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ARTICLES

STANDARDS OF REVIEW: JUDICIAL REVIEW OF DISCRETIONARY DECISIONMAKING

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I. INTRODUCTION

A. Standards of Review Generally

The idea of using standards to guide appellate review of decisions of tribunals below has existed from the beginning of American jurisprudence, but the articulation of those standards is a fairly recent and still not always clear development.[1] A standard of review indicates to the reviewing court the degree of deference that it is to give to the actions and decisions under review.[2] In other words, it is a statement of the power not only of

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1. STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW (Wiley 1986) was the first comprehensive work on the subject.

2. *See* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L.

the appellate court but also of the tribunal below, measured by the hesitation of the appellate court to overturn the lower court's decision.

"All appellate Gaul," says Professor Maurice Rosenberg, "is divided into three parts: review of facts, review of law, and review of discretion."[3] In reviewing fact decisions, the appellate court displays a high level of deference to the trial court under a "clearly erroneous" standard[4] and to the agency decision under "substantial evidence" review.[5] Under either standard, an appellate court will sustain any reasonable or not unreasonable decision that could be reached by reasoning from the evidence. In reviewing questions of law, and the more difficult "mixed" questions (applications of law to the facts of the case), the appellate court typically applies straightforward de novo review.[6] If the court agrees with the trial court decision, it is sustained; otherwise, the lower court decision is reversed. Where an agency decision is concerned, the reviewing court need not agree even with the statement of law so long as the agency's interpretation of law is a reasoned one. In fact, agency decisions receive in general more deference than is accorded to trial court decisions.[7] Discretionary decisions, such as issues of policy, supervision, and the like, are reviewed under the label "abuse of discretion."

"Abuse of discretion" is a poorly framed label for the review done of discretionary decisionmaking,[8] but it has been used broadly and for a considerable time, so it will likely

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Rev. 468, 469 (1988).

3. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978).

4. *See* FED. R. CIV. P. 52(a); *see also, e.g.*, Anderson v. Bessemer City, 470 U.S. 564, 573-75 (1985); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

5. *See* CHILDRESS & DAVIS, *supra* note *, §§ 15.04-15.06; Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938).

6. *See* CHILDRESS & DAVIS, *supra* note *, §§ 2.13-2.20, 15.02.

7. *See id.* at Part IV. Also see *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in which the Court established an area of statutory construction that is the business of the agency and not of the court. "If Congress has explicitly left a gap for the agency to fill, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an administrative agency." *Id.* at 844. The *Chevron* case is more fully discussed *infra* at notes 69-79 and accompanying text.

8. *See infra* notes 13-69 and accompanying text, describing the comments of the three scholars under examination in the next section.

continue to be used to describe the review. In review of discretion, the focus of the reviewing court is supposed to be on the process used to reach the decision and *not* on the decision itself. However, appellate courts have come to apply deferential abuse of discretion review to a broader area, including to the merits of the decision. The degree to which abuse of discretion review has come to be applied with a very broad brush reflects both a drift of the Supreme Court toward more deferential review for selected parties, agencies, and courts, and also the current Court's reputation as the "harmless error Court."

The labels identifying the levels or intensity of appellate review sound deceptively simple, but not one of them admits of easy analysis. Indeed, any attempt to deal with standards of review will raise some very difficult questions, such as whether an issue is one of law, fact, or mixed, or of policy or judgment, or determining the exact scope of the issue under review. This article is not intended to cover all standards, but to consider only discretionary decisionmaking and the manner in which courts review such decisions under the label "abuse of discretion" review. The article begins with an exploration of the work of three leading scholars defining and analyzing discretion and its review, it then traces five cases that have significantly molded the current understanding of the abuse of discretion standard, and concludes with some general advice to appellate practitioners and judges.

B. Discretion, Specifically

Discretion is one of the most exercised and least understood of trial court or agency activities—a very basic activity that must be understood in all areas of decisionmaking and administrative, criminal, and civil appeals, and one of the most difficult to address rationally. The need for discretion arises because there are areas in which the trial court or agency must exercise a certain measure of judgment in reaction to its "on the scene" presence at trial, or because Congress and the courts have given no guidelines for deciding the issue, or because the issue is one that is so novel or vague that there is no way to measure the "correctness" of the trial court's decision.

Major among such areas are trial supervision, conduct of the parties, and admission (or rejection) of evidence.

"The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."[9] The highly deferential review indicated in the quotation is not the level of deference always accorded to decisions labeled "discretionary." Frequently, when an issue of law is new to a jurisdiction, the reviewing court is more focused on the developing factors and considerations than on the actual decision itself. This kind of deferential review may continue for some time in order to allow appellate or trial courts to develop the factors that should be considered when exercising the discretion, as well as the balancing of those factors. Eventually, 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 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[10] than an exercise of discretion.[11] During the time that the decision remains an actual discretionary exercise of judgment, the

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9. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976) (in context of dismissal for discovery violations). Thus, *discretion* implies the power to choose within a range of acceptable options. *See generally* Wheat v. United States, 486 U.S. 153, 164 (1988) (does not mean one answer is "right" and other "wrong").

10. *See* In re Japanese Elec. Prods., 723 F.2d 238, 265 (3d Cir. 1983) ("There is no discretion to rely on improper factors."), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Abrams v. Interco, Inc., 719 F.2d 23, 28 (2d Cir. 1983) (Judge Friendly writing that "[i]t is not inconsistent with the discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law"); *cf.* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401-02 (1990), discussed *infra* at notes 101-19 and accompanying text.

11. Professor Kenneth Culp Davis describes the separation between law and discretion as a "zone," not a sharp line. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 4.05, at 99 (3d ed. 1972). That does not, of course, argue for lumping together all choices made below as discretionary decisions. Professor Post has clarified that "[d]iscretion is not simply the negative reflection of law, and if we persist with such a vision, we truncate our understanding of important and complicated occasions when law authorizes the exercise of discretion." Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 169-70. The "misleading image" of an absolute dichotomy "focuses [our] attention on the presence or absence of discretion, rather than on the intricate ways in which discretion and law interact in the process of decision making." *Id.* at 207. Professor Post would distinguish between discretion resulting from lessened review and discretion resulting from no legal standards. *Id.* at 211.

decision of one district court on the issue should have no broad control over the same decision by another district court. However, once the guiding factors (or rules) are put in place, the question no longer is an application of personal judgment to supervisory facts and issues, but a broader legal determination of what facts and issues should determine generically this category of overall choice.

This article is concerned, then, with discretion—what it is, why it exists, how it should be exercised, what constitutes its abuse, how it evolves, and at what point, if ever, an issue becomes well enough developed jurisprudentially that it ceases to be discretionary and becomes in fact a rule of law in itself.

II REVIEW OF SELECTED ARTICLES[12]

Many scholars have written on discretion and its exercise. The writings examined here are those of Professors Maurice Rosenberg and Robert C. Post and of Judge Henry J. Friendly. The works of these three scholars were selected because each of them approaches the analysis of discretion and its review in a slightly different way; together they provide a reasonably comprehensive understanding.

A. Professor Rosenberg

According to Professor Rosenberg, the basic notion underlying the idea of discretion is choice[13]—that is, no decision

12. This section's discussion incorporates some of the ideas of Professor Maurice Rosenberg, Judge Henry J. Friendly, and Professor Robert C. Post, as set forth in the following articles: Maurice Rosenberg, *Appellate Review of Trial Court Discretion,* 79 F.R.D. 173 (1978) [hereinafter Rosenberg, *Appellate Review*]; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L.REV. 635 (1971) [hereinafter Rosenberg, *Judicial Discretion*]; Henry J. Friendly, *Indiscretion About Discretion,* 31 EMORY L.J. 747 (1982); Post, *supra* note 11. All quotations from these works have been reproduced with permission of the appropriate review. *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); CHRISTOPHER EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); H.L.A. HART, THE CONCEPT OF LAW (1961); Steven Alan Childress, *Standards of Review in Federal Civil Appeals: Fifth Circuit Illustration and Analysis,* 29 LOY. L. REV. 851, 890-903 (1983); George P. Fletcher, *Some Unwise Reflections About Discretion,* 47 LAW & CONTEMP. PROBS. 269 (1984).

13. Rosenberg, *Judicial Discretion, supra* note 12, at 636.

can be discretionary in the absence of more than one possible outcome, with the selection of outcome, whether between two alternatives or among a possibly infinite number, left to the decisionmaker. Professor Rosenberg divides discretion into two basic types: *primary,* by which is meant "decision-liberating" or "true" discretion, and *secondary,* or "review limiting" or "guided" discretion.[14] The reviewing courts sometimes lump together these two kinds of discretion, thus creating confusion about the meaning of discretion.[15] While there are many and varied ways to divide discretionary exercises, Professor Rosenberg's primary/secondary division (or true discretion/guided discretion) is a simple one to use.

Primary or true discretion can be exercised not only by trial courts, but also by reviewing courts and by agencies. Professor Rosenberg posits that, under primary discretion, the decisionmaker is free to render whatever decision it chooses because there are no overriding principles or guidelines within which it must operate. "In such an area, the court can do no wrong, legally speaking, for there is no officially right or wrong answer."[16] On the other hand, the decisionmaking *process* is reviewable for errors of law, even where the decision itself is not reviewable.[17]

Secondary or guided discretion is concerned not so much with the process of decision as it is with the degree of deference that will be accorded to the choice made. It "comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision."[18] This kind of discretion essentially is confined to trial court and agency decisions. Professor Rosenberg illustrates this concept

14. *Id.* at 638.

15. *See id.* at 636.

16. *Id.* at 637.

17. For example, prior to the introduction of the Sentencing Guidelines, any choice by the trial court as to sentence, so long as it was within the statutory limits, was a protected discretionary decision. *See* CHILDRESS & DAVIS, *supra* note *, § 11.34. However, if the jury failed to find the defendant guilty, the trial court could not impose any sentence no matter how strongly it felt the defendant was in fact guilty. Thus, with true discretion, as in the discretion to sentence, the appellate court could review as to process and determine the decision was legal error without ever reviewing the decision itself.

18. Rosenberg, *Judicial Discretion, supra* note 12, at 637.

by reference to football games.[19] In football, he points out, although there are many, varied, and very strict rules laid down for the conduct of the game (the antithesis of primary or true discretion, where discretion at times arises solely because there are no rules[20]), once a call has been made by the officials, there is no way to correct it, even though it may be patently wrong and obviously costly to the wronged team. Although video shows the call was wrong and everyone who analyzes it says it was wrong, there simply is no mechanism for redress. The reason for no review is obvious—in games, finality is essential. Even if the final score has been skewed by the erroneous call, it is nonetheless final; it stands, and everyone moves on to the next game.[21]

In a way, this is also true of judicial and agency discretion. If the allocation of discretion has been made to the trial court or agency in such a way that its decision is either unchallengeable or challengeable only in a restricted way, the trial court can be wrong without being reversed.[22] Further, some discretionary decisions are insulated not by allocation to a certain decisionmaker but because the decision itself has so little positive or negative impact on anyone that it is not worth the effort to challenge.[23] Insulation of the discretionary decision to

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19. *Id.* at 639-41.

20. *Cf.* HART, *supra* note 12, at 40 (discussing an "umpire's choice" game of no rules and how that differs from review at law).

21. Rosenberg, *Judicial Discretion*, *supra* note 12, at 639-41. Obviously, NFL replay officiating has changed the point at which a decision is final, but Professor Rosenberg's point still holds.

22. For example, note the problem of unreviewability of mid-trial evidentiary rulings against the prosecutor's position outlined in Scott J. Shapiro, Note, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Mid-Trial Evidentiary Rulings*, 99 YALE L.J. 905 (1990).

This kind of discretion varies qualitatively from the discretion related to separation-of-powers authority accorded agencies in determinations of policy. In judicial review of discretion exercised below, review is limited because *this decision* has been allocated to the court below and is not available for review by the appellate court; in review of agency discretion, review often is limited because the system of government stays the hand of the judiciary as to the area of decisionmaking at issue. *See* EDLEY, *supra* note 12, at 102-05.

23. For example, almost all courts have a dress code for lawyers and parties. If one judge chooses to strictly enforce the dress code and another chooses not to enforce it at all, it is unlikely that either exercise of discretion will be challenged because a challenge would be costly and would be of little benefit even to the person who brought it. Thus, although there are rules, the issue is of such limited importance jurisprudentially that it is almost totally insulated from review.

this degree is unusual in law. Where such protection is given, it is most often given to agency decisionmaking by a statute that forbids the courts to review the decision.[24]

According to Professor Rosenberg, the first task for review must be recognizing a discretionary decision. Helpfully, many statutes and procedural rules set out the standard of review for various decisions as "abuse of discretion,"[25] and we assume that the label for review is meant to indicate discretionary decisions below. Continued discretionary decisionmaking as to any particular issue depends primarily on the willingness of Congress and higher courts to continue to allow the exercise of such discretion. That is, some issues are initially the subject of discretionary decisionmaking because they are novel, or vague, or without guiding law. When either Congress through statutes or higher courts through rulings determine to remove trial court discretion, they are free to do so.[26]

When reviewing discretionary decisions for abuse, the reviewing court seeks to determine whether and when the bounds of discretion seem to have been overreached. While it would be difficult to determine an abuse of true discretion because there is no standard by which to measure it even for reasonableness,[27] abuse of guided discretion occurs either when the decisionmaker has considered incorrect factors (or has failed to consider necessary factors) in applying his discretion, or when

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24. For example, until 1988, courts had no jurisdiction to review decisions of the Veterans' Administration concerning benefits awarded to veterans. *See* 38 U.S.C. § 211(a) (repealed by Act of Aug. 6, 1991, Pub L. No. 102-83, § 21a, 105 Stat. 378). While this was modified in 1988 with the Judicial Review of Veterans Claims Act, 38 U.S.C. § 101, the acts of the agency as to benefits still do not receive the level of review given to other acts of discretion. Congress, prior to the 1988 Act, had followed the usual procedure—setting up an Article I court within the agency to hear appeals of agency decisions, and limiting review to that court. *See generally* Jonathan Goldstein, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L.Q. 889, 921-22 (1989).

25. *See, e.g.*, 8 U.S.C. § 1252(e)(4)(D) (immigration rulings) (1997); 12 U.S.C. § 203(b)(1) (appointment of conservator) (1994); FED. R. CRIM. P. 23(b) (discretion of court to receive verdict from eleven person jury after one juror has been dismissed).

26. For example, the United States Sentencing Guidelines removed an area of formerly very broad discretion from the district judge, that of within-the-statute sentencing. Sentencing Reform Act of 1984 (codified at 28 U.S.C. §§ 991-98 and 18 U.S.C. §§ 3551-59); *see* Calderon v. Thompson, 523 U.S. 538 (1998) (discussed *infra* notes 120-26).

27. Rosenberg, *Judicial Discretion*, *supra* note 12, at 637. However, an admission of bias by the trial judge or other decisionmaker—such as stated bias based on ethnicity contrary to law—would permit a finding of abuse of discretion.

his exercise of discretion (the choice he makes within his authority) is contrary to the evidence or experience, or is so arbitrary, on its own terms, that the appellate court feels compelled to reject the actual choice.[28] Reversal may be ordered because the process of the decisionmaking (rather than the decision itself) is unacceptable. The appellate court may also reverse for some combination of these errors, but still is generally deferential to the overall process and decision and will refuse to reverse exercises of discretion hastily or lightly.[29]

Areas in which the trial court may exercise discretion are viewed by Professor Rosenberg as pastures in which the trial judge can roam and graze freely, rendering rulings his appellate colleagues might not have made, unless and until the higher court or Congress fences off a corner of the pasture by announcing that a rule of law covers the situation and has been violated.[30] Until that occurs, the trial judge, wielding discretionary power, need not be "right" by appellate court lights in order to be upheld. Even if the appellate judges disagree with his call, they will defer to his discretion so long as it was properly, lawfully exercised.[31]

Professor Rosenberg describes five reasons for conferring discretion on the trial court. The "lesser reasons" he lists as: (1) judicial economy; (2) trial court morale; and (3) finality of decision, and describes their common vice as a "failure to provide clear clues as to which trial court rulings are cloaked with discretionary immunity of some strength."[32] The "good reasons," which escape that criticism, are (1) that the issue defies formulation of general rules of decision, whether from persistent and long-term nonamenability or from novelty; and (2) the superiority of the trial court's position in being on the spot. This second justification for conferring discretion is of particular importance when a decision is "based on facts or

28. *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 43 (1983) (discussing agency exercise of discretion).

29. Rosenberg, *Judicial Discretion*, *supra* note 12, at 645-56.

30. *Id.* at 650.

31. *Id.*

32. *Id.* at 662.

circumstances that are critical to decision and that the record imperfectly conveys."[33]

The second of these "good reasons" for conferring discretion changes very little from court to court or from time to time. But the first reason—issues that defy formulation—causes this concept of discretion to be in a constant state of flux. Some issues originally thought by the appellate courts to be incapable of governance by general rules of decision are, after a time and a number of decisions on cases with similar facts, found to be addressable by such rules. When, over time, a pattern of decision with regard to similar facts emerges, it becomes in effect a rule of law, and that "corner of the pasture" is removed from the discretionary field.[34] When a decision is no longer discretionary, the lower court commits legal error when it fails to follow the rule of law, even though the decisionmaking may continue to be labeled as discretionary. The same is true when some novel issue arises. 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.[35] Various issues will be, at any given time, at different stages in this evolutionary process.

Thus, Professor Rosenberg's major contribution to a definition of discretion is the recognition that there are many, varied kinds and degrees of discretionary exercises that are not amenable to the same treatment by the reviewing court. His main distinctions are between primary (true) and secondary (guided) discretion, and between issues that have no law, or very little law, to guide the decision and those that are simply novel or vague and that are likely over time to develop more specificity and come to be controlled by rules.

B. Judge Friendly

Judge Friendly focused his analysis on methods for determining the degree and kind of discretion the trial court has

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33. *Id.* at 664.

34. *Id.* at 650; *cf.* OLIVER.W. HOLMES, THE COMMON LAW 121-29 (1881) (describing how negligence issue became more concrete and more factual over time).

35. Rosenberg, *Judicial Discretion*, *supra* note 12, at 662-63.

as to a particular issue and therefore whether appellate review should be "full" or "deferential."[36] Under Judge Friendly's assessment, perhaps the first thing that should be considered is *why* the trial court has this particular power of discretion.[37] Because discretionary power "varies in force from the virtually irresistible to the virtually meaningless,"[38] an inquiry into the cause for the allocation of discretion as to a particular issue can help to determine whether the exercise of discretion is of the controlling or the suggestive variety.

Judge Friendly posits that part of the problem of understanding this review arises from the common use of the label "abuse of discretion":

> There are a half dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.[39]

Each of these different definitions may be no more than the child of a judicial parent with the notion that discretion is a descriptive rather than a generic term, or they may indicate a series of discretionary issues at different levels of the evolutionary process described by Professor Rosenberg.[40] In any event, Judge Friendly, like Professor Rosenberg,[41] believed that the word "abuse" leads to some untoward conclusions about the decisionmaker,[42] but finally decided that, whatever term is used must be a flexible one to accommodate the multifarious reasons for submitting various issues to discretionary decisionmaking.[43]

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36. Friendly, *supra* note12, at 762.

37. *Id.* at 764 (citing Judge Sloviter in United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981)).

38. Rosenberg, *Judicial Discretion*, *supra* note 12, at 660.

39. Friendly, *supra* note 12, at 763.

40. *Id.* at 771.

41. Professor Rosenberg says that "abuse of discretion" is "used to convey the appellate court's disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future. . . . It is a form of ill-tempered appellate grunting and should be dispensed with." Rosenberg, *Judicial Discretion*, *supra* note 12, at 659.

42. Friendly, *supra* note 12, at 763.

43. *Id.* at 764.

And because the reasons for allowing discretionary decisionmaking are so various, the intensity with which such decisions are reviewed must also be very flexible. Where there is literally "no law to apply,"[44] there should in fact be "complete appellate abdication."[45] Otherwise, "[e]ven when a statute or rule expressly confers discretion . . . there is still the implicit command that the judge shall exercise his power reasonably."[46] It is this "implicit command" that leads to an evolution of discretionary issues into rule-controlled issues:

> The rulemakers gave the district courts discretion; but after enough of them had decided always to exercise it the same way, a way that the court of appeals deemed appropriate, the channel of discretion had narrowed, and a court of appeals should keep a judge from steering outside it rather than allow disparate results on the same facts.[47]

Judge Friendly ends his article with a quotation from Chief Justice Marshall, that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'"[48]

C. Professor Post

Professor Post rejects the idea of choice as *the* central theme of discretion, stating that the concept is "a misleading image" because it "invites us to conceptualize choice as a single, unitary act."[49] Because our jurisprudence is replete with instances of discretionary decisions that must be guided by legal norms, some concept other than free choice is required.[50] Professor Post asserts the *viewpoint* theory of discretion: An appellate court may view a trial court's sentencing decision as a

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44. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

45. Friendly, *supra* note 12, at 765.

46. *Id.*

47. *Id.* at 772.

48. *Id.* at 784 (quoting United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807)).

49. Post, *supra* note 11, at 207.

50. While Professor Post's point is logical, it seems to beg the question. As a practical matter, it is unlikely that exercise of true discretion in the sense of *no* guidelines occurs in any substantive area of tribunal decisionmaking; all such decisions must be made within boundaries. Thus the "choice" language of Professor Rosenberg and the "un"-choice language of Professor Post seem to amount to the same thing.

discretionary one, for example, reviewable for abuse.[51] As long as the sentencing decision does not violate the statutory authority granted the court making the decision, the judge is afforded broad discretion in arriving at a sentencing determination. The trial judge may, however, view the same sentencing decision as one of very limited discretion that must be made within well-defined parameters of law and policy.

Thus, a trial court's sentencing decision is discretionary, but it is also governed by legal standards that closely inform or guide discretion, just as other discretionary decisions are not committed to the trial court's unlimited or unfettered exercise of discretion. Although the judge may have room for some choices within the framework of the legal standards, he feels "bound to choose the appropriate legal policies"[52] and to implement them in accordance with the factors that must guide his decision. From the trial judge's point of view, his discretion is guided by the need to implement the appropriate legal policies; he may therefore consider himself "an instrument of law."[53]

Abuse is found when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination. However, when the trial judge makes a decision within the legal standards and takes the proper factors into account in the proper way, his decision is protected even if not wise. The appellate court is not reviewing the decision but, instead, the manner of making it.[54] In this kind of review, abuse of discretion is *only* a standard of review and deals not at all with the merits of the decision.

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51. *Id.* at 209.

52. *Id.* at 207.

53. Post, *supra* note 11, at 207; *see also* Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 326, 381 (1924) ("Courts are the mere instruments of the law, and can will nothing.").

54. *Cf.* Miller v. Mercy Hosp., Inc., 720 F.2d 356, 361 (4th Cir. 1983) ("'clearly erroneous' review is properly focused upon fact-finding processes rather than fact-finding results"). This assessment tracks appellate review of agency decisions under the Administrative Procedure Act § 706 standard of abuse of discretion review. *See* CHILDRESS & DAVIS, *supra* note *, ch. 15; *see also* Denton v. Hernandez, 504 U.S. 25 (1992); Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1231 (1996).

There are other decisions in which the trial judge may act "as he pleases"[55] because there is "no law to guide the judge's decision."[56] In these cases, there is discretion both from the viewpoint of the trial judge and of the appellate court. This kind of discretion is "true" discretion, what Professor Rosenberg calls *primary* or *decision-liberating* discretion,[57] and what Judge Friendly describes as a situation calling for "complete appellate abdication."[58] Such situations are very rare.[59]

Professor Post's *viewpoint* discretion varies along a spectrum ranging from decisions subject to standards that give no guidance (a form of "no law to apply"; though there is law, it is so formless that it actually leaves complete discretion in the trial court), to those with standards so rigid that the decisionmaker can hardly be said to exercise judgement at all. As with other spectral standards, most decisions fall in the middle.[60]

The deference accorded by the appellate court to such decisions varies among *independent review, deference,* and *delegation*, depending on the decision.[61] Independent review is applied to those decisions that, although they may be denominated discretionary, are actually either contained by standards so rigid as to allow little or no exercise of judgment or so "open-textured" as to license the appellate court to second-guess the trial court's decision.[62] Deferential review occurs when "appellate courts retain control over the governing legal

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55. Post, *supra* note 11, at 210 (citing Kaufman, *Judicial Discretion,* 17 AM. L. REV. 567, 567 (1883)).

56. *Id.* at 210-11. For example, the trial judge may control the court calendar. *See* CHILDRESS & DAVIS, *supra* note *, § 4.08. Although there are many procedural examples of such true discretion situations, there are probably no such examples in a trial court's substantive decisionmaking.

57. *See* Rosenberg, *Judicial Discretion, supra* note 12, at 638.

58. Friendly, *supra* note 12, at 765.

59. *Id.*; Post, *supra* note 11, at 211; Rosenberg, *Appellate Review, supra* note 12, at 184 ("It runs strongly against the grain of our traditions to grant uncontrollable and unreviewable power to a single judge.").

60. Post, *supra* note 11, at 212; *see also* CHILDRESS & DAVIS, *supra* note *, § 4.21.

61. Post, *supra* note 11, at 213-14.

62. *Id.* at 214. "Independent review" of discretionary decisions is appropriate in First Amendment cases in which full appellate review of the record is essential to ensure that a trial court's exercise of its discretion does not result in a violation of protected rights. Bose Corp. v. Consumer's Union, 466 U.S. 485, 499 (1984).

standard, but defer to trial court judgments in the implementation of that standard."[63] The term *delegation* is used in situations where the trial judge's decision is essentially unreviewed because the appellate courts have delegated "to trial courts the power to determine the legal standards by which the correctness of their decisions will be judged."[64]

Overriding all these standards of review is the recognition that when the applicable legal standards are open-textured—a term borrowed from Professor Hart meaning abstract or capable of widely varying interpretations,[65] or what Professor Dworkin calls "furry edge[d]"[66]—the appellate court may opt for any one of the three levels of review. Professor Post notes that an appellate court may opt for delegation long enough to allow the work of trial courts to give concrete significance to the standard. Then, when the appellate courts have made the governing legal standards more forceful or specific, these standards will in turn more directly guide and influence trial court judgment. This view is closely akin to Professor Rosenberg's theory of evolutionary development of legal standards, which gradually fences in the discretionary pasture;[67] and to Judge Friendly's "implicit command that the judge shall exercise his power reasonably."[68]

Thus three scholars, while using varied approaches, come to much the same conclusions about discretion and how it should be reviewed. The next question, then, is whether cases reflect these shared conclusions.

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63. *Id.* at 215. This standard applies when appellate courts "believe that the question before the trial court is susceptible of *different satisfactory resolutions*." Rosenberg, *Appellate Review*, *supra* note 12, at 176-77 (discussing circumstances in which trial court may be affirmed even when it made "wrong" choices).

64. *Id.*

65. HART, *supra* note 12, at 124-26.

66. DWORKIN, *supra* note 12, at 22.

67. *See supra* note 31 and accompanying text.

68. Friendly, *supra* note 12, at 765.

III. INTERPRETIVE CASE LAW

A. Chevron U.S.A. v. Natural Resources Defense Council

The tendency of the Court toward a more inclusive, highly deferential standard has been apparent for some time. The case that got everyone's attention was *Chevron U.S.A. v. National Resources Defense Council.*[69] Though an administrative law case dealing with statutory interpretation, not previously considered discretionary decisionmaking, it did portend the Court's move toward allowing each decisionmaker to interpret statutes for itself and it formed the groundwork for later civil and criminal cases.

Under *Chevron*, if the statute unambiguously speaks to the question at issue, and Congress' intent is clear, no issue arises. But if Congress has not directly dealt with the precise question at issue, or if there is a gap in the statute arguably intended by Congress to be filled by the agency, whether explicit or implicit, then the Court may not impose its own construction of the statute on the agency, so long as the agency's interpretation is reasonable.[70] The agency interpretation is to be given "controlling weight" unless "arbitrary, capricious, or manifestly contrary to the statute."[71]

This view had been building for some time in administrative law. Under usual circumstances,

> [i]f the court defined an issue as purely one of law, then de novo or independent review was appropriate; if the court defined an issue as purely one of fact, then deference under either a substantial evidence or an arbitrary and capricious standard should be applied. If the issue was a mixed question, and many questions of agency interpretation are in fact mixed questions, then the issue must receive either deferential review as a policy statement or nondeferential review as strictly an interpretive application of law to fact.[72]

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69. 467 U.S. 837 (1984).

70. *Id.* at 842-43; *see also* CHILDRESS & DAVIS, *supra* note *, § 17.02 at 17-13.

71. *Chevron*, 467 U.S. at 843; *see also* CHILDRESS & DAVIS, *supra* note *, § 15.02.

72. CHILDRESS & DAVIS, *supra* note *, § 17.02 at 17-11.

However, even if the issue were characterized as purely one of law, the Court might see fit to give it deferential review for any one of a number of reasons, including the fact that the agency had followed the interpretation over a long period of time. Scholars might argue how strong a line of cases the deference-to-law cases were,[73] but *Chevron* put "paid" to any doubt that the Court felt free to refuse to substitute judgment in questions of law.

The fine-tuning of the *Chevron* doctrine has been responsive to whatever cases came before the Court. Thus, in *Pauley v. Bethenergy Mines*,[74] the Court in effect held that it would defer not only to an agency's interpretation of its own statute, as in *Chevron*, but also to one agency's interpretation of another agency's regulations. The same issue arose in *Norfolk & Western Railway v. American Train Dispatchers Association*,[75] where the Court reviewed with deference the interpretation of the Railway Labor Act by the ICC. In *Rust v. Sullivan*,[76] the Court extended *Chevron* deference to new regulations of the agency that represented a very sharp break with past interpretation of an unchanged statute.

The peculiarity of the development of *Chevron*, however, is not in the expansiveness of application, but in those situations in which the Court refused to apply the doctrine even though factually there was very little difference between *Chevron*-controlled cases and non-*Chevron*-controlled cases. For example, in *EEOC v. Arabian American Oil Company*,[77] the issue was whether Title VII applies overseas. Suit was by the agency to assert protection against employment discrimination for American employees working in the Persian Gulf area for American companies. In 1988, the EEOC amended its policy guidelines to include its opinion that the protection of the Act extended to such employees. The Supreme Court reversed, citing several reasons for refusing to extend deference to the statutory interpretation, but concluding that "while we do not

73. *See* DAVIS, *supra* note 11, § 29:16 at 403.

74. 501 U.S. 680, 696-99 (1991).

75. 499 U.S. 117, 133-34 (1991) (recognizing deference to agency, but affirming the decision "because the commission's interpretation is the correct one").

76. 500 U.S. 173, 186 (1991).

77. 499 U.S. 244 (1991).

wholly discount the weight to be given to the 1988 guideline, its persuasive value is limited when judged by the standards set forth in [citing cases]."[78] All the cases cited were pre-*Chevron* and the majority did not mention *Chevron* in its opinion.[79]

Although, as stated, all of these cases are administrative law cases, the idea of deferential review of statutory interpretation stood judicial review on its head. Would this notion, allowing each decisionmaking body to choose its own interpretation of a statute, totally change the face of appellate review?

B. Pierce v. Underwood

A little over four years after *Chevron*, the Court decided to extend its reasoning to interpretations of law in civil matters. In 1988, in *Pierce v. Underwood*,[80] the Court set out a general analysis to help courts decide when particular procedural or evidentiary decisions would receive abuse deference.[81] At issue in the case was whether the government's position in a civil rights case was substantially justified. Under the Equal Access to Justice Act, a losing governmental agency may prevent attorney fee-shifting by showing that its position at trial was substantially justified. For some few specific trial court determinations, the applicable standard of appellate review is set or implied by a statute or rule; "[f]or most others, the answer is provided by a long history of appellate practice."[82] There is little doubt, then, that precedential characterizations of specific review standards should weigh heavily in a given application.[83] Some decisions, however, are not so easily classified, and the *Underwood* Court conceded that for a determination without "a

78. *Id.* at 258.

79. *See also* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992); Funk, *Supreme Court News*, 21 ADMIN. & REG. NEWS 6 (1996).

80. 487 U.S. 552 (1988).

81. *See id.* at 557-63. The majority, in an opinion by Justice Scalia, applied the analysis to determine that the issue—whether the government's position was "not substantially justified" (so that fee-shifting would be appropriate)—is discretionary to the trial court. *See* CHILDRESS & DAVIS, *supra* note *, § 4.15.

82. *Underwood*, 487 U.S. at 558.

83. For a discussion of such historical characterizations, see CHILDRESS & DAVIS, *supra* note *, chs. 4 and 11.

clear statutory prescription" or "a historical tradition," it is "uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer."[84]

Rather than a statutory directive or a solid framework of precedent, the trial court is occasionally faced with a kind of "free-floating" issue with no statutory or precedential standard to apply, and the Court, acknowledging that its resolution is not "rigorously scientific," looked for the following "significant relevant factors" to weigh in favor of or against deferential review:[85] (1) implicit statutory direction, even when language does not compel deference or is not perfectly clear;[86] (2) provision for deferential review in analogous determinations under the statute;[87] (3) the judicial actor who, as a "matter of the sound administration of justice," is "better positioned than another to decide the issue";[88] (4) whether it is impracticable to formulate a rule of decision for the issue, because the problem is multifarious, novel, fleeting, and resists generalization for now;[89] and (5) the substantial consequences and liability of an erroneous determination.[90]

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84. *Underwood*, 487 U.S. at 558 (footnote and citation omitted).

85. *Id.* at 559, 563.

86. *Id.* at 559 (language hints at deference by saying "unless the court finds").

87. *See id.* at 559. Justice White in dissent used this factor to argue for de novo review because Congress was silent as to deference in the relevant portion while explicitly directing an abuse standard elsewhere in the statute: "Congress knew how to specify an 'abuse of discretion' standard when it chose to do so." *Id.* at 584 n.1 (White, J., dissenting in part). At the least such "missing" direction seems to cut both ways.

88. *Id.* at 559-60. The Court was quoting from *Miller v. Fenton*, 474 U.S. 104, 114 (1985), and explicitly borrowing its policy approach used to determine whether mixed law-fact questions would receive deference on appeal, as discussed in CHILDRESS & DAVIS, *supra* note *, §§ 2.18 and 7.05. Note, however, that other cases say that lack of superior position does not necessarily mean that it is inappropriate to defer on *factfindings*. *See, e.g.*, Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1985).

89. *Underwood*, 487 U.S. at 561-62 (quoting extensively from Rosenberg, *Judicial Discretion*, *supra* note 12, at 662-63). The factor was found to justify deference, at least until courts had the chance to develop principles for applying the abuse test. *See also* CHILDRESS & DAVIS, *supra* note *, § 7.06, discussing how discretion can evolve into a legal standard.

90. *Underwood*, 487 U.S. at 563; *see generally* Martin B. Louis, *Discretion or Law: Appellate Review of Determinations That Rule 11 Has Been Violated or That Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. REV. 733, 734-35, 748-50, 756-57 (1990) (arguing for free review of sanctions and collateral estoppel in part based on the consequences of such findings).

Under the facts of *Underwood*, the Court found that the framework of the statute weighed in favor of deferential review, finding in the words "unless the Court finds" that the government's trial position is substantially justified, an implied directive that the court's substantial justification decision is to be reviewed deferentially.[91] The Court also found that the statutory structure of the provision for deferential review under analogous provisions of the statute cut in favor of deference.[92] In addition, the Court found the trial court better positioned to decide the issues because the decision may turn on evidentiary matters, settlement conferences, or other matters of which the trial court had first-hand knowledge but as to which the appellate court would be required to spend an inordinate amount of time and energy to place itself in a comparable position.[93] The last factor—the substantial amount of liability produced by the district judge's decision—militates against deferential review in many cases, but not in connection with an EAJA fee award.[94]

A factor that the Court may have implicitly applied within the above considerations, but which might be better considered more explicitly, is a sense in which the matter appears to be discretionary, i.e., does it smack of judgment, choice, sensitivity, and presence, or is it instead somewhat informed by broader concepts that seem legal?[95] Though the Court decided to use a general policy analysis, some weight likely should be given to how the issue appears under common understandings of law and discretion. Is any part of the decision an exercise of true discretion? If the Court avoided a head-on inquiry because the analysis could cut either way so readily, then perhaps the matter needs consideration.[96] Whatever its motive, the Court often does

91. *Underwood*, 487 U.S. at 559.

92. *Id.*

93. *Id.* at 559-60.

94. *Id.* at 563 (noting that the average amount of EAJA fee awards is under $3,000).

95. *See, e.g.*, CHILDRESS & DAVIS, *supra* note *, §§ 4.02 (distinguishing evidence review by rulings having unusual choice or apparent discretion) & 7.06 (discussing apparent discretion and concomitant appellate review).

96. *See Underwood*, 487 U.S. at 583-85 (White, J., dissenting in part). On its face, whether a party's position is grounded in substantial legal justification may *seem* naturally like an issue of law. *See also* Christopher A. Considine, Note, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L. REV. 727, 745-46 (1990).

include the *nature* of the issue as a factor in the classification decision even in policy opinions.[97]

Another policy factor that cuts in favor of de novo review is appellate consistency, uniformity, and the possibility of short-term guidance to the lower courts.[98] That factor was likewise not considered by the Court in *Underwood*. Finally, the specific issue had a good deal of precedent that should count as it does in other inquiries, and in this context, nearly all circuits had found the matter reviewable de novo.[99]

In any event, *Underwood* does, by developing the factor and balancing approach, give courts a reasonably easy process to use in reviewing discretionary decisionmaking for unsettled issues.

C. Cooter & Gell v. Hartmarx Corp.

In 1990, in *Cooter & Gell v. Hartmarx Corp.*,[100] the Supreme Court dealt with review of the district court's assessment of rule 11 sanctions. The Court pointed out that the decision involves three types of issues:

> The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is "warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an "appropriate sanction."[101]

Several circuit courts previously had used a similar separating analysis, dividing the issues into factfindings, reviewed under the clearly erroneous standard, legal questions, reviewed de novo, and the actual sanction decision, reviewed for abuse of discretion.[102] Various circuits combined these reviews

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97. *See* CHILDRESS & DAVIS, *supra* note *, §§ 2.18 and 7.05, discussing the use of this literal factor by the Court in *Miller v. Fenton*, 474 U.S. 104 (1985).

98. *See, e.g., Underwood*, 487 U.S. at 584-85 (White, J., dissenting in part).

99. *See id.* at 586 (White, J., dissenting in part) (citing cases).

100. 496 U.S. 384 (1990).

101. *Id.* at 399.

102. *Id.*

in different ways, but the *Cooter & Gell* Court determined to use a "unitary abuse of discretion" standard[103]—that is, an abuse of discretion standard that applied not only to the review of the sanction decision itself but also to review of the underlying facts and to decisions of law.

Prior to *Cooter & Gell*, most circuit courts had agreed that certain aspects of a sanctions decision would receive deference under an abuse test or, in part, as factfindings subject to deference if not clearly erroneous.[104] To this extent, the Court said, the circuits were in virtual agreement.[105] It is not clear, however, that under *Cooter & Gell*'s unitary abuse of discretion standard, questions of fact, law, and discretion get the same or a similar level of deference. Certainly as to factfindings, the Court seems at bottom to be expressing an unwillingness to label review at all, stating that

> [w]hen an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.[106]

Further, the Court noted the difficulty, particularly in the rule 11 context, of distinguishing between legal and factual issues.[107]

Similarly, pure legal errors, such as misunderstanding of the scope of rule 11 or reliance on an incorrect view of the law, in this context could be reviewed (apparently without deference) *within* the abuse of discretion inquiry: "An appellate court would be justified in concluding that, in making such errors, the district court abused its discretion."[108] In *Koon v. United*

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103. *Id.* at 403 (relying on Pierce v. Underwood, 487 U.S. 552 (1988)).

104. *See id.* at 399-400 (citing cases). See also CHILDRESS & DAVIS, *supra* note *, § 2.03, regarding the applicability of rule 52 to findings underlying motions.

105. *Cooter & Gell*, 496 U.S. at 400.

106. *Id.* at 401.

107. *Id.* (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) for the following statement: "Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion").

108. CHILDRESS & DAVIS, *supra* note *, § 4.01 at 4-10 (quoting *Cooter & Gell*, 496 U.S. at 402). In this case, then, the Court used abuse of discretion as the applicable test

States,[109] the Supreme Court, citing *Cooter & Gell*, emphasized that review of legal matters *within* the general abuse of discretion inquiry empowers the appellate court to do its lawmaking function, yet reaffirms that the term de novo need not be used since the discretion concept subsumes such review:

> Little turns, however, on whether we label review of this particular question abuse of discretion or de novo, for an abuse of discretion standard does not mean that a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. That a [sentencing guideline] departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled de novo while other parts are labeled an abuse of discretion. The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.[110]

This review has been a goal of some members of the Supreme Court for years.

Apparently this review of issues of law is supposed to be done without deference so that it might as well be called de novo, and it seems peculiar to wish to label the whole thing abuse of discretion simply so that the Court need not differentiate between facts and law. That residual appellate power was implicit in *Pierce v. Underwood* and later cases but was not so openly stated, as those courts were stressing a preference for general deference. In effect, then, the Court may be minimizing the extent to which legal error is a factor in the applicability of abuse review, and maximizing the extent to which abuse deference follows from the judge's position to assess facts.

On the one hand, applying de novo review to legal questions separately from application of abuse of discretion

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over pure legal errors, rather than as a reason to make it inapplicable, because a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of law or on a clearly erroneous assessment of the evidence." *Id.* at 405. As noted above, some courts are explicit that such legal error is not then discretionary; at the least, courts should be clear, even in applying a more umbrella-like abuse test, that the legal error *may* be identified and reviewed freely.

109. 518 U.S. 81 (1996).

110. *Id.* at 99-100 (three citations to *Cooter & Gell* omitted).

review, as opposed to saying review of legal questions is subsumed by abuse of discretion review because proceeding on legal error is necessarily an abuse, may be a distinction without a difference. However, applying pure de novo review as a function of the appellate court seems certain to have different results than holding that the legal interpretation by the court below is so egregiously erroneous as to constitute abuse. Obviously, pure de novo review will be the more rigorous and intrusive. If, in fact, that is one function of appellate courts, we may be seeing an abdication of that function.[111]

In *Cooter & Gell*, then, what remained to be decided was whether abuse of discretion review also should protect determinations of legal conclusions, or whether instead de novo review is the appropriate standard for the larger questions of legal sufficiency.[112] The Court used certain *Underwood* factors to find that deference is appropriate on even the legal conclusion of sufficiency in rule 11 proceedings.[113] In this context, the Court asserts that the inquiry is not into "purely legal questions, such as whether the attorney's legal argument was correct," but also considers "issues rooted in factual determinations," including credibility calls, plausibility, and reasonableness under the

111. This is not a development peculiar to civil and administrative matters. In *Wright v. West*, 505 U.S. 277 (1992), a habeas opinion (habeas is labeled a civil matter but is treated in many ways like a criminal matter, as discussed in CHILDRESS & DAVIS, *supra* note *, ch. 13), Justice Thomas put forth a strong argument for very nearly absolute deference to state courts in their interpretations of the United States Constitution. It has long been the practice of federal habeas courts to review state court holdings on mixed fact-law questions involving constitutional issues using a de novo review standard. *Wright*, 505 U.S. at 289. Although *Wright v. West* did not overrule that practice, Justice Thomas' position on the matter had three adherents and he used a large part of the opinion to put forth his reasoning for applying deferential review to law holdings of state courts in habeas matters. *Id.* at 291-93. The opinion is perhaps most memorable for Justice Thomas' misstatements of precedential holdings, but it is part of an ongoing trend toward collapsing all standards into simply "review" and making it all deferential. For comment on this trend, *see* CHILDRESS & DAVIS, *supra* note *, chs. 1 & 7.

112. *See Cooter & Gell*, 496 U.S. at 399 (citing Ninth and D.C. Circuit cases using some de novo review).

113. *See id.* at 400-05. In fact, the Court stated the matter a bit broader by asking whether deference is given the court's "legal conclusions," but it is apparent that this refers to conclusions about the legal sufficiency of a filing, not the pure law underlying it, which as noted above may constitute an abuse of discretion *because* informed by incorrect law or improper factors. On the legal underpinnings, it is obvious the circuit court need not defer, nor need it defer to "legal conclusions" if that means "statements of applicable law."

circumstances. By characterizing it as a "fact-dependent legal standard,"[114] the Court can justify a holding that the district court is "better situated than the court of appeals to marshal the pertinent facts and apply" this fact-dependent legal test[115] under the "judicial position" factor.

Further, the Court faced the *Underwood* issue of "substantial justification" roughly analogous to rule 11 sanctions; two of its factors—sound administration by superior-positioned actors, and the difficulty of generalizing a clear legal principle in such close calls—supported deference in this context.[116] The Court assumed, also, that the policy goals of rule 11 support deference through encouraging deterrence by streamlined process even though it also found some inconsistency in application "inevitable."[117] Thus the Court held that, pursuant to those factors, abuse of discretion review, subsuming fact and law determinations, is the proper test on all rule 11 issues.

While confirming that *Underwood's* factors would become a mode of inquiry in resolving initial questions into the appropriate standard of review on procedural issues, *Cooter & Gell* also reconfirmed that some first-glance guesses as to the

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114. *Id.* at 402. Again, the Court might be criticized for downplaying an inquiry into the *nature* of the issue, instead emphasizing policy analysis. One might expect a "legal standard" to generally be judged by a de novo standard, even if the factual aspects or underlying determinations receive deference. Yet *Underwood* "also concluded that [a] district court's rulings on legal issues should be reviewed deferentially." *Id.* at 403.

115. *Id.* at 402.

116. *Id.* at 403. The Court rejected, however, a distinction of *Underwood* based on the mandatory *language* of rule 11: "that sanctions 'shall' be imposed when a violation is found" has no "bearing on how to review the question" whether there was a violation. *Id.* at 404. Perhaps it should; further, one could argue similarly that the presence of discretionary language elsewhere in the rule's structure, *see id.* at 400 (in picking appropriate sanction), argues in favor of de novo review over the mandatory provisions, especially because the point of the rule 11 amendments is to make sanctions mandatory and remove bad faith as the key inquiry. *See* CHILDRESS & DAVIS, *supra* note *, § 4.15.

117. *Cooter & Gell*, 496 U.S. at 405. Fact-bound issues, the Court believed, cannot be made consistent by de novo review. *Accord* Thomas v. Capital Security Serv., Inc., 836 F.2d 866, 873 (5th Cir. 1988) (en banc). *Compare* CHILDRESS & DAVIS, *supra* note *, §§ 2.13 and 2.28. Others have argued that rule 11 sanctions are unfairly inconsistent, apparently assuming that one of the functions of appellate review is to establish guidelines and some uniformity. *See, e.g.*, CHILDRESS & DAVIS, *supra* note *, § 4.15; Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOODE HALL L.J. 353 (1987). The Court may have downplayed uniformity as a policy goal; it also seemed to ignore the *Underwood* factor of consequences and money amounts.

applicability of abuse of discretion review—both cases involved admittedly legal standards—will be deceiving under the Court's current trend.

Extending abuse of discretion further as the generally applicable test, however, makes it more likely that the term itself will develop an even wider variety of meanings or at least many more applications.[118] Even under a deferential general standard, review of judgment requires judgment. The key, then, is focused review, not excruciating labeling, and perhaps the Court's seeming overgeneralizations in reality recognize this.

D. Koon v. United States

The Supreme Court has used the same inclusive discretion standard to settle the issue of the proper standard of review for a district court's decision to depart downward from the applicable sentencing range, without distinguishing between the initial decision that a departure is justified and the consequent decision what that departure will be.

In *Koon v. United States*,[119] the police officers whose treatment of Rodney King had been videotaped and entered in evidence were charged under 18 U.S.C. § 242 with violating Mr. King's constitutional rights under color of law and with willful use of unreasonable force in arresting Mr. King. Two of the officers were convicted of one or more counts.[120] The sentence applicable to the convicted offenses for a person with criminal history category I (no criminal history) was 70 to 87 months. However, the district court chose to depart downward a total of eight levels based on the victim's wrongful conduct of provoking the crime, the likelihood that the defendants would be targets of abuse in prison, that the defendants would suffer a deprivation of employment and prospective employment, that

118. Professor Louis argued, before *Cooter & Gell*, that parts of rule 11 and other review should be de novo in part because flexible review is needed. Louis, *supra* note 91, at 757-61 (urging a less monolithic, more flexible approach, which in effect breaks down particular issues and reviews them separately). He is correct, of course, that courts should not avoid scope of review issues by resorting to labels instead of focused analysis. But his proposal might be too complex and unrealistic in its own way by slicing sub-issues too finely.

119. 518 U.S. 81 (1995).

120. *Id.* at 88.

the defendants were "significantly burdened" by successive state and federal prosecutions, and that there was no danger of recidivism.[121] The Ninth Circuit Court of Appeals reviewed the departure decision de novo and reversed the downward departure, largely on the grounds that the district court had misinterpreted the departure instructions contained in the Sentencing Guidelines.[122]

The Supreme Court granted certiorari for the specific purpose of determining "the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines."[123] The Guidelines allow courts to depart from the applicable guideline ranges if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described,"[124] but taking into account only the Guidelines themselves and the policy statements and commentary accompanying the Guidelines. The Guidelines refer to the usual sentencing ranges for typical cases as the "heartland," and then instruct courts how to treat a case with facts that make it atypical and that take it out of the "heartland."[125] These atypical factors are categorized as prohibited factors (factors that may *never* be used for purposes of departing), encouraged factors (factors that are often present but that cannot easily be taken into account when formulating the general guidelines), and discouraged factors (factors that are ordinarily not relevant in making a departure decision and that should be relied on only in very exceptional circumstances).[126]

The Court then stated:

> If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it

121. *Id.* at 89-90.
122. *Id.* at 90.
123. *Id.* at 91.
124. *Id.* at 92 (citing 18 U.S.C. § 3553(b)).
125. *Id.* at 93.
126. *Id.*

> into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," . . . decide whether it is sufficient to take the case out of the Guideline's heartland.[127]

All of these decisions, the Court held, should be reviewed for abuse of discretion. This discretion arises both from the traditional deference given to within-the-statutory-limits sentencing by district judges, and by 18 U.S.C. § 3742, as amended, which instructs courts of appeals to give "due deference" to the decisions of the district courts in applying the Guidelines to the facts.[128] Although the Court points out that the level of deference due the district court's decision "depends on the nature of the question presented,"[129] nevertheless the departure decision in most cases will be "due substantial deference" not only because of the traditional deference accorded the kind of first-hand familiarity with the case itself, but also because the trial court has an "institutional advantage over appellate courts in making those sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do"[130] and thus can make the atypicality assessment much more reliably than an appellate court. In addition, these decisions are fact-driven decisions in which de novo review would not serve its important function of giving guidance for lower courts.[131]

The Court recognized that some parts of the departure exercise do constitute questions of law, but refused to separate the kinds of issues and apply differing standards of review labels to them.

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127. *Id.* at 95-96.

128. *Id.* at 97.

129. *Koon*, 518 U.S. at 98. So a mathematical error, for example, is owed no deference at all and is reviewed de novo as a law question.

130. *Id.*

131. *Id.* at 99.

> The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of that point. Little turns, however, on whether we label review of this particular question abuse of discretion or de novo, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled de novo while other parts are labeled an abuse of discretion. The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.[132]

An example of the Court's own interpretation of the *Koon* decision is shown by its GVR[133] of *Meza v. United States*.[134] The Seventh Circuit in that case had applied a separating analysis to the departure decision of the trial court, holding that a "defendant may . . . appeal a refusal to depart which rests upon legal error," but that a "decision not to depart [from the sentencing guidelines] is unreviewable on appeal if based on the district court's discretion."[135] The Court apparently felt that the *Meza* analysis did not conform to *Koon*'s more expansive view of the boundaries of a lower court's discretion.[136]

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132. *Id.* at 100; *see also* Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697 (1998); Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Depatures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1 (1997).

133. The notation "GVR," now familiar to many or perhaps most experienced appellate practitioners, refers to the determination of the United States Supreme Court to grant the petition for writ of certiorari, vacate the judgment below, and remand the cause for further consideration in light of a potentially controlling authority, especially a newly rendered decision of the Court. The practice is discussed at length in *Stutson v. United States*, 516 U.S. 193 (1996) and *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam).

134. 519 U.S. 990 (1996).

135. United States v. Meza, 76 F.3d 117, 120-21 (7th Cir.), *cert. granted*, 519 U.S. 990 (1996), *on remand*, 127 F.3d 545 (7th Cir.), *cert. denied*, 522 U.S. 1139 (1998). *Compare* United States v. Prevatte, 66 F.3d 840, 843 (7th Cir. 1995) (court of appeals lacks jurisdiction to review discretionary refusals to depart), *with* United States v. Burnett, 76 F.3d 376 (4th Cir.) (court of appeals has such jurisdiction but reviews with great deference).

136. *See also* United States v. Crouse, 78 F.3d 1097, 1100-01 (6th Cir. 1996) (same

E. Calderon v. Thompson

But the Court does not consistently move toward the more inclusive standard and the more deferential review. In an opinion that seems to run counter to the general direction of the foregoing cases, and in an odd twist on the concept of abuse of discretion, the Supreme Court in *Calderon v. Thompson*[137] held that the Ninth Circuit had committed a "grave abuse of discretion"[138] by recalling its mandate denying habeas. The court's mandate to correct error is usually considered "inherent in the judicial power."[139] Because this conduct is most often considered solely a supervisory or administrative function, not usually subject to development of legal rules, it should in the normal course get highly deferential review as a discretionary decision. However, the *Calderon* majority offers a number of reasons why the discretionary decision at issue should be reviewed by some other standard: (1) Recall was issued *sua sponte* only two days before the defendant's scheduled execution; (2) the defendant had filed two or more habeas petitions (though the Ninth Circuit specifically set out that its decision was on the merits of the first habeas petition and no other, as required by the Antiterrorism and Effective Death Penalty Act (AEDPA)); (3) and, most importantly, as the Court states, "Although the AEDPA does not govern this case, . . . its provisions 'certainly inform our consideration' of whether the Court of Appeals abused its discretion."[140]

Justice Souter, in dissent, replies: "Why AEDPA is thought to counsel review of recalls of mandates under anything but the traditional abuse of discretion standard is unexplained by anything in the majority opinion,"[141] and argues further that "[n]othing in AEDPA speaks to the courts of appeals' inherent power to recall a mandate, as such, and so long as the power over mandates is not abused to enable prisoners to litigate otherwise forbidden 'second or successive' habeas petitions, . . .

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analysis, also GVR'd at 519 U.S. 801 (1996).

137. 523 U.S. 538 (1998).

138. *Id.* at 542.

139. *Id.* at 567.

140. *Id.* at 558.

141. *Id.* at 572 (Souter, J., dissenting).

AEDPA is not violated."[142] In any event, the majority determines to set a new standard of review for this specific kind of decision: "[W]e hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."[143] In other words, the Supreme Court invented an "abuse per se" test, so that issuing a recall in this particular fact setting is no longer a discretionary call.

The result here is an unsurprising affirmation of the fact that both the Court and Congress have the power to limit the discretionary authority vested in the court or agency below, and that at least a part of the standard for reviewing discretionary decisionmaking is premised on the subject matter of the decision.[144]

III. ADVICE TO PRACTITIONERS

Because discretion and its exercise are often vague and open ended, courts have some difficulty writing about discretion and its review, and have set out slightly different tests with each passing case. A common vice of appellate courts is treating the various sorts and stages of discretionary decisionmaking under the universal rubric of abuse of discretion, giving the appearance that the courts believe they are dealing with one kind of issue.

Clearly there is no such thing as *one* abuse of discretion standard. It is at most a useful generic term. Even within review of discretionary calls (or perhaps because sometimes different types of calls have a varying amount of real judgment to them), this standard of review more accurately describes a *range* of appellate responses. In practice, however, while courts cite "the" abuse of discretion standard in varying contexts, most imply awareness that varying kinds of review follow, whether by firmly applying the factors applicable to the discretionary

142. *Id.*

143. *Id.* at 558.

144. The many wars over discretion in the administrative context, and its difference from criminal and civil appeals, are compared in CHILDRESS & DAVIS, *supra* note *, §§ 15.08 & 17.03.

choice,[145] or by giving a stronger presumption to one set of applications,[146] or even by blatantly stating that several abuse of discretion standards may be involved.[147]

Most trial courts, however, do not explicitly clarify the process of their decisionmaking when exercising discretion, so that sometimes the reviewing court has difficulty deciding whether the process of decision was a correct one. The lack of clarity probably does not mislead most reviewing courts. They understand that, once clearly stated, the factors and considerations required to be used in the decision are legal (not discretionary) factors and issues and thus are subject to independent review on appeal. In such cases, abuse is still the standard articulated, but it is simply found more readily where the legal factors are dealt with improperly.

Nevertheless, courts and practitioners must bear in mind that this shorthand sends an unclear message by including a legal element within the *abuse of discretion* language, even when the reviewing judges are rightly acting as if the decision is necessarily an abuse of discretion because illegal means were used to reach it. The formula does not clearly address what is unacceptable for review of an exercise of discretion. On the other hand, in some cases the only objection the appellate court could have is to the ultimate choice made. Finding abuse in such situations leads the reviewing court to describe more accurately what has gone on below and what makes the decision itself unacceptable, even though the process was proper and the decision appears to be within the discretionary range.

While these methods of dealing with discretionary decisions seem very different, in many cases it would be hard to draw a line between them. Depending on the stage of development of the particular exercise of discretion and its potential to evolve into a legal rule, the reviewing court's focus

145. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (factors to weigh when determining whether to close trials to public); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) (mandating consideration of twelve factors when determining attorney fees under 42 U.S.C. § 1988).

146. *See, e.g.*, Dixon v. International Harvester Co., 754 F.2d 573, 586 (5th Cir. 1985) (motion for new trial reviewed for abuse, but deference applied especially to denials). This reality is discussed in CHILDRESS & DAVIS, *supra* note *, § 4.21.

147. *See, e.g.*, Chris-Craft Ind. v. Piper, 480 F.2d 341, 389 (2d Cir. 1973) (affirmance no matter which abuse test is used, indicating that there are many).

may be unreliable.[148] On the one hand, the appellate court may simply not yet be prepared to state that this overall choice is unacceptable because as a legal matter the judge used improper factors. Likewise, it may not be ready to say that the choice is necessarily to be separated from its process. Thus the reviewing court, when it has evolved a legal rule (e.g., is ready to declare generically that no court may do what the judge below did), should clearly acknowledge its function as a law-making authority not bound by the factors and process of decisionmaking below. *Discretion* is no longer actually involved in the process, so it is no longer helpful to refer to that process as reversible only upon an abuse of discretion.

While the decisionmaking is in the evolutionary process from discretion to legal rule, reviewing courts often subdivide the issue into its various components (facts, law, policy, supervision) and apply the various standards as to independent issues. However, the point of Supreme Court jurisprudence is not that evolving decisions must be broken down into smaller and smaller bits with each reviewed under the appropriate label. Rather, as Justice Breyer said in *First Options of Chicago v. Kaplan*,[149] "It is undesirable to make the law more complicated by proliferating review standards without good reason."[150] What is needed instead of a separating analysis is a more careful *description* of the *exact* question up for review. Counsel should focus on the particular decision at hand and address whether either the discretion label or the deference result is truly appropriate. In turn, courts should address the decision on its own terms without reflexive resort to the habitual catchphrase

148. *See, e.g.*, Abrams v. Interco, Inc., 719 F.2d 23, 28 (2d Cir. 1983) (abuse found more readily for class action denials than for continuances; "The courts have built a body of case law with respect to class action status."); CHILDRESS & DAVIS, *supra* note *, § 7.06. And, of course, a court might not want to distinguish them if it has fully considered the intricate relationship between law and discretion in the particular case. *See, e.g.*, Post, *supra* note 11, at 210: "It is rather common for trial court decisions to be governed by legal standards, even though the decisions are 'discretionary' from the point of view of an appellate court. This is typical of the structure of the Federal Rules of Civil Procedure." Post would, however, distinguish between *deference,* by which the reviewers defer to implementation but retain control over its legal standard, and *delegation,* in which courts have power to determine the governing rule, apparently viewing these as two forms of discretion. *Id.* at 215. Only rarely is discretion given without criteria for its exercise. *Id.* at 210-11.

149. 514 U.S. 938 (1995).

150. *Id.* at 948.

abuse of discretion unless it is found specifically applicable.[151] That is, almost every issue has underlying facts and most have some area of law to apply. Clear error in factfinding or mistake of law both can be subsumed under abuse of discretion review in that a discretionary decision based on clearly erroneous facts or on a mistake of applicable law is certainly an abuse of discretion in itself.[152]

As is apparent from the above, deciding when review should in fact fall under an abuse of discretion standard (rather than applying de novo review as a legal matter or clearly erroneous review as to facts) can be as difficult as sorting discretion from fact and law. For some time, abuse of discretion, like other review standards, received little comment other than the conclusory statements of courts, "This decision is within the sound discretion of the trial court and no abuse is found."[153] There seemed no way to argue with such a statement, but an attempt at a minimum to define the decision in terms of the intensity of review to be applied may refocus the attention of the reviewing court from whether it agrees with the decision to the exact nature of review that should be applied.

While the courts often may not state this reality,[154] it is implicit in the actual spectrum of responses they take under the single abuse standard.[155] In the civil context, for instance, it

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151. CHILDRESS & DAVIS, *supra* note *, § 4.01 at 4-6.

152. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990).

153. *See, e.g.*, Pittsburgh Plate Glass v. United States, 360 U.S. 395, 396 (1959) (re inspection (or not) of grand jury minutes); United States v. Hall, 165 F.3d 1095, 1117 (7th Cir. 1999) (admission of rebuttal evidence); Sequa Corp. v. GBJ Corp., 156 F.3d 136, 149 (2d Cir. 1998) (value of attorney services).

154. *Cf.* Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 940 (7th Cir. 1989) (Flaum, J., concurring) (no single abuse of discretion standard exists, nor one de novo standard, citing CHILDRESS & DAVIS, *supra* note 1, § 4.1); American Int'l Underwriters, Inc. v. Continental Ins. Co., 843 F.2d 1253, 1256 (9th Cir. 1988) ("the abuse of discretion standard in this [abstention] case should not be confused with the broader abuse of discretion test used in other matters, such as rulings on certain evidentiary issues"); Christ-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 389 (2d Cir. 1973) (in comparing "the" abuse test for grants versus denials of SEC injunctions, judge notes "scope of review would appear to be different," but urges abuse to be found "whatever abuse of discretion standard be applied"); United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981) (despite use of the same phrase, "in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance").

155. For example, in CHILDRESS & DAVIS, *supra* note *, § 11.01, it is noted that in the criminal appeal, deference traditionally has been so slight as to approach skepticism when

cannot seriously be claimed that the same abuse of discretion standard is used when a judge refuses to award attorney fees to a prevailing civil rights plaintiff[156] as when she grants a one-day continuance[157] or permits separate trials.[158] Even a seemingly single issue, such as the motion for new trial, may get different deference under the abuse of discretion standard depending on the basis for new trial argued, or whether it was granted or denied.[159] Indeed, courts implicitly recognize the importance of the factual context of the lower court's decision by saying more often that the particular decision may not be reversed absent an abuse of discretion than saying that the decision is reviewed under "the" abuse of discretion test.

It is not difficult to understand how the factual circumstances of a case become linked to the standard of review on appeal. The trial court often exercises its discretion after considering the unique facts and factors presented by the case. On appeal, the appellate court reviews the trial court's exercise of discretion for abuse *under the relevant considerations.* Those factors, then, become part of the individual issue on appeal and thus part of the particular appellate application of an abuse of discretion standard.[160] Therefore, the abuse of discretion label is often a variable that depends for its meaning on the context and

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the judge goes to trial without the defendant, or nearly unreviewable when he imposes sentence within statutory limits and under proper factors. *See also id.* § 4.21.

156. *See id.* § 4.15.

157. *See id.* § 4.08. In setting a trial date, for example, a judge has been said to have the power to act "as he pleases." Kaufman, *Judicial Discretion,* 17 AM. L. REV. 567, 567 (1883); *see also* Post, *supra* note 11, at 210; A. Wallace Tashima, *Motion Practice in the Central District,* CAL. LAW., Jan. 1985, at 25 (district judge believes there is virtually unlimited and unreviewable discretion in managing the docket). But see *Clinton v. Jones,* 520 U.S. 681 (1997), wherein Judge Wright's decision to delay the trial against President Clinton until he had completed his term was held an abuse of discretion because, the circuit court said, Judge Wright did not fully take into account Ms. Jones' right to have an immediate trial. *Id.* at 707-08. It appears that most exercises of discretion are accompanied by limiting factors or guidelines.

158. CHILDRESS & DAVIS, *supra* note *, § 11.21.

159. *See generally id.* § 5.09.

160. *See id.* § 4.01 at 4-15; *see also* Durrett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990) (where court's discretion is restrained in favor of a certain policy, that policy is factored *into* abuse of discretion analysis; trial judge to exercise discretion by what Judge Friendly called a "principle of preference"); Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985) (same).

content of its application. The test becomes a sliding scale rather than a single yardstick.

This does not mean that a situation in which discretion is involved cannot be reviewed in a principled manner. Rather, it means that the source of the review principle will be found not in the bald abuse of discretion expression but in the particular applications made for that and similarly postured issues.[161]

Thus the successful practitioner must approach each issue with sensitivity to the level of deference afforded the issue itself and the factors the court must consider in making its choice.[162] Counsel should direct the appellate court's attention to the judge's decision below with an eye toward exploring *generally* what kind of discretionary decision was made there, in a way that aids the reviewing court in understanding properly why, and how much, deference should or should not follow. Appellate courts, in turn, should frame their review by issue, factors, reasoned analogy, and degree of discretion, providing general guidance on the evolving concept of discretion as well as the specific application at hand.[163] At the very least, the court or counsel should consider four questions:

1. Has this decision been given to the discretion of the trial court? If so, why? That is, is there law to apply, a framework of legal standards to contain possible discretion, factors to guide the exercise of the discretion, but nevertheless no actual rule of law, so that the trial court is best positioned to exercise the necessary discretion?
2. If the decision to be made has a framework of legal standards or factors to guide the trial judge's exercise of discretion, has the judge stayed within the framework and properly considered the factors?

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161. CHILDRESS & DAVIS, *supra* note *, § 4.01 at 4-15.

162. See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997), wherein Judge Wright gave the President a stay during his presidential term, and the Supreme Court, though acknowledging that the court calendar is within the trial court's discretion, nevertheless found the decision an abuse because the court did not give sufficient account of respondent's interest in immediate trial. *Id.* at 707-08.

163. *See* CHILDRESS & DAVIS, *supra* note *, where several such applications are discussed in sections 4.02-4.20, 5.08-5.09, 5.12-5.13, and 7.06. In addition, section 4.21 analyzes the broad meanings and deferences of abuse of discretion apart from its varying contexts and factors.

3. If this is a discretionary decision that is in the evolutionary process, is there enough precedent to show a pattern of decision and, if so, what is that pattern?
4. Has the appellate court indicated in this or analogous issues that it is ready to state a rule of law based on that pattern?

Answering these questions about the discretionary decision at issue will help to formulate a way to address the issue itself.

IV. CONCLUSION

Counsel and scholars should look to the body of caselaw on the issue involved to see what discretion means in that context.

Courts also may consider analyzing the *Pierce v. Underwood* factors[164] to decide whether abuse of discretion is applicable, not only to determine applicability, but also to guide *application* of the flexible abuse test. The strength or presence of such factors—including judicial economy, position to judge, use of evidentiary facts, and practicality of generating a principle or rule—also may weigh heavily in a court's considered decision as to the strength and scope of review *within* the abuse of discretion standard.[165]

In the final analysis, the concept of discretion quite naturally fights uniformity, so it should not be surprising that review of discretion is not consistently applied or even theorized. Discretion is a pervasive yet evasive concept.[166] Nevertheless, "[t]o tame the concept requires no less than to say *why* it is accorded or withheld, and to say so in a manner that provides assurance for today's case and some guidance for tomorrow's."[167] Despite this direction, the courts have set out an abuse of discretion inquiry broadly as the standard for reviewing district courts' evidentiary, trial, and supervisory roles.

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164. *See* Pierce v. Underwood, 487 U.S. 552 (1988), discussed *supra* in text accompanying notes 81-100.

165. Guidance from *Underwood,* statutes, precedent, and the nature of the issue may aid the difficult application inquiry. Perhaps *Underwood,* then, is more about how much deference than about the "whether deference" issue it decided.

166. *See* Post, *supra* note 11, at 169.

167. Rosenberg, *Appellate Review, supra* note 12, at 185.

Review of discretionary decisionmaking has long been a difficult area for appellate courts. These courts almost always seek at least consistency and disinterestedness. But exercises of discretion are so personal to the decisionmaker that even the idea of second-guessing such a decision seems overly intrusive. The appellate courts and the decisionmakers recognize that *some* standards must be applied. Reviewing courts have thus selected the label "abuse of discretion," which is used with flexible intrusiveness of review tending to reflect the subject matter and process of the decision.