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September 9, 2008

# The Meaning, Measure, and Misuse of Standards of Review

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# The Meaning, Measure, and Misuse of Standards of Review

By Amanda Peters

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## I. Introduction

Anyone who has ever had to draft a judicial opinion or an appellate brief has had to come to terms with standards of review. They are “the essential language of appeals.”<sup>1</sup> They are the “keystone to court of appeals decision-making.”<sup>2</sup> Standards of review play a critical role in the appellate decision-making process; however, they are sometimes ignored, manipulated, or misunderstood.<sup>3</sup>

Scholars and academics have difficulty explaining them consistently and often resort to using metaphors and analogies to describe standards of review.<sup>4</sup> As one scholar stated, “standard[s] of review are far easier to describe than to define.”<sup>5</sup> Even many law dictionaries fail to define the term “standard of review,” which compels lawyers and judges to create their own definitions.<sup>6</sup>

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<sup>1</sup> STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW*, ix (3d ed. 1999).

<sup>2</sup> MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, *LEGAL RESEARCH AND WRITING*, 493 (2006).

<sup>3</sup> See Jeffrey P. Bauman, *Standards of Review and Scopes of Review in Pennsylvania—Primer and Proposal*, 39 DUQ. L. REV. 513, 522 (2001) (blaming judicial confusion and ambivalence towards standards of review on the bar’s “difficulties in ascertaining their meaning and their appropriate application to a particular issue”).

<sup>4</sup> See e.g., W. Wendell Hall, *Standards of Review in Texas*, 34 ST. MARY’S L.J. 1, 8 (calling the standards of review “the appellate court’s ‘measuring stick’”) (quoting Alvin B. Rubin, *The Admiralty Case on Appeal in the Fifth Circuit*, 43 LA. L. REV. 869, 873 (1983)); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682-83 (2002) (analogizing standard of review to a telescope and using a sports metaphor to explain the appellate review process); Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991) (describing standards of review as the “height of the hurdles over which ... appellants must leap”); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 645-46 (1971) (“Standards of review indicate the decibel level at which the appellate advocate play to catch the judicial ear.”).

<sup>5</sup> Hofer, *supra* note 3, at 232.

<sup>6</sup> See Richard H. W. Maloy, *Standards of Review – Just the Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, n. 9 (2000) (stating that only one out of three legal dictionaries defines the term).

However, standards of review are not as complex as some may believe. Appellate courts exist primarily to review trial court decisions. If a case is appealed, an appellate court reviews the trial court's decisions for error. Appellate courts exercise their control over trial court decisions through their power to reverse the lower court after reviewing its decisions.<sup>7</sup> However, that power has parameters. Each issue that is appealed – whether it is an argument about the admission of evidence or a complaint about the trial court's application of law – is controlled by a standard of review. The standard of review guides the appellate court in determining “how ‘wrong’ the lower court has to be before it will be reversed.”<sup>8</sup> Maurice Rosenberg, professor of law at Columbia University Law School and one of the earliest and most quoted commentators on standards of review, once stated, “[t]here are wide variations in the degree of ‘wrongness’ which will be tolerated” by appellate courts.<sup>9</sup>

When used properly, standards of review require appellate judges to exercise self restraint and in so doing, act to create a more respected and consistent body of appellate law and a more efficient judicial system.<sup>10</sup> When judges manipulate the standard of review's scope, or ignore its underlying purpose, an inconsistent and unreliable body of law results.<sup>11</sup> One commentator aptly noted the various methods of manipulation as follows:

Some courts invoke [standards of review] talismanically to authenticate the rest of their opinions.... Other courts use standard[s] of review to create an illusion of harmony between the appropriate result and the applicable law.... Finally, some courts disregard standard[s] of review in their analysis entirely.<sup>12</sup>

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<sup>7</sup> See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 417 (2007).

<sup>8</sup> MARY BETH BEAZLEY, *APPELLATE ADVOCACY* 12 (Aspen Publishers, 2d ed. 2006).

<sup>9</sup> Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 176 (1978).

<sup>10</sup> See Kim, *supra* note 7, at 418 (2007) (stating that “reviewing courts [must] exercise self-restraint in the use of their reversal power”).

<sup>11</sup> See Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. PITT. L. R. xvi, xvi (1987) (asserting standards of review, when used as boilerplate, “had the appearance of being used not to confine the boundaries of appellate review prior to deciding particular issues in the case, but rather as mechanistic incantations inserted to justify a predetermined result”).

<sup>12</sup> See Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U.L. REV. 11, 12 (1994).

Though this observation was made nearly fifteen years ago, courts continue to wrestle with standards of review, often treating them like “automated verbiage” or worse.<sup>13</sup>

Few articles have been written about standards of review in general. No article has examined how standards of review, when applied, differ from what they were meant to accomplish in theory. Furthermore, no article has ever used empirical data to illustrate the ways that courts abuse standards of review. This article seeks to do those things. It attempts to identify the policy reasons that led to the creation of standards of review. It also endeavors to demonstrate, by using empirical data collected from over 8,000 cases in two sample jurisdictions, the various ways that appellate courts routinely misuse standards of review.

Section two of this article will discuss the history of modern day standards of review and the reasons for their use. Section three will briefly identify and comment on the most commonly used standards of review. Section four will point out the problems that arise when standards of review are not fully understood or properly employed by appellate courts. Section four will also discuss judicial opinions and empirical data gathered from Texas and California. These two sample jurisdictions illustrate how appellate judges sometimes disregard or manipulate the various standards of review. Section five offers advice that appellate judges and attorneys can use to prevent standards of review abuse. This article concludes by exhorting appellate courts to recognize the significance of standards of review and to abide by their limitations, so that the resulting body of law rises above suspicion.

## **II. Background and Policies of Standards of Review**

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<sup>13</sup> See Rosenberg, *supra* note 4, at 659.

Finding a general history on standards of review is virtually impossible. Though some articles have discussed particular standards of review in specific jurisdictions,<sup>14</sup> few have explored the entire history of modern day standards of review.<sup>15</sup> One must research the language of the standards to determine when they began to affect appellate review.

Common phrases and terminology pervade the various standards of review used across the country. Some of the common phrases and words include “clearly erroneous,” “abuse of discretion,” “substantial evidence,” and “de novo.” The phrases are somewhat antiquated and can be traced far back into America’s jurisprudence.<sup>16</sup> For example, the phrase “abuse of discretion” can be traced back to decisions rendered around 1800.<sup>17</sup> In those early opinions, the phrase had at least two definitions: sometimes it was used to describe a judge’s actions and other times it was used to characterize the level of error that would warrant reversal on appeal.<sup>18</sup>

Though the language for modern-day standards of review can be traced to early American opinions, the concept of standards of review was not firmly rooted in opinions until

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<sup>14</sup> See, e.g., Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997); Jeffrey W. Rennecker, *Ex Parte Appellate Procedure in the Patent Office and the Federal Circuit's Respective Standards of Review*, 4 TEX. INTELL. PROP. L.J. 335 (1996); Andrew W. Stuart, *"I Tell Ya I Don't Get No Respect!" The Polices Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals*, 23 LAW & POL'Y INT'L BUS. 749 (1992); Gregory W. Carman, *A Critical Analysis of the Standard of Review Applied by the Court of Appeals for the Federal Circuit in Antidumping and Countervailing Duty Cases*, 17 ST. JOHN'S J. LEGAL COMMENT 177 (2003); Laura M. Burson, *A.C. Aukerman and the Federal Circuit: What is the Standard of Review for a Summary Judgment Ruling on Laches or Equitable Estoppel?*, 32 LOY. L.A. L. REV. 799 (1999).

<sup>15</sup> See Kunsch, *supra* note 12, at 15-19 (examining the historical antecedents to modern day standards of review).

<sup>16</sup> See e.g., *Emmett v. Stedman*, 3 N.C. 15, 15 (N.C.Super.L. & Eq. 1797) (using the term “clearly erroneous” to describe the trial court’s action); *St. Louis Agricultural & Mechanical Ass'n v. Delano*, 1889 WL 1666, \*6 (Mo. Ct. App. 1889) (“...we are not, however, concerned with the question, whether there is a preponderance of evidence supporting the conclusion of the court; it is enough for us to see that it is supported by substantial evidence, and of this there is no doubt.”).

<sup>17</sup> See e.g., *Miller v. Spreher*, 2 Yeates 162, 162 (Pa. 1796) (“The action of the court below ...is not reviewable except in cases of abuse in discretion.”); *Yates v. Lansing*, 9 Johns 395, 395 (N.Y. 1811) (“The law places a just confidence in the judges, that they will act with caution and deliberation, and will not abuse their discretion.”); *Eldridge v. Lippincott*, 1 N.J.L. 397, 397 (N.J. 1795) (“The law gives the court a complete and unlimited discretion, subject to control only when it appears to have abused its powers to arbitrary or fraudulent purposes.”).

<sup>18</sup> See *id.*; *Postell v. Postell's Ex'rs*, 1 S.C. Eq. 173, 173 (S.C.Ch., 1790) (stating that where a decree was clearly erroneous, it was modified).

the latter part of the 20<sup>th</sup> Century.<sup>19</sup> For example, one scholar found that in a search through Ninth Circuit opinions, the phrase “standard of review” did not occur at all prior to 1969, materialized only a handful of times in the 1970s, began to surface more regularly in the 1980s, and began appearing frequently starting in the 1990s.<sup>20</sup>

One can find the earliest formulations of modern-day standards of review beginning in the late 1950s and 1960s.<sup>21</sup> The first commentators on standards of review began to discuss them in the 1970s and 1980s.<sup>22</sup> However, it was not until the late 1980s and early 1990s that appellate courts routinely began to include a discussion on the applicable standard of review in most opinions.<sup>23</sup> As Martha Davis, professor and coauthor of the treatise on federal standards of review<sup>24</sup> stated, “[t]he idea of using standards to guide appellate review of decisions of tribunals below has existed from the beginning of American jurisprudence, but the articulation of those standards is a fairly recent and still not always clear development.”<sup>25</sup> Having established that standards of review, as we know them today, are relatively modern creatures, it is important to examine why they were created and what purposes they serve.

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<sup>19</sup> See also G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 3-4 (2005) (tracing the United States Supreme Court’s various Constitutional scrutiny reviews to their development in the twentieth century).

<sup>20</sup> See Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas, The Fairchild Lecture*, 1994 WIS. L. REV. 9, 19-20 (1994). See also Andrew M. Mead, *Abuse of Discretion: Maine’s Application of a Malleable Appellate Standard*, 57 ME. L. REV. 519, 530 (2005) (noting the increasing frequency with which the term “abuse of discretion” began appearing in Maine opinions throughout the later part of the 20<sup>th</sup> century).

<sup>21</sup> See e.g., *Bartholomew v. Board of Zoning Adjustment*, 307 S.W.2d 730, 734 (Mo. Ct. App. 1957) (creating a substantial evidence standard of review for zoning cases); *Harmon v. North Pac. Union Conference Ass’n of Seventh Day Adventists*, 462 P.2d 432, 435 (Alaska 1969) (establishing de novo review for a taxation appeal involving no factual disputes). See also Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007) (noting that modern strict scrutiny review did not emerge until 1960).

<sup>22</sup> See, e.g., Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982) (stating that the abuse of discretion standard is not applied uniformly); Rosenberg, *supra* note 4, at 650-63 (arguing that the vagueness of the term abuse of discretion is merely a temporary fix to issues involving judicial discretion). See also Timothy P. O’Neill, *Standards of Review in Illinois Criminal Case: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 53 (1992) (noticing that academics and the United States Supreme Court had recently begun to take standards of review seriously).

<sup>23</sup> See e.g., California empirical data, on file with author.

<sup>24</sup> STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (3d ed., 1999).

<sup>25</sup> Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47 (2000).

## A. *The Purposes of Standards of Review*

Standards of review balance the power among the courts, enhance judicial economy, standardize the appellate process, and give the parties to a lawsuit an idea of their chance of success on appeal. All of these policies are interconnected. And, when appellate court judges use standards of review faithfully and consistently, these principles are upheld. An examination of the policies undergirding standards of review leads to an appreciation of their role in judicial decision making and an appreciation of the significant negative effect brought about when they are misunderstood, manipulated, or ignored.

### 1. *Balance of Power*

“It runs strongly against the grain of our traditions to grant uncontrollable and unreviewable power to a single judge.”<sup>26</sup> Consequently, every American jurisdiction has a hierarchy that includes a trial court and at least one reviewing court. Trial courts and appellate courts serve different functions. The trial court is charged with determining the facts of the case at hand and applying the correct law to those facts. One scholar noted the following about the trial court’s role in the judicial system:

In an ongoing trial, many factors interact and accumulate. For certain issues, interaction among the entire panoply of factors is essential background for a decision. This interaction cannot be entirely reflected in the record. Because the trial judge is able to observe all the happenings at a trial first hand, his or her decisions about such issues should be accorded substantial deference.<sup>27</sup>

In contrast to the trial court’s expertise as first-hand observer, fact finder, and litigation manager,<sup>28</sup> the appellate court is primarily interested in reviewing the trial court’s decisions and

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<sup>26</sup>Rosenberg, *supra* note 9, at 184.

<sup>27</sup> Kunsch, *supra* note 12, at 35.

<sup>28</sup> See Kim, *supra* note 7, at 425, 438 (stating that trial judges are experts at determining witness credibility and facts).

ascertaining whether the law has been correctly applied. Because appellate courts focus on legal analysis instead of fact determination, and because they sit in multi-judge panels, they are in a better position to analyze decisions of law.<sup>29</sup>

Standards of review help judges in trial and appellate courts maintain a healthy respect for the others' strengths.<sup>30</sup> Standards of review "assign power among judicial actors."<sup>31</sup> They force the appellate court to recognize that the trial court proceedings were not just a warm-up exercise for the appellate court and that the decision reached in the lower court should be the final determination unless, of course, there was harmful error.<sup>32</sup>

The decision of the trial court becomes meaningless<sup>33</sup> when appellate judges fail to exercise self-restraint. Standards of review guide appellate courts into the uniform exercise of their judicial authority and help them reign in their power when it may have exceeded acceptable boundaries. The standard of review, in theory at least, works to balance the unique authority given to each.

## 2. *Judicial Economy*

The balance of judicial power and the theory of judicial economy go hand in hand. "Standards of review exist so that the legal process may work efficiently and fairly."<sup>34</sup> If

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<sup>29</sup> See *id.* at 437.

<sup>30</sup> See Hall, *supra* note 4, at 54 (2006); Kim, *supra* note 7, at 442 ("How lower court judges should decide when they have discretion is a difficult and highly contested issue, one that goes to important questions about institutional design and the appropriate balance between centralizing judicial authority and sharing that power between levels of the hierarchy."); Maloy, *supra* note 6, at 609 (standards of review "assure that the separate functions of trial and appellate courts in a judicial system are maintained").

<sup>31</sup> *Id.* See also Kim, *supra* note 7, at 442 (standards of review reign in appellate court discretion when it is in conflict with trial court discretion).

<sup>32</sup> See Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423, 465-66 (1994).

<sup>33</sup> See Kevin Casey, *et al.*, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 359 (2002) (describing the need for standards of review to avoid the temptation of appellate retrial).

<sup>34</sup> Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367, 397 (1997).

appellate courts examine all of the decisions made below without any deference to rulings, then the trial court's proceedings are meaningless. However, a deferential standard of review does not only work to preserve the integrity of the trial court, it also serves to protect the appellate court's valuable time and resources.<sup>35</sup> These resources would be wasted if appellate courts attempted to re-litigate trials on appeal.<sup>36</sup> Indeed, such efforts result in a poor use of judicial resources<sup>37</sup> since appellate judges can only glean facts from "sterile printed pages."<sup>38</sup> As the United States Supreme Court noted,

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.... [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the 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.<sup>39</sup>

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<sup>35</sup> See e.g., Crissa A. Seymour Cook, *Constructive Criticism: Phillips v. Awh Corp. and the Continuing Ambiguity of Patent Claim Construction Principles*, 55 U. KAN. L. REV. 225, 266-267 (2006) (recognizing that high reversal rates create more appeals and more costs to the judicial system).

<sup>36</sup> See Casey, *supra* note 33, at 359 (describing the need for standards of review to avoid the effort of appellate retrial). See also Brent E. Kidwell, *A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed On Appeal?*, 26 IND. L. REV. 117, 138 (1992) (reassessing facts from a cold reporter's record is unfair to litigants).

<sup>37</sup> See Hofer, *supra* note 4, at 241.

<sup>38</sup> Earl R. Waddell III & Tracy L. Abell, *A New Evidentiary Standard for Criminal Appellate Review: Clewis v. State*, 3 TEX. WESLEYAN L. REV. 235, 271 (1997). See also *Clewis v. Texas*, 922 S.W.2d 126, 151 (Tex. Crim. App. 1996) (*en banc*) (McCormick, P.J., dissenting. Keller, J., joins) (stating, "What this case boils down to is whether in criminal cases the appellate courts can substitute their judgment for the jury's on questions of credibility and weight of the evidence. Because the majority does not leave these matters to be resolved at the local level of the jury, I dissent); *Clewis*, 922 S.W.2d at 159 (White, J., dissenting) (declaring, "from this day forward, the decision by the majority will permit on some occasions as few as three judges of a mid-level appellate court to substitute their own personal judgment of the evidence for the decision of the twelve citizens of a jury who observed the witnesses and determined their credibility and truthfulness, personally listened to the presentation of testimony and physical exhibits, assessed the weight and credibility of all the evidence and rendered a verdict beyond a reasonable doubt based upon all of this under the direction and instructions of an experienced trial court. This decision is no less than an usurpation of the jury's role as the finder of fact in criminal cases."); Elizabeth A. Ryan, *The 13th Juror: Re-Evaluating the Need for a Factual Sufficiency Review in Criminal Cases*, 37 TEX. TECH L. REV. 1291, 1294 (2005) (exclaiming, "What happened to the jury in Texas?").

<sup>39</sup> *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574-75 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

Standards of review facilitate judicial economy not only because they prevent relitigation of the trial on appeal, but also because they simplify and focus the court's review process.<sup>40</sup> By permitting the appellate court to sign off on a number of trial court decisions,<sup>41</sup> standards of review allow the appellate court the opportunity to spend more time and resources on a close review of the issues raised on appeal.

### 3. *Standardized Review Process*

Closely connected to the policy of judicial economy is the idea of a uniform review process. A standardized review process is the ideal.<sup>42</sup> Because an appellate court's role is merely to review decisions made in the trial court, it is necessary for appellate courts to adopt and apply consistent standards of review. Without such a standardized procedure, the appellate court would simply be substituting its judgment for that of the trial court or, as the United States Supreme Court has described, sitting as "the thirteenth juror."<sup>43</sup> While it is true that a small number of issues on appeal do require the appellate judge to view the evidence as a juror,<sup>44</sup> most do not. Standards of review make sure each appellate judge sees the issues presented on appeal from the same angle. Additionally, they make sure the judge's view is an appropriate one.

### 4. *Notice to Parties*

When an appellate court's review is standardized, the parties interested in appealing a lower court decision have a better understanding of what to expect on appeal. Appellants with

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<sup>40</sup>See Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence At Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 659 (1989).

<sup>41</sup> See Rosenberg, *supra* note 4, at 645-46 (suggesting that others have argued that judicial economy "requires an appellate court to "sign off on a large proportion of the decisions a trial court makes, for otherwise it would never be able to get its work done").

<sup>42</sup> See Cook, *supra* note 35, at 266 (suggesting that in theory, a standard of review should result in standardized precedent).

<sup>43</sup> *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

<sup>44</sup> See *infra*, notes 160-75, and accompanying text.

less compelling claims have a more realistic view about their chances of winning and are less likely to take up the court's time.<sup>45</sup> As one commentator in Utah stated, standards of review "doom any number of appeals from the start... and are critical in tailoring the client's expectations of what can realistically be achieved."<sup>46</sup> The American Academy of Appellate Practitioners recently suggested that the success of appellate settlements rests upon an appellate lawyer's ability to educate trial attorneys and clients about the remedies available on appeal and the standards of review that govern the review process.<sup>47</sup> Without such uniformity in the appellate decision making process, appellants are unable to gauge success on appeal and are more likely to waste judicial resources.<sup>48</sup>

### 5. Conclusion

Standards of review balance power among judges, create a more efficient judicial system, make sure that decisions of like cases are decided similarly, and provide notice to potential appellants about the likely outcome on appeal. These four policies work together to guarantee that the system is functioning properly and to ensure public confidence in the appellate process. In order to understand more fully how standards of review are falling short of these goals, it is important to briefly discuss the most commonly used standards of review.

## **III. Standards of Review: Terms of Art that Guide the Appellate Review Process**

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<sup>45</sup> See Bauman, *supra* note 3, at 521 (stating that standards of review "send a clear message to the bar that not all matters should be appealed").

<sup>46</sup> Michael D. Zimmerman, *Business and Commercial Litigation in Federal Courts, Second Edition Edited By Robert L. Haig*, 21 UTAH BAR JOURNAL, 45, 46 (2008) (book review).

<sup>47</sup> See American Academy of Appellate Lawyers, *Statement on the Functions and Future of Appellate Lawyers*, 8 J. APP. PRAC. & PROCESS 1, 8 (2006).

<sup>48</sup> See Kunsch, *supra* note 12, at 19-20 (asserting that with more deferential review, parties are less likely to appeal, which conserves court resources and maintains lower court morale).

Numerous articles have detailed the most frequently used standards of review in appellate courts across the nation.<sup>49</sup> Judge Posner once stated that “there are more verbal formulas for the scope of appellate review ... than there are distinctions actually capable of being drawn in the practice of appellate review.”<sup>50</sup> While commentators have noted up to thirty different standards of review,<sup>51</sup> many of these are just variations of the four most common standards of review, which are abuse of discretion, clearly erroneous, substantial evidence, and de novo. A brief discussion and a general commentary on these standards of review will follow.

### A. *The Standards of Review Spectrum*

Most academics, scholars, and commentators who discuss standards of review tend to plot them on an imaginary spectrum.<sup>52</sup> In fact, this is often how they are "defined," since the standard of review's language fails to accurately describe how broad its scope actually is. On this spectrum, abuse of discretion is the standard of review that is most deferential to the trial judge's rulings.<sup>53</sup> Clearly erroneous and substantial evidence are usually plotted in the middle

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<sup>49</sup> See generally, Friendly, *supra* note 22, at 754-83 (examining the abuse of discretion standard of review and its many definitions); Drey Cooley, *Clearly Erroneous Review is Clearly Erroneous: Reinterpreting Illinois v. Gates and Advocating De Novo Review for a Magistrate's Determination of Probable Cause in Applications for Search Warrants*, 55 DRAKE L. REV. 85, 112 (arguing that deferential review of magistrate decisions regarding search warrants is inconsistent with Supreme Court precedent and violative of Fourth Amendment rights); Christopher P. Terry, *On the Frontiers of Knowledge: A Flexible Substantial Evidence Standard of Review for Zoning Board Tower Siting Decisions*, 20 TEMP. ENVTL. L. & TECH. J. 147, 149-55 (examining the split among Circuit Courts on which standard of review to use in zoning board tower siting decisions).

<sup>50</sup> *United States v. Boyd*, 55 F.3d 239, 242 (7<sup>th</sup> Cir. 1995).

<sup>51</sup> See Maloy, *supra* note 6, at 610-11 (noting thirty various standards of review and observing that state courts are more inclined to adopt unique or variant standards than federal courts).

<sup>52</sup> See e.g., Casey, *supra* note 33, at 287 (“the four standards of review, arrayed in order of increasing deference to the district court (arranging de novo, clearly erroneous, substantial evidence and abuse of discretion in order from least deferential to most deferential); James F. Holderman & Halley Guren, *The Patent Litigation Predicament in the United States*, 2007 U. ILL. J.L. TECH. & POL'Y 1, 14 (2007) (plotting abuse of discretion and de novo on opposite sides of a spectrum with clear error review in the middle of the two); Andrew Franklin Peterson, *Ten Years of Pena: Revisiting the Utah Mixed Question Standard of Appellate Review*, 19 BYU J. PUB. L. 261, 263 (2004) (stating that deferential review of facts and de novo “occupy the polar ends of the discretion spectrum”).

<sup>53</sup> See e.g., *People v. Coleman*, 701 N.E.2d 1063, 1089 (Ill. 2008) (“Our supreme court has also recognized that the abuse of discretion standard is ‘the most deferential standard of review available with the exception of no review at all.’”) (quoting Martha Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 480 (1988)); In

of the imaginary continuum and de novo is plotted on the opposite end of abuse of discretion because it is the least deferential standard of review.<sup>54</sup>

### ***B. Abuse of Discretion***

The abuse of discretion standard, which is the most deferential to trial court decisions, is often used to review procedural matters decided by the trial court.<sup>55</sup> Perhaps no other standard of review has been discussed more.<sup>56</sup> While the phrase “abuse of discretion” initially appeared in American decisions rendered in the late 18<sup>th</sup> and early 19<sup>th</sup> century,<sup>57</sup> the term has never been consistently defined,<sup>58</sup> which has led to criticism.<sup>59</sup> One California appellate judge stated that abuse of discretion “is so amorphous as to mean everything and nothing at the same time and [is] virtually useless as an analytic tool.”<sup>60</sup> Justice Felix Frankfurter described abuse of discretion as a “verbal coat of ... many colors.”<sup>61</sup> Indeed, some jurisdictions even have gradations of abuse of

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re N.M. Indirect Purchasers Microsoft Corp., 149 P.3d 976, 986 (N.M. Ct. App.,2006) (describing abuse of discretion as “already one of the most deferential standards of review”).

<sup>54</sup> See *id.*

<sup>55</sup> See *e.g.*, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (using abuse of discretion to review evidentiary rulings); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103 (1981) (reviewing decisions to grant or deny a trial court motion for abuse of discretion); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11<sup>th</sup> Cir. 1999) (reviewing the denial of a discovery order for abuse of discretion).

<sup>56</sup> See generally, *Mead*, *supra* note 20, at 519 (2005); Lindsay Gayle Stevenson, *Staton v. Boeing: An Exercise in the Abuse of Discretion Standard of Review*, 37 LOY. L.A. L. REV. 123 (2003); Mark P. Painter & Paula L. Welker, *Abuse of Discretion: What Should It Mean Under Ohio Law?*, 29 OHIO N.U. L. REV. 209 (2002); Melissa Grant, *Battling for ERISA Benefits in the Ninth Circuit: Overcoming Abuse of Discretion Review*, 28 SW. U. L. REV. 93 (1998); Cynthia K.Y. Lee, *A New “Sliding Scale Of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1 (1997).

<sup>57</sup> See *e.g.*, *Miller v. Spreher*, 2 Yeates 162, 162 (Pa. 1796) (“The action of the court below ...is not reviewable except in cases of abuse in discretion.”); *Yates v. Lansing*, 9 Johns 395, 395 (N.Y. 1811) (“The law places a just confidence in the judges, that they will act with caution and deliberation, and will not abuse their discretion.”); *Eldridge v. Lippincott*, 1 N.J.L. 397, 397 (N.J. 1795) (“The law gives the court a complete and unlimited discretion, subject to control only when it appears to have abused its powers to arbitrary or fraudulent purposes.”).

<sup>58</sup> See *Davis*, *supra* note 25, at 77 (“Clearly, there is no such thing as *one* abuse of discretion standard. It is at most a useful generic term....[that] more accurately describes a *range* of appellate responses.”).

<sup>59</sup> See *Hall*, *supra* note 4, at 58-59. See also *Arneson v. Arneson*, 670 N.W.2d 904, 910 (S.D. 2003) (stating that the abuse of discretion standard “defies an easy description”).

<sup>60</sup> *Hurtado v. Statewide Home Loan Company*, 167 Cal.App.3d 1019, 1022 (Cal. App. 1985).

<sup>61</sup> *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting). See also Charles A. Borek, *Social Science Explanations for Disparate Outcomes in Tax Court Abuse of Discretion Cases: A Tax Justice Perspective*, 33 CAP. U. L. REV. 623, 634 (2005) (calling deference “an elastic concept”).

discretion review.<sup>62</sup> Because the phrase itself is vague, many courts tack on additional verbiage to their abuse of discretion standard in an attempt to more clearly delineate its boundaries.<sup>63</sup>

In some jurisdictions, abuse of discretion is defined so that a reversal is warranted only if the trial court's decision was arbitrary or irrational.<sup>64</sup> Other jurisdictions state that a judge abuses her discretion when she acts outside the scope of the applicable law.<sup>65</sup> Regardless of the definition, however, in theory it is a difficult standard for an appellant to overcome.<sup>66</sup> Consequently, as a matter of strategy, appellants often avoid framing issues on appeal which require review under this highly deferential standard.

### *C. Clearly Erroneous*

A trial court's determinations, which are based upon its findings of fact, are often reviewed under the clearly erroneous or clear error standard of review.<sup>67</sup> Like abuse of discretion, this standard of review grants the trial court much deference. The Seventh Circuit Court of Appeals once stated that in order for a trial court's decision to warrant reversal under this standard, the determination must be "dead wrong," so wrong that it "must be more than maybe or probably wrong, it must ... strike us as wrong with the force of a five-week-old dead,

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<sup>62</sup> See Davis, *supra* note 25, at 77 ("Clearly, there is no such thing as *one* abuse of discretion standard. It is at most a useful generic term....[that] more accurately describes a *range* of appellate responses.").

<sup>63</sup> See *infra*, notes 119-23 (for a discussion on Pennsylvania and Colorado courts that found the surplus language on their abuse of discretion standard of review confusing).

<sup>64</sup> See *e.g.*, *In re Marriage of Pond and Pomrenke*, 885 N.E.2d 453, 458 (Ill. App. Ct. 2008); *State v. McOmer*, 173 P.3d 690, 694 (Mont. 2007); *State v. Wong*, 40 P.3d 914, 919 (Haw. 2002); *Breech v. Turner*, 712 N.E.2d 776, 780 (Ohio Ct. App. 1998); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996); *Allegra*, *supra* note 32, at 434 (describing the Tax Court's review of Commissioner decisions under section 482 appeals).

<sup>65</sup> See *e.g.*, *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (abuse of discretion happens when trial court makes findings unsupported by the evidence or improperly applies the law); *State v. Lord*, 165 P.3d 1251, 1256 (Wash. 2007) (defining one type of abuse of discretion as applying the wrong legal standard).

<sup>66</sup> See *Arneson v. Arneson*, 670 N.W.2d 904, 910 (S.D., 2003) (stating that despite being hard to define, abuse of discretion amounts to "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable").

<sup>67</sup> See *e.g.*, Henry W. McGee, Jr. & Brock W. Howell, *Washington's Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards*, 31 SEATTLE U. L. REV. 549, 592 n.30 (2008) (stating that the clearly erroneous standard of review generally applies to legal determinations).

unrefrigerated fish.”<sup>68</sup> Along the same line, but with perhaps less vivid imagery, the United States Supreme Court has suggested that a reviewing court must not reverse the trial court under this standard of review merely because it disagrees with it or because it would have interpreted the facts differently.<sup>69</sup> “When a trial judge's finding is based on his 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, that finding, if not internally inconsistent, can virtually never be clear error.”<sup>70</sup> Though not as deferential as abuse of discretion, clearly erroneous review is still very respectful to the trial court’s factual determinations.

#### ***D. Substantial Evidence***

The substantial evidence standard is used to examine factual determinations made in the lower trial court. When substantial evidence supports the trial court's decision, the reviewing court has no authority to reverse the lower court,<sup>71</sup> which seems clear enough on first reading. But, the problem with this standard, as some commentators suggest, is that there is effectively no difference between it and the clearly erroneous standard of review.<sup>72</sup> The two standards are so similar in their wording and application, that many believe there really is very little, if any, difference between the two.<sup>73</sup> However, the United States Supreme Court has suggested that the distinction between substantial evidence and clear error is “a subtle one – so fine that (apart from

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<sup>68</sup> *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7<sup>th</sup> Cir. 1988), *cert. denied*, 493 U.S. 847 (1989).

<sup>69</sup> *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-75 (1985).

<sup>70</sup> *Id.* at 575.

<sup>71</sup> *See e.g., Rupf v. Yan*, 85 Cal.App.4th 411, 429–430 (Cal. 2000) (stating that the appellate court must not substitute its judgment for the trial court’s judgment when substantial evidence exists to support the trial court’s decision).

<sup>72</sup> *See e.g., Casey*, *supra* note 33, at 308 (suggesting that because application of either test usually results in the same result – an affirmation of the trial court decision – the practical differences between the two are hard to decipher).

<sup>73</sup> *See e.g., Verkuil*, *supra* note 4, at 682-83 (“‘Clearly erroneous’ is distinguished from ‘substantial evidence’ in theory although the two standards are often equated in practice.”).

the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.”<sup>74</sup>

### *E. De Novo*

De novo review is generally reserved for the review of legal issues.<sup>75</sup> De novo review of legal issues dates back to the formation of our country.<sup>76</sup> The Latin phrase “de novo” means “anew” or “from the beginning.”<sup>77</sup> Courts using de novo review examine the trial court’s application of the law without affording the lower court discretion. But even de novo review is subject to interpretation.<sup>78</sup>

To contrast the difference between de novo review, which is the least deferential standard, and abuse of discretion, which is the most deferential, one commentator suggested that under de novo review, the lower court’s determination is protected by “a gossamer film” whereas under abuse of discretion, the trial court’s decision “is safeguarded by a Kevlar shield.”<sup>79</sup> Theoretically, appellate courts have much more authority to reverse a trial court using de novo review and far less authority to reverse a trial court using abuse of discretion, which can be viewed as the polar opposite of de novo review.<sup>80</sup>

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<sup>74</sup> *Dickinson v. Zurko*, 527 U.S. 150, 162-63 (1999).

<sup>75</sup> Kunsch, *supra* note 12, at 37-38.

<sup>76</sup> See Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 911 (1989) (“[I]ndependent appellate inquiry into questions of law has marked our republic’s legal system from its earlier days.”).

<sup>77</sup> BLACK’S LAW DICTIONARY 435 (6<sup>th</sup> ed. 1990).

<sup>78</sup> See Steven Alan Childress, *A 1995 Primer on Standards of Review in Federal Civil Appeals*, 161 F.R.D. 123, 128 (1995) (asserting that de novo means that the appellate court does not give the trial court any deference, not that it requires a full rehearing or new findings of fact); Casey, *supra* note 33, at 284 (suggesting that even though the appellate court is entitled to review the issue anew, in practice the appellate court cannot escape examining the trial court’s reasoning for the decision, which may have a “subtle effect” on the appellate court’s determination).

<sup>79</sup> See e.g., Allegra, *supra* note 32, at 473.

<sup>80</sup> Andrew Franklin Peterson, *Ten Years of Pena: Revisiting the Utah Mixed Question Standard of Appellate Review*, 19 BYU J. PUB. L. 261, 263 (2004) (stating that deferential review of facts and de novo “occupy the polar ends of the discretion spectrum”).

### ***F. Conclusion***

Each standard of review, in theory at least, serves to perform a specific task and all but de novo review grant the trial court considerable discretion in making decisions. Theoretically, standards of review are one thing; in practice, they are often another. As Martha S. Davis states, “[t]he labels identifying the levels of intensity of appellate review sound deceptively simple, but not one of them admits of easy analysis.”<sup>81</sup>

## **IV. Exposing the Problems in Standard of Review Application**

The goal of this section is to analyze the problems with standards of review in their application. It would be impossible to examine how every jurisdiction uses each of its standards of review. But, if the focus was shifted from the more universal to the more specific, then the outcomes of a single legal issue reviewed under a single standard of review could be compared. Of course, with similar facts, similar issues, and similar standards of review, one would expect similar outcomes.<sup>82</sup> But that is not what always happens.

For the purpose of keeping the focus of this article more specific and less abstract, the author chose to examine two sample jurisdictions, California and Texas, in an attempt to illustrate how standards of review are sometimes misused. California and Texas were chosen because they both have a large body of law and their standards of review, unlike many smaller jurisdictions, do not mimic those used in the federal system. Rather, they are sometimes uniquely worded and periodically undergo revision. Because they are uniquely worded and

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<sup>81</sup> See Davis, *supra* note 12, at 25.

<sup>82</sup> See also Cook, *supra* note 35, at 266-267 (noting that appeals in the Federal Circuit on patent claim construction cases lead to inconsistent and conflicting lines of authority, in part because of the high reversal rate under the de novo standard of review).

because they periodically undergo revision, they provide a rich sample of law and a fertile ground for analysis.

While there are appellate judges in every jurisdiction who respect trial court decisions and defer to the degree required under the appropriate standard of review, other judges do not. Often appellate judges ignore the standards of review, are confused by them, or cleverly manipulate them to achieve a specific result. When one considers the innate ambiguities in the language of the standards of review themselves and the fact that they limit the authority of the appellate judges, it is no wonder that some appellate courts attempt to resist the restraint imposed by the controlling standard of review. This section will explore some of the difficulties inherent in the application of standards of review.

#### ***A. Problem Number One: Their Ambiguous Language***

As Steven Alan Childress, one of the authors of the treatise on federal standards of review,<sup>83</sup> said, “The various catchphrases associated with standards of review are often difficult for court and counsel to define and apply in practice.”<sup>84</sup> That he said it more than ten years ago makes no difference; standards of review still plague judges and attorneys in their application. This section will examine the theoretical problems with the language of the standards of review and it will identify ways that courts have tried and failed to clarify their language with definitions.

Standards are hard to define and apply, in part, because of their terminology.<sup>85</sup> The language is often inexact, which makes their boundaries imprecise. Standard of review language

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<sup>83</sup> See STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (3d ed. 1999).

<sup>84</sup> Childress, *supra* note 78, at 126.

<sup>85</sup> See Fallon, *supra* note 21, at 1271-72 (asserting that one of the problems with strict scrutiny review is that it confuses practitioners with its vague terminology).

has been described as defining moods, rather than precisely defining legal boundaries.<sup>86</sup> Justice Felix Frankfurter once called standards of review “undefined defining terms.”<sup>87</sup> Consequently, academics have resorted to defining standards of review through an imaginary spectrum,<sup>88</sup> which poses a unique problem.

The continuum illustration, at best, gives a judge only a vague understanding of the boundaries that each standard of review imposes. One commentator rejected the idea of a continuum altogether because the various standards implicate different approaches; for example, substantial evidence looks at the quantum of evidence supporting the trial court’s decision, de novo requires scrutinized examination from a different judge’s viewpoint, and clearly erroneous and abuse of discretion require an impressionistic perspective of how wrong the alleged error was.<sup>89</sup> From this analysis, it is clear that the standard of review continuum is flawed.

Some critics praise standards of review for their ambiguity, believing that their imprecise nature allows courts to apply them to the wide variety of cases they encounter.<sup>90</sup> However, when the language of the standard itself is vague, courts are more likely to define the standard, heaping on qualifiers and explanations so that it becomes more convoluted over time.<sup>91</sup> Added definitions are sometimes just as vague as the standard of review language. One commentator in Michigan, stated that the Michigan abuse of discretion “definition has been both quoted and

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<sup>86</sup> Casey, *supra* note 33, at 284.

<sup>87</sup> *Universal Camera Corp. v. Nat’l Labor Relations Bd.* 340 U.S. 474, 489 (1951).

<sup>88</sup> See e.g., Allegra, *supra* note 32, at 462-73 (mapping abuse of discretion, substantial evidence, clearly erroneous, and de novo, from most deferential to least deferential standard of review); Verkuil, *supra* note 4, at 691 (coining standard deference as a “verbally defined sliding scale”).

<sup>89</sup> See Kunsch, *supra* note 12, at 14.

<sup>90</sup> See e.g., Kim, *supra* note 7, at 410 (stating rules of law need an “open texture” to apply to the variety of situations judges encounter) (quoting H.L.A. Hart, *THE CONCEPT OF LAW* 124 (1961); Kunsch, *supra* note 12, at 13 (stating that standards of review “are and should be flexible”).

<sup>91</sup> See Kunsch, *supra* note 12, at 49 (asserting that adding more qualifying and defining language to standard of review terminology further confuses matters).

assailed and the precise meaning of the phrase...evolves with the composition of the court.”<sup>92</sup>  
Michigan is not alone.

### 1. Case Study: California’s Abuse of Discretion Definition

The author examined nearly 250 opinions in California related to motion to disqualify counsel appeals. This author chose to review this body of law because it was a smaller class of appeals using a revised abuse of discretion standard of review. Every case that has ever raised a motion to disqualify counsel issue on appeal in California was studied.

The author catalogued the following data upon reading each case: the citation, appellate court division, year, judges, outcome at trial, outcome on appeal, standard of review used, and subsequent history. The author also noted any unusual holdings or dicta in relation to the standard of review. The data and notes were used to closely examine the application of the standard of review in California intermediate appellate courts.

California’s standard of review for motions to disqualify attorneys provides many examples of bad definitions courts have used to explain a particular standard of review. California’s attempt to define “abuse of discretion” in the context of motions to disqualify attorneys is an example of how standard of review language can become hazy even with valiant attempts at clarification.

In California, the state appellate courts use one of three standards of review: abuse of discretion, substantial evidence, and de novo review.<sup>93</sup> The trial court’s granting or denial of a

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<sup>92</sup> Michael P. Taylor, *Evidence – Standard of Review – Abuse of Discretion – Although an Abuse of Discretion May Be Found Where a Trial Court Made Its Ruling Within an Erroneous Legal Framework, Such a Finding is Improper Where the Court of Appeals Merely Viewed the Evidence in a Different Manner: People v. Hine*, 650 N.W.2d 659 (Mich. 2002), 81 U. DET. MERCY L. REV. 261, 263 (2004).

<sup>93</sup> See Jon B. Eisenberg et al., *Cal. Prac. Guide Civ. App. & Writs*, Ch. 8-C, *Scope and Limits of Appellate Review* (2008). “These three standards are commonly used and commonly understood standards of review. Some

motion to disqualify an attorney is generally reviewed for abuse of discretion.<sup>94</sup> Unique policy considerations are involved in motions to disqualify attorneys and these policy considerations sometimes weigh against the abuse of discretion standard.<sup>95</sup>

Appellate courts in California have recognized that motions to disqualify can be used to harass opposing counsel, to delay litigation, and to force an adversary to settle the case for far less than it is worth.<sup>96</sup> Indeed, parties sometimes ask that opposing counsel be removed from the case for purely strategic reasons, not because there is an actual conflict of interest.<sup>97</sup> Another fact taken into consideration by both the trial and appellate courts is that the client's right to her counsel of choice must be delicately weighed against the need to maintain ethical standards in the legal profession.<sup>98</sup> Because of these considerations, appellate courts must make sure they respect trial court rulings on motions to disqualify counsel, carefully examine the motives for filing the motion, and protect the party's interests in keeping the lawyer on the case.<sup>99</sup> This is no easy task for the reviewing court.

Before 1999, California courts almost always used the abuse of discretion standard to review motion to disqualify appeals.<sup>100</sup> During this time, however, lower appellate courts defined abuse of discretion in different ways; some of those definitions were at best problematic

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practitioners would argue that California has a fourth standard of review that is not typical of most jurisdictions: a presumption in favor of appellant. This standard requires the appellate court to review the matter, "presuming the truth of allegations or evidence favorable to appellant." *Id.* at 8:36.

<sup>94</sup> *See id.* at 8:94.1.

<sup>95</sup> *People ex. Rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1144 (Cal. 1999).

<sup>96</sup> *See Reed v. Superior Court*, 92 Cal.App.4th 448, 456 (Cal. Ct. App., 2001).

<sup>97</sup> *See Mark F. Anderson, Motions to Disqualify Opposing Counsel*, 30 WASHBURN L.J. 238, 238 (1991).

<sup>98</sup> *See Forrest v. Baeza*, 58 Cal.App.4th 65, 73 (Cal. Ct. App. 1997).

<sup>99</sup> *See People ex. Rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1144 (Cal. 1999).

<sup>100</sup> *See California empirical data*, on file with author. *But see Cho v. Superior Court*, 45 Cal. Rptr. 2d 863 (Cal. Ct. App. 1995) (using de novo review); *In re Lee G.*, 1 Cal. Rptr. 2d 375, 380 (Cal. Ct. App., 1991) (using de novo review).

and at worst completely inadequate. For example, in the late 1970's a few California appellate courts<sup>101</sup> stated that an abuse of discretion occurs "in the rare instance when the facts command discretion be exercised in but one way."<sup>102</sup> Another poor definition used in the 1970's simply stated that a trial court's discretion must not be inappropriately exercised.<sup>103</sup> Neither definition explains the basis for the appellate court's determination. They are both crafted with nebulous language that fails to add anything meaningful to the term "abuse of discretion;" rather, they muddy the already murky waters of the standard of review's language.

The definitions California courts gave to abuse of discretion continued to morph over the next couple of decades, but some still were poorly written. Perhaps the worst definition assigned to that standard is one that was used in the early 1990's: "Discretion is deemed abused when there is a failure to exercise discretion in a situation where such exercise is required."<sup>104</sup> This definition is circular and fails to adequately define the abuse of discretion standard.

Using these rough and inexact definitions, an appellate court can reverse simply by disagreeing with the decision the trial judge made. It is difficult to understand how these ill-defined definitions guided the review process, how they informed the appellate judiciary of its scope of review, or how they educated the trial court on what it should avoid doing in future cases. How can an appellate court understand the limits of its review process when the language defining the standard of review is so ambiguous?

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<sup>101</sup> See *Comden v. Superior Court*, 20 Cal.3d 906, 913 (Cal. 1978); *Harris v. Superior Court*, 97 Cal.App.3d 488, 493 (Cal. Ct. App. 1979); *Pepper v. Superior Court*, 76 Cal.App.3d 252, 260 (Cal. Ct. App. 1977).

<sup>102</sup> *Comden v. Superior Court*, 20 Cal.3d 906, 913 (Cal. 1978).

<sup>103</sup> See *People v. Wolfe*, 69 Cal.App.3d 714, 719 (Cal. Ct. App. 1977) (review is "subject to [the] appropriate exercise of the trial court's discretion in a particular case").

<sup>104</sup> *Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, 6 Cal.App.4th 1050, 1055 (Cal. Ct. App. 1992).

As scholars have noted, the practical application of standards of review is complicated through “the difficulty of using relatively crude linguistic distinctions to calibrate different levels of deference in particular settings.”<sup>105</sup> When courts cloud these “crude linguistic distinctions” with nebulous definitions, it does nothing to clarify the review process.<sup>106</sup> Many practitioners already have a difficult time grasping standards of review. Blurry and ill-conceived definitions layered on top of already vague standard of review language ends up creating more problems than it solves.<sup>107</sup>

### ***B. Problem Number Two: Judges Fail to Recognize Standards of Review***

Standards of review are conceptually hard for even law-trained minds to understand.<sup>108</sup> They have been described by judges and scholars as confusing to apply and explain.<sup>109</sup> As a result, some appellate judges treat standards of review as mere “automated verbiage” and “kneejerk terminology.”<sup>110</sup> By including the applicable standard in the opinion, but not recognizing that it serves a practical purpose just like any substantive law, courts avoid realizing

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<sup>105</sup> Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 703 (2007).

<sup>106</sup> *Id.*

<sup>107</sup> See Tracy Lipinski, *Major League Baseball Players Ass'n v. Garvey Narrows the Judicial Strike Zone of Arbitration Awards*, 36 AKRON L. REV. 325, 362 (2003) (“The result of these vague and confusing judicially created standards for review [in arbitration award appeals] is that losing parties in arbitration proceedings often attempt to overturn the award on one of these imprecise grounds, even though such attempts are almost always futile.”).

<sup>108</sup> See e.g., Bauman, *supra* note 3, at 513 (stating that lawyers in Pennsylvania struggle with standards of review); Thomas A. Sheehan, *Standard Of Review On Appeal*, 53 J. MO. B. 281, 282 (1997) (detailing confusion by appellate judges and practicing attorneys in Missouri who erroneously used the phrases “de novo” and “clearly erroneous” in the same standard of review); Brian Serr, *Fifth Circuit Survey: Criminal Procedure*, 29 TEX. TECH L. REV. 547, 560-561 (1998) (citing the Fifth Circuit with confusing standards of review for warrant probable cause attacks); Cassandra H. Welch, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 HARV. J. L. & PUB. POL'Y 1085, 1086 (2007) (citing the rule of admissibility for expert testimony, along with the abuse of discretion standard of review for such admissions as resulting in continued confusion among courts); Emmer v. Brucato, 813 So.2d 264, 265 n.1 (Fla. Dist. Ct. App. 2002) (stating that it is “unclear to us the difference between ‘gross abuse of discretion’ and ‘abuse of discretion,’ although some courts have recognized, though not defined, a difference”).

<sup>109</sup> See *People v. Jackson*, 128 Cal.App.4th 1009, 1018 (Cal. App. 2 Dist., 2005) (“As straightforward as the standards of review may appear, they can be more confusing than enlightening in some applications.”); Hall, *supra* note 4, at 57 (“Identifying the standard of review in most cases is not complicated. Like tying a shoe, it is often easier to demonstrate the proper use of the standard of review than it is to explain that use.”).

<sup>110</sup> See Rosenberg, *supra* note 4, at 659.

the worth of the standard and keep it in its conceptual, not practical, form.<sup>111</sup> Thus, appellate courts are sometimes confused by standards of review and they demonstrate their confusion in two ways: they improperly label substantive law as a standard of review or they create and inconsistently use standards of review in the appellate process.

### 1. *Mislabeling*

Some courts express confusion by mislabeling a substantive rule of law a standard of review.<sup>112</sup> Scholars have written about this practice time and time again, even implicating the United States Supreme Court with making this mistake.<sup>113</sup> Michael R. Smith, Director of Legal Writing at Wyoming College of Law, noted at a recent legal writing and research conference that many states have misidentified a rule of law as a standard of review, which further confuses the appellate review process.<sup>114</sup> Smith identified opinions from seventeen different states where the

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<sup>111</sup> See Stevenson, *supra* note 56, at 127-34 (2003) (criticizing the Ninth Circuit for its faulty application of the abuse of discretion standard of review).

<sup>112</sup> See *infra* notes 114-15, and accompanying text.

<sup>113</sup> See e.g., D.A. Jeremy Telman, *The Business Judgment Rule, Disclosure, and Executive Compensation*, 81 TUL. L. REV. 829, 833-39 (2007) (detailing confusion over the business judgment rule as either an evidentiary presumption, standard of review, or abstention doctrine); Henry W. McGee, Jr. & Brock W. Howell, *Washington's Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards*, 31 SEATTLE U. L. REV. 549, 558 (2008) (legislature was confused in thinking "preponderance of the evidence" was a standard of review rather than the evidentiary standard of quantum of proof); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1739 (2006) (suggesting that "perhaps the most perverse aspect of the Supreme Court's current Section Five jurisprudence has been to confuse the standard of review with the Constitution itself and thereby impose on Congress what had been a rule of judicial deference."); Bauman, *supra* note 3, at 513 (stating that "practitioners often mistake the substantive standard to be applied to the legal issue for the appropriate standard of review"); Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1137 (2001) (accusing the Second Circuit of confusing scope of review with standards of review in ERISA claim appeals); Kunsch, *supra* note 12, at 13. See also Evans v. Buchanan, 468 F.Supp. 944, 950 (D.C., 1979) ("Burden of proof should not be confused with standard of review.").

<sup>114</sup> See Michael R. Smith, *Fog on the Lens: Appellate Court Confusion Between Standards of Review and Substantive Rules*, presented at the Seventh Annual Rocky Mountain Legal Writing Conference at University of Nevada, Las Vegas on March 9-10, 2007 (presentation on file with author) (citing courts in Texas, Mississippi, Kansas, Missouri, Alabama, Pennsylvania, New York, Connecticut, California, Iowa, New Mexico, Arkansas, South Dakota, Kentucky, North Dakota, Louisiana, and Indiana with mislabeling substantive legal principles as standards of review); James W. Paulsen, *Family Law: Parent and Child*, 54 SMU L. REV. 1417, 1468 (2001) (stating that the "clear and convincing" standard of review in Texas has confused courts because it is also used to describe a burden of proof, among other things); Thomas F. Guernsey, *When the Teachers and Parents Can't Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act*, 36

reviewing court inaccurately labeled a substantive rule of law a standard of review.<sup>115</sup> This evidence demonstrates that appellate courts do not grasp either the theoretical underpinnings or the practical applications of standards of review.<sup>116</sup> It also creates discord among the levels of judiciary because appellate judges, by mistaking the authority they possess to review the lower court's decision, may improperly exceed the limits of their power.

## 2. *Inconsistency*

Appellate courts sometimes alter the prevailing standard of review or create a new and unprecedented standard of review,<sup>117</sup> demonstrating a “propensity for spontaneously generating standards of review.”<sup>118</sup> The Second and Sixth Circuits have been cited with creating new standards by rewording United States Supreme Court standards of review.<sup>119</sup> Colorado’s Supreme Court encountered a problem with modified standards of review, which created the appearance of inconsistency and unfairness.<sup>120</sup> The Pennsylvania Supreme Court likewise had to delete standard of review surplus language in an attempt to standardize its own review

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CLEV. ST. L. REV. 67, 93 (1988) (recognizing that courts were sometimes confusing burden of proof with standards of review).

<sup>115</sup> See *id.*

<sup>116</sup> See also Bauman, *supra* note 3, at 526 (noting that some Pennsylvania courts confused standards of review with scope of review).

<sup>117</sup> See Michelle Bryan, *Baldrige v. Board of Trustees: A Case for Reform of Montana's Tenured Teacher Dismissal Process*, 61 MONT. L. REV. 251, 266 (2000) (citing the Montana Supreme Court for applying various standards of review in tenured teacher dismissal proceedings); Walter M. Hudson, *Racial Extremism in the Army*, 159 MIL. L. REV. 1, 43 (1999) (“The absence of a constant standard of review and the great deference to military policy has caused confusion and controversy.”); Coenen, *supra* note 76, at 900 (“[I]n almost every circuit, different panels have articulated different formulations of the measure of deference applicable under the rule.”); James C. Lopez, *Appellate Control of Excessive Jury Verdicts Since Gasperini v. Center for Humanities: From Nisi Prius Courts to “Gasperini Hearings,”* 66 U. CIN. L. REV. 1323, 1350-1352 (1998) (noting that federal judges in the Second and Sixth Circuits reworded the standard of review for excessive awards claims that the United States Supreme Court created).

<sup>118</sup> Kunsch, *supra* note 12, at 48.

<sup>119</sup> See Lopez, *supra* note 117, at 1350-1352 (noting that federal judges in the Second and Sixth Circuits reworded the standard of review for excessive awards claims).

<sup>120</sup> See Carillo v. People, 974 P.2d 478, 485 (Colo. 1999) (stating that the practice by Colorado appellate courts of adding modifiers to the abuse of discretion standard in an attempt to clarify it resulted in confusion). See also Coenen, *supra* note 76, at 940 (asserting that one of the policy aims of appellate review is to legitimate the justice system by preserving the appearance and reality of fairness).

process.<sup>121</sup> When the standards of review do not match, this can cause confusion among appellate court judges.<sup>122</sup>

An example of this phenomenon can be seen in the California cases. One court applied a unique standard of review that mysteriously made its way to motion for disqualification appeals, even though no previous appeal dealing with that issue had applied such a standard.<sup>123</sup> The appellate court stated that it would affirm the lower court decision if it was correct under any applicable theory of law and cited a medical board appeal opinion that never even addressed a motion to disqualify issue.<sup>124</sup> But even in cases where the standard of review was one that was traditionally accepted, California appellate courts frequently cited to different opinions and described the standard differently from one another.<sup>125</sup> When some of these appellate courts use a foreign standard of review, others state that the review is abuse of discretion, and still others cite authority that suggests the standard of review is de novo, substantial evidence, *and* abuse of

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<sup>121</sup> See Moore v. Moore, 634 A.2d 163, 168 n.4 (Pa. 1993).

<sup>122</sup> See e.g., Kuhn v. Sandoz Pharmaceuticals, 14 P.3d 1170, 1179 (Kan. 2000) (acknowledging confusion in jurisdiction regarding applicable standard of review); Hofer, *supra* note 4, at 36-39 (pointing out that circuit courts varied in their standard of review of federal sentencing guideline departures, which led to different reversal rates); Laura Whitmore, *Abuse of Discretion: Misunderstanding the Deference Accorded Trial Court Rulings*, 79-JUN FLA. B.J. 83, 86 (2005) (advocating a single abuse of discretion standard of review in Florida appeals because a consistent standard of review will result in a better understanding of the standard among practitioners).

<sup>123</sup> See *In re R.C.*, 2004 WL 2978288, 10 (Cal. Ct. App., 2004)

<sup>124</sup> See *id.* at 10 (citing D'Amico v. Board of Medical Examiners, 11 Cal.3d 1, 19 (Cal. 1974).

<sup>125</sup> Compare Hollins Schechter, APC v. Nissanoff, 2008 WL 444919, 2 (Cal. Ct. App. 2008) (referring to abuse of discretion review only and citing to Ochoa v. Fordel, Inc. 146 Cal.App.4th 898, 906 (Cal. 2007) for that proposition); Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1100 (Cal. 2007) (California Supreme Court opinion stating review is for abuse of discretion without any mention to its earlier precedent, which includes substantial evidence and de novo review); J.R. Marketing, L.L.C. v. Hartford Cas. Ins. Co., 2007 WL 3154266, 3 (Cal. Ct. App. 2007) (listing abuse of discretion and substantial evidence, but not de novo review); SWT Corp. v. Egri, 2005 WL 1168407, 6 (Cal. Ct. App. 2005) (relying upon decisions from the 1980s citing an abuse-of-discretion-like standard of review); and Cochran v. Cochran, 2007 WL 2705745, 3 (Cal. Ct. App. 2007) (stating merely that a “trial court has discretion in ruling on a motion to disqualify counsel,” citing Machado v. Superior Court 148 Cal.App.4th 875, 880 (Cal. 2007)).

discretion, what would seem a straightforward application of the standard of review becomes complicated.<sup>126</sup>

Another example of inconsistency within standard of review application can be seen in the way California appellate courts define "abuse of discretion." For instance, some courts define it with language that suggests the trial court abuses its discretion only if it acted unreasonably or without a rational basis.<sup>127</sup> Other courts explained abuse of discretion review by stating that the trial court must act within the boundaries of the law it is applying.<sup>128</sup> Some courts combined these two definitions.<sup>129</sup> And yet others failed to define or expand the abuse of discretion standard at all.<sup>130</sup>

The courts that defined abuse of discretion using a rational basis definition reversed approximately one-fourth of those decisions.<sup>131</sup> Courts that defined abuse of discretion using a law-based definition reversed thirty-five percent of the time.<sup>132</sup> The appellate courts that used a combination of the above two definitions reversed nearly forty percent of the opinions while those who stated the standard of review without further explanation reversed only fifteen percent of the time.<sup>133</sup> With this data, it is difficult to determine whether the definition of the standard influenced the outcome or whether the outcome influenced the definition or lack thereof. Nevertheless, this data demonstrates that appellate courts should consistently apply and define standards of review. If the court's definition influences its interpretation of the standard's scope,

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<sup>126</sup> *See id.*

<sup>127</sup> *See e.g.*, California empirical data, on file with author. Nineteen cases out of the 241 surveyed used this definition. *See* California empirical data, on file with the author.

<sup>128</sup> *See id.* Fifty-one courts used this definition. *See* California empirical data, on file with the author.

<sup>129</sup> *See e.g.*, *id.* Out of the 241 cases, 48 opinions combined these two definitions. *See* California empirical data, on file with the author.

<sup>130</sup> *See id.* Eighty-four opinions failed to define the abuse of discretion standard of review. *See* California empirical data, on file with the author.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

then having numerous definitions results in a suspect review process. Furthermore, parties who cannot realistically evaluate their success on appeal are more likely to appeal when the definitions change with the makeup of the court, which itself results in an inefficient judicial process.

### ***C. Problem Number Three: Standards of Review as Boilerplate***

Practitioners are often encouraged to frame the issues on appeal strategically so as to take advantage of the standard of review that is best for their client.<sup>134</sup> After all, standards of review “are debatable topics, not useless appendages to the brief, scribbled in as an afterthought.”<sup>135</sup> Yet appellate courts sometimes treat standards of review as postscript, if even that.<sup>136</sup> To be sure, this is probably the most common problem found with standards of review.<sup>137</sup>

Many appellate courts merely cut and paste another court’s discussion on the standard of review into the opinion.<sup>138</sup> There is no application and sometimes no further language from the standard of review found elsewhere in the opinion.<sup>139</sup> As one scholar stated, standards of review are “oft-repeated and little analyzed by the courts.”<sup>140</sup> It is as if the standard of review serves no other function than to occupy the small space between the fact and discussion sections of the opinion.

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<sup>134</sup> See MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY*, 13 (Aspen, 2<sup>nd</sup> ed.)

<sup>135</sup> Bosse, *supra* note 34, at 389.

<sup>136</sup> See *e.g.*, Verkuil, *supra* note 4, at 713 (stating that administrative law appellate judges appeared to ignore their obligation under de novo review).

<sup>137</sup> See also MARY BETH BEAZLEY, *APPELLATE ADVOCACY* 13 (Aspen Publishers, 2d ed. 2006) (recognizing that even appellate attorneys often ignore the standard of review after they have included it in the appellate brief).

<sup>138</sup> See Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 752 (2008) (noting that appellate courts often use boilerplate string cites that have been cut and pasted for the standard of review).

<sup>139</sup> See *e.g.*, *Cheyney University v. State College University Professional Ass'n*, 743 A.2d 405, 409 (Pa. 1999) (“[B]ased upon the number of challenges to arbitration awards, this court’s standard of review has seemingly become a boilerplate standard lacking in real meaning or practical application.”); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 37-38 (2004) (faulting courts with using standard of review boilerplate in the place of reasoned and explained analysis).

<sup>140</sup> Allegra, *supra* note 32, at 493.

Additional explanations and definitions, which are sometimes added onto the standard of review, seem to serve no purpose either because judges often block quote the expanded standard of review without further application or analysis. Though it is better to include a discussion of the standard of review in an opinion than not to include it, “a mechanical recitation of the relevant standard of review, without more, is no more helpful than completely ignoring the standards altogether.”<sup>141</sup> However, that is what many appellate courts do time and time again. Consider the implications of what a federal judge said at an appellate conference about the role the court’s clerk plays in appellate brief writing:

I find it very useful to have the clerk set out the pertinent facts, describe the issues raised, and take a first stab at applying applicable precedent to those issues. But I do a fair amount of reorganizing of clerk drafts, I make substantial revisions to almost every paragraph, and about the only statements of black-letter law that I may leave untouched are boilerplate, such as standard of review.<sup>142</sup>

Notice that the judge viewed the standard of review as boilerplate. This is a problem because judges will continue to ignore the purpose of standards of review and fail to apply them as long as standards of review are considered to be generic words with no practical meaning. To illustrate the point, we will briefly examine the standard of review that California uses for motions to disqualify attorneys.

Motions to disqualify attorneys in California are examined using three standards of review, depending on what is being challenged on appeal.<sup>143</sup> The facts supporting the trial court’s ruling are reviewed for substantial evidence; the ruling itself is reviewed for abuse of

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<sup>141</sup> Hall, *supra* note 4, at 56.

<sup>142</sup> Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. APP. PRAC. & PROCESS 141, 189 (2006) (quoting a federal judge on the duties assigned to law clerks).

<sup>143</sup> See *SpeeDee Oil Change Systems, Inc.*, 20 Cal.4<sup>th</sup> at 1143-44.

discretion; and the legal conclusions (and some say the ruling itself, if the facts are not disputed)<sup>144</sup> are reviewed de novo.<sup>145</sup> California courts created an amalgam when they decided to use three different standards to examine a single issue.<sup>146</sup> To clarify matters for the parties before it and the trial court below where three possible standards of review can apply, appellate courts should clearly state in their opinion which standard of review applies and when.<sup>147</sup> However, they often do not.<sup>148</sup> Many California courts block quoted the standard of review language without any further discussion.<sup>149</sup>

Including these three standards in a block quote without articulating which standard the court is using is not good practice since “[t]he invocation of multiple standards of review increases the number of opportunities for judicial discretion – and judicial confusion.”<sup>150</sup> Courts in Maine, Louisiana, and Michigan have encountered similar problems with this practice.<sup>151</sup> The

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<sup>144</sup> See e.g., *Cho v. Superior Court*, 45 Cal. Rptr. 2d 863 (Cal. Ct. App. 1995) (stating that de novo review is appropriate where trial court was not called upon to resolve material factual disputes).

<sup>145</sup> See *SpeeDee Oil Change Systems, Inc.*, 20 Cal.4<sup>th</sup> at 1143-44.

<sup>146</sup> See Edward J. Walters, Jr. & Darrel J. Papillion, *Appellate Review of Mixed Questions of Law and Fact: Due Deference to the Fact Finder*, 60 LA. L. REV. 541, 541 (2000) (“Louisiana’s system of appellate review, which permits appellate courts to review both legal and factual determinations of trial courts in civil cases, has led to more than a little confusion as lawyers and judges have struggled to apply the correct standard of review in individual cases.”).

<sup>147</sup> See Bauman, *supra* note 3, at 522 (standards of review are not always identified by an appellate court making it difficult to discern which standard applies).

<sup>148</sup> See e.g., *In re Marriage of Eyster*, 2008 WL 2623974, 2-5 (Cal. Ct. App., 2008) (opinion includes a standard of review block-quote, an analysis that ignores the trial court findings, and a cursory declaration at the end of the opinion stating the trial court abused its discretion); *Cochran v. Cochran*, 2007 WL 2705745, 2-3 (Cal. Ct. App., 2007) (mentioning fact trial court has “discretion” in very last paragraph of appeal, after appellate court reviews record on its own). See also Mead, *supra* note 20, at 536-37 (noting that the Supreme Court of Maine does not always clarify which standard of review it is using and when, despite the fact that numerous standards are sometimes invoked to review an issue on appeal).

<sup>149</sup> See *id.*

<sup>150</sup> Richard A. Epstein, *Property: Why is This Man a Moderate*, 94 MICH. L. REV. 1758, 1774 (1996). See also Whitmore, *supra* note 123, at 86 (stating that by giving appellate courts the option of choosing one of two abuse of discretion standards of review, it causes confusion and creates the appearance of inconsistency and unfairness).

<sup>151</sup> See *supra*, notes 147-150.

exercise of clearly articulating the standard of review removes speculation that the appellate court is using one standard when it is in fact using another.<sup>152</sup>

Treating standards of review as boilerplate creates another problem. Courts that give the standard of review such a meaningless role appear to misunderstand the true function standards of review serve. Standards of review shape the appellate court's review process. Because reviewing lower court opinions is the job of an appellate court, how it conducts that review should be of utmost importance. As noted earlier, the standard of review guides the appellate court in determining the level of error the trial court committed and whether such error should form the basis for reversal.<sup>153</sup> The standard of review should be the first thing an appellate court considers in the review process. Yet, so often it seems to serve no other purpose in the opinion than to take up space. As one scholar commented, appellate court review should not be "an irrelevant labeling exercise," but the meaning of the standards of review is nevertheless sometimes lost on the courts.<sup>154</sup> For a standard of review to work the way it was intended to work, however, it must be understood, applied, and used by the court to reach its decision.<sup>155</sup> Until appellate courts fully understand the policy reasons for standards of review, they will continue to pay them lip-service as they ignore their true significance.

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<sup>152</sup> See also Katia Brener, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 484 (1999) ("By articulating clearly the standard of review, rather than claiming to use rational basis when actually applying a different standard, state courts can avoid the confusion that the Supreme Court's garbled standards have introduced into land-use jurisprudence."); Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235, 252 (1998) ("[B]oilerplate language in appellate court opinions as to the standard of review may not describe the true behavior of those courts.").

<sup>153</sup> MARY BETH BEAZLEY, *APPELLATE ADVOCACY* 12 (2d ed. 2006).

<sup>154</sup> Verkuil, *supra* note 4, at 682 (2002) (conducting an empirical analysis on scope of review outcomes in administrative law cases).

<sup>155</sup> See Charles F. Baird, *Standards of Appellate Review in Criminal Cases*, 42 S. TEX. L. REV. 707, 760-61 (2001) ("appellate court opinions must determine the appropriate standard of review and employ that standard to correctly resolve each point of error"). See also Rosenberg, *supra* note 9, at 179 ("Discretion is an unruly concept in a judicial system dedicated to the rule of law, but it can be useful if it is domesticated, understood, and explained.").

#### ***D. Problem Number Three: Courts Ignore Changed Standards of Review***

Appellate courts may occasionally decide to review a trial court decision under a completely new standard of review,<sup>156</sup> but it is less common to see a single standard of review reworded. However, in Texas, one standard of review was altered three times in the span of a decade.<sup>157</sup> This is a highly unusual practice in the world of standards of review and one that allows for a unique analytical opportunity.

The author reviewed 7,895 decisions in Texas – dating from 1996 to 2008 – where the defendant-appellant raised factual sufficiency as an issue on appeal. The author catalogued the following data after reading the cases: citation, publication status, court, year of decision, standard of review, judges, crime, decision of the court to affirm or reverse, if the case was reversed, the basis for reversal, and any subsequent history. The purpose of gathering the information was to determine whether the changed standard of review resulted in a changed outcome on appeal. A discussion of each standard of review and its significant substantive changes, followed by the empirical data of reversal outcomes will demonstrate that the changes were largely ignored by the intermediate appellate courts.<sup>158</sup>

##### *1. The Evolution of Texas's Factual Sufficiency Standard of Review*

In 1996, Texas's highest criminal court, the Court of Criminal Appeals, created a factual sufficiency standard of review for criminal appeals in *Clewis v. Texas*.<sup>159</sup> Factual sufficiency is a

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<sup>156</sup> See e.g., *U.S. v. Booker*, 543 U.S. 220, 260-61 (2005) (changing standard of review for sentencing guidelines appeals from de novo to “reasonableness”); *Leighow v. Crump*, 960 So.2d 122, 128-29 (La. Ct. App., 2007) (recognizing a small window of change in standard of review from de novo to abuse of discretion for inconsistent damages awards).

<sup>157</sup> See *Clewis v. Texas*, 922 S.W.2d 126 (Tex. Crim. App. 1996); *Zuniga v. Texas*, 144 S.W.3d 477 (Tex. Crim. App. 2004); *Watson v. Texas*, 204 S.W.3d 404 (Tex. Crim. App. 2006).

<sup>158</sup> See also *Kunsch*, *supra* note 12, at 12 (1994) (citing an early United States Supreme Court with ignoring a changed standard of discretionary review).

<sup>159</sup> See *Clewis v. Texas*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)

standard of review that is used to determine whether enough evidence exists to support the jury's verdict;<sup>160</sup> it is analogous to the substantial evidence standard. The *Clewis* court held that an appellate court reviewing the evidence for factual sufficiency “views all the evidence without the prism of ‘in the light most favorable to the prosecution’ and set[s] aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.”<sup>161</sup>

A debate about the factual sufficiency standard of review *Clewis* created started immediately.<sup>162</sup> Some of the criticism found in the dissenting opinions centered on the complaint that the new standard usurped the jury's role.<sup>163</sup> But another much more damning criticism against the *Clewis* standard focused on the language contained within the standard itself.<sup>164</sup> Scholars argued that a standard of review for an issue of criminal factual sufficiency that is borrowed from a civil factual sufficiency standard of review allows the appellate court to “unfind” facts on a burden of proof that is substantially less onerous than the one imposed upon the jury during the criminal trial.<sup>165</sup>

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<sup>160</sup> *Id.* at 133.

<sup>161</sup> *See id.* (quoting *Stone v. Texas*, 823 S.W.3d 375, 381 (Tex. App.—Austin 1992)).

<sup>162</sup> *See e.g.*, Mark Bankston, *Criminal Law—Appellate Review—Forty Nuns Can't Be Wrong: Reviewing Factual Sufficiency of Evidence Without the Light Most Favorable to the Prosecution*, *Clewis v. Texas*, 922 S.W.2d 126 (Tex. Crim. App. 1996), 38 S. TEX. L. REV. 263, 276-79 (1997) (arguing that factual sufficiency review is necessary to correct unjust verdicts); Waddell and Abell, *supra* note 38, at 260-81 (assessing the potential conflicts with the new standard set out in *Clewis*, particularly as it fails to address factual sufficiency review for death penalty appeals).

<sup>163</sup> *Clewis v. Texas*, 922 S.W.2d 126, 151 (Tex. Crim. App. 1996) (en banc) (McCormick, P.J., dissenting. Keller, J., joins); *Clewis*, 922 S.W.2d at 159 (White, J., dissenting).

<sup>164</sup> *See Ryan*, *supra* note 38, at 1302-03, 1307-09.

<sup>165</sup> *See id.* *See also Casey supra* note 33, at 322 (“The review standard should also include within it any burdens or presumptions from the substantive law applicable to the issue under review at the trial level.”); W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 577 (2008) (detailing criminal law practitioners' disagreement with bringing civil law and criminal law appellate review together). *See infra* note 174, describing the complications that arise when courts mix burden of proof language with standard of review language.

Eight years later, the Texas Court of Criminal Appeals attempted to incorporate “beyond a reasonable doubt” language into its factual sufficiency review with *Zuniga v. Texas*.<sup>166</sup> The court did so by stating

There is only one question to be answered in a factual-sufficiency review: Considering all the evidence in a neutral light, was a jury rationally justified in finding guilt beyond a reasonable doubt? However there are two ways in which the evidence may be insufficient. First, when considered by itself, evidence supporting the verdict may be too weak to support the finding of guilt beyond a reasonable doubt. Second, there may be both evidence supporting the verdict and evidence contrary to the verdict. Weighing all the evidence under this balancing scale, the contrary evidence may be strong enough that the beyond-a-reasonable-doubt standard could not stand. *This standard acknowledges that evidence of guilt can “preponderate” in favor of conviction but still be insufficient to prove the elements of the crime beyond a reasonable doubt. Stated another way, evidence supporting guilt can “outweigh” the contrary proof and still be factually insufficient under a beyond-a-reasonable-doubt standard.*<sup>167</sup>

While *Clewis* required a reversal when evidence of innocence outweighed evidence of guilt to the extent that the verdict was clearly wrong and manifestly unjust,<sup>168</sup> *Zuniga* allowed reversal in instances when the evidence of innocence *outweighed* the evidence of guilt but was nevertheless still insufficient to support the jury’s verdict.<sup>169</sup> This standard arguably allowed appellate courts to “reverse on a whim.”<sup>170</sup>

Two years after *Zuniga*, the Texas Court of Criminal Appeals yet again reconstructed the factual sufficiency standard of review in *Watson v. Texas*.<sup>171</sup> The court declared that the *Zuniga* standard of review was “problematic” because it allowed the appellate court to reverse the jury’s verdict merely because it disagreed with it, which was inconsistent with the previous factual

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<sup>166</sup> See *Zuniga v. Texas*, 144 S.W.3d 477, 482 (Tex. Crim. App. 2004).

<sup>167</sup> *Id.* at 484-85.

<sup>168</sup> Compare *Zuniga*, 144 S.W.3d at 483 with *Clewis*, 922 S.W.2d at 129.

<sup>169</sup> See *Zuniga*, 144 S.W.3d at 484-85.

<sup>170</sup> Ryan, *supra* note 38, at 1321-22.

<sup>171</sup> See *id.*

sufficiency standard of review articulated in *Clewis*.<sup>172</sup> Stating that the *Zuniga* standard of review was flawed from the beginning and had a clear potential to cause too many reversals, the *Watson* court suggested a standard of review that looked similar to *Clewis*'s: "an appellate court must first be able to say, with some objective basis in the record, that the great weight and preponderance of the... evidence contradicts the jury's verdict before it is justified in exercising its appellate fact jurisdiction to order a new trial."<sup>173</sup> Whether this articulation of the standard of review is satisfactory,<sup>174</sup> it is the one that is currently used by intermediate appellate courts in reviewing the evidence for factual sufficiency review.

## 2. *Empirical Research on Texas's Factual Sufficiency Standards of Review*

Standards of review should theoretically be the first and most important consideration in evaluating a case on appeal. However, the empirical analysis of Texas's factual sufficiency standard of review demonstrates that standards of review may not matter as much as they should and sometimes are ignored altogether by appellate judges. After three changes to the standard of review and numerous judicial opinions commenting on the various standards of review, the data reveals that the changes in the standard did not change the outcome in any significant way.

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<sup>172</sup> *Id.* at 416.

<sup>173</sup> *Id.* at 417.

<sup>174</sup> Marrying standards of review with burden of proof language has caused great confusion among appellate courts elsewhere and the decision to do so here may generate more confusion in an already muddled area of law. *See e.g.*, D.A. Jeremy Telman, *The Business Judgment Rule, Disclosure, and Executive Compensation*, 81 TUL. L. REV. 829, 833-39 (2007) (detailing confusion over the business judgment rule as either an evidentiary presumption, standard of review, or abstention doctrine); Henry W. McGee, Jr. & Brock W. Howell, *Washington's Way II: The Burden of Enforcing Growth Management in the Crucible of the Courts and Hearings Boards*, 31 SEATTLE U. L. REV. 549, 558 (2008) (legislature was confused in thinking "preponderance of the evidence" was a standard of review rather than the evidentiary standard of quantum of proof); Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1739 (2006) (suggesting that "perhaps the most perverse aspect of the Supreme Court's current Section Five jurisprudence has been to confuse the standard of review with the Constitution itself and thereby impose on Congress what had been a rule of judicial deference."); Kennedy, *supra* note 115, at 1137 (accusing the Second Circuit of confusing scope of review with standards of review in ERISA claim appeals). *See also* Evans v. Buchanan, 468 F.Supp. 944, 950 (D.C., 1979) ("Burden of proof should not be confused with standard of review.").

Out of 4,231 opinions rendered using the *Clewis*<sup>175</sup> standard of review, 29 were reversed.<sup>176</sup> That means only 0.685% of the cases ended in reversal under *Clewis*.<sup>177</sup> The *Zuniga* standard,<sup>178</sup> which was criticized for having the potential to create a high amount of reversals,<sup>179</sup> was used to reverse fifteen out of 2,273 cases.<sup>180</sup> The incident of reversals under *Zuniga* was slightly lower than *Clewis*'s, with only 0.659% of the cases reversed on appeal.<sup>181</sup> The *Watson*<sup>182</sup> standard, which closely resembled the *Clewis* standard of review, was used in 1,267 cases surveyed.<sup>183</sup> The reversal rate, however, was less than half of *Clewis*'s, with only four cases reversed, which amounts to a 0.315% reversal rate.<sup>184</sup>

According to the language of the standard of review and the commentary by scholars and judges, the *Zuniga* standard of review allowed appellate courts to reverse the jury's verdict too easily.<sup>185</sup> However, the data shows that the intermediate appellate courts in Texas actually reversed fewer cases under the *Zuniga* standard than under the *Clewis* standard of review. It appears that the appellate courts simply ignored the changes occurring within the standard of review. The conclusion to be drawn from the similar *Zuniga* and *Clewis* reversal rates is that the Texas judges just pasted in the new boilerplate language for the standards of review and continued on as they had before.

That Texas appellate courts simply ignored standards of review can be show by a different look at the same data. In 229 out of the 7,895 Texas opinions reviewed, the appellate

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<sup>175</sup> *See id.*

<sup>176</sup> *Clewis v. Texas*, 922 S.W.2d 126, 151 (Tex. Crim. App. 1996); Texas empirical data, on file with author.

<sup>177</sup> *See id.*

<sup>178</sup> *Zuniga v. Texas*, 144 S.W.3d 477 (Tex. Crim. App. 2004).

<sup>179</sup> *See supra* notes 170-73, and accompanying text.

<sup>180</sup> *See* Texas empirical data, on file with author.

<sup>181</sup> *See id.*

<sup>182</sup> *Watson v. Texas*, 204 S.W.3d 404 (Tex. Crim. App. 2006).

<sup>183</sup> *See supra* notes 170-73, and accompanying text. Opinions dated after June 1, 2008 were not included in this study.

<sup>184</sup> *See id.*

<sup>185</sup> *See* Ryan, *supra* note 38, at 1321-22. *See supra* notes 168-71, and accompanying text.

court failed to use the current standard of review.<sup>186</sup> That means in nearly three percent of the factual sufficiency appeals in Texas, the appellate court was using the wrong standard of review.<sup>187</sup> One of the intermediate appellate courts in Texas intermittently used the *Clewis* standard with no mention of *Zuniga* for nearly a year and a half after the *Zuniga* opinion was released.<sup>188</sup> Only two of the fourteen intermediate appellate courts used the correct standard of review in every released opinion.<sup>189</sup> This shows that Texas appellate courts treated the new standards as insignificant and interchangeable, though their language was not.

*a. Possible Non-Standard of Review Correlations for Reversal Rates*

Theoretically, courts reviewing a single issue with the same standard of review should have similar outcomes.<sup>190</sup> However, commentators have consistently linked extraneous factors to appellate reversal<sup>191</sup> and have not been surprised by disparate appellate outcomes.<sup>192</sup> One scholar, in analyzing scope of review standards in administrative law decisions, which mirror standards of review semantically and procedurally, noted the following about the importance, but difficulty in correlating outcomes with standards of review:

It is asking a lot to have scope of review standards reflect outcomes or reversal rates in a predictable way. Review standards have to be measured after the fact, and they are entangled with the inarticulate premises of judicial oversight. Cases have individual characteristics and an unknowable mix of law and facts, such that outcomes are hard to determine in advance. As with umpires, questions of

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<sup>186</sup> See Texas empirical data, on file with author.

<sup>187</sup> See Texas empirical data, on file with author.

<sup>188</sup> See Corpus Christi court data in Texas empirical data, on file with author.

<sup>189</sup> See *id.*

<sup>190</sup> See also Cook, *supra* note 35, at 266-267 (noting that appeals in the Federal Circuit on patent claim construction cases lead to inconsistent and conflicting lines of authority, in part because of the high reversal rate under the *de novo* standard of review).

<sup>191</sup> See *e.g.*, Hofer, *supra* note 4, at 45 (“Clearly, the most important influences on within-range rates are not the legal standards governing appellate review of judge-initiated departures, but the policies and programs of the Department of Justice.”).

<sup>192</sup> See Hall, *supra* note 4, at 67 (2006) (“Because the concept of discretion or choice defies uniform application to all situations, it is not surprising that the appellate courts’ review of discretion is not uniform.”).

judgment are complicated and calls are rarely obvious.... Despite these difficulties, inquiring about outcomes can be a revealing exercise. The analysis can discern trends and highlight counterintuitive outcomes. Ultimately, the efficacy of a review system is judged by the results it produces. In a broad sense, affirmance, remand, and reversal rates are the results produced.<sup>193</sup>

It is therefore important to analyze what factors, aside from the standard of review, may have impacted reversal rates. The empirical data in California and Texas reveals that the specific court hearing the appeal, underlying tangential facts, and the subsequent history of the opinion contributed significantly to the outcome on appeal. Arguably, these non-standard of review influences had a greater impact on the outcome than the use of the standard of review itself.

*i. Reversal Rates Differed Among Courts*

In both Texas's factual sufficiency cases and California's motions to disqualify attorneys, the outcome on appeal was affected by which court heard the appeal. For example, in Texas, some of the appellate courts with the smallest dockets had the highest reversal rates and the courts in major metropolitan areas reversed rarely, if ever.<sup>194</sup> As one Texas commentator has noted, "It is ... no secret that the courts of appeals produce varying results depending on the make-up of the court."<sup>195</sup> Whatever the reason for the reversals or lack thereof, it appears that the group of judges hearing the case and the geographical, political, and representational location of the court had an effect on the outcome of the appeal.

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<sup>193</sup> Verkuil, *supra* note 4, at 724.

<sup>194</sup> See Texas empirical data, on file with author. The Waco intermediate appellate court had the highest reversal rate at 2.564 percent; the Amarillo and Texarkana courts of appeals had similar percentages. *See id.* Cities with larger dockets, like the Houston courts of appeals, and the San Antonio and Dallas courts of appeals had reversal rates of less than one-third of one percent. *See id.* Three of the appellate courts – located in Eastland, Tyler, and one in Houston – did not reverse any cases over the 12-year period. *See id.*

<sup>195</sup> Hall & Emery, *supra* note 166, at 609.

The author examined 241 California opinions and tallied the reversal rates for each of the appellate courts.<sup>196</sup> The most reverse-prone appellate court reversed half of the cases before it while the court least likely to reverse did so only fifteen percent of the time.<sup>197</sup> This statistic is even more determinative of the appellate outcome than how the court defined the standard of review.<sup>198</sup> It appears that the various California appellate courts have very different ideas about the level of wrongness required to reverse on appeal.<sup>199</sup>

### *ii. Type of Offense Impacted Reversal Rates*

A factor contributing to Texas's factual sufficiency reversal rate was the crime for which the defendant had been convicted. Capital murder, murder, manslaughter, child sexual assault, robbery, and rape cases were included in the list of cases reversed for factual sufficiency.<sup>200</sup> However, while those serious types of offenses generally make up a large portion of cases appealed on factual sufficiency grounds, they represented a minority of cases reversed.<sup>201</sup> Drug possession, theft, misdemeanor, and simple assault cases encompassed the majority of reversals.<sup>202</sup> Based upon these results, it appears that the kind of case before the court and the seriousness of the alleged offense may have impacted the courts' decision to reverse.

### *iii. Subsequent History Impacted Reversal Rates*

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<sup>196</sup> See California empirical data, on file with author.

<sup>197</sup> See California empirical data, on file with author. The First District Court of Appeals in California had the lowest reversal rate while the Fifth District Court of Appeals in California had the highest rate. See *id.* The Third and Fourth District Courts of Appeals had reversal rates of forty-five and forty-six percent, respectively, while the Second and Sixth Courts of Appeals had rates of thirty-eight and twenty-two percent, respectively. See *id.*

<sup>198</sup> De novo review resulted in a 62.5 percent reversal rate whereas abuse of discretion resulted in a reversal rate of 34 percent. See California empirical data, on file with author.

<sup>199</sup> See Rosenberg, *supra* note 9, at 176.

<sup>200</sup> See Texas empirical data, on file with author.

<sup>201</sup> See *id.* These listed offenses represented only nine out of 51 reversals. See *id.*

<sup>202</sup> See *id.* These crimes represented 27 out of 51 reversals.

In Texas, perhaps the most significant factor which correlates with reversal rates is the review of intermediate appellate court decisions by the Court of Criminal Appeals. The Texas Court of Criminal Appeals reversed nearly thirty percent of the intermediate appellate court factual sufficiency reversals.<sup>203</sup> And in each of the reversed cases, once they were remanded to the intermediate appellate court, the case's outcome differed from the one originally pronounced by the intermediate appellate court.<sup>204</sup> This is not surprising, since scholars, through empirical analysis, have determined that lower courts are more likely to reshape their ideological preferences to avoid reversal by a higher court.<sup>205</sup> However, it is difficult to argue that the Texas factual sufficiency review is a judicially economic one when nearly one-third of all factual sufficiency appeals were reversed at the final appellate level. Not only is this problematic because it results in wasted judicial resources, but "a high proportion of reversals on review erodes public confidence in the [lower] courts."<sup>206</sup>

### 3. Conclusion

Texas courts, by and large, seemed to ignore the changes that the Court of Criminal Appeals made to the factual sufficiency standard of review. The difference in reversal rates between the three different standards was largely inconsequential.<sup>207</sup> Data seems to indicate that the makeup of the court, the underlying offense, and fear of reversal from a higher court affected

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<sup>203</sup> See Texas empirical data, on file with author;

<sup>204</sup> Compare *e.g.*, *Zuniga v. Texas*, 2001 WL 1464147, \*10 (Tex. App.—Amarillo 2001) (reversing jury decision due to factual insufficiency) with *Zuniga v. Texas*, 2004 WL 1749229, \*3 (affirming jury verdict after Texas Court of Criminal Appeals reverses intermediate appellate court decision and remands case to them for reconsideration). Compare *Watson v. Texas*, 160 S.W.3d 627, 631 (Tex. App.—Waco, 2005) (reversing jury decision due to factually insufficient evidence) with *Watson v. Texas*, 2007 WL 1704853, \*2 (2007) (affirming jury verdict on remand after higher court reversal of intermediate decision).

<sup>205</sup> See *e.g.*, Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts*, available at <http://ssrn.com/abstract=1114207> (using principle-agent theory and statistical data to assert that federal district court judges curtail ideological influences so as to avoid reversal on appeal by Circuit Court judges).

<sup>206</sup> Kunsch, *supra* note 12, at 20.

<sup>207</sup> See *supra*, notes 176-85, and accompanying text.

the outcome more than the applicable standard of review. And though “[r]eview standards should not be directly tied to outcomes, . . . they should not ignore or contradict outcomes either.”<sup>208</sup>

### ***E. Problem Number Five: Judges Manipulate the Standards of Review***

Judges sometimes have difficulty abiding with a lower court’s ruling when they disagree with it.<sup>209</sup> A recent study revealed that judges are prone to believe their judicial decisions are more legally sound than the decisions of other judges.<sup>210</sup> As one scholar stated, “Like professors, reviewing judges sometimes think they know an ‘A’ or an ‘F’ when they see one, and grade accordingly.”<sup>211</sup> Standards of review sometimes get in the way of this appellate grading process.<sup>212</sup>

Standards of review impose restrictions on the review process and judges, if even reluctantly, must recognize that policy considerations such as judicial economy and balance of power are best served through the implementation of standards of review.<sup>213</sup> Judges who try to force what is in their view an equitable result must artfully maneuver their way around the

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<sup>208</sup> Verkuil, *supra* note 4, at 691.

<sup>209</sup> See Borek, *supra* note 61, at 634 (recognizing a judicial reluctance to defer); Coenen, *supra* note 76, at 907 (recognizing nine exceptions to deferential review of state law in federal court appeals); *In re McLinn*, 739 F.2d 1395, 1398 (9<sup>th</sup> Cir. 1984) (en banc) (stating that deferential review is “an abdication of our appellate responsibility”).

<sup>210</sup> See Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 436-38 (2007) (discussing a study involving U.S. Magistrates and the fact that the judges in the study overwhelmingly viewed their own decisions as more sound than other judges’ decisions); Hall & Emery, *supra* note 161, at 606-07 (noting that some appellate courts sweep away verdicts they are troubled with when there is legally sufficient evidence to support the verdict).

<sup>211</sup> Verkuil, *supra* note 4, at 690.

<sup>212</sup> See Allegra, *supra* note 35, at 514 (stating that appellate judges must “observe fastidiously the limitations on their authority”).

<sup>213</sup> See *e.g.*, *Bridgestone/Firestone North American Tire, LLC v. Garcia*, \_\_\_ So. 2d \_\_\_, 2008 WL 2986498, \*4 (Fla. Dist. Ct. App., 2008) (Polen, J., concurring) (“Would I have reached the same result the trial court reached in this case? Probably not. But our standard of review on decisions granting or denying a motion to dismiss on *forum non conveniens* grounds is abuse of discretion. If for no other reason than that reasonable judges could disagree on the trial court’s ruling, I agree we must affirm.”).

appropriate standard of review and the constraints it imposes.<sup>214</sup> In California, appellate judges do this in at least two different ways. Some courts have taken clever routes to get de novo review, while others have so liberally construed abuse of discretion review that it has lost all practical meaning. Before examining this manipulation of standard of reviews, however, a brief history on the case that revised the standard from abuse of discretion to an amalgam of standards is necessary.

#### A. California's Motion to Disqualify Standard of Review

Prior to the 1990s, appellate review of motions to disqualify was inconsistent in California.<sup>215</sup> Starting in the 1950s and 1960s, when the earliest appeals of this kind surfaced, the appellate courts rarely used an obvious standard of review at all, though some opinions did briefly include “abuse” or “discretion” language in the opinion.<sup>216</sup> Even in these early opinions where the term “abuse of discretion” appeared, the court rarely associated it with any standard-of-review-like function.<sup>217</sup>

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<sup>214</sup> See Justin F. Marceau, *Deference and Doubt: The Interaction Of Aedpa § 2254(D)(2) and (E)(1)*, 82 TUL. L. REV. 385, 396-398 (2007) (complaining that federal courts “cherry-pick” standard of review language in Antiterrorism and Effective Death Penalty Act cases); Coenen, *supra* note 35, at 963-1017 (examining circuit courts decisions, which reveal that many of the circuits abandoned or created numerous exceptions to deferential review of state law issues in federal appeals); Borek, *supra* note 61, at 658 (citing the United States Tax Court with creating its own standard of review rather than using a deferential one); Friendly, *supra* note 22, at 776-77 (recognizing that appellate judges get around discretionary review by finding an area of law the trial court overlooked or misapplied or by claiming that the trial court’s failure to hold an evidentiary hearing on the contested matter limits the discretion afforded to its fact-finding role).

<sup>215</sup> See, e.g., *Vivitar Corp. v. Broidy* 143 Cal.App.3d 878, 886 (Cal. Ct. App. 1983) (making no mention of “abuse of discretion” in its decision, but merely claiming the trial court’s decision was erroneous “as a matter of law”); *McGee v. Superior Court*, 176 Cal.App.3d 221, 221 (Cal. Ct. App. 1985) (analyzing the law and the facts without any standard of review or abuse of discretion language).

<sup>216</sup> See e.g., *Earl Scheib, Inc. v. Superior Court for Los Angeles County* 253 Cal.App.2d 703, 706 (Cal. Ct. App. 1967) (“The question before us is whether the respondent court abused its discretion in denying the motion on the grounds stated in its minute order and in refusing to determine the motion on its merits. This appears to be a case of first impression in California.”);

<sup>217</sup> See e.g., *White v. Superior Court*, 98 Cal.App.3d 51, 56 (Cal. Ct. App. 1979) (holding the trial court abused its discretion by entertaining a motion to disqualify opposing counsel when that motion was not submitted to the trial court earlier); *Cornish v. Superior Court* 209 Cal.App.3d 467, 479 (Cal. Ct. App. 1989) (using the phrase “abuse of discretion” in concluding the trial court’s decision was correct).

During the 1970s and 1980s, some attempts were made to formulate a discretion-respecting review process, but the language of these formulations was not at all consistent.<sup>218</sup> For example, some of these opinions deferred to the trial court's discretion unless the decision was one that was irrational or unreasonable.<sup>219</sup> Many opinions simply stated that the standard of review was abuse of discretion, but offered no further guidance as to what the standard really meant.<sup>220</sup> And still other opinions failed to mention any standard of review at all.<sup>221</sup>

Language defining the abuse of discretion standard for disqualification motions began to become standardized in the late 1980s and early 1990s.<sup>222</sup> One case decided in 1986<sup>223</sup> and another decided in 1989<sup>224</sup> included definitions of abuse of discretion that suggested refusing to comply with the controlling legal principles constituted an abuse of discretion. Defining an abuse of discretion in this way became very popular in the mid to late 1990s.<sup>225</sup> Most cases at that time married the concepts of rationality with adherence to legal principles in defining abuse

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<sup>218</sup> See, e.g., *Hewlett-Packard Co. v. Jensen*, 252 Cal.Rptr. 14, 16 (Cal. Ct. App. 1988) (using the phrase “abuse of discretion” in the opinion and holding that the trial court, which had “broad discretion,” made a decision that was supported by facts and reason); *Reynolds v. Superior Court* 177 Cal.App.3d 1021, 1026 -1027 (Cal. Ct. App. 1986) (“We are cognizant of our duty to uphold respondent court in its ruling on a motion to disqualify if there is ‘a rational basis in the record supporting the manner in which the court exercised the power and discretion vested in it.’”) (quoting *Lyle v. Superior Court*, 122 Cal.App.3d 470, 479 (Cal. Ct. App. 1981)).

<sup>219</sup> See e.g., *Lyle v. Superior Court*, 122 Cal.App.3d 470, 479 (Cal. Ct. App. 1981) (“...we can overturn the determination of the trial court only if that court acted in excess of its jurisdiction or if there is no rational basis in the record supporting the manner in which the court exercised the power and discretion vested in it”).

<sup>220</sup> See e.g., *People v. Conner*, 187 Cal.Rptr. 608, 611 (Cal. Ct. App. 1982) (“The decision of a trial court on a motion to recuse will be overturned only if the court abused its discretion.”);

<sup>221</sup> See e.g., *Woods v. Superior Court*, 149 Cal.App.3d 931, 197 (Cal. Ct. App. 1983) (reviewing the law and facts without mention of any controlling standard of review).

<sup>222</sup> See e.g., *Reynolds v. Superior Court*, 177 Cal.App.3d 1021, 1026 -1027 (Cal. Ct. App. 1986) (“We are cognizant of our duty to uphold respondent court in its ruling on a motion to disqualify if there is ‘a rational basis in the record supporting the manner in which the court exercised the power and discretion vested in it.’”) (quoting *Lyle v. Superior Court*, 122 Cal.App.3d 470, 479 (Cal. Ct. App. 1981)).

<sup>223</sup> See *Mills Land & Water Co. v. Golden West Refining Co.*, 186 Cal.App.3d 116, 126 (Cal. Ct. App. 1986) (“judicial discretion is a legal discretion subject to the limitations of the legal principles governing the subject of its action, and subject to reversal on appeal where no reasonable basis for the action is shown”).

<sup>224</sup> See *Gregori v. Bank of America*, 207 Cal.App.3d 291, 299-300 (Cal. Ct. App. 1989) (“In exercising its discretion, the trial court must make a ‘reasoned judgment’ and compl[y] with the ‘... legal principles and policies appropriate to the particular matter at issue.’”).

<sup>225</sup> See e.g., *Continental Ins. Co. v. Superior Court*, 32 Cal.App.4th 94, 108 (Cal. Ct. App. 1995) (“The scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion.”).

of discretion.<sup>226</sup> Only one opinion, which was issued in the 1990s, made a strong argument for abandoning the rational basis language in abuse of discretion review altogether and adopting legal correctness language.<sup>227</sup> But courts continued to vary in their definitions and their approaches to the abuse of discretion standard as applied to motions to disqualify attorneys.

In 1999, the standard of review for motions to disqualify attorneys was expanded by the California Supreme Court in *People v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1140-41 (Cal. 1999).<sup>228</sup> California's high court, in reversing the intermediate appellate and trial court decisions, set out the following revised standard of review for motions to disqualify attorneys:

Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. However, the trial court's discretion is limited by the applicable legal principles. Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion.<sup>229</sup>

The Supreme Court found that because the trial court reached a legal conclusion in its holding and the facts at the hearing were uncontested, it would review the trial court's decision

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<sup>226</sup> See e.g., *In re Marriage of Zimmerman*, 16 Cal.App.4th 556, 561 (Cal. Ct. App. 1993) ("In exercising discretion, the trial court is required to make a reasoned judgment which complies with applicable legal principles and policies.").

<sup>227</sup> See *People v. Eubanks*, 44 Cal.Rptr.2d 846, 850-51 (Cal. Ct. App. 1995) (arguing that defining abuse of discretion with language that focuses on irrational or arbitrary decisions is too hard to overcome and that ultimately, rationally exercised discretion will come down to whether the judge applied the law correctly).

<sup>228</sup> See *People v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1140-41 (Cal. 1999).

<sup>229</sup> *Id.* (citations omitted).

de novo.<sup>230</sup> Thus, *SpeeDee Oil* established a two pronged test that appellate courts had to meet in order to use de novo review: (1) the trial court must have based its determination regarding disqualification upon the law, and (2) there were no material facts in dispute.<sup>231</sup>

Since *SpeeDee Oil*, the number of appellate courts using de novo review has increased dramatically.<sup>232</sup> Currently, many appellate courts confronted with motions to disqualify appeals cite *SpeeDee Oil* and review evidence supporting the trial judge's decision for substantial evidence, the decision itself, if substantial evidence exists, for abuse of discretion, and questions of law de novo.<sup>233</sup> However, some courts cleverly maneuver around the *SpeeDee Oil* standard of review.

### *1. Creative Routes to De Novo Review*

Before the *SpeeDee Oil* case, only two courts had used the de novo standard to review motions to disqualify attorney appeals.<sup>234</sup> Since *SpeeDee Oil*, twenty-one courts have used de novo review to examine the trial court's decision on whether to grant or deny a motion to disqualify opposing counsel.<sup>235</sup> Some of those courts did so based on questionable reasoning.

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<sup>230</sup> *See id.*

<sup>231</sup> *See SpeeDee Oil*, 20 Cal.App.4 at 1143-44. Only one intermediate appellate court has recognized the two-pronged test *SpeeDee Oil* set out. *See Ali v. Survival Ins. Brokerage, Inc.* 2005 WL 1864074, 7 (Cal. Ct. App. 2005) (“[I]n our view *SpeeDee* does not support the proposition that the trial court's exercise of discretion on a motion to disqualify counsel is subject to de novo review whenever the material facts were undisputed. Rather, *SpeeDee* held that the ruling on a motion to disqualify counsel is subject to de novo review only if the material facts were undisputed and the ruling was based on a legal conclusion.”). *See also In re Complex Asbestos Litigation*, 232 Cal.App.3d 572, 585 (Cal. Ct. App. 1991) (refusing to use de novo review to examine cross-appeal because of deference to trial court resolutions).

<sup>232</sup> *See California data*, on file with the author (noting 21 opinions using the de novo standard of review since *SpeeDee Oil* and only two using de novo review prior to *SpeeDee Oil*).

<sup>233</sup> *See id.*

<sup>234</sup> *See In re Lee G.*, 1 Cal.App.4th 17, 27 (Cal. Ct. App. 1991) (because evidence is not conflicting, the existence of the attorney-client relationship is reviewed de novo); *Cho v. Superior Court*, 39 Cal.App.4th 113, 199 (Cal. Ct. App. 1995) (where trial judge made no findings of fact to support decision, appellate court reviews decision de novo).

<sup>235</sup> *See California empirical data*, on file with author.

Traditionally, as explained earlier, the application of law by the trial court is reviewed de novo. As one academic stated,

The fast pace of trial proceedings...limits the amount of useful information that trial judges receive. Lawyers at trial must focus on logistics, witness preparation, jury selection, jury argument, presentation of evidence, cross-examination of adverse witnesses, and numerous, often unanticipated, questions of law. Burdened by these tasks, counsel often focus only limited attention on important legal issues. Consequently, the district judge must rule on those issues with neither extended reflection nor extensive information.<sup>236</sup>

In contrast to the hurried schedule of a trial judge, appellate judges can focus more of their time on keeping abreast of the law and applying that law to specific legal issues.<sup>237</sup>

Accordingly, the views of appellate judges on matters of pure law are esteemed more highly than those of trial judges; de novo review is a way of tipping the authority on legal issues in favor of the appellate judge.

De novo review is generally not used to review factual findings by a trial court.<sup>238</sup> Indeed, the United States Supreme Court has expressed a concern over using the de novo standard for factual review.<sup>239</sup> In doing so, it warned “appellate courts must constantly have in mind that their function is not to decide factual issues de novo.”<sup>240</sup> However, California

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<sup>236</sup> Coenen, *supra* note 76, at 923.

<sup>237</sup> *See id.* at 924-27.

<sup>238</sup> *See Childress, supra* note 78, at 128 (asserting that de novo means that the appellate court does not give the trial court decision deference, not that it requires a full rehearing or new findings of fact); Coenen, *supra* note 76, at 919 (explaining that in federal appeals, judges avoid extensive appellate review, relying instead on deferential review); Borek, *supra* note 61, at 626 (“a highly deferential review is generally appropriate when the issue being reviewed is factual, as opposed to legal, in character”); Stevenson, *supra* note 56, at 134 (faulting the Ninth Circuit for reviewing facts in a “quasi-de novo” way, even though it declared that it was using an abuse of discretion standard of review).

<sup>239</sup> *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

<sup>240</sup> *Id.*

appellate courts have, when it has served their purpose, creatively gotten around applying the more deferential standards of review to factual disputes.<sup>241</sup>

For example, one intermediate appellate court reviewed factual issues de novo by claiming that the facts were too unusual to warrant a more deferential review.<sup>242</sup> The court stated that because there was no precedent – due to the uniqueness of the facts – to guide the trial court, “the trial court’s ruling cannot realistically be viewed as a routine exercise of discretion.”<sup>243</sup>

In another instance, a California court admitted that because of the careful policy considerations involved with a motion to disqualify, many California appellate courts intentionally get around using the abuse of discretion standard of review.<sup>244</sup> The court then went onto review the facts de novo and stated in its opinion that the trial court had “misunderstood” the facts.<sup>245</sup> The appellate court stated that it believed it was in the same position as the trial court to review the record since the trial court did not hear live testimony at the hearing and did not make official findings of fact.<sup>246</sup> The court brushed off the trial court’s ability to make credibility decisions, claiming that because it did not hear live testimony at the motion hearing, it was “equally equipped” to make credibility judgments as the court below.<sup>247</sup>

The difference between the trial court’s perspective and the appellate court’s perspective that these reviewing courts failed to recognize, however, is that the trial judge knew the parties

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<sup>241</sup> See also Maloy, *supra* note 6, at 617 (noting that other state courts sometimes review facts de novo, though they “often do not clearly set forth the rationale for such rulings”).

<sup>242</sup> See Haraguchi v. Superior Court, 49 Cal.Rptr.3d 590, 595-96 (Cal. Ct. App. 2006).

<sup>243</sup> *Id.*

<sup>244</sup> See Wilkes v. Wilkes, 2005 WL 488674, 4 (Cal. Ct. App. 2005).

<sup>245</sup> See *id.* at 4-8. See also Archuleta v. American Airlines, Inc., 2003 WL 42511, 1 (Cal. Ct. App. 2003) (reversing lower court decision because of the fact trial court misunderstood the facts).

<sup>246</sup> See *id.*

<sup>247</sup> See Wilkes v. Wilkes, 2005 WL 488674, 7 (Cal. Ct. App. 2005).

and their attorneys. As Maurice Rosenberg once stated, trial judges “‘smell[] the smoke of battle’ and can get a sense of the interpersonal dynamics between the [participants in trial].”<sup>248</sup>

Factual review should be deferential because the trial court is in a much better position to believe or disbelieve testimony and witnesses based upon personal observation. Standards of review are not to be cast aside merely because an appellate court wants to interpret the facts differently.

Another California appellate court cunningly abandoned the abuse of discretion standard by claiming that “the trial court did not even purport to exercise discretion.”<sup>249</sup> Discretion is generally not something that is announced before it is exercised; rather, discretion is inherent in every trial court determination. This is yet another example of an appellate court’s desire to get past the appropriate standard for factual review.<sup>250</sup>

Appellate judges who review the trial court’s factual findings de novo give a “hard look” at those factual determinations.<sup>251</sup> This close examination results in higher reversal rates,<sup>252</sup> which causes judicial inefficiency by requiring both the appellate and trial courts to complete the same task: factual review. It creates an imbalanced judicial system by allowing the appellate court to reverse the trial court’s findings of fact when the trial court is in a superior position to make such findings. Finally, it generates more appeals because it gives appellants hope that the

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<sup>248</sup> Rosenberg, *supra* note 9, at 176.

<sup>249</sup> See *City of Santa Barbara v. Superior Court*, 122 Cal.App.4th 17, 22 (Cal. Ct. App. 2004).

<sup>250</sup> See also, *Park Place Associates, Ltd. v. Bell Gardens Bicycle Club*, 2002 WL 31187844, 3 (Cal. Ct. App. 2002) (claiming because “the trial court neither confronted nor resolved disputed questions of fact in deciding the motion,” it would review the motion de novo); *Cho v. Superior Court*, 39 Cal.App.4th 113, 119 (Cal. Ct. App. 1995) (reviewing case de novo because no material facts in dispute); *Frazier v. Superior Court*, 97 Cal.App.4th 23, 118 (Cal. Ct. App. 2002) (determining de novo review appropriate because there are no material disputed factual issues).

<sup>251</sup> Verkuil, *supra* note 4, at 700 (“Although the Court did not rein in ‘hard look’ arbitrary or capricious review in other settings, it minimized intense review of informal agency adjudications by district courts in an effort to avoid the potentially higher reversal rates such review surely would have produced.”).

<sup>252</sup> See *id.* at 691 (“Decisions that might pass muster under arbitrary or capricious review could be upset under a de novo standard.”).

reviewing court might disagree with the lower court's factual findings.<sup>253</sup> One Ninth Circuit commentator observed the following:

[T]he Ninth Circuit ...erred by examining the facts too closely and making independent determinations as to what the facts meant, rather than using the facts in the record to review the propriety of the district court's decision. The problem with this sort of quasi de novo review of the facts is the lack of evidence and witnesses in front of the appellate court.... Because of its discomfort, the Ninth Circuit drew its own bare conclusions despite the clear availability of findings by the district court.<sup>254</sup>

Statistical data of the motion to disqualify attorney cases suggests, as expected, that de novo review results in more reversals than abuse of discretion.<sup>255</sup> Of the 241 cases that the author reviewed, twenty-four opinions expressly used de novo review and fifteen of those cases were reversed.<sup>256</sup> The reversal rate for cases with de novo review was 62.5%.<sup>257</sup> As stated earlier, some of these cases involved de novo review of facts, not law.<sup>258</sup> But, by using unorthodox means to get to de novo review, some of the courts were able to more easily reverse the trial court on determinations of fact, which is not a traditional use of de novo review.

## 2. Abuse of Discretion Liberally Defined

While there are many gradations of abuse of discretion in any jurisdiction, it is still a highly deferential standard. Courts across the country have defined "abuse of discretion" as a decision that is arbitrary or unreasonable.<sup>259</sup> Some scholars have complained that it is such a

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<sup>253</sup> See Stevenson, *supra* note 56, at 138("When you have a quasi-de novo standard for factual review, appellants are more apt to appeal and the appellate process is consequently busier and it takes longer.").

<sup>254</sup> See *id.* at 134-36.

<sup>255</sup> See California empirical data, on file with author.

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

<sup>258</sup> See *supra*, notes 242-250, and accompanying text.

<sup>259</sup> See *e.g.*, State v. Shannon, 642 S.E.2d 516, 522 (N.C. 2007) (an abuse of discretion occurs where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision); Johnson v. St. Paul Ins. Cos., 305 N.W.2d 571, 573 (Minn.1981) (stating that a decision that will not be reversed unless arbitrary); Walker v. Packer, 827

strong burden that the standard, as traditionally defined, is virtually impossible to overcome on appeal.<sup>260</sup> However, other commentators have noted that the abuse of discretion standard has been, in recent years, watered down.<sup>261</sup> For example, scholars have charged courts in Oklahoma and the Ninth Circuit with rendering the abuse of discretion standard meaningless.<sup>262</sup> Regardless of the view that one takes on this issue, the exercise of discretion is something that trial judges implement routinely. One commentator stated,

If there is any common core of meaning, it is that “discretion” has something to do with choice. Where someone acts under compulsion, she cannot be said to exercise discretion. But discretion also implies something more than mere choice. It suggests that a decision should be made not randomly or arbitrarily, but by exercising judgment in light of some applicable set of standards, guidelines, or values. Those standards or norms may rule out certain options while still permitting the decisionmaker to exercise some choice.<sup>263</sup>

Appellate courts are not always so magnanimous about a trial court’s choice, however.

Courts have been known over time to cut away trial court discretion in favor of appellate court

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S.W.2d 833, 839 (Tex. 1992) (abuse of discretion amounts to a decision so arbitrary and unreasonable as to be a clear and prejudicial error of law); *Blakemore v. Blakemore*, 450 N.E.2d 1140, 1142 (Ohio 1983) (stating that an abuse of discretion occurs when the trial court’s attitude is unreasonable, arbitrary, or unconscionable); *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 8 (Ky. Ct. App. 2006) (“The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”) (internal citations omitted).

<sup>260</sup> See *Painter & Welker*, *supra* note 56, at 226 (observing that reviewing courts using an abuse of discretion standard “require outrageous or heinous conduct for reversal”). *But see Childress*, *supra* note 78, at 138-39 (suggesting that there are different shades of discretion); Daniel D. Blinka, “*Practical Inconvenience*” or *Conceptual Confusion: The Common-Law Genesis of Federal Rule 703*, 20 AM. J. TRIAL ADVOC. 467 (1997) (“Staring at a cold record armed with only an abuse of discretion standard of review, appellate courts can be reluctant to second-guess trial judges with holdings that are extremely fact intensive and, thus, of limited precedential value.”); Rosenberg, *supra* note 9, at 184 (charging some courts with throwing around the word deference so carelessly that it becomes “promiscuous deference”).

<sup>261</sup> See *e.g.*, Stevenson, *supra* note 56, at 138 (arguing that the Ninth Circuit created a quasi de novo standard of review in its abuse of discretion standard); Bradley W. Welsh, *Original Jurisdiction Actions As a Remedy for Oklahoma’s Decision Deficit*, 57 OKLA. L. REV. 855, 858 (2004) (“The problem with ... the supreme court’s exercise of discretion in reviewing the district court’s own ‘discretionary’ decision essentially renders the ‘abuse of discretion’ standard contentless.”).

<sup>262</sup> See *id.*

<sup>263</sup> Kim, *supra* note 7, at 408-09.

discretion.<sup>264</sup> Judge Friendly noted this phenomenon in the Ninth Circuit court more than 25 years ago,<sup>265</sup> but the trend continues today in many jurisdictions, including California.

The California Supreme Court, in defining the scope of discretion in motion to disqualify attorney appeals, stated in *SpeeDee Oil* that a trial court's "discretion is limited by the applicable legal principles."<sup>266</sup> This definition of the abuse of discretion standard of review sounds more like a de novo definition than an abuse of discretion definition.<sup>267</sup> And while this definition is not without precedent,<sup>268</sup> it gives the appellate court more room to reverse trial court decisions than a more deferential definition.<sup>269</sup> California is not the only jurisdiction using de novo-like abuse of discretion review; the Ninth Circuit has applied what one commentator called a "quasi-de novo" abuse of discretion standard of review to examine factual issues in a federal class action lawsuit.<sup>270</sup>

Because abuse of discretion is defined in different ways,<sup>271</sup> even within a single jurisdiction, it is hard to gauge what abuse of discretion standard reversal rates should look like. Since abuse of discretion is theoretically the most deferential standard of review, one could

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<sup>264</sup> See Friendly, *supra* note 22, at 763 (noting that Ninth Circuit opinions afforded less discretion to trial courts over a twenty-year period). See also Fallon, *supra* note 21, at 1312 (suggesting that the fact that there are three versions of strict scrutiny review allows justices to vary the applicable version "to reflect their personal views concerning the nature and significance of the rights involved in particular cases.")

<sup>265</sup> See *id.* See also Coenen, *supra* note 76, at 963 (stating that "the rule of deference is crumbling at the edges" before citing several circuit courts for abandoning or failing to use it as it was intended to be used).

<sup>266</sup> See *SpeeDee Oil*, 20 Cal.App.4 at 1143-44.

<sup>267</sup> See also Borek, *supra* note 61, at 642 (asserting that the tax courts' review under an abuse of discretion standard of review appears more consistent with de novo review); Rosenberg, *supra* note 9, at 179 (recognizing that the most diluted abuse of discretion review can mirror de novo review).

<sup>268</sup> See Davis, *supra* note 25, at 59 (noting that abuse of discretion is sometimes defined as going outside the bounds of the legal standards).

<sup>269</sup> See also Allegra, *supra* note 32, at 493 (noting a divergence from true abuse of discretion review among administrative tax court decisions).

<sup>270</sup> Stevenson, *supra* note 56, at 134.

<sup>271</sup> See Friendly, *supra* note 22, at 763-64 (describing various abuse of discretion definitions).

assume that it would hypothetically have the lowest reversal rate.<sup>272</sup> In California, however, trial court decisions on motions to disqualify attorneys were reversed 34% of the time using an abuse of discretion review.<sup>273</sup> While this is certainly a lower rate of reversal than the 62.5% de novo reversal rate, it is still incredibly high when one considers that the *SpeeDee Oil* Court stated “the reviewing court should not substitute its judgment for the trial court's express or implied findings [of fact].”<sup>274</sup> Unfortunately, it appears that is exactly what the intermediate appellate courts are doing when they are collectively reversing a third of all trial court decisions. Regardless of the characterization of the abuse of discretion standard used by California’s appellate courts, the reversal rates indicate that the appellate courts are not giving much credence to the trial court’s findings of fact.

Whether the appellate courts in California were using de novo in unorthodox ways or allowing for less discretion with a traditionally very deferential review, it is apparent that at least some of the time, the reviewing courts exercise more control than they should. Judges must exercise self-control over the desire to change a decision that another judge rendered when the standard of review prohibits such a change. By doing this, appellate courts ensure that the judicial system is appropriately balanced and that the system is economically viable.

## **V. Measures for Change**

Standards of review are not broken beyond repair. There are several ways practitioners and judges can realize their purpose. Some jurisdictions have reworded them so that their

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<sup>272</sup> See e.g., Verkuil, *supra* note 4, at 689 (hypothesizing an affirmance rate of 85-90% for arbitrary and capricious review in administrative law appeals).

<sup>273</sup> See California empirical data, on file with author.

<sup>274</sup> *People v. SpeeDee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1140-41 (Cal. 1999).

meaning is less vague.<sup>275</sup> This is not an arduous task since the judges are often the ones who delineate the reach of the jurisdiction's standards of review.<sup>276</sup> By creating more definite standards that mirror the rules of substantive law, appellate judges would be less likely to be confused by the standard of review's conceptually open nature.

Another consideration is one that has been advocated for years by scholars: judges must understand the general policy reasons for standards of review and the policy reasons behind their application to each issue raised on appeal.<sup>277</sup> In other words, courts need to examine the purposes behind standards of review, the policy considerations raised by the legal issue on appeal, and whether the law and its correlating standard of review are appropriately matched.

The standard used for motions to disqualify attorneys is a good example of a standard of review that may need to be reworked. If the reasons behind granting or denying a motion to disqualify are factually heavy, yet complicated by ethical and legal issues that are difficult for a trial judge to resolve, then it may be better for appellate courts to change the standard of review altogether or create a new standard that reflects the competing policy and legal issues.<sup>278</sup> In order to do this, however, appellate judges must spend time analyzing the purpose behind the law and the policy reasons for the applicable standard to determine whether they complement each other. As stated earlier, each standard of review is used for a specific reason. Sometimes the purpose of the standard of review needs to be reevaluated, especially when the law has evolved

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<sup>275</sup> See e.g., *State v. Lambert*, 787 A.2d 175, 177 (N.H. 2001) (abandoning traditional standards of review language for more definite language). *Urquhart v. Urquhart*, 854 A.2d 193, 195 (Me. 2004) (advocating simpler standard of review terminology). See also *Lee*, *supra* note 56, at 42 (suggesting that courts should consider replacing traditional standard of review language, which tends to confuse, with simpler language).

<sup>276</sup> See *Mead*, *supra* note 20, at 524 ("It is interesting to note that appellate standards of review are limitations that the appellate courts have placed, by and large, upon their own prerogative to substitute their judgment of that of the trial court.").

<sup>277</sup> See e.g., *Kunsch*, *supra* note 12, at 12 ("Instead of trying to force questions into rigid categories, a court should turn to policy analysis.").

<sup>278</sup> See e.g., *Borek*, *supra* note 61, at 626 (advocating a modified standard of review for more evenhanded review of taxpayer appeals).

over time but the standard of review has not. After all, “[i]t is much more forthright and intellectually honest to confront the issues on a policy level than to obfuscate the review process with more boilerplate nomenclature followed by more unexplained application.”<sup>279</sup>

Appellate courts must be held accountable for confusing and misusing standards of review. Frequent reexamination of their purpose and practical worth is one way to achieve this goal. Appellate courts must not assume that new or even experienced appellate judges understand the “moods” expressed by standards of review.<sup>280</sup> Were appellate courts to mandate standard of review training for judges, clerks, and interns, some of the problems outlined in this article might be avoided.

In jurisdictions where there is more than one level of appellate review, the highest reviewing court needs to ensure that all intermediate courts are using the same standard and properly applying the standard to each case. By doing this, the highest court would guarantee that the appropriate standards of review are being used and that they are being worded and applied consistently.

Finally, attorneys could use additional appellate relief to hold appellate courts accountable when they manipulate standards of review. If the judiciary knew that appellate attorneys are likely to file motions for reconsideration or additional appeals due to their erroneous application or manipulation of the applicable standards, they might be less inclined to abuse standards of review. Nevertheless, with empirical research, attorneys are more likely to convince appellate courts that they are either not being consistent in their use of standards of review or that they are ignoring standards of review in their judicial oversight function.

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<sup>279</sup> Kunsch, *supra* note 12, at 49.

<sup>280</sup> Casey, *supra* note 33, at 284.

## VI. Conclusion

Standards of review serve a purpose. They facilitate a better judicial system by balancing power among trial and appellate judges. They ensure judicial economy of time and resources. They create a standardized review process. And, they give notice to parties about the likelihood of success on appeal.

On a more basic level, they are the practical rules that serve to guide the appellate court's review of every case before it. However, these purposes are being missed or ignored by members of the appellate judiciary. Appellate judges must abide by the terms they have set for their review. Standards of review are not to be lauded when the appellate court agrees with the trial court's determination and abused when the reviewing court disagrees with the lower court's decision. Standards of review must pervade the appellate court's analysis of the legal issues on appeal, making sure the result was reached with the restrictions the standard of review imposed.

When appellate judges better understand standards of review, appreciate the policy reasons for them, and exercise self-control in their application, they are more likely to see consistent and fair results that rise above suspicion. Moreover, when the standard permeates the opinion, it demonstrates that the appellate court used the standard to guide its review process. By implementing these practices, standards of review can achieve their purpose, which is not unattainable. One commentator humorously noted that searching through standard of review terminology to find one, true meaning was like searching for the Holy Grail.<sup>281</sup> While it is sometimes hard to decipher their meaning and acknowledge their purpose, standards of review

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<sup>281</sup> See Mead, *supra* note 20, at 540.

are not impossible. Neither is the job of appellate judges in using standards of review appropriately.