cases such as *Dean*, the affixed label in this case would be one of "law." The Law Court then relied on the early morning hour, crossing the center line, strik-

91. *Id.* at 637-38 (Glassman, J., dissenting).

92. 675 A.2d 504 (Me. 1996).

93. Brief of Appellant at 7, State v. Brown, 675 A.2d 504 (Me. 1996) (KEN-95-531).

94. Brief for Appellee at 4-5, State v. Brown, 675 A.2d 504 (Me. 1996) (KEN-95-531).

95. State v. Brown, 675 A.2d at 505 (citing State v. Dube, 655 A.2d 338, 340 (Me. 1994)). These standards did not originate in these cases; they have been part of Maine law for some time. *See, e.g.*, State v. Nelson, 638 A.2d 720, 722 (Me. 1994) (clear error); State v. Dulac, 600 A.2d 1121, 1122 (Me. 1992) (same); State v. Cyr, 501 A.2d 1303, 1305 (Me. 1985) (same); State v. Thurlow, 485 A.2d 960, 963 (Me. 1984) (same); State v. Fillion, 474 A.2d 187, 190 (Me. 1984) (same). *But see* State v. Dube, 655 A.2d 338, 340 (Me. 1995) (de novo); State v. Hill, 606 A.2d 793, 795 (Me. 1992) (same); State v. Cloutier, 544 A.2d 1277, 1280 (Me. 1988) (same).

ing the fog line, and the speed of the vehicle to support a de novo determination that articulable suspicion existed. No one dissented. Would the district court's ruling have been overturned if the matter had been reviewed deferentially instead of de novo? Could the results of this case be reconciled with the result of *Dean* if both had been reviewed under the same level of deference?

This bifurcated standard of review for determinations of articulable suspicion and probable cause is inconsistent with the United States Supreme Court's holding in *Ornelas*,[96] yet it surely is not a meaningless distinction made by the Law Court. For whatever reason, the Law Court is more comfortable in conducting a de novo review when the historical facts are undisputed than when they are not. Under the doctrine set out by the United States Supreme Court, however, the purely historical facts would always be reviewed deferentially, but the mixed questions of articulable suspicion and probable cause would always be reviewed de novo. The different standards of review generate the question of which standard is "better." Which standard is more soundly supported by policy rationales? The question is left for future advocates to study, examine, and argue before both courts.

Another useful area of study is the voluntariness of confessions. In *State v. Graves*,[97] Graves, a police officer, was accused of sexually assaulting a twenty-two-year-old woman.[98] On the day that the victim complained to the authorities, Graves's supervisor phoned him and told him to come to the police station immediately.[99] Upon his arrival at the station, he was interviewed by two detectives. When Graves saw the detectives, he said, "What did I do now?"[100] During the interview, he first denied that the alleged victim had been at his house on the night in question, then admitted that she was present but denied any sexual contact, then finally admitted that sexual contact occurred but suggested that the victim consented.[101] Graves

96. While the Law Court has not adopted the reasoning in *Ornelas*, other state courts generally have cited *Ornelas* approvingly. *See* State v. Rogers, 924 P.2d 1027, 1029 (Ariz. 1996); People v. Smith, 926 P.2d 186, 188 (Colo. Ct. App. 1996); State v. Rodriguez, 684 A.2d 1165, 1171 n.17 (Conn. 1996); State v. Gonzalez, 682 So. 2d 1168, 1170 n.2 (Fla. Dist. Ct. App. 1996); People v. Patterson, 667 N.E.2d 1360, 1366 (Ill. App. Ct. 1996); D.D. v. State, 668 N.E.2d 1250, 1254 (Ind. Ct. App. 1996); Jones v. State, 681 A.2d 1190, 1195 (Md. Ct. Spec. App. 1996); Commonwealth v. Alvarado, 667 N.E.2d 856, 859 (Mass. 1996); City of Grand Forks v. Zejdlik, 551 N.W.2d 772, 774 (N.D. 1996); State v. Rodriquez, 476 S.E.2d 161, 164 (S.C. Ct. App. 1996); Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah Ct. App. 1996); James v. Commonwealth, 473 S.E.2d 90, 91 (Va. Ct. App. 1996).

97. 638 A.2d 734 (Me. 1994).

98. *See id.* at 735.

99. *See id.*

100. *Id.* at 736.

101. *See id.* (quoting defendant's version of victim's response to his overture, "I'm not going to say no . . . [but] I'm just going to lay here.").

also admitted that he had been "evasive" with some of his responses.[102] Graves was not given *Miranda* warnings, and he testified that he did not feel that he had the choice to leave the interview or to decline to answer questions. No one, however, told him that he could not leave or that his job was in jeopardy if he did not answer.[103] The trial court refused to suppress statements made by Graves before his arrest, and he subsequently appealed his conviction.[104]

Graves could have argued on appeal, citing *Miller*, that whether his confession was voluntary should be reviewed de novo by the Law Court. The State, seeking deferential review, could have cited from a long line of Maine cases noting that whether a trial court erred in finding that a confession was voluntary is reviewed only for clear error.[105] Graves apparently made no such argument, however, and the court applied the clear error review.[106] The court first noted that the State has the burden to prove beyond a reasonable doubt that the confession is voluntary.[107] The Law Court subsequently canvassed the trial court's findings and held that it had not committed clear error in finding that Graves's statement was voluntary.[108]

The standards of review used by the United States Supreme Court and the Law Court conflict in that they label the issue of voluntariness differently. Although the result on these facts probably would not have been different had a de novo review been applied, this issue certainly is open to discussion. The circumstances in this case did not appear to be coercive. In any event, under more egregious facts than these, a trial court's holding might not be clearly erroneous, but the appellate court, on a de novo review, might decide the question differently. What if the detectives had told the defendant that he was going to lose his job, his family would starve, and he would be the object of ridicule in the department? What if they had told him that he would receive no food until he confessed, even if it took a couple of days? What if the detectives had threatened him with physical harm? What if in fact they beat him into confessing? Would it be "better" to label the voluntariness of a confession as an issue of "fact" or "law"?[109] In *Miller*, the United States Supreme Court held that, in the habeas corpus setting, the issue should be

102. *See id.*

103. *See id.* at 737 & n.3.

104. *See id.* at 735-36.

105. *See, e.g.*, State v. Smith, 615 A.2d 1162, 1163 (Me. 1992); State v. Hutchinson, 597 A.2d 1344, 1346 (Me. 1991); State v. Birmingham, 527 A.2d 759, 761 (Me. 1987); State v. Pinkham, 510 A.2d 520, 522 (Me. 1986).

106. State v. Graves, 638 A.2d at 737.

107. *See id.* at 736.

108. *See id.* at 737.

109. *See supra* note 15 and accompanying text.

labeled as one of "law."[110] Surprisingly, the Law Court has never cited *Miller* in its decisions. If in some future case where a fair amount of police coercion has occurred and a defendant has reluctantly confessed, how should the trial court's conclusion that the confession is voluntary be reviewed? Which standard of review is the "better" one to utilize? The answer is left to the future arguments of Maine defense lawyers if they choose to raise it in their briefs.

Dean, Brown, and *Graves* all contained standards of review that were applied after the Law Court labeled the issue that was being reviewed. Furthermore, these cases demonstrate that although the Law Court typically does not analyze in depth the appropriate standard of review, its rationale for applying particular standards of review may be inferred from the labeling used by the court. Although not as clearly, the Law Court also labels issues "fact" or "law" according to the substantive law at issue. The same kind of policy rationales that applied in *Ornelas* and *Miller* apply in these cases, but they remain largely unarticulated by the Law Court.

More important, the divergence of opinion in these two areas demonstrates that standards of review are debatable topics, not useless appendages to the brief, scribbled in as an afterthought. Too often, advocates seem willing to accept the prevailing standard of review without recognizing the policy rationales underlying the standard or attempting to challenge the standard with countervailing concerns that might lead to more or less deference. Behind the labeling stand important and often unarticulated decisions based on policy that can only be examined by the appellate court when properly presented with thoughtful advocacy and argument. Getting to the bottom of the subject requires not merely labeling the issue as

110. The Seventh Circuit Court of Appeals, however, has held that a federal appellate court should review the findings of a federal trial court only for clear error. *See* United States v. Baldwin, 60 F.3d 363 (7th Cir. 1995). The court stated:

> *Miller* held that 28 U.S.C. § 2254(d), which requires federal courts in habeas corpus proceedings to presume that state courts' "factual" findings are correct, is inapplicable to the issue of voluntariness.... This is a different matter from whether a federal court of appeals should review de novo a determination of voluntariness made not by a state judge in a state trial but by a federal district judge in a federal trial. Since the relation between federal and state courts and the relation between federal appellate and federal trial courts are not symmetrical, the two questions need not be answered the same way. *Miller* is designed to provide a state prisoner with generous federal review of the constitutional question whether he was convicted with the aid of a coerced confession. It has nothing directly and, as it seems to us at any rate, very little indirectly to do with the scope of appellate review of determinations made by federal judges.

Id. at 364; *see also* Keith R. Dolliver, Comment, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. CHI. L. REV. 141 (1990).

one of "fact" or "law," but also a thorough analysis of why a certain level of deference is "better" in a particular case.

IV. The Maine Law Court and State Questions

The Maine Law Court has also had the opportunity to address the meaning of standards of review through their application to particular cases involving state legal issues. A review of the use of identically-termed standards of review can illuminate policy decisions that exist in different subject areas of the law. These cases also show that "fact" and "law" are terms defined by policy and not their inherent natures. Once again, the labeling of the issue as "fact" or "law" is driven by practical considerations that must be seized by advocates. Three Law Court cases are instructive.

A. Willis Realty Associates v. Cimino Construction Co.

In *Willis Realty Associates v. Cimino Construction Co.*,[111] the Law Court concluded that a provision of a standard American Institute of Architects (AIA) form construction contract barred subrogation recovery between Willis Realty and Cimino Construction. Willis Realty, a partnership owning property in Portland, leased a building to Maine Printing that was constructed in 1980 by Cimino Construction.[112] The building was originally designed to incorporate an addition, and in 1986, Willis Realty contacted Cimino to build that addition.[113] The parties signed a standard AIA contract that included a provision that the owner and Cimino "waive all claims for damages 'to the extent covered by insurance obtained pursuant to this [contract] or any other property insurance applicable to the work.'"[114] Willis Realty and Cimino later amended the contract to require the contractor, Cimino, to maintain property risk insurance on the entire work.[115] In October of 1986, a collapse in the rear of the existing building occurred during excavation for the addition, and Royal Globe, the insurer for Willis Realty and Maine Printing, covered the losses.[116] Although Cimino procured coverage pursuant to the amended contract on November 1, 1986, any prior damage to the property was excluded under the terms of the insurance contract.[117]

Royal Globe, as the insurer of both Willis Realty and Maine Printing, filed suit against Cimino Construction to recoup its losses. The focus during trial was whether the contractual waiver of the

111. 623 A.2d 1287 (Me. 1993).
112. *See id.* at 1288.
113. *See id.*
114. *Id.* (quoting the language of the AIA contract).
115. *See id.*
116. *See id.*
117. *See id.*

subrogation provision applied to these circumstances. As the dissent indicates, the court admitted extrinsic evidence to determine the intent of the parties regarding the applicability of this provision.[118] Following a jury-waived trial, the superior court granted a judgment in favor of the plaintiffs against Cimino and concluded that the subrogation provision did not apply against any of the plaintiffs.[119]

On appeal, Cimino argued in part that the court erred as a matter of law in concluding that the claims of Willis Realty and Maine Printing were not barred by the contractual waiver of subrogation provision. The Law Court agreed that the claim against Willis Realty was barred. First, the court noted that the interpretation of "an unambiguous written contract . . . is a question of law."[120] The court also stated that whether a contract is ambiguous is a question of law, and "[o]nly when the language of a contract is ambiguous or uncertain is its interpretation a question of fact to be determined by the factfinder."[121] The majority concluded that, as a matter of law, the contract "bars subrogation recovery between the parties to the contract for damages to the extent covered by insurance."[122]

Willis Realty argued that the court's finding of the inapplicability of the contractual provision was subject to review only for clear error[123] and that position garnered support in Justice Clifford's dissent. Justice Clifford concluded that the waiver provision was not applicable to the claims pursued in the names of Willis Realty and Maine Printing. He stated that "[t]his Court reviews the trial court's decision *de novo*, and construes the contract as a matter of law. The trial court, however, did not decide the case as a matter of law . . . ."[124] Instead, the dissent noted that the trial court had resorted to the admission of extrinsic evidence to determine the parties' intent regarding the applicability of the waiver in this case. Relying on that fact, the dissent concluded that "[i]n the case of this contract that I would conclude is ambiguous, that factual determination should be reviewed for clear error, and I find no such error."[125] In one light, this case revolves around the determination of whether the intent of the parties could be termed a matter of "law" or a

118. *See id.* at 1290 (Clifford, J., dissenting).

119. *See id.* at 1288.

120. *Id.* (citing Hopewell v. Langdon, 537 A.2d 602, 604 (Me. 1988)).

121. *Id.* (citing F.O. Bailey Co. v. Ledgewood, Inc., 603 A.2d 466, 468 (Me. 1992)).

122. *Id.* at 1289.

123. Brief of Appellee at 5-6, Willis Realty Assocs. v. Cimino Constr. Co., 623 A.2d 1287 (Me. 1993) (CUM-92-119).

124. Willis Realty Assocs. v. Cimino Constr. Co., 623 A.2d at 1290 (Clifford, J., dissenting).

125. *Id.*

matter of "fact." What divided the court, however, was the act of labeling the issue as one of "law" or one of "fact."

B. Fournier v. Rochambeau Club

In *Fournier v. Rochambeau Club*,[126] the Law Court concluded that the finder of fact did not err in determining that the Rochambeau Club's negligence resulted in an injury to Fournier. Fournier, a long-standing member of the Rochambeau Club, often helped the club prepare the kitchen on beano nights.[127] Preparations included readying pre-formed hamburger patties for cooking. Although the patties were usually thawed, they were still frozen one night in February of 1988.[128] An agent of the club instructed Fournier to separate some of the frozen patties but did not provide him with instructions on how to accomplish this task.[129] Using a knife, Fournier sliced his thumb.[130]

Fournier sued the club alleging that it negligently failed to instruct him on how to properly separate the hamburgers. The court, in a jury-waived trial, found that the club was negligent and that the negligence was a proximate cause of Fournier's injuries.[131] On appeal, the club argued that any breach of its duty of care was not the proximate cause of Fournier's injury.[132] The Law Court majority disagreed and noted that "the finder of fact determined that the club's direction that Fournier separate the frozen patties, coupled with its failure to instruct him on the proper method of achieving that end, were both an inadequate protection from a reasonably foreseeable harm and a substantial factor in bringing about that harm."[133] The court held that the trial court's finding that the negligence was a proximate cause of Fournier's injury was not erroneous as a matter of law.[134] In addition, the majority concluded that the trial court's finding that the club was more negligent than Fournier was not a cause for reversal: "[T]he assessment of the relative causative fault of the parties regarding liability is in the instant case a determination properly left to the court in its role as trier of fact."[135] Given that the trial court's findings were factual ones, the Law Court could have stated explicitly that the findings were not clearly erroneous.

126. 611 A.2d 578 (Me. 1992).
127. *See id.* at 579.
128. *See id.*
129. *See id.*
130. *See id.*
131. *See id.*
132. *See id.*
133. *Id.*
134. *See id.*
135. *Id.*

Justice Clifford dissented and sided with the club.[136] He emphasized that Fournier was not using a "complex piece of machinery."[137] He was "an intelligent adult, who had worked in the Rochambeau Club's kitchen for two years, [and] was given the task of separating frozen hamburger patties. He chose to use a common kitchen knife. He was familiar with the techniques for using such a knife safely .... He cut his own hand."[138] He concluded that "as a matter of law, and of common sense, [the negligent conduct of Fournier was clearly equal to or greater than the negligent conduct of the club.]"[139]

C. Mutual Fire Insurance Co. v. Hancock

In *Mutual Fire Insurance Co. v. Hancock*,[140] Hancock brutally beat and raped the victim, referred to in the opinion as Jane Doe, over several hours. Although the two people at one time had a relationship, it had deteriorated.[141] On the night of the attack, Hancock had been drinking and wanted to talk to Doe. When she refused to speak with him, the attack commenced.[142] Hancock hit Doe over several hours with a closed fist, broke several bones, and raped her. Hancock subsequently pleaded guilty to aggravated assault and gross sexual assault.[143]

Doe brought a civil action against Hancock seeking damages for injuries resulting from Hancock's conduct.[144] Hancock was insured by Mutual Fire Insurance Company pursuant to a policy that denied coverage for "bodily injury or property damage . . . which is expected or intended by the insured."[145] Mutual defended Hancock, but additionally filed a declaratory judgment action alleging that Hancock was not covered pursuant to the policy for these acts.[146] The court heard both cases together in a jury-waived trial and determined that Mutual owed Hancock a duty to defend and indemnify. The trial court concluded that Hancock's "acts were not committed intentionally or knowingly. They were committed without any conscious awareness. His mental state was at best reckless."[147]

On appeal, Mutual should have argued that the issue of Hancock's mental state was at least a mixed question of fact and law and

136. *See id.* at 580 (Clifford, J., dissenting).
137. *Id.*
138. *Id.*
139. *Id.*
140. 634 A.2d 1312 (Me. 1993).
141. *See id.* at 1312.
142. *See id.*
143. *See id.* at 1312-13.
144. *See id.* at 1313.
145. *Id.*
146. *See id.*
147. *Id.*

that the issue should be reviewed de novo. Mutual, however, instead labeled the issue as "fact" and attempted to show that the factual findings were clearly erroneous.[148] Hancock, with the judgment in his favor, agreed that the issues were "factual," and argued that the court did not clearly err in its decision.

The Law Court reversed the trial court's ruling. The court concluded that "[a]s a matter of law, a systematic, hours-long brutal beating is not a 'reckless' act; it can only be intentional and the injuries resulting from expected."[149] The court reiterated that the trial court had found as a matter of "fact" that Hancock had repeatedly hit Doe with a closed fist, had forced sexual intercourse with her, and choked her to keep her from screaming. Nevertheless, the court noted, the trial court found that Mutual did not meet its burden of proving that the injuries were expected or intended because of Hancock's intoxication at the time of the commission of the acts.[150] The court concluded that, as a matter of law, a person could not accidently hit another person repeatedly or submit someone to sexual intercourse.[151] The court concluded that by proving these acts occurred, Mutual had proved that the injuries were, as a matter of law, intended or expected. Thus, Mutual had no duty to defend or indemnify Hancock in his civil suit.[152]

Justice Glassman dissented.[153] She believed that the trial court had correctly labeled the issue of Hancock's mental state as a matter of "fact." Based on that characterization, she dissented because she concluded that "the Court not only fails to grant proper deference to the Superior Court in its factfinding role, but also determines that as a matter of law the issue is precluded from litigation in the present civil action."[154] After canvassing the facts that the trial court found, she noted that factual findings are overturned on appeal only if they are clearly erroneous.[155] She then stated:

> In this case, while a reasonable factfinder might have reached a different conclusion than that of the trial court, there is ample evidence in the record to support the trial court's finding on this issue. Accordingly, it cannot be said as a matter of law that the trial court erred in so determining.[156]

Thus, Justice Glassman labeled the issue as one of "fact" and accordingly applied a clear error analysis.

148. *See id.*
149. *Id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.* (Glassman, J., dissenting).
154. *Id.*
155. *See id.* at 1314.
156. *Id.* (citing Fournier v. Rochambeau Club, 611 A.2d 578, 579 (Me. 1992)).

These three cases "characterized" the particular issues; the court did not, however, determine the essential nature of them. First, a comparison of *Fournier* and *Willis Realty* reveals a battleground for choosing particular standards of review. In *Willis*, a question existed about the interpretation of a contract and the intent of the parties regarding one of its provisions. A majority of the Law Court labeled the issue as one of "law" in which the trial court would receive no deference. The majority in *Fournier*, however, labeled the questions of proximate cause and comparative negligence as issues of "fact" that were better left to the "court in its role as trier of fact."[157] Neither decision, however, garnered a unanimous court.

The choice of label foretold the outcome in these cases, yet more than mere labeling was occurring. Indeed, the battle so vocally waged in front of the United States Supreme Court is also fought at the Law Court. The court in *Fournier* found it better to style relative fault and causation as questions of "fact," but in *Willis Realty* found more utility in determining that contractual interpretation was a question of "law." The reasons behind these decisions should occupy legal study and advocacy. When advocates transcend the long-held belief that "fact" and "law" are inherently discernable categories, they open for themselves a new world of advocacy, argumentation, and an eye into the very heart of the law.

What policies are at work here? Why did the Law Court label as it did? Perhaps the court feels more competent to interpret contracts than weigh fault, even if extrinsic evidence was admitted to interpret the contract, and the court made a factual determination on appeal. Perhaps the court wanted to encourage appeals in cases like *Willis* and discourage them in cases such as *Fournier*. After all, significantly more was at stake in *Willis* than in *Fournier*. In both cases, insurers were left to compensate the injured parties for their losses. Did the court feel that the losses in these cases—expenses for an injury to a finger and for the collapse of an existing wall—were better absorbed by the parties who were expected to cover them, the Rochambeau Club and Royal Globe Insurance?

Just as *Willis Realty* can be compared with *Fournier*, so may *Mutual Fire* be compared with either of them. The court labeled the issue as one of "law" because it had persuasive reasons for doing so. Uncovering and arguing those reasons leads to more effective appellate advocacy of standards of review. A comparison of *Fournier* and *Mutual Fire*, however, reveals deeper problems with the rationale of the Law Court in this area. Ideally, the court should first decide how a particular issue is to be labeled, i.e., as "fact" or "law," and what policy considerations lead to the particular characterization of the issue. After the issue is labeled, then the merits of the appeal should be examined. Was there clear error on this record? How

157. Fournier v. Rochambeau Club, 611 A.2d at 579.

should the issue of "law" be decided? In *Fournier* and *Mutual Fire*, however, the Law Court collapsed the individual components of a standard of review issue. The court decided the entire case without indicating how the issue was labeled, why that label was used, or how it applied in this particular case. If the issue is labeled as one of "fact," then Rule 52(a) of the Maine Rules of Civil Procedure should be applied on appeal to determine whether the findings are clearly erroneous. If the issue is labeled as one of "law," then Rule 52(a) has no application at all and the court is free to decide the legal issue de novo. In *Fournier* and *Mutual Fire*, the court, at least in the opinions, skipped the first step and simply decided the legal issue, leaving the reader to work backwards to determine the standard of review that the court actually applied.

These cases expose the fallacies surrounding standards of review. They were not decided because the question involved was inevitably one of "fact" or "law." Instead, the Law Court applied a standard of review based on unarticulated policy decisions. These labels are not out there somewhere in our collective consciousness waiting to be revealed. They are conclusions wrought from policy considerations. The policies at work expose an area for debate and allow a view into the inner workings of the legal process. Our legal minds should be turned to these inner workings of standards of review.

V. CONCLUSION

For a long time now, commentators and courts have labored to apply standards of review based on whether an issue "is" one of "fact" or one of "law." Both groups have attempted to discover formulas for identifying and distinguishing factual issues from legal ones. The goal of this Article is to stop this futile search.

We must abandon this way of thinking about standards of review. Justice Jackson once said that one "who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[158] Justice Jackson's prediction seems particularly appropriate in the area of standards of review. The metaphysical attempt to define the separate universes of "facts" and "laws" is a misguided and impossible adventure. Nothing is inherently "fact" or "law," and we should stop trying to define that for which no definition exists. The search for the *a priori* understanding of "fact" and "law" is the search for a chimera, and thus a waste of the time and resources of lawyers and judges.[159]

158. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

159. *See* Hofer, *supra* note 3, at 251. Hofer states that "[t]he law loses nothing by ignoring or abandoning the old labels, as long as appellate courts give reasons for according or not according deference to particular lower tribunal determinations." *Id.*

The cases discussed in this Article demonstrate that the reasoning behind the labeling is the important first step in the analysis. There is a better language to use when speaking about standards of review. The United States Supreme Court has illuminated the notion that policies define the labeling of issues. Policy rationales indicate that in different situations, different judicial actors are better able to decide the issue in question. For instance, the *Ornelas* Court was persuaded by policy arguments favoring a non-deferential review of investigatory stop issues, and it determined that the appellate court was best positioned to decide whether articulable suspicion or probable cause existed. The holding in *Bose Corp.* can be explained by the Court's unwavering protection of rights guaranteed by the First Amendment and the need for an appellate court to check decisions impacting those rights. In *Miller*, the Court labeled the issue of voluntariness as one of "law" in order to protect due process rights. The lesson of these cases is not that this or that issue is inherently "factual" or "legal," but instead that policy rationales persuaded the Court to apply a particular standard of review to a certain issue.

The Law Court engages in the same process, but with less fanfare. Although the Law Court has not had as many opportunities to examine deeply the application of standards of review to certain issues, it also makes decisions based on policy. The substantive law invariably drives the court to choose different levels of deference. Advocates must embrace, understand, and argue policy rationales based on the substantive law at issue in order to have a positive effect on the jurisprudence of standards of review.

The cases discussed in this Article demonstrate that lawyers are in a position to advocate for a particular standard of review, rather than merely accepting the propriety of a standard of review and applying it to the facts of a case. An advocate seeking a deferential standard of appellate review for an issue has a duty to marshal policy arguments in her favor. Likewise, one arguing for de novo review ought to be prepared to justify why an appellate court must pore over the entire trial record when a trial judge has already done so. If precedent is hopelessly against a lawyer, perhaps an appeal is a waste of time and money for the client. On the other hand, once practitioners realize that standards of review are largely debatable issues, a new universe of concerns is revealed for future examination and study, argumentation and analysis, and finally, judicial debate and decision.

Standards of review exist so that the legal process may work efficiently and fairly. A general definition of efficiency and fairness, however, is impossible. The answer depends on the issue, the background, the "facts," and the creativity of the lawyers involved in the case. In examining standards of review, advocates must understand that the terms "fact" and "law" carry no magic of their own; instead,

their substantive meaning depends on an examination of case law, issues, and their attendant policy concerns. Properly argued and decided, the standard of review may control the outcome of a case. At the very least, a standard of review seeks to clarify the scope of the case before an appellate court and to inform that court of the parameters of its appellate function. At the very most, standards of review represent the substance and life of the law.