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Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review

Edward H. Cooper*

I. Introduction

My text is a single and rather simple sentence from Rule 52(a) of the Federal Rules of Civil Procedure:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

My theme is equally simple. Rule 52(a) serves a vital institutional role in allocating the responsibility and the power of decision between district courts and the courts of appeals. The "clearly erroneous" standard of appellate review established by the Rule is a fine example of the rule-making process working at its best. The Rule has been enormously successful. Professor Wright believes that no provision of the Civil Rules has been quoted and cited more often than this one.¹ This success is due to the fact that the "clearly erroneous" phrase has no intrinsic meaning. It is elastic, capacious, malleable, and above all variable. Because it means nothing, it can mean anything and everything that it ought to mean. It cannot be defined, unless the definition might enumerate a nearly infinite number of shadings along the spectrum of working review standards. Learned Hand recognized early on that "[i]t is idle to try to define the meaning of the phrase. . . ."² Much more recently, the Supreme Court has noted that "the meaning of the phrase 'clearly erroneous' is not immediately apparent. . . ."³

The fact that definition is neither possible, nor—as I shall argue—desirable, naturally has not quenched the eternal ardor of judges who seek to substitute longer phrases, also intrinsically meaningless, for the elusive phrase of the authoritative text. The most famous effort was made by the Supreme Court in *United States v. United States Gypsum Co.*: "A finding is 'clearly erroneous' when although there is evidence to support

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1 C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 96, at 647 (4th ed. 1983). Professor Wright continues this passage by observing: "The rule is usually cited to justify refusal to interfere with the fact findings made in the trial court." *Id.*

2 *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d. Cir. 1945). Judge Hand continued: "[A]ll that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded." *Id.*

3 *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."⁴

The Court also has suggested that findings cannot be reversed if they are "plausible in light of the record viewed in its entirety," and that there "can virtually never be clear error" if the finding rests on a "decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence. . . ."⁵

No apparent harm has been done by these attempts at definition, because they have not impaired the vagrant variability of the Rule. Courts by and large have been astute to make the Rule mean whatever it should mean in the circumstances presented for appellate decision. Different kinds of fact-finding chores give rise to more or less penetrating review according to the relative capacities of district courts and appellate courts in many dimensions, the need for uniformity between cases, the perceived importance of the dispute, and the nature of the legal rules involved. Different kinds of law-applying chores are followed by more or less penetrating review according to these same factors. Over time, all of these factors change; the actual measure of review appropriate for a case decided in 1988 may be different from the measure appropriate in 1958 or 1938.

The variability of the "clearly erroneous" phrase is not limited to the setting of court of appeals review of district court findings in civil litigation. The success of the phrase has caused it to be used in many other settings. In each setting the actual level of appellate scrutiny should be adjusted to the institutional roles involved. As one example, Civil Rule 72(a) provides that orders of magistrates acting on nondispositive pre-trial matters shall be set aside if "clearly erroneous," and the Advisory Committee Notes to Civil Rule 74 assert correctly that the clearly erroneous standard is appropriate if the parties have agreed that appeal from a magistrate exercising civil trial jurisdiction shall be taken to the district court. There is little reason to suppose that the district courts acting in these settings should act in exactly the same way as courts of appeals reviewing district court findings. Magistrates are different from district judges, who in turn are different from appellate judges. If the hopes held out for district court appeal prove true, the process will be quicker and less expensive than appeal to a court of appeals. The consequences of reversal may easily be less costly, leading to quicker and more effective correction than follows reversal of a district court by a court of appeals.⁶ Surely these factors should affect the working standard of review.

My elaboration of this simple theme breaks down into three components. First is a brief summary of the familiar history of the Rule, designed to suggest that those who framed it knew full well that it would prove as adaptable as in fact it has been. Second is a review of the insti-

4 333 U.S. 364, 395 (1948).

5 *Anderson*, 470 U.S. at 574-75.

6 The allocation of review of magistrate trial decisions between district courts and courts of appeal is explored in 15 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3901.1 (Supp. 1988).

tutional factors, the comparative competencies of district courts and appellate courts, that shape review of questions of fact. Many of these factors, but not all, are reflected in the 1985 amendment that brought into the explicit text of the Rule the not quite universally recognized proposition that the clearly erroneous standard applies to findings based on documentary evidence.⁷ Review of fact inferences drawn from undisputed factual predicates thus will occupy center stage of this part. Finally comes an exploration of the problems of law application. Appellate review of district court law application has given rise to many of the most disputed and interesting questions of clear error review. This part accordingly accounts for the bulk of my remarks.

II. A Summary History

The background of Rule 52(a) is well known.⁸ A brief summary of the familiar story is helpful, however, as a reminder of the checkered history of appellate review of judge-found facts, and as a more important reminder of the flexibility that was deliberately built into the Rule.

The First Judiciary Act provided for review both at law and in equity by writ of error, essentially foreclosing review of facts found by a judge sitting in equity. Review by appeal was restored to equity practice in 1803.⁹ An 1865 statute provided that the parties to an action at law could waive the right to jury trial, and that fact findings of a judge would "have the same effect as the verdict of a jury."¹⁰ Eventually equity revived the practice, briefly introduced by the First Judiciary Act, of receiving oral testimony. Many court of appeals decisions came to announce the rule that findings based on oral testimony would be reversed only if clearly erroneous, even as the tradition of *de novo* review became confused in other settings as well. By 1934, judge findings of fact were reviewed at law as if made by a special verdict of a jury, and were reviewed in equity by an uncertain set of rules that depended in part on the role of oral testimony.

Against this background, it was easily agreed that the new Rules should adopt a standard of review of judge findings that did not depend on the former distinctions between law and equity. The effort to unify law and equity in one form of action would be seriously undermined if

7 The order transmitting the 1985 amendment of Rule 52 is set out at 105 F.R.D. 179, 202 (1985); for the text of the rule as amended *see id.* at 204-05; for the note of the Advisory Committee *see id.* at 221-23.

8 Among the articles that provide useful information are Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUDICATURE SOC'Y 68 (1936); Clark, *Review of Facts Under Proposed Federal Rules*, 20 J. AM. JUDICATURE SOC'Y 129 (1936); Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937); Oliver, *Appellate Fact Review Under Rule 52(a): An Analysis and Critique of Sixth Circuit Precedent*, 16 U. TOL. L. REV. 667 (1985); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 101-05 (1923); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 764-71 (1957); Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 508-16 (1963).

9 *See* Warren, *supra* note 8.

10 Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501: "The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. . . . When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment." *Id.*

the standard of review depended on the historic division. Rule 68 of the draft rules proposed that judge-made findings of fact should "have the same effect as that heretofore given to findings in suits in equity."¹¹ This draft prompted a vigorous debate over the question whether judge findings should be accorded the weight given to jury findings at law, or instead should be given some reduced measure of respect drawing from the practice in equity. The result of this debate was a rule drafted in the clearly erroneous terminology used on equity review of findings based on oral testimony, accompanied by an Advisory Committee Note stating that the clear error standard applies whether the finding of fact is made on conflicting testimony or is "deduced or inferred from uncontradicted testimony."¹²

It is commonly stated that rejection of the draft proposal to adopt the standard of review applied in equity proceedings rested on uncertainty as to the actual scope of equity review. It is more important that the result was that judge findings were accorded less deference than jury findings. It is still more important to recall that those who engaged in the original rule-making debate understood that the standard of review, however phrased, left room for accommodation to the needs of specific decision. Clark—Professor, Dean, Reporter and Judge—observed during the course of the debate that the actual standard of review would not much depend on the words chosen to capture it:

There seems to be no hard and fast distinction between questions of law and questions of fact; . . . and since there are so many cases on the border line between ultimate facts and conclusions of facts, *i.e.*, law, the way is open to a court with understanding to accomplish substantial justice, whatever the formula. Messrs. Arnold and James point out that "the elasticity of these two escapes" of review of an error of law or of an arbitrary finding without evidence to support it, . . . "is sufficient to give the Court almost complete power to review if it wants to take it."¹³

The clear error rule that emerged from this process was more complicated than the uncertain equity practice that it followed. The complication, however, arose from the increasingly diverse circumstances of trial court decision and appellate review. The Rule was well drafted to meet the need for flexible adaptation to those circumstances.

The only significant amendment of Rule 52(a) since 1938 was the 1985 addition of the reminder that the clear error standard applies to all findings of fact, "whether based on oral or documentary evidence."¹⁴ Although this amendment did no more than force on all the circuits the rule already recognized in most, the justifications for the amendment deserve patient restatement. The appellate practice confirmed by the amendment goes to the very heart of the allocation of authority between

11 Draft Rule 68 is quoted in 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2571, at 682 n.14 (1971).

12 The Advisory Committee Note to Rule 52 as originally promulgated is set out in 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* 490-91 (1973).

13 Clark & Stone, *supra* note 8, at 211 n.93 (citations omitted).

14 See *supra* note 7.

trial judges and appellate judges. A study of the reasons underlying this practice advances understanding of the institutional realities recognized by Rule 52.

III. The Institutional Setting — Fact Review

The clearly erroneous standard of review could mean many things. In fact it does mean many things, and properly so. A vast array of institutional factors affect the allocation of responsibility between trial judges and appellate courts. These factors are not constants. To the contrary, they change over time and at any moment vary from one case to another. This part will explore some of the factors that bear on wise allocation of the responsibility for finding the facts of individual cases. The next part will explore some of the factors bearing on responsibility for law application.

Examination of the allocation of responsibility between trial judges and appellate courts must begin with the common assertion that the federal courts of appeals serve two functions: the correction of error in individual cases and the development of the law in ways that will guide future conduct and future litigation.¹⁵ The proper balance between these functions is not self-evident. Neither need it be fixed over time. Thus we can find roughly contemporaneous complaints by a distinguished trial judge and an outstanding circuit judge, one urging that the courts of appeals are improperly increasing the scrutiny given trial court findings in an effort to improve the quality of justice in individual cases,¹⁶ and the other arguing that the courts of appeals are improperly surrendering the obligation to ensure justice in individual cases.¹⁷ The constantly increasing numbers of appeals force continued reexamination of the balance between these functions. At the extreme, it is now occasionally proposed that we should abandon the tradition that for a century has made one appeal available as a matter of right.¹⁸ Short of that measure, it is common to worry about the balance between the factors that affect the present structure of regional courts of appeals. Thus it is wondered how many judges can function effectively as a single "court," what price is paid for continuing the process of splitting regional circuits to reduce the number of judges on any single court, whether a national court of appeals is necessary to achieve national uniformity of federal law, whether specialized courts of appeals could do the same job better, whether appeal as of right should be limited to more localized tribunals much as the

15 *E.g.*, P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL*, 2-3 (1976).

16 Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?* 59 WASH. U.L.Q. 409 (1981).

17 Judge Alvin B. Rubin, speaking at the 47th Annual Judicial Conference of the District of Columbia Circuit, May 20, 1986, observed in part: "The error-correction function of the Courts of Appeal is largely vanishing. It is a matter of a lot of things: the amount of pressure, of caseload, and I feel, out of the erroneous ruling of interpreting such cases as the Pullman Standard and the City of Natchitoches. So that the emphasis now is on fact-finding in the district court and minimal error correction in the Court of Appeals." 114 F.R.D. 419, 549 (1986).

18 The question whether there should be a right of appeal from a trial court to a first-level court of appeals is thoughtfully explored in Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

parties now can agree to trial before a magistrate with appeal of right only to the district court, and so on.¹⁹

The standard of review applied to judge findings of fact cannot escape this debate over the role and structure of the courts of appeals. It would be remarkable if the actual working standard of review were not affected by the shifting functional ability of the courts of appeals to devote attention to the wisdom of specific findings in particular cases. It also would be undesirable to avoid such effects. One of the valuable attributes of the clearly erroneous standard is that it can be adapted to the changing roles to which the courts of appeals are drawn or driven.

However the standard of review may shift over time, the next most obvious factor to consider is the comparison between review of judge findings and jury verdicts. Judge findings are accorded somewhat less deference than jury findings, at least in common comparisons of the clear error standard with directed verdict standards. On the face of things, this result seems surprising since judges are trained professionals who constantly gain experience with the tasks of deciding disputes presented according to our rules of adversary trial, while jurors ordinarily are amateurs without substantial experience in this eccentric process (apart from the vicarious experience provided by television and an occasional motion picture). One obvious explanation for the difference springs from our traditional and constitutionalized reverence for jury trial. Another draws from the fact that jury verdicts are subject to discretionary control through the trial judge's power to grant a new trial while there is no comparable outside review of trial judge findings in the district court. Perhaps more important, trial judges can be forced to articulate detailed findings of fact in ways that juries cannot duplicate, even with the use of interrogatories or special verdicts. Many jury verdicts stand because of findings that might have been made within the outermost reaches of reason, not because of findings actually made. Still more important, however, is that the comparison between clear error and directed verdict standards means very little. Each standard is shifting and fugitive. The most that can be said is that trial and appellate judges, taken collectively, are more like each other and less like jurors. The standards of review take these matters into account.

Another obvious factor to consider is the ability of the trial judge to evaluate the demeanor of witnesses. This factor is embraced in the requirement of Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." There is room still to wonder whether the opportunity to evaluate the demeanor of witnesses at trial actually enhances the fact-finding process. The outward signs of lying are extraordinarily subtle and complex.²⁰ The trial judge may easily be distracted by the effort to unravel the signals of demeanor in ways that even a subsequent study of the paper rec-

19 Two recent explorations of these problems are provided by Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C.L. REV. 411 (1987) and Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 S.C.L. REV. 393 (1987).

20 A lengthy accounting of the complex ways in which deceit may be reflected in externally visible manifestations is provided by P. EKMAN, *TELLING LIES* (1985).

ord cannot undo. Nonetheless, it is our firm tradition, and the belief of most today, that great regard is "due" the trial judge's opportunity to evaluate demeanor. It is difficult to show clear error in a decision to believe a single witness, or in a decision to disbelieve a single witness unless the witness is the seldom encountered perfect witness who is uninterested, unimpeached, and uncontradicted by any circumstance. It is nearly impossible to show clear error in a choice between two or more witnesses whose testimony is at all plausible.²¹

The 1985 amendment making it clear that the clear error standard applies to findings based on documentary evidence provides the richest basis for exploring the institutional factors that affect the allocation of responsibility for the facts between trial judges and appellate courts.²² In a variety of circumstances, a case may be submitted to a judge for a "trial"—not summary judgment—on the basis of stipulations, discovery materials, documents, or even the transcript of a trial before another judge or tribunal. Demeanor has nothing to do with the process. In these circumstances, it is easy to argue that the court of appeals has available the very same basis for decision as the trial court had. Why, then, should any deference be extended to trial court findings of fact inferred from the paper record? In a famous decision, *Orvis v. Higgins*,²³ the Second Circuit indeed ruled that when a trial judge "decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding."²⁴ The 1985 amendment squarely rejects this approach, as had most other courts of appeals and the Supreme Court.²⁵ The reasons for rejecting the Second Circuit approach provide rich insights into the institutional relationships caught up in the clear error rule.

Among the reasons often given for deferring to findings based on a paper record are those that focus on appellate burdens. The more difficult it is to win reversal, the smaller the number of appeals likely to be taken. Mere reduction in the number of appeals does not have any obvious intrinsic virtue. Appellate courts should be responsible for deciding cases as well as possible, and should not narrow the standard of review simply to avoid the responsibility of decision. Nonetheless, if we cannot or will not increase appellate capacity to the point needed to employ the best standard of review, it may be wise to serve the interests of all litigants by adopting standards of review that help sift out all but the more extreme claims of error. Reduction in the number of appeals also may

21 The problem of appellate review of credibility determinations in the slightly different setting of jury trials is explored in Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 928-55 (1971).

22 See *supra* note 7.

23 180 F.2d 537 (2d Cir. 1950), *cert. denied*, 340 U.S. 810 (1950).

24 *Id.* at 539 (Frank, J.) (footnote omitted).

25 In *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), the Court ruled that findings based on physical or documentary evidence are reviewed under the clearly erroneous standard. It noted the contrary rule announced in *Orvis v. Higgins*, but concluded that it is impossible to trace the *Orvis v. Higgins* rule "back to the text of Rule 52. . . ." *Id.* at 574. Court of appeals decisions are explored in 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2587 (1971 & Supp. 1988).

help to maintain a regional circuit structure. In addition, it may be useful to the parties—not only to the appellee who is spared the burden of appeal, but also to would-be appellants who might be encouraged to take bootless appeals in cases that, to a disinterested eye, are doomed from the beginning.²⁶ However many appeals are taken, moreover, appeals courts can devote more of their limited capacities to developing the law if they are freed from the obligation of making searching inquiry into case-specific matters of fact.

Other reasons for deferring to findings based on a paper record focus on the trial courts. One argument frequently advanced is that the prestige of trial courts is enhanced by limiting the scope of review. This argument may be directed to the hope that enhanced prestige may help lure good people to the district bench,²⁷ or may focus more broadly on the need to maintain the acceptability of trial court decisions in a system that cannot afford to provide appeals in all cases for all litigants.²⁸ Such arguments, however, depend on the belief that trial court decisions in fact deserve respect. Federal district judges indeed are very good, and deserve deep respect. For present purposes, it may be more important to observe that in many ways a narrow standard of review may work to enhance the quality of district court findings and thus to fulfill its own prophecy.

The most obvious ways in which the quality of trial court findings is enhanced by a narrow standard of review depend on the behavior of the parties and the judge. Parties who know that they will not have any significant second chance to convince another tribunal on the facts must take the initial trial seriously. If there is any reason to believe in our adversary system of trial, more serious party effort should lead to better decisions. In like fashion, a judge who knows that the central responsibility of decision cannot be shared is likely to take the task of decision more seriously. A narrow standard of review, further, may avoid an artificial incentive to demand jury trial that could lead parties who believe in the immediate emotional impact of their cases to demand jury trial simply to avoid the risks of searching and unemotional appellate review.

There also are less obvious reasons for believing that a narrow standard of review may enhance the quality of trial judge decisions. These reasons depend on the rough outlines of the trial and appellate court structure we have chosen to create. Once it has been decided that there should be a first trial but not a second trial *de novo*, and that courts of

26 The theory that both parties are helped by strict standards of review was stated in *Anderson*: [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading that trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much. *Anderson*, 470 U.S. at 575.

Of course at least one party is often eager for the opportunity to expend energy and resources on a second chance. The primary justification for limiting the standard of review must be protection of the other parties and the courts. There is some added justification, however, in the paternalistic prospect of conferring an undesired benefit on the party who is discouraged from appealing despite dissatisfaction with the trial court disposition.

27 See Nangle, *supra* note 16, at 426-27.

28 See Wright, *supra* note 8, at 779-82.

appeals should have important responsibilities for developing the law, it is necessary to create trial and appellate procedures, and to appoint trial and appellate judges, with an eye on this basic structure. It is almost inevitable that these procedures will resemble the procedures we now have. The standard of fact review can be expanded or contracted, but it will be applied in any event by appellate judges chosen more for their capacities in law than for their abilities to find facts, and through a procedure that involves consideration of selected facts rather than a patient and concerted review of the record as a whole.²⁹ If we continue to rely on appellate panels of three judges, moreover, the difficulties of conjoint fact-finding must be considered. To use a homely analogy, it is easier to criticize a symphony than to write one, and much easier for one person to write a symphony than for a panel of three. Thus the Supreme Court has suggested that "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."³⁰

If it is right that we could expect substantial improvements in fact-finding on review only by making substantial changes in the basic structure of our trial and appellate courts, it is entirely appropriate to do everything we can to enhance the quality of trial court fact-finding. We can, and have, adopted trial court procedures and standards of appellate review that make trial judges primarily responsible for most pretrial and trial rulings. We have adopted rules of appeal jurisdiction that by and large prevent appellate intrusion before final judgment. To the extent that these efforts succeed, we can entrench the justifications for narrowing the standard of appellate review. The benefits may be further increases in the quality of trial court findings and enhancement of the quality of justice provided by trial and appellate courts acting together. These benefits are important for those who appeal. They may be even more important for those who could not afford to appeal; if we are uncomfortable with the prospect that "better" justice might be available to those who can afford to appeal,³¹ narrowing the standard of review may help directly those who cannot appeal rather than simply deny the better brand of justice to those who can.

Most cases, of course, are not decided on paper records alone. As soon as oral testimony enters the picture, the reasons for adopting a narrow standard of review are reinforced by the belief that trial judge determinations of credibility are better than appellate determinations. It is no response to suggest that a trial judge need merely spell out each portion of the testimony of each witness that is believed or not believed, thereby providing the appellate court a foundation of direct fact equivalent to the

29 Professor Wright compared the trial process of the appellate process as follows: "[T]he trial judge has the advantage of having made the initial sifting of the entire record and of having put it into logical sequence, while the appellate court has lawyers before it picking out bits and pieces of the record to attack or defend a particular finding." *Id.* at 782.

30 *Anderson*, 470 U.S. at 574-75.

31 Professor Wright framed this concern as a question: "If in two similar cases the person rich enough to afford an appeal gets a reversal, however just, while the person of insufficient means to risk an appeal is forced to live with the judgment of the trial court, has justice really been improved?" Wright, *supra* note 8, at 780.

foundation provided by an entirely paper record. The chore of such articulation would itself be considerable. More important, the tasks of assessing credibility and drawing inferences are not independent. The determination whether to believe the testimony that affirms or that which denies receipt of a letter accepting an offer to contract, for example, may depend not only on demeanor but on the detailed inferences suggested by the entire testimony of each witness and on the correspondence between those inferences and the full fact setting. This difference between cases decided entirely on paper records and cases in which oral testimony intrudes suggests that application of the clear error standard should depend on the nature of the record. While clear error must be found to reverse, it is easier for an appellate court to find clear error when it has the same materials for decision as were available to the trial court. Although it has been suggested that the 1985 amendment of Rule 52(a) requires that the same deference be extended to findings based on a paper record,³² the Supreme Court has recognized that greater deference is due to findings based on the credibility of witnesses.³³ In addition, it has suggested that more searching review is appropriate if there is a conflict between testimonial and documentary evidence.³⁴ Here, then, is at last a first illustration: the actual degree of scrutiny required by the clear error standard varies according to the nature of the evidence.

Even as to matters of fact—genuine, historic fact—there are other reasons as well for recognizing that the clear error standard provides variable measures of review. The Supreme Court has suggested, for example, that less searching review should be provided “as the trial becomes longer and more complex, . . . when trial judges have lived with the controversy for weeks or months instead of just a few hours.”³⁵ This suggestion cannot be based only on the enhanced cost of retrying longer cases, since proceedings on remand in judge-trying cases ordinarily need not duplicate the original trial. Instead, it must reflect an appreciation of the extent to which the familiarity of prolonged exposure can enhance the empathetic and intuitive aspects of decision. Appellate courts may well be less able to offset the advantages of exposure to the living trial as the length of the trial grows.

32 In *McFarland v. T.E. Mercer Trucking Co.*, 781 F.2d 1146 (5th Cir. 1986), the court concluded that a trial judge finding based on depositions is entitled to the same deference as a finding “based on oral, in-court testimony.” *Id.* at 1148.

33 After ruling that the clearly erroneous rule applies to findings based on physical or documentary evidence, the Court went on to state: “When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” *Anderson*, 470 U.S. at 575. Several court of appeals decisions reflecting the view that the clearly erroneous standard applies differently to findings based on documentary or otherwise undisputed evidence are collected in 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2587 n.36 (Supp. 1988).

34 The testimony of witnesses denying that they had acted in concert was elicited by “questions in extremely leading form. . . . Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot . . . rule otherwise than that Finding 118 is clearly erroneous.” *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948).

35 *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500 (1984).

Application of the clear error standard also should vary according to the standard of proof imposed at trial. The Supreme Court has recognized that application of directed verdict standards should be adjusted to reflect the fact that more evidence is required to persuade a rational jury if the proposition must be proved by clear and convincing evidence than if the proposition need be proved only by a preponderance of the evidence.³⁶ The same proposition seems to underlie reversal of the trial court findings in *Baumgartner v. United States*.³⁷ The policies that justify an enhanced standard of proof apply equally to justify an enhanced level of appellate scrutiny; the issue is one that justifies an increased expenditure of appellate resources, within the limits of relative appellate and trial judge capacities to find the facts.

More searching appellate review also is appropriate if a trial court has adopted, essentially verbatim, findings proposed by one party. The courts apply the clear error standard to such cases, at times even when there is telling circumstantial evidence that the district judge has not undertaken the responsibility of independent decision.³⁸ Nonetheless, such decisions do not justify the ordinary assumption that the trial judge has made full use of the comparative advantages that warrant appellate deference. Application of the clear error standard should be adjusted accordingly.

A more troubling question is raised by the prospect that the level of appellate scrutiny may be adjusted according to the level of confidence reposed in the particular district judge who made the findings. Years of experience with a particular judge may convince a court of appeals that his findings are less trustworthy than the findings of other judges, either in particular categories of cases touched by some bias or across the full range of cases. Careful observers have asserted that in fact courts of appeals provide more searching review in such cases.³⁹ It seems very likely that this observation is correct. It also seems likely that the practice is right. Perhaps it is best that we trust the courts of appeals to use such a

36 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986).

37 322 U.S. 665 (1944). For a discussion of the *Baumgartner* case, see *infra* note 83 and accompanying text.

38 The Supreme Court has described its earlier decisions as suggesting "that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985). The clearly erroneous rule was applied to affirm findings, after correction of mathematical and typographical errors, in *Falcon Constr. Co. v. Economy Forms Corp.*, 805 F.2d 1229, 1233 (5th Cir. 1986). The court of appeals noted that the district court opinion was rendered two years after the conclusion of a 6-day trial, following issuance of a writ of mandamus to compel entry of judgment. 805 F.2d at 1232. "The district court then adopted much of EFCO's proposed findings of fact and conclusions of law—often verbatim, including typographical errors and erroneous mathematical calculations—and entered judgement. . . ." 805 F.2d at 1232.

39 A leading civil procedure text states: "[A]n appellate court's inclination to accept a trial judge's findings depends. . . on the court's unstated degree of confidence in the trial judge's fair-mindedness." F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 12.8, at 668 (3d. ed. 1985). Professor Louis, after noting that appellate courts arguably are free to take a hard look at any "suspicious" finding of ultimate fact, adds that although appellate courts will not admit it, former appellate law clerks will, off the record, "[r]egularly attest that both important cases and the decisions of certain notorious trial judges are scrutinized more carefully than others." Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of Review, The Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. Rev. 993, 1015-16 & n.160 (1986).

power wisely but surreptitiously—open announcement that heightened scrutiny is accorded the findings of some judges would carry severe consequences, and (in part because of those consequences) would deter use of the power.

Preliminary injunction findings raise a different problem. Rule 52(a) expressly requires that findings of fact be made in granting or refusing interlocutory injunctions. The procedure leading to such interlocutory decisions, however, may be much less thorough than full trial procedure, and indeed may be nothing more than a contest of affidavits. It is tempting to suggest that application of the clear error test should be adjusted to reflect this procedure. On balance, however, the suggestion is not persuasive. The court of appeals has no more satisfactory a basis for decision than the district court. The problem is simply different from the problems of review after trial; there is no cogent basis for a general practice of more, or less, searching review.

One final example may be offered as a bridge to the law application questions discussed in the next part. Contract interpretation often depends on evidence extrinsic to the writing; in such cases the clear error rule applies. In some cases, however, the process of interpretation proceeds solely within the four corners of the document, perhaps as illuminated by uncontested facts surrounding the transaction. Courts of appeals have been willing to review some such cases free of the clear error rule.⁴⁰ The general rule that clear error review applies to decisions based on documentary evidence should not bar this practice. At least in some circumstances, the courts of appeals will bring to such problems the same comparative advantage they bring to questions of law. These advantages can be particularly important with respect to form contracts used in many transactions, where the courts of appeals may be able to achieve a significant measure of uniformity and predictability. In such cases it is appropriate to treat interpretation as a question of law, free of Rule 52(a).

The standard of review also should vary according to the nature of the legal rules involved in each case and the nature of the uncertainties that must be resolved. The reasons for distinguishing between different rules of law are explored in the ensuing discussion of law application problems. The nature of the uncertainties to be resolved affects the standard of review in the same way as the formally articulated standard of proof. The preponderance of the evidence standard applied to most issues in civil litigation does not in fact represent a single and unvarying standard of persuasion. As a simple illustration, it is more important that the defendant be correctly identified as one who had some involvement with the events in suit than it is that each element of damages be precisely determined following a proper determination of liability.

40 *E.g.*, *Lumber & Wood Prods., Inc. v. New Hampshire Ins. Co.*, 708 F.2d 916, 918 (11th Cir. 1987); *Chapman v. Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984).

All of these reflections underscore the proposition that trial courts are primarily responsible for sifting the evidence and finding the facts,⁴¹ while appellate courts are primarily responsible for developing the law.⁴² One obvious qualification of this proposition arises with review of law application, the problem addressed in the next part. A less obvious qualification is imposed by the fact that we trust courts of appeals to make law only when law-making is required to decide a case. The entire enterprise of appellate decision-making depends on the need to decide cases, and that need can be justified only if there is some measure of responsibility for correct decision. Courts of appeals cannot avoid completely the task of ensuring that there is a plausible fact platform for their declarations of law.⁴³

Finally, residual appellate responsibility for the facts is underscored by the vocabulary chosen to express respect for trial judge findings. The clear error rule inescapably means that in many cases the court that affirmed findings of fact also would have affirmed contrary findings. Yet we do not ordinarily speak of fact-finding as a discretionary function of district judges.⁴⁴ Even though the judge himself may not be fully confident of his findings, responding to the dilemma of uncertainty only by determining whether the party with the burden of persuasion has reduced the uncertainty to the point at which action is warranted, we view the effort as an attempt to be right. In a very real sense, appellate review asks not whether the findings were right but only whether they were clearly wrong. Nonetheless the matter is treated as one of right and wrong, not one of discretion. In this way too, appellate courts recognize some measure of shared responsibility that is not properly transferred by reliance on district court discretion.

IV. Law Application

The clearly erroneous standard limits review of "findings of fact." By long understanding, appellate courts undertake independent redetermination of questions of law. Deference to trial court expositions of the

41 A court of appeals is reluctant to reverse trial judge findings. "This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions." *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945) (L. Hand, J.).

42 "[T]he main reason for appellate deference to the findings of fact made by the trial court is not the appellate court's lack of access to the materials for decision but that its main responsibility is to maintain the uniformity and coherence of the law, a responsibility not engaged in if the only question is the legal significance of a particular and nonrecurring set of historical events." *Mucha v. King*, 792 F.2d 602, 605-06 (7th cir. 1986) (Posner, J.).

43 Judge Phillips has made this point nicely: "The impulse to depart from the formal design in order to announce a legal principle arises from an anomaly at the heart of our system of appellate review as it has evolved. The declarative, legislative function of appellate courts can only be rightly exercised as a by-product of their more mundane corrective function." Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1, 6 (1984). "This is a particularly ironic circumstance for those who would rate the declarative function as the more important of the two." *Id.* at n.12.

44 Professor Louis does prefer the language of discretion: "Thus, fact-finding is a form of discretionary power as defined by and within the limits set by law." Louis, *supra* note 39, at 999.

law depends on the cogency of the exposition and, perhaps, individualized measures of respect for the trial judge. It is now common to recognize that there is a third category, law application, that has the characteristics of both law-making and fact-finding. Law application does not always involve this blend. There may be a clear rule that a seventeen-year-old lacks capacity to contract and a specific finding that the party charged on a contract was seventeen years old when the contract was made. The finding provides a clear basis for automatic application of the legal rule; appellate judges are as able to perform the task as a trial judge. Often, however, judges are unable or unwilling to elaborate legal rules to the level of articulated detail that would permit mechanical application of rule to fact. Instead, the rules are expressed in more general terms that require particularized application to specific facts.

The familiar standard of reasonable care imposed by negligence law is the most common example. Application of such general standards to specific facts is in part law-making, because it generates a specific rule of conduct, albeit one that initially is good only for a specific case. At the same time, the process of application is so fact-specific that it may seem inseparable from the fact-finding process.

The obvious response to the law application process would be to create a third standard of appellate review. Determinations of historic fact, on the basis of direct testimony or by a process of inference, would be reviewed by the limited standard of clear error. Rules of law would be reviewed *de novo*. Law application would be reviewed by some different, presumably intermediate, standard. Courts have not made this choice. Instead, they adhere to the fiction that all determinations are reviewed either as if rulings of law or as if findings of fact. This fiction has the virtue of avoiding the need for explicit differentiations of standards of review, and seems to be leading more and more to treating matters of law application as if matters of fact.⁴⁵ Unfortunately the fiction, as transparent as it is, has not escaped the common vice of obscuring the realities of appellate behavior. Appellate courts actually invoke a wide array of standards of review, more or less searching, as appropriate to different tasks of law application. The variety of these standards of review has given rise to the most interesting questions of appellate review, and the most interesting literature. The following discussion seeks to highlight the most important problems.

Academics have long known that it is artificial to allocate law application problems to review by the standards applied to questions of fact, or instead to review by the standards applied to questions of law. Judge Clark made the point clear during the debates that led to adoption of the clearly erroneous standard in Rule 52(a),⁴⁶ and many have made the

45 Professor Louis has argued that it is not wise to attempt an open, avowed determination that some matters of law application are better suited to trial courts, others to appellate courts. Such a process would "be endless, confusing and uncertain. A general rule presumptively favoring either the fact finders or the appellate judges, with whatever controls and exceptions are necessary, is all that is practically possible—and is in fact what we have now." Louis, *supra* note 39, at 1012-13.

46 See *supra* note 13 and accompanying text.

point since.⁴⁷ The Supreme Court has not lagged far behind the academics. Perhaps predictably, one of the nicest statements was provided by an academic turned Justice. Felix Frankfurter wrote, not long after adoption of Rule 52(a), that findings based on application of standards of law may be labeled findings of fact, or instead may be labeled questions of law, "but that is often not an illuminating test and is never self-executing."⁴⁸ More recent decisions tend to state simply that the distinction between law and fact for purposes of identifying the standard of review is not easy. In *Pullman-Standard v. Swint*,⁴⁹ for example, Justice White characterized the distinction between fact and law as "vexing," lamented that "Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact,"⁵⁰ and noted with apparent relief that the case could be decided without addressing the "much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact, — i.e., questions . . . whether the rule of law as applied to the established facts is or is not violated."⁵¹

Two years later, Justice Stevens suggested that the point at which the line is drawn between law and fact "varies according to the nature of the substantive law at issue."⁵² When faced with the problem of assessing the obviousness of a patented invention, the Court asked the Federal Circuit to provide its "informed opinion on the complex issue of the degree to which the obviousness determination is one of fact."⁵³ And outside Rule 52(a) cases, the Court has confessed openly that

the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, . . . 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 In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. . . .⁵⁴

⁴⁷ Dean Carrington put the matter succinctly:

To paraphrase a doubting remark of Jabez Fox, findings of fact may be defined as the class of decisions we choose to leave to the trier of fact subject only to limited review, while conclusions of law are the class of decisions which reviewers choose to make for themselves without deference to the judgment of the trial forum.

Carrington, *The Power of District Judges and The Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 518 (1969) (footnotes omitted). Professor Monaghan's elegant statement is that fact, law, and law application are not "static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience." Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985).

⁴⁸ *Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

⁴⁹ 456 U.S. 273 (1982).

⁵⁰ *Id.* at 288.

⁵¹ *Id.* at 289 n.16.

⁵² *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 n.17 (1984).

⁵³ *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986).

⁵⁴ *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (citations omitted). A similar statement was made in *United States v. Taylor*, 108 S. Ct. 2413, 2419-2420 (1988).

The fundamental secret is out, and notoriously so. Characterization of an issue of law application as fact or law for purposes of identifying a formalized standard of review depends on the perceived need for review, not on the actual status of the issue.

Several difficulties remain. One is that of determining which issues of law application should be formally assigned the status of fact, which the status of law. Another is that of confessing that the actual standard of review does not depend entirely on the choice of category. The most important is identifying the characteristics that justify more searching appellate review or instead warrant greater reliance on trial judge decisions. All three of these problems are best discussed together.

At the outset, it may be useful to reflect again on the analogy to jury trial. Allocation of responsibilities between juries and judges, both trial and appellate, ordinarily is accomplished by characterizing matters as issues of fact for the jury or as matters of law for the court. Vast volumes of authority are available for guidance in applying Rule 52(a) if the problem is the same. Yet there is no a priori reason for believing that the allocations of responsibility between judges and jury should always be guided by the same considerations which guide allocation between trial judges and appellate judges. The inquiry should not stop with observing that directed verdict standards are not the same as Rule 52(a) clear error standards. A cogent argument has been made, for instance, that deference to juries in negligence cases arises from the fact that six or twelve jury members have more experience with the activities ordinarily involved in negligence cases, justifying treatment of negligence law application as a matter of fact, while three appellate judges have more experience than a single trial judge, justifying characterization as an issue of law for purposes of Rule 52(a).⁵⁵ The specific argument need not be accepted—and I do not accept it—to agree with the basic principle. The problems of judicial law application are different, and should be approached independently.

Several factors may work to give law application responsibility to district judges. Many can be illustrated by considering the question of negligence. Most of the courts of appeals treat findings of negligence as matters of fact, reviewed under the clearly erroneous standard.⁵⁶ Perhaps the most obvious justification is that this matter is one of individual case administration, important to the parties but ordinarily not important to the appellate function of developing the law. Another justification is that trial judges often will be unable to make findings sufficiently detailed to communicate the full factual basis for the decision to the court of appeals. The conclusion that an accident would not have happened unless the defendant was driving at a rate of speed unreasonable in all the circumstances, for instance, may spring more from the trial judge's familiarity with the entire record than from any specific articulable fact. Still other justifications may be found in the beliefs that de novo appellate determination would not really achieve greater uniformity by treating

55 Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1033 (1967).

56 See 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2590 (1971 & Supp. 1988).

like cases alike, that little added guidance would be provided by appellate disposition, and that individual disposition of individual cases is at least as fair as ever more detailed pronouncements on the rules of negligence law. There even may be a belief that trial judges can enhance justice by an intuitive disregard for the law in ways that appellate courts cannot duplicate. Trial judges might seem more similar to juries than to appellate judges in this regard, in part because of their intimate familiarity with their cases and in part because it is out of character for appellate courts to connive at disregarding the law that is their special responsibility.

Other factors may work to draw law application responsibility to appellate courts. Many can be illustrated by the ruling in *Bose Corporation v. Consumers Union of United States, Inc.*,⁵⁷ that Rule 52(a) does not apply to a finding that a disparaging statement about the sound quality of the plaintiff's loudspeakers was made with "actual malice." The most general factor was the Court's concern, reiterated in many ways, that it has not been able to articulate the controlling first amendment standards with sufficient clarity to ensure accurate understanding by lower courts. A process of case-by-case adjudication remains necessary, at least for the time being, to help develop the rule and guard against misapplication. The most particular factor was the Court's concern with the need "to preserve the precious liberties established and ordained by the Constitution."⁵⁸ Other cases as well, however, will present more or less distinctive concerns that accurate enforcement of some rights is more important than accurate enforcement of others. Another concern, expressed with diplomatic indirection, was that close review is necessary to protect against biases of trial courts; in the first amendment context, the concern was expressed as the need to preserve adjudication that is content neutral. In other contexts, such as employment discrimination cases, similar concerns may affect the actual standard of review even though the clearly erroneous phrase is invoked. Beyond these specific concerns, other cases may arise in which appellate scrutiny of law application is enhanced because uniformity, predictability, and reliability are thought both desirable and attainable.

Given these competing concerns and constraints, it is easy to predict that characterization of law application issues will vary across the wide range such issues cover, and even as to a single issue may vary over time. As appellate courts feel increasing pressure on their collective capacities for decision, there is a temptation to increase the number of matters re-

⁵⁷ 466 U.S. 485 (1984).

⁵⁸ *Id.* at 511. The extent to which a special standard of review is applied in first amendment cases will depend on the relative importance of the desire "to preserve the precious liberties" as compared to lack of clearly articulated standards. If searching review is justified primarily by the desire to protect free expression, it might be argued that less searching review is appropriate if the district court has upheld a claimed first amendment right. The disagreement of the circuit courts of appeals on this issue is described in *Don's Porta Signs, Inc. v. City of Clearwater*, 108 S. Ct. 1280 (1988) (White, J., dissenting from denial of certiorari). If such distinctions are to be drawn, care will be required to distinguish cases in which a first amendment right is upheld at the expense of a private party and cases in which the right is upheld at the expense of a public party.

viewable only for clear error, and hence called issues of fact. It may be that some such process is in fact occurring now.

Far more important, it is clear that these competing concerns and constraints cannot be accommodated by a single standard of review, whether it be *de novo* review, clear error review, or some single intermediate standard. Courts, in fact, tailor the level of review to the perceived needs of particular classes of cases.⁵⁹ Several examples may be offered to support this assertion.

The first examples draw from the inability to articulate legal rules with such clarity that lower court application is fully trusted. Rules of law are useful means of control,⁶⁰ but only to the extent that they can be stated with unescapable clarity. The *Bose* case affords one specific example. Another, rather older, was *United States v. Appalachian Electric Power Co.*⁶¹ The Court rejected lower court findings that the New River was not navigable. Explaining the reasons for putting aside the "two court" rule that counsels against Supreme Court review of trial court findings affirmed by a court of appeals, the Court confessed that with respect to such issues,

facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide. The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula. . . . We do not purport now to lay down any single definitive test. . . . Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied.⁶²

A third and wonderfully rich example of the inability to articulate precise legal rules may seem more ambiguous. One of the most famous fact review decisions is *Commissioner v. Duberstein*.⁶³ Duberstein was president of a company that bought products from Mohawk; frequently Duberstein suggested potential customers to Mohawk. Eventually Mohawk gave Duberstein a new Cadillac. The Tax Court found the Cadillac was

⁵⁹ Dean Carrington again put the matter well. After observing differences between review of judge and jury findings, he continued:

The difference amongst these tests is insubstantial. The principle which restrains review is too plastic to be subject to such refinements of language. The scope of review must be shaped to particular factors in each case, such as the value of the substantive principle invoked, the likelihood of a misapplication resulting from stubborn disregard or limited understanding by the trier of fact, and the nature and extent of the evidence on which the findings rest. Also, the scope of review will be responsive to differences in the nature of the forum under review. This rich mix will remain constant in its variation.

Carrington, *supra* note 47, at 520-21.

Professors James and Hazard have observed that "the substantive question at issue makes an important difference, although this is not often openly acknowledged." F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 12.8, at 668 (3d ed. 1985). Professor Oliver has suggested that appellate intervention is less likely if the legal standard involved is a nontechnical, colloquial one drawing on common sense. Oliver, *Appellate Fact Review Under Rule 52(a): An Analysis and Critique of Sixth Circuit Precedent*, 16 U. Tol. L. Rev. 667 (1985).

⁶⁰ Many writers have observed that appellate courts can enhance their own power in relation to trial courts by announcing more detailed and refined rules of law, reducing the need for individualized creativity in the law application process. See Louis, *supra* note 39, at 1019-27.

⁶¹ 311 U.S. 377 (1940).

⁶² *Id.* at 404.

⁶³ 363 U.S. 278 (1960).

income, not a gift, because the only justifiable inference was that it was intended to be remuneration for services rendered. The Sixth Circuit reversed the Tax Court, and the circuit court in turn was reversed. Most of the Supreme Court opinion was devoted to the vagueness of the concept of "gift" for income tax purposes, and to the reasons for not attempting a more detailed statement of criteria that would control the distinction between gifts and income. Quoting from Justice Cardozo's opinion dealing with a different tax problem, the Court observed that "[t]he standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."⁶⁴ The Court then went on to a much-quoted passage:

Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the main springs of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.⁶⁵

The Court concluded that appellate review must be "quite restricted," and findings of a district judge or the Tax Court must follow the standard of Rule 52(a). Justice Frankfurter dissented, arguing that the Court should adopt a presumption that such business-related transactions give rise to income, and urging that more detailed rules should be developed to make tax administration as uniform as possible.⁶⁶ The Court's most revealing response to this dissent was the observation that diversity of result would be lessened since tax decisions tend to be reported, "and since there may be a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters."⁶⁷

Although the *Dubenstein* opinion thus clearly invoked the clear error standard of review, it provides a compelling illustration of an issue that often should be reviewed more intensely than a finding of negligence. The need for uniform treatment of taxpayers perhaps cannot be met by stating more elaborate rules, which could easily be met by artificial contrivance and avoidance. Certainly the Supreme Court should not attempt to write tax code provisions that the Internal Revenue Service cannot wrest from Congress or promulgate by legitimate regulations. But if elaboration of legal rules is not wise, the need for uniformity should be met in part by an enhanced degree of appellate scrutiny. The

64 *Id.* at 288 n.9 (quoting *Welch v. Helvering*, 290 U.S. 111, 115 (1933)).

65 *Dubenstein*, 363 U.S. at 289 (citations omitted).

66 *Id.* at 294-98. Dean Griswold was more sharply critical of the Court's failure to develop "some guides and standards," and its "undue and unfortunate yielding of responsibility to juries and other triers of the facts." He even suggested that Justice Cardozo's language, as elegant as it was, is essentially empty. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 88-91 (1960).

67 363 U.S. at 290.

Court's surprising suggestion that triers of fact might follow each other implicitly recognizes as much.

Closely related to an appeals court's inability to articulate detailed rules of law is its ability to insist that district courts make detailed findings of fact. Review of law application is facilitated by elaborate findings of the fact assumptions made for the purpose of decision. It is to be expected that courts of appeals will insist on more elaborate findings in cases in which they hope to exercise more searching review. Employment discrimination cases provide a fine example of this proposition.

The employment discrimination cases begin, for present purposes, with *Pullman-Standard v. Swint*.⁶⁸ Title VII of the Civil Rights Act of 1964 permits employment practices adopted pursuant to a bona fide seniority system, so long as the differences arising from the seniority system "are not the result of an intention to discriminate because of race."⁶⁹ *Pullman-Standard* was organized by the United Steelworkers ("USW") and the International Association of Machinists ("IAM") in 1941; IAM gradually ceded some workers from its bargaining unit to the USW, so that IAM represented an all-white unit and USW represented a racially mixed unit. A departmental seniority system was adopted in 1954; employees transferring from one department to another lost all seniority. The district court upheld the validity of the seniority system. It found that the system applied equally to all employees, black and white, because approximately equal numbers of employees in each group were affected; that the departmental structure was rational as a matter of standard industry practice and as a matter of the employer's own situation; that the seniority system, although adopted during a period of substantial discrimination, was adopted for reasons in no way related to the discriminatory practices; and that there was no discriminatory purpose. The court of appeals reversed. The Supreme Court in turn reversed, finding substantial indications that the court of appeals had made an independent determination on the issue of intent, and in any event clearly had erred in making its own findings rather than remanding for new district court findings to replace findings infected by legal error. The Court stated that intent to discriminate on account of race "is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact."⁷⁰

The *Pullman-Standard* opinion provides an invaluable illustration of the difficulty of drawing clear distinctions between facts inferred and facts evaluated and characterized according to some concept of law. The concept of intent chosen from among the familiar varieties of intent seems to be one of purpose: the issue was identified as whether the seniority system was "adopted because of its racially discriminatory impact."⁷¹ It was this motivating desire that was characterized as a matter of pure fact. The purpose of a single individual can readily be character-

68 456 U.S. 273 (1982).

69 *Id.* at 276 (quoting 42 U.S.C. § 2000e-2(h) (1982)).

70 *Id.* at 287-88.

71 *Id.* at 277.

ized as a question of fact in some senses. Characterization of the purpose of at least two large organizations, an employer and a union, is more difficult. If there were a clear showing that a single middle-management employee or mid-level union bargainer had a discriminatory intent, for example, attribution of that individual intent to one or both organizations is easy only if the applicable legal standard puts aside all questions of causal connection between the role of one individual and a process of group decision. Looking for difficulty in another direction, the Court stated that since actual intent is required, such intent cannot be "presumed" from the fact of differential impact. At the same time, it asserted that discriminatory impact is part of the evidence to be considered in determining whether to find an actual intent to discriminate. The fact-finding process that infers actual intent from actual impact, reasoning that employer and union must have desired the results actually achieved, is entirely rational. Yet in this process it is difficult to separate the fact-finder's evaluation of the results from the characterization of the accompanying state of mind. Finally, the intent to be found includes the element of discrimination. Unless discrimination means no more than differential impact, it seems impossible to separate a conclusion of discriminatory intent from legal concepts of permissible and impermissible differentiation. The Court's bland assertion that the question of purpose is a matter of "pure fact" covers over a number of elements that can be divorced from law application only with difficulty, if at all.

Whether or not discriminatory intent is a matter of pure fact, there are good reasons to believe that relatively stringent appellate review is appropriate. In the early years of Title VII, legal standards required substantial development; searching review was appropriate to test the depth of trial court understanding. Even now, with a relatively mature body of race discrimination law, it seems appropriate to provide more searching review than in negligence cases. Race discrimination remains an important problem. Discrimination litigation often involves the interests of many people, not only those who may have suffered discrimination but others as well. Injunctive decrees may have profound effects long into the future. There even may be a risk that some trial judges are less hospitable to the purposes of antidiscrimination legislation than others.

One way to facilitate more searching review of discrimination findings under the clear error rubric is to insist on detailed findings by district judges. The Fifth Circuit—the court that was reversed in the *Pullman-Standard* decision—in fact exacts a high level of detail. In one of its leading statements, the court has observed that when intentional discrimination is the issue, a trial court that believes the employer's explanation of intent cannot merely state that the plaintiff has failed to prove a pretext, or that there was no evidence of discrimination. Instead, the court "must at least refer to the evidence tending to prove and disprove the merits of the proffered explanation and state why the court reached

the conclusion that the explanation has not been discredited."⁷² An even more demanding approach is reflected in a Fourth Circuit opinion.⁷³ Similar approaches can be found in other cases dealing with a variety of other discrimination problems.⁷⁴

Insistence on detailed fact findings may help to transfer substantial portions of the responsibility for law application to courts of appeals, even under the clear error banner. The requirement of detailed findings, however, does not of itself respond to the risk that findings may be deliberately slanted to justify the result actually reached on more intuitive grounds.⁷⁵ In rare cases, the process of adjusting findings to the result may be so open as to justify correction on that ground.⁷⁶ In other cases, searching review is apt to be the only protection.

72 *Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394, 401 (5th Cir. 1986). This opinion has frequently been cited in later opinions, e.g., *Lopez v. Current Director Tex. Econ. Dev. Comm'n.*, 807 F.2d 430, 433-34 (5th Cir. 1987).

73 *See Warren v. Halstead Indus. Inc.*, 802 F.2d 746 (4th Cir. 1986).

74 In *Buckanaga v. Siseton Indep. School Dist.*, 804 F.2d 469 (8th Cir. 1986), involving a challenge to an at-large election system as abridging the right to vote on account of race, the court ruled that district courts are required to explain with particularity the reasoning and subsidiary factual conclusions underlying their reasoning. The court must discuss not only the evidence supporting its decision but also the substantial evidence contrary to the decision. Such detailed findings must be made with respect to at least the following issues: whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district (*Id.* at 472); whether there is racially polarized voting (*Id.* at 473); whether there is a history of discrimination against the minority group (*Id.* at 474), here American Indians; what is the effect of present social and economic disparities between American Indians and Whites (*Id.*); whether there are voting practices that are used to enhance the opportunity for discrimination (*Id.* at 475); what factors account for electoral successes and failures of minority group members (*Id.* at 476); whether the elected body—a school district—has been responsive to the needs of the minority. *Id.* at 477.

A finding that a commitment to fully integrate a state prison system was contained in the defendant's plan to remedy existing problems was not sufficient. There must be more detail. *Battle v. Anderson*, 788 F.2d 1421, 1425 (10th Cir. 1986).

75 The fear that findings may be shaded to support the desired result has been expressed in many ways. Professor Blume noted that barely a year after adoption of the First Judiciary Act provisions limiting review of the facts found in equity and admiralty proceedings, Attorney General Randolph urged that review should be restored, saying: "Perhaps, therefore, the original law is exceptionable in allowing the judge whose opinion is to be canvassed the privilege of placing the cause in any attitude which squares best with that opinion." Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUDICATURE Soc'y 68, 68 (1936).

Dean Carrington has expressed the danger in more modern language: "[T]he general principles . . . and policies . . . could be quickly subverted by hostile findings. By taking a discolored view of the facts in every case in which a principle is invoked, the trier of fact could frustrate its application." Carrington, *supra* note 47, at 519.

Reviewing courts tend to be more gentle in their suggestions. In *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), for example, the Court observed that a trial judge may not "insulate his findings from review by denominating them credibility determinations. . . ." *Id.* at 575.

76 A fine illustration is provided by *Barber v. United States*, 711 F.2d 128 (9th Cir. 1983). The trial judge initially concluded that the negligence of a private airplane pilot was equal to the negligence of the air traffic controllers, and that Oregon Law—applicable through the Federal Tort Claims Act—denied recovery. After appeal was taken, he filed amended findings that the pilot's negligence was greater than that of the air traffic controllers. The amended findings were explained on the ground that the judge had first decided that the pilot should not recover, and then found that the negligence was equal because of the understanding that Oregon law would deny recovery. Upon discovering that Oregon law bars recovery only if the plaintiff's negligence is greater than that of the defendant, the findings were amended "to bring the result into conformity with what I thought the result should be." *Id.* at 130. The court of appeals remanded for new findings, suggesting that perhaps the trial judge might wish to find that the circumstances warranted assignment to a different judge. *Id.* at 131.

Four more cases may help fill out the general picture of law application review. The first, *Inwood Laboratories v. Ives Laboratories*,⁷⁷ again involved a legal test framed in terms of intent. Ives had a patent on the drug cyclandelate and sold it under the CYCLOSPASMOL trademark. After the patent expired, Inwood and others produced generic equivalent drugs packaged in capsules of the same colors as the Ives capsules. The generic drugs were marketed to pharmacists by catalogues that at times contained explicit price comparisons to CYCLOSPASMOL and pointed out the similarity of the capsules. Some retail pharmacists sold generic cyclandelate in prescription bottles labeled as containing CYCLOSPASMOL. Suit was brought against the generic manufacturers for inducing trademark infringement. The district court found there was no liability,⁷⁸ the court of appeals reversed,⁷⁹ and the Supreme Court reversed the court of appeals because the district court findings were not clearly erroneous. The Supreme Court stated that the question was whether the generic manufacturers "intentionally induced the pharmacists to mislabel generic drugs."⁸⁰ It ruled that liability could not rest on showing that illegal substitution could be reasonably anticipated. It also approved, however, the formulation used by the court of appeals on an interlocutory appeal in the same case—liability could be found if the generic manufacturers "suggested, even by implication,"⁸¹ that the generic drugs be sold in trademarked bottles. The district court found that the catalogue comparisons of price and capsule color did not amount to an implicit suggestion of substitution, relying in part on the relatively small number of instances of trademark infringement by pharmacists and an alternative explanation for the infringement in the ambiguities of state labeling requirements.⁸² Wrapping these various elements together, it is difficult to characterize the issue raised by the test of contributory infringement as an issue of fact. The task of finding an implied suggestion of substitution in the catalogues surely is one of determining whether the catalogues went too far in describing the opportunity for illicit behavior. The task seems more one of evaluation than fact inference. At the very least, the line between fact inference and law application is obscure. Since the catalogue materials are available for independent review in the court of appeals, the task is simple, and the precise nature of the contributory infringement test murky, the clear error standard can properly permit more searching review than is provided other issues of law application.

77 456 U.S. 844 (1982).

78 *Ives Laboratories, Inc. v. Darby Drug Co., Inc.*, 488 F. Supp. 394 (E.D.N.Y. 1980), *rev'd*, 638 F.2d 538 (2d Cir. 1981), *rev'd sub nom.* *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982).

79 *Ives Laboratories, Inc. v. Darby Drug Co., Inc.*, 638 F.2d 538 (2d Cir.1981), *rev'd sub nom.* *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982).

80 *Inwood*, 456 U.S. at 855.

81 *Id.* at 851.

82 *Ives Laboratories, Inc. v. Darby Drug Co., Inc.*, 488 F. Supp. 394, 397 (E.D.N.Y. 1980) *rev'd*, 638 F.2d 538 (2d. Cir. 1981), *rev'd sub nom.* *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982).

The next case is *Baumgartner v. United States*,⁸³ in which the trial court revoked Baumgartner's naturalization decree on finding fraud by the required clear, unequivocal, and convincing proof. The evidence essentially showed that Baumgartner had said some kind things about Nazi Germany and some unkind things about democracy, free speech, and other of our cherished values. The Supreme Court reversed, despite the two court rule, writing at length to show that the findings below were not

the kind of "fact" that precludes consideration by this Court. . . . Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.⁸⁴

The sweeping review practiced in *Baumgartner* was explained in part on the basis of the same policies as require clear proof. Those policies surely are reflected in the Court's emphasis on the need for review of matters of broad social judgment. As compared to many issues of law application, the Court was surely right to take a close look.

The third case is *Panduit Corporation v. Dennison Manufacturing Co.*⁸⁵ The district court held the patent in suit invalid on the ground that the invention was obvious to a person skilled in the art. The Federal Circuit reversed, without mentioning the clearly erroneous rule.⁸⁶ The Supreme Court remanded to the Federal Circuit for a statement of its "informed opinion on the complex issue of the degree to which the obviousness determination is one of fact."⁸⁷ On remand, the Federal Circuit ruled that a determination of obviousness is a matter of law, reviewable without deference to Rule 52(a). Perhaps the most important part of its opinion for present purposes was the observation that treating the question as one of law would "facilitate a consistent application of the patent statute in the courts and in the Patent and Trademark Office."⁸⁸ A major purpose of conferring jurisdiction of appeals in patent cases on the Federal Circuit was to reduce the wide variations in patent law that had emerged from review by the regional circuits.⁸⁹ Taking account of the desire to achieve national uniformity in determining the scope of review seems entirely appropriate.

The final case seems to look the other way. *Thornburg v. Gingles*⁹⁰ involved the question whether multi-member legislative districts violated the Voting Rights Act of 1965. The finding that the districts diluted black citizens' votes was treated as a question of fact, reviewed only for clear error. The Court emphasized that the determination involves application of the legal standard to the facts of each case in an intensely

83 322 U.S. 665 (1944).

84 *Id.* at 671.

85 810 F.2d 1561 (Fed. Cir.), *cert. denied*, 107 S. Ct. 2187 (1987).

86 *Panduit Corp. v. Dennison Mfg. Co.*, 774 F.2d 1083 (Fed. Cir. 1985).

87 *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986).

88 810 F.2d at 1567.

89 The role of the Federal Circuit is described in 15 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3903 (Supp. 1988), and 17 *Id.* at § 4104 (2d ed. 1988).

90 478 U.S. 30 (1986).

individualized way, and that use of the clearly erroneous standard “preserves the benefit of the trial court’s particular familiarity with the indigenous political reality without endangering the rule of law.”⁹¹ This statement seems to identify a problem of law application that should be subject to less rigorous review than many others, apparently because district courts—even three-judge district courts—cannot be expected to articulate their familiarity with indigenous political reality in ways that would support more searching appellate review.

These grand examples from the Supreme Court may be supplemented by one problem, more mundane, but common. The measurement of damages for personal injury, dignitary offense, or the like, is an exceedingly elusive task. Appellate review may well be limited to an effort to maintain some very loose semblance of uniformity between cases, and to guard against an occasional act of outrageous excess or stinginess. Thus, in reducing to \$1,000,000 a \$2,000,000 award for pain and anguish to a child born disabled because of malpractice at an Army medical center, the Ninth Circuit observed that an award for intangible injury should be reviewed primarily to maintain some degree of uniformity between cases, and concluded that the award “shocks our sense of sound judgment.”⁹² The Seventh Circuit, affirming an award of \$25,000 for nonpecuniary harm caused by racial harassment by the plaintiff’s co-workers, stated that an appellate court is no better able to review a judge finding of intangible damages than a jury finding, and that the clearly erroneous standard of review merges with an abuse of discretion standard.⁹³ Such damages determinations do involve a law application task, the use of vague standards of fair compensation to measure incredibly elusive facts. The determination that appellate review should be very narrow provides one last illustration of the variability of the standard of review.

One final question remains. If I am right in asserting that many different standards of review properly pass under the clear error phrase, and that much of the variability depends on the nature of the legal rules involved in matters of law application, it is useful to consider the Erie question. When a federal court applies state law, should the standard of review be adjusted to reflect the standard applied in state courts? The formal answer is virtually certain. Civil Rule 52(a) is valid, and therefore controls.⁹⁴ To the extent that the standard of review reflects the institutional realities of federal judges, federal docket pressures, and federal procedure, there are strong reasons for adhering to the federal standard. The institutional realities and aspirations that shape the relations between state trial courts and courts of appeals may often be different, and account for general differences in standards of review. Yet if the federal standard itself varies according to differences in the need for appellate supervision of different rules of law, surely it is appropriate to be as flexi-

91 *Id.* at 79.

92 *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986).

93 *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424-1425 (7th Cir. 1986).

94 *See generally* *Hanna v. Plumer*, 380 U.S. 460 (1965).

ble for state law as for federal law. If state courts believe that a particular area of state law demands greater appellate supervision because the rules are difficult to communicate by abstract formulation, or because of a need for uniformity, predictability, or reliability, federal courts should be free to take that judgment into account in developing their own standard of review.

V. Conclusion

Rule 52(a) has been successful because the clearly erroneous standard of review does not establish a single test. Appellate courts have been left free to adapt the measure of review to the shifting needs of different cases, different laws, and different times. This success reflects the rulemaking process at its best. A general tone is set, no attempt is made to anticipate and meet the exigencies of countless multitudes of cases, and practice develops along lines that are not often articulated but are often wise. Rule 52(a), at least, should be as strong when our successors celebrate its centenary as it is now while we celebrate its golden anniversary.