Volume 75 | Number 5 Article 5

6-1-1997

The Appellate Role in Ensuring Justice in Fourth Amendment Controversies: Ornelas v. United States

Jeffrey M. Grybowski

NOTES

The Appellate Role in Ensuring Justice in Fourth Amendment Controversies: *Ornelas v. United States*

The framers of the Bill of Rights intended the Fourth Amendment[1] to act as a bulwark against unreasonably intrusive searches and seizures by government agents.[2] Justice Robert Jackson, an eyewitness to the devastating consequences of excessive government invasions into the private sphere,[3] ranked the protections of the

---

1. The Fourth Amendment to the United States Constitution provides:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) ("[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government."). Although the text of the Amendment prohibits "unreasonable searches and seizures," the Court has interpreted this reasonableness requirement to mean that, as a general rule, a warrant is necessary before the police may search or seize a person or property. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 51 (1970). Even while carving out exceptions to the rule, the Court has issued reaffirmations of this basic principle: "[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or [else] in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." Terry v. Ohio, 392 U.S. 1, 20 (1968) (citations omitted); *see also* Beck v. Ohio, 379 U.S. 89, 96 (1964) (explaining that "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause and substitutes instead the far less reliable procedure of an after-the-event justification"). The warrant requirement serves several goals important to the relationship between citizen and state: It guarantees that a neutral magistrate has reviewed the reasons for the requested search or seizure, *see* United States v. Chadwick, 433 U.S. 1, 9 (1977); it increases the likelihood that the search or seizure will be executed within lawful bounds, *see id.*; and it provides some assurance to the individual subjected to the search that it is done pursuant to legal authority and not merely at the whim of law enforcement agents, *see* Camara v. Municipal Court, 387 U.S. 523, 532 (1967). The text further demands that a warrant be issued only if supported by probable cause. *See* U.S. CONST. amend. IV; *see also* ARNOLD H. LOEWY & ARTHUR B. LAFRANCE, CRIMINAL PROCEDURE: ARREST AND DETENTION 1 (1996) (explaining that the Fourth Amendment includes one substantive requirement—probable cause, and one procedural requirement—a warrant issued by a neutral magistrate).

3. Justice Jackson's views on police authority were undoubtedly influenced by his service as the chief prosecutor for the United States in the Nuremberg war crimes trials following the Second World War. *See* Philip B. Kurland, *Robert H. Jackson*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR

Fourth Amendment among the most vital in the Constitution: "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[4]

Because evidence crucial to a criminal conviction may be excluded from use at trial if the government obtains such evidence through an investigation method that violates the Fourth Amendment, defendants are likely to pursue constitutional challenges.[5] These evidentiary challenges often implicate the fundamental requisites of Fourth Amendment law: the satisfaction of the probable cause[6] and reasonable suspicion standards.[7] The proper function of

---

OPINIONS 1305-09 (Leon Friedman & Fred L. Israel eds., 1995).

4. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

5. *See* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (requiring exclusion from trial of evidence obtained in violation of the Constitution); Weeks v. United States, 232 U.S. 383, 393 (1914) (declaring that if evidence obtained in violation of the Constitution were allowed to be used against the defendant at trial, the Fourth Amendment would be "of no value"). *See generally* 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 2-24 (3d ed. 1996) [hereinafter SEARCH & SEIZURE] (discussing the exclusionary rule); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) (detailing the exclusionary rule in search and seizure cases); *Twenty-Fifth Annual Review of Criminal Procedure*, 84 GEO. L.J. 713, 873-86 (1996) (presenting an overview of the exclusionary rule cases).

6. While not susceptible to a precise or formulaic definition, the Court has sketched several outlines of what probable cause must entail, including the following: "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.' " *Brinegar*, 338 U.S. at 175-76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). Chief Justice Marshall authored an oft-cited definition of probable cause: "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion." Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813). But the Court has often cautioned that probable cause determinations are not hyper-technical exercises, but are " 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " Illinois v. Gates, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, 338 U.S. at 175).

7. Like probable cause, the exact boundaries of reasonable suspicion are not amenable to easy definition since they are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." United States v. Ornelas, 116 S. Ct. 1657, 1661 (1996). However, at least one characteristic of reasonable suspicion is well-defined: It demands a lesser quantum of proof than does probable cause. *See* United States v. Sokolow, 490 U.S. 1, 7 (1989). Furthermore, the Court has articulated rough guidelines for its determination, which focus on particularity: "Based upon [the] whole picture the detaining officers must have a particularized and objective basis for sus-

the appellate court in reviewing trial court determinations on excluding evidence was disputed until the Supreme Court's recent decision in *United States v. Ornelas*.[8] Before *Ornelas*, the United States courts of appeals had split on the question of whether they should review trial court determinations of probable cause under a clear error or a de novo standard.[9] The *Ornelas* majority resolved the dispute in favor of de novo review, despite questions surrounding the efficacy of such exacting appellate scrutiny, guaranteeing criminal defendants at least two opportunities to argue their Fourth Amendment claims.[10]

This Note begins by discussing the facts, procedural history, and opinion of the Court in *Ornelas*.[11] The Note then examines the ambiguity at the heart of *Ornelas*—the dilemma presented by mixed questions of law and fact.[12] Analysis of the opinion follows, beginning with a review of Supreme Court[13] and courts of appeals precedent[14] and expanding into an examination of the policy rationales presented by the proponents of the two competing standards of review.[15] Finally, the Note discusses the potential impact of the decision on the appellate courts' role in Fourth Amendment controversies.[16]

On December 11, 1992, Detective Michael Pautz of the Milwaukee County Sheriff's Department was on duty and engaged in his usual drug-interdiction surveillance in downtown Milwaukee.[17] His

---

pecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("Any number of factors may be taken into account in deciding whether there is reasonable suspicion.").

8. 116 S. Ct. 1657 (1996).

9. Proponents of appellate activism argue that reviewing courts have a constitutional duty to ensure individual justice. *See, e.g.*, McConney v. United States, 728 F.2d 1195, 1203 (9th Cir. 1984). These proponents support de novo review of Fourth Amendment rulings, reasoning that since "three heads are better than one," federal appellate courts are more likely to do justice for particular defendants than are trial court judges. *See* Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 527 (1969). Opposing appellate activism are the proponents of deferential review who doubt that appellate judges are wiser than trial court judges or better able to dispense justice. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957).

10. *See infra* notes 51-74 and accompanying text.

11. *See infra* notes 17-78 and accompanying text.

12. *See infra* notes 79-94 and accompanying text.

13. *See infra* notes 95-128 and accompanying text.

14. *See infra* notes 129-44 and accompanying text.

15. *See infra* notes 145-89 and accompanying text.

16. *See infra* notes 190-97 and accompanying text.

17. *See Ornelas*, 116 S. Ct. at 1659.

suspicions were aroused by a 1981 Oldsmobile parked in a motel parking lot.[18] Detective Pautz, a twenty-year police veteran,[19] noticed the car because its license plates were from California—a state Pautz knew to be a "source state"[20] for drugs.[21] He also knew that older, two-door General Motors models were favored by criminals secreting drugs.[22]

Pautz began his investigation by calling the police dispatcher for information on the car's registration and learned that the vehicle was registered to Miguel Ledesma Ornelas, a resident of San Jose, California.[23] However, Pautz forgot which name the dispatcher recited and later was uncertain whether it was Miguel Ledesma Ornelas or Miguel Ornelas Ledesma.[24] A check of the motel registry revealed that an Ismael Ornelas had checked in without a reservation at 4:00 a.m. accompanied by a second male.[25] When Pautz's partner, Detective Donald Hurrle,[26] arrived, the two called the local office of the Drug Enforcement Administration and requested a search of the Narcotics and Dangerous Drugs Information System ("NADDIS")[27]

---

18. *See id.*

19. *See id.* Detective Pautz was also a two-year veteran of the special narcotics detail. *See id.*

20. In his opinion for the Court of Appeals for the Seventh Circuit, Judge Posner explained that "California, like other states on the eastern, western, and southern borders of the United States, is a state from which drugs are shipped to other states, a 'source state.' " United States v. Ornelas-Ledesma, 16 F.3d 714, 715 (7th Cir. 1994), *on remand*, 52 F.3d 328 (7th Cir. 1995), *vacated sub nom.* Ornelas v. United States, 116 S. Ct. 1657 (1996); *see also* United States v. Buenaventura-Ariza, 615 F.2d 29, 31 n.5 (2d Cir. 1980) (identifying Los Angeles, California as a major "source" of narcotics); Michael J. Mills, Note, *Reasonable Suspicion and the Fourth Amendment:* United States v. Sokolow, 23 CREIGHTON L. REV. 45, 65-66 (1989) (listing Los Angeles, California, as a common American distribution center for narcotics); Ben Kaufman, *Three Dealers in Cocaine Sentenced*, CINCINNATI ENQUIRER, Apr. 27, 1995, at C08 (identifying California as a major source of the narcotics reaching the Midwest).

21. *See Ornelas*, 116 S. Ct. at 1659.

22. *See id.*

23. *See id.*

24. *See id.* The court of appeals came to the defense of Pautz's memory lapse:

> Confusion on this score is understandable, though not justifiable. Spanish naming conventions are confusing to non-Hispanic Americans. When a Hispanic has two surnames, such as Ornelas Ledesma or Ledesma Ornelas, the first is his father's last name and the second his mother's maiden name . . . exactly the reverse of the middle and last names of non-Hispanics.

Ornelas-Ledesma, 16 F.3d at 715.

25. *See Ornelas*, 116 S. Ct. at 1659.

26. Detective Hurrle was a twenty-five year veteran of the police force. *See id.*

27. NADDIS is a computer database of known and suspected narcotics criminals. *See* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 918 (1987). The data in NADDIS are gathered from informants, sur-

for the names Ismael Ornelas and Miguel Ledesma Ornelas.[28] The system reported that Miguel Ledesma Ornelas was a known heroin dealer from El Centro, California, and that Ismael Ornelas, Jr. was a cocaine dealer from Tuscon, Arizona.[29] Deputy Luedke and a police dog trained to uncover narcotics were summoned and Pautz departed for another assignment when they arrived.[30]

While Officers Luedke and Hurrle waited outside, two men exited the motel and climbed into the Oldsmobile.[31] Hurrle approached them, identified himself and asked if they possessed any narcotics.[32] The men answered that they did not,[33] and upon request they produced two California driver's licenses identifying them as Saul and Ismael Ornelas.[34] The men consented to a search of the car and "appeared calm, but Ismael was shaking somewhat."[35] Luedke, a veteran of two thousand car searches for narcotics, began his task inside the Oldsmobile without the aid of the police dog.[36] Leudke noticed a loose panel on the passenger door and suspected that the panel had recently been removed because he noticed a rusty screw embedded in it.[37] His suspicions raised, Leudke removed the panel and discovered two kilograms of cocaine.[38] The men were charged with possession of cocaine with the intent to distribute.[39]

In pre-trial motions the defendants argued for suppression of the cocaine as evidence, asserting that both their detention in the parking lot and the search by Leudke were in violation of the Fourth Amendment.[40] The magistrate judge concluded that the officers had

---

veillance, and the intelligence reports of several federal agencies, including the Drug Enforcement Administration. *See id.* This information is made available to law enforcement agents at both the federal and state levels. *See id.*

28. *See Ornelas*, 116 S. Ct. at 1659.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.* at 1659-60.

33. *See id.* at 1660.

34. *See id.*

35. *Id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See* United States v. Ornelas-Ledesma, 16 F.3d 714, 715 (7th Cir. 1994), *on remand*, 52 F.3d 328 (7th Cir. 1995), *vacated sub nom.* Ornelas v. United States, 116 S. Ct. 1657 (1996).

40. *See id.* The initial detention was subject to the restrictions placed on *Terry* stops. *See id.* at 716; *see also* Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (authorizing a brief stop and search for weapons by the police when there is a reasonable suspicion to believe the subject poses an immediate threat to the officer's safety). The search inside the car was

reasonable suspicion for the investigatory stop, but not probable cause to search the loose door panel.[41] However, the magistrate judge further held that the presence of the police dog would have eventually led the police to the cocaine by lawful means.[42] Invoking the inevitable discovery doctrine,[43] the magistrate ruled that the evidence should not be suppressed.[44] The district court reversed the magistrate judge's probable cause finding and allowed the use of the evidence, reasoning that discovery of the loose panel was enough to

---

subject to the probable cause requirement and the automobile exception to the warrant rule. *See Ornelas-Ledesma*, 16 F.3d at 719. One of the many exceptions that has circumscribed the warrant requirement is the automobile exception, which allows police officers to search an automobile, even in the absence of a warrant, if in their judgment probable cause exists to believe the vehicle contains contraband or evidence of a crime. *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970); *see also* California v. Acevedo, 500 U.S. 565, 569-70 (1991) (holding that a warrantless search of a car on a highway does not violate the Fourth Amendment if there is probable cause to believe the vehicle contains evidence of a crime). *See generally Twenty-Fifth Annual Review*, *supra* note 5, at 791-94 (compiling and discussing the major Supreme Court cases establishing the automobile exception to the warrant rule).

41. *See Ornelas*, 116 S. Ct. at 1660. After examining the screw that aroused Luedke's suspicion, the magistrate judge found that as a matter of fact there was no rust, thus deflating Luedke's basis for believing there was probable cause to search behind the panel. *See id.*

42. *See id.*

43. The Supreme Court clarified the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). The doctrine allows the use at trial of evidence obtained by unconstitutional means if the prosecution can establish by a preponderance of the evidence that the evidence inevitably would have been discovered by lawful means. *See id.* at 443-45. *But see id.* at 459 (Brennan, J., dissenting) (arguing that the prosecution should be required to demonstrate inevitability at a higher standard of proof than preponderance of the evidence). The *Nix* Court noted that deterrence of unconstitutional police methods is the usual rationale for exclusion of illegally obtained evidence. *See id.* at 442. But where the evidence would have been discovered independently of the illegal methods, the Court reasoned that exclusion would not deter the police, but would put the prosecution in a worse position than if no violation had occurred: "Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." *Id.* at 447. For further discussion of the inevitable discovery doctrine, see 5 SEARCH & SEIZURE, *supra* note 5, § 11.4(a), at 240-53; John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need for a Good Faith Requirement*, 17 WM. MITCHELL L. REV. 1085 (1991); Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 DICK. L. REV. 313 (1987); Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349 (1983); Stephen H. LaCount & Anthony J. Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483 (1976); Mark Paul Schnapp, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137 (1976); *Twenty-Fifth Annual Review*, *supra* note 5, at 882-83; Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221 (1987).

44. *See Ornelas*, 116 S. Ct. at 1660; *see also Nix*, 467 U.S. at 443-45 (establishing the inevitable discovery exception to the exclusionary rule).

expand the officer's reasonable suspicion into probable cause.[45]

The United States Court of Appeals for the Seventh Circuit, in an opinion written by Chief Judge Posner, affirmed the district court's reasonable suspicion determination by applying a clear error test.[46] The court chose not to rule on the probable cause issue since the lower court had never expressly found Leudke's testimony regarding the loose panel to be credible.[47] The court of appeals therefore remanded the case for such a determination.[48] On remand, the magistrate judge promptly found Leudke's testimony credible, and the district court again held that probable cause existed for the search.[49] The defendants appealed a second time, and the Seventh Circuit turned once more to a deferential standard of review in affirming the district court's ruling, thus setting the stage for the Supreme Court debate.[50]

In an opinion by Chief Justice Rehnquist, the Supreme Court began its analysis with a discussion of the ephemeral nature of the two Fourth Amendment standards at issue: "Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."[51] The Court dismissed the notion that exacting rules can provide courts with any guidance in applying these standards and emphasized the fact-specific nature of such determinations: "They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed."[52] In denouncing the use of legal formulae in the search for probable cause, the Court turned to the language of landmark Fourth Amendment cases for the proposition that such determinations must be based on " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians,

45. *See Ornelas*, 116 S. Ct. at 1660.

46. *See* United States v. Ornelas-Ledesma, 16 F.3d 714, 719 (7th Cir. 1984), *on remand*, 52 F.3d 328 (7th Cir. 1995), *vacated sub nom.* Ornelas v. United States, 116 S. Ct. 1657 (1996).

47. *See id.* at 721.

48. *See id.* at 722.

49. *See Ornelas*, 116 S. Ct. at 1661.

50. *See id.* On review to the United States Supreme Court, both the government and the defendants argued that the appropriate standard of review for determinations of probable cause and reasonable suspicion in the warrantless search context is de novo review. *See id.* at 1661 n.4. The Supreme Court therefore invited a third party to brief and argue as amicus curiae in support of the lower court's determination that clear error is the appropriate standard of review. *See id.*

51. *Id.* at 1661.

52. *Id.*

act.' "[53] Findings of both probable cause and reasonable suspicion, the Court declared, will turn on the particular facts and circumstances of each case.[54]

The Court next turned its attention to the legal issue upon which the circuits had split—the proper standard of appellate review for trial court dispositions of probable cause and reasonable suspicion questions in the warrantless search context.[55] Noting that it had never expressly deferred to a trial court on such matters,[56] the Court rejected the Seventh Circuit's clear error rule and announced that de novo appellate review was necessary.[57] Chief Justice Rehnquist offered four justifications for this holding.[58]

First, the Court cited the need to maintain a unitary system of laws in which all criminal defendants are accorded the same protec-

---

53. *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)); *see also* Brinegar v. United States, 338 U.S. 160, 176 (1949) (outlining the method to be used by courts in searching for probable cause); Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317, 319-37 (1971) (detailing historical judicial definitions and interpretations of probable cause); *Twenty-Fifth Annual Review, supra* note 5, at 723-28 (compiling and discussing major Supreme Court cases examining probable cause). *See generally* 2 SEARCH & SEIZURE, *supra* note 5, § 3.2, at 22-88 (discussing the probable cause standard and the techniques used to test for it).

54. *See Ornelas*, 116 S. Ct. at 1661; *see also* Ker v. California, 374 U.S. 23, 33 (1963) ("Each case is to be decided on its own facts and circumstances."). In applying both the probable cause and reasonable suspicion standards, the Court has rejected the use of multi-step tests. *See Gates*, 462 U.S. at 238. The Court in *Gates* expressly rejected the two-pronged probable cause test crafted by the decisions in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). *See Gates*, 462 U.S. at 238. This discarded approach to probable cause required law enforcement agents to demonstrate both the reliability and the underlying basis of knowledge of the information upon which probable cause was predicated. *See Spinelli*, 393 U.S. at 415-16. The primary defect in this method of analysis, the Court determined, was its "excessively technical dissection" of facts that "cannot sensibly be divorced" from each other and its failure to allow a deficiency in one factor to be compensated for by a particularly substantial demonstration of the other. *Gates*, 462 U.S. at 234-35. Judges are now instructed to evaluate these standards in light of the totality of the circumstances. *See id.* at 238. This approach has been described by the Court as a "practical, common-sense decision." *Id.*; *see also* United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]he evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."). *But see Gates*, 462 U.S. at 290 (Brennan, J., dissenting) (arguing that the majority's use of the word "practical" is merely a subterfuge for an "overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment").

55. *See Ornelas*, 116 S. Ct. at 1661-63.

56. *See id.* at 1662; *see also* Alabama v. White, 496 U.S. 325, 331-32 (1990) (examining independently the corroborative value of an informant's tip); *Brinegar*, 338 U.S. at 168-70 (examining independently the basis for probable cause).

57. *See Ornelas*, 116 S. Ct. at 1662.

58. *See infra* notes 59-69 and accompanying text.

tions.[59] A de novo standard provides a means of guaranteeing that defendants in similar situations are not subjected to wholly inconsistent notions of probable cause.[60] The Court anticipated such an outcome if " 'the Fourth Amendment's incidence turned on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.' "[61]

Second, the Court explained that probable cause and reasonable suspicion are formless concepts in the abstract and are given meaning only in the context of particular factual circumstances.[62] Giving substance to these rules through independent de novo review of specific applications is within the appellate court's " 'primary function as an expositor of law,' " and provides opportunities to clarify the meaning of legal principles.[63]

Third, the Court argued that judicial efficiency justifies de novo appellate review.[64] Appellate courts have the capacity to preserve consistency among the judicial pronouncements of a particular jurisdiction, which facilitates the development of clear rules that can be applied by laymen, such as law enforcement agents, *before* Fourth Amendment rights are abridged by an improper search or seizure.[65]

Finally, the Court noted that appellate review standards can promote constitutionally-desirable police practices.[66] The standard applied to lower court decisions to issue warrants is highly deferen-

---

59. *See Ornelas*, 116 S. Ct. at 1662.

60. *See id.*

61. *Id.* (quoting *Brinegar*, 338 U.S. at 171).

62. *See id.*

63. *Id.* (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

64. *See id.*

65. *See id.*; *see also* Thompson v. Keohane, 116 S. Ct. 457, 467 (1995) ("[T]he law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law."). The need for relatively simple rules for practical application of Fourth Amendment doctrine has been advocated by criminal process commentators because the Amendment

> is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

Wayne LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. CT. REV. 127, 141 (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting), *rev'd*, 414 U.S. 218 (1973)).

66. *See Ornelas*, 116 S. Ct. at 1663.

tial.[67] The Court reasoned that if determinations of the legality of warrantless searches are to be afforded the same deference, the incentive for police officers to secure warrants will be destroyed.[68] Law enforcement agents might then conclude that the additional effort needed to obtain a warrant was unnecessary since their invocation of an exception to the general warrant rule would be subject to deferential scrutiny on appeal.[69]

In the Court's view, analysis of probable cause and reasonable suspicion involves a two-step process. A court must begin by assembling the historical facts preceding the government action; this constitutes the court's fact-finding role.[70] The second step requires application of these facts to the appropriate legal standards.[71] This inquiry is often labeled a mixed question of law and fact.[72] The *Ornelas* Court tempered its holding with a final admonition to appellate tribunals that recognized the dual nature of judicial scrutiny in this area: "[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[73] According to the Court, inferences made by those closest to the community are important because "[t]he background facts, though rarely the subject of explicit findings, inform the judge's assessment of historical facts."[74]

Justice Scalia, the only dissenter, wrote in defense of deferential appellate review.[75] His analysis is primarily concerned with honoring

---

67. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983) (discussing the Fourth Amendment's "strong preference for searches conducted pursuant to a warrant").

68. *See Ornelas*, 116 S. Ct. at 1663. The Court explained that "the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive." *Id.*

69. *See id.*

70. *See id.* at 1661-62.

71. *See id.* at 1662.

72. *See id.*

73. *Id.* at 1663. Justice Scalia deemed this instruction contradictory to the majority's primary holding because, under a de novo standard of review, "the 'weight due' to a trial court's finding is zero." *Id.* at 1666 (Scalia, J., dissenting).

74. *Id.* at 1663. The Court cited the harshness of the Milwaukee winter as an example of a background fact in this case that informed the judgments of the law enforcement officers and the lower court. *See id.* Daily high temperatures of 31 degrees and only a 38% chance of sunshine are common. *See id.* This, the Court reasoned, is a climate that may well lead a police officer to question the presence of a California-licensed automobile. *See id.*

75. *See id.* at 1663-66 (Scalia, J., dissenting).

the respective institutional advantages of the trial and appellate courts.[76] Justice Scalia explained that deferential review of mixed questions of law and fact is appropriate when the trial court can better judge such issues, often because of that court's proximity to the factual presentations at trial and its expertise in grappling with the probabilities of factual situations.[77] The law-clarifying value of appellate de novo review was rejected by Justice Scalia, who found little in the fact-intensive nature of probable cause and reasonable suspicion determinations that would allow easy application of one ruling to subsequent cases: "Law clarification requires generalization .... Probable cause and reasonable suspicion determinations are ... resistant to generalization."[78]

The controversy at the heart of *Ornelas* is whether appellate courts should review determinations of probable cause and reasonable suspicion in the warrantless search context under a deferential or a de novo standard. Taking the field on the side of de novo review are those concerned that appellate courts must not abandon their role as guarantors of justice; they are met by those whose support of a deferential standard is premised on a fear of appellate courts being "sucked into a whirlpool of unending review of fact patterns too peculiar to recur."[79] The difficulty with review of these determinations is that they lie at the border of law and fact, in the nether world of mixed questions.

Drawing logical distinctions between facts and law has been described as a "chicken-and-egg problem."[80] In order to formulate a statement of the governing legal rule in a given situation, the court must establish the relevant facts; but in order to know what facts are relevant, it must know what the rule of law demands.[81] This dilemma complicates the judicial decision-making framework, which consists of three components: fact gathering, law declaration, and law application.[82]

---

76. *See id.* at 1664-65 (Scalia, J., dissenting).

77. *See id.* at 1664 (Scalia, J., dissenting).

78. *Id.* at 1665 (Scalia, J., dissenting).

79. Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 236 (1991).

80. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 359 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

81. *See id.*

82. *See id.* at 350-51. The three steps of this process are not necessarily followed in any particular order; the discovery of relevant facts may provoke a refinement of the applicable legal propositions, and during the evolution of the case both relevant fact and law

Findings of fact are the historical facts "in the sense of a recital of external events and the credibility of their narrators."[83] They describe the persons, time, place, actions, and surrounding circumstances of the dispute.[84] Law declaration, on the other hand, does not turn on any particular circumstantial setting, but involves "formulating a proposition which affects not only the case before [the judge] but all others that fall within its terms."[85]

Mixed questions exist on the frontier separating law and fact, combining elements of both, and eschewing easy identification with either.[86] The Supreme Court has defined the mixed question as an inquiry "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."[87] In essence, the judge confronted with a mixed question must perform the most fundamental of legal tasks: applying the given facts to the governing proposition of law.[88]

When the courts are able to classify a determination as one of fact or of law, well-established standards of review are applicable.[89]

---

may undergo multiple changes. *See id.* at 351.

83. Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963); *see also* Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981) (defining basic facts as the "historical and narrative events elicited from the evidence presented at trial, admitted by stipulation, or not denied").

84. *See* Jay E. Rosenblum, *The Appropriate Standard of Review for a Finding of Bad Faith*, 60 GEO. WASH. L. REV. 1546, 1569 (1992); *see also* ARTHUR BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 562 (1989) (defining basic facts as those that describe what happened, why, and to whom); JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 190-91 (1898) (defining facts as things "really taking place"); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (defining basic facts).

85. HART & SACKS, *supra* note 80, at 350.

86. *See* Rosenblum, *supra* note 84, at 1571. Examples of mixed questions of law and fact include whether a confession was coerced, whether a person acted with malice, or whether a counterclaim arose out of a same transaction or occurrence. *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1003 (1986).

87. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

88. *See* Lee, *supra* note 79, at 238 (describing the process as "the same task asked of law students in their examinations"). Although the tripartite description of the judicial function is the most widely accepted analysis, other constructions of the judge's task have been suggested, including a scheme that divides findings into four classifications: historic fact, inferences drawn from circumstantial evidence, conclusions based on application of law to fact, and abstract legal rules. *See* Charles R. Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of* Pullman-Standard v. Swint, 58 TUL. L. REV. 403, 412-13 (1983).

89. *See* Rosenblum, *supra* note 84, at 1567; Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 8 (1991). *But cf.* Monaghan, *supra* note 84, at 233 n.24 (explaining that the law/fact distinction provides little guidance for determining the

In a civil suit, rules of procedure require appellate courts to accept the trial court's findings of fact unless they are clearly erroneous.[90] This standard also has been adopted by the Supreme Court in the criminal context.[91] According to the Court, a clearly erroneous finding occurs " '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.' "[92] Legal questions, however, always are reviewed de novo.[93] Application of the de novo standard requires the appellate court to consider the issue as if

---

standard of review since the distinction itself is artificial); Rosenblum, *supra* note 84, at 1568 (noting that the law/fact distinction is often difficult to grasp and that "[t]rial court determinations resist this bi-polar classification"). When the fact is classified as a "constitutional fact," such as whether a publication is obscene, a less deferential standard of review may be appropriate. *See* Peter B. Rutledge, Comment, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. CHI. L. REV. 1311, 1328-32 (1996) (discussing the doctrines involved with review of constitutional facts); *see also* Frank R. Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C. L. REV. 311, 312-25 (1969) (reviewing U.S. Supreme Court's treatment of the constitutional fact doctrine in the 1967 term).

90. *See* FED. R. CIV. P. 52(a). *See generally* Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988) (discussing the implications of Rule 52(a) for appellate review). The relevant section of the rule states: "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." FED. R. CIV. P. 52(a).

91. *See* Maine v. Taylor, 477 U.S. 131, 145 (1986); Campbell v. United States, 373 U.S. 487, 493 (1963). The Supreme Court in *Taylor* explained that although the Federal Rules of Criminal Procedure do not have a counterpart to Federal Rule of Civil Procedure 52(a), "the considerations underlying Rule 52(a)—the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first hand observation . . . —all apply with full force in the criminal context." *Taylor*, 477 U.S. at 145.

92. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400 (1990) (requiring the appellate court to uphold trial court determinations that fall "within a broad range of permissible conclusions"); Steven Alan Childress, *"Clearly Erroneous": Judicial Review over District Courts in the Eighth Circuit and Beyond*, 51 MO. L. REV. 93, 98 (1986) (discussing the debate among courts and commentators about the meaning of the clearly erroneous standard); 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) (discussing traditional definitions of the clear error standard). *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4, at 604-05 (2d ed. 1993) (discussing the clearly erroneous standard of review).

93. *See* First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1926 (1995); Pierce v. Underwood, 487 U.S. 552, 558 (1988); United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961). The Court has explained that even when a court must accept a lower tribunal's findings of fact, the appellate court is not precluded "from making an independent determination as to the legal conclusions and inferences which should be drawn from them." *Mississippi Valley Generating Co.*, 364 U.S. at 526.

it had never been addressed before, giving no weight to the resolution of the controversy at the trial level.[94]

Prior to *Ornelas*, the Supreme Court had not expressly adopted a standard of appellate review for the two crucial Fourth Amendment determinations in the warrantless search context.[95] When the police search under the aegis of a warrant and the question is whether there is sufficient probable cause to support the warrant, there is no dispute that the Court's instructions in *Illinois v. Gates*[96] require the application of a clear error standard of appellate review.[97] However, the *Gates* rule has not been applied in the warrantless search context.[98] Not only did the *Ornelas* majority fail to claim express precedential guidance in the warrantless search context, but the ambiguity of its prior position compelled the Court to state in its own defense: "We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination."[99] Several decisions of the Court, however, contain textual hints favoring the de novo review standard.[100] Furthermore, the Court's method of evaluation of the probable cause and reasonable suspicion questions in several other cases also implies support for that standard.[101]

The petitioners in *Ker v. California*[102] challenged the constitu-

94. *See* Salve Regina College v. Russell, 499 U.S. 225, 231 (1991); United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967). *See generally* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 599 (2d ed. 1995) (discussing the de novo standard of review).

95. *See* United States v. McKines, 933 F.2d 1412, 1419 (8th Cir. 1991) (concluding that the Court has not expressly established an appellate standard); Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 151 (1991) (noting that standards of review for Fourth Amendment questions are in "a state of flux"). *But see* Wright v. West, 505 U.S. 277, 301-03 (1992) (O'Connor, J., concurring) (noting that the Court is leaning toward applying de novo review of mixed questions of law and fact generally). For a summary of the standards of review used for mixed questions in other contexts, see Louis, *supra* note 86, at 1003-05.

96. 462 U.S. 213 (1983).

97. "A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Gates*, 462 U.S. at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)). There is, however, substantial disagreement among the courts of appeals regarding the exact meaning of the *Gates* standard of review. *See* 5 SEARCH & SEIZURE, *supra* note 5, § 11.7(c), at 410-15.

98. *See Ornelas*, 116 S. Ct. at 1662.

99. *Id.*

100. *See infra* notes 102-12 and accompanying text.

101. *See infra* notes 113-24 and accompanying text.

102. 374 U.S. 23 (1963).

tionality of a warrantless search conducted incident to their arrest.[103] The United States Supreme Court stated that although it does not function as a trial court in resolving multiple factual disputes among parties, it will, "where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself" whether the evidence supports the probable cause decision.[104] The next year in *Beck v. Ohio*,[105] the Court reaffirmed its capacity to make an "independent examination" to ensure that the probable cause standard had been satisfied by the evidence.[106]

Although these decisions establish an appellate court's right to independently review the evidence and record when making a probable cause or reasonable suspicion determination, neither expressly mandates the use of either the de novo or clear error standard.[107] Since a court may independently review the record while laboring under either standard, *Ker* and *Beck* do not establish the quantum of error necessary to overturn a trial court ruling.

The Court may have come closer to promulgating a standard of appellate review in one of its most important modern Fourth Amendment cases, *Brinegar v. United States*.[108] At issue in that case was whether the police had probable cause to arrest Brinegar when they spotted his car on the highway and suspected him of illegally transporting alcohol.[109] Because the Court deemed the facts undisputed and remarkably similar to those in *Carroll v. United States*,[110] in which probable cause was upheld, the Court supported the probable cause determination by reasoning that "[i]n the absence of any significant difference in the facts [when compared to *Carroll*], it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause."[111] This statement seems

103. *See id.* at 24.

104. *Id.* at 34.

105. 379 U.S. 89 (1964).

106. *See id.* at 92.

107. *See id.* at 92-97; *Ker*, 374 U.S. at 33-34.

108. 338 U.S. 160 (1949).

109. *See id.* at 164.

110. 267 U.S. 132 (1925). In *Carroll*, the defendants were stopped on the highway by federal prohibition agents who suspected them of transporting liquor illegally. *See id.* at 135-36.

111. *Brinegar*, 338 U.S. at 171. In dissent, Justice Jackson argued that *Carroll* was distinguishable from the facts of *Brinegar* because the trial court in *Carroll* had determined that probable cause existed to search a car on the highway suspected of smuggling alcohol,

to reflect the Court's concern with uniformity of precedent, a goal that can be achieved most effectively through the adoption of a de novo standard.[112]

Although prior to *Ornelas* the Court had provided scant express instruction on the standard of review question,[113] the method it employed in evaluating probable cause and reasonable suspicion in several cases implied at least an unwritten adoption of the de novo rule.[114] In *United States v. Cortez*,[115] the Court reviewed the constitutionality of a highway stop of a vehicle by Border Patrol agents where probable cause was predicated on a complex web of circumstantial evidence.[116] In reversing the lower court, the Court carefully reconstructed the investigatory history, taking pains to link each piece of evidence to the inference that could reasonably have been made by the agents.[117] The ultimate question for the Court was "whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity."[118] In answering in the affirmative, the Court made no mention of deferring to the discretion of the lower court; to the contrary, the Court engaged in an analysis so detailed that it practically retraced the officers' steps.[119]

---

while in *Brinegar* both the trial and intermediate appellate courts decided that the police arrest was without probable cause. *See id.* at 184 (Jackson, J., dissenting). From these differing procedural histories the Justice reasoned:

> If we assume the facts to be indistinguishable, this important distinction emerges from the decisions: *Carroll* held only that these facts *permitted* a District Court, if so convinced, to find probable cause from them. The Court now holds these facts *require* a finding of probable cause. This shift from a permissive to a mandatory basis is a shift of no inconsiderable significance.

Id. (Jackson, J., dissenting).

112. *See Ornelas*, 116 S. Ct. at 1662 (explaining that the "varied results" identified by the *Brinegar* Court "would be inconsistent with the idea of a unitary system of law").

113. *See* United States v. McKines, 933 F.2d 1412, 1419 (8th Cir. 1991) (concluding that the Court has not expressly established an appellate standard); Poulin, *supra* note 95, at 151 (noting that standards of review for Fourth Amendment questions are in "a state of flux").

114. *See* Alabama v. White, 496 U.S. 325, 331-32 (1990) (ruling on the corroborative value of an anonymous informant's tip in supporting reasonable suspicion); United States v. Cortez, 449 U.S. 411, 418-21 (1981) (examining in great detail the inferences made by the law enforcement officers); Terry v. Ohio, 392 U.S. 1, 27-28 (1968) (exploring the reasonable inferences that could have been made by the police); Carroll v. United States, 267 U.S. 132, 159-61 (1925) (examining the facts supporting probable cause).

115. 449 U.S. 411 (1981).

116. *See id.* at 418-22 (analyzing the complex factual inferences made by the law enforcement officers).

117. *See id.* at 418-21.

118. *Id.* at 421-22.

119. *See id.* at 418-22.

Similarly, in *Terry v. Ohio*,[120] the Court detailed the events preceding a police officer's detention of suspected robbers on a public street and described its task in this way: "We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable . . . ."[121] In concluding that the officer had acted reasonably, the Court explored in depth the inferences a reasonably prudent person could have drawn from the facts as they unfolded before the police officer.[122] Again, no mention was made of a need to defer to the conclusions of the trial court or of errors made by the courts below.[123] Several other Fourth Amendment cases seem to fit this general pattern of implicit de novo review.[124] But the standard of review was not a question squarely before the Court in any of these cases, and in each the Court refrained from expressly establishing a universal standard.

In contexts outside of search and seizure challenges, the Court has also addressed the problem of applying a standard of review to mixed questions of law and fact, even while acknowledging "the vexing nature of the distinction between questions of fact and questions of law."[125] In determining whether a suspect was in custody for Fourth Amendment purposes, the Court rejected the argument that the question was a factual one and that deference must be given to the conclusions of the state court.[126] The Court explained that analysis of the voluntariness of a confession involves an application of the facts to the law, demanding an independent review while considering the totality of the circumstances.[127]

---

120. 392 U.S. 1 (1968). The Court held in *Terry* that a police officer may stop an individual for the purpose of a limited investigation when the officer has a reasonable suspicion that a crime has been or is about to be committed. *See id.* at 30-31. Furthermore, the Court not only sanctioned the stop in order to question the suspected criminal, but also allowed a limited frisk of the outer garments of the suspect for the protection of the police officer and bystanders. *See id.*

121. *Id.* at 27.

122. *See id.* at 27-28.

123. *See id.*

124. *See, e.g.*, Alabama v. White, 496 U.S. 325, 331-32 (1990) (ruling on the corroborative value of an anonymous informant's tip in supporting reasonable suspicion); Carroll v. United States, 267 U.S. 132, 159-61 (1925) (examining whether probable cause supported a highway stop).

125. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (admitting that the Court is unaware of any rule "that will unerringly distinguish a factual finding from a legal conclusion").

126. *See* Thompson v. Keohane, 116 S. Ct. 457, 466 (1995).

127. *See id.* at 464; *see also* Miller v. Fenton, 474 U.S. 104, 112 (1985) (explaining that whether a confession was constitutionally procured was an issue to be resolved by examining the totality of the circumstances during an independent federal determination).

While not establishing a fixed rule for the review of mixed questions of fact and law, the Court has employed a flexible test which instructs that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[128] This test demands an issue-by-issue determination of the usefulness of exacting appellate review and hangs resolution of the question on a weighing of the policy merits and weaknesses of the two standards.

The uncertainty created by the Court with regard to the proper appellate treatment of mixed questions has precipitated a split among the circuit courts[129] with regard to the proper standard of review for search and seizure challenges.[130] The majority of circuits that have faced the issue have adopted the de novo standard.[131] However, several courts have only recently abandoned the deferential review practice.[132] A comparison of the Seventh Circuit's decision in *United States v. Spears*[133] and the Ninth Circuit's decision in *United States v. McConney*[134] provides the sharpest contrast among the circuits on this issue.

The court in *Spears* relied upon the Supreme Court's decision in *Illinois v. Gates*[135] to justify clear error review for warrantless

128. Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (quoting *Miller*, 474 U.S. at 114).

129. *See infra* note 131 (listing the cases involved in the split).

130. *See Pullman-Standard*, 456 U.S. at 289 n.19 (noting the persuasive support on both sides of the de novo versus clear error debate); *see also* United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984) ("This disarray in standard of review jurisprudence appears to be pervasive.").

131. *Compare* United States v. Padro, 52 F.3d 120, 122 (6th Cir. 1995) (applying a de novo standard of review to determinations of probable cause and reasonable suspicion in the warrantless search context); United States v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994) (same); United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992) (same); United States v. Ramos, 933 F.2d 968, 972 (11th Cir. 1991) (same); *and* United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990) (same), *with* United States v. Spears, 965 F.2d 262, 268-71 (7th Cir. 1992) (applying a clear error standard of review to determinations of probable cause and reasonable suspicion in the warrantless search context).

132. The Sixth Circuit's decision in favor of de novo review in *Padro* overruled its own preference for clear error review outlined in *United States v. Sangiento-Miranda*, 859 F.2d 1501, 1508 (6th Cir. 1988). The First Circuit sanctioned a similar reversal in *Zapata* from its earlier decision favoring clear error in *United States v. Rodriguez-Morales*, 929 F.2d 780, 783 (1st Cir. 1991).

133. 965 F.2d 262 (7th Cir. 1992).

134. 728 F.2d 1195 (9th Cir. 1984).

135. 462 U.S. 213 (1988).

searches.[136] The *Gates* Court unequivocally established a standard of review in the context of warrant searches: "[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit [supporting probable cause] should not take the form of de novo review."[137] Even though the Court in *Gates* dealt with a challenge to the sufficiency of probable cause in the context of a warrant search, the Seventh Circuit deemed *Gates* controlling in warrantless situations as well: "[T]here is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a nonwarrant case, appellate review should be the same for both."[138] The critical similarity between the two scenarios according to the *Spears* court is that "[i]t is the front-line judicial officer in both cases who conducts the initial inquiry, who concludes there is or is not probable cause, and an appellate panel should not substitute its judgment in either case."[139]

Unlike the *Spears* court, the Ninth Circuit in *McConney* adopted a functional test for mixed questions: "[I]n each case, the pivotal question is do the concerns of judicial administration favor the district court or do they favor the appellate court."[140] The factors considered by the court in this measuring of judicial roles "generally favor the appellate court."[141] Factors relevant to the capacity and appropriate functions of the courts will favor appellate de novo review when "the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles."[142] This bias is especially strong when the question is a determination of constitutional rights since such ques-

136. *See Spears*, 965 F.2d at 269 (citing the *Gates* rule that the standard of review for determinations to issue warrants is substantial basis to believe probable cause supported the warrant).

137. *Gates*, 462 U.S. at 236. Soon after *Gates*, the Court held that the proper standard of review in the warrant search context is "whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." Massachusetts v. Upton, 466 U.S. 727, 728 (1984) (per curiam).

138. *Spears*, 965 F.2d at 270.

139. *Id.* at 271.

140. *McConney*, 728 F.2d at 1202. No Fourth Amendment issues were raised in this case, but the court discussed the mixed question problem extensively in the abstract. In *McConney*, the police entered the home of a defendant named in an arrest warrant without awaiting either voluntary admittance or a refusal by the occupants, in apparent violation of the "knock-notice" rule. *See id.* at 1198. At issue was whether the circumstances constituted such an exigency that the police were excused from the requirements of the rule. *See id.* at 1199.

141. *Id.* (citing Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).

142. *Id.*

tions demand exposition of abstract constitutional principles, not merely the facts of immediate controversies.[143]

The Supreme Court's resolution of this dispute dividing the circuit courts was difficult to predict given the Court's precedents. The standard of review question was not at issue in *Brinegar* or in any of its progeny. Likewise, the reliance on *Gates* by proponents of a deferential standard may be equally misplaced since *Gates* contemplated situations in which the challenged probable cause determination was made before the issuance of a warrant, a procedure the Court was anxious to promote.[144] Application of deferential review, in light of this constitutional preference, reasonably follows.

With precedential guidance murky at best, proponents of both standards of review turned to policy rationales for support. Ultimately, these considerations focus on the relative capacities and limitations of the district and appellate courts.[145] First, proponents argued that while addressing individual claims, de novo review allows the appellate courts to unify precedent, which serves the goal of "providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' "[146] At the heart of this judicial task is efficiency.[147] By unifying precedent, the appellate courts may reduce the incidence of constitutional transgressions, thereby reducing the burden on the courts while increasing public welfare.[148]

---

143. *See id.* at 1203 (citing Ker v. California, 374 U.S. 23, 34 (1963), in which the Supreme Court required de novo review of probable cause determinations).

144. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983) (noting that under Fourth Amendment doctrine there is a "strong preference for searches conducted pursuant to a warrant").

145. *See* Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) ("[D]eferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question . . . ." (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985))). It has even been suggested that "the labels 'law' and 'fact' often amount to little more than divisions of decision making authority between judges and juries or between appellate courts and trial courts." Lee, *supra* note 79, at 236.

146. *Ornelas*, 116 S. Ct. at 1662; *see also* Thompson v. Keohane, 116 S. Ct. 457, 467 (1995) (explaining that precedent unification may "stabilize the law"); Poulin, *supra* note 95, at 152 (arguing that deferential review would result in mixed judicial signals being sent to law enforcement officers, which is "far from precise fourth amendment protection").

147. Another efficiency rationale supporting de novo review is that "[a]ppellate judges also have the luxury of distanced reflection, which might undo the ill effects of trial court impetuosity in some cases." Lee, *supra* note 79, at 251.

148. *See Ornelas*, 116 S. Ct. at 1662 (quoting New York v. Belton, 458 U.S. 454, 458 (1981)).

The *Ornelas* Court, however, seemed to acknowledge the impracticality of the efficiency through law clarification rationale. The creation of a set of rules for easy use by street-level law enforcement agents requires generalization of legal rules.[149] The Court has often warned that probable cause and reasonable suspicion are "not readily, or even usefully, reduced to a neat set of legal rules."[150] The *Ornelas* Court even conceded this point by citing *Gates* for the proposition that " 'one determination will seldom be a useful precedent for another.' "[151] As the Court explained, however, fact patterns similar enough to merit constitutional comparison do occur, even if infrequently.[152] In these cases at least, de novo review functions efficiently, allowing a reviewing court to apply the holding in a prior case to a later one. But by the Court's own admission, this possibility of comparison is the exception, compelling Justice Scalia to ask "why we should allow the exception to frame the rule."[153]

The uniqueness of the factors supporting probable cause in *Ornelas* bolsters Justice Scalia's view. The Court reasoned that because it was December, when Californians would be unlikely to be vacationing in Milwaukee, the police were justified in paying special attention to Mr. Ornelas's car.[154] The police officers also claimed that

149. *See id.* at 1665 (Scalia, J., dissenting).

150. Illinois v. Gates, 462 U.S. 213, 232 (1983). The *Ornelas* majority quoted this warning approvingly. *See Ornelas*, 116 S. Ct. at 1661 (quoting *Gates*, 462 U.S. at 232). Judge Posner, in holding that in the civil context mixed questions are subject to deferential review, reasoned: "Review is deferential precisely because it is so unlikely that there will be two identical cases; the appellate court's responsibility for maintaining the uniformity of legal doctrine is not triggered." Mucha v. King, 792 F.2d 602, 606 (7th Cir. 1986) (noting that where the mixed question at issue involved whether plaintiff had possession of paintings, appellate review of the facts de novo would be a waste of judicial resources since the facts in this case were unlikely to recur; therefore the appellate court would be unable to establish a general rule that could be applied in future cases).

151. *Ornelas*, 116 S. Ct. at 1662 (quoting *Gates*, 462 U.S. at 238 n.11).

152. For example, the Court demonstrated that it had previously acknowledged the factual similarities in *United States v. Sokolow*, 490 U.S. 1 (1989), and *Florida v. Royer*, 460 U.S. 491 (1983). *See Ornelas*, 116 S. Ct. at 1662. In both cases, a defendant suspected of drug trafficking used an assumed name, paid cash for airline tickets, passed through Miami, and appeared nervous to narcotics agents. *See Sokolow*, 490 U.S. at 3-5; *Royer*, 460 U.S. at 493-95.

153. *Ornelas*, 116 S. Ct. at 1665 (Scalia, J., dissenting). Justice Scalia likened the value of de novo review in these cases to that in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), in which the Court warned of depleting judicial resources for the sake of " '[d]uplication of the trial judge's efforts in the court of appeals,' " when it " 'would very likely contribute only negligibly to the accuracy of fact determination.' " *Ornelas*,. 116 S. Ct. at 1665 (Scalia, J., dissenting) (quoting *Anderson*, 470 U.S. at 574-75).

154. *See Ornelas*, 116 S. Ct. at 1663. The Court explained that "what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the

a late model two-door General Motors car was likely to arouse their suspicions because of its common use by drug traffickers.[155] The Court's analysis of this issue suggests that if this incident were to recur exactly, except that the car involved was a four-door General Motors model or that the incident took place in the summer, reasonable suspicion would be lacking. The facts of the *Ornelas* search are not particularly complex; many searches involve far more intricate fact patterns,[156] thereby limiting the appellate role in establishing clear rules for law enforcement officers applicable to general scenarios. If the value of law clarification rests in judicial efficiency, then the infrequent recurrence of complex fact patterns would seem to overwhelm any value derived from the exceptions.[157]

Furthermore, any efficiency gains of de novo review must be weighed against efficiency losses in other areas of the appellate function.[158] Were the appellate courts not engaged in resolving the specific conflicts of individual parties by exercising de novo review, more energy might be channeled into "developing uniform, principled doctrine" that is a "more efficient use of a scarce resource (i.e., appellate court time) than is attempting to ensure just results in individual cases."[159] But an obstacle to the persuasive use of the efficiency rationale by either side of the debate is the lack of empirical data proving the efficacy or waste associated with a de novo rule in mixed-question situations.[160] Unlike other policy factors at issue, efficiency must focus only on the actual consequences of a judicial decision. Whether appellate resources are more efficiently utilized

---

height of the summer tourist season may rise to that level in December in Milwaukee." *Id.*

155. *See id.* at 1662.

156. *See, e.g.*, United States v. Cortez, 449 U.S. 411, 418-22 (1981) (analyzing the complex factual inferences made by law enforcement officers based on a variety of circumstantial evidence, estimates, and surmises).

157. As proof of the rarity of fact pattern repetition, Justice Scalia identified ten facts that were component parts of the probable cause determination in *Ornelas*, such as the loose panel in the car door and the defendant's lack of motel reservations, and concluded that "the absence of any one of these factors in the next case would render the precedent inapplicable." *Ornelas*, 116 S. Ct. at 1665 (Scalia, J., dissenting).

158. *See* Lee, *supra* note 79, at 250-52.

159. *Id.* at 250. Judge Posner has warned of the costs of plenary appellate review of mixed questions: "[T]he appellate court's ... main responsibility is to maintain the uniformity and coherence of the law, a responsibility not engaged 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). Another possible efficiency loss created by de novo review is a higher appeal rate. *See* Lee, *supra* note 79, at 251.

160. *See* Lee, *supra* note 79, at 251 ("We do not know whether appellate courts that apply fact to law during plenary review reach results that produce greater net satisfaction among litigants and society than do results reached by trial courts.").

in reviewing trial court determinations for precise correctness or in clarifying broad legal rules is a question to which the answer can only be surmised, since no data exist to assist this examination. Advocates must therefore turn to other factors for justification.[161]

The *Ornelas* Court also cited the importance of the law declaration role of appellate courts as a justification for de novo review.[162] The Court argued that certain legal rules have meaning only when applied to particular factual circumstances.[163] Under a deferential standard of review, appellate courts would abandon their function as expositors of the law to the district courts in certain areas, such as probable cause, where the text of the rule itself provides little guidance for application.[164]

The nature of mixed questions of law and fact, however, may counsel against appellate forays into detailed factual analysis given the institutional limitations on appellate courts generally. While trial courts hear live testimony and are immersed in the factual minutiae of a dispute, the appellate court never has this "intimate familiarity with the details of the case."[165] Because determinations of probable cause and reasonable suspicion are based on the totality of the cir-

---

161. *See id.* at 251-52; *see also infra* notes 162-85 and accompanying text (discussing other justifications for de novo review, which include the law declaration role of the appellate courts, encouragement of the use of warrants, and appellate protection of constitutional rights).

162. *See Ornelas*, 116 S. Ct. at 1662.

163. *See id.* The Court explained that because the standards for probable cause and reasonable suspicion are given meaning only through application to specific fact patterns, de novo review is "necessary if appellate courts are to maintain control of, and to clarify the legal principles." *Id.*

164. *See id.* (citing Miller v. Fenton, 474 U.S. 104, 114 (1985)). The Court has also stated that de novo review is appropriate when "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication." Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 502 (1984). However, an appellate court's ability to declare the law is limited by the constraints on its time, which has resulted in a strengthening of the power of the trial courts. *See* Louis, *supra* note 86, at 1006.

165. *Ornelas*, 116 S. Ct. at 1664 (Scalia, J., dissenting); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945) (explaining that when an appellate court decides a case in which witnesses proffered testimony, "the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds"); 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) (asserting the trial court's expertise in judging witnesses and weighing the evidence). *But see* 5 SEARCH & SEIZURE, *supra* note 5, § 11.7(c), at 402 (discussing that appellate courts have the advantage of not being consumed by the arduous process of hearing evidence and have more time to reflect upon the key legal questions).

cumstances, and not precise factual formulae, direct exposure to the evidence in a case acquires heightened importance.[166] Additionally, trial courts are more adept than appellate courts in dealing with facts.[167] When mixed questions in contexts outside of the Fourth Amendment have entailed the application of complex fact patterns to a fluid legal standard, the Court has required a deferential standard.[168]

One example of the Supreme Court's application of deferential review in a legal dispute deemed highly fact-intensive by the Court is *Commissioner v. Duberstein*,[169] a case in which the question posed was whether payments from a business associate could constitute a gift, thereby making the payments excludable from taxation.[170] The Court deferred to the judgment of the lower court because such a fact-intensive, non-technical determination "must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case."[171]

Similar reasoning in *Cooter & Gell v. Hartmarx Corp.*[172] led the Court to apply a deferential standard to the determination of whether an attorney had a reasonable belief that a suit brought by the attorney was not frivolous under Rule 11 of the Federal Rules of Civil Procedure.[173] Given it's superior knowledge of the facts, the Court held that the trial court was better positioned than the court of appeals to "apply the fact-dependent legal standard."[174] Thus, an analysis of the functional capacities of the courts reveals the trial court's superiority in mastering complex fact patterns and seems to favor deferential review.

The *Ornelas* Court also reasoned that de novo review encour-

166. *See* Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (encouraging deference to the court better positioned to decide the issue).

167. *See* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.").

168. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399-405 (1990) (involving a frivolous claim suit under Federal Rule of Civil Procedure 11); Commissioner v. Duberstein, 363 U.S. 278, 290-91 (1960) (involving the question of whether certain business transactions constituted a gift under the tax laws); *infra* notes 169-74 and accompanying text (discussing these cases).

169. 363 U.S. 278 (1960).

170. *See id.* at 279-80.

171. *Id.* at 289.

172. 496 U.S. 384 (1990).

173. *See id.* at 399-405.

174. *Id.* at 402.

ages the constitutionally desired use of warrants by law enforcement officers.[175] The constitutional preference for searches and seizures executed pursuant to warrants legitimizes policies that encourage the police to obtain warrants prior to intrusive conduct.[176] The Court determined that "police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches."[177] This finding supports maintaining the distinction between the deferential review accorded searches by warrant and the de novo review applied to searches without a warrant. While *Gates* favored deferential review of magistrates' decisions to issue warrants in order to encourage their use,[178] applying a deferential standard to post-hoc determinations of the constitutionality of warrantless searches does nothing to encourage the use of warrants, since the search has already taken place.

Contrary to the Court's analysis, even under a deferential review regime police officers who obtain warrants before conducting searches or seizures will benefit from advantages developed by the Court to advance law enforcement interests that are not available for warrantless searches.[179] For example, evidence discovered by an officer armed with a warrant, who in good faith relies on that warrant, is admissible in court even if the probable cause underlying it is later found to be lacking.[180] Furthermore, the courts have a policy of validating warrants in cases where the probable cause question is close.[181] These judicial preferences remain as incentives to law enforcement officers to obtain warrants, so it is not clear that de novo review furthers a constitutional preference.

Appellate protection of constitutional rights is offered by de

175. *See Ornelas*, 116 S. Ct. at 1663.

176. *See id.*

177. *Id.*

178. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983).

179. *See Ornelas*, 116 S. Ct. at 1666 (Scalia, J., dissenting) ("Only a warrant can provide this assurance that the fruits of even a technically improper search will be admissible. Law enforcement officers would still have ample incentive to proceed by warrant.").

180. *See* United States v. Leon, 468 U.S. 897, 913 (1984).

181. *See Gates*, 462 U.S. at 237 n.10; United States v. Ventresca, 380 U.S. 102, 109 (1965) ("[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."); Jones v. United States, 362 U.S. 257, 270 (1960) (explaining that the reason for judicial deference to warrants in close cases is the importance of encouraging the police to use the warrant system). *But see* Poulin, *supra* note 95, at 152 (arguing that judicial deference to warrants leads to police domination of the warrant process since appellate courts defer to trial courts and trial courts often defer to the police).

novo proponents as another policy justification. Although the Court did not expressly hold that constitutional rights require more intense scrutiny by appellate courts than other matters, it did note that varied conceptions of what the Fourth Amendment demands would "be unacceptable" in a judicial system that values uniformity of the law.[182] Moreover, precedent in other constitutional realms supports this notion. In a case in which First Amendment values were at stake, the Court stressed the importance of correct judicial determinations when constitutional rights are implicated: "[T]he constitutional values protected by the rule make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied."[183] The Court has even regarded independent appellate review of determinations of rights as a "duty of constitutional adjudication."[184] If this special appellate scrutiny of constitutional rights does impact the determination of the appropriate standard of review, cases cited by the proponents of deferential review, such as *Duberstein,* which demand lesser scrutiny of fact-intensive mixed questions, are easily distinguished. Neither *Duberstein* nor *Cooter & Gell* involved a constitutional right.[185] Therefore, this policy factor seems to favor de novo review.

Finally, some commentators are critical of an appellate role in the judicial system that, in their view, has overstepped its rightful bounds.[186] External constraints on the courts of appeals are few since Supreme Court review is limited to only a small fraction of their decisions.[187] This void creates a dilemma for courts since "[v]isible constraints on the judicial decision-making process . . . enhance the

182. *See Ornelas*, 116 S. Ct. at 1662; *see also* Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 725 (1992) (noting that the Fourth, Fifth, and Sixth Amendments are particularly in need of judicial protection because of the inherent upper-hand police have in their dealings with the public).

183. Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 502 (1984).

184. Haynes v. Washington, 373 U.S. 503, 515 (1963).

185. *See supra* notes 169-74 and accompanying text (discussing *Duberstein* and *Cooter & Gell*).

186. *See* Lee, *supra* note 79, at 248-49 (citing LEON GREEN, JUDGE AND JURY 392-94 (1930), and Wright, *supra* note 9, at 751, as critics of the "creeping usurpation of trial court prerogatives by appellate courts"). One commentator counts Chief Justice Ellsworth as a critic of expansive appellate powers because of his observation that " 'it cannot be deemed a denial of justice, that a man shall not be permitted to try his ca[u]se two or three times over.' " Wright, *supra* note 9, at 780-81 (misquoting Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 329 (1796), by changing "cause" to "case").

187. *See* Lee, *supra* note 79, at 252-53. In comparison, external constraints on the district courts are strong since as a matter of right final judgments of those courts are appealable. *See id.* at 252.

credibility and moral force of judicial pronouncements."[188] Internal constraints, those imposed by the court itself, therefore attain magnified importance. One such restriction on the progression of unchecked appellate power is "an obligation to accord deference to another decision maker."[189] Opponents of appellate activism generally, and those concerned with the political legitimacy of the appellate courts, should therefore favor deferential review as an internal constraint.

Despite the Court's hints in favor of de novo review, precedent did not command the holding in *Ornelas* since the standard of review question never squarely appeared before the Court in *Brinegar* or its progeny.[190] Likewise, the application of the *Gates* standard by deferential review proponents seems inapposite given the important differences between the warrant and warrantless search contexts.[191] The policy considerations also are conflicting—in the final analysis efficiency cannot justify adoption of either standard because of the lack of data regarding the best use of appellate energies.[192]

Two factors, however, seem to favor deferential review: the functional capacities of the courts and the lack of precedential value in de novo review. Probable cause and reasonable suspicion are highly fact-driven determinations, and trial courts benefit from a vantage that promotes a deeper comprehension of the facts and context of a trial.[193] Appellate courts must rely on the written record and

188. *Id.* at 254.

189. *Id.* at 255.

190. *See* Alabama v. White, 496 U.S. 325, 331-32 (1990) (ruling on the corroborative value of an anonymous informant's tip in supporting reasonable suspicion); United States v. Cortez, 449 U.S. 411, 418-21 (1981) (examining in great detail the inferences made by the law enforcement officers); Terry v. Ohio, 392 U.S. 1, 27-28 (1968) (exploring the reasonable inferences that could have been made by the police); Brinegar v. United States, 338 U.S. 160, 171 (1949) (implicitly applying a de novo review by exploring the factual inferences); Carroll v. United States, 267 U.S. 132, 159-62 (1925) (examining the facts supporting probable cause).

191. When, as in *Gates*, the issue is whether a warrant is supported by probable cause, a deferential standard of review is appropriate in order to promote the Constitution's preference for warrants. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983); 5 SEARCH & SEIZURE, *supra* note 5, § 11.7(c), at 410-12 (discussing the *Gates* standard of review).

192. *See* Lee, *supra* note 79, at 251 (noting that no data exist to support the view that plenary review by appellate courts produces a more efficient judiciary).

193. *See Ornelas*, 116 S. Ct. at 1664 (Scalia, J., dissenting) ("An appellate court never has the benefit of the district court's intimate familiarity with the details of the case—nor the full benefit of its hearing of the live testimony."); *see also* FRIEDENTHAL ET AL., *supra* note 92, § 13.4, at 604 (noting the trial court advantage in viewing the witnesses and the appellate court's lack of demeanor evidence); 5 SEARCH & SEIZURE, *supra* note 5, § 11.7(c), at 401 (discussing advantages of the trial courts in reviewing evidence).

therefore lack the ability to judge the credibility of evidence and to accord appropriate weight to the evidence in light of the totality of the trial. The low precedential value of probable cause and reasonable suspicion determinations also favors the application of a deferential standard of review. Since each case will require independent determination of probable cause or reasonable suspicion, the appellate court adds little to this function given the impracticality of promulgating rules of universal application.[194]

One significant factor, however, does favor de novo review—protection of constitutional rights. Abandonment to the trial courts of rights as vital to our social compact as those guaranteed by the Fourth Amendment seems nearly a dereliction of appellate duty. Protection of our highest freedoms ought not be relegated only to the lowest courts in the federal system.[195] Ultimately, the standard of review dilemma must be resolved by gauging whether deferential review can adequately safeguard the Fourth Amendment's mandates or whether the demands of judicial efficiency are so great that they trump these constitutional concerns.

The practical impact of the Court's decision in *Ornelas* seems less weighty than the theoretical issues surrounding it. Determinations in the Seventh Circuit, at least, will be conducted under a new standard of review, but the other circuits already conform to the dictates of *Ornelas*.[196] The impact on the Supreme Court itself should be minimal as well. Although the Court has never expressly stated that de novo review was required in these cases, examination of the Court's opinions in cases such as *Cortez*[197] reveals a method of judi-

194. *See Ornelas*, 116 S. Ct. at 1661 (citing *Gates* for the proposition that multi-faceted probable cause determinations are seldom useful as precedents for later cases). Judge Posner, in holding that in the civil context mixed questions are subject to deferential review, reasoned: "Review is deferential precisely because it is so unlikely that there will be two identical cases; the appellate court's responsibility for maintaining the uniformity of legal doctrine is not triggered." Mucha v. King, 792 F.2d 602, 606 (7th Cir. 1986).

195. *See* Brinegar v. United States, 338 U.S. 160, 171 (1949) (explaining that allowing the trial court determination too much deference would allow the probable cause question in similar cases to "turn[] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause"); *see also Ornelas*, 116 S. Ct. at 1662 (citing with approval the *Brinegar* warning against excessive deference to the trial courts).

196. *See* United States v. Padro, 52 F.3d 120, 122 (6th Cir. 1995) (applying a de novo standard of review to determinations of probable cause and reasonable suspicion in the warrantless search context); United States v. Zapata, 18 F.3d 971, 975 (1st Cir. 1994) (same); United States v. Puerta, 982 F.2d 1297, 1300 (9th Cir. 1992) (same); United States v. Ramos, 933 F.2d 968, 972 (11th Cir. 1991) (same), *cert. denied*, 503 U.S. 908 (1992); United States v. Patrick, 899 F.2d 169, 171 (2d Cir. 1990) (same).

197. United States v. Cortez, 449 U.S. 411, 418-21 (1981); *see supra* notes 115-19 and

cial decision-making that can only be predicated on de novo review. It is likely that the Court's post-*Ornelas* decisions will employ the same exacting scrutiny as the pre-*Ornelas* decisions, albeit under the authority of an express standard of review rather than an implied one.

JEFFREY M. GRYBOWSKI

accompanying text (discussing the *Cortez* case).