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# The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court

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I confess.

These two words—if the jury hears them—often seal the fate of a criminal defendant.[1] As a result, defense lawyers will fight furiously to suppress a client's confession. A trial court will not admit a confession into evidence if the defendant did not make it voluntarily. Even after the trial court has ruled on the confession's voluntariness, an appellate court can reverse that ruling.[2]

In *Miller v Fenton*, the Supreme Court held that the question whether a trial court correctly ruled on the confession's

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[1] "[A] full confession in which the defendant discloses the motive for and means of the crime may tempt the jury te rely upon that evidence alone in reaching its decision." *Arizona v Fulminante*, 499 US 279, 296 (1991). See also *Bruton v United States*:

> [T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

391 US 123, 139-40 (1968) (White dissenting). See also *Colorado v Connelly*:

> Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process. Triers of fact accord confessions such heavy weight in their determinations that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained." . . . No other class of evidence is so profoundly prejudicial.

479 US 157, 182 (1986) (Brennan dissenting) (citations omitted).

[2] Recently, the Supreme Court has scaled back protection for confessing defendants. Most notably, the Court has held that the improper admission of an involuntary confession may in some circumstances be harmless error and thus not grounds for reversal. See *Fulminante*, 499 US at 310 ("It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions helong in the former category.").

voluntariness (hereinafter "voluntariness determination") requires independent federal determination.[3] Most federal appellate courts have interpreted this case as requiring de novo review of the voluntariness determination.[4] However, the voluntariness determination in *Miller* arose in the context of a habeas corpus petition.[5] The *Miller* Court did not resolve whether a federal appellate court must conduct an independent review of such determinations in cases other than habeas proceedings. As a result, at least one circuit has declined to review the voluntariness determination de novo and instead applied the more deferential standard of "clear error" review on direct appeal.[6] The Supreme Court has yet to resolve this confusion among the circuits.

Deciding the proper standard of review for voluntariness determinations is important. First, the standard of review affects an appellate court's willingness to disturb a lower court ruling. When the standard requires deference (as do "abuse of discretion" and "clear error," for example), the appellate court often will not disturb a lower court's finding even if it would not have reached the same result.[7] Moreover, the standard of review may influence the behavior of the trial court. The standard of review sends a signal to the trial court about the finality of its ruling. A more deferential standard might promote activism among trial judges who know that appellate courts will not reverse their rulings.[8] In

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[3] 474 US 104, 112 (1985).

[4] See note 44.

[5] *Miller*, 474 US at 108. Habeas corpus is a postconviction procedure by which a defendant may collaterally attack his conviction after he has exhausted all other remedies. A writ of habeas corpus "is a judicial order directing a person to have the body of another brought before a tribunal at a certain time and place." Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 28.1 at 1178 (West 2d ed 1992). Federal courts may issue this writ when a prisoner is being held in violation of the Constitution or laws of the United States. Id at 1177. See, for example, *Darden v Wainwright*, 477 US 168, 181 (1986) (writ may issue when prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

[6] *United States v Baldwin*, 60 F3d 363, 365 (7th Cir 1995). Clear error review is more deferential than de novo review. Courts reverse under the clear error standard when they have "a definite and firm conviction that a mistake has been committed." *United States v United States Gypsum Co.*, 333 US 364, 395 (1948). See text accompanying notes 57-63.

[7] See *United States v Real Estate Boards*, 339 US 485, 495 (1950); *Anderson v Bessemer City*, 470 US 564, 573-74 (1985).

[8] Or, a more deferential standard might encourage restraint among trial judges who know that appellate courts will be less likely to correct their errors. Which effect would obtain is an empirical matter beyond the scope of this Comment. In either case, the choice of standard affects the trial court's behavior.

contrast, less deferential review might promote restraint among trial judges because appellate courts are more likely to reverse an erroneous ruling. Finally, standards of review are especially important in the context of confessions. A confession alone may provide sufficient evidence to convict a defendant. Therefore, the choice between the de novo and clear error standards of review may determine the fate of an entire class of defendants—specifically, those whose confessions are erroneously admitted at trial but who cannot establish that the trial court's lapse rises to the level of clear error.

On direct appeal, the standard of review for the voluntariness determination should be de novo. While *Miller* did not conclusively determine the standard of review for this class of cases, it offered several reasons for adopting the de novo standard that apply with equal force in cases on direct appeal. Rather than rely solely on *Miller*, however, federal appellate courts should employ other doctrines to support de novo review. For example, courts should consider treating voluntariness as a type of "mixed question"—a question involving the application of law to fact—that should receive de novo review. Alternatively, courts should expand the constitutional fact doctrine, which permits de novo review of certain issues involving constitutional rights. Mixed question analysis and the constitutional fact doctrine alike yield the de novo result. Either doctrinal solution would be superior to the current, misplaced reliance on *Miller*.

Section I of this Comment reviews the Supreme Court's jurisprudence on confessions, provides a close reading of *Miller*, and reviews the division among the federal circuits over the standard of review for voluntariness determinations on direct appeal. Section II analyzes the literature on standards of review and focuses on two vexing problems in this field—the application of law to fact (hereinafter "mixed questions") and the constitutional fact doctrine. These two issues frame the analysis of voluntariness determinations. Section III analyzes these determinations and defends the application of de novo review in cases on direct appeal.

## I. CONFESSIONS IN THE COURTS

### A. Confessions in the Supreme Court

The legal rules governing the admissibility of confessions have undergone a dramatic transformation from the early common law. At early common law, confessions were admissible even

if they had been extracted by inducements, psychological trauma, or physical torture.[9] By the middle of the eighteenth century, common law courts had begun to exclude confessions from evidence when the defendant had not made them "voluntarily."[10] Following this rule, early American courts asked whether the interrogation methods were so extreme as to overcome the presumption that "one who is innocent will not imperil his safety . . . by an untrue statement."[11]

Voluntariness first acquired its constitutional status roughly one hundred years ago, and the contours of the requirement have evolved significantly over the last century. The Court first elevated voluntariness to constitutional status in *Bram v United States*, a federal murder prosecution in which the Court held that the admission of an involuntary confession violated Fifth Amendment due process.[12] The modern jurisprudence began with *Brown v Mississippi*,[13] then unfolded in a series of cases that, like *Brown*, originated in state courts and came before the Supreme Court via habeas corpus petitions or on direct appeal from state supreme courts.[14] Unlike *Bram* and other cases that originated in the federal courts, these cases considered voluntariness through the lens of Fourteenth Amendment due process.[15] These cases often involved brutal interrogation techniques, and the voluntariness determination served as an essential protection for defendants in state courts. While the origins of the due process rights differ,

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[9] LaFave and Israel, *Criminal Procedure* § 6.2 at 294 (cited in note 5). The basis for this rule is unclear. The courts might have admitted the confessions because they did not recognize voluntariness as a ground for exclusion. Alternatively, courts might have been concerned about voluntariness yet admitted the confessions because they had a Hobbesian conception of what was voluntary—at some level, confessions under even the most extreme circumstances involve choice. Whatever the reasoning, though, the result was clear: admit the confession.

[10] Id. See, for example, *The King v Warickshall*, 168 Eng Rep 234, 235 (KB 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of gnilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given te it; and therefore it is rejected.").

[11] *Hopt v Utah*, 110 US 574, 585 (1884).

[12] 168 US 532, 542 (1897).

[13] 297 US 278 (1936). In *Brown*, state police stripped two defendants, whipped them, and tortured them until they confessed to murder. Id at 282. The Supreme Court held that the confessions were involuntary and that the convictions denied the defendants their due process rights. Id at 287.

[14] See *Miller*, 474 US at 109-10 (tracing the development of *Brown* and its progeny); Frank R. Strong, *The Persistent Doctrine of "Constitutional Fact"*, 46 NC L Rev 223, 249-61 (1968) (a dated but more thorough discussion of the Court's voluntariness cases).

[15] See *Miller*, 474 US at 109-10, and cases cited therein.

courts appeal to both the Fifth and Fourteenth Amendment lines of cases as authority for their due process analysis of the voluntariness of a confession.[16]

These decisions set the modern procedural and substantive standards for voluntariness determinations. Until 1966, they governed all confessions regardless of the setting in which the confessions were made. Then in the landmark case of *Miranda v Arizona*, the Court held that custodial interrogations were inherently coercive and required police to give certain warnings when placing a defendant in custody.[17] The classic due process cases, however, still govern the voluntariness determination in cases involving noncustodial interrogations. These cases require the trial judge to hold an evidentiary hearing outside the presence of the jury in order to determine the confession's admissibility.[18] In this hearing, the court must decide whether, under the "totality of the circumstances," the confession was the product of an "overborne" will.[19] If it was not, the court may admit the confession and allow the jury to hear it.

### B. *Miller v Fenton*

In *Miller*, the New Jersey State Police questioned the defendant, Frank Miller, as a possible murder suspect. After extensive

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[16] See Joseph D. Grano, *Confessions, Truth, and the Law* 120-23 (Michigan 1993) (discussing incorporation).

[17] 384 US 436, 467 (1966). For a discussion of how post-*Miranda* courts have narrowed the definition of "custodial interrogation," see George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 Tex L Rev 231, 238-39 (1988).

[18] The Supreme Court held that due process requires an "in camera" voluntariness determination in *Jackson v Denno*, 378 US 368, 389-91 (1964). *Jackson* overruled *Stein v New York*, 346 US 156, 188 (1953), which had allowed the jury to make the initial voluntariness determination. See generally David M. Nissman, Ed Hagen, and Pierce R. Brooks, *Law of Confessions* § 11:1 at 299-301 (Law Co-op 1985) (practitioner's discussion of the roles of judge and jury in the voluntariness determination).

[19] See *Culombe v Connecticut*:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

367 US 568, 602 (1961) (plurality opinion). But see Grano, *Confessions, Truth, and the Law* at 61-64 (cited in note 16) (criticizing the "overborne will" doctrine).

questioning, Miller "fully confessed to the crime."[20] At trial, Miller moved to suppress his confession on the ground that it was involuntary. The trial court rejected Miller's motion, and the jury convicted him.[21] After the New Jersey Superior Court Appellate Division reversed the trial court, the New Jersey Supreme Court reversed the appellate court and held that the confession was voluntary.[22]

Miller then filed a petition for a writ of habeas corpus in federal district court in New Jersey. The district court dismissed the application without a hearing. On appeal, the Third Circuit held that voluntariness is a "factual issue" and limited its review to "whether the state court applied the proper legal test, and whether [its] factual conclusions . . . [were] supported on the record as a whole."[23] The Third Circuit affirmed the dismissal of Miller's application.

The United States Supreme Court reversed the Third Circuit's decision. The Court held that "whether . . . the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination,"[24] and required the Court of Appeals to "independently evaluate the admissibility of the confession."[25] However, the Supreme Court did not clearly define the scope of its holding. Some language suggests that the holding governs *all* appellate review of voluntariness determinations, while other language suggests that the holding governs only appellate review of habeas petitions.[26]

Several phrases in the *Miller* opinion suggest that its holding applies to all appellate review of voluntariness determinations. First, the Court observed that voluntariness has a "uniquely legal dimension," because a coerced confession would deprive the defendant of due process.[27] Thus, it stated, independent federal

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[20] *Miller*, 474 US at 107.

[21] Id at 108.

[22] *New Jersey v Miller*, 76 NJ 392, 388 A2d 218, 226 (1978).

[23] *Miller v Fenton*, 741 F2d 1456, 1462 (3d Cir 1984), rev'd, 474 US 104 (1985). The federal habeas corpus statute provides that certain state court findings of fact "shall be presumed to be correct." 28 USC § 2254(d) (1994). Doctrinally, the Third Circuit was holding that voluntariness was a finding of fact within the meaning of § 2254(d).

[24] *Miller*, 474 US at 112.

[25] Id at 118.

[26] *Miller* did not divide its analysis along these lines. Instead, the *Miller* Court first considered, but did not resolve, whether voluntariness was a mixed question of law and fact. Id at 112-16. Second, the *Miller* Court analyzed the "practical considerations" about voluntariness that supported independent review. Id at 116-18.

[27] Id at 116.

review "play[s] an important parallel role in protecting the rights at stake."[28] Second, "assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness.'"[29] Third, confessions "almost invariably occur in a secret and inherently more coercive environment."[30] The unregulated environment increases the possibility that a defendant will be deprived of his rights. Fourth, the Court traditionally has treated voluntariness "as a legal inquiry requiring plenary federal review."[31] Finally, a confession's admissibility depends on the answer to a "legal question" regarding the compatibility of the interrogation methods "with a system that presumes innocence."[32]

These grounds for the *Miller* holding suggest several conclusions. First, each supports the application of a more exacting standard of appellate review. In addition, nothing about this conclusion—at least as it flows from these premises—is peculiar to the review of habeas petitions. The due process rights implicated by confessions are no less important on direct appeal than on review of habeas petitions.[33] And if the ultimate issue of voluntariness does not depend on "assessments of credibility and demeanor," then an appellate court is situated to make this judgment equally well on direct review and in habeas petitions. Likewise, federal investigators are just as capable as state investigators of conducting a confession in a "secret and inherently more coercive setting."[34] Finally, the relationship between the pre-

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[28] Id.

[29] Id at 116-17. But see *United States v Baldwin*, 60 F3d 363, 365 (7th Cir 1995) (justifying clear error standard on direct review partly because trial judge "is closer to the facts" and is also "more practiced than appellate judges in assessing the significance of facts"). *Miller* and *Baldwin* disagree on this point because they offer different conceptions of the voluntariness determination. See note 117.

[30] *Miller*, 474 US at 117.

[31] Id at 115.

[32] Id at 116.

[33] However, in cases in federal court, a due process argument on direct review will be rooted in the Fifth Amendment, while arguments on habeas petitions will be rooted in the Fourteenth Amendment. The Fourteenth Amendment applies only to states while the Fifth Amendment applies to the federal government. See LaFave and Israel, *Criminal Procedure* § 6.3 at 299 (cited in noto 5).

[34] The *Miller* Court largely drew on examples of abuse by stato police. However, federal investigaters are equally capable of extracting an involuntary confession in a coercive setting. See, for example, *United States v Hull*, 441 F2d 308, 312-13 (7th Cir 1971) (holding a confession involuntary after a suspect with an IQ of 51 was "subjected to a continuous series of intensive interrogations for nearly twelve hours," denied food, and possibly beaten by federal officials).

sumption of innocence and the method of obtaining the confession exists with equal force in federal trials.

If the Supreme Court had grounded its holding in these reasons only, proponents of the de novo standard on direct appeal would have a strong case. However, the *Miller* Court did not confine its analysis to a general discussion of voluntariness. Instead, it offered several additional reasons for applying de novo review in the case before it that suggest its holding is limited to habeas petitions.

First, "a half century of unwavering precedent" on habeas petitions had created a "settled rule" that voluntariness determinations require independent federal review.[35] Second, the Court looked to the legislative history of the federal habeas corpus statute.[36] While the statute requires a federal court to defer to the state courts on certain types of findings, the Court found that the legislative history "undermine[d]" the claim that the voluntariness determination was a "factual issue" requiring deference.[37]

Far from clarifying the holding of the case, this reasoning only muddled the issues. Unlike the factors that applied generally to confessions in all types of cases, these last reasons have no analogues in cases on direct appeal. The Supreme Court has not offered a half century of unwavering precedent on voluntariness determinations on direct appeal.[38] Nor do federal appellate courts have the benefit of a statute that specifies standards of review on direct appeal.[39] Thus, while all of the premises noted by the Court yielded the same conclusion in the habeas proceeding before it, they point in different directions where the issue arises on direct appeal. As a result, *Miller* created more confusion than it resolved and prompted one federal appellate judge to conclude that "*Miller* casts only an oblique ray of light on the question whether a court of appeals in a federal criminal case should determine the voluntariness of a confession."[40]

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[35] *Miller*, 474 US at 115.

[36] 28 USC §§ 2241-55 (1994).

[37] See *Miller*, 474 US at 111.

[38] Most of the Court's confession cases have come through state courts via habeas corpus petitious, rather than through direct appeals in federal cases. See Lafave and Israel, *Criminal Procedure* § 6.1 at 292-93 (cited in note 5).

[39] On other occasions, the Supreme Court has avoided the standards-of-review thicket by resolving a fact/law distinction on statutory grounds. See, for example, *Anderson v Bessemer City*, 470 US 564, 566 (1985) (defining intentional discrimination as a finding of fact by appealing to statutory language in Title VII).

[40] *United States v Rutledge*, 900 F2d 1127, 1129 (7th Cir 1990). *Miller* has even

## C. Current Approaches

The confusion after *Miller* has caused federal appellate courts to adopt different standards of review for voluntariness determinations on direct appeal.[41] Most federal circuits use the de novo standard—the standard customarily employed by appellate courts to review trial courts' conclusions of law.[42] Of these courts, most hold that *Miller* requires de novo review for cases on direct appeal, but a few provide reasons for applying de novo review that are independent of *Miller*. In contrast, the Seventh and, possibly, Eleventh Circuits apply the more deferential clear error standard, traditionally used to review trial courts' findings of fact.[43] These courts reason that *Miller* does not govern the standard on direct appeal, and contend that voluntariness, at least on direct appeal, is more analogous to findings that are reviewed for clear error.

### 1. De novo courts.

The majority of circuits conducts a de novo review of the voluntariness determination on direct appeal. Most hold that this is compelled by *Miller*.[44] These courts still review a lower court's

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created some ambiguity in the context of the review of habeas petitions. In *Miller*, the federal district court declined to hold an evidentiary hearing. Thus, the Third Circuit was the first federal court to review fully the petition. In requiring "independent federal determination" in that case, the *Miller* Court did not clarify whether such review is necessary in all cases before the circuits, or rather is necessary only in cases where the district court has not conducted a hearing. See Keith R. Dolliver, Comment, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U Chi L Rev 141, 149-50 (1990) (*Miller* "based its decision on the need for an 'independent federal determination' of issues;" its "emphasis, then, was on establishing that the *federal* courts as a body should not defer to state court findings on voluntariness of confessions.").

[41] Readers unfamiliar with standards of review may first wish to consnlt text accompanying notes 57-69.

[42] See, for example, *Wirtz v Barnes Grocer Co.*, 398 F2d 718 (8th Cir 1968) (reversing, under de novo review, a district court's conclusion about the meaning of "enterprise" in the Fair Labor Standards Act).

[43] See, for example, *St. Bartholomew's Church v City of New York*, 914 F2d 348 (2d Cir 1990) (affirming, under clear error review, a district court's finding that a church had failed to demonstrate its inability to conduct its religious activities in its existing facilities).

[44] See, for example, *United States v Romero*, 897 F2d 47, 52 (2d Cir 1990); *United States v Bethancourt*, 65 F3d 1074, 1078 n 1 (3d Cir 1995); *United States v Locklear*, 829 F2d 1314, 1317 (4th Cir 1987); *United States v Robinson*, 20 F3d 320, 322 (8th Cir 1994); *United States v Wolf*, 813 F2d 970, 974-75 (9th Cir 1987); *United States v Chalan*, 812 F2d 1302, 1307 (10th Cir 1987); *United States v Yunis*, 859 F2d 953, 957-58 (DC Cir 1988) (dictum).

findings of "subsidiary facts" under the clear error standard.[45] For example, these courts will defer to a trial court's determination about the setting of the confession.[46] However, when reviewing the totality of subsidiary facts, these courts make independent determinations about whether the confession was voluntary as a matter of law.

Other courts have justified de novo review on grounds independent of *Miller*. For example, in *United States v Rigsby*, the Sixth Circuit reviewed de novo a voluntariness determination on direct appeal.[47] In *Rigsby*, the defendant had confessed to a crime but alleged that the police had physically coerced him into giving the confession. Rather than relying on *Miller*, the court justified de novo review because police threats of physical violence would have violated his due process rights.[48] Under this reasoning, appellate courts should conduct de novo review whenever a case involves the disposition of due process rights.[49]

2. Clear error courts.

In *United States v Baldwin*, the Seventh Circuit departed from the de novo review standard preferred by the other circuits.[50] After making inculpatory statements to a federal agent, Baldwin was convicted of drug-related crimes and sentenced to

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[45] See, for example, *Locklear*, 829 F2d at 1317 ("[T]he findings of the district court as to the facts surrounding the confession are to be accepted unless clearly erroneous.").

[46] See, for example, *United States v Rohrbach*, 813 F2d 142, 144-45 (8th Cir 1987) (deferring to district court's findings about the setting of the confession but reviewing voluntariness "as a matter of law").

[47] 943 F2d 631, 635 (6th Cir 1991).

[48] Id.

[49] This reliance on due process suggests that the court may be using the constitutional fact doctrine to justify de novo review. See notes 94-111, 137-55 and accompanying text.

[50] 60 F3d 363, 364-65 (7th Cir 1995). The Eleventh Circuit may have created this circuit split before *Baldwin*; however, that circuit has sent conflicting signals regarding its standard of review for voluntariness determinations on direct appeal. In *United States v Mendoza-Cecelia*, for instance, the Eleventh Circuit, citing a pre-*Miller* decision, held that it "review[ed] determinations regarding the voluntariness of a confession for clear error." 963 F2d 1467, 1475 (11th Cir 1992), citing *United States v Vera*, 701 F2d 1349, 1364 (11th Cir 1983). Subsequently, though, in *Coleman v Singletary*, a habeas case, that same circuit held that it "review[ed] *de novo* the district court's determination of the voluntariness of a defendant's confession." 30 F3d 1420, 1426 (11th Cir 1994). These two cases suggest that the Eleventh Circuit either rejects the binding effect of *Miller* in cases on direct appeal, or that the *Mendoza-Cecelia* court did not consider *Miller*. While the explanation for the contradictory decisions remains unclear, dictum in a recent Eleventh Circuit opinion suggests that the latter interpretation may be the correct one. See *United States v Barbour*, 70 F3d 580, 584 (11th Cir 1995) (voluntariness of confession and waiver of *Miranda* rights both reviewed de novo).

twenty-three years in prison. On appeal, Baldwin alleged that the agent had coerced his confession by promising to inform the prosecutor of Baldwin's cooperation if Baldwin assisted with the investigation. The Seventh Circuit reviewed the voluntariness of Baldwin's confession for clear error and affirmed the conviction.[51] In so doing, the *Baldwin* court explicitly overruled *United States v Hawkins*, a 1987 case in which the Seventh Circuit, citing *Miller*, had established de novo as the standard of review for voluntariness determinations on direct appeal.[52]

The *Baldwin* court offered several reasons for applying the more deferential standard of review. First, the court read narrowly the holding of *Miller* as applying only to review of habeas corpus petitions and not to federal criminal cases generally.[53] The court then argued that a district judge is in a superior position to make a voluntariness determination because he is "closer to the facts" and "more practiced than appellate judges in assessing the significance of facts."[54] Furthermore, the court stated that "de novo review is not necessary to produce a reasonable uniformity of the legal principles applied within the court's jurisdiction."[55] Finally, the *Baldwin* court analogized voluntariness determinations to other criminal procedure issues that it reviewed under the clear error standard and posited that "[c]onsistency and common sense require that the issue of the voluntariness of a confession be treated the same way."[56]

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[51] *Baldwin*, 30 F3d at 366.

[52] 823 F2d 1020, 1022-23 n 1 (7th Cir 1987), overruled by *Baldwin*, 60 F3d at 364, 366. Between *Hawkins* and *Baldwin*, several judges on the Seventh Circuit had questioned the binding effect of *Miller* in cases on direct appeal. See *Sotelo v Indiana State Prison*, 850 F2d 1244, 1254 (7th Cir 1988) (Easterbrook concurring) (questioning the application of *Miller* in federal criminal cases); *Wilson v O'Leary*, 895 F2d 378, 383 (7th Cir 1990) (same); *United States v Rutledge*, 900 F2d 1127, 1129 (7th Cir 1990) (same); *United States v Wildes*, 910 F2d 1484, 1485-86 (7th Cir 1990) (same); *Johnson v Trigg*, 28 F3d 639, 645 (7th Cir 1994) (questioning whether a federal appellate panel must conduct de novo review in habeas proceedings where a district judge already has considered the petition).

[53] *Baldwin*, 60 F3d at 364. The *Baldwin* court suggested that direct review, unlike habeas review, requires more deference. Justice Jackson, in the context of another case, reached the opposite conclusion. See *Ashcraft v Tennessee*, 322 US 143, 158 (1944) (Jackson dissenting) (In cases on direct appeal, the Court "should be at liberty to apply rules as to the admissibility of confessions, based on [its] own conception of permissible procedure, and in which [it] may embody restrictions even greater than those imposed upon the States by the Fourteenth Amendment."). The *Ashcraft* majority did not reach this issue.

[54] *Baldwin*, 60 F3d at 365. See note 29 and accompanying text (noting that *Miller* rejects this proposition).

[55] *Baldwin*, 60 F3d at 365.

[56] Id (noting that the existence of probable cause, the validity of waivers of *Miranda* rights, and the validity of consent to search are all reviewed for clear error, not de novo).

## II. STANDARDS OF REVIEW

In order to decide whether the majority standard of de novo review is superior to the more deferential clear error standard, one must understand the rationales for each. This Section analyzes the literature on standards of review. First, it introduces the conceptual underpinnings of the distinction between findings of fact, which are reviewed for clear error, and conclusions of law, which are reviewed de novo. Second, it explores limitations on the fact/law distinction by focusing on two vexing problems in the field, mixed questions and constitutional facts. This analysis creates a framework for classifying the voluntariness determination and evaluating the circuits' standards for reviewing this issue on direct appeal.

### A. The Fact/Law Distinction

The classic typology suggests that issues on appeal are either findings of fact (reviewed for clear error) or conclusions of law (reviewed de novo). In simple (and simplistic) examples, categorizing a particular issue is an easy task.

Appellate courts review district courts' findings of fact under the clear error standard. The Supreme Court defined this standard when it wrote: "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."[57]

A simple example illustrates the application of the clear error standard to a question of fact. Suppose that *P* sues *D* for negligence arising from an automobile accident.[58] *P*'s witness

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[57] *United States v United States Gypsum Co.*, 333 US 364, 395 (1948). This simple wording of the standard hides the difficulties in applying it. See Steven Alan Childress, *"Clearly Erroneous": Judicial Review Over District Courts in the Eighth Circuit and Beyond*, 51 Mo L Rev 93, 98 (1986) (noting that the "misunderstanding and misapplication" of the clearly erroneous standard "has led to constant debate"); 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, 416 (1981) (questioning the value of the *Gypsum* restatement of the clear error rule). Judge Learned Hand doubted the ability of courts to unpack the meaning of the clear error standard and concluded that "[i]t is idle to try to define the meaning of the phrase, 'clearly erroneous.'" *United States v Aluminum Co. of America*, 148 F2d 416, 433 (2d Cir 1945).

[58] The example of an automobile accident, both in this context and in the subsequent discussion on conclusions of law, is adapted from 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 NC L Rev 993, 993-94 n 3 (1986).

claims that the traffic light was red. *D*'s witness claims that the traffic light was green. In a bench trial to determine whether *D* was negligent,[59] the judge will decide whether the light was green or red. The appellate court will then defer to this determination unless it is clearly erroneous, as it would be, for example, if the factfinder determined that the light was red even if no one testified to that effect and everyone testified to the contrary. In other words, an appellate court will not "reverse a trial judge's fact-finding simply because it would have found the facts differently."[60]

This deference reflects several policy concerns. Since the trial judge is present during testimony, he is better able to observe the demeanor and determine the credibility of a witness than an appellate court that is reviewing a cold record.[61] In addition, some trial judges develop a skill at observing witnesses and are able to "sniff out" those who are lying.[62] Finally, deference is administratively efficient. Because appellate judges, reviewing a cold record, are unlikely to be able to add much to the trial judge's findings, deference saves the parties and the courts from unproductive review of minute findings of fact on appeal.[63]

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[59] Ordinarily, a jury would make this determination, and its findings would be subject to even more deferential review than clear error. See Jack H. Friedenthal, Mary Kay Kane, and Arthur R. Miller, *Civil Procedure* § 13.4 at 607 (West 2d ed 1993). Confining the example to a bench trial simplifies the hypothetical by limiting the discussion to the standards at issue in voluntariness determinations. Since such a ruling at trial is made outside of the presence of the jury, this simplification is appropriate.

[60] Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U Kan L Rev 1, 8 (1991). See also *Anderson v Bessemer City*, 470 US 564, 573 (1985) (Clear error 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.").

[61] See *Anderson*, 470 US at 574 (noting superior position of trial judge to make credibility determinations). 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, 260 (1991) (noting the "especially acute knack [of trial judges] for extracting the subtle inference from otherwise inscrutable declarations and deposition transcripts"); Brent E. Kidwell, Note, *A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed on Appeal?*, 26 Ind L Rev 117, 133 (1992) (noting trial court's "special expertise . . . in judging the credibility of the witnesses, analyzing the demeanor of the parties, and weighing the evidence").

[62] See *Anderson*, 470 US at 574 (discussing "experience" and "expertise" of trial judge in determinations of fact).

[63] Sward, 40 U Kan L Rev at 24 (cited in note 60) (Appellate review of factfinding "would be inefficient because it would produce little or no change in the outcome but would cost the parties and society a large expenditure of legal and judicial resources."); Kidwell, Note, 26 Ind L Rev at 133 (cited in note 61) ("[J]udicial economy" favors deferential review.). See also *Anderson*, 470 US at 574-75 ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources" and "is requiring too

By contrast, appellate courts review district courts' conclusions of law under the de novo standard. De novo review is "[t]he fullest scope of review."[64] The appellate court "do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below."[65] It involves "an independent determination as to the legal conclusions and inferences which should be drawn from them."[66] Suppose, hypothetically, that the district judge were to conclude that victims of automobile accidents may not sue in negligence. In contrast to the above example, the appellate court would not defer to this determination. The appellate court would instead draw its own conclusion from the record and would, if the jurisdiction's law were otherwise, reverse that finding.

The lack of deference in de novo review reflects a different set of policy concerns than review of factual findings. First, by nature of their institutional role, appellate judges can spend more time thinking about legal issues. By contrast, trial judges must spend more time dispensing with procedural motions on their overburdened dockets.[67] Second, de novo appellate review of legal questions promotes fairness. By creating "uniform legal principles,"[68] appellate courts strive to ensure that similar cases result in similar outcomes. Finally, de novo appellate review of legal issues is efficient. Because appellate decisions are binding on district courts within the circuit, appellate courts reduce the need to relitigate the same issues in every trial.[69]

Courts apply different standards depending on the issue under review. Trial judges witness the course of a trial and develop an expertise in factfinding. Thus, appellate courts defer to their findings of fact unless they have committed a clear error. By contrast, appellate courts are not burdened with time-consum-

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much" from the parties.).

[64] Friedenthal, Kane, and Miller, *Civil Procedure* § 13.4 at 603 (cited in note 59). See also Charles Alan Wright and Arthur R. Miller, 9A *Federal Practice and Procedure* § 2588 at 599 (West 2d ed 1995) (discussing de novo standard); James Wm. Moore, 5A *Moore's Federal Practice* ¶ 52.03[2] at 52-77 to 52-81 (Matthew Bender 2d ed 1995) (same).

[65] *United States v Silverman*, 861 F2d 571, 576 (9th Cir 1988).

[66] *United States v Mississippi Valley Generating Co.*, 364 US 520, 526 (1961).

[67] One scholar observes that "[a]ppellate judges . . . may be able to devote more time and energy to analyzing questions of law because that is their primary task." Sward, 40 U Kan L Rev at 14 (cited in note 60). But Sward goes on to note that this advantage is "slight." Id.

[68] Id.

[69] Id at 15 (Appellate litigation reduces the "need for repeated litigation in dozens of trial-level courts."). Of course, good trial lawyers still will seek to distinguish their clients' cases from unfavorable precedents.

ing procedural motions and have more time to develop uniform legal rules for an entire circuit. Thus, they review a trial court's conclusion of law de novo. These imperfect distinctions presuppose that a court can easily classify an issue as a finding of fact or a conclusion of law. The next Section demonstrates that this classification is far from clear and explores the limitations on the fact/law distinction.

### B. Limitations on the Fact/Law Distinction

Upon closer inspection, the differences between fact and law "belie more complex distinctions between the categories."[70] Courts and scholars have characterized the distinction between fact and law as a "formalistic riddle,"[71] "increasingly hazy,"[72] and as having a "vexing nature."[73] Others have suggested that law and fact are not "static, polar opposites" but have a "nodal quality" and "are points of rest and relative stability on a continuum of experience."[74] In some instances, courts confront cases where the law evolves only through application to the facts. For example, the law of negligence depends on whether a party's action was reasonable in a particular set of circumstances. These mixed questions do not fit neatly into the definition of either fact or law. Since the standard of review depends on the classification, courts struggle to find the proper approach to these questions.

In other cases, law gives facts their texture and defines their significance. For instance, where constitutional rights are involved, fact review may implicate important constitutional values. Under the constitutional fact doctrine, courts sometimes will review these facts de novo even though strict adherence to the standards of review might command deference.[75]

#### 1. Mixed questions.

Once the material facts are known (for example, whether the light was green or red) and the proper legal rule identified (that

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[70] Louis, 64 NC L Rev at 994 (cited in note 58). In *Pullman-Standard v Swint*, the Court confessed that it does not "yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion." 456 US 273, 288 (1982).

[71] Loe, 64 S Cal L Rev at 237 (cited in note 61).

[72] Childress, 51 Mo L Rev at 132 (cited in note 57).

[73] *Pullman-Standard*, 456 US at 288.

[74] Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum L Rev 229, 233 (1985).

[75] See text accompanying notes 94-111.

negligent drivers must pay), all that remains is for the judge to apply the law to the facts and announce the result. If only the process were so easy! Many questions involve elements of both fact and law. These "intermediate adjudicative determinations"[76] are known as mixed questions.

In *Pullman-Standard v Swint*, the Supreme Court defined mixed questions of law and fact as:

> [Q]uestions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard . . . [or] whether the rule of law as applied to the established facts is . . . violated.[77]

Unfortunately, this generalization does not take us very far. When does this process cross the line between factfinding and lawmaking? More relevant for the purposes of this Comment, if this process involves the trial court "making" law, must an appellate court review the determination de novo? Scholars note that "there is no recognized intermediate scope of review"[78] for these questions.[79] Nor is there consistency in the standard of review for different substantive issues that share the general qualities of mixed questions.[80] As a result, the uncertainty regarding the treatment of mixed questions has created a "troublesome and divisive conflict among the federal circuits."[81]

One potential solution to the dilemma of mixed questions is to develop bright-line rules: *X* is fact, *Y* is law. This might simplify the otherwise tortuous inquiry about how to classify—and, thus, under what standard to review—an issue. However, when the Court adopts this method, it often cannot articulate a rationale for the chosen line.[82] As a consequence, this method often

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[76] Louis, 64 NC L Rev at 1002 (cited in note 58).

[77] 456 US 273, 289 n 19 (1982).

[78] Louis, 64 NC L Rev at 1002 (cited in note 58).

[79] The Supreme Court recently passed up the opportunity to provide some much needed guidance in this area. See *Wright v West*, 505 US 277, 290 (1992) (plurality opinion) (declining to decide the standard of review for mixed constitutional questions in habeas petitions). In a concurring opiuion, Justice O'Connor suggested that the Court's cases favor de novo review of mixed constitutional questions. See id at 301-03 (O'Connor concurring).

[80] Louis, 64 NC L Rev at 1003-05 (cited in note 58) (Definitions of "employee," "scope of employment," "coercion," and "actual malice" all involve application of law to fact but are reviewed under different standards.).

[81] Loe, 64 S Cal L Rev at 235 (cited in note 61). See also id at 238-47 (classifying the circuits' approaches to the split); *Pullman-Standard*, 456 US at 289-90 n 19 (describing the circuit split over how to review mixed questions).

[82] See *Anderson v Bessemer City*, 470 US 564, 573 (1985) (asserting that intentional

leads to inconsistent applications.[83] For example, in trying to craft bright-line rules for defining "facts" in habeas review, the Court itself has recognized that it "has not charted an entirely clear course."[84]

Another potential solution is to create a set of standards that distinguish findings of fact from issues of law. Such standards might focus on certain qualities of the determination and the relative capacities of institutional actors.[85] For example, one could argue that an issue that turns on a credibility determination ought to be characterized as a finding of fact, since a trial judge, unlike an appellate panel, is particularly well situated to make this determination. By contrast, an issue that turns on the evaluation of a written record might be characterized as an issue of law. In this case, the appellate panel and the trial judge are equally well situated to make a determination. If the determination creates a legal rule, then the appellate judge should not be restricted by the trial judge's holding.[86]

The second, standards-based approach is the superior method for determining the standard of review for mixed questions. This method avoids the logic-chopping of blunt classifications and reduces the possibility of inconsistent results by providing future courts with rationales by which to analogize and distingnish types of findings.

This approach also reflects two important institutional considerations. First, it allocates decision-making authority. Since the Supreme Court's opinions on standards of review may support both the clear error and the de novo standards in a particular case, this approach reflects a determination about "who ought to have primary responsibility for such decisions."[87] Since mixed questions involve at least some legal issues, too much deference ignores the appellate court's duty "to ensure that justice is

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discrimination is a finding of fact without providing an explanation for this assertion).

[83] See *Thompson v Keohane*, 116 S Ct 457, 464-65 (1995) (explaining different classifications of mixed questions as either fact or law).

[84] See *Miller*, 474 US at 113.

[85] See *Pierce v Underwood*, 487 US 552, 559-60 (1988) (Classification of mixed questions "has turned on a determination that, as a matter of the sound administration of jnstice, one judicial actor is hetter positioned than another to decide the issue in question."), citing *Miller*, 474 US at 114.

[86] In some cases, there may be independent reasons, such as efficiency, for the appellate judge to defer to the trial judge's determination, even on a matter of law. See notes 124-36 and accompanying text.

[87] Lee, 64 S Cal L Rev at 236 (cited in note 61).

done."[88] On the other hand, too little deference would "suck[ ] [an appellate court] into a whirlpool of unending review of fact patterns too peculiar to recur."[89] Thus, classifying an issue as a finding of fact would shift decision making to the trial court while classification as a conclusion of law would shift it to the reviewing court.[90]

Second, this approach has the advantage that different institutions share the power to choose the standard of review.[91] In some cases, the appellate courts have chosen the standard.[92] In other instances, however, Congress has intervened and expressly required deferential review.[93] Even if there are doctrinal reasons for treating these issues as independently reviewable, the congressional determination will prevail.

2. Constitutional facts.

The constitutional fact doctrine requires appellate courts to review independently certain lower court determinations implicating constitutional rights. Constitutional fact review "reflects a deeply held conviction that judges—and particularly Members of [the Supreme] Court—must exercise such [independent] review in order to preserve the precious liberties established and ordained by the Constitution."[94] Despite this broad mandate, however, the Supreme Court appears to have given this doctrine a narrow scope.[95] The Supreme Court most recently invoked the constitutional fact doctrine in *Bose Corp v Consumers Union*

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[88] Id.

[89] Id.

[90] See *Pullman-Standard*, 456 US at 293 (discriminatory intent as a finding of fact under § 703(h) of Title VII); *Anderson*, 470 US at 573 (same); *Icicle Seafoods Inc. v Worthington*, 475 US 709, 713-14 (1986) (status as "seaman" as a finding of fact under Fair Labor Standards Act). Sward suggests the concept of "discrimination" exemplifies a mixed question despite the contrary language in *Pullman-Standard*. Compare Sward, 40 U Kan L Rev at 32-33 (cited in note 60), with *Pullman-Standard*, 456 US at 292 n 23.

[91] See *Pierce*, 487 US at 558 (noting that some standards of review are determined by "statutory command" while others are determined by "a long history of appellate practice").

[92] See Louis, 64 NC L Rev at 1027-38 (cited in note 58) (noting the "classification power" of appellate courts to manipulate standards of review by defining issues as either fact or law). As an example of this classificatory power, Louis cites the courts' classification of the construction of writings as a legal question. Id at 1028.

[93] For example, § 2254(d) of the federal habeas corpus statute defines certain state court findings to which a federal court must defer. 28 USC § 2254(d).

[94] *Bose Corp v Consumers Union of United States, Inc.*, 466 US 485, 510-11 (1984).

[95] This Comment does not consider the use of the doctrine in review of administrative agency decisions.

*of United States, Inc.*[96] In *Bose*, a manufacturer of music speakers sued a magazine for libel after it published an unfavorable evaluation of its products. The Court granted certiorari to consider whether Federal Rule of Civil Procedure 52(a) governed the standard of review for whether the defendant acted with the "actual malice" necessary in a libel action.[97] The Court held that "[a]ppellate judges . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."[98]

The reach of the constitutional fact doctrine, as enunciated in *Bose*, is unclear. The *Bose* Court articulated three general principles to justify de novo review of the "actual malice" determination. First, "the common-law heritage" of the determination left a broad role for judicial lawmaking through the application of law to fact.[99] Second, though rooted in the First Amendment, the rule governing "actual malice" acquired meaning only "through the evolutionary process of common-law adjudication."[100] Third, "the constitutional values protected by the actual malice rule" justified independent review.[101]

These generalizations might apply to any number of constitutional determinations.[102] Indeed, Henry Monaghan, in his influential work on constitutional fact review, noted that "*Bose* presents simply one example of constitutional fact review, and the Court's reasoning is not easily confined to the first amendment context."[103] However, post-*Bose* courts have not used the doctrine to decide other issues implicating constitutional rights.[104]

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[96] 466 US 485 (1984).

[97] Id at 487-88. FRCP 52(a) provides that "[f]indings of fact . . . shall not be set aside unless clearly erroneous." See generally Wright and Miller, 9A *Federal Practice* § 2585 at 565-78 (cited in note 64).

[98] *Bose*, 486 US at 514.

[99] Id at 502.

[100] Id.

[101] Id. Professor Monaghan argues that this third justification, not the first two, is "the driving impulse of [the Court's] decision." Monaghan, 85 Colum L Rev at 243 (cited in note 74).

[102] See Childress, 51 Mo L Rev at 151 (cited in note 57) (identifying several areas where the justifications for the *Bose* constitutional fact doctrine may extend beyond libel cases). See also Louis, 64 NC L Rev at 1036-37 (cited in note 58) (listing several areas with "constitutional nexus" not classified as constitutional facts).

[103] Monaghan, 85 Colum L Rev at 238 (cited in note 74). See also id at 267 ("That the Court sees itself under a duty to exercise independent judgment with respect to some, but not all, constitutional facts suggests that the Court is proceeding on an ad hoc basis, failing to consider the systemic ramifications of its decisions."); Kidwell, Note, 26 Ind L Rev at 142 (cited in note 61) ("Broadly read, [*Bose*] requires de novo review of any action based upon an interpretation of a constitutional principle.").

[104] See, for example, *Hernandez v New York*, 500 US 352, 367 (1991) (plurality opin-

Even within its present doctrinal limits, the constitutional fact doctrine, as enunciated in *Bose*, has come under sharp criticism. Professor Monaghan argues that the *Bose* Court overstated the role of appellate courts in the review of constitutional facts decided by lower courts. While either Article III or the Due Process Clause might justify independent judicial review of administrative adjudication of constitutional facts, these provisions do not, in Monaghan's view, require independent appellate review of trial court determinations.[105] For appellate review of judicial determinations, Monaghan argues that independent review "is a matter for judicial (and legislative) discretion, not a constitutional imperative."[106]

Although he rejects the notion of a judicial duty to review constitutional facts de novo, Monaghan does admit that appellate courts should have the discretion to conduct such reviews. In particular, he encourages courts to exercise heightened review in two types of cases. First, courts should exercise de novo review in cases where there is a "need to guard against systemic bias brought about or threatened by other actors in the judicial system."[107] Second, the "most important trigger" for de novo review is the presence of a "perceived need for case-by-case development of constitutional norms."[108]

Professor Monaghan's standard appears to differ little from the first two principles announced by the *Bose* Court: a common-law heritage and the need for case-by-case rule making. But the inquiry is subtly different. Monaghan's inquiry looks to the process of norm elaboration, while the *Bose* theory looks to rule development. To be sure, norms underlie rules, and shifts in norms will alter legal rules. But, for Monaghan's purposes, one must look not simply at the process of rule making, but, more importantly, at the influences behind a court's moral norms.

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ion) (holding that "[w]hether a prosecutor intended to discriminate on the basis of race in challenging potential jurors" is not a constitutional fact). According to Monaghan, the *Bose* Court confined the doctrine to First Amendment cases in order to "bypass[ ] the need to face more systemic considerations." 85 Colum L Rev at 243-44 (cited in note 74). See Heidi M. Westby, Comment, *Fourth Amendment Seizure: The Proper Standard for Appellate Review*, 18 Wm Mitchell L Rev 829, 839-40 n 76 (1992) (listing cases that read *Bose* narrowly).

[105] See Monaghan, 85 Colum L Rev at 262-64 (cited in note 74) (discussing the "legitimacy deficit" in administrative proceedings that is not present in lower courts).

[106] Id at 238.

[107] Id at 272.

[108] Id at 273.

Monaghan's explication of the proper scope of the constitutional fact doctrine is incomplete. As often happens in the development of multifactored tests, Monaghan does not explain whether a single factor is sufficient to justify de novo review. For example, if a case does not involve a systemic bias but does involve a need for case-by-case development (or vice versa), should the appellate court review the issue de novo? Furthermore, Monaghan's theory is too general; it leaves many important questions unanswered. For example, what types of biases warrant the application of de novo review? How does a court identify a "perceived need" for case-by-case development of the law? Finally, as an institutional matter, who should make the determination of "systemic bias" or "perceived need"? If appellate courts should make the determination, then this simply slips the substantive justification for de novo review in through the back door—rather than justifying review based on the values at stake, appellate courts will do so by defining certain systemic biases or perceiving certain needs. Regrettably, such an approach enables a court to achieve a desirable result without having to consider whether the values at stake justify the approach.

Despite its shortcomings, Monaghan's explanation highlights a conceptual similarity between mixed questions and constitutional facts.[109] Both constitutional facts and mixed questions involve legal principles that only develop through their application to particular cases. One might conceive of the presence of constitutional facts as merely one factor in determining the standard of review for mixed questions.[110] However, the Court's

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[109] The Court in *Miller* recognized this analytic similarity between mixed questions and the constitutional fact doctrine. 474 US at 113-14. See George C. Christie, *Judicial Review of Findings of Fact*, 87 Nw U L Rev 14, 28-29 (1992) (noting that Professor Monaghan's analytic framework for constitutional facts "bears some resemblance to the traditional distinction among questions of law, questions of fact, and mixed questions of law and fact . . . [but] also shares many of the unsatisfactory qualities of that traditional analysis"); Childress, 51 Mo L Rev at 149 (cited in note 57) (describing the constitutional fact doctrine as an instance in which courts have "refashioned the mixed fact-law analysis in constitutional terms"); Louis, 64 NC L Rev at 996 n 19 (cited in note 58) (describing the constitutional fact doctrine as a "model" by which appellate courts may remove mixed questions from the factfinder and review them independently). Justice Rehnquist's dissent in *Bose* highlights the overlap between mixed questions and the constitutional fact doctrine. The *Bose* majority explained a number of First Amendment cases in terms of the constitutional fact doctrine. 466 US at 503-11. Rehnquist, instead, saw these cases as examples of "the kind of mixed questions of fact and law which call for de novo appellate review." *Bose*, 466 US at 517-18 n 1 (Rehnquist dissenting).

[110] See Kidwell, Note, 26 Ind L Rev at 144-45 (cited in note 61) (encouraging courts to employ the doctrine as a facter to determine the standard of review for a particular mixed question).

treatment of the doctrine in *Bose* and in subsequent opinions citing *Bose* suggests that the constitutional fact doctrine is an independent ground for de novo review.[111]

## III. THE PROPER STANDARD OF REVIEW FOR VOLUNTARINESS DETERMINATIONS ON DIRECT APPEAL

The preceding Section has presented two doctrines that provide a framework within which to evaluate the proper standard of review for an issue before an appellate court. In some cases, the issue is easily classified as a finding of fact or a conclusion of law, and the standard of review in these cases is well settled. Voluntariness determinations, however, are not so easily classified. Although such judgments involve findings of subsidiary facts and are thus partly fact-driven, they also require a court to draw legal conclusions from the aggregation of facts and thus involve conclusions of law. Since some of these legal conclusions implicate the defendant's due process rights, voluntariness determinations may also involve conclusions of constitutional law. Thus, applying the analytical framework developed above, the standard of review for voluntariness determinations on appeal from a federal criminal trial should be de novo.

### A. The Voluntariness Determination as a Mixed Question

Under a mixed question analysis, appellate courts should review voluntariness determinations de novo. Once the trial judge has established the historical record based on the "totality of the circumstances," the appellate court is in an equally good position to evaluate the sufficiency of the record under the legal standard. In addition, in those cases in which a settled rule's meaning depends on its application, appellate courts must engage in the sort of factual analysis shunned by the *Baldwin* court. Indeed, only by performing such factual analysis can appellate courts fulfill their lawmaking function.

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[111] Only the post-*Bose* treatment of the doctrine has confirmed its use as an independent, albeit rarely used, ground. A cryptic footnote in *Bose* suggested that the doctrine might simply be a factor in the mixed question analysis. See *Bose*, 466 US at 500 n 16 ("The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. . . . Particularly is this so where a decision here for review cannot escape broad social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship."), citing *Baumgartner v United States*, 322 US 665, 670-71 (1944).

The choice of de novo review under a mixed question analysis becomes more clear by examining the voluntariness determination within the *Pullman-Standard* definition of a mixed question.[112] In part, the determination turns on certain historical facts. The doctrine reflects this by requiring that the court look at the "totality of the circumstances" to determine voluntariness.[113] For example, a court must inquire whether the defendant was deprived of food or water. Establishing the historical facts also may require credibility determinations. Thus, if the defendant claims that the police promised him lenient treatment and the police deny this, a court must resolve the swearing match.

Once these pure questions of fact are answered, the voluntariness determination then involves the second half of the *Pullman-Standard* analysis: whether the facts satisfy the legal standard. The doctrine reflects this by requiring that the court ask whether the defendant's confession was the product of an "overborne" will.[114] No amount of metaphysics will enable a court to discover when a will is overborne. A court can reach this judgment only by analyzing the established facts and comparing them to earlier determinations of when a will was overborne.

Thus, framed in terms of the *Pullman-Standard* analysis, the voluntariness determination consists of two sequential determinations: the ascertainment of the totality of the circumstances and the application of the "overborne will" test.[115] Trial and appellate courts have different competencies for addressing these questions. Specifically, trial courts are better able to determine the "totality of the circumstances," whereas appellate courts are at least as—if not more—qualified to determine the application of the "overborne will" rule to those circumstances.

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[112] See text accompanying note 77. See also *Baldwin*, 60 F3d at 368 (Rovner dissenting from denial of rehearing en banc) (discussing the "appropriate methodology" of the voluntariness determination).

[113] *Arizona v Fulminante*, 499 US 279, 286 (1991).

[114] See *Culombe v Connecticut*, 367 US 568, 602 (1961) (plurality opinion).

[115] Justice Frankfurter, in an opinion that preceded *Pullman-Standard*, recognized the multiple stages of the voluntariness determination but divided them into three. First, trial judges engaged in the finding of "crude historical facts." The second phase involved the discovery of "psychological" facts (for example, how the defendant reacted in the setting)—a matter for the reviewing court. Third, the reviewing court also applied these facts to the "standard of judgment." See *Culombe*, 367 US at 603-05 (plurality opinion). By this third phase, Justice Frankfurter apparently means the application of law to fact. Interestingly, he stressed that the rule of law, in voluntariness cases, "comprehended both induction from, and anticipation of, factual circumstances." Id at 603.

Appellate courts should defer to trial courts' determinations about the totality of the circumstances. The advantages of trial court factfinding, identified in Section II, apply with full force to this part of the voluntariness determination. Trial courts bring experience and expertise to the evaluations of credibility, demeanor, and police conduct that establish the circumstances of the confession. To this part of the determination, appellate courts can add little.

However, appellate courts should not defer to trial courts' applications of the "overborne will" test once the facts have been established.[116] The trial court is no more qualified than the appellate court to evaluate how the law applies to that particular set of circumstances.[117] In fact, as noted in Section II, appellate courts may be more qualified to apply the law since they are spared the need to engage in time-consuming factfinding. Furthermore, appellate review helps to ensure uniform results in like cases. Indeed, Justice Frankfurter suggested that appellate review of application of law to fact was an essential part of the lawmaking process for voluntariness determinations.[118]

The Supreme Court recently offered this conception of the mixed question analysis in the related context of habeas peti-

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[116] In Frankfurter's terms, this process of application begins once the external happenings are "uncontested." *Culombe*, 367 US at 604 (plurality opinion).

[117] This bifurcation of the voluntariness determination may explain the disagreement between *Miller* and *Baldwin*. The Court in *Miller* asserted that the ultimate issue of voluntariness did not depend on credibility determinations. 474 US at 116-17. The *Baldwin* court argued that appellate courts should defer to the trial judge's determination because he is "closer to the facts." 60 F3d at 365. Both may be correct. The trial court is closer to the facts, and, on those historical matters, the appellate court should defer. In this regard, *Baldwin* is correct. However, the "ultimate issue," using the *Miller* terminology, is the judgment of voluntariness once those facts have been settled. By characterizing the voluntariness determination as a single judgment, the court in *Baldwin* sidesteps this issue.

[118] *Culombe*, 367 US at 578 (plurality opinion) ("That judges who agree on relatively legal considerations may disagree in their application to the same set of circumstances does not weaken the validity of those considerations nor minimize their importance."). See also *Davis v North Carolina*, 384 US 737, 741-42 (1966) ("It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."); *Beckwith v United States*, 425 US 341, 348 (1976) (citing *Davis* and noting that "it is the duty of an appellate court, including [the Supreme Court]," to make an independent determination of voluntariness). Justice White, joined by Justice O'Connor, offered a similar conception of the mixed question analysis in another context. See *Pierce v Underwood*, 487 US 552, 584 (1988) (White dissenting) ("The historical facts having been established, the question is to be resolved by the legal analysis of the relevant statutory and decisional authorities that appellate courts are expected to perform.").

tions. In *Thompson v Keohane*, the Court considered the standard of review for determining whether a defendant was "in custody."[119] The Court held that the "in custody" determination was not a § 2254(d) finding of fact and, like the voluntariness determination in *Miller*, required "independent federal determination."[120] In the Court's opinion, the "in custody" determination consisted of "[t]wo discrete inquiries."[121] For the "circumstances surrounding the interrogation," the reviewing court should defer. This resembles the "totality of the circumstances" determination in the voluntariness test. But "[o]nce the scene is set and the players' lines and actions are reconstructed," the reviewing court then moves to the second part of the analysis: "an objective test to resolve 'the ultimate inquiry.' . . . The second inquiry . . . calls for application of the controlling legal standard to the historical facts. This ultimate determination, we hold, presents a 'mixed question of law and fact' qualifying for independent review."[122] Not surprisingly, this second part of the test resembles the ultimate determination about whether a confession was voluntary.

Under the *Thompson* conception of the mixed question analysis, an appellate court should review the voluntariness determination de novo. "In custody" proceedings are arguably more fact-intensive, fact-dependent inquiries than voluntariness determinations.[123] Thus, if "in custody" determinations are mixed questions requiring de novo review, then voluntariness determinations must require similar review.

One counterargument to this analysis might be that courts cannot easily separate factual findings from legal conclusions. An appellate court, reviewing a cold record, cannot appreciate the subtle observations that lie behind a trial court's legal conclusion. Thus, appellate courts should defer to the trial court's ruling on a mixed question such as voluntariness.

As an empirical matter, this observation may be true, but as a legal matter, this argument fails. Empirically, courts may be unable to separate their personal observations from their legal conclusions. However, the law does not evolve through the per-

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[119] 116 S Ct 457, 460 (1995). This issue is important because if a defendant is in custody, police are required to read him his *Miranda* rights before interrogating him. Id.

[120] Id at 465.

[121] Id.

[122] Id.

[123] See LaFave and Israel, *Criminal Procedure* § 6.6 at 320 (cited in note 5) ("[I]n custody" inquiry "will often require a careful examination of all the facts and circumstances of the particular case.").

sonal observations of trial judges. Rather, trial judges must be able to explain their legal conclusions through appeal to evidence apparent on the record. Thus, while the counterargument might be empirically valid, the legal system treats this method of reasoning as irrelevant.

A second counterargument to the mixed question analysis is that even if the appellate court is in a superior (or at least not inferior) position to make this second half of the voluntariness ruling, there may be reasons, independent of its capacity, to support deferential review. Most notably, some criticize independent review of mixed questions as an inefficient use of appellate resources.

Appellate courts, the argument begins, operate with scarce resources. Reviewing mixed questions is an expensive, time-consuming, and wasteful process. It requires appellate courts to delve into trial records and examine closely the factual underpinnings of a trial court's judgment. Since two cases rarely, if ever, involve exactly the same set of facts, this burdensome fact review does little to further the appellate court's primary goal of crafting and refining legal rules. Furthermore, expanding the scope of appellate review encourages parties to appeal, thereby adding more cases to the appellate docket.[124]

This argument has merit in some cases but is not compelling in the context of voluntariness determinations. Of course, as a matter of common sense, delving into a multivolume trial record is more time-consuming than making a legal determination based on a brief's factual summary. However, the efficiency argument is too generalized. Where the legal rule is unsettled, the primary goal of appellate courts should be to bring coherence to the area. In these sorts of cases, the mixed question need not be reviewed de novo; rather, the appellate court should review the trial court's formulation of the legal rule. If the trial court's formulation is improper, the appellate court can remand without having to delve into the facts.[125]

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[124] For a general discussion of the efficiency rationale for deferential review, see Nangle, 59 Wash U L Q at 426-28 (cited in note 57) (arguing that expanding the scope of appellate review encourages appeals, reduces morale among trial judges, discourages settlements, and erodes public confidence in the legal system).

[125] Through the repeated application of law to fact, corollaries te general legal principles will develop. As these principles develop, appellate courts can review trial records more efficiently because the corollaries will guide their inquiries. For example, if courts consistently held a confession involuntary when it involved physical abuse, future courts could focus their review of the record on whether physical abuse occurred. This reduces the power of the efficiency argument for deferential review. As one commentator has ob-

By contrast, when the legal rule is settled (for example, a confession is involuntary where the defendant's will has been overborne), the primary goal should not be to clarify doctrine but to ensure that the doctrine has been properly applied.[126] In these sorts of cases, appellate courts should review the mixed question de novo. This type of review may require closer consideration of the facts, but the trial court has simplified this process by determining the "totality of the circumstances."[127] Furthermore, the appellate court need only review those portions of the record that concern the mixed question.[128] Where the legal rule is well established, appellate courts can spend more time considering the facts.

A third counterargument to the idea that the mixed question analysis compels de novo review was advanced by the *Baldwin* court. Since the Seventh Circuit had already reviewed the mixed questions of consent to search, waiver of *Miranda* rights, and probable cause determinations under the clear error standard, the *Baldwin* court held that "[c]onsistency and common sense require that the issue of the voluntariness of a confession be treated the same way."[129]

The argument from consistency suffers from two fatal flaws in its logic. Initially, it is not at all apparent that confessions should be treated in a fashion similar to these other issues.[130] The dispositive nature of confessions requires a court to approach the voluntariness determination differently. Although consent to

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served: "One would expect that as legal doctrine becomes more uniform and thus more certain, courts and litigants will expend fewer resources preparing and conducting trials." Lee, 64 S Cal L Rev at 250 (cited in note 61). However, Lee douhts the strength of this hypothesis in the absence of "hard empirical data." Id at 251.

[126] Justice White offered this distinction between mixed questions where the law is settled and mixed questions where the law is unsettled in another context. *Pierce*, 487 US at 585-86 n 2 (White dissenting) (role of appellate court depends on whether law is "quite clear" or "unsettled").

[127] On this view, it is essential for district courts to provide clear findings in their decisions. Clearly stated findings help set the stage for appellate review and enable the appellate courts to determine to which findings they may defer. Thus, clear findings may reduce the burden on appellate courts, but, in fairness, probably would require more work from district courts.

[128] The *Bose* Court suggested that the review need not exhaust the entire record. See *Bose*, 466 US at 514 n 31 ("[O]nly those portions of the record which relate to the actual-malice determination must be independently assessed.").

[129] 60 F3d at 365.

[130] See Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va L Rev 859, 906-07 (1979) ("[W]hile we appropriately may borrow voluntariness terminology from other legal contexts, uncritical extrapolation of analysis or standards from those contexts to the law of confessions is unjustifiable.").

search may be a dispositive issue in possession offenses,[131] it will not be dispositive in most other crimes. Thus, clear error operates as a more appropriate baseline standard for consent to search while de novo is more appropriate for voluntariness.

Even if the issues identified by the *Baldwin* court involve the same general inquiry, an appeal to consistency really begs the question, for it is just as likely that the Seventh Circuit is reviewing *Miranda* waivers, consents to search, and probable cause under the wrong standard.[132] Consistency, then, would demand that they be treated like confessions and, following the Seventh Circuit's pre-*Baldwin* precedent, be reviewed de novo.

One last counterargument to the notion that the mixed question analysis compels de novo review of the voluntariness determination on direct appeal is that one might distinguish mixed questions on habeas review from mixed questions on direct review. The *Baldwin* court narrowed *Miller* to apply only to habeas corpus cases.[133] Following the *Baldwin* court's lead, one could argue that the *Miller* Court justified de novo review not because voluntariness was a mixed question, but because Article III required a federal court to make an independent determination of federal rights. If federal adjudication of federal rights is the goal, however, then an appellate court would not have to review the voluntariness determination de novo, since an Article III court—the district court—would have already determined the federal rights.

This argument provides the most persuasive reason for deferential review of the voluntariness determination on direct appeal, but it ultimately fails. First, it ignores those portions of *Miller* that justified de novo review with reference to the nature of the determination—not as one involving credibility determinations, but as a particular form of mixed question that should be reviewed de novo.[134] Second, it fails to account for the exceptional nature of confessions as potentially dispositive statements given in oft-coercive settings, a unique characteristic that likewise justifies de novo review. Finally, the argument disregards the few

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[131] A suspect's consent to search relieves police of the need to seek a warrant or establish probable cause. See LaFave and Israel, *Criminal Procedure* § 3.10 at 233-34 (cited in note 5).

[132] See, for example, *United States v Flores*, 63 F3d 1342, 1363 (5th Cir 1995) (voluntariness of *Miranda* waiver reviewed de novo); *United States v Jenkins*, 46 F3d 447, 451 (5th Cir 1995) (consent to search reviewed de novo).

[133] 60 F3d at 364.

[134] See *Miller*, 474 US at 115-17. See also text accompanying notes 27-32.

federal criminal cases that have come before the Supreme Court where the Court has, in dictum, approved de novo review of voluntariness determinations. For example, in *Beckwith v United States*, the Court held that IRS investigators were not required to give Miranda warnings during an interview.[135] The *Beckwith* Court suggested that if the investigation had been coercive, however, it would have been "the duty of an appellate court . . . 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.'"[136]

A mixed question analysis also supports de novo review of the voluntariness determination. As Justice Frankfurter identified over thirty years ago, the determination actually consists of multiple inquiries. First, a court must determine the underlying facts; the trial court is in a superior position to make these determinations, and, to these, an appellate court should defer. But a court must also draw a legal conclusion (the "ultimate determination"); the appellate court is in as good a position, indeed a superior one, to make this determination, and, thus, should review a trial court's determination de novo.

### B. Voluntariness as a Constitutional Fact

The constitutional fact analysis presents an even more compelling case for de novo review than the mixed question analysis. The voluntariness determination fits well within the standards for constitutional facts announced in *Bose*, and under the *Bose* constitutional fact doctrine, the voluntariness determination warrants de novo review.

The voluntariness determination arguably satisfies the first *Bose* principle—its "common law heritage" has left a broad role for judicial rule making. This notion may seem inseparable from the second *Bose* principle, that the law only acquires meaning through the common law adjudicative process. But the first principle is important and distinct in at least one respect. By using the term heritage, the *Bose* Court might have been requiring a *recognition* among courts of their special lawmaking role in a particular area.[137] If the *Bose* Court intended this meaning, which makes its first principle distinct from its second, then the voluntariness determination clearly satisfies this "heritage" re-

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[135] 425 US 341, 347 (1976).

[136] Id at 348, quoting *Davis*, 384 US at 741-42.

[137] See, for example, *Medina v California*, 505 US 437, 446 (1992) (discussing "common law heritage" in terms of the historical practice of courts).

quirement. The Supreme Court consistently has recognized a special role for reviewing courts in making this determination.[138] Indeed, the *Miller* Court did so by specific analogy to *Bose*.[139]

The voluntariness determination also satisfies the second *Bose* principle, that the rule can only acquire meaning through a process of common law adjudication. The early twentieth-century voluntariness cases did not turn on disagreement over abstract legal principles. Rather, they involved an application of a settled test to the specific interrogation methods used to extract given confessions.[140] Even where judges dissented from holdings, the dissents focused not on the correctness of the rule but rather on how to apply it in the circumstances of the challenged confessions.[141]

The Court reaffirmed this conception of the voluntariness inquiry in a recent post-*Miller* case. In *Hernandez v New York*, four members of the Court held that a claim of racial discrimination in the use of peremptory challenges was "a question of historical fact" not subject to independent review.[142] Yet, the *Hernandez* plurality reached this holding by distinguishing *Bose* and *Miller* on the grounds that "actual malice" and "voluntariness" determinations, unlike peremptory challenges, "involve legal, as well as factual elements."[143] In doing so, the Court confirmed that the law on voluntariness evolves through its application to particular sets of facts. More importantly, as a

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[138] See *Thomas v Arizona*, 356 US 390, 393 (1958) (justifying independent review of voluntariness determination in a habeas case because it "involves the application of constitutional standards of fundamental fairness under the Fourteenth Amendment"); *Arizona v Fulminante*, 499 US 279, 288-89 (1991) (White dissenting) (citing several cases in which the Court reversed convictions involving erroneously admitted confessions). The holding in *Fulminante* may have eroded this role by allowing appellate courts te affirm convictions in cases where the confession's admission was harmless error. Id at 310.

[139] *Miller*, 474 US at 114 ("Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in doing so, strip a federal appellate court of its primary function as an expositor of law.").

[140] See, for example, *Bram*, 168 US at 559-61 (analyzing the treatment of "leading and well-considered cases" in terms of the interrogation methods rather than legal principles); *Chambers v Florida*, 309 US 227, 229 (1940) (Voluntariness "necessarily turns" on factual analysis.); *Davis v North Carolina*, 384 US 737, 741-52 (1966) (conducting detailed analysis of facts surrounding confession).

[141] See, for example, *Bram*, 168 US at 569-71 (Brewer dissenting).

[142] 500 US 352, 367 (1991) (plurality opinion).

[143] Id.

doctrinal matter, the Court recognized the analytical similarity between voluntariness and actual malice.

Finally, courts have placed a high premium on the constitutional values implicated by confessions.[144] However, the Court has offered few clear lines with which to distinguish the importance of constitutional values. This Comment offers one such line, based on the dispositive nature of a confession.[145] In the absence of further guidance from the Court, however, courts and commentators will struggle to identify those constitutional values that warrant heightened review under the constitutional fact doctrine.

Unlike the *Bose* analysis, the constitutional fact analysis posited by Professor Monaghan does not clearly favor de novo review. One commentator has argued, in the context of habeas corpus review, that voluntariness determinations are not constitutional facts.[146] However, a close examination of the Court's jurisprudence on confessions reveals that the constitutional fact doctrine should not be dismissed so easily in this context.[147]

Under a Monaghan-like analysis, the proper standard of review is unclear. The voluntariness determination on direct appeal does not satisfy the "systemic bias" standard for Monaghan's review.[148] No evidence suggests a systemic bias against criminal defendants in the federal courts that would justify de novo review on direct appeal. By contrast, the Court's confession cases often found bias in state criminal justice systems.[149] If true, this would support de novo review in habeas

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[144] See, for example, *Spano v New York*, 360 US 315, 316 (1959) ("Because of the delicate nature of the constitutional determination which we must make [in voluntariness determinations], we cannot escape the responsibility of making our own examination of the record.").

[145] See Section III.C.

[146] Dolliver, Comment, 57 U Chi L Rev at 153-55 (cited in note 40). But Dolliver does not cite any support for this assertion.

[147] Indeed, the Court in *Miller* recognized the potential application of the constitutional fact doctrine to voluntariness determinations. 474 US at 113-14. However, the Court declined to resolve the case on that ground. One commentator has attributed this choice to Justice O'Connor, who wrote for the *Miller* Court and joined Justice Rehnquist's dissent in *Bose*. See Dolliver, Comment, 57 U Chi L Rev at 151 n 39 (cited in note 40). However, Dolliver misreads the *Bose* dissent, which did not reject the constitutional fact doctrine. Instead, the *Bose* dissent opposed the application of the doctrine in that case, due to "an appellate court's inability to make . . . the de novo determination about the state of mind of a particular author at a particular time." *Bose*, 466 US at 518-19 (Relnquist dissenting). Thus, Justice O'Connor's position in *Bose* does not explain the *Miller* Court's failure to decide whether voluntariness was a constitutional fact.

[148] See note 107 and accompanying text.

[149] See Monaghan, 85 Colum L Rev at 272 (cited in note 74) (state confession cases as

proceedings but not in direct appeals.[150] Monaghan himself recognizes that the admission of criminal confessions in state court proceedings represents a "salient example" of an issue warranting independent review, especially where such confessions involve racial bias. However, after a lengthy criticism of the doctrine's application in First Amendment cases, he rejects the confession precedents as "much weaker."[151]

By contrast, Monaghan's second standard, a perceived need for case-by-case development of constitutional norms, provides much more support for de novo review of the voluntariness determination. The voluntariness determination influences the development of due process norms.[152] The doctrine reflects a set of beliefs about the compatibility of a particular set of police methods with the Court's conception of due process.[153] This conception of due process evolves through its application to different interrogation methods and circumstances surrounding different confessions. Thus, voluntariness provides a ripe example of the norm elaboration that justifies de novo constitutional fact review under Monaghan's theory.[154]

Under Monaghan's analysis, the proper standard of review for voluntariness determinations on direct appeal is unclear. This stems partly from Monaghan's failure to explain the relationship between his two standards. Analysis under the first standard does not support de novo review, while analysis under the second standard strongly supports de novo review. Monaghan does inti-

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an example of "systemic bias").

[150] But see Dolliver, Comment, 57 U Chi L Rev at 155 (cited in note 40) (arguing that, at best, Monaghan's analysis supports de novo review in federal district courts but not in federal appellate courts).

[151] Monaghan, 85 Colum L Rev at 271 (cited in note 74).

[152] For a discussion of the constitutional foundations of confession law, see generally Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich L Rev 865 (1981).

[153] See note 140. See also Louis, 64 NC L Rev at 1035 (cited in note 58) ("Thus, free review through the doctrine of constitutional fact of questions arising out of police searches, seizures, and interrogations is designed to deter illegal police conduct."). Scholars continue to disagree over which values drive the voluntariness determination. Compare Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 Rutgers L Rev 728, 745-46 (1963) (regulating police interrogations as primary value), and Schulhofer, 79 Mich L Rev at 873 (cited in note 152) (same), with Grano, 65 Va L Rev at 865 (cited in note 130) (reliability of evidence among primary values). See generally LaFave and Israel, *Criminal Procedure* § 6.2 at 295-96 (cited in note 5) (discussing the policies underlying the voluntariness doctrine).

[154] The Sixth Circuit's opinion in *Rigsby* exemplifies this type of reasoning. *Rigsby*, unlike cases in several other circuits, grounded its de novo review not in a broad reading of *Miller* but in a concern for the defendant's due process rights. 943 F2d at 635.

mate, however, that the second standard may be more important when he characterizes it as the "most important trigger."[155] The analysis, then, tips in favor of de novo review.

### C. A Limiting Principle?

Either the mixed question analysis or the constitutional fact doctrine offers a possible rationale for de novo review of voluntariness determinations on direct appeal. Several other issues might also qualify as mixed questions or constitutional facts, yet the courts have been reluctant to expand these doctrines and critics have warned that such expansion would create a flood of new appeals. Perhaps this reluctance explains, in part, the appellate courts' misplaced reliance on *Miller* to justify de novo review. A principle that limited plenary review to a small class of cases would allay the concerns of both courts and critics.

The Court has offered some guidance in the search for such a limiting principle. A confession can be dispositive in a criminal case, "amount[ing] in effect to a waiver of the right to require the state at trial to meet its heavy burden of proof."[156] If a confession is admitted into evidence, then the protection afforded by other rights may quickly lose its value. Admittedly, in particular cases, evidence implicating other areas of criminal procedure, such as illegal searches in possession offenses, may also be dispositive. But, as noted earlier, confessions, unlike consent to search, can be dispositive regardless of the crime. Thus, an appellate court could limit de novo review to cases involving the admissibility of confessions.

A second reason, not explicit in the confession cases, justifies special treatment of voluntariness determinations. In many cases, constitutional protections regulate the competence of the evidence admitted in a criminal trial. For example, suppose police conduct a warrantless search of a defendant's apartment and find drugs. The defendant will generally seek to suppress the evidence, but even if the court erroneously admits it, we are not left with the sense that a grave injustice has been committed. While the defendant's privacy rights may have been violated, we have little doubt that the defendant is the individual who committed the crime. By contrast, in the case of confessions, due

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[155] Monaghan, 85 Colum L Rev at 273 (cited in note 74).

[156] *Colorado v Connelly*, 479 US 157, 182 (1986) (Brennan dissenting) (citation omitted).

process may serve primarily to protect a defendant who had no connection to a crime. For example, suppose police apprehend a suspect and extract a confession that the defendant later claims is involuntary. If we begin to doubt the voluntariness of the confession, not only do we worry that the defendant's rights have been violated, but we may begin to question whether the defendant had any connection to the crime. Thus, de novo review provides an added level of protection in cases where we may justifiably doubt whether the proper defendant is on trial.

Appellate courts should limit de novo review to mixed questions and constitutional facts where the issue is dispositive across an entire range of crimes. This sort of limiting principle provides two advantages. First, it provides a clear rule for distinguishing cases that warrant heightened review from those that do not. This prevents the characterization games that have created such confusion in the mixed question cases. Second, it protects an important category of constitutional rights without opening the floodgates to constitutional fact review in every criminal proceeding. This should allay the critics' fears of unlimited de novo review.

## CONCLUSION

Federal appellate courts should conduct de novo review of voluntariness determinations on direct appeal. *Miller v Fenton* does not necessarily dictate the standard of review for these cases, and courts applying the clear error standard do not misread *Miller*. However, by reading away *Miller*, these courts fail to recognize that many of its powerful reasons for applying de novo review in habeas proceedings apply with equal force in cases on direct appeal.

Two doctrines provide solid and independent justification for de novo review of the voluntariness determination on direct appeal. First, the voluntariness determination exemplifies a classic mixed question of fact and law. Second, the voluntariness determination presents the ripest area for expansion of the constitutional fact doctrine. For both of these reasons, appellate courts should abandon their exclusive reliance on *Miller* and instead employ these doctrines to justify de novo review of the voluntariness determination in cases on direct appeal. Moreover, if a court is concerned about wholesale expansion of these doctrines, it may limit them to cases involving confessions, which,

because of their dispositive nature, are particularly deserving of de novo review.