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# Mixed Questions of Fact and Law: Deferential or Plenary Review?

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"When reviewing a mixed question of law and fact, this court reviews the trial court's findings of fact for clear error and its conclusions of law de novo." This is perhaps one of the most familiar statements of the scope of appellate review in state and federal appellate decisions.

At first glance, it appears that one should be able to distinguish fact questions, which "usually call[] for proof," from legal questions, which "usually call[] for argument." Clarence Morris, *Law and Fact*, 55 Harv. L. Rev. 1303, 1304 (1942). This understanding suggests a deferential appellate review of questions of fact and a plenary review of legal questions. *See United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) (Posner, J.).

On closer examination, though, this formulaic statement of the standard of review is incomplete. It leaves out a third type of appellate review, law application—applying the controlling law and norms to the facts—which also requires plenary review. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 237–38 (1985) ("[I]t seems misguided to assume, as many courts apparently do, that all law application judgments can be dissolved into either law declaration or fact identification. Law application is a distinctive operation."). In addition, it makes no mention of the constitutional-fact doctrine, which requires plenary review of constitutional facts.

These latter two types of appellate review of facts are the focus of this article.

## Appellate Review of Facts and Law Application

Courts generally do conduct a deferential review of historical facts. This means that when a trial court's findings are based on an evaluation of witnesses' credibility, appellate courts defer to the trial court's findings unless they are clearly erroneous. "By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" *Townsend v. Sain*, 372 U.S.

293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (citations omitted).

When, though, the trial court's findings of fact are based on a purely documentary record (such as videotapes) or undisputed facts, appellate courts are in as good a position as the trial court to independently evaluate the evidence. But the issue of whether a question is one of fact or law "is not analytic, but allocative: what decisionmaker should decide the issue?" Monaghan, *supra*, at 237. And federal and state courts have diverged in their jurisprudential attitudes toward allocating decision-making authority regarding this question.

On one hand, *Anderson v. Bessemer City, N.C.* applies the deferential standard to all questions of historical fact regardless of whether they are based on a purely documentary record or undisputed facts. 470 U.S. 564, 574–75 (1985). On the other hand, many state courts reject this federal approach and reaffirm "the long-standing principle that an appellate court may independently review documentary evidence, but should accept subsidiary findings based partly or wholly on oral testimony, unless clearly erroneous." *See, e.g*., *Commonwealth v. Tremblay*, 107 N.E.3d 1121, 1124 (Mass. 2018) (citation omitted); *see also Wells v. State*, 838 S.E.2d 242, 245 (Ga. 2020) ("We generally review a trial court's factual findings and credibility determinations for clear error, but 'where controlling facts are not in dispute, such as those facts discernible from a videotape, our review is de novo.'") (citation omitted); *Battle N., LLC v. Sensible Hous. Co*., 370 P.3d 238, 251 (Colo. App. 2015) (gathering cases) (same). Even in the face of *Anderson*, some federal courts also engage in this type of independent review. *See, e.g.*, *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 260 (2d Cir. 2010) (do novo review of documents in appeal of bankruptcy proceedings); *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 999 (D.C. Cir. 1998) (de novo review of the documents submitted in camera); *CK Co. v. Burger King Corp.*, No. 94-9115, 1995 WL 595526, at *2 (2d Cir. Sept. 20, 1995) (same).

The plenary review standard is especially important because intermediate appellate courts are, in practice, the near-exclusive forum for error correction. The supreme courts of the states and the U.S. Supreme Court do not see error correction among their functions. Their review is concerned with "whether the subject matter of the appeal has significant public interest, whether the cause involves legal principles of major significance to the jurisprudence of the [Supreme Court], [and] whether the decision below is in probable conflict with [its] precedent." *Halbert v. Michigan*, 545 U.S. 605, 611–12 (2005) (internal quotation marks omitted).

It appears that the rationale for *Anderson*'s holding was the massive increase in appellate caseloads that began in the 1960s.

> Simply put, today's appellate judges are responsible for considerably more cases than their counterparts from a half century ago, and can not possibly devote the time required for full, Learned Hand treatment to each case. Something had to give, and the result is that these less significant, error-correction cases not only are not resolved via published opinion, but they also typically receive no oral argument and are often handled primarily by central court staff rather than by judges or their personal clerks. Without minimizing the explanatory power of this increase in volume, these developments are also consistent with the view that error correction is difficult work. Put differently, if the law does not provide clear answers even in some portion of seemingly routine cases, then there is a natural tendency for appellate courts to regard the work of lower courts as *"good enough"* and leave it undisturbed. That could explain things like the rise of unpublished opinions and the delegation of much of the work of error correction to others.

Chad M. Oldfather, *Error Correction*, 85 Ind. L.J. 49, 74–75 (2010) (emphasis added).

Error correction, however, is one of the main functions of intermediate appellate courts' review. In addition, even under the deferential standard, appellate courts would have to actually review the record (not just the lower court's opinion) and analyze it in light of the parties' arguments to determine if the trial court's findings were clearly erroneous. *See generally* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & App. Advoc. 179, 246 (2012).

This probably explains why states that do not deem the "good enough" approach good enough instead apply the plenary review standard, both in this context and in their review under the constitutional-fact doctrine.

## Independent Review under the Constitutional-Fact Doctrine

The standard statement of the standard of review for mixed questions of law and fact also fails to note that there is something distinctive about judicial review of adjudicative facts decisive of any constitutional claim.

In *Bose Corp. v. Consumers Union of United States*, the Supreme Court "held that the clearly erroneous standard of Federal Rule of Civil Procedure 52(a) does not prescribe the scope of appellate review of a finding of actual malice in defamation cases"; and, "as a matter of 'federal constitutional law,' appellate courts '*must* exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.'" Monaghan, *supra*, at 229 (quoting *Bose Corp.*, 466 U.S. 485, 510, 514 (1984) (emphasis

added by Monaghan)). "[I]ndependent judgment in the first amendment context is merely one example of a systemic issue: the scope of judicial review of the adjudicative facts decisive of constitutional claims. This issue is traditionally raised under the rubric of the constitutional fact doctrine." *Id.* at 230–31.

Before and after *Bose*, federal and state courts have applied the constitutional-fact doctrine beyond the context of constitutional defenses to libel and First Amendment cases. *See Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964) (opinion of Brennan, J.) ("In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case.") (citations omitted); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (reasonable suspicion and probable cause under the Fourth Amendment); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 567 (1995) (expressive association); *Miller v. Fenton*, 474 U.S. 104, 115–116 (1985) (voluntariness of confession under the Fourteenth Amendment's Due Process Clause); *see also United States v. Axsom*, 289 F.3d 496, 500 (8th Cir. 2002) (in custody determinations); *State v. Heinonen*, 909 N.W.2d 584, 590 (Minn. 2018) (same); *People v. Hebert*, 46 P.3d 473, 480 (Colo. 2002) (suppression appeal); *United States v. Gaines*, 918 F.3d 793, 796 (10th Cir. 2019) (consensual encounter); *In re Termination of Parental Rights of Brittany Ann H.*, 607 N.W.2d 607, 619 (Wis. 2000), *holding modified by In re Matthew D.*, 880 N.W.2d 107 (Wis. 2016) (termination of parental rights cases); *In re Interest of Noah B.*, 891 N.W. 2d 109 (Neb. 2017) (same); *In re Carrington H.*, 483 S.W.3d 507, 523–24 (Tenn. 2016); *In re C.M.*, 432 P.3d 763, 768 (Okla. 2018) (same); *In re A.S.*, 906 N.W.2d 467, 472 (Iowa 2018) (same); *W. Va. Reg'l Jail & Corr. Facility Auth. v. Marcum*, 799 S.E.2d 540, 549 (W. Va. 2017) (FOIA's exemptions); *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 134 (2d Cir. 2017) (right of public access on common law or First Amendment grounds); *Sierra Club, Inc. v. U.S. Fish & Wildlife Serv.*, 925 F.3d 1000, 1015 (9th Cir. 2019), *cert. granted*, No. 19-547, 140 S. Ct. 1262 (U.S. Mar. 2, 2020) (deliberative process exemption); *City of San Buenaventura v. United Water Conservation Dist.*, 406 P.3d 733, 740 (Cal. 2017), *as modified on denial of reh'g* (Feb. 21, 2018) (tax or fee); *Rankin v. McPherson*, 483 U.S. 378, 385–86, n.9 (1987) (public employee speech); *Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) (campaign finance reform); *Utah Licensed Bev. Ass'n v. Leavitt*, 256 F.3d 1061, 1067–68 (10th Cir. 2001) (liquor advertising); *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1146–47 (10th Cir. 2001) (Winter Solstice display); *Am. Target Advert., Inc. v. Giani* 199 F.3d 1241, 1247 (10th Cir. 2000) (charitable solicitations); *Brown v. Palmer*, 915 F.2d 1435, 1441 (10th Cir.1990) (public fora); *United States v. Friday*, 525 F.3d 938, 949–50 (10th Cir. 2008) (free exercise and RFRA); *United States v. Erie Cty.*, 763 F.3d 235, 238 (2d Cir. 2014) (government's "compelling interest"); *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 174–75 (5th Cir. 2011) (government's "compelling interest"). *See generally U.S. Bank Nat'l Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

The rationale for conducting an independent review of constitutional facts in civil and criminal cases involving constitutional and statutory rights is the importance of the rights implicated or the need for the appellate courts to maintain control over law declaration and norm elaboration. *See, e.g.*, *United States v. Boyle*, 105 S. Ct. 687, 692 n.8 (1985) ("When faced with a recurring situation . . . the Courts of Appeals should not be reluctant to formulate a clear rule of law to deal with that situation."); *State v. Fry*, 388 N.W.2d 565 (Wis. 1986), *overruled on other grounds by State v. Dearborn*, 786 N.W.2d 97 (Wis. 2010) (applying the constitutional-fact doctrine and holding that "[t]he scope of constitutional protections, representing the basic value commitments of our society, cannot vary from trial court to trial court, or from jury to jury"); *Mahaffey v. Page*, 162 F.3d 481 (7th Cir. 1998); *People v. Louis*, 728 P.2d 180, 191 (Cal. 1986) ("When, as here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the trial judge's determination independently." (citation, internal quotation marks, and alterations omitted)); *People v. Kennedy*, 115 P.3d 472, 483–85 (Cal. 2005) (noting that the constitutional-fact doctrine addresses "the risk of inconsistent results arising not from different facts but from different trial judges drawing varying general conclusions, the need for appellate courts to control and clarify legal principles when the legal rules are defined through their application to facts in different cases, and the ability to come closer to developing a defined set of rules"); *Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc*., 442 P.3d 402, 408 (Colo. 2019) (explaining that "de novo review is appropriate 'when applying the law involves developing auxiliary legal principles of use in other cases'"); *A.R. v. D.R.*, 456 P.3d 1266, 1276 (Colo. 2020) ("A determination of the proper legal standard to be applied in a case and the application of that standard to the particular facts of the case are questions of law that we review de novo."); Monaghan, *supra*, at 236 (explaining that, "while 'what happened' may be viewed as a question of fact, the legal sufficiency of the evidence may be viewed as the equivalent of a question of law").

This is not to say that all state and federal courts apply the plenary review of facts when the record is purely documentary or based on undisputed facts or otherwise extends the application of the constitutional-fact doctrine beyond defenses to libel. *See, e.g*., *Stracka v. Peterson*, 377 N.W.2d 580, 582 (N.D. 1985) (following *Anderson* and applying the clearly erroneous standard); *FTC v. Brown & Williamson Tobacco Corp*., 778 F.2d 35, 41 n.3 (D.C. Cir. 1985) (refusing to extend *Bose* to the commercial speech context); *Kraft, Inc. v. F.T.C*., 970 F.2d 311, 317 (7th Cir. 1992) (refusing to extend *Bose* to FTC findings regarding deception in commercial speech). Nonetheless, the weight of federal and state courts' opinions points to a legal norm recognizing application of the constitutional-fact doctrine beyond the context of constitutional defenses to libel in First Amendment cases.

## Conclusion

Practitioners should not necessarily be put off by the formulaic presentation of the clearly erroneous standard of review of factual findings in the context of mixed questions of law and fact. When the trial court's findings of fact are based on a purely documentary record or undisputed facts, or when the case involves important constitutional or statutory rights, those facts can be subject to plenary review.