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Standard of Review (State and Federal): A Primer

*Kelly Kunsch**

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* B.A. 1980, Gonzaga University; J.D. 1983, University of Washington; M.L.S. 1985, University of Washington. Reference Librarian, Seattle University School of Law.

I. INTRODUCTION

It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review. Some courts invoke it talismanically to authenticate the rest of their opinions. Once they state the standard, they then ignore it throughout their analysis of the issues. Other courts use standard of review to create an illusion of harmony between the appropriate result and the applicable law. If an appellate court wants to reverse a lower tribunal, it characterizes the issue as a mixed issue of law and fact, thereby allowing *de novo* review. If the court wants to affirm, it characterizes the issue as one of fact or of discretion. It then applies a higher (more deferential) standard to the lower tribunal's decision. Finally, some courts disregard standard of review in their analysis entirely.

Standard of review has been virtually ignored by legal scholars.[1] The phrase does not even appear in any of the major law dictionaries. Yet, as a concept, it is essential to every appellate court decision. It is to the appellate court what the burden of proof is to the trial court. Ironically, although no trial judge would think of sending a case to the jury without an instruction on the burden of proof, appellate judges often omit the standard of review when they discuss whether or not to overrule a trial court's determination.

The one exception to the general lack of analysis in standard of review lies in the area of administrative law. This exception is apparently the result of a clumsy codification of common law principles. Unfortunately, the discourse over administrative law has borne little fruit. To quote Professor Kenneth Culp Davis: "Probably more than 500 pages a year are devoted to detailed statements about scope of review of administrative action; most of that verbiage is harmless, for neither the judges nor the readers of opinions take it seriously.

1. The one major work in the field is STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW (2d ed. 1992). This two volume work sets out the federal law as it applies to various specific issues on review.

Whether the verbiage about scope of review is helpful is doubtful, for it is typically vague, abstract, uncertain, and conflicting."[2]

Despite Davis' assessment of the value of such analysis, this article discusses standard of review. The discussion is not limited to review of administrative actions, but rather covers standard of review as it is applied to all lower tribunal findings.

This Article will define standard of review, trace its origins and evolution, and discuss how the appropriate standard of review is determined. A brief discussion of each standard will follow the general discussion. Finally, suggestions will be made for analyzing standard of review problems. The main point is that standards of review are and should be flexible.[3] Courts must recognize this and must look to the policies behind a standard when they select and apply it in a particular case.

II. DEFINITIONS

The terms "standard of review" and "scope of review" are often used interchangeably. They will be used here as two separate concepts, although they are interrelated and often confused.[4] Scope of review is often used in a way that includes both scope of review and standard of review as those terms are defined in this article. The two, however, should be distinguished. "Scope of review" best delineates the range of issues which are subject to appellate review in a given case. It answers the question: Can the issue be reviewed? The scope of appellate review for trial court decisions in Washington is governed by the court rules;[5] in federal courts, it is governed by statute.[6] "Standard of

2. 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:2 (2d ed. 1984). Davis apparently heeded his own words. The 130 page chapter on "Scope of Review" in the second edition of his treatise was condensed into a portion of a chapter of less than 40 pages on "Judicial Review of Adjudications" in the third edition. *See* 2 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE ch. 11 (3d ed. 1994). Subsequent citations are to the second edition.

3. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

4. *See* BALLENTINE'S LAW DICTIONARY 1145 (3d ed. 1969). The first definition for "scope of review" is correct: "The matters proper for consideration by an appellate court upon review of a lower court decision." The second definition would be better placed under "standard of review": "A variable in appellate practice, ranging from a trial de novo on appeal to a determination of no more than the question whether there was substantial error producing a miscarriage of justice in the trial court, the scope of review in the particular case depending upon constitutional and statutory provisions." *Id.*

5. WASH. CT. R. APP. P. 2.2-2.5, promulgated pursuant to authority of WASH. REV. CODE § 2.06.030 (1994). Review of administrative provisions is generally governed by the Administrative Procedure Act. *See* WASH. REV. CODE § 34.05.570 (1994) (formerly WASH. REV. CODE § 34.04.130 (1987)).

6. 28 U.S.C. § 1291-1295 (1988). Administrative actions are reviewed pursuant to 5 U.S.C. § 706 (1988).

review," by contrast, operates only after an issue has been determined to lie within the court's scope of review. Standard of review is based on and defines how much deference the lower tribunal's decision will be accorded. It answers the question: What is necessary to overturn the decision? Typically, standards of review have been derived from common law although they may have later been codified, as the standards contained in the Administrative Procedure Act have been.[7]

Precise definition of standard of review is virtually impossible, because each standard evolved independently. As a result, different standards measure different variables. Thus, while the burden of proof can always be defined in terms of quantum (how much evidence is necessary to establish a fact), no similar measure is common to all standards of review. Standards range from quantum ("substantial evidence"), to point of view ("*de novo*"), to impression ("clearly erroneous" and "arbitrary or capricious").

Furthermore, the different standards look to different components of the decision-making process in their analysis. For instance, "substantial evidence" looks to the evidence in the lower tribunal's record in support of the finding.[8] By contrast, "abuse of discretion" looks to the decision-maker and his or her actions or inactions.[9] "*De novo*" looks to the appellate tribunal, describing how it can review the finding.[10] Finally, "clearly erroneous" and "arbitrary or capricious" look at the overall big picture of what happened below, beyond the lower tribunal's record.[11]

Because each standard examines different components, most standards cannot accurately be characterized as higher or lower than others. Without doubt, some standards are broader than others (*e.g.*, "clearly erroneous" is a higher—more limiting—standard than "*de novo*"). However, a continuum of standards cannot be constructed. Therefore, one question remains unanswered: Is a given standard exclusive and if so, does a "higher standard" encompass a "lower standard"?[12] Typically, courts apply a single standard to each issue to the exclusion of all other standards.

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7. *See* WASH. REV. CODE § 34.05.570 (1994); 5 U.S.C. § 706 (1988).

8. *See* State v. Galisia, 63 Wash. App. 833, 838, 822 P.2d 303, 306 (1992).

9. *See, e.g.*, State v. Aguirra, 73 Wash. App. 682, 871 P.2d 616 (1994).

10. *See* Ski Acres, Inc. v. Kittias County, 118 Wash. 2d 852, 854, 827 P.2d 1000, 1002 (1992).

11. Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wash. 2d 267, 274, 552 P.2d 674, 678 (1976).

12. *See* Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L. J. 377, 404 (1984) (stating that the "clearly erroneous" standard incorporates the "substantial evidence" standard and citing cases in which the court uses a two-step analysis). The issue generally arises only in administrative cases where the statute lists several standards.

Within this context, the following will at least provide a working definition: *The standard of review is the criterion by which the decision of a lower tribunal will be measured by a higher tribunal to determine its correctness or propriety.*

One way to add understanding to this rather stark definition is to study the origin and evolution of standard of review.

III. Historical Antecedents

A. Common Law

Nothing that could properly be called an appeal was known at early English common law before its fusion with equity in 1875.[13] Instead, the remedy for a dissatisfied litigant was to bring an entirely new action against the judge or jury in the original case.[14] This so-called "attaint" was a quasi-criminal procedure.[15] The focus of the inquiry was on the decisionmakers' actions or inactions within the context of the trial.[16] If the decisionmakers had decided in error, they would be punished according to the nature of their error.[17] Incidentally, the verdict of the second tribunal was substituted for that of the first.[18]

The writ of error ultimately replaced the writ of attaint.[19] It, too, was considered an entirely new proceeding, rather than a continuation of a previous one.[20] The writ of error was an examination of the record of the original proceedings by a second court.[21] By the mid-1700s, it had become the primary means of reviewing a lower tribunal decision at common law.[22] The rules of pleading required that the challenged

13. 2 Sir Frederick Pollock & Frederic W. Maitland, History of English Law Before the Time of Edward I 664 (2d ed. 1959).

14. *See* Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 Iowa L. Rev. 3, 7 (1940).

15. *See* Theodore F. T. Plucknett, A Concise History of the Common Law 131 (5th ed. 1956).

16. *See* 2 Pollock, *supra* note 13, at 665.

17. Jurors of the first trial were convicted of perjury and were often heavily punished. A resulting problem was that jurors of the attaint became increasingly unwilling to find the former jury guilty. In time, courts adopted the method of granting new trials when the verdict was unreasonable without punishing the jurors. *See* James B. Thayer, A Preliminary Treatise on Evidence at the Common Law 138-40 (1898). Attaint fell into disuse and was abolished in 1825. 6 Geo. 4, ch. 50, § 60 (Eng.).

18. 2 Pollock, *supra* note 13, at 665.

19. *See* Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 Ind. L. Rev. 985, 986 (1989).

20. Black's Law Dictionary 1610 (6th ed. 1990).

21. Henry J. Stephen, A Treatise on the Principles of Pleading in Civil Actions 116-21 (1867).

22. 3 Sir William Blackstone, Commentaries on the Laws of England 405 (1768).

errors appear on the formal record of the case.[23] Thus, the common law knew nothing of review by rehearing a case.[24]

B. Early Development

The process of reviewing a case itself was first introduced into the English court system by the Chancery courts.[25] This review (called an appeal) took the form of a trial *de novo* complete with the taking of testimony and other evidence.[26]

The dual system of law and equity, with its concomitant methods for review, eventually found its way to the colonies. The colonies adopted English procedural law to varying degrees.[27] Generally, however, appellate review was performed in one of two ways: as a complete trial *de novo*,[28] or as a review based on the record of the lower court.[29] This latter form of review derived from the writ of error used by the English common law court.[30] Conceptually, both the trial *de novo* and the writ of error were considered new suits rather than continuations of existing suits.[31] Therefore, there was no standard of review; there was merely a burden of proof in a new case.

With time, appellate procedure in the colonies became uniform. By the time of the Revolution, the writ of error had become the normal appellate proceeding in the colonies.[32] Even though colonial courts began to recognize such an appeal as a continuation of the original action, they did not formalize this recognition—they did not create new mechanisms for it.

In adopting the Constitution, the federal government continued to recognize the distinction between cases in law and cases in equity.[33] Furthermore, the Federal Judiciary Act of 1789[34] recognized the writ of error as the appropriate vehicle for review of all cases at the federal level.[35] Thus, review by writ of error applied to equity suits as well as

23. 1 SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 214 (1956).
24. *Id.*
25. *Id.* at 214-15.
26. *See* 5 ROSCOE POUND, JURISPRUDENCE 637 (1959).
27. *See* ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 72 (1941).
28. *Id.*
29. ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 4 (2d ed. 1988).
30. *See* POUND, *supra* note 27, at 73.
31. *See* 3 C.J.S. *Appeal and Error* § 12 (1915).
32. 5 POUND, *supra* note 26, at 630.
33. U.S. Const. art. III, § 2.
34. Ch. 20, 1 Stat. 73 (1789).
35. *Id.* § 25, 1 Stat. at 85-87.

to suits at law.[36] It was not until 1803 that review by writs of appeal in equity was allowed in federal courts.[37]

One of the primary differences between the two methods of review was the ability to review facts. Under the writ of error, factual determinations were not subject to review.[38] Under appeal, issues of fact as well as those of law were subject to full review.[39] This made sense in an equity court because initially, all evidence in equity cases, including testimony (via interrogatory or deposition), was placed into the record.[40] Evidence was not taken in open court as it was in cases at law. The reviewing court was thus in the exact same position as the trial court in determining facts. When later amendments to equity rules allowed the taking of testimony in court,[41] the appeals standard was not modified to reflect the change. The result was that, even though the rationale behind the difference in review no longer existed, the two methods of review were not brought into alignment.

Over time, equity practice in America departed from the broad *de novo* review of ancient chancery. While theoretically the review in equity cases was still that of a rehearing or trial *de novo*, there had

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36. *Id.* § 22, 1 Stat. at 84-85. This provision was bitterly opposed by chancery lawyers as an attack on the integrity of their own system. *See* Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 194 (1937).

37. Act of Mar. 3, 1803, ch. 40, 2 Stat. 244. The addition of the writ of appeal was a result of a change in political power. The election of 1800 resulted in the overthrow of the Federalist party and with it, Federalist control of the judicial process. Chancery lawyers had complained about the limited review of facts under the writ of error and about Chief Justice Ellsworth's interpretation of the Judiciary Act in *Wiscart v. D'Auchy*, 3 U.S. (1 Dall.) 320 (1796) (holding that the statement of facts by a circuit court was conclusive in all cases brought under a writ of error). Responding to these complaints, the new congress enacted legislation that ultimately led to the revitalization of writs of appeal. *See* Clark & Stone, *supra* note 36, at 195-96.

38. 3 ROGER FOSTER, A TREATISE ON FEDERAL PRACTICE, CIVIL AND CRIMINAL § 496, at 1969 (4th ed. 1909).

39. JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENT AND BEGINNINGS TO 1801, 24-25 (1971).

40. Section 30 of the Judiciary Act of 1789 abrogated the common law rule and provided for oral testimony and examination in open court. In 1802, however, Congress returned to the former system of allowing testimony of the witnesses to be taken by deposition. Act of April 29, 1802, ch. 31, § 25, 2 Stat. 156, 166. In 1842, when the United States adopted its equity rules, the practice in suits in chancery generally was to put written questions to witnesses and take down the answers in writing, and to certify, seal and file them in the court record. They were opened and published only after all testimony had been taken. *See* 1 CHRISENBERRY L. BATES, FEDERAL EQUITY PROCEDURE: A TREATISE ON THE PROCEDURE IN SUITS OF EQUITY IN THE CIRCUIT COURTS OF THE UNITED STATES § 390, at 442 (1901).

41. Under Equity Rule 67, prior to its amendment in 1862, testimony could be taken by written interrogatories, and, by agreement of parties, upon oral interrogatories. Under the rule as amended, 66 U.S. (1 Black) 6 (1861), oral examination became the general rule with examination by written interrogatories being the exception. Finally, in 1893, the Supreme Court amended Equity Rule 67 to allow for taking of oral testimony in open court. Amendment to Rules, 149 U.S. 793 (1893).

grown up certain well-settled and often-reiterated principles observed by equity courts in considering findings of fact.[42] Deference was accorded to most findings of fact at the trial level. This deference was a logical result of allowing oral testimony at equity trials.[43] Later, deference also reflected the acknowledged expertise of fact finders in the new and growing administrative agencies. Ultimately, it was accepted as a rule that trial court findings, although not conclusive, had great weight with the appellate court. That "great weight" was codified as the "clearly erroneous" standard of Rule 52 when the Federal Rules of Civil Procedure were adopted.[44]

C. *Modern Practice*

In 1928, Congress abolished the writ of error in federal appeals and substituted the appeal.[45] However, the abolition turned out to be an act more of form than of substance (at least in terms of standard of review). It did not change the different standards of review in law cases and equity cases.[46] That distinction did not disappear until 1938, when law and equity were merged with the adoption of the Federal Rules of Civil Procedure.[47] By 1938, an appeal was recognized for what it really was: a review of an existing case, rather than a new case. The new Federal Rules treated it as such. Rule 52(a) stated: "In *all* actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the wit-

42. Clark & Stone, *supra* note 36, at 207. Although these principles were not codified by statute or rule, they were commonly noted by the courts. *See* William W. Blume, *Review of Facts in Non-Jury Cases: Proposed Federal Rule 68*, 20 J. AM. JUD. SOC'Y 68, 71 (1936).

43. Professor (later Justice) Frankfurter believed that the requirement of special findings of fact in equity cases, emphasized since a 1930 amendment to the equity rules, led automatically to a restriction on the standard of review. *See* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 32 (1930).

44. *See* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE [hereinafter FEDERAL PRACTICE AND PROCEDURE] § 2571 (1971).

45. Act of Jan. 31, 1928, ch. 14, 45 Stat. 54, *amended by* Act of Apr. 26, 1928, ch. 440, 45 Stat. 466. Abolition of the writ of error was the result of several years worth of activity by the bar. By the 1920s, the writ had been abolished in many states and replaced by a simpler practice of appeal by notice. The American Bar Association's Committee on Jurisprudence and Law Reform recommended that writs of error be abolished in 1921. The Committee was of the opinion that there was no good reason for retaining the complex and cumbrous machinery for review in federal courts. Even so, it took legislation several years to come to fruition. *See* Philip M. Payne, *The Abolition of Writs of Error in the Federal Courts*, 15 VA. L. REV. 305 (1929).

46. JAMES W. MOORE, MOORE'S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE § 73.01 (1938). *See also* Clark & Stone, *supra* note 36, at 205.

47. 302 U.S. 783 (1937).

nesses."[48] Findings of fact by a jury were protected by the Seventh Amendment and thus continued to be reviewed only as they had been at common law.[49] Issues of law continued to be reviewed *de novo*.[50]

In contrast to the federal government, the State of Washington never recognized a distinction between law and equity.[51] Review standards in the state, therefore, have always been drawn along the lines of the law/fact distinction.

Before analyzing the law/fact distinction, however, a short discussion of reasons for deferring to lower tribunal determinations is in order.

IV. Policy Reasons For Deference to Lower Tribunal Decisions

Many reasons are given for deferring to decisions of lower tribunals. Some are more persuasive than others. The first group of reasons focuses on the judicial system and what such deference does for the system itself. The first reason asserted is finality. The more deference given to the decision of the lower tribunal, the less likely the losing party is to appeal that decision. Regardless of the outcome, parties will at least have the satisfaction of knowing that the issue has been deter-

48. Fed. R. Civ. P. 52(a) (1938), *reprinted in* Moore, *supra* note 46, at 3115 (emphasis added). The provision of Rule 52(a) that findings of fact not be set aside unless "clearly erroneous" represented a statement of what was considered to be the federal equity practice in the years just prior to the merger of law and equity. The Advisory Committee deemed it desirable to have a single standard of review for all actions tried before the court, whether historically legal or equitable. The majority of the Committee preferred the broader equity review to the narrower review at law. 9 Federal Practice and Procedure, *supra* note 44, § 2571, at 680-81.

49. The standard at common law was that the facts as found and stated by the court below were conclusive on review. In addition, review of cases with special findings extended only to a determination of whether the facts as found were sufficient to support the judgment, but not to whether the findings were supported by the weight of the evidence. Dooley v. Pease, 180 U.S. 126, 131 (1901).

50. *See* 9 Federal Practice and Procedure, *supra* note 44, § 2588, and cases cited therein.

51. [A]ll common law forms of action, and all distinctions between law and equity are hereby abolished, and hereafter there shall be in this territory but one form of action, to establish and enforce private rights, which shall be called a civil action.

An Act Regulating the Practice and Proceedings in Civil Action, ch. 1, § 1, 1854 Wash. Laws 131 (passed Apr. 28, 1854). This provision may have passed as a matter of administrative convenience. Such a rationale is supported by court interpretations after the fact. Courts have said that although the provisions abolished the distinct pleading forms of law and equity, the substance beneath the forms remains. Thus, actions that would have been brought in different courts under either law or equity are administered by the same courts and judges. Still, some of the rules governing the different branches of action remain distinct. *See* State *ex rel.* Northeast Transp. Co. v. Superior Ct. of King County, 194 Wash. 262, 77 P.2d 1012 (1938). Considering the sparse population of the Territory at the time of the provision's enactment, a single court for all actions would be a logical creation.

mined, and they can move on with their lives. The second reason given is a reduction of court congestion. If fewer parties appeal, there will be fewer appellate cases. This results in a reduction in the backlog of the appellate docket. A final institutional reason for deferring to lower tribunals is to maintain the morale of trial court and administrative law judges. Certainly no judge likes to be reversed. However, as a rationale for deferring to a decision, this reason is in itself terribly lacking. A better one, perhaps, is that a high proportion of reversals on review erodes public confidence in trial courts. However, none of the above rationales helps to determine *which* decisions should be given deference.[52]

A second group of reasons for deferring to lower tribunal decisions helps specify which decisions should be accorded more deference. These reasons focus on the specific decision. Typically, the stated rationale for giving deference to the decision of a lower tribunal is that the decision-maker was in a better position to make findings on the issue.[53] These decision-makers are present throughout the entire course of the trial. They can observe first-hand the demeanor of each witness and thereby determine each witness' credibility. They spend more time with the facts and parties of the case so they generally have a better understanding of the context within which an issue arises. A second rationale for deference is preserving the sanctity of jury trials. Jury decisions have always been considered sacred in American jurisprudence.[54] Juries protect parties from compliant, biased, or eccentric judges.[55] Unless their decisions are given deference at the appellate stages, the right to jury trial will be an empty one, protecting only against trial judges, who might not make the ultimate determination. Under the third stated rationale, administrative tribunals are often deferred to because of their expertise on the subject matter over which they administer laws.[56] Some courts have also said that trial judges develop expertise at making inferences from testimony and evidence because it is a function they perform all the time.[57]

The latter group of policy reasons for giving deference may be more applicable to some decisions than to others. For example, the facts found at an administrative hearing with numerous expert witnesses have more reasons to be deferred to than those found by a judge

52. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635, 660-62 (1971).

53. United States v. Bailey, 444 U.S. 394, 413 n.9 (1980).

54. *See* U.S. CONST. amends. VI, VII.

55. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

56. 5 DAVIS, *supra* note 2, § 29.16, at 399.

57. *See* Swanson v. Elmhurst Chrysler Plymouth, 882 F.2d 1235, 1238 (7th Cir. 1989).

when all the evidence is documentary. Because of this, it can be argued that a single standard can be applied differently to different cases on review.[58]

Courts, however, do not initially look to policy in determining the standard of review. Instead, they have traditionally begun their analysis with characterization. Following suit, this Article does the same.

V. CHARACTERIZATION

Legal issues have traditionally been classified as issues of law, issues of fact, or mixed issues of law and fact. A variety of judicial results stems from the way in which an issue is characterized. The characterization of an issue can therefore be critical to an attorney.

A. *Distinction Between Law and Fact*

The debate on what constitutes an issue of fact and what constitutes an issue of law has been going on in this country for over a century.[59] The distinction is commonly used to determine whether the judge or jury will decide an issue at trial.[60] It is also critical to the standard of review. Both federal and Washington courts have held that the determination of the proper standard of review hinges on whether the question presented for review is one of fact, one of law, or a hybrid of fact and law.[61]

One major commentator states that the difference between an issue of law and an issue of fact is only one of degree, that the relationship between fact and law can be described as a spectrum with finding of fact shading imperceptibly into conclusion of law.[62] Another meta-

58. *See, e.g.*, Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988).

59. *See* Sparf v. United States, 156 U.S. 51, 138 (1895) (Gray, J., dissenting). The roots of the debate seem to stem as far back as the Magna Charta. *Id.* at 114.

60. WASH. REV. CODE § 4.44.080 (1994) states all questions of law are to be decided by the court. WASH. REV. CODE § 4.44.090 (1994) states all questions of fact are to be decided by the jury. The latter statute is obviously intended to apply only to cases that are tried by jury rather than to the court. State *ex rel.* Dept. of Ecology v. Anderson, 94 Wash. 2d 727, 732, 620 P.2d 76, 78 (1980). Although not codified, the federal rule is the same. *See* United States v. Johnson, 718 F.2d 1317, 1321 (5th Cir. 1983).

61. *See* Pullman-Standard v. Swint, 456 U.S. 273, 286 n.16 (1982) (citing Baumgartner v. United States, 322 U.S. 665, 671 (1944)); Devine v. Employment Security, 26 Wash. App. 778, 781, 614 P.2d 231, 233 (1980).

62. Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 240 (1955).

phor might be to say the distinction is the legal "devil's pitchfork."[63] At each end of the spectrum, there is clarity. That is, some findings are indisputably findings of fact, while others are indisputably statements of law. This leads to the illusion that a given issue should be definable as either one or the other. However, when the two begin to merge in what has been called "ultimate fact," "application of law to facts," or "mixed question of law and fact," applying the available definitions and appropriate standards becomes problematic.

In 1981, the United States Supreme Court observed that it did not yet know of any rule or principle that would unerringly distinguish a factual finding from a legal conclusion.[64] Some guidelines can be established, however. Where courts perceive the inquiry as empirical—revolving around actual events, past or future—the inquiry is labeled a question of fact; where the issue is primarily policy—centering on the values society wishes to promote—it becomes one of law.[65] A question of law has also been defined as an issue that involves the

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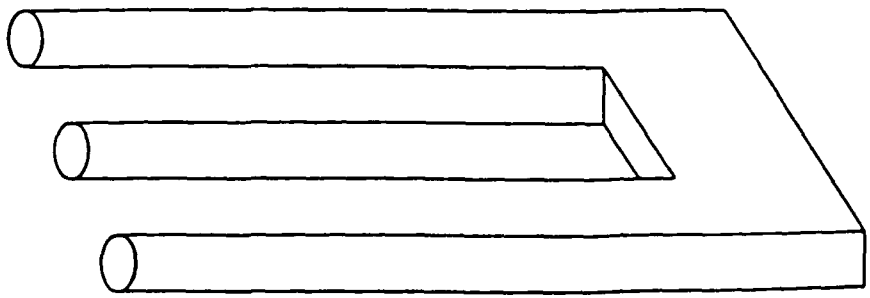

64. *Pullman-Standard*, 456 U.S. at 288.

65. Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 179 (1985).

application or interpretation of a law.[66] Of course, at some point these distinctions meet and overlap, and any attempt at definitively classifying the issues runs aground. Still, courts have traditionally attempted to select the standard of review based on their classification of the issue (although one suspects that some courts make their decision the other way around even if they do not say so).

Washington courts have said that when a determination is made about evidence showing that something occurred or existed, it is a finding of fact, but, when the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.[67] These courts have also stated that a finding of fact is an assertion that a phenomenon has happened or is or will happen independent of or anterior to any assertion about its legal effect.[68] These courts are really saying that *any* legal analysis makes the finding a mixed issue of law and fact.

The problem is that in classifying an issue as either one of law or a mixed question, the standard of review is usually *de novo*. This allows an appellate court carte blanche even though there may be reasons for deferring to the lower tribunal. When an issue falls within the blurred area of a mixed question, it might be better to fall back on policy considerations. Parties could argue why a certain standard was appropriate for the situation and how it should be applied in the particular case.

One final note: A lower tribunal's determination of an issue as one of fact or law does not bind an appellate court.[69] That is to say, the characterization of an issue is itself an issue of law. There is no testimony, special expertise, or other reason for deferring to a trial court's finding on the issue.

B. Discretionary Functions

Courts ignore the fact/law distinction in determining the standard of review for procedural and evidentiary questions. Certainly a trial judge's ruling on the admissibility of evidence cannot be characterized as a question of fact. It is probably best characterized as one of law. However, reviewing courts have not attempted to characterize such decisions as law or fact. Instead, they classify them simply as matters of discretion.[70] Courts have not explained why the philosophical underpinnings for the standard of review on these issues differs from

66. BLACK'S LAW DICTIONARY 1246 (6th ed. 1990).

67. State v. Niedergang, 43 Wash. App. 656, 658-59, 719 P.2d 576, 577 (1986).

68. Leschi Improvement Council v. State Highway Comm'n., 84 Wash. 2d 271, 283, 525 P.2d 774, 783 (1974) (this definition was originally put forth in Jaffe, *supra* note 62, at 241).

69. Local 1296, International Ass'n. of Firefighters v. Kennwick, 86 Wash. 2d 156, 162, 542 P.2d 1252, 1256 (1975).

70. *See, e.g.*, State v. Matthews, 75 Wash. App. 278, 283, 877 P.2d 252, 255 (1994).

the typical analysis. The best explanation seems that a judge makes so many of these determinations during litigation that allowing *de novo* review (as is typical for issues of law) would congest the appellate court system. Rather than allowing such review and limiting reversals by asserting harmless error, the courts limit the review itself by applying a more deferential standard.

VI. APPELLATE REVIEW OF PARTICULAR DECISIONS

A. Review of Findings of Fact

Review of fact-finding in federal court is sometimes governed by court rule, other times by common law. Civil Rule 52(a) requires facts found by the court to be reviewed under a "clearly erroneous" standard.[71] Although the Federal Rules of Criminal Procedure have no provision similar to Rule 52(a), the Supreme Court has said that the considerations underlying that rule apply with full force in a criminal context.[72] Accordingly, the "clearly erroneous" standard of review has long been applied to non-guilt findings of fact by district courts in criminal cases.[73] Facts found by a jury are reviewed with the common law "substantial evidence" test.[74] The sanctity of the Constitutional right to jury trial is the justification given for this enhanced deference.[75]

In Washington, as a rule, all findings of fact are reviewed under the substantial evidence test. This test has been adopted through a process of gradual evolution.[76] From 1893 to 1951, there was *de novo* review of evidence in nonjury cases.[77] During the fifties, the Washington Supreme Court started asking whether the evidence preponderated against the findings.[78] Finally, the substantial evidence test was enun-

71. FED. R. CIV. P. 52(a).

72. *See* Maine v. Taylor, 477 U.S. 131, 145 (1986).

73. *See id.*; 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 374, at 315-16 (2d ed. 1982).

74. Glasser v. United States, 315 U.S. 60, 80 (1942). *See also* 9 FEDERAL PRACTICE AND PROCEDURE, *supra* note 44, § 2585, at 730.

75. *See* U.S. CONST. amends. VI, VII; WASH. CONST. art. I, § 21.

76. *See* Philip A. Trautman, *Motions Testing Sufficiency of Evidence*, 42 WASH. L. REV. 787, 803 n.65 (1967).

77. *See* Crofton v. Bargreen, 53 Wash. 2d 243, 254, 332 P.2d 1081, 1088 (1958) (Foster, J. dissenting).

78. Trautman, *supra* note 76, at 803 n.65 (citing Johnson v. Harvey, 44 Wash. 2d 455, 268 P.2d 662 (1954)).

ciated in *Thorndike v. Hesperian Orchards*.[79] Since then, it has been recognized as the appropriate standard.[80]

B. *Exceptions to General Rules in Fact-Finding*

Both Washington and federal courts have made exceptions to the general rules for reviewing findings of fact. In Washington, if the facts are undisputed, the reviewing court stands in the same position as the trial court and can therefore apply the *de novo* standard.[81] The same is true for decisions based on evidence which is exclusively documentary.[82] Because some federal circuits had similar holdings,[83] the U.S. Supreme Court amended the Federal Rules of Civil Procedure in 1985 to provide specifically: "Findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous . . ."[84] Washington has also created an exception for reviewing trial court findings when constitutional rights are at issue.[85] In such cases, they require an independent evaluation of the evidence (*de novo* review).

Federal Courts, like the Washington courts, have made an exception to the usual standard of review for factual questions when a "constitutional fact" is involved.[86] A constitutional fact is defined as a fact whose determination will decide an issue of constitutional rights.[87] In such instances the appellate court applies a *de novo* review to the constitutional facts (as opposed to all the facts).

There is some question as to whether *de novo* review extends to all constitutional questions, or just to certain ones, such as those that

79. 54 Wash. 2d 570, 343 P.2d 183 (1959). Prior to *Thorndike*, Washington courts had conducted *de novo* review pursuant to Act of 1893, ch. 61, § 21, 1893 Wash. Laws 130. The statute was abrogated by the court under its rule-making power, Rule 65, WASH. RULE ON APPEAL 65, *reported in* Amendments of Rules on Appeal, 47 Wash. 2d xvii, xx-xxi (effective Jan. 3, 1956), and later repealed by the legislature. "Substantial evidence" was the test used before the 1893 statute that made review *de novo*. However, that test was based on a territorial statute that had since been repealed and should not, therefore, have been relied upon. *Thorndike* and subsequent cases ignored the basis for the decision and applied that test. It has since become an accepted standard.

80. *See, e.g.*, Pope v. University of Wash., 121 Wash. 2d 479, 490, 852 P.2d 1055, 1062 (1993); Bell v. Hegewald, 95 Wash. 2d 686, 688, 628, P.2d 1305, 1306 (1981).

81. Peeples v. Port of Bellingham, 93 Wash. 2d 766, 613 P.2d 1128 (1980), *overruled on other grounds by* Chaplin v. Sanders, 100 Wash. 2d 853, 861 n.2, 676 P.2d 431, 436 n.2 (1989).

82. Wilson v. Howard, 5 Wash. App. 169, 486 P.2d 1172 (1971).

83. *See, e.g.*, Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

84. FED. R. CIV. P. 52(a) (emphasis added).

85. State v. Byers, 85 Wash. 2d 783, 786, 539 P.2d 833, 835 (1975) (probable cause), *rev'd on other grounds*, State v. Byers, 88 Wash. 2d 1, 554 P.2d 1334 (1977).

86. *See* Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 508 n.27 (1984) (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971) (plurality opinion)).

87. New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1259 (3d Cir. 1986).

involve the First Amendment.[88] The United States Supreme Court has not dealt with the issue. Washington courts have applied *de novo* review to defamation cases and criminal proceedings.[89] The issue does not appear to have been raised in any other civil situations. Nor has the Washington Supreme Court indicated whether or not it would apply such exceptions to factual determinations of constitutional right under the state constitution.

Actually, any constitutional "fact" is more truly characterized as a mixed issue of law and fact which normally receives *de novo* review, anyway. The constitutional fact doctrine, however, *does* allow *de novo* review of jury findings as well as bench findings if a constitutional issue is involved.[90] This is not true of jury findings on mixed issues that are not of constitutional magnitude. Thus, a jury finding of actual malice in a defamation action (based on the First Amendment) is reviewed differently from a jury finding of negligence (not constitutionally protected).

C. *Review of Fact-Finding by Administrative Tribunals*

Review of fact-findings by administrative tribunals is governed by statute: the Administrative Procedure Act.[91] Administrative facts are reviewed at the federal level under the "substantial evidence" test[92] unless some other standard of fact review is specified by statute. Under the original Washington Administrative Procedure Act, "substantial evidence" was also the standard of review.[93] However, that test was replaced in 1967 by the "clearly erroneous" test.[94] In 1988, Washington returned to the "substantial evidence" test in reviewing administrative fact findings.[95]

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88. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 264-76 (1985).

89. *See* Miller v. Argus Pub. Co., 79 Wash. 2d 816, 829, 490 P.2d 101, 110 (1971) (citing *Rosenbloom*), *overruled on other grounds by* Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976); State v. Daugherty, 94 Wash. 2d 263, 616 P.2d 649 (1980) (and cases cited therein).

90. *See, e.g.*, City of Tacoma v. Mushkin, 12 Wash. App. 56, 527 P.2d 1393 (1974).

91. The review provisions of the federal Administrative Procedure Act can be found at 5 U.S.C. § 706 (1988). Those in the Washington Administrative Procedure Act can be found at WASH. REV. CODE § 34.05.570 (1994).

92. 5 U.S.C. § 706(2)(E) (1988).

93. Administrative Procedure, ch. 234, § 13(6)(e), 1959 Wash. Laws 1088.

94. Administrative Rules and Procedure, ch. 237, § 6(6)(e), 1967 Wash. Laws 1218 (codified at WASH. REV. CODE § 34.04.130(6)(e) (1987)).

95. Sunset Revisions—Administrative Procedure Act Revised, ch. 288, § 516, 1988 Wash. Laws 1386 (codified at WASH. REV. CODE § 34.05.570(3)(e) (1994)). One commentator suggests that the rationale for returning to the "substantial evidence" test was its familiarity (being the standard for factual review of agency decisions under the federal APA and the standard for factual review of non-administrative decisions in Washington). William R. Andersen, *The 1988*

D. Review of Issues of Law

Judicial review of issues of law is straightforward. The standard is always *de novo*.[96] There are no exceptions. Courts may say that deference is given to an agency's interpretation of a statute.[97] In other words, deference will be given to the manner in which the agency applies the law. Even though phrased as an issue of law, such a question is really one of mixed law and fact.

E. Review of Mixed Questions of Law and Fact

Mixed questions of law and fact, or application issues, involve the comparison or bringing together of the correct law and the correct facts with a view to determining the legal consequences.[98]

1. Federal Review of Mixed Questions

There are two standards of review for mixed questions of law and fact at the federal level. The Supreme Court has acknowledged that while it usually reviews mixed questions independently, its precedents are not entirely consistent and there is support in its decisions for "clearly erroneous" review of some mixed questions.[99] The Ninth Circuit has elaborated on this by stating that the appropriate standard should be determined by reference to the sound principles that underlie appellate review.[100] That court has also said that the appropriate standard of review turns on whether factual matters or legal matters predominate.[101] If an inquiry is essentially factual, or it properly relies on the District Court's discretion, then the Court of Appeals gives def-

Washington Administrative Procedure Act—An Introduction, 64 WASH. L. REV. 781, 838 (1989). Professor Andersen says that the Washington courts appeared uncertain about the purpose of the 1972 change and its application. *Id.*

96. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

97. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965).

98. Franklin County v. Sellers, 97 Wash. 2d 317, 329-30, 646 P.2d 113, 119 (1982).

99. *Cf.* United States v. McConney, 728 F.2d 1195, 1200 (9th Cir. 1984); Pullman-Standard v. Swint, 456 U.S. 273, 288-90 (1982) (particularly n.19). The Supreme Court's approach is not inconsistent if the Court recognizes that application of standards is flexible and should be based on policy considerations. Policy reasons may have called for more deference to one mixed question than to another. Thus, the Court can be consistent and yet use different standards for the same type of issue or apply the same standard differently.

100. United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984). The court said: "If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to *de novo* review. Thus, in each case, the pivotal question is do the concerns of judicial administration favor the district court or do they favor the appellate court." *Id.*

101. *Id.*

erence to the decision of the District Court.[102] Otherwise the Court of Appeals conducts *de novo* review.[103] Concerns for judicial administration will generally lead an appellate court to justify de novo review.[104] Although the test calls for looking to the policy behind review for determining the amount of deference, the test itself is either/or. That is, review will either be "clearly erroneous" or *de novo* even though a policy analysis might dictate an amount of deference somewhere in between.

2. Washington State Review of Mixed Questions

The Washington Supreme Court has said that it is not the province of the reviewing court to try the facts *de novo* when presented with mixed questions of law and fact that are on appeal from a judgment of a superior court, administrative tribunal, or administrative judge.[105] Yet the court's stated standard for mixed questions of law and fact is *de novo*.[106] The solution to this apparent paradox is in bifurcation. What is reviewed *de novo* in a mixed question is the meaning of the law and how it applies to facts as determined by the trier of fact; the court does not reweigh evidence of credibility or demeanor.[107] In other words, historical facts receive deference but the statement of the law and the application of that law to the historical facts (to determine ultimate facts) is reviewed *de novo*. This proposition, however, does not hold true when an appellate court reviews a jury decision. To allow *de novo* review would totally eviscerate the right to a jury trial.

F. Review of Jury Findings

A major problem in reviewing jury decisions is that juries do not ordinarily make specific findings of fact. While a judge is required to make written findings of fact and conclusions of law,[108] juries typically make only legal conclusions. In a criminal case, the jury usually just checks off on a form whether the defendant was guilty or not guilty. In a civil case, it determines whether, for example, the defendant was negligent and if so, how much he or she should pay in damages. A review-

102. United States v. Owens, 789 F.2d 750, 753 (9th Cir. 1986), *rev'd on other grounds*, 484 U.S. 554 (1987).

103. *Id.*

104. *Pullman-Standard*, 456 U.S. at 289 n.19.

105. *Sellers*, 97 Wash. 2d at 330, 646 P.2d at 119-20.

106. *See* Rasmussen v. Employment Sec., 98 Wash. 2d 846, 849-50, 658 P.2d 1240, 1242 (1983).

107. *Sellers*, 97 Wash. 2d at 330, 646 P.2d at 119.

108. FED. R. CIV. P. 52(a); WASH. SUPER. CT. CIV. R. 52(a)(1); WASH. SUPER. CT. CRIM. R. 6.1(d). *But see* FED. R. CRIM. P. 23(c) (which does not require specific findings unless requested before a general finding is made).

ing court does not know what evidence the jurors found credible. The court cannot know what historical facts the jury found and cannot determine whether or not the jury erroneously applied the law to these facts. If the law was stated correctly in the jury instructions, then, the court's power to review is virtually nonexistent even if it is characterized as *de novo*. Thus, courts typically review jury findings under the "substantial evidence" standard.[109]

Courts might find it easier to conduct meaningful review if attorneys utilized special verdict forms.[110] An attorney could ask the jury to determine whether or not the defendant committed a specific act or knew a particular fact. These historical facts would be given the great deference due to jury fact-finding. The jury's legal conclusion, however, that such an act or knowledge constituted guilt or negligence could be reviewed less deferentially without violating the sanctity of the right to a jury trial.

The way courts analyze standard of review for mixed questions is particularly ripe for change. As seen above, courts have made conflicting statements in trying to define a consistent standard for mixed questions. It would be more practical for them to acknowledge that different mixed questions should be treated differently. Instead of trying to force questions into rigid categories, a court should turn to policy analysis.

Mixed questions exist on a continuum; therefore, rigid application of standards is inappropriate. Courts should analyze the reasons for giving deference in each particular case and review the decision accordingly. This may, in fact, be what some courts are doing, but they do not acknowledge the process. It would be better if they did.

G. *Review of Procedural/Evidentiary Questions*

For certain questions, courts totally ignore the fact/law distinction in determining the appropriate standard of review. These are issues of trial procedure—including questions about courtroom conduct and admissibility of evidence. The reason for deferring to lower courts' views of these questions is largely one of judicial economy. A judge may make hundreds of determinations in a single case before and during the course of a trial. To deter parties from appealing every adverse decision, statutes and court rules have given judges wide discretion to make everyday types of decisions.[111] Therefore the standard of review

109. State v. Jeffries, 105 Wash. 2d 398, 407, 717 P.2d 722, 728 (1986).

110. *See* FED. R. CIV. P. 49(a); WASH. SUPER. CT. CIV. R. 49(a).

111. *See, e.g.*, FED. R. EVID. 611; WASH. R. EVID. 611. The word "may" usually implies some degree of discretion. United States v. Rodgers, 461 U.S. 677, 706 (1983).

for these questions is "abuse of discretion." It will be discussed later in this Article.

The evolution of "abuse of discretion" exemplifies the haphazard manner in which some standards of review have developed. Because early writs for judicial review encompassed discretionary matters, a trial court's decision on such matters was considered final. In 1892, Justice Brown stated: "The general principle is too well settled to admit of doubt that where action of an inferior tribunal is discretionary its decision is final."[112]

Once the rigidity of the procedures for review by writ relaxed, however, the rationale for not reviewing such matters no longer existed. The key stroke appears to have been made in 1892. In the same term that *Earnshaw* said the trial court's decision was final, the Supreme Court also stated: "The question . . . is ordinarily addressed to the sound discretion of the trial court, and in the present case no abuse of that discretion is shown."[113]

Three years later, the Court said that the proposition that a matter of discretion was not subject to review, "unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question."[114] Thus, in less than five years, the standard for reviewing discretionary decisions was changed, a new standard was created, and nobody even seemed to notice.

H. Review of Administrative Decisions[115]

Administrative decisions present unique issues in standard of review. While standard of review generally evolved with the common law, administrative review is a creature of statute. The statutes, however, were created with an eye to judicial review of court determinations. Therefore, cases concerning judicial review of administrative acts prior to passage of the Administrative Procedure Act and those concerning judicial review of court determinations can be helpful in interpretation.[116]

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112. Earnshaw v. United States, 146 U.S. 60, 68 (1892) (and cases cited therein).

113. Means v. Bank of Randall, 146 U.S. 620, 629 (1892).

114. Isaacs v. United States, 159 U.S. 487, 489 (1895) (citing both *Earnshaw* and *Means*, among others, as authority for the proposition).

115. For a more detailed discussion of judicial review of agency actions in Washington, see Tim J. Filer, *The Scope of Judicial Review of Agency Actions in Washington Revisited—Doctrine, Analysis, and Proposed Revisions*, 60 WASH. L. REV. 653 (1985); Harlan S. Abrahams, *Scope of Review of Administrative Action in Washington: A Proposal*, 14 GONZ. L. REV. 75 (1978); William R. Andersen, *Judicial Review of Agency Fact-Finding in Washington: A Brief Comment*, 13 WILLAMETTE L. REV. 397 (1977).

116. According to Tom C. Clark, the Attorney General at the time of the Act's adoption, the Act merely "restates the law governing judicial review of administrative action." S. REP. NO. 752,

As stated above, judicial review of administrative decisions is generally governed by statute at both federal[117] and state[118] levels. In addition to the general review provisions in the administrative procedure acts, there may also be specific review statutes for particular agencies.[119]

Typically, statutory judicial review provisions for administrative acts are veritable laundry lists of standards. Determination of how the standards should be applied is left for the courts. In response, courts have followed the traditional fact/law/procedure distinction.

1. Federal Review of Administrative Actions

Judicial review of administrative actions at the federal level depends largely on whether the agency action is formal or informal. As in other areas, federal courts decide questions of law *de novo* in reviewing administrative agency actions.[120] Factual questions that stem from formal rulemakings[121] and formal adjudications[122] are reviewed under the "substantial evidence" test.[123] When an agency takes informal action, the reviewing court decides whether or not its factual determinations were arbitrary or capricious.[124] Additionally, all agency actions are reviewable for abuse of discretion.[125]

2. Washington Review of Administrative Actions

The new Washington Administrative Procedure Act distinguishes among rulemaking, administrative orders, and "other agency actions"

79th Cong., 1st Sess. 38 (1945) (Appendix B), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONGRESS 1944-46 at 224 (1946). *See also* United States v. Wiley's Cove Ranch, 295 F.2d 436, 441 (8th Cir. 1961) (stating that the "Administrative Procedure Act did not change the common law . . . but rather codified it.")

117. 5 U.S.C. § 706 (1988).

118. WASH. REV. CODE § 34.05.570 (1994) (formerly WASH. REV. CODE § 34.04.130 (1987)).

119. *See, e.g.*, 31 U.S.C. § 755 (1988); WASH. REV. CODE § 28B.16.150(1) (1994). The new Washington APA excludes certain agencies like the Board of Industrial Insurance Appeals from its judicial review provisions. *See generally* WASH. REV. CODE § 34.05.030 (1994); *see also* WASH. REV. CODE § 34.05.030(2)(a) (1994).

120. 5 U.S.C. § 706 (1988).

121. *Id.* §§ 553, 556.

122. *Id.* §§ 554, 556.

123. *Id.* § 706(2)(E).

124. *Id.* § 706(2)(A); *see* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-15 (1971). The arbitrary and capricious standard is applicable to formal rulemakings and adjudications as well. *See* RICHARD J. PIERCE, ADMINISTRATIVE LAW AND PROCESS § 7.3, at 357 (1985); Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 934 (1973).

125. 5 U.S.C. § 706(2)(A) (1988).

in defining the standard of review.[126] It creates a newly phrased standard for reviewing agency rulemaking. A rule can be invalid not only for unconstitutionality, exceeding an agency's statutory authority, and procedural irregularities, but also if it "could not conceivably have been the product of a rational decision-maker."[127] This standard is supposed to be distinguishable from the more traditional "arbitrary or capricious" standard.[128] More likely, it will add to the current muddle.

For review of agency orders, the statute continues to list a variety of standards against which the agency's action will be measured.[129] Other agency actions are reviewed under a new provision setting out a more limited set of standards.[130]

The 1988 revisions to the Administrative Procedure Act make Washington's law conform more closely to the federal law. Prior to passage of the new Act, the standard of review for administrative decisions differed with the type of proceeding and the manner in which review was sought. The standard for contested cases was either *de novo*,[131] "clearly erroneous",[132] or "arbitrary or capricious,"[133] depending on the appellant's grounds for challenging the agency's action.

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126. *See* WASH. REV. CODE § 34.05.570 (1994).

127. WASH. REV. CODE § 34.05.570(2)(c) (1994).

128. *See* Andersen, *supra* note 195, at 835.

129. Under WASH. REV. CODE § 34.05.570(3) (1994), an order is invalid if it is:

(a) in violation of the Constitution,

(b) outside the agency's authority,

(c) the product of invalid procedure,

(d) based on an erroneous interpretation or application of law,

(e) unsupported by "substantial evidence",

(f) incomplete as to all issues requiring resolution by the agency,

(g) entered by persons subject to disqualification,

(h) inconsistent with an agency rule; or

(i) arbitrary or capricious.

130. Under WASH. REV. CODE § 34.05.570(4)(c) (1994) such relief can be obtained if the action is:

(i) unconstitutional,

(ii) outside the agency's authority,

(iii) arbitrary or capricious; or

(iv) taken by persons not properly entitled to take such action.

131. WASH. REV. CODE § 34.04.130(6)(d) (1987).

132. WASH. REV. CODE § 34.04.130(6)(e)(1987). The legislature abandoned the "substantial evidence" rule in 1967 and prescribed as a standard for judicial review the more strict "clearly erroneous" concept. *See* Ancheta v. Daly, 77 Wash. 2d 255, 259-61, 461 P.2d 531, 533-34 (1969). *See also* WASH. REV. CODE ANN. § 34.04.130(6)(e) (West Supp. 1967). Ironically, the legislature's action created a situation where Washington reviewed judicial fact findings with the "substantial evidence" standard and reviewed administrative fact findings with the "clearly erroneous" standard, while federal courts applied the standards in the exact opposite manner. More recent changes in the APA have returned to the "substantial evidence" standard, bringing Washington into more uniformity with federal administrative procedure. *See* Sunset Provisions-Administrative Procedure Act Revised, ch. 288, § 516, 1988 Wash. Laws 1386.

133. WASH. REV. CODE § 34.04.130(6)(f) (1987).

In contested cases, the standard of review for findings of fact was whether the findings were "clearly erroneous" based on the record as a whole.[134] For issues of law the standard of review was announced as "error of law," which can usually be translated as *de novo*.[135] Mixed questions of law and fact were treated the same as issues of law.[136]

The Court of Appeals said that the standard of review in enforcement cases differed from classic appellate review of agency decisions.[137] In enforcement cases, findings of fact were upheld if they were supported by substantial evidence *on the record considered as a whole*;[138] the classic test considered only evidence in support of the finding.[139]

Formerly, Washington's APA expressly stated that it was the exclusive means for judicial review.[140] Even so, Washington courts held that review provisions of a specific statute would prevail if there was a conflict with the APA and the specific statute had been passed subsequent to the APA.[141] The courts also held that judicial review of administrative acts was available apart from the APA by writ of certiorari.[142] Such writ may be either statutory[143] or constitutional.[144]

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134. Franklin County v. Sellers, 97 Wash. 2d 317, 324, 646 P.2d 113, 116 (1982). The *Sellers* court said that WASH. REV. CODE § 4.04.130(6)(e) was the applicable standard for agency factual determinations. *Id.* That court also pointed out that a 1967 amendment to the Administrative Procedure Act did away with the "substantial evidence" test, replacing it with the "clearly erroneous" standard. *Id.*

135. *Sellers*, 97 Wash. 2d at 325, 646 P.2d at 117. The court states: "Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review." *Id.* (quoting Overton v. Economic Assistance Auth., 96 Wash. 2d 552, 554-55, 637 P.2d 652, 654 (1981)). This substantial weight rapidly becomes insubstantial, as the following sentence reads: "We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law." *Id.* (quoting *Overton*).

136. *Id.* at 324, 646 P.2d at 119.

137. Highline Community College v. The Higher Educ. Personnel Bd., 45 Wash. App. 803, 808, 727 P.2d 990, 993 (1986).

138. *Id.*

139. *Id.*

140. WASH. REV. CODE § 34.04.130 (1987) provided:

> Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof only under the provisions of this 1967 amendatory act, and such person may not use any other procedure to obtain judicial review of a final decision, even though another procedure is provided elsewhere by a special statute or a statute of general application.

141. Public Employment Rel. Comm'n. v. City of Kennewick, 99 Wash. 2d 832, 839, 664 P.2d 1240, 1243 (1983).

142. *See* State *ex rel.* DuPont-Ft. Lewis Sch. Dist. 7 v. Bruno, 62 Wash. 2d 790, 794, 384 P.2d 608, 610 (1963).

143. WASH. REV. CODE § 7.16.040 (1994). Washington courts have held that statutory certiorari accords the petitioner full review of the issue raised, while constitutional certiorari is limited to a review of the record to determine whether the decision or act complained of was or

Washington's new APA has exclusivity language similar to that in the former Act.[145] Whether the language will be treated like that of the old statute has yet to be judicially determined.

Having stated the appropriate standards of review for the various types of issues, this Article turns to the standards themselves. It will summarize and analyze the major standards applied at both the federal and state levels. It will also discuss some of the exceptional standards applied to due process, equal protection, the Washington Constitution's privileges and immunities clause, and to Washington damage awards.

VII. THE STANDARDS

A. Abuse of Discretion

Conduct of court proceedings is generally left to the trial judge's discretion and is therefore reviewed under the "abuse of discretion" standard of review.[146] Primarily, discretion appears as the standard for procedural rather than substantive rules.[147] It governs rulings on most motions,[148] objections, admissibility of evidence, criminal sentencing,[149] and general conduct issues such as findings of contempt.[150] "Abuse of discretion" is usually the standard of review if phrases like

involved arbitrary and capricious or illegal actions, thus violating the petitioner's fundamental rights to be free of such action. Pierce County Sheriff v. Civil Serv. Comm'n for Sheriff's Employees, 98 Wash. 2d 690, 693-94, 658 P.2d 648, 650-51 (1983).

144. WASH. CONST. art. IV, §§ 4, 6. The common law writ of certiorari embodied in the constitution is distinguished from the statutory writ of review. The statute requires the superior court to grant the writ only when four enumerated factors are present and accords the petitioner full review of the issue raised. If any of the enumerated factors are absent, there is no jurisdiction for review. The common law writ embodied in the constitution contains no such imperative. The grant of common law certiorari is always discretionary with the court as part of its inherent powers. Bridle Trails Community Club v. City of Bellevue, 45 Wash. App. 248, 252, 724 P.2d 1110, 1112-13 (1986).

145. WASH. REV. CODE § 34.05.510 (1994).

146. For a jurisprudential treatment of discretion, see RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 31-39 (1977); Rosenberg, *supra* note 52.

147. Rosenberg, *supra* note 52, at 653.

148. State v. Bebb, 44 Wash. App. 803, 723 P.2d 512 (1986) (continuance); State v. Haynes, 16 Wash. App. 778, 559 P.2d 583 (1977) (change of venue); Adkins v. Aluminum Co. of America, 110 Wash. 2d 1287, 750 P.2d 1257 (1988) (mistrial); State v. Bartholomew, 98 Wash. 2d 173, 654 P.2d 1170 (1982) (new trial; but note: a much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying it); Johnson v. Howard, 45 Wash. 2d 433, 275 P.2d 736 (1954) (discovery). A notable exception would be motions for summary judgment.

149. State v. Oxborrow, 106 Wash. 2d 525, 530-31, 723 P.2d 1123, 1127 (1986) (citing WASHINGTON SENTENCING GUIDELINES COMM'N., REPORT TO THE LEGISLATURE 51 (Jan. 1983)).

150. Seventh Elect Church v. Rogers, 34 Wash. App. 105, 660 P.2d 280 (1983).

"the court may" or "for good cause" are involved.[151] However, this is not always true.[152]

The "abuse of discretion" standard is appropriate when (1) concerns of judicial economy dictate that the trial court be responsible for the decision, or (2) the trial judge is in a better position to make the decision because he or she can observe the parties.[153] In an ongoing trial, many factors interact and accumulate. For certain issues, interaction among the entire panoply of factors is essential background for a decision. This interaction cannot be entirely reflected in the record. Because the trial judge is able to observe all the happenings at a trial first hand, his or her decisions about such issues should be accorded substantial deference. Logically, the less the need for "having been there," the less deference should be accorded.

Judge Friendly of the Second Circuit argues that there is not just a single static "abuse of discretion" standard.[154] The trial judge's discretion varies with the function. It may be more or less limited by statute and/or court rule. Friendly says: "An appellate court must carefully scrutinize the nature of the trial court's determination and decide whether that court's superior opportunities of observation or other reasons of policy require greater deference than would be accorded to its formulations of law or its application of law to the facts. In cases within the former categories, 'abuse of discretion' should be given a broad reading, in others a reading which scarcely differs from the definition of error."[155] The standard does not give nearly so complete an immunity bath to the trial court's rulings as counsel for appellees would have the reviewing court believe.[156]

"Abuse of discretion" has been defined as what happens when a court's decision is "manifestly unreasonable, or exercised on untenable

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151. Rosenberg, *supra* note 52, at 655.

152. *Id.*

153. State v. Oxborrow, 106 Wash. 2d 525, 542-43, 723 P.2d 1123, 1133 (1986).

154. Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L. J. 747, 783 (1982).

155. *Id.* at 784.

156. *Id.* Professor Maurice Rosenberg also claims that there is more than a single measurement. He, however, claims that there are two distinct kinds of discretion: primary and secondary. Rosenberg, *supra* note 52, at 637. With primary discretion, the judge had "a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process." *Id.* Secondary discretion "comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from the appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal." *Id.* Professor Waltz argues that "guided" and "unguided" discretion may be better labels. Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 N.W. U. L. REV. 1097, 1103 (1984/85). Friendly's analysis of discretion as a continuum is more convincing with Rosenberg's "primary" and "secondary" being merely points along that continuum.

grounds, or for untenable reasons."[157] An exercise of discretion by a trial court may be erroneous without being illegal.[158] Washington courts have stated that "discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court."[159] Such a statement is at odds with Friendly's continuum analysis, particularly in cases where the standard would "scarcely differ from the definition of error."[160] Washington does acknowledge a range in discretionary functions, however. For example, whether or not the trial was by jury is often one factor used to determine the amount of deference that should be given.[161]

Washington courts have been extremely reluctant to find abuse of discretion. One of the few times a trial court was found to have abused its discretion by excluding evidence, the court of appeals said that the trial court could not deny a party the opportunity to present a crucial link in his proof.[162] In 1986, Justice Goodloe noted that only once[163] has a criminal sentence been ruled an abuse of discretion.[164]

For some motions, the trial court is required to give definite findings of law and facts in its order.[165] Not giving such reasons would in itself be grounds for an appellate court to find the decision erroneous.[166] However, for most motions at trial, no such requirement exists. The procedure would be too time-consuming. Therefore, a reviewing court often has an inadequate record with which to examine the trial judge's decision.

Professor Rosenberg calls for a trial judge relying on discretionary power to place on the record the circumstances and factors that were crucial to his or her determination.[167] It is ironic, Rosenberg points out, that if the court fails to do this, its chances of being affirmed are better than if the record is spelled out.[168] Based on the number of dis-

157. State *ex rel.* Carroll v. Junker, 79 Wash. 2d 12, 26, 482 P.2d 775, 784 (1971).

158. Rosenberg, *supra* note 52, at 641 (citing Bringhurst v. Harkins, 32 Del. 324, 331, 122 A. 783, 787 (1923)). A discretionary decision should not be reversed if the reviewing court merely disagrees with the decision, but rather only if "it appears that it was exercised on grounds, or for reasons, clearly untenable or to an extent clearly unreasonable." *Id.*

159. State v. Hurst, 5 Wash. App. 146, 148, 486 P.2d 1136, 1138 (1971).

160. Friendly, *supra* note 154, at 784.

161. *See* 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 14-2 (3d ed. 1989) (and cases cited therein regarding evidentiary rulings).

162. Grigsby v. Seattle, 12 Wash. App. 453, 457, 529 P.2d 1167, 1170 (1975).

163. State v. Potts, 1 Wash. App. 614, 646 P.2d 742 (1969).

164. *See* State v. Armstrong, 106 Wash. 2d 547, 553, 723 P.2d 1111, 1115 (1986) (Goodloe, J., dissenting).

165. *See, e.g.*, FED. R. CIV. P. 59(f).

166. *See, e.g.*, State v. Smith, 68 Wash. App. 201, 842 P.2d 494 (1992).

167. Rosenberg, *supra* note 52, at 665.

168. *Id.* at 666.

cretionary decisions a judge makes in each case, placing everything in the record could overencumber an already slow judicial process. A better approach might be to let trial attorneys ask the court to place circumstances and factors in the record in certain instances. This would limit additional recordmaking to only those discretionary decisions that are most at issue.

Because "abuse of discretion" is usually the standard for procedural issues, the typical remedy for finding an abuse is to reverse and remand (unless the error is found to be harmless). This is done because the reviewing court would have no way of knowing how the trial court would have decided if the procedure had been different.

B. *De Novo*

The United States Supreme Court has said that *de novo* review occurs when a "reviewing court makes an original appraisal of all the evidence to decide whether or not it believes [the conclusions of the trial court]."[169] *De novo* review of the lower tribunal's record should be distinguished from a trial *de novo*. The latter means a completely new trial at which witnesses are heard and new evidence is taken. The trial *de novo* is still used to review some determinations by agencies and courts that are not of record.

The *de novo* standard of review applies to issues of law, to motions for summary judgment, and, at times, to mixed questions of law and fact.[170] Washington courts have inverted the language at times, and made statements like "the correct standard on review is error of law."[171] Correctly speaking, "error of law" is not a standard. It is a classification of an issue. The standard is properly called *de novo*. This is another example of the courts' imprecision in dealing with the concept of standard of review.

The *de novo* standard is applied when the appellate court is in as good a position as the trial court to judge the evidence. Because of this, if all the relevant evidence is in documentary or deposition form, the appellate court should be able to substitute its judgment for that of the trial court about facts as well as application.[172] Appellate courts can do this in Washington. Some federal circuits followed this approach until Civil Rule 52(a) was adopted making "clearly erroneous" the standard

169. Bose Corp. v. Consumers Union of United States, Inc. 466 U.S. 485, 514 n.31 (1984).

170. Johnson v. Employment Sec., 112 Wash. 2d 172, 175, 769 P.2d 305, 306 (1989).

171. *See, e.g.*, Devine v. Employment Sec., 26 Wash. App. 778, 781, 614 P.2d 231, 233 (1980).

172. *See, e.g.*, Southwest Wash. Prod. Credit Ass'n. v. Seattle-First Nat'l Bank, 19 Wash. App. 397, 406, 577 P.2d 589, 594 (1978), *rev'd on other grounds*, 92 Wash. 2d 30, 593 P.2d 167 (1979).

for all federal findings of fact, even if such findings are based solely on documentary evidence.

Confusion arises because appellate courts reviewing cases *de novo* sometimes speak of giving deference to lower tribunal's decisions even though no deference is necessary.[173] Giving substantial weight to the lower court's decision is not in accord with strict *de novo* review. Giving deference to the lower tribunal and reviewing *de novo* are, in fact, contradictory.

C. *Clearly Erroneous*

The "clearly erroneous" standard is generally applied to findings of fact. It recognizes the trial court's role as primary fact-finder and prevents needless review of fact-findings on appeal.[174] The Federal Rules of Civil Procedure state that findings of fact shall not be set aside unless they are "clearly erroneous."[175] By contrast, Washington's Court Rules do not announce a standard of review for factual findings; and, facts found by trial courts are reviewed under the "substantial evidence" standard.[176]

According to the United States Supreme Court, a finding is "clearly erroneous" when the reviewing court, in considering the entire body of evidence, is left with the definite and firm conviction that a mistake has been committed, even though there is evidence to support the lower court's finding.[177] Washington courts have said that under the "clearly erroneous" test, the reviewing court may conduct a broader, more intensive review than under the "substantial evidence" test.[178] Theoretically, an appellate court could say: "I agree that a reasonable person could make such a finding, but I think it clearly wrong."[179] The "clearly erroneous" standard is applied to the record as a whole, rather than to the evidence of one party or the other.[180]

Applying the "clearly erroneous" standard to findings of fact in purely documentary cases is an excellent illustration of the illogic of

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173. *See, e.g.*, Franklin County v. Sellers, 97 Wash. 2d 317, 325, 646 P.2d 113, 117 (1982) stating that the reviewing court may "essentially substitute its judgment for that of the administrative body, though substantial weight is accorded the agency's view of the law").

174. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

175. FED. R. CIV. P. 52(a).

176. *See* WASH. SUPER. CT. CIV. R. 52. Factfinding is reviewed in Washington with the "substantial evidence" test. *See supra* part V1.A.

177. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

178. Ancheta v. Daly, 77 Wash. 2d 255, 259, 461 P.2d 531, 534 (1969). "Substantial evidence" asks whether a reasonable person could draw the conclusion the trial court reached.

179. Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 81 (1944).

180. *Sellers*, 97 Wash. 2d at 324, 646 P.2d at 116.

rigidly applying standards rather than looking to the policies behind them. Obviously, the appellate court is in as good of a position to evaluate the facts as the trial court in such instances. However, one United States Supreme Court opinion can be interpreted as implying that the "clearly erroneous" standard might be applied differently to different types of cases.[181] After stating that the standard applies to non-jury findings of fact whether based on witness credibility, on physical and documentary evidence, or on inferences from other facts, the Court said: "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what was said."[182] Giving the trial court "greater deference" makes for a more limited review of the facts even though the same "clearly erroneous" standard was used. The *Bessemer City* court also said that when a finding is based on a decision to credit the testimony given by one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be "clearly erroneous."[183]

One commentator has gone so far as to say that "clearly erroneous" has no intrinsic meaning: "It is elastic, capacious, malleable, and above all variable. Because it means nothing, it can mean anything and everything that it ought to mean. It cannot be defined, unless the definition might enumerate a nearly infinite number of shadings along the spectrum of working review standards."[184] This adaptability, he claims, is desirable.[185] It allows appellate courts the latitude to adapt the measure of review to the shifting needs of different cases, different laws, and different times. Factors to consider in the stringency of review are the relative capacities of lower and higher tribunals, the need for uniformity among cases, the perceived importance of the dispute, and the nature of the legal rules involved. This analysis might be extended to other, if not all, standards.

Examples of Washington cases in which fact-finding was judged "clearly erroneous" are *Swift v. Island County*[186] and *Hitchcock v.*

181. Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

182. *Id.*

183. *Id.*

184. Cooper, *supra* note 58, at 645.

185. *See id.* at 670.

186. 87 Wash. 2d 348, 552 P.2d 175 (1976) (holding that a determination of "no significant impact" made pursuant to the State Environmental Policy Act by the county planning director was "clearly erroneous").

Department of Retirement Systems.[187] In both of these cases, additional considerations beyond the findings of fact themselves helped the courts reach their decisions. In *Swift*, the court decided that the public policy behind SEPA added additional weight to appellant's factual arguments.[188] In *Hitchcock*, the court found that the legislative intent of liberal construction favored the appellant/beneficiaries.[189] As these cases illustrate, public policy and/or presumptions favoring the appealing parties may provide the extra quantum necessary for a finding of "clearly erroneous."

Appellate courts often avoid the constraints imposed upon them by the "clearly erroneous" standard by finding the issue under consideration something other than one of pure fact.[190]

D. Arbitrary or Capricious

Despite the fact that most courts and commentators use the phrase "arbitrary and capricious," the statutory standard they apply is "arbitrary or capricious."[191] "Arbitrary or capricious" is one of the standards used to review administrative decisions. "Arbitrary or capricious" first became a recognized standard for judicial review of administrative action when Congress passed the Administrative Procedure Act in 1946.[192] The phrase is included in the Administrative Procedure Acts of both the federal government[193] and Washington.[194] The federal APA designates the "arbitrary or capricious" standard for judicial review of *informal* agency actions and the "substantial evi-

187. 39 Wash. App. 67, 692 P.2d 834 (1984) (finding that the Department of Retirement Systems' determination that payments made in lieu of transportation expenses were made for personal services was "clearly erroneous").

188. *Swift*, 87 Wash.2d at 357-58, 552 P.2d at 181.

189. *Hitchcock*, 39 Wash. App. at 72, 692 P.2d at 838.

190. *See* Susan R. Petito, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68, 87-90 (1977) (and cases cited therein).

191. 5 U.S.C. § 706(2)(A) (1988) says: "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;". The "or" in the clause makes the standard arbitrary or capricious. The Washington statute is more explicit. WASH. REV. CODE §§ 34.05.570(3)(i), 34.05.570(4)(b)(iii) (1992) both use the phrase "arbitrary or capricious." Because the arbitrary and capricious language is often used in applying these statutes, "arbitrary and capricious" and "arbitrary or capricious" can be considered synonymous for standard of review purposes even though they otherwise would not appear so.

192. 5 DAVIS, *supra* note 2, § 29:6, at 354.

193. 5 U.S.C. § 706 (1988).

194. WASH. REV. CODE § 34.04.130 (1987).

dence" standard, which is theoretically more rigorous, for review of formal, record-producing agency actions.[195]

Washington courts have said that "arbitrary or capricious" means "willful and unreasoning action, action without consideration and in disregard of the facts and circumstances of the case."[196] Action is not "arbitrary or capricious," even if an erroneous conclusion was reached, when there is room for two opinions and an agency has acted honestly and upon due consideration of the facts.

In *Citizens to Preserve Overton Park v. Volpe*,[197] the United States Supreme Court said: "To make this finding [arbitrary or capricious] the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[198] This passage gave birth to the "clear error of judgment" language which has since been used by courts as a portion of the "arbitrary or capricious" standard. Some commentators and courts have even treated it as a standard of review itself.[199]

The U.S. Supreme Court has also delineated certain circumstances that would make an agency ruling "arbitrary or capricious." Normally, an agency rule will be "arbitrary or capricious" if the agency has relied on factors that Congress has not intended it to consider, has failed to consider an important aspect of the problem, or has offered an explanation for its decision that either runs counter to the evidence before the agency, or is so implausible that it can not be ascribed to a difference in view or the product of agency expertise.[200]

In reviewing an administrative decision, the Court of Appeals for the D.C. Circuit announced that the "arbitrary or capricious" standard may be applied differently to different issues in the same case.[201] The court stated that the scope of review of an agency's procedure and the scope of review of the agency's discretion or policy are both governed by the "arbitrary or capricious" standard. However, the court stated that the scope of the judicial inquiry differs considerably, because courts are experts on many problems of procedure while agencies may be experts on many problems of discretion or policy within their areas of specialization.[202] "In short, the concept of arbitrary and capricious

195. Matthew J. McGrath, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541, at 541 (1986).

196. Sweitzer v. Industrial Ins. Comm., 116 Wash. 398, 401, 199 P. 724, 725 (1921).

197. 401 U.S. 402 (1971).

198. *Id.* at 416.

199. *See, e.g.*, 2 CHILDRESS & DAVIS, *supra* note 1, § 15.06 (and cases cited therein).

200. Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual, 463 U.S. 29, 43 (1983).

201. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979).

202. *Id.* at 1049-50.

review defies generalized application and demands, instead, close attention to the nature of the particular problem faced by the agency."[203] Thus, another court wisely emphasizes the flexibility of yet another standard.

The difference between the "clearly erroneous" standard and the "arbitrary or capricious" standard was enunciated by the Washington Supreme Court in *Norway Hill Preservation & Protection Ass'n. v. King County Council*.[204] The court said:

> The "clearly erroneous" standard provides a broader review than the "arbitrary or capricious" standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision. Judicial review under the "clearly erroneous" standard set out in RCW 34.04.130(6)(e) also requires consideration of the "public policy contained in the act of the legislature authorizing the decision." Consequently, that public policy is "a part of the standard of review."[205]

E. Substantial Evidence

In Washington, the "substantial evidence" test is used to decide whether or not to uphold a trial court's findings of fact.[206] In federal courts, "substantial evidence" is used only in reviewing factual determinations by a jury.[207] It is also the general test for reviewing administrative decisions at the federal level.[208] Under the federal APA, the "substantial evidence" standard applies to review of formal, record-producing agency actions but not to informal rulemaking.[209] Congress has deviated from the APA model in a number of statutes, however, by mandating the use of the "substantial evidence" standard for review of informal agency actions.[210] As a result of this additional application of the standard, at least some courts and commentators have suggested

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203. *Id.* at 1050. The *Natural Resources* court adds in a footnote that such a focus on the particular problem would appear to hold true for standards other than "arbitrary and capricious" review. *Id.* at n.24.

204. 87 Wash. 2d 267, 552 P.2d 674 (1976).

205. *Id.* at 274-75, 552 P.2d at 678-79 (citations omitted).

206. Ridgeview Properties v. Starbuck, 96 Wash. 2d 716, 719, 638 P.2d 1231, 1233 (1982).

207. Glasser v. United States, 315 U.S. 60, 80 (1942).

208. ICC v. Louisville & N. R.R., 227 U.S. 88, 94 (1913).

209. McGrath, *supra* note 195, at 541.

210. *See, e.g.*, Securities Exchange Act of 1934, § 25(b)(4), 15 U.S.C. § 78y(b)(4) (1988); Occupational Safety and Health Act, § 6(f), 29 U.S.C. § 655(f) (1988).

that the "arbitrary or capricious" and "substantial evidence" standards have converged at the federal administrative level.[211]

"Substantial evidence" has been interpreted as evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.[212] When the evidence conflicts, a reviewing court must determine only whether or not the evidence most favorable to the prevailing party supports the challenged findings.[213] An appellate court will not substitute its judgment for that of the trial court, even though it might have resolved the factual dispute differently.[214] Courts rarely find that there is not "substantial evidence" to support a decision.[215]

The United States Supreme Court says:

> Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.[216]

"Substantial evidence" has also been interpreted to mean that the decision had "warrant in the record" and "a reasonable basis in law."[217] An appellate court cannot set aside a finding or verdict merely because it would have reached a different conclusion itself.[218]

The "substantial evidence" standard will vary depending upon the quantum of proof required for the point at issue.[219] Evidence that is "substantial" enough to support a "preponderance of evidence" burden

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211. *See* McGrath, *supra* note 195, at 553 (citing Scalia & Goodman, *supra* note 124, at 935, n.138; Pacific Legal Found. v. Department of Transp., 593 F.2d 1338, 1343 n.35 (D.C. Cir), *cert. denied* 444 U.S. 830 (1979); and other cases).

212. Holland v. Boeing Co., 90 Wash. 2d 384, 390-91, 583 P.2d 621, 624 (1978).

213. State v. Black, 100 Wash. 2d 793, 802, 676 P.2d 963, 969 (1984). *But see* Stern, *supra* note 179, at 77.

214. Beeson v. Arco, 88 Wash. 2d 499, 503, 563 P.2d 822, 824 (1977). *But see* Arnold v. Sanstol, 43 Wash. 2d 94, 260 P.2d 327 (1953) (finding a lack of "substantial evidence" because the conclusion drawn was not the *only* one that could fairly and reasonably be drawn).

215. *But see* McGovern v. Department of Social and Health Servs., 94 Wash. 2d 448, 617 P.2d 434 (1980) (four Justices dissenting). The Court in McGovern merely makes a single conclusory statement: ". . . here there is no substantial evidence that the facility is other than temporary." *Id.* at 451, 617 P.2d at 437. *See also* Olien v. Department of Labor & Indus., 74 Wash. App. 566, 874 P.2d 876 (1994). Although this case never mentions "substantial evidence" as the standard, it reverses the trial court's findings of fact as being unsupported by the evidence. *Id.*

216. NLRB v. Columbian, 306 U.S. 292, 300 (1939) (citations omitted).

217. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944).

218. Stern, *supra* note 179, at 89.

219. *In re* Sego, 82 Wash. 2d 736, 739, 513 P.2d 831, 833 (1973).

of proof may not support a "clear, cogent, and convincing" burden.[220] Although some commentators contend that such heightened analysis does not extend to review of criminal cases,[221] some courts do give more scrutiny to fact-findings in such cases.[222] Opinions give no indication of any difference in the meaning of "substantial evidence" as applied by appellate courts than as applied by trial courts (as in a motion for a judgment nonwithstanding verdict).[223]

As previously stated, "substantial evidence" is one of the standards for reviewing federal administrative agency actions.[224] The federal standard differs from the state standard, however, because the statute dictates that it be applied to the record as a whole.[225] Prior to passage of the federal APA, courts reviewed only the evidence that supported the agency action.[226] To rectify this one-sided scrutiny, Congress required that courts consider the "whole record" when reviewing agency action.[227] Even though some state decisions use the "record as a whole" language,[228] the rule at common law and the rule usually stated today requires "substantial evidence" viewed in the light most favorable to the prevailing party.[229] Courts have interpreted this to

220. *In re* Estate of Reilly, 78 Wash. 2d 623, 640, 479 P.2d 1, 11 (1970); *In re* Sego, 82 Wash. 2d at 739, 513 P.2d at 833. However, some lower courts have refused to follow this type of application in certain circumstances. *See In re* Ott, 37 Wash. App. 234, 237 n.2, 679 P.2d 372, 374-75 n.2 (1984).

221. WASHINGTON STATE BAR ASSOCIATION, WASHINGTON APPELLATE PRACTICE HANDBOOK § 5-3 (1980).

222. *See, e.g.*, State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628, 632 (1980) (emphasis omitted) (quoting Jackson v. Cirginia, 443 U.S. 307, 318 (1979)). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* The court then elaborated on that test: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis omitted) (quoting *Jackson*, 443 U.S. at 318). The result has been that, instead of using the phraseology of a single logical system (*i.e.*, saying that the standard of review is "substantial evidence" being applied to the burden of proof "beyond a reasonable doubt"), later courts have treated the *Green* phraseology as an entirely new standard unrelated to all others. *See, e.g.*, State v. Aver, 109 Wash. 2d 303, 310-11, 745 P.2d 479, 482-83 (1987).

223. *See* Trautman, *supra* note 76, at 803 n.65 (1967).

224. *See* 5 U.S.C. § 706(2)(E) (1988).

225. *See id.*

226. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 478 (1951).

227. 5 U.S.C. § 706 (1988).

228. *See, e.g.*, Public Employment Rel. Comm'n. v. Kennewick, 99 Wash. 2d 832, 842, 664 P.2d 1240, 1244 (1983) (an administrative decision looking to federal law for guidance).

229. Bennett v. Department of Labor & Indus., 95 Wash. 2d 531, 534, 627 P.2d 104, 106 (1981).

mean that only the evidence favoring the prevailing party's case need be looked at in such determination.[230]

Justice Scalia (while a member of the D.C. Circuit) distinguished the "substantial evidence" standard from the "arbitrary or capricious" standard by considering the circumstances where the standards apply.[231] He said that the "arbitrary or capricious" standard applies to whatever the agency had before it when it acted, regardless of whether the information was shown to or known by the parties in the proceeding.[232] The "substantial evidence" standard, by contrast, applies only to a confined body of evidence (within the record of closed-record proceedings).[233] Thus, the "arbitrary or capricious" standard operates on a broader base. Another possible distinction which can be made is that the "substantial evidence" standard applies to factual determinations while "arbitrary or capricious" goes to the entire process of the administrative action (including, but not limited to, factual determinations).

One problem that has arisen in applying the "substantial evidence" and "arbitrary or capricious" standards illustrates the problems inherent in applying any standard of review. Crucial to any application is a delineation of exactly what the standard is being applied to. "The record considered as a whole" need not be elaborated. It includes all testimony and evidence in the lower tribunal's record. However, problems arise when language such as "in a light most favorable to [one of the parties]" is used. Does this language mean to look at the entire record and make all reasonable inferences in favor of the party? Or does it mean to look only at the parts of the record that support that party, ignoring entirely any contradictory evidence or testimony? Courts have interpreted the same phrase in both of these ways.[234] For other standards, like "clearly erroneous," the appellate court looks beyond the record to considerations such as legislative policy.

F. Other Standards

In addition to the preceding "major" standards of review, the courts have created other standards for certain types of cases or issues. Examples include the standards developed for federal equal protection

230. *See, e.g.*, Thomas v. Ruddell Lease-Sales, Inc., 43 Wash. App. 208, 212, 716 P.2d 911, 914 (1986).

231. *See* Association of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Reserve Sys., 745 F.2d 677 (D.C. Cir. 1984).

232. *Id.* at 684.

233. *Id.*

234. *Compare* Conversions and Surveys v. Department of Revenue, 11 Wash. App. 127, 521 P.2d 1203 (1974) (looking at the entire record) *with* Hall v. Puget Sound Bridge and Dry Dock, 66 Wash. 2d 442, 403 P.2d 41 (1965) (disregarding contradictory evidence).

and state privileges and immunities review and the standard for reviewing damage awards in Washington.

There are essentially three standards of review applied by federal courts to equal protection cases. They are the two traditional standards: "strict scrutiny" and "rational basis"; and a third intermediate test: "substantial relationship."

"Strict scrutiny" is one of the tests available under a constitutional equal-protection analysis.[235] It is used if a classification attacked as discriminatory under the equal protection clause involves either a "suspect class" or a "fundamental right" explicitly or implicitly guaranteed by the Constitution.[236] When "strict scrutiny" is involved, the classification will be upheld only if the state can justify it by showing a compelling state interest.[237]

The "rational basis" test is another standard of review for equal protection. It applies to equal protection under the federal Constitution and privileges and immunities under the state constitution.[238] The two requirements of the test are (1) a classification must apply alike to all members within the designated class, and (2) reasonable grounds must exist for making a distinction between those falling within the class and those falling outside of it.[239]

There is also at least one intermediate equal-protection test that falls somewhere between the other two.[240] It has been formally adopted for gender and illegitimacy cases. Under this standard, the classification must have a "substantial relationship" to an important governmental interest.[241] The standards for equal protection and substantive due process have been exhaustively treated elsewhere,[242] however, and will not be discussed further in this Article.

The same approach to standard of review has been used by Washington courts in construing the state Constitution's privileges and

235. State v. Rice, 98 Wash. 2d 384, 399, 655 P.2d 1145, 1153 (1982).

236. *Id.*

237. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

238. *See* Housing Authority of King County v. Saylors, 87 Wash. 2d 732, 738-39, 557 P.2d 321, 325 (1976).

239. Griffin v. Department of Social and Health Servs., 91 Wash. 2d 616, 627, 590 P.2d 816, 823 (1979).

240. *See* JOHN E. NOWAK, CONSTITUTIONAL LAW § 14.3, at 576 (4th ed. 1991).

241. *Id.*

242. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 16 (2d ed. 1988); NOWAK, *supra* note 240, at ch. 14 (and articles cited therein).

immunities clause,[243] although the potential for a different analysis has been hinted at by Justice Utter.[244]

These standards differ from the standards previously discussed in that they are applied to *action* taken by administrative or state entities rather than to decisions rendered by the courts. This distinction makes them difficult to compare with other standards.

Another unique standard has been used to review damage awards in Washington. Damages can be reduced or the award vacated if they are "unmistakably . . . the result of passion or prejudice."[245] Unfortunately, this entirely new standard is not the only one for reviewing damages. Absent a showing of passion or prejudice, appellate courts still may review the adequacy or inadequacy of a damage award. Although stating this proposition in *Malstrom v. Kalland*,[246] the Washington Supreme Court failed to articulate a standard for such review (the court did manage to decide the case even without a standard, however). Almost ten years later, Division Three of the Court of Appeals announced a standard for review of damages absent a showing of passion or prejudice.[247] The test is whether the verdict "shocks the conscience, sense of justice and sound judgment of the appellate court."[248] The court cited no authority for this standard which, ignoring any fact/law classification, appears unrelated to any other standard of review. A still later Court of Appeals decision states: "It is well established that an appellate court will not disturb a jury award supported by 'substantial evidence'."[249] The Supreme Court has combined the standards, announcing that Washington courts will not disturb an award of damages made by a jury unless it (1) is outside the range of "substantial evidence" in the record, (2) shocks the conscience, or (3) appears to have been arrived at as the result of passion or prejudice.[250]

The issue of damage awards illustrates Washington's inability to come to grips with standard of review. California fits damage awards

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243. WASH. CONST. art. 1, § 12.

244. *See* Matter of Mota, 114 Wash. 2d 465, 472, 788 P.2d 538, 542 (1990). The criteria to be used in making such an argument are listed in State v. Gunwall, 106 Wash. 2d 54, 61-62, 720 P.2d 808, 812-13 (1986).

245. WASH. SUPER. CT. CIV. R. 59(a)(5); WASH. REV. CODE § 4.76.030 (1992). The creation of new standards is an unfortunate consequence of the legislature crossing into a field normally reserved for the courts.

246. 62 Wash. 2d 732, 736-38, 384 P.2d 613, 616 (1963).

247. Curtiss v. YMCA, 7 Wash. App. 98, 104, 498 P.2d 330, 334 (1972), *aff'd*, 82 Wash. 2d 455, 511 P.2d 991 (1973).

248. *Id.*

249. Alpine Indus., Inc. v. Gohl, 30 Wash. App. 750, 758, 637 P.2d 998, 1003, *opinion changed*, 645 P.2d 737 (1981) (the damage award here was said to "slightly exceed" the maximum amount supported by the evidence).

250. Rasor v. Retail Credit, 87 Wash. 2d 516, 554 P.2d 1041 (1976).

into the general scheme of standard of review by treating the amount of damages as a finding of fact. A California appellate court does not weigh the evidence on damages and will reverse a judgment on appeal only if no "substantial evidence" supports the award.[251] Other courts also treat the damages as a question of either fact[252] or law.[253]

The above examples do not exhaust the universe of "other standards." Even if they did, considering the courts' propensity for spontaneously generating standards of review, there will probably be additional standards in the future. The above merely illustrate the fact that the standards discussed in this article will not encompass review of every issue.

VIII. CONCLUSION

There are many standards of appellate review. They have evolved over the course of several centuries; and each has evolved somewhat independently of all the others. The result for anyone looking at the big picture is a state of confusion.

The language used to define different standards often refers to different components of the decision/review process (e.g., "substantial evidence" in the record as opposed to "abuse of discretion" by the decisionmaker). This makes comparison between standards difficult. Interpretation of the standards has done little, if anything, to clarify matters.

The real problem with standards of review, critics argue, is that they have been applied inconsistently. The critics are undoubtedly correct. However, this does not mean that the process as it exists should be scrapped. Too much intelligent consideration has gone into the system as it exists. Nor does the answer lie in further definition of terms. Previous elaborations have often resulted in additional standards. That will not solve the problem; if anything, it will add to it.

A better approach is to recognize the flexible nature of standards (as well as of words themselves, which define standards) and take advantage of that flexibility. Attorneys should argue and courts should decide the amount of deference to accord a lower tribunal decision by focusing on policy considerations: Is demeanor of witnesses important to the case? Does the lower tribunal have particular expertise in the area? Were there factors outside the record that weighed on the finding

251. Hilliard v. A.H. Robins Co., 196 Cal. Rptr. 117, 143 n.28 (Cal. Ct. App. 1983).

252. *See, e.g.*, Albany Ins. Co. v. Bengal Marine, Inc., 857 F.2d 250 (5th Cir. 1988).

253. *See, e.g.*, *In re* American Cas. Co., 851 F.2d 794 (6th Cir. 1988) (applying Michigan law).

or determination? If so, an appellate court should give greatly increased deference to the trial court.

For those who prefer a black-or-white, easy-to-apply standard, such a process is discomforting. However, there are no easy answers to many questions about standard of review. It is much more forthright and intellectually sound to confront the issues on a policy level than to obfuscate the review process with more boilerplate nomenclature followed by more unexplained application.