THE STANDARD OF REVIEW DOES MATTER: EVIDENCE OF JUDICIAL SELF-RESTRAINT IN THE ILLINOIS APPELLATE COURT

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I. INTRODUCTION[1]

Each issue on appeal is subject to a standard of review,[2] which dictates the degree of deference that the reviewing court will afford to the lower court's decision.[3] The standard is sometimes said to represent a measure of "how wrong" the lower court's decision must be to warrant reversal.[4] The standard of review is so significant that the rules of most reviewing courts (including those of Illinois) specifically require the appellant to identify the appropriate standard of review for each issue addressed in the opening brief.[5]

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1. This article draws from, expands upon, and updates several important works that have addressed the development of standards of review in Illinois courts, including the following: Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51 (1992); Timothy P. O'Neill & Susan L. Brody, *Taking Standards of Appellate Review Seriously: A Proposal to Amend Rule 341,* 83 ILL. B.J. 512 (1995); and Kathleen L. Coles, *Mixed Up Questions of Fact and Law: Illinois Standards of Appellate Review in Civil Cases Following the 1997 Amendment to Supreme Court Rule 341*, 28 S. ILL. U. L. J. 13 (2003).
2. Redmond v. Socha, 837 N.E.2d 883, 890 (Ill. 2005).
3. The "core function" (Nelson v. State, 68 P.3d 402, 406 (Alaska Ct. App. 2003)) of a standard of review is to define the proper role of the reviewing court when passing on the conduct of other decision makers (Evans v. Eaton Corp Long Term Disability Plan, 514 F.3d 315, 320 (4th Cir. 2008)) by identifying the "degree of deference given by the reviewing court to the decision under review." Martha S. Davis & Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 465 (1986). However, the standard of review must be distinguished from the standard of proof, which is "concerned with the quantum and quality of proof that must be presented in order to prevail on an issue." Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 469 (1988). The standard of review has also been described as "the power of the lens through which the appellate court may examine the decision of a particular issue in a case." Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. PITT. L. REV. XXII, XXII (1987).
4. O'Neill & Brody, *supra* note 1 at 512.
5. ILL. SUP. CT. R. 341(h)(3). *See also* FED. R. APP. P. 28(a)(9)(B).

Courts and commentators have observed that the standard of review applied in a particular case may be outcome determinative.[6] In other words, application of a standard that is highly deferential to the lower court's decision may dictate affirmance of a decision that would have been reversed under a less deferential standard. That appears to be a reasonable hypothesis considering the strikingly different degrees of deference that accompany the various standards, ranging from none under the *de novo* standard[7] to almost complete deference when the abuse of discretion standard is applied.[8]

While standards of review certainly matter in theory, do they matter in practice? Is there a quantifiable effect on decisional outcomes of appeals that corresponds to the degree of deference under each standard of review? Notwithstanding their theoretical importance, some have questioned whether the standard applied has any real impact in individual cases.[9] There has been very little evidence to support any view of the practical impact of the standards of review because there has been little systematic empirical study of the impact of the standard of review.[10] Yet it is impossible to draw any accurate conclusions about the significance of standards of review without seeking to understand their actual role in appellate decision-making.

The remainder of the article will proceed as follows: Part II provides a basic introduction to the theoretical role of the standard of review in appellate decision-making. Part III outlines the four standards employed in appellate review by Illinois courts. Part IV addresses the vital importance of a common understanding of the standards of review, and of their consistent application, by reviewing courts. Part V provides the results of the author's study to determine whether standards of review are consistently applied in reported opinions of the Illinois Appellate Court. Finally, Part VI discusses several

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6. *See, e.g.*, Gerlach v. Woodke, 881 N.E.2d 1006, 1009 n. 1 (Ind. Ct. App. 2008) ("[A]lthough the standard of review is not outcome-determinative in this case, it often is in a significant number of cases."); Kearney v. Standard Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999) (a change from *de novo* to a clearly erroneous standard of review could be outcome determinative). *See also* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391 (1995) ("Appellate courts have to decide what the 'standard of review' is, and that standard more often than not determines the outcome.").
7. Interior Crafts, Inc. v. Leparski, 853 N.E.2d 1244, 1247 (Ill. App. Ct. 2006).
8. *In re* D.T., 818 N.E.2d 1214, 1222 (Ill. 2004) (review under the abuse of discretion standard is "next to no review at all").
9. People v. Coleman, 701 N.E.2d 1063, 1072–73 (Ill. 1998), *quoting* Johnson v. Trigg, 28 F.3d 639, 643 (7th Cir. 1994) ("As the Seventh Circuit has aptly noted, there exist 'verbal distinctions within the deferential category (clear error, substantial deference, abuse of discretion) [that] have little consequence in practice.'").
10. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 120 (2002) ("Law, admittedly, has long ignored empirical methods.").

problems with the consistent application of standards of review as disclosed by the study.

II. THE ROLE OF THE STANDARD OF REVIEW

The American court structure consists of a system of trial courts, with the decisions of those courts appealable to one or more appellate levels. The trial courts' primary role is to adjudicate disputes by ascertaining the facts in a particular case and applying established law to the facts.[11] Judges at the trial court level are the initial and, in most cases, the only judicial decision-makers who will be involved in a particular lawsuit.[12]

The charge of the appellate-level courts is far more limited in particular cases than that of the trial court, yet appellate decisions carry implications of greater magnitude across the broad range of cases. The appellate courts' primary responsibility is maintaining a stable body of legal precedent to guide the trial courts.

While there are numerous reasons why maintaining a clear division between the respective functions of the trial and reviewing courts is a vital component of the established court system, one is preeminent: certainty. Justice Brandeis commented that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[13] A legal dispute, and the ensuing lawsuit, represent uncertainty.[14] By way of simple illustration, suppose that two people lay claim to the same property and it is uncertain to whom the property rightfully belongs under the law. A lawsuit is filed to settle rights to the property. The resolution of the case by a trial court provides a degree of certainty for the parties to the individual dispute, as well as potential lenders, purchasers, and others with a possible interest in the property.

A certainty-enhancing decision by the trial court is a benefit to the parties and society at large. Such a decision allows interested parties to better understand their respective rights and risks. Much of the benefit of certainty would be lost, however, if it were possible for a party dissatisfied with the

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11. Bryan L. Adamson, *Federal Rule of Civil Procedure 52(A) As An Ideological Weapon*?, 34 FLA. ST. U. L. REV. 1025, 1044–45 (2007).
12. RICHARD A. POSNER, HOW JUDGES THINK 44 (2008) (the vast majority of cases are never appealed "because the outcome of the appeal is a foregone conclusion" due to the clear dictates of the law to be applied).
13. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).
14. Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 813 (2002) (discussion of legal uncertainty costs).

result in the trial court to simply "try again" in another forum and, perhaps, even keep trying until achieving a result more to his or her liking.[15]

As important as the benefits of certainty in the resolution of individual disputes are, another version of certainty–what one might call predictive certainty–is an equally important feature. Predictive certainty arises from consistency and coherence in the law. Clear and stable legal norms established by determinations made in a variety of cases over time provide benefits to society at large by allowing people to more clearly understand their rights and risks.[16] To be effective, the courts must be seen by most of the participants most of the time as generally "fair." For present purposes, "fair" is the functional equivalent of consistent.[17] That is, people must believe that disputes of like kind will be resolved in (essentially) the same way, regardless of the identities of the individual parties.[18]

Here again, the fundamental concern is certainty. By creating a series of consistent decisions over time that illustrate how disputes of particular types will be resolved, the judicial decision-making process creates certainty. [19] Anyone may then assess his or her own situation in light of similar situations decided by courts in the past to better gauge the likely success of one's own position if it is subjected to the same judicial decision-making process in a lawsuit.[20]

Absolute consistency of results is probably impossible and, even if possible, is not the goal. The sort of consistency that serves the judicial system's purpose of enhancing certainty is intellectual consistency. That is,

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15. *In re* C. B., 898 N.E.2d 252, 259 (Ill. App. Ct. 2008). ("A reviewing court's function is not to retry the defendant and it should not substitute its judgment for that of the trier of fact.").
16. Van Alstine, *supra* note 14.
17. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1160 (2005) (where it appears to litigants that similar cases do not yield similar judgments, the law "inevitably seems unfair and arbitrary in its application").
18. Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 333 (2009) ("Only when those subject to the legal system know that they will be treated in a manner consistent with those who have preceded them can they structure their affairs with confidence. That, in turn, reduces the operational costs of the legal system, because informed actors will commit fewer violations. Moreover, the ability to regard prior applications of legal standards as binding on present disputes reduces the cost of adjudicating those violations that do occur as compared to a regime in which each case is determined anew.").
19. Posner, *supra* note 12 at 206 ("Stability and continuity are highly valued qualities in any legal system, and judges (in part for that reason) are hemmed in, though not nearly so tightly as legalists believe, by precedents and other authoritative texts.").
20. *Id*. at 145 (where the law is more certain, the litigation rate will be lower).

there must be a unifying basis for decisions that is objective, rational, articulable, and understandable.[21]

While vital, such consistency is not easily achieved. Some divergence is nearly unavoidable when numerous trial courts seek in good faith to apply even a static body of established law to a virtually unending stream of differing factual situations. It is here where the review function operates.

Appellate courts assure (or are intended to assure) the existence of the objective, rational, articulable, and understandable basis for decisions issued by the courts–i.e., the law.[22] They seek to assure, most importantly, that the same law is applied in the same situations by all of the trial courts within the jurisdiction of the reviewing court.[23] They also assure, although somewhat less strictly,[24] that similar factual situations are resolved in a similar manner by all of the trial courts within the appellate court's jurisdiction. Finally, they provide some assurance that all trial courts conduct their business in accord with basic notions of fairness and proper procedure.

The reviewing court can enhance the certainty of judicial decision-making only by acting within the proper scope of its responsibility. If the reviewing court leans too far in the direction of allowing appeals to be a "do over" of the trial court proceeding for disgruntled litigants, certainty suffers.[25] On the other hand, if the reviewing court does not discharge its function of

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21. The need to maintain a stable body of precedent is the foundation of *stare decisis* and is often identified by Illinois reviewing courts as an imperative. *See, e.g.*, O'Casek v. Children's Home & Aid Soc. of Ill., 892 N.E.2d 994, 1005 (Ill. 2008) (overlooking forfeiture of an issue on appeal "in the interest of maintaining a sound and uniform body of precedent"); Porter v. Decatur Mem'l Hosp., 882 N.E.2d 583, 592 (Ill. 2008) (noting that there is "some interest in having a uniform body of precedent [between state and federal law] where many cases involving a diversity of citizenship could be brought in either state or federal court"). For a discussion of the need for articulability of legal rules, *see* Oldfather, *supra* note 18 at 325.

22. Posner, *supra* note 12 at 87 (thereby reducing the occasion for "idiosyncratic judging").

23. Adamson, *supra* note 11 at 1044–45. In Illinois, decisions of an appellate court are binding precedent on all circuit courts in the state regardless of whether they lie within the geographic jurisdiction of the appellate court district. People v. Carpenter, 888 N.E.2d 105, 111–12 (Ill. 2008).

24. *See infra* Part III.B.

25. The United States Supreme Court explained the importance of refraining from over-broad appellate review as follows:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. 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. In addition, the 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. As the Court has stated in a different context, the trial on the merits should be the "main event" . . . rather than a "tryout on the road." Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574–75 (1985).

maintaining a proper degree of consistency among the trial courts, certainty likewise suffers.[26]

While the distinction between trial courts and courts of review may be clearly and simply stated in theory, the system of judicial review can function properly only if that role distinction is maintained in practice, which occurs only through adherence to mechanisms that differentiate between the trial court function and the review function[27] in a way that will maximize the court system's ability to provide its preeminent product: certainty. The standard of review is one of the two most important mechanisms working to confine the appellate courts to their proper role[28] (the other is appellate jurisdiction).[29] Standards of review have existed since the beginning of American jurisprudence.[30] They should be the starting point for the resolution of the issues on appeal.[31] Yet the standard of review is often viewed as an afterthought by many practitioners, as well as by some appellate court judges.[32]

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26. *See* State Chamber of Commerce v. Filan, 837 N.E.2d 922, 930 (Ill. 2005) (noting the reviewing courts' responsibility to "maintain a sound and uniform body of precedent").
27. O'Neill & Brody, *supra* note 1 at 516 (The "[p]roper standard of review is of far more than mere academic interest. The decision largely determines which court will have the final word on a particular issue.").
28. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 996 (1986).
29. *Id.*
30. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 47 (2000).
31. O'Neill, *supra* note 1 at 51.
32. For example, Judge Posner has suggested that most appellate judges actually approach application of the standard of review in a basic and practical manner:

> Opinions recite a variety of standards of review–plenary, clearly erroneous, substantial evidence, some evidence, a modicum of evidence, reasonableness, arbitrary and capricious, abuse of discretion, *Chevron*, *Skidmore*, and so forth–but the gradations of deference that these distinctions mark are finer than judges want, can discern, or need. The only distinction the judicial intellect actually makes is between deferential and nondeferential review. Deferential review implies that the opposite ruling by the lower court probably would also have been upheld, and thus is inappropriate for reviewing a ruling on a question of law . . ., as that would make the law vary according to which trial judge one happened to be before. But other rulings, such as deciding whether the plaintiff in a particular case was negligent, can vary among judges without unsettling the law. So those rulings are not reversed unless the appellate court is pretty confident that they are wrong, and that confidence–and hence how searching appellate review will be–will vary with the court's assessment of its own competence relative to that of the lower court of agency that made the ruling. If, as in the case of a scheduling decision, there really is no standard of evaluating the correctness of a ruling, or if the ruling resolved a highly technical issue that is the bread and butter of the agency that made it, the appellate court will be strongly inclined to defer, swallowing any doubts it might have.

It is not uncommon for attorneys to relegate them to little more than a formulaic throw-away line buried somewhere in the dense text of an appellate brief because the rules require it.[33] Even some appellate courts have failed to treat the standard of review as more than boilerplate to be dispensed with before getting to the decision of the case.[34]

The standard of review is–or should be–much more than that.[35] It lies at both the theoretical and practical heart of the entire multi-tiered system of judicial review.[36] It is the governor that maintains the certainty of results in the judicial process, applying just that quantum of review that is heavy enough to assure a stable and consistent body of precedent but not so heavy as to destroy the trial court's preeminent role in concluding litigation.[37]

> So what is involved in appellate review is, at bottom, simply confidence or lack thereof in another person's decision. That is an intuitive response informed by experience with similar decisions. It is not rule– or even standard-driven, except in clearest cases, but it is not mindless guesswork either.

Posner, *supra* note 12 at 113–14 (emphasis added).

33. "Over the years–while teaching law, reading appellate briefs, and listening to oral arguments–we have been surprised by the number of law students and practicing attorneys who treat the standards of review as mere 'legalese'." HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW (2007). The explicit use of defined standards of review is a fairly recent development in the appellate review process in Illinois. Since 1997, Illinois Supreme Court Rules have required that the appellant state the proper appellate standard in the opening brief:

> The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument.

ILL. SUP. CT. R. 341(h)(3). The addition of that requirement to the rules also marks the time when reviewing courts started to become more diligent about explicitly stating in their opinions the standard being applied to each issue decided.

34. Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. PITT. L. REV. xxii, xxii (1987) ("When these statements [of the standard of review] appeared in opinions, they frequently were in the nature of boilerplate expressions which 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.").

35. O'Neill & Brody, *supra* note 1 ("It should be impossible to decide any issue in an appeal without first identifying the appropriate standard of review.").

36. Davis, *supra* note 30 at 47–48 (The standard of review "is a statement of the power not only of the appellate court but also of the tribunal below, measured by the hesitation of the appellate court to overturn the lower court's decision.").

37. This relationship was described by Judge Posner as follows:

> The proper standard of review depends on the character of the ruling sought to be reviewed. If it is a ruling on a pure question of law, review is plenary because it is intolerable to have the law differ from district judge to district judge. If it is a pure question of fact –a "who did what where when and to whom" kind of question, "pure" in the sense that no legal knowledge or instruction is necessary to answer it–then the correct standard is clear error.
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> If it is a "mixed" question of law and fact or, the same thing under a different label, an "ultimate" question of fact–that is, if it is the application of a legal standard (such

The standard of review as applied in individual cases, then, reflects the degree of deference that the reviewing court gives to the decision of the trial court under review.[38] The level of deference varies with the type of decision under review and, in each instance, is designed to maximize the certainty of the results produced by the judicial process as a whole.[39]

> as negligence) to the pure facts (what the defendant did) to yield a legal conclusion (the defendant was or was not negligent)–then, again, except in those few, mainly constitutional cases in which the Supreme Court has decreed plenary review of such determinations, the clear-error standard governs. The application of a legal rule or standard to the particular facts of particular cases will yield different outcomes from case to case depending on the facts of the individual case. So uniformity of outcome is unattainable; and as divergent *applications* of law to fact do not unsettle the law–doctrine is unaffected–a heavy appellate hand in these cases is unnecessary to assure the law's clarity and coherence.
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> Then too the court that finds the facts will know them better than the reviewing court will, and so its application of the law to the facts is likely to be more accurate. And in many cases the determination of a "mixed" question of fact and law reduces to a series of purely factual determinations–for example, in a negligence case, to a determination of the burden of precautions, the magnitude of the injury, the likelihood that the injury would occur if the defendant failed to take the precautions, and the relation among these variables, all of which are factual, and their relation to each other likewise. One might suppose that Rule 52(a) all by itself compelled application of the clear-error standard to an "ultimate" finding of fact that was in truth merely a composite of pure factfindings and thus not a "mixed" question of fact and law at all.
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> Finally, if the ruling under review is judgmental, managerial, or otherwise discretionary, rather than being either legal or factual in character, such as the choice of a sanction that will be appropriate in light of the gravity of a litigant's or a lawyer's misconduct, review is for abuse of discretion, again and for obvious reasons a deferential standard.
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> To summarize, whereas review of rulings on pure questions of law is plenary, review of pure factfindings, of applications of a legal standard to pure facts, and of judgmental rulings is deferential. All three of the deference categories involve case-specific rulings, which, even if they do not compose a consistent pattern across similar cases (the possibility inherent in deferential appellate review–deference implying that the appellate court might well have affirmed an opposite ruling by the district court), do not unsettle the law because the rulings set forth no general propositions of law. Thomas v. General Motors Acc. Corp., 288 F.3d 305, 307 (7th Cir. 2002) (extensive citations omitted).

38. *See, e.g.*, *In re* D.T., 818 N.E.2d 1214, 1221–22 (Ill. 2004) (discussing the role and function of the standard of review).

39. Determining the applicable standard of review is a "difficult, but important step" in any appeal. Franz v. Calaco Dev. Corp., 818 N.E.2d 357, 368 (Ill. App. Ct. 2004). The appropriate standard of review depends on three factors: (1) the type of decision-maker (judge or jury); (2) the type of case (civil or criminal); and (3) the type of issue being reviewed (fact or law). *Id*.

As a limitation on the courts' power, standards of review share many significant aspects in common with appellate jurisdiction.[40] Appellate jurisdiction refers to the power of the appellate tribunal to issue a valid and binding judgment in a particular case.[41] Like appellate jurisdiction, application of standards of review limits the reviewing courts' interference with the actions of lower courts.[42] As with appellate jurisdiction, the application of the standards of review is dictated by *stare decisis* and is not discretionary with the reviewing court.[43] The appropriate standard of review with respect to each issue is typically set forth in case law.[44] Appellate courts are bound to apply the standard of review designated by case law or statute for the particular issue

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40. Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 576 (Ill. 1988), *quoting* 2 C. KOCH, ADMINISTRATIVE LAW & PRACTICE §9.1 (1985) ("While the line between the two concepts is not hard and fast, generally, reviewability sets out the area of review and . . . standards of review set out the level of the judicial involvement within that area.").

41. *In re* W.M., 767 N.E.2d 846, 849 (Ill. App. Ct. 2002), *aff'd* 795 N.E.2d 269 (Ill. 2003).

42. Some courts have also equated standard of review and scope of review because of their function as limitations on the reviewing courts' power. *See* Peplinski v. Fobe's Roofing, Inc., 531 N.W.2d 597, 599 n.1 (Wis. 1995). *See also* Coalition To Save Our Children v. State Bd. of Educ. of State of Del., 90 F.3d 752, 779 (3d Cir. 1996) ("As judges . . . we are constrained to fulfill an obligation to address only those constitutional questions properly presented to us, and to show fealty to appropriate standards of review, lest we abandon the limits on judicial power that give coherence to our political system.").

43. The Illinois Supreme Court is not similarly constrained. Indeed, nearly all of the published opinions at the supreme court level are either explicitly or implicitly pronouncements of legal doctrine. All but a handful of cases coming before the Illinois Supreme Court are there on a discretionary basis. *See* ILL. SUP. CT. R. 302, 315, 316 and 317. Those cases in which the court grants leave to appeal are chosen based upon their projected precedential import. *See* ILL. SUP. CT. R. 315(a). In practice, that means establishing what the law is. Even where the supreme court deals with issues that would be reviewed under a standard other than *de novo* if heard by a lower reviewing court, the supreme court's purpose in announcing its decision is broader than merely correcting error committed by a lower court in a particular case.

44. Determining the proper standard to apply to a particular type of issue in civil cases has proven to be largely without significant controversy in Illinois. The districts of the appellate court nearly always reach identical conclusions about the standard under which a particular type of issue should be reviewed, even without guidance from the supreme court. The fairly rare disagreement in that respect usually involves issues that may be fairly seen as on the margin between fact finding and application of legal doctrine or decisions as to which there is a legitimate disagreement about whether the question is one of "judicial discretion" or of "law." Those areas of disagreement are minor in overall effect both because of their relative rarity and because they are usually resolved by the supreme court before causing much trouble. Over all, the key point is that no one challenges the available categories themselves, but only the categorization in rare instances. *See, e.g.*, People v. Vincent, 871 N.E.2d 17, 26 (Ill. 2007) (discussing the development of case law governing the standard of review to be applied to the appeal of a ruling on a motion brought pursuant to 735 ILL. COMP. STAT. 5/2–1401 (2000)).

under review.[45] Finally, a party may not "waive" or disregard the standard of review.[46]

However, application of the standard of review differs from appellate jurisdiction in one key way. While the absence of appellate jurisdiction entirely eliminates the reviewing court's power to hear a case, the standard of review merely limits the scope of review of a case that is properly before the appellate court.[47] The question of whether a lower court has the authority to hear and decide a case (jurisdiction) is reviewed by higher courts as a matter of law.[48] An appellate court is also bound to consider its own appellate jurisdiction to hear a case regardless of whether any party raises the question.[49] An order entered without jurisdiction is void,[50] and the lack of jurisdiction may be raised at any time in any court, directly or indirectly, in an attack on the order.[51]

Whether a reviewing court has applied the proper standard of review is also an issue of law subject to *de novo* review.[52] However, faulty application of the standard of review is subject to far less effective scrutiny than is the entry of an order without jurisdiction.[53] For that reason, the effectiveness of the standard of review as a limitation on the reviewing court depends almost

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45. Sieron & Assoc., Inc. v. Dep't of Ins., 857 N.E.2d 805, 813 (Ill. App. Ct. 2006) ("[W]e are bound by our standard of review, which obliges us to take the agency's findings as *prima facie* true and correct."); Chief Judge of the Cir. Ct. of Cook County v. American Fed. of State, County. & Mun. Employees, 607 N.E.2d 182, 185 (Ill. 1992) ("The issues which we are asked to address . . . must be viewed in light of the standard of review by which we are bound.").
46. Zurich Ins. Co. v. Raymark Indus., Inc., 572 N.E.2d 1119, 1122 (Ill. App. Ct. 1991) ("There is not any case in Illinois which has held that a party waived the standard of review by failing to recite the standard in its brief.").
47. Standards of review are not, of course, a jurisdictional bar to the court's power to hear a case. There is a difference between reviewability, which delineates the area of judicial review, and standard of review, which controls the level of the reviewing court's involvement in that area. Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 576 (Ill. 1988), *citing* 2 C. KOCH, ADMINISTRATIVE LAW & PRACTICE §9.1 (1985) (noting the relationship between reviewability, or the area of judicial review, and standard of review, or the level of judicial involvement in that area). *See also* Bigelow Group, Inc. v. Rickert, 877 N.E.2d 1171, 1181 (Ill. App. Ct. 2007), *appeal denied*, 882 N.E.2d 76 (Ill. 2008).
48. Dir. of Ins. *ex rel.* State v. A & A Midwest Rebuilders, Inc., 891 N.E.2d 500, 502 (Ill. App. Ct. 2008) ("Whether a trial court has jurisdiction is a question of law subject to *de novo* review.").
49. Cavanaugh v. Lansing Mun. Airport, 681 N.E.2d 39, 41 (Ill. App. Ct. 1997) (The appellate court "is obligated to consider its own jurisdiction *sua sponte*.").
50. *In re* Marriage of Dobbs, 831 N.E.2d 1154, 1156 (Ill. App. Ct. 2005).
51. People v. Flowers, 802 N.E.2d 1174, 1184 (Ill. 2003).
52. *See, e.g.*, Gatlin v. Ruder, 560 N.E.2d 586, 589–90 (Ill. 1990).
53. *See infra* Part IV.

entirely upon judicial self-restraint[54]–the courts' own consistent application of the standards according to the requirements of precedent.[55]

When seen as a means to confine the reviewing courts to a limited role that enhances the consistency of judicial decision-making, the standard of review becomes more than a mere procedural nicety. It is more accurately viewed as a substantial limitation on the power of an intermediate reviewing court.

Thus, standards of review "matter, for in every context they keep judges within the limits of their role and preserve other decision-makers' functions against judicial intrusion."[56] Although the standard of review may be legitimately viewed as procedural[57] or functional,[58] it also serves a broader function.[59] For that reason, the role played by the standard of review in judicial decision-making may be more accurately viewed as an important and substantial limitation of the reviewing court's power.[60]

III. THE FOUR STANDARDS OF REVIEW IN ILLINOIS

The framework for the reviewing courts' self-restraint is the hierarchy of standards of review. For purposes of ascertaining the proper standard of review, "[a]ll appellate Gaul is divided into three parts: review of facts, review of law, and review of discretion."[61] While standards of review are sometimes stated or formulated in slightly different ways depending upon the particular jurisdiction, the three-part distinction between fact, law, and discretion describes the basic framework of all standards of review in American

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54. Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315, 320–21 (4th Cir. 2008) ("Standards of review are thus an elemental expression of judicial restraint, which, in their deferential varieties, safeguard the superior vantage points of those entrusted with primary decisional responsibility.").
55. *See infra* Part IV.
56. *Evans*, 514 F.3d at 326.
57. Caligiuri v. First Colony Life Ins. Co., 742 N.E.2d 750, 755 (Ill. App. Ct. 2000); State v. Thurman, 846 P.2d 1256, 1267 (Utah 1993) ("[F]ederal appellate courts characterize the standard of review as a matter of procedural, rather than substantive, law.").
58. Franz v. Calaco Dev. Corp., 818 N.E.2d 357, 372 (Ill. App. Ct. 2004).
59. State v. Sykes, 840 P.2d 825, 829 (Utah Ct. App. 1992) (Jackson, J., concurring) ("The review standard is vital to the appellate process because it limits and focuses the power the appellate court may exercise over the trial court. At the same time, the standard limits or expands the power of the trial court. Thus, policy considerations underlying standards of review include: what is the proper balance of power between two court levels, and how will judicial resources be affected.").
60. O'Neill, *supra* note 1 at 54 (underlying the standards of review is the "crucial question of how power is allocated among the decisionmakers").
61. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 173 (1978).

jurisprudence.[62] Because this article addresses a study of the application of standards of review in the Illinois Appellate Court, we will briefly examine the standards of review as applied in civil cases by the Illinois courts.

A. Review of Legal Rulings

The "main function"[63] of the appellate courts is to assure the existence of objective, rational, articulable, and understandable bases for judicial decisions to be used as precedent for future cases.[64] In that respect, the appellate court's role is most significant in assuring that the same law is applied in the same situations by all of the trial courts under its jurisdiction.[65] When determining what the "law" is–that is, the pure legal doctrine–the power and role of the appellate court is at its fullest.[66] In that realm, there is no room for deviation from one trial court to another.[67] This is true without regard for the "correctness" of the higher courts' legal determinations as compared with divergent views of the lower court.[68] Therefore, reviewing courts review pure issues of law *de novo*, granting no deference to the decision of the trial court in that regard.[69]

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62. Some have suggested that the tripartite distinction is not the true determinant of the standard. Instead, the basic conclusion is which decision-maker (trial court or appellate court) is better equipped to make a particular sort of decision. Then, the standard is selected so that the decision-making power will be properly focused. *See, e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985); and Miller v. Fenton, 474 U.S. 104, 114 (1985) (The "fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.").

63. O'Neill, *supra* note 1 at 55.

64. *See* Ornelas v. United States, 517 U.S. 690, 697 (1996) (commenting on the need for appellate courts "to maintain control of, and to clarify . . . legal principles").

65. Posner, *supra* note 12 at 1 ("If changing judges changes law, it is not even clear what law is.").

66. Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L. J. 377, 407 (1984) (determining questions of law is "the very essence of the appellate court's role").

67. The policy concerns that underlie *de novo* review have been described as follows:

> Under the doctrine of *stare decisis*, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants. Rulings on factual issues, on the other hand, are generally of concern only to the immediate litigants. From the standpoint of sound judicial administration, therefore, it makes sense to concentrate appellate resources on ensuring the correctness of determinations of law.

> Joel R. by Salazar v. Bd. of Educ. of Mannheim Sch. Dist. 83, 686 N.E.2d 650, 655 (Ill. App. Ct. 1997), *quoting* U. S. v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984).

68. Lindquist & Cross, *supra* note 17 at 1172 ("The rule of law depends on stability and thus willingly suffers the perpetuation of some incorrect rulings in exchange for the benefit of stability and predictability of outcomes.").

69. Zebra Tech. Corp. v. Topinka, 799 N.E.2d 725, 731 (Ill. App. Ct. 2003).

Some of the most common applications of the *de novo* standard are found in reviews of decisions on motions to dismiss[70] and motions for summary judgment.[71] Whether a legal doctrine should apply in a particular case is also subject to *de novo* review.[72]

B. Review of Fact Findings

For the sake of certainty and reliability, reviewing courts must also assure that similar factual situations are resolved in a similar manner by all of the trial courts.[73] In attempting to do so, the reviewing court faces two disadvantages, one practical and the other theoretical.

As a practical matter, the reviewing court is not equipped to discover facts in the manner of a trial court.[74] The responsibility for fact-finding belongs to the trial courts.[75] This is not mere happenstance, of course. It is possible that the law could provide for a reviewing court to hold a new trial. But there is no such provision in the law, because creating a "do over" in the higher court would destroy the certainty instilled by the trial court's decision. Thus, reviewing courts are limited to working with the facts already developed in the trial court.[76]

However, the extent to which the appellate court is handicapped by not being a fact-finder depends somewhat upon the source of the facts. If the source of a fact is the words on a page of a document in evidence, without further exposition from witness testimony, then it would seem that reviewing court judges are in as good a position as the trial judge to make of those words

70. Karas v. Strevell, 884 N.E.2d 122, 129 (Ill. 2008).

71. Williams v. Manchester, 888 N.E.2d 1, 9 (Ill. 2008).

72. Heastie v. Roberts, 877 N.E.2d 1064, 1075 (Ill. 2007) (whether the *res ipsa loquitur* doctrine should apply in a particular case presents a question of law, so *de novo* review is appropriate).

73. Oldfather, *supra* note 18 at 333 ("Only when those subject to the legal system know that they will be treated in a manner consistent with those who have preceded them can they structure their affairs with confidence. That, in turn, reduces the operational costs of the legal system, because informed actors will commit fewer violations. Moreover, the ability to regard prior applications of legal standards as binding on present disputes reduces the cost of adjudicating those violations that do occur as compared to a regime in which each case is determined anew.").

74. Salve Regina Coll. v. Russell, 499 U.S. 225, 231–33 (1991) (the dichotomy between the standard for reviewing legal determinations and the standard for reviewing fact determinations recognizes "the respective institutional advantages of trial and appellate courts").

75. Pullman-Standard v. Swint, 456 U.S. 273, 291–92 (1982), *quoting* DeMarco v. U.S., 415 U.S. 449, 450 n. 94 (1974).

76. Further, as a matter of judicial economy, the resources of the appellate courts are most properly devoted to determining issues of law "because they are free from the time-consuming process of hearing evidence." State v. Attaway, 870 P.2d 103, 107 (N.M. 1994).

what they will.[77] On the other hand, where witness veracity is in question, and the demeanor of the witness is key to judging honesty, words on the pages of a transcript are a poor substitute for first-hand observation.[78]

The theoretical challenge in seeking to bring consistency (and therefore certainty) to decisions of trial courts on diverse fact patterns is that perfect consistency is not possible. Put more precisely, it would be impossible to achieve unanimous agreement as to the contours of what would constitute "consistency," let alone to actually achieve it.[79]

The theoretical challenge, though, becomes the saving grace. Judicial decision-making need not strive for scientific certainty in the fact-finding function.[80] Not all decisions have to be perfectly consistent. They only have to be "consistent enough" that the integrity of the system overall can be trusted.[81] Put more bluntly, participants do not need to be convinced that the system is perfect, only that it is not out of whack–producing results that are either entirely unpredictable or palpably "wrong"–or, worse yet, "rigged" or subject to the personal preferences of the particular fact-finder.[82] Thus, when it comes to achieving consistency in applying law to diverse fact situations, the judicial system's acceptable margin of error is much greater than when assuring consistency of legal doctrine.

All of this is balanced by applying a standard of review to the fact finding function that is not as exacting as *de novo*, but nevertheless allows for a degree

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77. *See* Northwest Div., Inc. v. Desai, 818 N.E.2d 753, 760 (Ill. App. Ct. 2004) ("[I]n cases where the trial court heard no testimony and based its decision entirely on documentary evidence, the rationale underlying a deferential standard of review is inapplicable, and a reviewing court will make an independent decision on the facts." (internal quotations and citations omitted)); Muhammad v. Muhammad-Rahmah, 844 N.E.2d 49, 55 (Ill. App. Ct. 2006) ("While we are aware of no authority prescribing a different standard of review under these circumstances, we believe that a lesser degree of deference may be owed where the reviewing court weighs essentially the same evidence–here, transcribed testimony and bystanders' reports–as the trial court did."); Rosenthal-Collins Group, L.P. v. Reiff, 748 N.E.2d 229, 233 (Ill. App. Ct. 2001) ("Generally, the manifest weight of the evidence standard of review applies if the trial court heard courtroom testimony, but a *de novo* standard applies when the trial court heard no testimony and ruled solely on the basis of documentary evidence.").

78. *In re* Marriage of Walker, 899 N.E.2d 1097, 1104 (Ill. App. Ct. 2008) ("A reviewing court will defer to a trial court's determination of credibility because the trial court is in the best position to observe the conduct and demeanor of witnesses.").

79. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) ("Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.") (*quoting* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 936 (1989)).

80. Oldfather, *supra* note 18 at 333.

81. *Id*. ("A fundamental tenet of the American legal system is that like cases should be treated alike.").

82. Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 287 (1992) (The "rule of law attracts formidable support only so long as people believe that there is a rule of *law* and not a rule *by judges*.").

of review to catch and correct outliers.[83] An outlier for current purposes may be thought of as a decision that is sufficiently different from the norm as to draw undue attention. (In other words, an outlier is a decision that is obviously wrong.) A few outliers are inevitable and many will go uncorrected, either because no one takes an appeal or because deferential review, combined with other aspects of the appellate system, allows them to stand. However, a proliferation of highly questionable outcomes would eventually destroy the integrity of the system because questionable outcomes interfere with subsequent attempts to ascertain a pattern and, as such, undermine the key ingredient of predictive certainty.

In Illinois, fact-based determinations are subject to two differently-worded standards, depending upon the identity of the fact finder. For issues that call upon the trial judge or a jury to make factual or evidentiary determinations, the reviewing court will reverse the trial court only when the lower court's decision is against the manifest weight of the evidence.[84] Reversal under the manifest weight of the evidence standard is warranted when "all reasonable people would find that the opposite conclusion is clearly apparent."[85] That an opposite conclusion may be equally as reasonable as the trial court's decision or that the reviewing court might have ruled differently based upon the same evidence does not justify a reversal.[86] While the standard is difficult for the appellant to meet, manifest weight review cannot be entirely deferential to the initial fact-finder if the reviewing court is to fulfill its corrective function.[87] Accordingly, manifest weight of the evidence review applies to such fact-based determinations as findings of fact made by a trial judge after trial,[88] a jury's verdict,[89] the substitution of a judge for cause,[90] jury challenges for cause,[91] and the grant or denial of mandamus.[92]

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83. *See* Roger J. Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 636 (1958) ("The problem is that facts are forever gone and no scientific method of inquiry can ever be devised to produce facsimiles that bring the past to life. The judicial process deals with probabilities, not facts, and we must therefore be on guard against making fact skepticism our main preoccupation.").

84. *In re* Marriage of Vancura, 825 N.E.2d 345, 350 (Ill. App. Ct. 2005).

85. Bono v. Chi. Trans. Auth., 882 N.E.2d 1242, 1249 (Ill. App. Ct. 2008).

86. Reynolds v. Champaign County Officers Electoral Bd., 884 N.E.2d 1175, 1177 (Ill. App. Ct. 2008).

87. Kathleen L. Coles, *supra* note 1 at 43 (A "review system that gives complete deference to fact-findings below may lead to an unacceptable number of incorrect decisions and may ultimately undermine the public's faith in the fairness of the judicial system.").

88. Webster v. Hartman, 749 N.E.2d 958, 962 (Ill. 2001).

89. Downey v. Dunnington, 895 N.E.2d 271, 303 (Ill. App. Ct. 2008).

90. 735 ILL. COMP. STAT. 5/2–1001(a)(3)(2008). *In re* J.D., 772 N.E.2d 927, 934–35 (Ill. App. Ct. 2002).

91. 735 ILL. COMP. STAT. 5/2–1105.1 (2008). Magna Trust Co. v. Ill. Cent. R.R. Co., 728 N.E.2d 797, 810 (Ill. App. Ct. 2000), *appeal denied*, 734 N.E.2d 894 (Ill. 2000).

92. Emerald Casino, Inc. v. Ill. Gaming Bd., 803 N.E.2d 914, 918 (Ill. App. Ct. 2003), *appeal denied*, 813 N.E.2d 222 (Ill. 2004).

Where the decision originates not from a trial court but an administrative agency, a different standard applies. The Illinois Supreme Court has approved the use of the "clearly erroneous" standard for review of administrative decisions on mixed questions of law and fact.[93] The clearly erroneous standard carries a level of deference between that accorded by the manifest weight standard and that of the *de novo* standard.[94] A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is "left with the definite and firm conviction that a mistake has been committed."[95]

C. Review of Discretionary Rulings

Not all of the trial court's important decisions involve either ascertaining the law or determining the facts. Some of the most significant and outcome-determinative rulings may be essentially procedural. Despite their potential importance, such decisions are far less amenable to strict review. Again, the reasons are both practical and theoretical.

The practical reason is that there are simply too many of them and they are too closely associated with the smooth daily functioning of diverse courtrooms. Decisions such as whether to grant an extension of time for a filing or a continuance of a hearing may be of great significance, but they cannot be regularized except along the most broad and general contours.

The theoretical considerations grow from the practical. It is neither necessary nor particularly desirable for every trial judge to conduct his or her courtroom in exactly the same way as every other courtroom or, for that matter, for a judge to grant the same procedural considerations in every situation. Those decisions are to be resolved by application of the judge's overall knowledge and experience coupled with his or her familiarity with the case under consideration. Such situations require the trial court to make a "qualitative rather than a quantitative determination, permitting the court to apply its own knowledge and experience to its determination."[96]

That is not to say that the court should be free to dispense with basic notions of fairness and proper procedure. Such decisions are not entirely

93. Samour, Inc. v. Bd. of Election Comm'rs of City of Chi., 866 N.E.2d 137, 144 (Ill. 2007). The clearly erroneous standard is also codified in Rule 52 of the Federal Rules of Civil Procedure: "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."

94. Metro. Water Reclamation Dist. of Greater Chi. v. Dep't of Revenue of the State of Ill., 729 N.E.2d 924, 929 (Ill. App. Ct. 2000).

95. AFM Messenger Serv., Inc. v. Dep't of Employment Sec., 763 N.E.2d 272, 282 (Ill. 2001).

96. Clay v. County of Cook, 759 N.E.2d 6, 11 (Ill. App. Ct. 2001).

unreviewed. Instead, they are reviewed with great deference to the trial court under the abuse of discretion standard.[97] This most deferential standard of review–next to no review at all–is traditionally reserved for decisions made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial.[98] It has been noted that discretion can have a dual meaning–sometimes relating to the initial reviewability of a decision and sometimes to the standard of review to be applied.[99]

Among the many types of decisions reviewed for abuse of discretion are joinder of parties,[100] intervention,[101] the grant or denial of declaratory judgment,[102] class certification,[103] the grant or denial of sanctions,[104] and the grant or denial of a protective order.[105]

IV. THE NEED FOR CONSISTENT APPLICATION OF THE STANDARDS

As elegant as the standard of review construct may be as a balancing mechanism to ensure that certainty in judicial decision-making is enhanced, there is a profound potential weakness. The standards of review can function as intended only if the meaning of each standard is understood consistently among judges of the reviewing courts. For example, one appellate court's idea of deference at the manifest weight of the evidence level cannot be the same as the deference accorded by another court at the abuse of discretion level if the standards of review system is to serve its intended purpose.[106]

The effectiveness of the standard of review is so dependent upon faithful application because application of the standard is virtually unreviewable as long as the court invokes the proper standard for the issue under consideration.[107] The selection of the standard of review is a matter of law,

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97. Wheat v. U.S., 486 U.S. 153, 164 (1988) (the reviewing court recognizes that the fact that trial courts "might have reached differing or opposite conclusions with equal justification . . . does not mean that one conclusion was 'right' and the other 'wrong'").

98. *In re* D.T, 818 N.E.2d 1214, 1222 (Ill. 2004).

99. Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 576 (Ill. 1988).

100. Carrao v. Health Care Serv. Corp., 454 N.E.2d 781, 791 (Ill. App. Ct. 1983).

101. People *ex rel.* Birkett v. City of Chi., 779 N.E.2d 875, 888 (Ill. 2002).

102. Bruemmer v. Compaq Computer Corp., 768 N.E.2d 276, 285 (Ill. App. Ct. 2002).

103. Weiss v. Waterhouse Sec., Inc., 804 N.E.2d 536, 544 (Ill. 2004).

104. Morris B. Chapman & Assoc., Ltd. v. Kitzman, 739 N.E.2d 1263, 1275 (Ill. 2000).

105. Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 12 (Ill. 2000).

106. Posner, *supra* note 12 at 39–40 ("Consistent adherence to precedent by appellate judges also makes it more likely that lower courts will be the faithful agents of those judges, because they will be receiving clearer directives.").

107. In a related vein, it has been noted that "the power of precedent may rely in substantial part upon the notion of judicial good faith." Lindquist & Cross, *supra* note 17 at 1164.

itself subject to *de novo* review.[108] Although a court will occasionally correct on further appeal a lower appellate court's explicit use of an improper standard of review,[109] it is nearly impossible to find a reported opinion in which a court has explicitly corrected the improper application of the proper standard of review. Thus, if an intermediate reviewing court explicitly applies *de novo* review to an issue that calls for review under the manifest weight of the evidence standard, a higher court can easily identify the error. However, if a court properly refers to, for example, an abuse of discretion standard but then fails to give sufficient deference to the lower court's decision, the error is much more difficult to detect.

Part of the difficulty arises from the question of what constitutes "sufficient deference." Is such a concept susceptible to definition under a system of judicial review? While the various standards of review are stated and ostensibly defined with time-honored verbal formulae, many of those formulations use undefined words to define other words.[110] If the standard to be achieved is consistency of outcome, then more than mere consistency of definition is required for the standards of review to serve their intended function of maintaining the proper relationship between trial courts and appellate courts. Courts must apply a fairly consistent level of deference to the trial court's decision under each standard of review.

Because that sort of consistency is unlikely to be achieved through the usual route of judicial review, the onus lies upon the individual appellate court and the individual judge who will author the court's opinion to remain faithful to the spirit of the appropriate standard of review in working through the decision-making process.[111] Thus, the standard of review is effective as a limitation on judicial power only to the extent that reviewing courts consistently interpret the scope of review available under each standard and abide by that limitation in deciding cases.

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108. Lindsey v. Bd. of Educ. of the City of Chi., 819 N.E.2d 1161, 1168 (Ill. App. Ct. 2004).

109. *See, e.g.*, Wilson v. Dept. of Prof'l Regulation, 801 N.E.2d 36, 45 (Ill. App. Ct. 2003), *appeal denied*, 809 N.E.2d 1292 (Ill. 2004), *cert. denied*, 543 U.S. 869 (2004) (noting that the circuit court applied an incorrect standard of review in an administrative review proceeding); and Boxdorfer v. Daimler Chrysler Corp., 790 N.E.2d 391, 400 (Ill. App. Ct. 2003), *appeal denied*, 803 N.E.2d 479 (Ill. 2003) (Goldenhersh, J., dissenting) (contending that the majority used an incorrect standard of review).

110. "The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 489 (1951) (discussing judicial review of agency decisions under the "substantial evidence" standard).

111. *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1472–73 (2003) ("[E]conomists and political scientists tend to assume that people are more likely to conduct themselves as they prefer than to act as they are supposed to behave, at least without external checks.").

Given the central importance of the standard of review to the judicial system and the often-noted tendency of those with power to seek more power, one might question the degree to which appellate courts have successfully regulated themselves in that respect.[112] Have appellate courts tended to encroach a bit over time on the proper function of the trial court?[113]

Although a court's fidelity to the spirit of the standards of review is virtually unreviewable in an individual case, it is possible to obtain an indication of how well appellate courts are maintaining a consistent application of the standards of review by examining the results of numerous cases over a period of time decided by reviewing courts at the same level within a particular court system.[114] The following sections of this article will explain the design and results of the author's study of decisions of the Illinois

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112. Speaking of judges' voluntary compliance with various rules in a more general sense, Judge Posner observed as follows:

> Wholehearted compliance with the rules cannot be guaranteed, given judges' freedom from the kind of external constraints that operate on other game players. If you do not play chess by the rules, you are not doing anything. If you do not play judging by the rules, but instead act the politician in robes, you are doing something, and it may be something you value more than you do the game of judging as it is supposed to be played.

Posner, *supra* note 12 at 91.

113. Some divergence of understanding between various appellate judges as to the proper level of deference that should accompany each standard of review may arise more from differing perspectives than from intentional action. For example, Judge Posner has observed that

> [a]ppellate judges promoted from the trial court may be more likely than other appellate judges to vote to affirm a trial judge. They are more sensitive to the advantages that the trial judge has over the appellate court in gaining a deep understanding of a case–especially a case that is actually tried, for then the trial judge will have spent much more time on it than the appellate judges who review his ruling. In addition, having become accustomed to resolving cases without too much concern for creating a bad precedent . . . a former trial judge promoted to the court of appeals may be more likely to focus on the "equities" of the individual case B the aspects of the case that tug at the heartstrings–and less on its precedential significance than would his colleagues who had never been trial judges.

Posner, *supra* note 12 at 74.

114. *See* Clermont & Eisenberg, *supra* note 10 at 153 ("[E]mpirical methods, as they push back the realm of unknowns, offer judges, practitioners, and policymakers some really practical lessons. We may not know precisely what determines who prevails on appeal, but we are beginning to understand some of the factors involved."). *See also* State v. Saucier, 926 A.2d 633, 652 n. 6 (Conn. 2007) (Norcott, J., concurring in part) ("I also believe that the existence of clearly delineated standards of review provides necessary guidance to practitioners who, in reviewing a trial record, must determine which claims are likely to succeed on appeal and, therefore, are worthy of valuable real estate in a thirty-five page brief."); and Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367, 370 (1997) ("To understand and to know what standards of review apply is important to the practitioner . . . for two reasons: first, to know whether an appeal is likely to be successful, and second, to argue that appeal.").

Appellate Court in an attempt to track whether that court has exhibited a consistent understanding of the weight of each standard.[115]

V. ARE STANDARDS OF REVIEW CONSISTENTLY APPLIED?

Even if the reviewing court selects the correct standard for a particular issue (thereby not offending legal doctrine), the limiting purpose of the standard of review can be altered or eliminated if the reviewing court "fudges" in the application of the standard to enlarge or restrict the scope of review available in connection with a particular issue.[116] One way to test the fidelity of the appellate courts to a consistent application of each standard of review is to determine whether the standard of review applied has some consistently observable effect on the affirmance and reversal rates of cases on review before a particular court. As set forth above, the formal definitions or descriptions of the relative levels of deference accorded under the standards of review are well established.[117] The *de novo* standard provides no deference to the lower court, the abuse of discretion standard provides great deference to the lower court, and the clearly erroneous and manifest weight of the evidence standards fall between.[118]

A. Basic Outcome Expectations

If the standards of review are applied in accordance with their intended level of deference, one would expect that a (sufficiently large) randomly-selected set of trial court decisions subjected to appellate review under the abuse of discretion standard would exhibit a substantially higher affirmance rate than decisions reviewed *de novo*.[119] Just how much higher is not necessarily apparent, but the difference should be obvious, given the great difference in the level of deference between standards.[120] The gap between the affirmance rate under the *de novo* standard as compared with that under the

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115. The design of the study discussed in this article can be readily adapted and applied to analyze the decisions of any intermediate reviewing court.
116. *See supra* Part IV.
117. *See supra* Part III.
118. *See supra* Part III.
119. *See* Paul R. Verkuil, *An Outcomes Analysis Of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 687–92 (2002) (discussion of hypothetical affirmance rates under various standards of review).
120. *See* Cross, *supra* note 111 at 1502 ("The precise degree of deference commanded by the different standards is somewhat ambiguous and certainly not quantifiable.").

manifest weight of the evidence standard should be less, but nevertheless significant.[121]

However, appeals are not, of course, random reviews of trial court decisions. Instead, appeals deal with only a small fraction of the trial court's decisions and are particularly (not randomly) selected for review by the party that lost in the trial court. The seminal Priest-Klein theory of case selection predicts that litigants' decisions to proceed with litigation (including pursuing an appeal), rather than settle the case, can be explained by the parties' divergent expectations in untested areas of the law.[122] Because litigated cases represent only a sample of cases falling within that marginal area, the model predicts that plaintiffs and defendants would each win about 50% of the time.[123] The 50% hypothesis would apply to outcomes on appeal, as well.[124] At the appellate level, the theory suggests that the standard applied should not independently vary outcomes because the parties will have taken into consideration the applicable standards, along with other relevant factors, when deciding whether to proceed with an appeal.[125]

There are numerous reasons to question the accuracy of the 50% prediction. Probably the most compelling is the notable lack of consistent empirical support for the hypothesis.[126] In Illinois, the overall affirmance rate observed in reported appellate court opinions statewide is about 67%.[127] Studies of appeals decided by the federal circuit court of appeals reflect an overall affirmance rate of over 80%.[128] Numerous explanations have been advanced to attempt to explain the failure of the 50% hypothesis in practice.[129]

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121. *In re* D.F., 777 N.E.2d 930, 943 (Ill. 2002) (*de novo* review affords no deference to the trial court's ruling, while manifest weight of the evidence review gives only some deference to the trial court).

122. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 16–17 (1984).

123. *Id.*

124. Cross, *supra* note 111 ("The same theoretical analysis generally applied to decisions pursued on appeal.").

125. Verkuil, *supra* note 119 at 688.

126. Under the case selection hypothesis, cases surviving the various stages of litigation to reach appellate adjudication should exhibit an affirmance rate not far from 50%, but that "is clearly wrong, as the data prove." Clermont & Eisenberg, *supra* note 10 at 151.

127. *See infra* Table 4.

128. *See, e.g.*, Clermont & Eisenberg, *supra* note 10 at 151; Chris Guthrie & Tracey E. George, *Judicial Decisionmaking: The Futility of Appeal: Disciplinary Insights Into the "Affimance Effect" on the United States Court of Appeals*, 32 FLA. ST. U. L. REV. 357, 359 (2005).

129. *See, e.g.*, Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation,* 22 J. LEGAL STUD. 187 (1993); Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 6–8 (2000); Clermont & Eisenberg, *supra* note 10 at 151.

Ultimately, the conclusion must be that the Priest-Klein "selection theory sheds little light" on the observed appellate affirmance rates.[130]

The more likely hypothesis is that appellate outcomes should show a significant correlation with the level of deference applied by means of the standards of review. That is, the affirmance rate should be highest for decisions reviewed under the highly deferential abuse of discretion standard. Decisions reviewed under the clearly erroneous and manifest weight of the evidence standards should be affirmed at a lower rate. Finally, the affirmance rate of decisions reviewed *de novo* should be lower still.[131] That is the hypothesis that the instant study is designed to test.

B. The Design of the Study

The author has conducted a survey and analysis of opinions issued during a three-year period by the five districts of the Illinois Appellate Court to determine whether there is a correlation between the standard of review applied and the affirmance/reversal rates within each district over time and between the districts. Basically, high levels of correlation would indicate consistent application of the standards of review while lower levels of correlation or a negative correlation may indicate a divergence in the application of the standards of review in the data set being analyzed.[132]

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130. Guthrie & George, *supra* note 128.

131. Although not necessarily significant to the study described in this article, one would hope that the affirmance rate under even *de novo* review would be in excess of 50%. An affirmance rate of less than 50% upon plenary review would seem to suggest that the state's trial courts are "wrong" in a very substantial portion of their legal determinations, even recognizing that appeals are a non-random selection of cases.

132. If all appealed decisions of the trial court were "objectively correct," and the appellate courts recognized that, the affirmance rate would be 100%, regardless of the standard of review applied to a particular decision. On the other hand, even if all decisions of the trial court were "objectively erroneous" (assuming, again, that the appellate court knew that), the reversal rate would not necessarily be 100%.

Are we looking at the wrong part of the equation? Is it possible that trial judges' legal decisions are reversed more often than their discretionary rulings simply because judges tend to be "wrong" about the law more often than about discretionary matters? In a way, the answer is yes, but not in a way that diminishes the study's significance.

The variant standards of review are, in part, a recognition that there is no "objectively correct" answer to some questions confronted by trial judges. Even in the case of legal doctrine, the judicial system does not strive for metaphysical correctness, but merely for consistency. Of course, when it comes to factual findings, one might more plausibly argue that there is, ultimately, a "right" answer. But even finding that answer is not what the courts set out to do. Rather, the fact finder assesses the evidence presented to arrive at a conclusion. The unavailability to the reviewing court of the actual events as the ultimate benchmark with which the trial court's factual findings may be compared makes objectively verifiable results impossible.

More than that, the deferential standard of review applied to factual findings recognizes that the

The Illinois Appellate Court is the state's intermediate appellate court.[133] Most types of final decisions by the state's trial courts are appealable to the Appellate Court as a matter of right.[134] Although there is considered to be only a single appellate court for purposes of precedence and precedent,[135] the operational reality is different. The court is organized into five separate geographical districts.[136] The justices of each district are elected by the citizens of that district only.[137] The number of judges sitting in each district is roughly coordinated with the workload of the particular court. As of this writing, there are 52 appellate court judgeships, as determined by the legislature.[138]

Each appellate district is responsible for deciding cases appealed from the circuit court or courts within that district. Decisions are rendered by panels of three justices. Appellate justices from one district do not sit on panels, or otherwise participate in judicial decision-making, with justices from other districts.

The study described in this article covers decisions issued during the period from January 1, 2005, through December 31, 2007. In that period of time, the five districts of the Appellate Court of Illinois disposed of a total of 12,536 civil appeals.[139] Of those, 1,518 cases (or approximately 12% of all civil case dispositions) were decided by a reported majority opinion.[140]

Several categories of dispositions are not included in the study. First, the study includes only civil cases, so that all of the criminal appeals disposed by the appellate courts are excluded.[141] Second, only cases disposed by reported

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appellate court is at least one step further removed than the trial court from the actual events in question.

133. Gillen v. State Farm Mut. Auto Ins. Co., 830 N.E.2d 575, 581 n. 2 (Ill. 2005).

134. ILL. SUP. CT. R. 301 and 303.

135. Renshaw v. General Tel. Co. of Ill., 445 N.E.2d 70, 73 (Ill. App. Ct. 1983).

136. ILL. CONST. art. VI § 2; People v. Ortiz, 752 N.E.2d 410, 423 (Ill. 2001).

137. ILL. CONST. art. VI § 2; *Ortiz*, 752 N.E.2d at 423.

138. ADMIN. OFFICE OF ILL. COURTS, ADMIN. SUMMARY 24 (ADMIN. OFFICE OF ILL. COURTS 2007) (1993).

139. Annual Report of the Illinois Courts – Statistical Summary (2005–2007), available at http://www.state.il.us/court/supremecourt/annreport.asp (follow "2007," "2006," and "2005" hyperlinks).

140. *Id.*

141. There are several reasons why criminal appeals were excluded from the study. The most significant, and ultimately dispositive, of which is that the review of criminal convictions is governed by different standards and considerations than review of civil appeals. While some of the same language with respect to the standard of review is common to civil and criminal appeals, criminal convictions carry with them to the appellate court an exceedingly strong presumption of correctness without exact parallel on the civil side. *See generally* O'Neill, *supra* note 1 at 60–77. Due to that difference in approach, it is not certain that "manifest weight of the evidence," for example, means– or, more accurately, is intended to mean–the same thing in the context of a civil appeal as in a criminal appeal. Although civil and criminal appeals are not necessarily incomparable–or even necessarily different at all–the difficulty introduced by the possible distinction is enough to warrant at least a preliminary

majority opinion are included. As a result, cases disposed by Rule 23 Order;[142] by Summary Order; or without an Opinion, Rule 23 Order, or Summary Order are excluded.[143] Of the 1,518 majority opinion dispositions, 1,204 (or about 79%) full-text opinions are available on Westlaw and were analyzed for the study.[144]

Each of the 1,204 reported opinions was analyzed to determine the standard of review applied to each issue decided. Of course, a single reported opinion often decides more than one issue and a separate standard of review applies to each such issue.[145] When assessing the outcome of issues in relation to the standard of review applied, it is necessary to consider the dispositions of individual issues rather than cases as a whole. Thus, for purposes of the study, the basic operative data set is the total number of issues decided by reported opinions in civil cases issued by the Illinois Appellate Court during the calendar years 2005–2007, for a total of 1,539 separate issues.

Each of the 1,539 issues was analyzed to ascertain two things: (1) the standard of review that the court applied to each issue (i.e., *de novo*, clearly erroneous, manifest weight of the evidence, or abuse of discretion); and (2) the disposition of the issue (i.e., whether the lower court's decision was affirmed,

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decision to exclude consideration of criminal appeals from this sort of study of civil appeals, and *vice versa*.

142. ILL. SUP. CT. R. 23(a) provides:

> A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied:
> (1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or
> (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

143. There is a potential skewing effect on the study results of excluding those categories of dispositions. It is possible that cases that do not satisfy the criteria for a reported opinion are affirmed at a higher rate than reported opinions. Although no attempt has been made in connection with the instant study to test the possibility, the hypothesis would be that the cases that are more "routine" and "easier" to decide on appeal (thus not justifying publication as an opinion) are also more routine and easier for the trial court judge to decide correctly. Such a situation would yield a higher observed affirmance rate for all decided cases than that reflected in reported opinions only.

144. Additional cases that were excluded from the study are those: (1) in which the opinion did not state the standard of review being applied and the standard could not be definitively established by the content of the opinion; and (2) not accessible through Westlaw.

145. Although analyzed in terms of the standard of review, it is important to recall that the standard depends upon the type of issue under review. That is, abuse of discretion review is applied to discretionary rulings while determinations of pure law are reviewed *de novo*. Because reviewing courts are supposed to grant greater deference to discretionary rulings than to purely legal ones, the affirmance rate for discretionary rulings would be expected to be much higher than that for legal rulings. That is so notwithstanding whether the decision under review could be said to be "correct" or "erroneous." Indeed, that is precisely the point of the differing levels of deference on appeal– "erroneous" discretionary rulings are at least tolerable and (perhaps) even an oxymoron, while erroneous rulings with respect to legal doctrine are (theoretically) intolerable.

or reversed, or affirmed in part and reversed in part).[146] For purposes of determining the standard of review applied, the court's own statement was taken as definitive. In other words, no effort was made to determine whether the court announced and applied the legally "correct" standard of review–i.e., the standard required by *stare decisis*.[147] Further, no subjective attempt was made in individual cases to gauge whether the court in fact accorded a degree of deference to the decision of the lower court that is appropriate to the announced standard. This latter concern is addressed in connection with the results of the overall study.[148]

C. Summary of Study Results

The results of the study were tabulated and are set forth in summary form in the following tables:[149]

146. It has been noted in past studies that the affirmance or reversal of the lower court's opinion may be dependent in some degree upon whether it is the plaintiff or the defendant who prevailed in the lower court. *See, e.g.*, Clermont & Eisenberg, *supra* note 10 at 153. The conclusions of those studies appear to be highly valid and indicative of a systematic pro-defendant bias on appeal. However, those concerns are beyond the scope of the present study, in which the author has not considered whether the appellant in each case was the plaintiff or defendant in the lower court.

147. As to those appellate court decisions that were ultimately appealed to the supreme court, no effort was made to follow those cases to ascertain the impact of further review on the appellate court's judgment. Such an analysis would add no useful information to the results of the current study because the point of using the appellate court's judgment (i.e., affirmed, reversed, or affirmed in part and reversed in part) as a data point is not that the decision is ultimately "correct," but simply that is was the appellate court's decision in light of applying a particular standard of review.

148. *See infra* Part V.D.

149. All raw data, including the list of decisions reviewed, the coding of each decision, and the raw numerical results, are on file with the author.

Table 1

Affirmance and Reversal Rates–2005

ALL ISSUES						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	67%	61%	65%	63%	67%	65%
Reversed	33%	39%	35%	37%	33%	35%
DE NOVO						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	65%	51%	50%	61%	58%	60%
Reversed	35%	49%	50%	39%	42%	40%
CLEARLY ERRONEOUS						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	50%	33%	0%	33%	100%	50%
Reversed	50%	67%	0%	67%	0%	50%
MANIFEST WEIGHT OF THE EVIDENCE						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	71%	77%	100%	40%	100%	74%
Reversed	29%	23%	0%	60%	0%	26%
ABUSE OF DISCRETION						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	73%	77%	88%	93%	67%	76%
Reversed	27%	23%	12%	7%	33%	24%

Table 2

Affirmance and Reversal Rates–2006

ALL ISSUES						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	69%	58%	73%	49%	73%	66%
Reversed	31%	42%	27%	51%	27%	34%
DE NOVO						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	66%	55%	84%	44%	71%	64%
Reversed	34%	45%	16%	56%	29%	36%
CLEARLY ERRONEOUS						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	63%	0%	100%	0%	0%	67%
Reversed	37%	0%	0%	0%	0%	33%
MANIFEST WEIGHT OF THE EVIDENCE						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	90%	67%	67%	50%	62%	72%
Reversed	10%	33%	33%	50%	38%	28%
ABUSE OF DISCRETION						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	68%	73%	20%	67%	92%	69%
Reversed	32%	27%	80%	33%	8%	31%

Table 3

Affirmance and Reversal Rates–2007

ALL ISSUES						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	71%	71%	55%	81%	72%	71%
Reversed	29%	29%	45%	19%	28%	29%
DE NOVO						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	67%	69%	54%	70%	54%	66%
Reversed	33%	31%	46%	30%	46%	34%
CLEARLY ERRONEOUS						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	80%	100%	0%	100%	0%	88%
Reversed	20%	0%	0%	0%	0%	12%
MANIFEST WEIGHT OF THE EVIDENCE						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	70%	50%	75%	88%	80%	73%
Reversed	30%	50%	25%	12%	20%	27%
ABUSE OF DISCRETION						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed	82%	92%	50%	94%	83%	82%
Reversed	18%	8%	50%	6%	17%	18%

Table 4

Affirmance and Reversal Rates – 2005–2007

ALL ISSUES ***Affirmed 3-Year Average Range*:** 63%–71%						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed ***Ann. Range***	67%-71%	58%-71%	55%-73%	49%-81%	67%-73%	65%-71%
Average	69%	63%	64%	67%	71%	67%
Reversed ***Ann. Range***	29%-33%	29%-42%	27%-45%	19%-51%	27%-33%	29%-35%
Average	31%	37%	36%	33%	29%	33%
DE NOVO ***Affirmed 3-Year Average Range*:** 58%–66%						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed ***Ann. Range***	65%-67%	51%-69%	50%-84%	44%-70%	54%-71%	60%-66%
Average	66%	58%	61%	59%	63%	63%
Reversed ***Ann. Range***	33%-35%	31%-49%	16%-50%	30%-56%	29%-46%	34%-40%
Average	34%	42%	39%	41%	37%	37%
CLEARLY ERRONEOUS ***Affirmed 3-Year Average Range*:** 50%–100%						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed ***Ann. Range***	50%-80%	33-100%	0%-100%	0%-100%	0%-100%	50%-88%
Average	60%	50%	100%	60%	100%	62%

Reversed ***Ann. Range*** ***Average***	20%-50% 40%	0%-67% 50%	0%-0% 0%	0%-100% 40%	0%-0% 0%	12%-50% 38%
MANIFEST WEIGHT OF THE EVIDENCE ***Affirmed 3-Year Average Range*:** 65%–83%						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed ***Ann. Range*** ***Average***	70%-90% 75%	50%-77% 71%	67-100% 83%	40%-88% 65%	62-100% 74%	72%-74% 73%
Reversed ***Ann. Range*** ***Average***	10%-30% 25%	23%-50% 29%	0%-33% 17%	12%-60% 35%	0%-38% 26%	26%-28% 27%
ABUSE OF DISCRETION ***Affirmed 3-Year Average Range*:** 57%–89%						
	1st Dist.	2nd Dist.	3rd Dist.	4th Dist.	5th Dist.	Statewide
Affirmed ***Ann. Range*** ***Average***	68%-82% 76%	73%-92% 80%	20%-88% 57%	67%-94% 89%	67%-92% 79%	69%-82% 77%
Reversed ***Ann. Range*** ***Average***	18%-32% 24%	8%-27% 20%	12%-80% 43%	6%-33% 11%	8%-33% 21%	18%-31% 23%

D. Conclusions of the Study

There is a widespread, albeit anecdotal, belief that the standard of review applied to the review of an issue on appeal may have a very substantial impact upon the outcome of the decision.[150] But there has been little empirical evidence supporting that view, until now.[151]

The results of the study reveal the anecdotal belief to be accurate, with a substantial consistency in the courts' application of the standards of review within each district over the period of the study, as well as between the five appellate districts. For example, for issues decided under the *de novo* standard, the First District affirmance rate varied by only two percentage points over three years, remaining in the very narrow range of 65% to 67%. While other districts (each with far fewer data points than those available in the First District) varied a bit more, the average affirmance rate for issues decided under the *de novo* standard generally hovered just over the 60% mark statewide. As expected, the affirmance rate under manifest weight of the evidence review was significantly higher, generally falling in the range of 70% to 75% statewide. Application of the abuse of discretion standard yielded an even higher affirmance rate–in excess of 75%.[152]

In sum, the study clearly indicates that application of standards of review that grant less deference to the lower court's decision regularly yield lower affirmance rates. The following are the average statewide affirmance rates during the three-year period included in the study:

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150. *See*, *e.g*., Gerlach v. Woodke, 881 N.E.2d 1006, 1009, n. 1 (Ind. Ct. App. 2008) ("Although the standard of review is not outcome-determinative in this case, it often is in a significant number of cases."); Berry v. Greater Park City Co., 171 P.3d 442, 449 (Utah 2007) ("We must initially return to the topic of the standard of review because its proper form and application largely determine the outcome."); Fantasyland Video, Inc. v. County of San Diego, 496 F.3d 1040, 1041 (9th Cir. 2007) ("Identification of the proper standard of review under state law will likely determine the outcome of this appeal."); Madelux Int'l v. Barama Co., Ltd., 186 Fed.App'x 10, 10 (1st Cir. 2006) ("This is an appeal in which the applicable standard of review determines the outcome."); Zignego Co., Inc. v. Wis. Dept. of Revenue, 211 Wis.2d 819, 828, 565 N.W.2d 590, 594 (Wis. Ct. App. 1997) ("In this case, as in many administrative appeals, the standard of review we are required to use determines the outcome of the appeal."); United Steelworkers of Am., AFL-CIO-CLC v. Schuylkill Metals Corp., 828 F.2d 314, 320 (5th Cir. 1987) ("In this case, the standard of review determines the outcome.").

151. Empirical evidence is vital, because even a court's statement as to the significance of the standard of review in a particular instance should not necessarily be taken at face value. *See, e.g.*, Posner, *supra* note 12 at 2 ("[M]ost judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often believe it, though it does not describe their actual practices.").

152. One exception is the Third Judicial District, where the abuse of discretion affirmance rate varied between 88% and 20% during the three years included in the study.

De Novo	63%
Clearly Erroneous	62%
Manifest Weight of the Evidence	73%
Abuse of Discretion	77%

Those results conform generally to the initial hypothesis.[153] In addition, the ordering of the degree of deference is in line with prior studies of affirmance rates of the federal courts of appeals.[154] That is, the sorts of decisions accorded the highest degree of deference are most often affirmed. However, some apparent anomalies in the results should be addressed.

First, the affirmance rate of 63% under the *de novo* standard may suggest that the reviewing courts are affording deference to the trial court even under *de novo* review, notwithstanding that no such deference is due. However, no such conclusion is necessary. The relatively high affirmance rate may indicate that the trial court is correct more often than not in its own legal determinations–even in the context of a set of cases selected for appeal by one of the parties.[155]

Second, the affirmance rate for the clearly erroneous standard, under which the appellate court accords some deference to the decision of the agency being reviewed,[156] is nearly as high as that of the *de novo* standard, which involves no deference to the initial decision-maker.[157] While it is possible that the relatively high affirmance rate indicates either that the appellate court is more deferential in practice than the formal statement of the standard would require or that the agencies whose decisions are under review are particularly accurate in their determinations, another explanation is more likely. For purposes of this study, only 37 decisions reviewed under the clearly erroneous standard were available statewide over a period of three years. The small number of data points renders the results with respect to the clearly erroneous standard questionable and likely unreliable in that the results of individual cases weigh too heavily to yield a meaningful result.

Finally, the affirmance rate of 77% under the abuse of discretion standard, while certainly substantial, and (as predicted) the highest under any of the standards, may not be as high as one would expect in connection with a standard of review that is sometimes described as involving "next to no review at all."[158] The observed affirmance rate for all decisions under the

153. *See supra* Table 4.
154. *See, e.g.*, Cross, *supra* note 111 at 1503.
155. *See id.*
156. Metro. Water Reclamation Dist. of Greater Chi. v. Dept. of Revenue of the State of Ill., 729 N.E.2d 924, 929 (Ill. App. Ct. 2000).
157. Zebra Tech. Corp. v. Topinka, 799 N.E.2d 725, 731 (Ill. App. Ct. 2003).
158. *In re* D.T., 818 N.E.2d 1214, 1222 (Ill. 2004).

"abuse of discretion" standard may be explained by the broad applicability of that standard to numerous types of decisions, including those that might more accurately be categorized as subject to *de novo* review.[159] If only decisions on procedural matters addressed to the pure discretion of the trial judge were included, the affirmance rate would be well above 90%, a level more in accord with the highly deferential review expected. Other implications of the breadth of the abuse of discretion standard are discussed below.[160]

The availability of results such as those reflected in the study described in this article contributes to the certainty that is intended to be one of the key products of the reviewing court process.[161] Decisions concerning whether to appeal may be aided by the knowledge of affirmance rates over a broad range of cases.[162] However, the limits of this information as a predictor of outcomes in individual future decisions should be noted. For example, while the study indicates that, in a broad range of cases over a period of time decided under the *de novo* review standard, the affirmance rate falls somewhere in the range of 60% to 66%, that does not suggest that the likelihood of affirmance in any future case reviewed under the *de novo* standard is 60% to 66%. Instead, the theoretical possibility of affirmance with respect to any future issue reviewed *de novo* (or under any other standard) falls within the range of 0% to 100%. Knowing the results of this study, by itself, does nothing to narrow the odds in a particular case. Each appeal or potential appeal must be analyzed on its own merits. Indeed, such individual consideration by parties and their counsel serves as a filtering mechanism without which the results of appeals (and the instant study) would be substantially different.

VI. SOME NOTABLE PROBLEMS

While the study delivers generally good news for consistency, it also discloses the continuing existence of some problems. In 1995, Professors Timothy P. O'Neill and Susan L. Brody identified four key problems with respect to the application of standards of review in Illinois.[163] They are the following: (1) "reviewing courts frequently decide issues without mentioning

159. *See infra* Part VI.C.
160. *See infra* Part VI.C.
161. Posner, *supra* note 12 at 206 ("Stability and continuity are highly valued qualities in any legal system, and judges (in part for that reason) are hemmed in, though not nearly so tightly as legalists believe, by precedents and other authoritative texts.").
162. Coles, *supra* note 1 at 81 ("[S]tandards of review act as messengers. For example, they convey to litigants the likelihood of reversal on appeal, thereby affecting litigants' decisions whether or not to appeal and their selection of issues to raise on appeal.").
163. O'Neill & Brody, *supra* note 1 at 512.

any standard of review;[164] (2) "decisions may mention one or even several standards, but then fail either to define or to explain their use;"[165] (3) "Illinois courts sometimes use the same standard of review for questions that deserve different degrees of deference;"[166] and (4) "Illinois courts sometimes apply a particular standard of review inconsistently."[167]

It appears that practice with respect to all four of those points has improved significantly since Professors O'Neill and Brody assessed the situation in 1995. However, many of those problems continue in some degree today. This section will provide a brief overview of the current status with respect to each of the problematic areas identified by Professors O'Neill and Brody and then propose solutions to resolve the continuing problems.

A. The Reviewing Court Fails to State the Standard

The first of the identified problems is that courts frequently decide issues without mentioning any standard of review.[168] A review of decisions underlying the study referenced in this article indicates that panels of the Illinois Appellate Court only rarely decide issues today without explicitly stating the standard of review being applied. That is a vast improvement over the situation identified by Professors O'Neill and Brody when such omissions were commonplace.[169]

However, it is still not difficult to locate decisions in which the reviewing court entirely fails to identify the standard of review that it is applying to a particular issue.[170] The practice of including an explicit statement of the

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164. *Id.* (emphasis added).
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *See, e.g.*, Thompson v. Hiter, 826 N.E.2d 503 (Ill. App. Ct. 2005); Chi. Trans. Auth. v. Ill. Labor Rel. Bd., 830 N.E.2d 630 (Ill. App. Ct. 2005); *In re* Annexation of Certain Territory to Vill. of Deer Park, 830 N.E.2d 791 (Ill. App. Ct. 2005); City of Highland Park v. Teamster Local Union No. 714, 828 N.E.2d 311 (Ill. App. Ct. 2005); *In re* Estate of Simmons, 841 N.E.2d 1034 (Ill. App. Ct. 2005); Galasso v. KNS Co., Inc., 845 N.E.2d 857 (Ill. App. Ct. 2006); Nat'l City Corp. and Subsidiaries v. Dep't of Revenue, 851 N.E.2d 224 (Ill. App. Ct. 2006); U.S. Bank, N.A. v. Phillips, 852 N.E.2d 380 (Ill. App. Ct. 2006); Krivanec v. Abramowitz, 851 N.E.2d 849 (Ill. App. Ct. 2006); Niles Twp. High Sch. Dist. 219, Cook County v. Ill. Educ. Labor Relations Bd., 859 N.E.2d 57 (Ill. App. Ct. 2006); Wolfe v. Menard, Inc., 846 N.E.2d 605 (Ill. App. Ct. 2006); Sutherlin v. Sutherlin, 843 N.E.2d 398 (Ill. App. Ct. 2006); Eagle Marine Indus., Inc. v. Union Pac. R.R. Co., 845 N.E.2d 869 (Ill. App. Ct. 2006); Gee v. Treece, 851 N.E.2d 605 (Ill. App. Ct. 2006); *In re* Marriage of Alexander, 857 N.E.2d 766 (Ill. App. Ct. 2006); Hartzog v. Martinez, 865 N.E.2d 492 (Ill. App. Ct. 2007); Tower Inv., LLC v. 111 E. Chestnut Consul., Inc., 864 N.E.2d 927 (Ill. App. Ct. 2007); Wilson v. Brant, 869 N.E.2d 818 (Ill. App. Ct. 2007); Russell v. Bd. of Educ. of City of Chi., 883 N.E.2d 9 (Ill. App. Ct. 2007);

applicable standard of review in opinions may be, in part, a matter of the culture of the particular court. For example, nearly all opinions of the Second District Appellate Court included within the study provide a recitation of the standard being applied. On the other hand, the Fourth District Appellate Court has been particularly lax about clearly and definitively stating in its published decisions the standard of review it is applying to each issue.[171]

The appellate court can properly decide an issue on appeal only after establishing the proper standard of review.[172] Whether stated or not, when an appellate court decides a case, it is necessarily applying *some* standard of review.[173] By failing to state the standard that it is applying, the reviewing court contributes to the "black box" nature of appellate decision-making.[174] Moreover, the failure to state the standard adds credence to the suspicion that the "rules governing judicial review have no more substance at the core than a seedless grape."[175] As noted, most districts of the appellate court are properly stating the standard on a routine–although not yet universal–basis.

In re Marriage of Duggan, 877 N.E.2d 1140 (Ill. App. Ct. 2007); *In re* Marriage of Thornton, 867 N.E.2d 102 (Ill. App. Ct. 2007); Nickon v. City of Princeton, 877 N.E.2d 776 (Ill. App. Ct. 2007); *In re* Estate of Howell, 867 N.E.2d 559 (Ill. App. Ct. 2007); Sathoff v. Sutterer, 869 N.E.2d 354 (Ill. App. Ct. 2007); Hall v. Sprint Spectrum L.P., 876 N.E.2d 1036 (Ill. App. Ct. 2007); Holtz v. Waggoner, 878 N.E.2d 180 (Ill. App. Ct. 2007); and Pekin Ins. Co. v. Harvey, 879 N.E.2d 540 (Ill. App. Ct. 2007).

171. For just a few, non-exhaustive examples, of Fourth District decisions rendered without a clear statement of the standard of review, *see* Bd. of Educ. of Gibson City-Melvin-Sibley Comm. Unit Sch. Dist. No. 5 v. Ill. Prop. Tax Appeal Bd., 822 N.E.2d 550 (Ill. App. Ct. 2005); Malone v. Smith, 823 N.E.2d 1158 (Ill. App. Ct. 2005); Borrowman v. Prastein, 826 N.E.2d 600 (Ill. App. Ct. 2005); Am. Family Ins. Group v. Cleveland, 827 N.E.2d 490 (Ill. App. Ct. 2005); Berg v. White, 828 N.E.2d 889 (Ill. App. Ct. 2005); Rohrback v. Ill. Dep't of Employment Sec., 835 N.E.2d 955 (Ill. App. Ct. 2005); Gen. Motors Corp. v. State Motor Vehicle Review Bd., 836 N.E.2d 903 (Ill. App. Ct. 2005); City of Quincy v. Weinberg, 844 N.E.2d 59 (Ill. App. Ct. 2006); *In re* Estate of Erickson, 841 N.E.2d 1104 (Ill. App. Ct. 2006); *In re* Marriage of Miller, 845 N.E.2d 105 (Ill. App. Ct. 2006); Phillips v. Dodds, 867 N.E.2d 1122 (Ill. App. Ct. 2007); Miller v. White, 868 N.E.2d 311 (Ill. App. Ct. 2007); File v. Duewer, 869 N.E.2d 432 (Ill. App. Ct. 2007); O'Casek v. Children's Home & Aid Soc. of Ill., 874 N.E.2d 150 (Ill. App. Ct. 2007); Sangamon County Sheriff's Dep't v. State Human Rights Comm'n, 875 N.E.2d 10 (Ill. App. Ct. 2007); Progressive Univ. Ins. Co. of Ill. v. Taylor, 874 N.E.2d 910 (Ill. App. Ct. 2007); and Heriford v. Moore, 883 N.E.2d 81 (Ill. App. Ct. 2007).

172. O'Neill, *supra* note 1 at 52–53.

173. *Id*. at 52.

174. "Black box" refers to decision-making in which "the inputs (evidence and argument) are carefully regulated by law and the output . . . is publicly announced, but the inner workings and deliberation . . . are deliberately insulated from subsequent review." United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008) (describing jury deliberation as a "black box"). *See also* United States v. Johnson, 585 F.2d 119, 125 n. 4 (5th Cir. 1978) (referring to trial courts' purely discretionary rulings as "black box" decisions that are "ultimately arbitrary in the sense that their basis is not subject to nonsophistical explanation").

175. Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975).

Just as the appellant is required to state the standard of review in the initial brief,[176] the reviewing court should also state explicitly in each and every written disposition what standard of review it is applying to each issue to enhance the transparency of appellate decision-making.[177]

B. Conflated Standards in Administrative Review

Although courts usually state specifically which standard of review the court is applying to a particular issue in accordance with meticulous practice, that practice is followed with much less rigor in connection with administrative review appeals. Appellate review of the decisions of administrative agencies is available under the Administrative Review Law[178] or under the common law writ of *certiorari*.[179] In such appeals, the reviewing court reviews the decision of the administrative agency, and not that of the circuit court.[180]

The applicable standards of review for various types of issues in administrative review are well established and depend upon whether the question presented is one of fact, law, or a mixed question of fact and law.[181] Questions of law are reviewed *de novo*,[182] questions of fact are reviewed under the manifest weight of the evidence standard,[183] and mixed questions of law and fact are reviewed for clear error.[184] The agency's evidentiary rulings are reviewed for abuse of discretion.[185]

Although appellate courts nearly always properly recite those standards in administrative review decisions, the difficulty arises in their application of the proper standard to the issue or issues under review. The court sometimes identifies the specific standard that it is applying to a given issue.[186] However,

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176. ILL. SUP. CT. R. 341.
177. People v. Heider, 896 N.E.2d 239, 260 (Ill. 2008) (Thomas, C.J., dissenting) ("It is incumbent on the majority to set forth the appropriate standard of review, the case law supporting its decision, and whether it is reversing based on an error of law or an improper weighing of sentencing factors.").
178. 735 ILL. COMP. STAT. 5/3–101, *et seq*. (2008).
179. Bono v. Chi. Trans. Auth., 882 N.E.2d 1242, 1247–49 (Ill. App. Ct. 2008).
180. Bertucci v. Ret. Bd. of the Fireman's Annuity and Benefit Fund of Chi., 813 N.E.2d 1021, 1023 (Ill. App. Ct. 2004), *appeal denied*, 212 Ill.2d 528, 824 N.E.2d 282 (Ill. 2004).
181. AFM Messenger Serv., Inc. v. Dept. of Employment Sec., 763 N.E.2d 272, 279 (Ill. 2001).
182. Carpetland U.S.A., Inc. v. Ill. Dep't of Employment Sec., 776 N.E.2d 166, 177 (Ill. 2002).
183. *Id.*
184. American Fed. of State, County & Mun. Employees, Council 31 v. State Labor Relations Bd., 839 N.E.2d 479, 485 (Ill. 2005).
185. Homebrite Ace Hardware v. Indus. Comm'n, 814 N.E.2d 126, 130 (Ill. App. Ct. 2004).
186. *See, e.g.*, Three Angels Broadcasting Network, Inc. v. Dept. of Revenue, 885 N.E.2d 554, 567 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 264 (Ill. 2008) ("The issue is whether, given the undisputed facts presented, TABN is entitled to a religious-use or charitable-use property tax

it is much more common for appellate court opinions to recite the laundry list of available standards and the type of issue to which the standard should be applied, but then fail to identify the type of issue or issues involved in the case and, thereafter, state specifically which standard or standards the court is actually applying to each such issue.[187]

The looseness in practice may arise in part from some degree of confusion over the distinction between the various standards when administrative review is involved.[188] However, if the appellate courts are confused, that confusion should be confronted rather than ignored or obscured by a smokescreen of verbiage about standards of review the meaning of which is inscrutable even to the decision-makers.

Just as with other types of appeals, the appellate courts in administrative review cases must make clear whether they are reviewing issues of fact, issues of law, mixed fact and law questions, or matters of discretion. Upon identifying the type of issue involved, application of the proper standard of review for each issue follows. Explicitly and clearly stating each step would clarify for the litigants and the agencies involved the exact grounds for the courts' decisions.

C. Over-Inclusive Abuse of Discretion Review

The Illinois Supreme Court has stated that "'[a]buse of discretion' is the most deferential standard of review–next to no review at all–and is therefore traditionally reserved for decisions made by a trial judge in overseeing his or

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exemption. [citation omitted.] Accordingly, we will only reverse the decision of the Department to deny the exemptions if that decision was clearly erroneous.").

187. *See, e.g.*, Illinois Dept. of Cent. Mgmt. Serv. (State Police) v. Illinois Labor Relations Bd., 888 N.E.2d 562, 574 (Ill. App. Ct. 2008); Bassett v. Pekin Police Pension Bd., 839 N.E.2d 130, 132–33 (Ill. App. Ct. 2005); Preuter v. State Officers Electoral Bd., 779 N.E.2d 322, 328–29 (Ill. App. Ct. 2002); Admiral Disposal Co. v. Dept. of Revenue, 706 N.E.2d 118, 120 (Ill. App. Ct. 1999), *appeal denied*, 712 N.E.2d 816 (Ill. 1999).

188. In Cinkus v. Village of Stickney Mun. Officers Electoral Bd., 886 N.E.2d 1011, 1019 (Ill. 2008), the Illinois Supreme Court stated as follows:

> We acknowledge that the distinction between these three different standards of review has not always been apparent in our case law subsequent to AFM Messenger. *See, e.g.*, International Union of Operating Engineers, Local 148 v. Illinois Department of Employment Security, 828 N.E.2d 1104 (Ill. 2005); Eden Retirement Center, Inc. v. Department of Revenue, 821 N.E.2d 240 (Ill. 2004). However, we reaffirm City of Belvidere's distinction between the three standards of review, as well as AFM Messenger's elucidation of the "clearly erroneous" standard of review. *See, e.g.*, Elementary School District 159 v. Schiller, 849 N.E.2d 349 (Ill. 2006); American Federation of State, County & Municipal Employees, 839 N.E.2d 479 (Ill. 2005); Carpetland U.S.A., Inc. v. Illinois Department of Employment Security, 776 N.E.2d 166 (Ill. 2002).

her courtroom or in maintaining the progress of a trial."[189] The results of the study show a relatively high (compared with the other standards of review) affirmance rate for decisions reviewed for abuse of discretion of over 75%.[190] Yet, given the highly deferential nature of the review intended to be accorded to discretionary rulings–i.e., "next to no review at all"[191] –one might expect the affirmance rate to be even higher. After all, reversal of the trial court's determination with respect to one in four issues reviewed seems a rather dramatically high result of "next to no review at all."

The explanation for a reversal rate that is higher than might be expected may lie in the nature of the issues to which discretionary review is applied. Although decisions "made by a trial judge in overseeing his or her courtroom or in maintaining the progress of a trial"[192] are reviewed for abuse of discretion, that standard is not "reserved" for such circumstances, as the Illinois Supreme Court has observed.[193]

Rather than a single standard, abuse of discretion is more accurately characterized as a "family of review standards . . . whose members differ greatly in the actual stringency of review."[194] In many cases, members of the family bear little family resemblance. While encompassing the traditional courtroom management issues, the abuse of discretion standard is also applied to a very broad range of decision types, some of which appear to contain some room for discretion as well as those that are not truly discretionary with the trial judge in the usual sense.[195] Indeed, one of the leading academic commentators on standards of review has observed that a "common vice of appellate courts is treating the various sorts and stages of discretionary decision-making under the universal rubric of abuse of discretion, giving the appearance that the courts believe they are dealing with one kind of issue."[196]

In Illinois, the abuse of discretion standard applies to the type of courtroom administrative or managerial matters that are most closely associated with the exercise of an individual trial judge's discretion. Among those are the decision of whether to grant a continuance,[197] whether to grant an

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189. *In re* D.T., 818 N.E.2d 1214, 1222 (Ill. 2004).
190. *See supra* Table 4.
191. *D.T.*, 818 N.E.2d at 1222.
192. *Id.*
193. *Id.*
194. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 594 (7th Cir. 1986).
195. *See* Davis, *supra* note 30 at 80–81 ("In the civil context, for instance, it cannot be seriously claimed that the same abuse of discretion standard is used when a judge refuses to award attorney fees to a prevailing civil rights plaintiff as when she grants a one-day continuance or permits separate trials.").
196. *Id.* at 77.
197. Holston v. Sisters of the Third Order of St. Francis, 650 N.E.2d 985, 993 (Ill. 1995).

extension of time for filings,[198] whether to grant finality language under Illinois Supreme Court Rule 304(a),[199] and whether to stay the proceedings.[200]

The abuse of discretion standard also applies to other instances which are somewhat less administrative, but which nonetheless involve the management of individual cases and so can be comfortably accommodated within the concept of judicial discretion. Those include correcting misnomers,[201] joinder of plaintiffs,[202] joinder of defendants,[203] intervention as of right or by permission,[204] allowing amendments to the pleadings,[205] granting voluntary dismissal,[206] setting aside a default judgment,[207] granting a protective order,[208] the scope of cross-examination during trial,[209] the propriety of remarks during opening statements or closing arguments,[210] and responding to questions from the jury.[211]

Additionally, the abuse of discretion standard is applied to numerous rulings that might reasonably be said to fall outside of the realm of the trial judge's pure discretion. For example, the grant or denial of declaratory judgment is reviewed for abuse of discretion.[212] Also reviewed under the discretionary standard are the trial court's decision to certify a class,[213] whether

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198. Bright v. Dicke, 652 N.E.2d 275, 277 (Ill. 1995).
199. U.S. Bank Nat'l Ass'n v. Clark, 807 N.E.2d 1109, 1124 (Ill. App. Ct. 2004), *rev'd on other grounds*, 837 N.E.2d 74 (Ill. 2005).
200. Jacksonville Sav. Bank v. Kovack, 762 N.E.2d 1138, 1142 (Ill. App. Ct. 2002).
201. 735 ILL. COMP. STAT. 5/2–401 (2008); Sharpness v. Grondfelt, 718 N.E.2d 327, 300 (Ill. App. Ct. 1999).
202. 735 ILL. COMP. STAT. 5/2–404 (2008); Carrao v. Health Care Serv. Corp., 454 N.E.2d 781, 791 (Ill. App. Ct. 1983).
203. 735 ILL. COMP. STAT. 5/2–405 (2008); Carrao, 454 N.E.2d at 791.
204. People *ex rel*. Birkett v. City of Chi., 779 N.E.2d 875, 888 (Ill. 2002).
205. 735 ILL. COMP. STAT. 5/2–616 (2008); Clemons v. Mech. Devices Co., 781 N.E.2d 1072, 1078 (Ill. 2002).
206. Bochantin v. Petroff, 582 N.E.2d 114, 117 (Ill. 1991).
207. People *ex rel*. Reid v. Atkins, 270 N.E.2d 841, 843 (Ill. 1971) (applying the abuse of discretion standard, but noting that the "overriding consideration now is whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits").
208. Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 12 (Ill. 2000).
209. McDonnell v. McPartlin, 736 N.E.2d 1074, 1090 (Ill. 2000).
210. Simmons v. Garces, 763 N.E.2d 720, 737 (Ill. 2002).
211. Kingston v. Turner, 505 N.E.2d 320, 328 (Ill. 1987) ("However, the trial court's discretion gives way to a duty to respond where the original instructions are incomplete and the jurors are clearly confused.").
212. E. St. Louis Sch. Dist. No. 189 Bd. of Educ. v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel, 811 N.E.2d 692, 701 (Ill. App. Ct. 2004) ("While the grant or denial of declaratory relief is discretionary, the trial court's exercise of discretion is not given the same deference as in other contexts. Instead, it is subject to an independent, searching review.").
213. Weiss v. Waterhouse Sec., Inc., 804 N.E.2d 536, 544 (Ill. 2004).

to deliver a particular jury instruction,[214] whether to grant a new trial,[215] a reduction in the amount of the recovery,[216] allowing interest on judgments,[217] granting motions *in limine*,[218] contract rescission,[219] specific performance,[220] and attorney disqualification.[221]

Abuse of discretion review is also applied to a number of substantive determinations, including such things as whether an insurer was responsible for vexatious and unreasonable delay under 215 ILCS 5/155,[222] approval of the assignment of structured payments,[223] whether to confirm or vacate an arbitration award,[224] and the determination under the Joint Tortfeasor Contribution Act of whether a settlement is made in good faith.[225]

Difficulties inherent in applying a single level of review to the broad range of decisions currently reviewed (or at least supposedly reviewed) for abuse of discretion have drawn some attention from courts and commentators.[226] The general conclusion seems to be that there is no single, definable, "abuse of discretion" standard. Instead, abuse of discretion should be seen as "a legal term of art . . . not a wooden term but one of flexibility, dependant on the type of case in which it is to be applied and the posture of the case when it arises."[227]

Flexibility is admirable, but a looseness that approaches standardlessness hardly seems to be a virtue. Abuse of discretion review in Illinois is not entirely amorphous so much as it is unnecessarily over-inclusive. In current usage, merely speaking of "abuse of discretion" does not define a standard of review because judges "possess varying degrees of discretion depending upon the nature of the decision, the precise legal context and the policy issues

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214. Schultz v. N.E. Ill. Reg'l Commuter R.R. Corp., 775 N.E.2d 964, 972 (Ill. 2002).
215. Snelson v. Kamm, 787 N.E.2d 796, 815 (Ill. 2003).
216. Richardson v. Chapman, 676 N.E.2d 621, 628 (Ill. 1997).
217. Niemeyer v. Wendy's Int'l, Inc., 782 N.E.2d 774, 777 (Ill. App. Ct. 2002), *appeal denied*, 787 N.E.2d 174 (Ill. 2003) ("The decision to allow statutory interest lies within the sound discretion of the circuit court and will not be disturbed absent an abuse of that discretion.").
218. Swick v. Liautaud, 662 N.E.2d 1238, 1246 (Ill. 1996).
219. Solar v. Weinberg, 653 N.E.2d 1365, 1370 (Ill. App. Ct. 1995).
220. Daniels v. Anderson, 642 N.E.2d 128, 132 (Ill. 1994).
221. S K Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282, 1286 (Ill. App. Ct. 1993).
222. Employers Ins. of Wausau v. Ehlco Liquidating Trust, 708 N.E.2d 1122, 1139 (Ill. 1999).
223. *In re* Nitz, 739 N.E.2d 93, 98 (Ill. App. Ct. 2000).
224. Colmar, Ltd. v. Freemantlemedia N. Am., Inc., 801 N.E.2d 1017, 1021 (Ill. App. Ct. 2003), *appeal denied*, 809 N.E.2d 1285 (Ill. 2004).
225. Johnson v. United Airlines, 784 N.E.2d 812, 821–22 (Ill. 2003).
226. *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 762–64 (1982), and Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 650–53 (1971).
227. Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 814 (7th Cir. 1991).

implicated by the decision."[228] Thus, courts may effectively apply the same standard for questions that deserve different degrees of deference, as Professors O'Neill and Brody pointed out.[229]

It has been observed that issues may be subjected to abuse of discretion review only until the law surrounding that issue is sufficiently developed to warrant the application of some other standard.[230] The shift from applying the abuse of discretion standard to imposing review under a more exacting standard occurs when appellate courts wish to establish "rules that will assure that cases with the same facts are decided the same way by different judges."[231] Thus,

> "for issues as to which rules can be developed, the appellate body, as part of its law-making function and after having further redefined the other factors, will specify those factors and considerations that will thereafter be required to make the decision. The end result is usually more a question of law than an exercise in discretion."[232]

This transition process has been referred to as "discretion hardened by experience into rule."[233]

The over-inclusive nature of abuse of discretion review could be mitigated if the Illinois Supreme Court were to reconsider the application of that standard to some issues. However, the Supreme Court has been slow to recognize the migration of issues from the abuse of discretion category to other, less deferential, levels of review. There is good reason to do so with respect to some issues that are currently accorded review under the discretionary standard. For example, certain cases that are heavily dependent upon fact-finding by the trial court could be designated for review under the manifest weight of the evidence standard. Such issues may include the grant

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228. Byer, *supra* note 3.
229. O'Neill & Brody, *supra* note 1.
230. Davis, *supra* note 30 at 56, *quoting* Rosenberg, *supra* note 226 at 662 ("The appellate courts may leave the decision to lower court discretion at least long enough to permit 'experience to accumulate at the lowest court level' until the appellate courts see a pattern allowing a prescribed rule.").
231. Johnson v. Trigg, 28 F.3d 639, 645 (7th Cir. 1994).
232. Davis, *supra* note 30 at 50.
233. Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987), *quoting* 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶57.08[2] at 57–36 to 57–37 (2d ed. 1982), *quoting* BORCHARD, DECLARATORY JUDGMENTS 293 (2d ed. 1941).

or denial of requests for declaratory judgment,[234] class certification, and attorney disqualification.

Other types of decisions currently reviewed for abuse of discretion seem to be notably ill-suited to such highly deferential review. Indeed, some of them relate to the application of settled law under principles of *stare decisis* that neither call for, nor allow, the trial court to exercise true "discretion." These may include whether to deliver a particular jury instruction, and whether to grant contract rescission or specific performance.

Confining abuse of discretion review to that still-broad range of issues in which such review is fully warranted would clarify the meaning of the standard. Thus, rather than attempting to apply a sliding scale of what constitutes a trial court's abuse of its discretion, the reviewing courts could actually implement a consistent standard that involves "next to no review at all."

D. Applying a Standard Other Than the One Stated

The final concern identified by Professors O'Neill and Brody is that "Illinois courts sometimes apply a particular standard of review inconsistently."[235] It can hardly be doubted that Illinois courts are sometimes inconsistent in the degree of deference actually accorded to the trial court's decision under each standard. However, the results of the study discussed in this article provide reason for optimism that the actual deference accorded under each standard is reasonably consistent between appellate courts and over time. Clearly, there is a difference in affirmance rates that appears to track the standard being applied.[236] Moreover, the affirmance rate corresponds to the stated level of deference for each standard: higher levels of deference to the trial court yield higher affirmance rates of the trial court's decisions.[237]

VII. CONCLUSION

The reviewing court's proper and consistent application of the standards of review is one key to maintaining the integrity of the system of appellate review. As reflected in the study discussed in this article, the empirical

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234. In the Seventh Circuit, a district court's decision to decline jurisdiction over a declaratory judgment case is reviewed *de novo*. Newell Operating Co. v. Int'l Union of United Auto, Aerospace & Agric. Implement Workers of Am., 532 F.3d 583, 591 (7th Cir. 2008).

235. O'Neill & Brody, *supra* note 1.

236. *See supra* Table 4.

237. *See supra* Part V.D.

evidence derived from an analysis of the decisions of the Illinois Appellate Court shows that the judges of that court have done an admirable job in maintaining the meaning and consistent application of the standards of review. Substantial improvement has occurred since Professors O'Neill and Brody identified numerous problems that plagued the understanding, and application, of the standards of review in Illinois. By continuing to direct attention to the importance of standards of review and implementing the basic improvements suggested in this article, the level of consistency in application of the standards can be further enhanced. The result will be a more cohesive and stable body of precedent that will more effectively deliver the judicial system's primary product: certainty.