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Unscrambling the Confusion: Applying the Correct Standard of Review for Rape-Shield Evidentiary Rulings

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Unscrambling the Confusion: Applying the Correct Standard of Review for Rape-Shield Evidentiary Rulings

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Abstract

It is well settled that the standard of review applicable to a case may be crucial to its outcome on appeal. This makes clarity with regard to the applicable standard of the utmost importance to litigants. This Article addresses specifically the standard used to review trial courts' decisions to admit or exclude evidence under rape-shield statutes. While most jurisdictions apply an abuse of discretion standard, the authors here examine the inconsistency of the jurisdictions that do not. Ultimately, the authors assert that the abuse of discretion standard is the best in these cases and should be applied by all jurisdictions collectively.

Introduction

Every appeal requires the application of a standard of review. And in most appeals, that standard controls the legal analysis. In some instances, courts even relate how crucial their standard of review is to a given appeal.[1] Often, however, courts seem to go through the motions when it comes to standards of review—referencing the standard only after

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[1] *See, e.g.*, Vail Assocs., Inc. v. Vend-Tel-Co., Ltd., 516 F.3d 853, 858 (10th Cir. 2008) (stating that the "standard of review sounds the death knell" of the plaintiff's claim on appeal).

appearing to have concluded the outcome. Of course, the preferred approach is that reviewing courts take standards of review more seriously.[2]

Under various states' case law, the applicable standard of review in evaluating a trial court's decision to admit or exclude evidence under a rape-shield statute is completely muddled. Litigants in these jurisdictions will be well served by a fine tuning of the unclear standards of appellate review concerning the admissibility of rape-shield evidence.

As discussed below, the trend in most jurisdictions is that this decision should be made pursuant to the abuse of discretion standard. We analyze the appropriateness of universalizing that standard, as well as the merits of considering a more reflective standard of review.

I. Standards of Review

Although "a discussion of standards of review might appear superficial, or worse, of little consequence,"[3] they "often impact the appeal more than the facts and the substantive law."[4] Indeed, the standard by which a case will be reviewed on appeal often affects the strategy an appellate advocate will employ.[5]

Brandon Harrison describes the spectrum of appellate deference towards trial-judge decisions as:

(least deference) ⟵ (most deference)

de novo — clearly erroneous — abuse of discretion[6]

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[2] For a partial discussion of some of the implications of differing standards of review see Robert Steinbuch, *An Empirical Analysis of Reversal Rates in the Eighth Circuit During 2008*, 43 LOY. L.A. L. REV. 51, 62-64 (2009).

[3] Kevin R. Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 279 (2002).

[4] *Id.* at 280.

[5] *See id.* at 281-84.

[6] Brandon J. Harrison, *Standards of Review on Appeal*, *in* HANDLING APPEALS IN ARKANSAS 9-1, 9-4 to -14 (2007). Other standards of review exist, particularly those created by statute. *See* Tandon Corp. v. U.S. Int'l Trade Comm'n, 831 F.2d 1017, 1019 (Fed. Cir. 1987) ("5 U.S.C. § 706, subparagraph (2)(E), imposes the 'substantial evidence' standard of review on Commission findings and conclusions. There is a significant difference between the standards of 'substantial evidence' and of 'clearly erroneous.'"). The court in *In re Gartside* noted that

These three standards can theoretically be divided into those that provide deference to trial judges for decisions involving factual determinations (clearly erroneous and abuse of discretion), and those that govern appellate courts' review of the trial courts' purely legal determinations (de novo).[7] Trial courts' legal determinations are not entitled to any deference, as appellate judges are viewed as being in an equal or, perhaps, better position than trial judges to make legal determinations.[8] For the more complex issues of mixed fact and law, the appellate court must first determine whether the issues can be disaggregated; if not, the court must decide whether its abilities to develop the law or the abilities of the trial court to view the historical facts should determine the level of review.[9]

Thus, the de novo standard applies to purely legal issues, where the appellate court should not be influenced whatsoever by the trial court's decision.[10] Typical cases would include questions of statutory construction and appeals from summary judgments.[11]

> the "substantial evidence" standard asks whether a reasonable fact finder could have arrived at the agency's decision, and is considered to be a less deferential review standard than "arbitrary, capricious." The Supreme Court has described "substantial evidence" [as] . . . "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . . Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

203 F.3d 1305, 1312 (Fed. Cir. 2000) (citations omitted). Additionally, "the standard of review for the denial of a motion for judgment as a matter of law is the same as the standard of review for reviewing a jury's verdict: both the verdict and the denial of the motion must be affirmed if there is substantial evidence to support the verdict." Harper v. City of L.A., 533 F.3d 1010, 1022 n.9 (9th Cir. 2008) (citations omitted). This is not the ideal use of language, however, to describe the standard of review of a jury verdict. STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 3.01, 9.01 (3d ed. 1999). The better language is one of *reasonableness*: "[C]ould reasonable minds reach different conclusions on the evidence presented?" *Id.* § 3.01; *see also id.* § 9.01. If so, the appeal of the verdict should be denied. *Id.*

In addition, the "plain error" standard of review, sometimes referred to as the "manifest injustice" standard of review, supplants the primary standards of review for issues raised for the first time on appeal; this standard is highly deferential. HARRY EDWARDS & LINDA ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW 3, 5 (2007).

[7] EDWARDS & ELLIOTT, *supra* note 6, at 5-8.

[8] *Id.*

[9] *Id.* at 12-16.

[10] *See* Helena-West Helena Sch. Dist. v. Fluker, 268 S.W.3d 879, 882 (Ark. 2007) (emphasis added) ("[A] circuit court's conclusion on a question of law is reviewed *de novo* and is given no deference on appeal.").

[11] *See* White County v. City of Judsonia, 251 S.W.3d 275, 277 (Ark.) (deciding whether a statute authorized county governments to force city courts to levy fines),

The "clearly erroneous" standard typically applies to factual determinations made by a trial judge.[12] The Federal Rules of Civil Procedure provide that "[f]indings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[13] In *Combs v. Stewart*, for example, the court used the clearly erroneous standard to review the trial court's division of property and debts between a widow and her husband's estate.[14] The common articulation of the standard is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[15]

The abuse of discretion standard normally applies to circumstances in which a judge is faced with conditions that require a certain measure of judgment at trial or because there are no guidelines for deciding the issue.[16] One scholar describes the abuse of discretion standard as muddled and "veiled in generality."[17]

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remanded to 247 S.W.3d 863 (Ark. 2007); *see also* Fathauer v. United States, 566 F.3d 1352, 1353 (Fed. Cir. 2009) ("This court reviews a grant of summary judgment by the United States Court of Federal Claims *de novo*" in deciding whether part-time meteorologists employed by the National Weather Service were "employees" within the meaning of a federal statute.).

[12] Atlanta J. & Const. v. City of Atlanta Dep't of Aviation, 442 F.3d 1283, 1287 (11th Cir. 2006) (Considering the district court's calculation of restitution, the Eleventh Circuit stated, "We review . . . findings of fact upon which the decision to grant equitable relief was made under the clearly erroneous standard."); *see also* Lebanon Farms Disposal, Inc. v. County of Lebanon, 538 F.3d 241, 247 (3d Cir. 2008) ("We engage in plenary review of the District Court's grant of summary judgment.").

[13] FED. R. CIV. P. 52(a)(6).

[14] 288 S.W.3d 574, 577 (Ark. 2008).

[15] Harrison, *supra* note 6, at 9-6 (citing Thompson v. Bank of Am., 157 S.W.3d 174, 176 (2004); United States v. U.S. Gypsum Co., 333 U.S. 364, 395, *reh'g denied*, 333 U.S. 869 (1948)).

[16] *Id.* at 9-6, 9-12; *see also* Re/Max North Cent., Inc. v. Cook, 272 F.3d 424, 429 (7th Cir. 2001);Williams v. State, 287 S.W.3d 559, 565 (Ark.), *reh'g denied*, (2008); Steinbuch, *supra* note 2, at 62 (citing Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 49 (2000)).

[17] Harrison, *supra* note 6, at 9-10 (suggesting only that the decision cannot be thoughtless, groundless, arbitrary or must display a rational basis). Professor Peter Nicolas argues that, while courts' common recitation that the admission or rejection of evidence is discretionary, in practice the standard of review for evidentiary rulings varies among the standards of de novo, clear error, and abuse of discretion depending on the evidentiary issues at hand. For example, when relevancy determinations involve

The classic example of a matter subject to this level of review is whether the trial judge properly excluded evidence under Federal Rule of Evidence 403.[18] Another candidate for the abuse of discretion standard would be a judgment call about the value of professional services.[19] The difficulty is that courts exercise discretion throughout their decision-making, and, as such, "an[y] error of law can always be [mis]characterized as 'an abuse of discretion.'"[20] Trial courts have the "broad[est] discretion on evidentiary rulings," typically resulting in the application of the abuse of discretion standard.[21]

Under the circumstances where the abuse of discretion standard normally applies, a judge is given extremely wide latitude in making a decision, and only when he goes beyond any reasonable position is he overturned.[22] The test to determine whether a judge has abused her discretion has been expressed in various formulations.[23] "The question . . . is not . . . whether the Court of Appeals[] would as an original matter

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questions of law, courts tend to apply the de novo standard. Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 540-42 (2004); *see generally* Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000).

[18] Old Chief v. United States, 519 U.S. 172, 191-92 (holding it was an abuse of discretion to admit evidence of a prior conviction where the defendant offered to stipulate to the prior conviction), *remanded to* 121 F.3d 448 (9th Cir. 1997); United States v. Abel, 469 U.S. 45, 54-55 (1984) (holding that is was not an abuse of discretion to admit evidence of details about a prison gang to which a criminal defendant belonged); *see also* Williams v. First Unum Life Ins. Co., 188 S.W.3d 908, 914-15 (Ark. 2004) (holding it was not an abuse of discretion to exclude evidence of a 1980 insurance application in a case where a policy that began in 1993 was at issue).

[19] Kenny A. *ex rel.* Winn v. Perdue, 532 F.3d 1209, 1218 (11th Cir.) (stating, "[t]he abuse of discretion standard applies to the district court's determination of the number of compensable billable hours, the hourly rate at which plaintiffs' counsel is compensated, [and] the award of costs and expenses"), *reh'g en banc denied*, 547 F.3d 1319 (2008), *cert. granted in part*, 129 U.S. 1907 (2009).

[20] United States v. Blue Bird, 372 F.3d 989, 991 (8th Cir. 2004).

[21] Harrison, *supra* note 6, at 9-29 to -30.

[22] *In re* Rasbury, 24 F.3d 159, 168 (11th Cir. 1994) (stating that "under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call"); *cf.* Thorne v. State, 601 S.W.2d 886, 887 (Ark. 1980) (finding abuse of discretion where a trial court denied a criminal defendant time to find a new attorney).

[23] Steinbuch, *supra* note 2, at 62.

have [acted as did the District Court, but rather] . . . whether the District Court abused its discretion in so doing."[24] Another commentator stated:

> When reviewing discretionary decisions for abuse, the reviewing court seeks to determine whether and when the bounds of discretion seem to have been overreached. . . . [A]buse 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 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. 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.[25]

Chief Justice Marshall emphasized, however, 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.'"[26] Thus, "[a]buse 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."[27] Otherwise, discretion would be unbounded and, therefore, not subject to abuse whatsoever. Absent these significant departures, though, the court's decision is protected even if unwise.[28] The appellate court does not review the decision itself, but, rather, "the manner of making it."[29]

The many different formulations of the abuse of discretion standard reflect the understanding "that there is no such thing as *one* abuse of discretion standard. It is at most a useful umbrella term. . . . [T]his multifaceted standard of review more accurately describes a range of

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[24] *Id.* at 62-63 (quoting Davis, *supra* note 17, at 50).

[25] Davis, *supra* note 17, at 54-55; *see* Steinbuch, *supra* note 2, at 63.

[26] Henry J. Friendly, *Indiscretion About Discretion,* 31 EMORY L.J. 747, 784 (1982) (quoting United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14692) (Marshall, C.J.)); *see* Steinbuch, *supra* note 2, at 63; Davis, *supra* note 17, at 58.

[27] Steinbuch, *supra* note 2, at 63 (quoting Davis, *supra* note 17, at 59).

[28] *Id.*

[29] *Id.* (quoting Davis, *supra* note 17, at 59).

appellate responses with varying degrees of deference handed down."[30] And if an appellate court determines that a trial court erred beyond any deference that it is afforded under this standard, the availability of a remedy will generally still be subject to a harmless error analysis.[31]

II. Variation in Appellate Standard for Rape-Shield Evidence

Rape-shield statutes render evidence of a victim's prior sexual conduct inadmissible, unless the trial judge determines—after a pre-trial or "rape-shield" hearing—that a piece of evidence is so relevant as to outweigh its prejudicial nature.[32] Allegations of sexual abuse that the victim asserts

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[30] CHILDRESS & DAVIS, *supra* note 6, § 4.01; *cf.* Casey et al., *supra* note 3, at 292-97, 300-07, 360 (discussing different levels of review within each standard).

[31] EDWARDS & ELLIOTT, *supra* note 6, at 5.

[32] *See, e.g.*, FED. R. EVID. 412. Rule 412 provides:

> (a) Evidence generally inadmissible.
> The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
> (b) Exceptions.
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
> (c) Procedure to determine admissibility.
> (1) A party intending to offer evidence under subdivision (b) must—
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

to be true[33] constitute prior "sexual conduct" under a rape-shield analysis.[34] Most states review rulings of admissibility of evidence under rape-shield laws for an abuse of discretion only.[35] We analyze here the

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(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Id.; *see also* ARK. CODE ANN. § 16-42-101(b) (1987) (amended 1993) ("In any criminal prosecution under § 5-14-101 et seq. or § 5-26-202 . . . opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.").

At least one commentator, however, criticized the rape-shield statute for being "poorly drafted" due to its vagueness. 3 JOHN WESLEY HALL, JR., TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 41:2 (2010-11 ed.).

[33] For obvious reasons, *false* allegations of sexual abuse do not qualify for protection under the rape-shield statute and may be admissible as relevant to the victim's credibility. *See* West v. State, 722 S.W.2d 284, 285 (Ark. 1987) (per curiam) (supp. opinion denying petition for reh'g); HALL, *supra* note 32, § 41:10.

[34] ARK. CODE ANN. § 16-42-101(b) (1987) (amended 1993); *see, e.g.*, Ridling v. State, 72 S.W.3d 466, 473 (Ark. 2002), *cert. denied*, 129 S. Ct. 1918 (2009).

[35] *See* United States v. Cardinal, 782 F.2d 34, 36 (6th Cir. 1986); *Ex parte* Dennis, 730 So. 2d 138, 143 (Ala. 1999); Bibbs v. State, 814 P.2d 738, 741 (Alaska Ct. App. 1991); People v. Chandler, 65 Cal. Rptr. 2d 687, 692 (Cal. Ct. App. 1997); People v. Garcia, 179 P.3d 250, 255 (Colo. App. 2007); State v. Cecil J., 970 A.2d 710, 714-15 (Conn. 2009); Scott v. State, 642 A.2d 767, 770, 771 (Del. 1994); Bryant v. United States, 859 A.2d 1093, 1104 (D.C. 2004); Esteban v. State, 967 So. 2d 1095, 1097 (Fla. Dist. Ct. App. 2007); George v. State, 356 S.E.2d 882 (Ga. 1987); People v. Santos, 813 N.E.2d 159, 162 (Ill. 2004); Oatts v. State, 899 N.E.2d 714, 721 (Ind. Ct. App. 2009); State v. Mitchell, 568 N.W.2d 493, 497 (Iowa 1997); State v. Perez, 995 P.2d 372, 376 (Kan. Ct. App. 1999); Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705, 721 (Ky. 2009); State v. Dixon, 982 So. 2d 146, 155, 156 (La. Ct. App. 2008); Johnson v. State, 632 A.2d 152, 156 (Md. 1993); Commonwealth v. Harris, 825 N.E.2d 58, 63 (Mass. 2005); People v. Hackett, 365 N.W.2d 120, 125 (Mich. 1984); State v. Benedict, 397 N.W.2d 337, 341 (Minn. 1986); Forrest v. State, 863 So. 2d 1056, 1065 (Miss. Ct. App. 2004); State v. Davis, 186 S.W.3d 367, 374 (Mo. Ct. App. 2005); State v. Detonancour, 34 P.3d 487, 491 (Mont. 2001); State v. Johnson, 609 N.W.2d 48, 54 (Neb. Ct. App. 2000); Summitt v. State, 697 P.2d 1374, 1377 (Nev. 1985); State v. Spaulding, 794 A.2d 800, 805 (N.H. 2002); State v. Cuni, 733 A.2d 414, 426 (N.J. 1999); State v. Johnson, 944 P.2d 869, 875 (N.M. 1997); People v. Lane, 47 A.D.3d 1125, 1128 (N.Y. App. Div. 2008); State v. Herring, 370 S.E.2d 363, 370 (N.C. 1988);

disparity created by those jurisdictions that, through a variety of other approaches, do not.

Several states review trial court decisions regarding rape-shield evidence under relatively muddled standards.[36] Arkansas is a prime example. Under Arkansas case law, the applicable standard of review in evaluating a trial court's decision to admit or exclude evidence under the rape-shield statute is whether the court committed "clear error or a manifest abuse of discretion."[37] This standard, however, simply does not exist. As a logical matter, the standard of review could be either clear error or abuse of discretion, but not both.

In *Swaim v. Arkansas*, Judge D. Price Marshall of the Arkansas Court of Appeals recently recognized the problem posed by this "standard."[38]

> This standard of review is [actually] two standards: clear error or abuse of discretion.... The combination of these alternative standards is unstable: review for an abuse of discretion is less searching than review for a clear error, which is most commonly associated with the evaluation of a circuit court's findings of fact after a bench trial under Rule of Civil Procedure 52(a).... [T]he supreme court should consider clarifying how hard an appellate court must look at a circuit court's ruling on the statutory exception.[39]

State v. Kautzman, 738 N.W.2d 1, 9 (N.D. 2007); State v. Young, No. 92127, 2009 WL 3216611, *4 (Ohio Ct. App. 2009), *available at* 2009 Ohio App. LEXIS 4505; Commonwealth v. Johnson, 638 A.2d 940, 942 (Pa. 1994); State v. Lynch, 854 A.2d 1022, 1035 (R.I. 2004); State v. Woodfork, 454 N.W.2d 332, 336 (S.D. 1990); State v. Sheline, 955 S.W.2d 42, 46 (Tenn. 1997); State v. Dudley, 223 S.W.3d 717, 725 (Tex. Crim. App. 2007); State v. Tarrats, 122 P.3d 581, 588 (Utah 2005); State v. Lund, 664 A.2d 253, 255 (Vt. 1995); State v. Posey, 167 P.3d 560, 565 (Wash. 2007); State v. Guthrie, 518 S.E.2d 83, 89 (W. Va. 1999); State v. Jackson, 575 N.W.2d 475, 485 (Wis. 1998). *But see* State v. Robinson, 803 A.2d 452, 457 (Me. 2002).

[36] *See* Joyner v. State, 303 S.W.3d 54, 57 (Ark. 2009); *see, e.g.*, State v. Fowler, 200 P.3d 591, 595 (Or. Ct. App. 2009) (citing State v. Muyingo, 15 P.3d 83 (Or. Ct. App. 2000)); Dill v. State, 2005 OK CR 20, 122 P.3d 866, 868 (Okla. Crim. App. 2005); *Robinson*, 803 A.2d at 457; State v. West, 24 P.3d 648, 652, 653 (Haw. 2001); State v. Gilfillan, 998 P.2d 1069, 1078 (Ariz. Ct. App. 2000) (citing State v. Fernane, 914 P.2d 1314, 1318 (Ariz. Ct. App. 1995)); State v. Winkler, 736 P.2d 1371, 1379 (Idaho Ct. App. 1987).

[37] *See* Allen v. State, 287 S.W.3d 579, 582 (Ark. 2008) ("This court will not reverse the circuit court's decision as to the admissibility of rape-shield evidence unless its ruling constituted clear error or a manifest abuse of discretion.") (citing Rounsaville v. State, 273 S.W.3d 486, 491 (Ark. 2008)).

[38] No. CA CR 09-143, 2009 WL 2777999, at *1 (Ark. Ct. App. Sept. 2, 2009), *available at* 2009 Ark. App. LEXIS 698.

[39] *Swaim*, 2009 WL 2777999, at *1 n.1. Judge Marshall was a rightfully well-

Swaim had been convicted of sexually assaulting his girlfriend's six-year-old daughter.[40] The trial court in *Swaim* held a pre-trial hearing where it addressed the relevance of the victim's prior abuse to the charges against Swaim.[41] The circuit court held that the evidence was inadmissible under the rape-shield statute.[42] Swaim's appeal questioned this evidentiary ruling.[43] On appeal, he challenged the conviction by arguing

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respected appellate judge on the Arkansas state middle appellate court. *See* ARK. JUDICIARY, http://courts.state.ar.us/coa/index.cfm (last visited Jan. 11, 2011). He was recently confirmed for a Federal District Court opening in the Eastern District of Arkansas and replaces U.S. District Judge William R. Wilson. *See Marshal Confirmed as New Arkansas Federal Judge*, ARK. NEWS (May 5, 2010), *available at* http://arkansasnews.com/2010/05/05/marshall-confirmed-as-new-arkansas-federal-judge/. Judge Wilson was one of eight judges (out of over sixty district judges in the Eighth Circuit) who were reversed in two or more cases by the United States Court of Appeals for the Eighth Circuit based on an abuse of discretion standard during 2008, excluding reversals relating to sentencing guidelines given the state of flux of this area of the law during the time period being examined, Steinbuch, *supra* note 2, at 64, and one of only nine if no exclusions are applied. Robert Steinbuch, *Further Insights from My Empirical Analysis of the Eighth Circuit* (forthcoming 2011).

While on the state court of appeals, Judge Marshall confronted various challenging Arkansas state precedents. In *Tipps v. State*, Marshall dealt with the admissibility of lay-person owner valuation of personal property—an unfortunate practice employed from time-to-time in Arkansas courts—particularly when such valuation relates to goods whose price can be readily determined through third party pricing organizations (*e.g.*, the Kelley Blue Book for used cars). No. CACR 80-1120, 2009 WL 1233469 (May 6, 2009), *available at* 2009 Ark. App. LEXIS 274. In *Tipps*, the value of a stolen car was at issue in determining the level of larceny for the defendant. *Id.* at *1. While this should be a relatively straight forward issue, the case was complicated by deficiencies of both the prosecutor and the defense attorney. *See id.* The prosecutor failed to put on expert testimony of the stolen car's value—something easily done through, *inter alia*, a used-car-salesperson, and the defense attorney failed to object on these grounds. *Id.* Such lapses are particularly unfortunate in criminal cases, and trial judges would do well to provide some guidance on such issues during a trial. One possible solution is for courts to take judicial notice (*see, e.g.*, FED. R. EVID. 201) of prices that can be readily determined through third party pricing organizations such as the Kelley Blue Book. Even if such sources were not to be used for specific valuation, they could be used to determine price ranges. Thus, in those criminal cases where the value of the stolen item is a factor (*e.g.*, grand larceny), the court could determine whether the minimum threshold amount was met. This would be an improvement over having an owner testify as to value. The latter could be reserved for those circumstances in which the fungible good was made unique due to some particularized transformation.

[40] *Swaim*, 2009 WL 2777999, at *1.

[41] *See* ARK. CODE ANN. § 16-42-101(c)(2)(C) (1999).

[42] *Swaim*, 2009 WL 2777999, at *1.

[43] *Id.*

that the circuit court erred in not permitting him to show that another man had sexually abused the victim in the past.[44] According to Swaim, that prior abuse provided the girl with an alternate source of sexual knowledge.[45] On appeal, the Court of Appeals affirmed the trial judge's decision and held that the instability of the standard of review was of no consequence.[46]

To date, Arkansas courts have used the "clear error or a manifest abuse of discretion" standard twenty-six times in reviewing admissibility determinations made under the rape-shield statute since it first appeared in *Byrum v. State*.[47] In creating this "standard," the *Byrum* court relied on case law mentioning and applying either one of those standards—rather than both of them in tandem.[48]

Specifically, *Byrum* cited *Drymon v. State*[49] and *Gaines v. State*[50] for adopting the manifest abuse of discretion and clear error standards, respectively.[51] The court in *Gaines*, however, only employed the clear error standard—relying on *Manees v. State*[52] and *Houston v. State*,[53] both of which addressed the admissibility of evidence of prior sexual conduct in rape cases.[54] Following the manifest abuse of discretion line of cases, *Drymon* cited *Laughlin v. State*[55] and *Logan v. State*.[56] While *Laughlin*'s

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[44] *Id.*

[45] *Id.*

[46] *Id.* at *1 n.1 (stating that "the circuit court's decision withstands scrutiny under both standards").

[47] 884 S.W.2d 248, 254 (Ark. 1994).

[48] *Byrum*, 884 S.W.2d at 254.

[49] 875 S.W.2d 73 (Ark. 1994), *denial of post-conviction relief aff'd*, 938 S.W.2d 825 (Ark. 1997).

[50] 855 S.W.2d 956 (Ark. 1993), *denial of post-conviction relief aff'd*, No. CR 94-531, 1995 WL 93692 (Feb. 27, 1995), *available at* 1995 Ark. LEXIS 111.

[51] *Byrum*, 884 S.W.2d at 254.

[52] 622 S.W.2d 166 (Ark. 1981).

[53] 582 S.W.2d 958 (Ark. 1979).

[54] *Gaines*, 855 S.W.2d at 958.

[55] 872 S.W.2d 848 (Ark. 1994), *denial of post-conviction relief aff'd*, No. CR 97-933, 1998 WL 811544 (Nov. 19, 1998), *available at* 1998 Ark. LEXIS 646. "Admissibility of prior sexual conduct is discretionary with the trial court." *Laughlin*, 872 S.W.2d at 853.

[56] 776 S.W.2d 341 (Ark. 1989), *denial of habeas corpus rev'd sub nom.* Logan v. Lockhart, 94 F.2d 1324 (8th Cir. 1993), *cert. denied*, 510 U.S. 1057 (1994).

vague formulation of the standard of review actually cited *Gaines*—which employs a clear error standard—for support, *Logan* relied on a murder case—*Bennett v. State*[57]—for the proposition that the manifest abuse of discretion standard applies.[58]

Interestingly, the court in *Drymon* ruled without any recognition of *Gaines*, which was decided roughly eleven months prior.[59] Additionally, while the *Gaines* court stated that it applied a clear error standard, it may actually have been inching toward an abuse of discretion standard.[60] The court stated, "[t]he trial court is vested with a *great deal of discretion* in ruling whether prior sexual conduct of a prosecuting witness is relevant, and we do not overturn its decision unless it was clearly erroneous."[61] Although one cannot know whether the *Gaines* court would have acted any differently if it had clearly applied an abuse of discretion standard or a clear error standard, the court, by its own admission, gave great deference to the trial court and let the trial judge's decision stand.[62]

Curiously, one author cites an Arkansas case—*State v. Babbs*[63]—for the proposition that "rape shield rulings, where reviewed, are examined under an abuse of discretion standard."[64] The *Babbs* court, however,

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[57] 759 S.W.2d 799 (Ark. 1988), *cert. denied*, 498 U.S. 851 (1990).

[58] *Logan*, 776 S.W.2d at 334. The use of the modifier "manifest" does not alter the applicability of the abuse of discretion standard. *See* CHILDRESS & DAVIS, *supra* note 6, § 4.02 n.3 ("Sometimes the abuse of discretion test is stated generally in terms of clear abuse or manifest error. Often in such cases (except in the expert context . . .), manifest error appears to define abuse of discretion."). At times, appellees will try to emphasize the term in the apparent hope that the appellate court will apply a different standard to the decision of the trial judge. At best, however, appellees are justified in emphasizing the fluid nature of the standard. *See id.* § 4.01(C). Reversal under this standard remains the most significant disapproval by an appellate court. Steinbuch, *supra* note 2, at 63.

[59] Drymon v. State, 875 S.W.2d 73, 73-79 (Ark. 1994), *denial of post-conviction relief aff'd*, 938 S.W.2d 825 (Ark. 1997). *Gaines* was decided on June 28, 1993, and *Drymon* was decided on May 2, 1994.

[60] *See* Gaines v. State, 855 S.W.2d 956, 958-59 (Ark. 1993), *denial of post-conviction relief aff'd*, No. CR 94-531, 1995 WL 93692 (Feb. 27, 1995), *available at* 1995 Ark. LEXIS 111.

[61] *Id.* at 958 (emphasis added) (citing Manees v. State, 622 S.W.2d 166 (Ark. 1981)).

[62] *Id.* at 960.

[63] 971 S.W.2d 774 (Ark. 1998).

[64] Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U. L. REV. 291, 301 n.52 (2005).

recited Arkansas's "clear error *or* a manifest abuse of discretion" standard.[65]

Further review of Arkansas's standard reflects even more confusion. The adjective "manifest" modifying "abuse-of-discretion," if anything, moves the abuse of discretion standard to the right (towards *more* deference) on the standard of review spectrum.[66] As such, the two standards combined by Arkansas courts may be even more incongruous with each other than they would be absent the "manifest" modifier. We say "if anything" because the use of the term "manifest" simply may be used to further reflect that an appellate court will only hold a trial judge in violation of the abuse of discretion standard when that judge's decision demonstrates the greatest departure from permissible decision-making.[67] Regardless, the concurrent recitation of the clearly erroneous standard casts doubt on whether such deference applies.

Maine seems to follow an approach similar to the confusing hybrid method employed by Arkansas.[68] The Maine Court of Appeals, in *State v. Robinson*,

> review[ed] the exclusion of evidence under Rule 412 [regarding past sexual behavior of the victim] for abuse of discretion *and* for clear error, and . . . the trial court's determination of the admissibility of evidence pursuant to Rule 403 [regarding the exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time] for an abuse of discretion.[69]

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[65] *Babbs*, 971 S.W.2d at 776 (emphasis added).

[66] *See supra* Part I.

[67] *See* Steinbuch, *supra* note 2, at 63. Eight out of the over sixty district judges in the Eighth Circuit were reversed for abusing their discretion more than once in the calendar year 2008, adjusting out sentencing-guideline cases due to the transitional nature of this area of law. Those judges are Gary A. Fenner, Western District of Missouri; Fernando J. Gaitan, Jr., Western District of Missouri; Jean C. Hamilton, Eastern District of Missouri; Charles B. Kornmann, District of South Dakota; Nanette K. Laughrey, Western District of Missouri; James M. Rosenbaum, District of Minnesota; Karen E. Schreier, District of South Dakota; and William R. Wilson, Jr., Eastern District of Arkansas. *Id.* at 64.

[68] *See* State v. Robinson, 803 A.2d 452 (Me. 2002).

[69] 803 A.2d 452, 457 (Me. 2002) (emphasis added) (citations omitted). Maine Rule of Evidence 412 provides:

> (a) In a criminal case in which a person is accused of rape, gross sexual misconduct, or sexual abuse of a minor, reputation or opinion evidence of past sexual behavior of an alleged victim of such crime is not admissible.

Maine *seems* to follow an approach similar to Arkansas's because an earlier case suggested that Maine applies an abuse of discretion standard: "Significantly, there is in the record no offer of proof by defense counsel pursuant to [Maine Rule of Evidence] 103, which might now support a conclusion that the Superior Court *abused its discretion* in excluding evidence of the victim's past alleged sexual behavior."[70] Perhaps because the Maine court uses "and" between "discretion" and "clear error," the court means to say that a clear error of judgment is the equivalent of an abuse of discretion. The difficulty with that forgiving construction of the court's language is that it allows the court's articulation of its standards to remain sloppy at best. And, of course, when the formulation uses the word "or" rather than "and"—as exists in other states—one would be required to provide an even more charitable interpretation of the standard to read out any conflict.[71]

A recent United States military court also employed language suggesting its use of either a muddled combination of standards, or a failure to well articulate the standard it was employing.[72] According to the appellate court, the military trial judge's ruling excluding evidence proffered by the defense under exceptions to the rape-shield rule "usurped the role of the panel members, and was clear error, and, as a result, an abuse of discretion."[73]

Oklahoma courts have also conflated abuse of discretion with clear error in evidentiary determinations.[74] In one case, an Oklahoma criminal

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(b) In a criminal case in which a person is accused of rape, gross sexual misconduct, or sexual abuse of a minor, the only evidence of a victim's past sexual behavior that may be admitted is the following:

(1) Evidence of specific instances of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(2) Evidence of specific instances of sexual behavior with the accused offered by the accused on the issue of whether the alleged victim consented to the sexual behavior with respect to which the accused is charged.

ME. R. EVID. 412.

[70] State v. Albert, 495 A.2d 1242, 1243 (Me. 1985) (emphasis added) (footnote omitted).

[71] *See Robinson*, 803 A.2d at 456-57.

[72] United States v. Zak, 65 M.J. 786, 792-94 (A. Ct. Crim. App. 2007).

[73] *Id.* at 793.

[74] *See* Dill v. State, 2005 OK CR 20, ¶ 9, 122 P.3d 866, 869 (Okla. Crim. App. 2005).

appeals court stated: "The decision to admit evidence [under Oklahoma's rape-shield statute] is discretionary with the trial court whose decision will not be disturbed on appeal unless clearly erroneous or manifestly unreasonable."[75]

Courts in Arizona and Oregon have skirted the question of standard of review under the rape-shield rule by suggesting that evidence barred under rape-shield statutes might also have been excluded as unfairly prejudicial.[76] The court in *State v. Gilfillan* stated that, "[a]lthough a false accusation of sexual misconduct against another person by the alleged rape victim is an exception to the general [rape-shield] ban on evidence, . . . the court has considerable discretion in determining whether the probative value of the evidence is substantially outweighed by its unfairly prejudicial effect."[77]

In Idaho, the standard of review seems to depend on the evidence at issue.[78] Hawaii's approach to its rape-shield rule is confused as well:

> "When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard. However, the traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a 'judgment call' on the part of the trial court."[79]

The court went on, however, to state that "the trial court's determination of preliminary factual issues concerning the admission of evidence will be upheld unless clearly erroneous."[80]

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[75] *Id.* ¶ 5, 122 P.3d at 868.

[76] State v. Gilfillan, 998 P.2d 1069, 1077-78 (Ariz. Ct. App. 2000); State v. Fowler, 200 P.3d 591, 595 (Or. Ct. App.), *review denied*, 210 P.3d 905 (Or. 2009).

[77] *Gilfillan*, 998 P.2d at 1077-78 (citing State v. Fernane, 914 P.2d 1314, 1318 (Ariz. Ct. App. 1995)); *see Fowler*, 200 P.3d at 595 (trial courts' rulings under the rape shield rule are reviewed for abuse of discretion only insofar as they are based on a determination of the evidence's "prejudicial effect").

[78] *Compare* State v. Winkler, 736 P.2d 1371, 1379 (Idaho Ct. App. 1987) (stating the trial judge "exercis[ed] his discretion under I.C. § 18-6105 [Idaho's rape-shield statute]"), *with* State v. Parker, 730 P.2d 921, 925 (Idaho 1986) (describing evidence excluded by the trial court under the rape shield statute as "relevant, as a matter of law").

[79] State v. West, 24 P.3d 648, 652-53 (Haw. 2001) (quoting Kealoha v. County of Haw., 844 P.2d 670, 676 (Haw. 1993)).

[80] *Id.* at 657 (quoting State v. McGriff, 871 P.2d 782, 791 (Haw. 1994)). Absent this rejoinder, the court's formulation would have looked similar to the one articulated

III. Recommendation

Because the standard of review applicable to any given case may be crucial to its outcome on appeal, appellate courts should apply a single well-defined standard when reviewing rulings on the admissibility of rape-shield evidence. For those states adhering to an unclear standard or a muddled combination of standards, the adoption of a single, clear standard of review would give litigants better guidance in assessing their chances of success if they opt to appeal an evidentiary ruling under the rape-shield statute.[81] As such, it would make litigants' decisions to appeal more informed and inject the appellate process with greater certainty and accountability.

One could argue that the abuse of discretion standard should apply because evidentiary rulings typically are reviewed for abuse of discretion, and the decision to admit or reject evidence under the rape-shield statute is an evidentiary ruling. "[A] district court has wide discretion in admitting and excluding evidence—reviewed for abuse of discretion—and will not be reversed absent a showing that the ruling had a substantial influence on the jury's verdict."[82] By following such an approach, the outlier jurisdictions would join the overwhelming majority of states in applying an abuse of discretion standard.

However, this position has been the subject of some historical debate.[83] As one scholarly jurist pointed out in *United States v. Blue Bird*, a case involving *the federal rape-shield statute* contained in Federal Rule of Evidence 412, as well as propensity evidence in sexual-assault cases under Federal Rule of Evidence 413[84] and related evidentiary issues,

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in the *United States v. Blue Bird* dissent discussed below. 372 F.3d 989, 994-96 (8th Cir. 2004); *see infra* note 88 and accompanying text.

[81] *See* ARK. CODE ANN. § 16-42-101(b) (1987) (amended 1993).

[82] Harris v. Chand, 506 F.3d 1135, 1139 (8th Cir. 2007) (citations omitted) (stating "a district court's evidentiary rulings are reviewed for a clear abuse of discretion") (citing United States v. Pirani, 406 F.3d 543, 555 (8th Cir.) (en banc), *cert. denied*, 546 U.S. 909 (2005)).

[83] *See Blue Bird*, 372 F.3d at 996-97 (Hansen, J., dissenting).

[84] Federal Rule 413 provides, in pertinent part, that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413(a).

> [t]here is some confusion in our cases on the proper standard of review with respect to evidentiary issues. We have sometimes said that in reviewing a district court's admission of evidence we review for an abuse of discretion. Strictly speaking, however, this is not correct. Some rules require a balancing of how particular evidence might affect the jury, and we properly accord deference to the trial judge on such questions. But a district court's interpretation and application of most rules of evidence are matters of law. Of course, an error of law can always be characterized as "an abuse of discretion," but our review in cases like the present one is more accurately characterized as *de novo*.[85]

The dissent argued otherwise:

> Generally, we review matters of law *de novo*. Therefore, to the extent that a district court's admission of evidence involves a legal interpretation of the Federal Rules of Evidence, our standard of review is plenary and *de novo*. Once we determine that the district court properly interpreted the rules, however, we extend greater deference in reviewing the court's ultimate decision to admit or exclude the evidence, principally because that decision can involve the careful balancing of competing factors.[86]

While the dissent suggested that the majority's view of the appropriate standard of review for the admission of rape-shield and related evidence was novel, the dissent's approach also was out of the mainstream.[87] The dissent essentially articulated a two-step standard for evidentiary questions: de novo, then abuse of discretion.[88] While this might occur in practice, such an explicit bifurcation is not common.[89] Moreover, the majority's approach was short lived: "We implicitly overruled our holding . . . that we review *de novo* a district court's admission of evidence."[90]

Other learned judges have supported the rationale of the *Blue Bird* court.[91] In discussing whether the level of review that an appellate court

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[85] United States v. Blue Bird, 372 F.3d 989, 991 (8th Cir. 2004) (citations omitted); *see also* Cent. Freight Lines v. NLRB, 653 F.2d 1023, 1026 (5th Cir. 1981) (deciding a hearsay issue as a matter of law).

[86] *Blue Bird*, 372 F.3d at 996 (citation omitted) (Hansen, J., dissenting).

[87] *See id.*

[88] *Id.*

[89] *See id.*

[90] Harris v. Chand, 506 F.3d 1135, 1139 n.2 (citing United States v. Chase, 451 F.3d 474, 479 n.3 (8th Cir. 2006)).

[91] *See* Friendly, *supra* note 26, at 783-84.

should apply to the appeal of whether a document was subject to the hearsay rule—a question that the iconic Judge Friendly aptly characterized as "classical instance of application of law to the facts"—Judge Friendly suggests a de novo analysis as the appropriate level of appellate review.[92] "It would be unfortunate if the work of the Advisory Committee and the Congress in framing carefully tailored exceptions to the hearsay rule and formulating other evidentiary rules should be dissipated by a blur of undifferentiated expressions with respect to the 'discretion' of the trial judge."[93] Judge Friendly contrasted, however, that a Federal Rule of Evidence 403 analysis is one subject to the abuse of discretion standard on appellate review.[94] However, this more sophisticated approach—one that differentiates between complex legal questions that are deserving of greater appellate scrutiny and those less scholarly decisions that necessitate a standard of deference—has garnered little support.[95]

Moreover, a review of the admission of rape-shield evidence *vel nom* requires a significant exercise of judgment, and it can be distinguished from hearsay evaluations, which are largely legal questions.[96] As such, while not ideal, particularly given its vague and varying formulation, the abuse of discretion standard fits best for the review of rape-shield decisions. While the application of the rape-shield law requires a more significant legal analysis than the classic Rule 403 investigation,[97] this

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[92] *Id.* at 782.

[93] *Id.*

[94] *Id.*

[95] *See id.* at 782-83.

[96] *See* State v. Pulizzano, 456 N.W.2d 325, 329 (Wis. 1990).

[97] This is especially true, for example, with respect to determinations under Arkansas's five-factor analysis developed in *State v. Townsend*, 233 S.W.3d 680, 685 (Ark. 2006). Following the decision of the Wisconsin Supreme Court in *Pulizzano*, the Arkansas Supreme Court in *Townsend* adopted a five-factor test "for which the defendant must offer proof prior to trial in order to admit evidence of a child's prior sexual conduct for limited purpose of proving an alternative source for sexual knowledge." *Townsend*, 456 N.W.2d at 685. The five factors require a court to compare prior sexual conduct to conduct alleged in the present act and include determining whether the previous act occurred, how similar the two acts are, whether the previous act is materially relevant to an issue in the present case, whether the evidence from the prior act is relevant to the present case, and whether the "probative value of the evidence outweighs its prejudicial effect." *Id.* (citing *Pulizzano*, 456 N.W.2d at 335).

mixed question does not seem sufficiently legal to argue for the application of the de novo standard.

Furthermore, this attempt at fine-tuning may simply be unwelcome by the courts:

> Now, however, the Supreme Court seems bent on returning to prior obfuscation by clumping together all [evidentiary] review under one label, *abuse of discretion*, to cover law fact, and discretion. Whether this guidance is to be applied across the board and exactly what such application might mean as a practical matter are yet unclear. The Court states its position as an attempt to keep things simple—why use several standards when one will do? The Court says that abuse of discretion subsumes clearly erroneous factfindings or legal error. What the Court does not tell us is how to determine whether the factfindings are clearly erroneous or conclusions of law are erroneous without actually reviewing the facts and law under those separate standards. What the Court appears to be suggesting is not that reviewing courts actually change the standards but that they cease labeling the issues as requiring different review. Several scholars have suggested that all standards tend to come together into some character of reasonableness review, but reasonableness is a lot like "plain meaning" in statutory construction—the "plain meaning" depends entirely on who is doing the construction. It is . . . unclear what is to be gained by this unitizing of standards [other than intellectual and jurisprudential indolence].[98]

These commentators further state:

> It may be, of course, that no practical difference results from the[] appellate characterizations [of the standard of review], since erroneously admitted evidence likely will constitute an abuse. [Such a notion is dangerous, h]owever, [because] traditionally, a lax . . . standard defines how hard the appeals court looks for error, and in the final analysis, legal error may be more easily excused under review only for abuse of discretion.[99]

Moreover, weak review standards lead to—and have led to—sloppiness by trial judges well aware that they are under no obligation (to the appellate courts, at least) to master the rules of evidence.[100]

With that said, given the need for uniformity and the clear direction that appellate courts have taken with evidentiary-rulings review, we

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[98] CHILDRESS & DAVIS, *supra* note 6, § 11.02.

[99] *Id.* § 4.02.

[100] *See id.*

recommend that appellate courts adopt the abuse of discretion standard for purposes of reviewing on appeal trial courts' decisions to admit or to reject evidence under a rape-shield statute. We leave for another day the broader question of revamping appellate review of decisions to admit evidence *vel nom*, as well as the effect of lax standards on the level of competence demanded of trial judges.

The abuse of discretion standard will best serve both litigants and courts: litigants will be more informed about their chances of success on appeal and appellate courts will be familiar with the concept of reviewing evidentiary rulings for abuse of discretion. As such, adoption of the abuse of discretion standard would simplify and lend predictability to appellate analyses in this area of the law.

Conclusion

The use of unclear standards of review for issues of rape-shield evidence unfortunately presents an image that the law regarding appellate review lacks sophistication. State courts employing a confusing combination of standards would do well to refine their approach in this important area of the law in order to provide the clearest guidance possible. For those states with confused standards of review for rape-shield decisions, we recommend adopting an abuse of discretion standard. This would streamline the appellate process with respect to rape-shield rulings for the benefit of the judiciary and inject the appellate process with certainty and transparency for the benefit of litigants.