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ABUSE OF DISCRETION: MAINE'S APPLICATION OF A MALLEABLE APPELLATE STANDARD

Honorable Andrew M. Mead

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ABUSE OF DISCRETION: MAINE'S APPLICATION OF A MALLEABLE APPELLATE STANDARD

*Honorable Andrew M. Mead**

> "malleable" – *adj.* 1. Capable of being extended or shaped by hammering or by pressure from rollers. 2. adaptable or tractable.[1]

I. INTRODUCTION

It is not unusual for an appellate court to simply announce: "In the circumstances of this case, the trial justice did not abuse his discretion . . . ."[2] No further clarification or elaboration is offered by the learned justices of the court. The parties are left with a final judgment, but little understanding of the appellate court's review process. Although the objective of finality is satisfied, the objective of clarity is ignored. When litigants and counsel are faced with similar factual or legal circumstances in the future, they remain without guidance or insight into the factors that the appellate court deemed to be of importance in deciding the issue.

An appellate court's bald statement that a trial court did—or did not—abuse its discretion accomplishes nothing beyond the conclusion of a pending appeal. There is no unique legal process that is invoked by the unadorned reference to the appellate standard of review known as "abuse of discretion." It is a highly flexible and malleable term that is applied to widely differing circumstances with equally differing results. In discussing this standard of review, a noted scholar has commented:

> Clearly there is no such thing as *one* abuse of discretion standard. It is at most a useful generic term. Even within review of discretionary calls (or perhaps because sometimes different types of calls have a varying amount of real judgment to them), this standard of review more accurately describes a *range* of appellate responses. In practice, however, while courts cite "the" abuse of discretion standard in varying contexts, most imply awareness that varying kinds of review follow, whether by firmly applying the factors applicable to the discretionary choice, or by giving a stronger presumption to one set of applications, or even by blatantly stating that several abuse of discretion standards may be involved.[3]

Scholars, lawyers, and judges[4] have struggled mightily with the concept over the years. Some have suggested that the appellate courts have failed to create a

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1. WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 488 (2004).

2. Moore v. Canal National Bank, 409 A.2d 679, 688 (Me. 1979); *see also* Hon. Mark P. Painter & Paula L. Welker, *Abuse of Discretion: What Should It Mean Under Ohio Law?*, 29 OHIO N.U. L. REV. 209, 209-10 (2002); State v. Neeley, 758 N.E. 2d 745, 767 (Ohio Ct. App. 2001) (Painter, J., dissenting).

3. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 77-78 (2000) (citation omitted).

4. Of both the appellate and trial varieties.

cohesive line of reasoning in cases citing abuse of discretion and have simply invoked the concept as a sort of blunt instrument to be used in dispatching the decisions of trial judges and substituting those of the appellate court. The eminent Professor Maurice Rosenberg[5] of Columbia University Law School has made the following observation:

> What are the standards or factors that lead to a finding that there has been an abuse of discretion? The decided cases are not especially informative. Their idea content and occasion for utterance are at about the same level as the sounds made by my college roommate, who was a boxer. While practicing in the room—shadow boxing and sparring—he would explode with noises like, "ugh! ugh! ugh!" as he threw punches, hitting his shadow opponent. The term, "abuse of discretion," seems to me to be the same sort of phenomenon. It is the noise made by an appellate court while delivering a figurative blow to the trial judge's solar plexus. It is a way of saying to the trial judge, "This one's on you." The term has no meaning or idea content that I have ever been able to discern. It is just a way of recording the delivery of a punch to the judicial midriff.[6]

Trial judges often feel quite severely chastised or rebuked by a finding that they have "abused their discretion." After all, the term "abuse" tends to connote some dark act of malfeasance. It suggests that the trial judge has done something that is terribly out of line.[7] This unfortunate choice of language has been noted by legal scholars.[8] In response to this, the New Hampshire Supreme Court has abandoned the language altogether in favor of the term "sustainable exercise of discretion."[9] As of this writing, the Maine Law Court has utilized this language on several occasions.[10]

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5. The late Professor Rosenberg was Medina Professor of Law at Columbia University.

6. Maurice Rosenberg, *Appellate Review of Trial Court Discretion* (May 1975) *in* 79 F.R.D. 173, 180 [hereinafter Rosenberg I].

7. *See* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1103-04 (1984).

8. *See* Davis, *supra* note 3, at 57 (stating that "Judge Friendly, like Professor Rosenberg, believed that the word 'abuse' leads to some untoward conclusions about the decisionmaker. . . ." (citation omitted)).

9. The term first appeared in Bianco, P.A. v. Home Insurance Co., 786 A.2d 829, 832 (N.H. 2001). Two weeks later in State v. Lambert, 787 A.2d 175 (N.H. 2001), the New Hampshire Supreme Court held:

> Because the term "abuse of discretion" may carry an inaccurate connotation, we will hereafter refer to it as the "unsustainable exercise of discretion" standard. To show that the trial court's decision was not sustainable, "the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case."

Id. at 177 (quoting State v. Johnson, 765 A.2d 165, 167 (2000)).

10. *See, e.g.*, Urquhart v. Urquhart, 2004 ME 103, ¶ 6, 854 A.2d 193, 195; Commercial Bank v. Dworman, 2004 ME 142, ¶ 7, 861 A.2d 662, 665; Sullivan v. Porter, 2004 ME 134, ¶ 25, 861 A.2d 625, 634; DiVeto v. Kjellgren, 2004 ME 133, ¶ 11 n.7, 861 A.2d 618, 622; Coyne v. Peace, 2004 ME 150, ¶ 1, ___A.2d___; Bates v. Dep't of Behavioral and Developmental Servs., 2004 ME 154, ¶¶ 38, 40, ___A.2d ___. The Law Court has also recently referred to an "inappropriate exercise of discretion," Maine v. Cornhuskers Motor Lines, Inc., 2004 ME 101, ¶ 10, 854 A.2d 189, 192, and a "reasonable exercise of discretion." Maine v. Forbis, 2004 ME 110, ¶ 7, 856 A.2d 621, 623. The Law Court has not, however, abandoned the classic abuse of discretion terminology. *See, e.g.*, Melanson v. Sec'y of State, 2004 ME 127, ¶ 7, 861 A.2d 641, 644; O'Toole v. KeyBank Nat'l Ass'n, 2004 ME 131, ¶ 13, 861 A.2d 678, 683.

As a starting point, this Article will first undertake a brief review of the traditionally recognized standards of appellate review with a particular focus upon the abuse of discretion standard. As noted herein, this topic has been the subject of innumerable appellate court decisions,[11] considerable scholarly comment,[12] and an authoritative two volume treatise.[13] This Article will then survey Maine Law Court[14] decisions to examine how the abuse of discretion standard has been applied in the state of Maine. Finally, this Article will offer suggestions to bench and bar for the application of this concept in the future.

II. STANDARDS OF APPELLATE REVIEW/ABUSE OF DISCRETION

The right to appeal from a judicial decision has always been part of the legal fabric of this nation[15] and the state of Maine.[16] Regardless of whether this right is seen as a kind of legal "quality control" or a rein on the power of the courts,[17] it is well established in the minds of the citizens that they have the right to have decisions reviewed by courts which have the power to undo what the court below has done.

Although many lay people believe that the right of appeal is an opportunity to have the appellate court try the case again from scratch—a true de novo review—students of the law know this is not so. Appellate courts review the decisions of the court below in very limited and very specific contexts. They are authorized to vacate or modify the trial court's decision only in certain circumstances. In scrutinizing the trial court's decision, appellate courts must apply appropriate standards of review. The facts and circumstances of a particular case will determine which standard of review is invoked.

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11. *See infra* note 12.

12. *See, e.g.*, FRANK M. COFFIN, ON APPEAL 266-67 (1994); Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 VA. TAX REV. 423 (1994); George C. Christie, *An Essay on Discretion*, 1986 DUKE L. J. 747 (1986); Davis, *supra* note 3; Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763-64 (1982); Painter & Welker, *supra* note 2; Rosenberg I, *supra* note 6; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971) [hereinafter Rosenberg II]; Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990).

13. *See, e.g.*, STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW, chs. 4, 7, 11 (3d ed. 1999). Although the title of this comprehensive and authoritative two-volume work suggests that it is limited to the federal courts, it is replete with references to state court decisions and federal decisions with clear implications for state court issues. It provides an indispensable repository of the lines of cases that make up the body of the constantly evolving abuse of discretion case law. *Id.*

14. In Maine, questions of law are determined by the Supreme Judicial Court sitting as the Law Court. *See* ME. CONST. art. VI, § 1; *see also* ME. REV. STAT. ANN. tit. 4, § 51 (West 1989).

15. *See* U.S. CONST. art. III, § 2. Although the Constitution does not expressly provide the framework for appeals, a multiple-tiered system of review was clearly envisioned and subsequent jurisprudence has confirmed such. *See* Rosenberg II, *supra* note 12, at 641-42.

16. *See* ME. CONST. art. VI, § 1; *see also* ME. REV. STAT. ANN. tit. 4 §§ 51, 57. (West 1989 & Supp. 2003).

17. In other words, the right to appeal ensures that the courts are self-regulating in the sense that they are bound by the law. A trial judge's colleagues on the appellate courts will see to it that he does not base his decisions upon his own personal view of justice while disregarding statute and precedent.

Although a number of appellate standards of review have evolved over the years, this section will discuss only the principal three that are most often invoked: clear error, de novo review, and abuse of discretion. Virtually every appellate decision involves one or more of these principles, or their derivatives, expressly or impliedly. Professor Maurice Rosenberg's oft-cited comments probably describe these appellate standards best:

> All appellate Gaul is divided into three parts for review purposes: questions of fact, of law and of discretion. Well accepted principles surround the first two matters:
>
> (1) In reviewing findings of fact, the first issue of consequence is whether the facts were found by a judge or a jury, for that will determine the scope and depth of the appellate court's scrutiny. A reviewing court does not disturb a jury verdict if on any rational view of the evidence, after resolving all issues of credibility in favor of the winner, it was "reasonable." It was reasonable if it could have been arrived at by a process of reasoning from the evidence. By contrast, if the facts were found by a judge alone, his findings need somewhat stronger underpinning. The test of sufficiency is typically phrased in terms of whether the supporting evidence is "substantial." A non-jury finding may be more open to reversal if it rests on documentary evidence rather than on the testimony of live witnesses.
>
> (2) In reviewing questions of law, appellate courts usually follow an approach that is brutally simple or simply brutal (depending on whether the process is being evaluated by the trial judge or an observer less intimately concerned). The appellate courts merely ask themselves whether they agree with the trial judge's resolution of the legal issue. If not, they reverse him quick as a flash—unless they determine that the error made was harmless, or waived.
>
> (3) Finally there are questions of discretion. This is the area in which appellate courts have adopted the remarkably tolerant, generous and permissive attitude already described. By doing this, they limit their prerogatives of review by their own act, without prompting or command by the legislature and even when they are not constrained by the inhibitions on review of facts that were described above. This magnanimity and toleration of lower court decisions they disagree with is not limited to certain courts or modern times.[18]

The invocation of the appropriate appellate standard of review is critical to the issuance of a correct appellate decision. Commentators have repeatedly stressed the importance of appellate counsel and judges specifying the appropriate standard early in their briefs or decisions.[19] Rule 28(a)(9)(B) of the Federal Rules of Appellate Procedure expressly requires an appellant to identify the standard of review prior to any discussion of the issues on appeal.[20]

Maine Law Court decisions have made reference to the three principal genres of appellate review standards noted above.[21] The clear error and de novo stan-

18. Rosenberg II, *supra* note 12, at 645-46.

19. *See, e.g.*, Davis, *supra* note 3, at 82; *see also* Sean T. Carnathan & Karen D. Kemble, *Hints on Writing Law Court Briefs from Some People Who Read Them*, 9 ME. BAR. J. 318, 319 (1994).

20. FED. R. APP. P. 28(a)(9)(B) provides: "The appellant's brief must contain, under appropriate headings . . . the argument, which must contain . . . for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)."

21. *See infra* Part III.

dards have been thoroughly reviewed in an article previously appearing in this publication.[22]

Appellate standards dictate the degree of *deference* which the appellate court is prepared to afford the trial court's decision.[23] The clear error standard is considered to be a very deferential standard—the trial court's factual findings will not be disturbed as long as there is a rational basis for them.[24] This "hands-off" approach is well founded in logic and policy reasons. Countless courts and commentators have noted the trial court's superior position to make such calls—the trial judge is present during the trial or hearing.[25] The trial judge has the best vantage point to make judgments on issues such as credibility.[26] The appellate court's cold transcript is a pale substitute.[27] As such, the facts are considered to be the sole province of the judge or jury.[28] By contrast, on issues of law, the appellate court has at least an equal capability to discern the proper legal standards[29] and will not hesitate to substitute its judgment if it differs from that of the trial court. Accordingly, the de novo standard of appellate review is not deferential at all.

It is interesting to note that appellate standards of review are limitations that the appellate courts have placed, by and large, upon their own prerogative to substitute their judgment for that of the trial court.[30] They are often prepared to defer to the judgment of the trial court despite the fact that they would have decided the issue differently in the first instance. As such, they create ideological zones where the trial court's decisions are, as a practical matter, not subject to appeal—or subject to a very limited review.

If the appellate standards of clear error and de novo review are straightforward in concept and application,[31] the abuse of discretion standard decidedly is not. As stated by the Honorable Henry J. Friendly:[32]

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22. *See* Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367 (1997). At footnote six of Mr. Bosse's excellent commentary, he specifically excludes abuse of discretion from the scope of his article. *Id.* at 369 n.6.

23. *See* Napolitano v. Compania Sud Americana de Vapores, 421 F.2d 382, 384 (2d Cir. 1970).

24. *See* FED. R. CIV. P. 52. The well established "clearly erroneous" rule is sometimes now referred to as a "presumptively correct" analysis of factual findings. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984).

25. *See* Rodriguez v. Jones, 473 F.2d 599, 604 (5th Cir. 1973); *see also* CHILDRESS & DAVIS, *supra* note 13, § 2.09.

26. *See* Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

27. In this age of audio and video records, however, the appellate court's vantage point may approach that of the trial court.

28. The Seventh Amendment to the Constitution of the United States provides: "no fact tried by a jury, shall be otherwise re-examined in any Court of the Unites States, than according to the rules of the common law." U.S. CONST. amend. VII.

29. Some would say that the appellate court is in a better position to make legal pronouncements due to the fact that more than one mind is contributing to the final conclusion. However, for perspective, see Charles Allen Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 741 (1957).

30. There are instances where appellate review is delimited by statutory provisions, but in many instances these are simply invocations of the appellate standards of review already promulgated by the courts.

31. The apparently straightforward application of clear error and de novo standards of review may be illusory. *See, e.g.*, Bosse, *supra* note 22 (providing a full discussion of the complexity of labeling an issue as one of fact or law and the lack of decisional guidance on the subject).

32. The late Judge Friendly was a Judge of the United States Court of Appeals for the Second Circuit.

> There are a half dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.[33]

Judge Friendly suggests that a single definition of abuse of discretion cannot be crafted. Indeed, he suggests that the differences in the definitions illustrate the wide range and adaptability of the abuse of discretion standard as applied in a multitude of cases.[34] Unfortunately, the term is used with considerable abandon by legislative bodies and courts to the point where it has almost no meaning.[35]

Although writers and scholars have written extensively on the topic of discretion generally,[36] the appellate standard of abuse of discretion has been specifically considered only within the last half-century. Any scholarly review of the subject must start with Professor Rosenberg's brilliant and seminal article[37] in which he decries the lack of previous scholarly writing on the subject.[38]

Professor Rosenberg posits that choice is the central concept presented by the exercise of discretion.[39] He states:

> To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another. In this sense, the term suggests that there is no wrong answer to the questions posed—at least there is no *officially* wrong answer.[40]

Professor Rosenberg divides the overarching concept of discretion into two subgroups.[41] The first, which he characterizes as "primary," is a significant grant of power to the court.[42] No constraining rules limit the court's ability to decide.[43] The other type of discretion, which he refers to as "secondary," relates to limits upon the appeal court's ability to substitute its decision for that of the trial court—even if it would have reached a different decision upon the same case.[44] Stated otherwise, secondary discretion has to do with the extent to which the appeal court will defer to the trial court.

Accordingly, discretion involves a *range* of different decisions by the trial court, all of which will be accepted by the appeal court as long as they fall within the scope—as defined by the appeal court—of the trial court's discretion.[45]

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

34. *See id.* at 764.

35. Rosenberg II, *supra* note 12, at 653.

36. *See, e.g.*, Christie, *supra* note 12; *see also* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

37. *See* Rosenberg II, *supra* note 12. A condensed and updated source of much of the same material appears in a presentation by Professor Rosenberg to a Seminar for Federal Appellate Judges on May 13, 1975. *See* Rosenberg I, *supra* note 6.

38. Rosenberg II, *supra* note 12, at 636. Professor Rosenberg states: "there is no reason why it should continue to be an unexplored dark continent in the realm of American justice." *Id.*

39. *Id.*

40. *Id.* at 636-37.

41. *Id.* at 637.

42. *Id.*

43. *Id.*

44. *Id.*

45. Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 642 (1976).

Consider the following illustration:

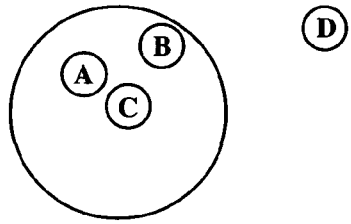


Fig. 1

If the large circle represents the boundaries of the court's discretion and the smaller circles represent possible decisions, decision "C" is right on the money—a presumptively correct decision. Decision "A" is a little off the mark. Decision "B" is on the periphery of the limits of discretion. Decision "D" falls outside the scope of permissible discretion on this matter. Decision "D" will be vacated by the appeals court. Decisions "C," "A," and "B" will all be affirmed despite the fact that they are all notably different and fall at various points within the "circle of discretion."

Practitioners of the law will have little difficulty or disagreement with the concepts illustrated above. However, the conundrum arrives with the inevitable question: How are the parameters of the "circle of discretion" to be established? In the illustration, if the circle were to be constricted, decisions "A" and "B" may be subject to reversal. If the circle were enlarged, decision "D" may fall within the range of decisions to be affirmed.

Cynics may conclude that the entire process is an illusion. Since the appellate court defines the boundaries of the "circle of discretion" on a case-by-case basis, isn't it simply arbitrarily picking and choosing which decisions to uphold and which to vacate? In other words, doesn't the concept of deference fall to the appellate court's circle-drawing whims?[46]

In fact, the abuse of discretion analysis is not driven by the particular *result* in a case.[47] As noted earlier, many highly differing results may still fall within the purview of a judge's discretion. Instead, the abuse of discretion review often focuses largely upon the judge's decision-making process. For example, if a judge has considered improper factors in reaching her decision (regardless of the appropriateness of her conclusions), the result constitutes a per se abuse of discretion.[48] Similarly, if a judge's decision-making process demonstrates clear gaps in logic or other substantial deficiencies, the final decision (regardless of how correct it may appear upon its face) will be vacated.[49]

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46. *See* Hon. Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas, The Fairchild Lecture*, 1994 WIS. L. REV. 9, 10, 24-25 (1994). In a remarkably frank discussion of how appellate courts handle abuse of discretion matters, Judge Schroeder notes that such decisions are based, at least in part, upon the recommendations of law clerk—law clerks who, in her words, "haven't a clue" about what constitutes abuse of discretion. To them, it has little meaning other than to affirm. *Id.* at 24-25.

47. *See* Davis, *supra* note 3, at 49 ("In review of discretion, the focus of the reviewing court is supposed to be on the process used to reach the decision and *not* on the decision itself.").

48. *See In re* Japanese Elec. Prods., 723 F.2d 238, 265-66 (3rd Cir. 1983), *rev'd on other grounds*, Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986).

49. *See* CHILDRESS & DAVIS, *supra* note 13, § 4.08(D).

The amount of deference which the appellate court is prepared to grant to the trial court decision varies greatly with the type of case and decision before the court. For instance, appellate courts will seldom, if ever, tinker with a procedural or administrative decision of a trial court.[50] Decisions like the order of witnesses or the granting of continuances[51] are generally considered to be exclusively within the domain of the trial court and a reversal for an abuse of discretion is a rare event indeed. By contrast, decisions concerning wide-ranging policy issues are accorded significantly less deference and will be overturned significantly more often.[52]

It has also been said that the trial court's discretion is broader in cases involving novel issues such as recently enacted laws or new administrative rules.[53] However, as courts become more familiar with such matters and more cases are decided on similar issues, a narrowing of the trial court's discretionary prerogative often occurs.[54] For each genre of cases and each set of laws, a body of law often evolves that dictates the amount of deference that the appellate court will accord a trial court decision in similar matters. In some cases, the discretion may be exceptionally broad; in others it may be exceedingly narrow. Professor Davis has made the following observation:

> It is not difficult to understand how the factual circumstances of a case become linked to the standard of review on appeal. The trial court often exercises its discretion after considering the unique facts and factors presented by the case. On appeal, the appellate court reviews the trial court's exercise of discretion for abuse *under the relevant considerations*. Those factors, then, become part of the individual issue on appeal and thus part of the particular appellate application of an abuse of discretion standard. Therefore, the abuse of discretion label is often a variable that depends for its meaning on the context and content of its application. The test becomes a sliding scale rather than a single yardstick.[55]

In determining the level of deference which an appellate court should afford to a trial court decision, Professor Davis suggests consideration of the following four questions:

> 1. Has this decision been given to the discretion of the trial court? If so, why? That is, is there law to apply, a framework of legal standards to contain possible discretion, factors to guide the exercise of the discretion, but nevertheless no actual rule of law, so that the trial court is best positioned to exercise the necessary discretion?
>
> 2. If the decision to be made has a framework of legal standards or factors to guide the trial judge's exercise of discretion, has the judge stayed within the framework and properly considered the factors?
>
> 3. If this is a discretionary decision that is in the evolutionary process, is there enough precedent to show a pattern of decision and, if so, what is that pattern?

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50. *See* Herring v. New York, 422 U.S. 853, 862 (1975).

51. *See* Avery v. Alabama, 308 U.S. 444, 446 (1940).

52. *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).

53. *See* Rosenberg II, *supra* note 12, at 662 ("When the problem arises in a context so new and unsettled that the rule-makers do not yet know what factors should shape the result, the case may be a good one to leave to lower court discretion . . . before the appellate judges commit themselves to a prescribed rule.").

54. *See id.* at 650.

55. Davis, *supra* note 3, at 81-82 (footnotes omitted).

> 4. Has the appellate court indicated in this or analogous issues that it is ready to state a rule of law based on that pattern?[56]

Similar "checklist" or "flowchart" techniques for formalizing the abuse of discretion analysis have been proposed by several courts.[57] While these formulaic approaches constitute a commendable starting point, it seems unlikely that a single, one-size-fits-all template can be promulgated for all abuse of discretion reviews.

In *Pierce v. Underwood*,[58] the United States Supreme Court presented a list of factors for an appellate court to consider in determining the degree of deference to be accorded under the abuse of discretion standard in civil cases.[59] Notably, the court conceded that the analysis is "not rigorously scientific."[60] In this fee-shifting dispute,[61] the Supreme Court determined that the lower court's decision would be reviewed under an abuse of discretion standard. The parties argued that "objective indicia," such as the terms of a settlement agreement and other courts' rulings on the subject, would determine the issue.[62] The Court allowed that these factors were relevant, but far from dispositive.[63] In arriving at its decision, the Court considered the statutory provisions (even though the statute did not expressly dictate the level of deference), the decisions of other courts on similar matters, the fact that the trial judge may have been "better positioned" to decide the issue,[64] the fact that the case presented a "novel question, little susceptible, for the time being at least, of useful generalization"[65] and the substantial liability involved in the matter.[66] As such, *Pierce v. Underwood* proffers a procedural framework for courts to use to balance the levels of deference to be accorded under the abuse of discretion standard.

Although the Supreme Court tipped its hat to the traditional trio of appellate review standards in the *Pierce* case,[67] it took a radical turn in the 1990 case of *Cooter & Gell v. Hartmax Corp.*[68] Traditionalists must have expelled a collective gasp when the Court undertook a unified approach to the standards of appellate

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56. *Id.*

57. *See* Johnson v. United States, 398 A.2d 354, 363 (D.C. App. 1979); *see also* Landon v. Jean-Paul Budinger, Inc., 724 S.W.2d 931, 937-40 (Tex. App. 1987).

58. 487 U.S. 552 (1988).

59. *Id.* at 558-59. In promulgating these factors, the court cites works by Professor Rosenberg, *supra* note 6, and Professors Childress and Davis, *supra* note 13. Pierce v. Underwood, 487 U.S. at 558; *see also* Painter & Welker, *supra* note 2, at 227.

60. Pierce v. Underwood, 487 U.S. at 563.

61. Under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (2000), a plaintiff's attorney's fees may be ordered paid by the losing government agency unless the agency can demonstrate that the agency's position at trial was "substantially justified." *See* Pierce v. Underwood, 487 U.S. at 563.

62. Pierce v. Underwood, 487 U.S. at 568.

63. *Id.*

64. *Id.* at 559-60 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

65. *Id.* at 562 (citing and following Rosenberg II, *supra* note 12, at 662-63).

66. *Id.* at 563.

67. *Id.* at 558 (stating early in the Court's opinion: "For purposes of standard of review, decisions of judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion').").

68. 496 U.S. 384 (1990).

review.[69] In the *Cooter & Gell* matter, in reviewing the imposition of Rule 11 sanctions,[70] the Court discussed the traditional standards of review at some length and commented: "The Court has long noted the difficulty of distinguishing between legal and factual issues. Making such distinctions is particularly difficult in the Rule 11 context."[71] The Court made the following ruling:

> In light of our consideration of the purposes and policies of Rule 11 and in accordance with our analysis of analogous EAJA provisions, we reject petitioner's contention that the Court of Appeals should have applied a three-tiered standard of review. Rather, an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.[72]

As such, the Court announced that the clear error and de novo doctrines are effectively subsumed with the abuse of discretion standard—at least in the context of Rule 11 disputes. An argument can thus be made that the Court is moving in a direction that accords greater deference to trial court decisions. However, the Court has apparently not altogether abandoned the traditional three appellate standard lexicon—this writer can find no other Supreme Court cases where the standards are again grouped under an overarching abuse of discretion standard. Indeed, there seems to be disagreement within the Court regarding the practical effect of certain appellate standards of review.[73] In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[74] Professor Rosenberg's three appellate standards appear to be alive and well—at least in the context of a punitive damage award dispute.

III. THE MAINE EXPERIENCE

The Maine Law Court has used the term "abuse of discretion" extensively over the better part of two centuries. The table below represents the number of times the phrase "abuse of discretion" appears in Maine Law Court cases for the years indicated:[75]

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69. Interestingly, the Court in *Cooter v. Gell*, *id.* at 403, cites *Pierce v. Underwood*, 487 U.S. 552 (1988), as supporting a unitary abuse of discretion standard.

70. The Court quotes the 1983 Amendment to Rule 11, which provided in pertinent part:

> The signature of an attorney . . . constitutes a certificate . . . that [he or she] . . . has read the pleading . . . [and] it is well grounded in fact and is warranted by existing law. . . . If a pleading . . . is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction . . . .

Cooter v. Gell, 496 U.S. at 392.

71. *Id.* at 401 (citations omitted).

72. *Id.* at 405.

73. See Ornelas v. United States, 517 U.S. 690, 699 (1996), in which the majority held that the trial court's determinations of reasonable suspicion (in Fourth Amendment cases) must be reviewed de novo. Having said that, however, the Court also opined that care should be taken to "give due weight to inferences drawn from those facts by resident judges," a directive to which the dissent delivers a blistering rebuttal, stating "the Court cannot have it both ways." *Id.* at 705 (Scalia, J., dissenting).

74. 532 U.S. 424 (2001).

75. This data was obtained from a "terms and connectors" search conducted on the LexisNexis legal research service, available at http://www.lexisnexis.com.

1835-1900	3
1900-1910	1
1911-1920	10
1921-1930	17
1931-1940	13
1941-1950	17
1951-1960	31
1961-1970	44
1971-1980	206
1981-1990	594
1991-2000	819
2001-1/1/2005	326

Table 1

The decade of the 1970s marked a quantum leap in the number of instances of reference to the abuse of discretion standard. To a degree this might represent a movement toward greater deference to trial court decisions by the appellate courts. However, it may simply reflect the quantum leap in court filings that occurred during the same period. In any event, the analysis of the Maine cases undertaken in this Article will be divided into two categories: cases decided prior to 1971 (which will be referred to as "the early cases") and those decided after 1971 (which will be referred to as "the later cases").[76]

A. The Early Cases

The earliest case on record that recites the phrase "abuse of discretion" is *Twitchell v. Blaney*.[77] In this insolvency case, the judge refused to appoint one Charles D. Seaton as assignee of the debtor's estate after Mr. Seaton had been duly elected such by the creditors. The court held:

> There should be some redress, in extreme cases at least, against the abuse of discretionary powers by inferior tribunals. Of course, the remedy must be sparingly and cautiously applied. The action of a judge in matters of discretion, and the appointment of or the refusal to appoint a particular person as assignee comes within his discretion,—is generally conclusive. There must be palpable error and abuse of discretion to justify our interference.

76. Although this writer has reviewed all of the pre-1971 cases that reference abuse of discretion, the sheer number of post-1971 cases prohibits individual review. Instead, for those matters, a sampling of the cases was undertaken.

77. 75 Me. 577 (1884). As noted, *supra* Part II, the concept of discretion is as old as the law itself, and general references to it can be found in the very earliest of Maine cases. However, the focus of this Article is upon the concept of abuse of discretion and discussion will be limited to cases invoking that specific phrase.

> In our judgment, the facts of the present case do not justify the remedy asked for by the petitioners. The reasons given by the judge for his action may not have been in strictness legal ones. But we cannot say there may not be some expediency in his position. The judge had a right to regard the assignee chosen by the creditors as not fitted for the place. His discretion, not ours, governs. It is not enough to overrule the judge's action, that this court might have acted differently upon the question. Nor does it disturb the result that he gave wrong reasons for a right action.[78]

Although the court does not define specifically what constitutes an abuse of discretion, it suggests that the redress for such should be "sparingly and cautiously applied" even where the judge "gave wrong reasons for a right action"—a deferential standard indeed.[79] Similarly, in *Cowan v. Umbagog Pulp Company*, the court held that it was not an abuse of discretion for a judge to send a jury to deliberations three times.[80] In *State v. Siddall*, the court found no abuse of discretion in refusing to allow the withdrawal of a guilty plea.[81]

The first major effort to define the parameters of abuse of discretion occurred in 1918 in the case of *Charlesworth v. American Express Company.*[82] During the trial in that matter, the judge allowed the plaintiff to amend his declaration of injuries.[83] The new assertions were a surprise to the defendant and a continuance was sought to review the new revelations and prepare.[84] The presiding Justice denied the continuance.[85] The Law Court vacated the Superior Court's judgment, stating:

> The granting or denying of a motion for continuance is of course recognized as a matter of judicial discretion, but the term judicial discretion does not mean the arbitrary will and pleasure of the Judge who exercises it. It must be sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law so as to work out substantial equity and justice. It is magisterial, not personal discretion. The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion. Incidents attending the progress of a trial are necessarily addressed to the discretion of the court. "That discretion is not to be exercised arbitrarily but to be guided and controlled, in view of all the facts, by the law and justice of the case subject only to such rules of public policy as have been wisely established for the common good." York & Cumberland R. R. Co. v. Clark, 45 Me. 151, 154.
>
> Hence the rule has been laid down and often applied in this State that a discretionary ruling is reviewable when some palpable error has been committed or when an apparent injustice has been done, but not otherwise.[86]

78. Twitchell v. Blaney, 75 Me. at 581-82.
79. *Id.* at 582.
80. 91 Me. 26, 39 A. 340 (1897).
81. 103 Me. 144, 68 A. 634 (1907).
82. 117 Me. 219, 103 A. 358 (1918).
83. *Id.* at 221, 103 A. at 358.
84. *Id.*, 103 A. at 358-59.
85. *Id.*, 103 A. at 359.
86. *Id.* (citations omitted).

Abuse of discretion rulings throughout the first half of the twentieth century tended to focus upon evidence and administration issues.[87] However, two cases cast doubt as to whether the abuse of discretion standard was directed toward errors of fact or law (or both). In *Thompson v. American Agricultural Chemical Co.*, the court stated: "[f]indings of fact must abide in the absence of proof of abuse of discretion."[88] In *Potter's, Inc. v. Virgin*, the court held: "[i]f, however, he [the judge] decides any one of them [the statutory criteria] without proof and there is nothing in the record to justify his decision, there is an abuse of discretion and the question becomes one of law."[89] Accordingly, it would appear in the early cases that the Maine Law Court pressed the abuse of discretion standard into service in a wide variety of settings.[90]

In 1943, the Law Court confirmed its commitment to a highly deferential abuse of discretion standard in *Lebel v. Cyr*,[91] when it again invoked the broad language of the *Charlesworth* decision: "The chief test as to what is or is not a proper exercise of judicial discretion is whether in a given case it is in furtherance of justice. If it serves to delay or defeat justice it may well be deemed an abuse of discretion."[92] In the 1957 case of *Young v. Carignan*,[93] the Law Court held:

> There is no error in a discretionary ruling unless indeed [the Justice] has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument. When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion cannot be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law. When some palpable error has been committed or an apparent injustice has been done, the ruling is reviewable on exceptions.[94]

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87. *See, e.g.*, Barber v. Barber, 115 Me. 327, 98 A. 822 (1916) (credibility issues are entrusted to the court and will not be set aside in the absence of abuse of discretion); Rodick v. Me. Cent. R.R. Co., 109 Me. 530, 85 A. 41 (Me. 1912) (admission of photographs into evidence is within trial court's discretion and will not be reversed in absence of abuse); Gregory v. Perry, 126 Me. 99, 136 A. 354 (1927) (granting of mistrial is within the discretion of the court and will not be reversed in absence of abuse); Glazer v. Grob, 136 Me. 123, 3 A. 895 (1935) (as long as a jury is instructed properly, it is no abuse of discretion to decline to amplify a particular point); Grant v. Dolley, 131 Me. 500, 163 A. 85 (1932) (admission of expert testimony is within the trial judge's discretion and will not be overturned in absence of discretion).

88. Thompson v. Am. Agric. Chemical Co., 134 Me. 61, 181 A. 829 (1935).

89. Potter's, Inc. v. Virgin, 139 Me. 300, 303, 30 A.2d 276, 277 (1943).

90. Other decisions simply muddy the waters further. *Compare In re* Estate of Frank E. Wagner, 155 Me. 257, 265, 153 A.2d 619, 624 (1959) ("This court has decided many times that when a decree or ruling rests on the judicial discretion of the court its decision may not be successfully reviewed unless an abuse of discretion is shown or there is error of law.") *and* Augusta Water Dist. v. Augusta Water Co., 100 Me. 268, 270, 261 A. 176, 177 (1905) ("The exercise of a judicial discretion by a justice who is given by law authority to determine questions in his discretion cannot be reviewed by an appellate court, unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law.") *and* State v. MacDonald, 229 A.2d 321, 324 (Me. 1968) ("No abuse of discretion having been shown, the denial of the motion was clearly not a 'manifest error of law.'").

91. 140 Me. 98, 34 A.2d 201 (1943).

92. *Id.* at 102, 34 A.2d at 202-03 (citations omitted).

93. 152 Me. 332, 129 A.2d 216 (1957).

94. *Id.* at 337, 129 A.2d at 218-19 (citations omitted).

Despite the seemingly deferential standard of review, however, the court does not hesitate to overturn the trial judge's ruling when an "apparent injustice" has been done.[95]

In the 1960s, the court continued to routinely apply the abuse of discretion standard to cases involving evidence and trial management issues.[96] In *State v. Oliver*,[97] the Law Court quoted with approval the following language of the United States Supreme Court:

> The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. The Styria, 186 U.S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027. It takes account of the law and the particular circumstances of the case and "is directed by the reason and conscience of the judge to a just result." Langnes v. Green, 282 U.S. 531, 541, 51 S. Ct. 243, 75 L. Ed. 520. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." Burns v. United States, 287 U.S. 216, 222, 53 S. Ct. 154, 156, 77 L. Ed. 266 (1932).[98]

Similarly, in *Strater v. Strater*,[99] the court quotes extensively from a Michigan case[100] which held:

> Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. When the determination of any questions rests in the judicial discretion of a court, no other court can dictate how that discretion shall be exercised, nor what decree shall be made under it. There are in such cases no established legal principles or rules by which the law court can measure the action of the sitting justice unless, indeed, he has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument. . . . "Discretion

95. *See, e.g.*, State v. Jutras, 154 Me. 198, 144 A.2d 865 (1958) (finding that the trial court inappropriately cut off cross-examination).

96. *See, e.g.*, Int'l Paper Co. v. State, 248 A.2d 749 (Me. 1968) (involving a refusal of request for view, allowance of expert testimony, and limitation of cross-examination); State v. Fernald, 248 A.2d 754 (Me. 1968) (applying abuse of discretion standard to exemption from an order segregating witnesses); Willette v. Umhoeffer, 245 A.2d 540 (Me. 1968) (applying abuse of discretion standard to Rule 60(b) relief from final judgment ruling); State v. Hodgkins, 238 A.2d 41 (Me. 1968) (involving a child witness and late deliberations); State v. Beckus, 229 A.2d 316 (Me. 1967) (applying abuse of discretion standard to refusal of motion for change of venue); State v. Coty, 229 A.2d 205 (Me. 1967) (applying abuse of discretion standard to refusal of motion for separate trials); MacLean v. Jack, 160 Me. 93, 99, 198 A.2d 1, 4 (1964) (decision on motion for new trial not set aside unless "clear and manifest abuse of discretion . . .").

97. 247 A.2d 122 (Me. 1968).

98. *Id.* at 123.

99. 159 Me. 508, 196 A.2d 94 (1963).

100. Spalding v. Spalding, 94 N.W.2d 810 (Mich. 1959).

> implies that in the absence of positive law or fixed rule, the judge is to decide by his view of expediency or of the demands of equity and justice."[101]

As the early cases illustrate, the Law Court has struggled to define the abuse of discretion standard. It has applied the standard to a fairly wide variety of issues and has not always strictly adhered to the three standards of review identified by Professor Rosenberg.[102] It was upon this patchwork of definitions and varying applications of the abuse of discretion standard that the litigation explosion of the 1970s arrived.

B. The Later Cases

Although the Maine Rules of Civil and Criminal Procedure were both promulgated in the 1960s,[103] they are mentioned here as their impact was primarily felt in the "later cases" cited herein. Although the phrase "abuse of discretion" appears only once in either set of rules,[104] the word "discretion" appears frequently.[105] As noted herein, the Law Court has frequently applied an abuse of discretion standard even where none is expressly stated in the applicable statute or rule.[106]

Although the later cases continue to use the phrase "abuse of discretion" frequently, it is occasionally difficult to determine where the line is drawn between review of facts, de novo review of law, mixed questions of fact and law, and flaws in the decision-making process. In *Driscoll v. Gheewalla*,[107] the court stated:

> In such circumstances, the standard of review is the same in the Law Court as it was before the Superior Court, whether the Board abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record. This standard of review, whether phrased in terms of abuse of discretion, clear error or substantial evidentiary support on the whole record, presents a single formula of uniconcept in appellate procedure. *See Bruk v. Town of Georgetown*, 436 A.2d 894, 989 (1981).[108]

Additionally, it is not unusual for the court to apply the standards interchangeably in similar settings.[109]

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101. Strater v. Strater, 159 Me. at 519-20, 196 A.2d at 99-100.

102. *See* Rosenberg II, *supra* note 12, at 645-46.

103. The Maine Rules of Civil Procedure were adopted on December 1, 1959, and the Maine Rules of Criminal Procedure were adopted on June 1, 1965.

104. *See* ME. R. CRIM. P. 36B(b), which provides that the Superior Court review of juvenile court orders shall be for "error of law or abuse of discretion, as determined from the record."

105. The Civil Rules contain no less than twenty instances where issues are expressly committed to the judge's discretion. The Criminal Rules mention eleven such instances. The Maine Rules of Evidence contain six references. The Maine Revised Statutes make thirteen references to an abuse of discretion standard, most of which appear in title 5, §§ 8001-11001 (the Administrative Procedure Act), title 38, §§ 361-571 (protection and improvement of waters), and title 15, §§ 3001-3601 (Maine Juvenile Code).

106. *See, e.g.*, State v. Cookson, 2003 ME 136, ¶ 20 n.2, 837 A.2d 101, 108 n.2. (discussing whether ME. R. EVID. 702 decisions are reviewed for clear error or abuse of discretion depending upon the circumstances).

107. 441 A.2d 1023 (Me. 1982).

108. *Id.* at 1026 (citations omitted).

109. *See* State v. Pierce, 438 A.2d 247, 253 (Me. 1981) ("The decision of the Superior Court to deny Pierce's motion [for new trial] must stand unless clearly erroneous.").

The Law Court has developed particular lines of cases that invoke a highly deferential approach to the abuse of discretion standard. In *Werner v. Lane*,[110] the Law Court reviewed the denial of a motion for a new trial brought pursuant to ME. R. CIV. P. 59(a). In vacating the trial justice's denial, the court used the following language:

> In appraising at the appellate level the propriety of the decision of the trial court upon a motion for a new trial, the test to be applied is, whether a clear and manifest abuse of discretion on the part of the trial justice is shown. *Chenell v. Westbrook College*, Me., 324 A.2d 735 (1974). It is the same rule as applies in the grant or denial of a motion for a mistrial, the latter usually being raised prior to verdict, while the motion for a new trial comes after the entry of judgment. See *Quinn v. Moore*, Me., 292 A.2d 846 (1972).[111]

The court's choice of language ("clear and manifest abuse of discretion") suggests that the appellate standard applied to motions for new trial is something above that of the garden variety abuse of discretion standard, or at least a very highly deferential version thereof. In fact, this is consistent with the historical evolution of appellate standards for such motions.[112]

In a similar vein, the Law Court seems to have established a highly deferential appellate standard of review in instances where trial courts have found no excusable neglect where time deadlines have been missed. In *Casco Bay Island Transit District v. Maine Public Utilities Commission,* the court stated:

> In a civil case, a finding of no excusable neglect constitutes an abuse of discretion *only in rare instances where extraordinary circumstances would work an injustice. Lane v. Williams*, 521 A.2d 706, 707 (Me. 1987); *Eaton v. LaFlamme*, 501 A.2d 428, 429 (Me. 1985). We apply this standard in evaluating the Commission's denial of a motion to extend time for filing an appeal as in appeals in civil actions from the Superior Court. *See* 35 M.R.S.A. § 303(1); M.R. Civ. P. 73(a).[113]

In attachment matters, the court has repeatedly made reference to the "clear abuse of discretion standard of review,"[114] thereby suggesting that the appellate court is looking for something beyond ordinary abuse of discretion.

The Maine cases clearly require that prejudice be demonstrated before an abuse of discretion will justify reversal of the trial judge's action.[115] Mere error is insuf-

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110. 393 A.2d 1329 (Me. 1978).

111. *Id.* at 1332. However, see *Hathaway v. City of Portland*, in which the court neatly laid out the three traditional standards, saying that it would review the decision "for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record." 2004 ME 47, ¶ 14 n.1, 845 A.2d 1168, 1172 n.1 (quoting Brackett v. Town of Rangeley, 2003 ME 109, ¶ 15, 831 A.2d 422, 427).

112. Historically, the granting or refusal of a new trial in civil matters was not reviewable. Chenell v. Westbrook, 324 A.2d 735, 736 n.1 (Me. 1974). Likewise, in the criminal setting, no review was possible except in felony cases. Bodwell-Leighton Co. v. Coffin & Wimple, Inc., 144 Me. 367, 69 A.2d 567 (1949).

113. Casco Bay Island Transit Dist. v. Me. Pub. Util. Comm'n, 528 A.2d 448, 451 (Me. 1987) (emphasis added).

114. Herrick v. Thebarge, 474 A.2d 870, 874 (Me. 1984); *see also* Burns v. Smith, 495 A.2d 777, 778 n.2 (Me. 1985).

115. State v. Pierce, 438 A.2d 247, 253 (Me. 1981); *see also* State v. Wing, 294 A.2d 418, 420 (Me. 1972); Spickler v. York, 566 A.2d 1385, 1389 (Me. 1989).

ficient to justify the reversal of a court's ruling.[116] The granting of routine motions (such as motions to amend pleadings) constitutes an abuse of discretion only if prejudice is demonstrated.[117]

The later cases continue to provide significant discretion to the trial judge for decisions involving admission of evidence and the management of trials.[118] The primary discretionary aspect in evidence issues often involves the balancing test provided in Rule 403 of the Maine Rules of Evidence.[119] Although the court generally allows a trial court wide discretion in the management of trials, the trial court's prerogatives are not unlimited. The complexity of the facts and law are factors to be considered in a trial judge's refusal to allow a defaulted defendant to offer evidence.[120] If the case is complex, and large sums of money are at issue, a judge abuses his discretion by refusing to allow a defaulted party to conduct discovery and to offer evidence on damages.[121]

Post-trial matters, such as motions for new trial or for relief of judgment, are entrusted to the trial judge's discretion and will not be set aside in the absence of abuse of discretion.[122] In *State v. Cookson*,[123] the court succinctly set out the standards of review for a motion for a new trial as follows:

> We review a motion for a new trial on the ground of newly discovered evidence for clear error and abuse of discretion. *State v. Sheldon*, 2000 ME 193, ¶ 7, 760 A.2d 1083, 1085. Factual findings stand unless clearly erroneous, but the decision as to whether the defendant has met the necessary elements is reviewed for an abuse of discretion. *Id.* Furthermore, the need for finality and for the preservation of the integrity of criminal judgments causes us to regard a motion for a new trial on the ground of newly discovered evidence with disfavor.[124]

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116. Phillips v. E. Me. Med. Ctr., 565 A.2d 306, 308 (Me. 1989). In *Phillips*, the court stated: "The exclusion of Mrs. Gardner's deposition was error. Rulings of this kind are not disturbed, however, unless the party challenging the ruling shows prejudice." *Id.* (citing ME. R. CIV. P. 61; 2 RICHARD H. FIELD ET AL., MAINE CIVIL PRACTICE § 61.1 (2d ed. 1970); ME. R. EVID. 103(a); RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE § 103.1 (1987)).

117. Bad faith or delay are often sources of prejudice; prejudice must be more than an increased likelihood of an adverse result for the responding party. 1 RICHARD H. FIELD ET AL., MAINE CIVIL PRACTICE, § 15.4 (2d ed. 1970).

118. *See, e.g.*, State v. Melvin, 390 A.2d 1024 (Me. 1978) (admissibility of expert testimony and photographs; request for jury view); Depositors Trust Co. v. Blanchard, 377 A.2d 101 (Me. 1977) (scope of cross examination); Higgins v. Higgins, 370 A.2d 670 (Me. 1977) (recording of proceedings); State v. Ifill, 349 A.2d 176 (Me. 1975) (change of venue); State v. Gordon, 321 A.2d 352 (Me. 1974) (single trial of two indictments); State v. Wing, 294 A.2d 418 (Me. 1972) (joinder and severance); Saucier v. Allstate Ins. Co., 1999 ME 197, 742 A.2d 482 (application of ME. R. EVID. 403, adequacy of jury instructions, award of attorney's fees); State v. Labare, 637 A.2d 854 (Me. 1994) (continuance); Poulette v. Herbert C. Haynes, Inc., 347 A.2d 596 (Me. 1975).

119. *See, e.g.*, State v. Bowman, 681 A.2d 469, 471 (Me. 1996).

120. *See, e.g.*, Boit v. Brookstone, 641 A.2d 864, 866 (Me. 1994).

121. *Id.*

122. *See, e.g.*, Fleet Bank v. Hunnewell, 633 A.2d 853, 854 (Me. 1993) (relief from final judgment); State v. Bazinet, 372 A.2d 1036, 1040 (Me. 1977) (motion for mistrial); Laurel Bank & Trust Co. v. Burns, 398 A.2d 41, 45 (Me. 1979) (relief from final judgment).

123. 2003 ME 136, 837 A.2d 101.

124. *Id.* at 110 (citing State v. Ardolino, 1999 ME 14, ¶ 8, 723 A.2d 870, 873).

However, again, the court's language is not always clear as to which standard of appellate review is being invoked and what the level of deference is to be.[125]

The Law Court has consistently articulated a high degree of deference for the decision-making and fact-finding processes of the trial courts. In a case involving an attorney's fee award,[126] the court stated: "The determination of a reasonable fee is reviewed only for abuse of discretion, and the court's factual findings are final unless demonstrated to be clearly erroneous."[127] The rationale for this high degree of deference is often stated as the trial court's superior perspective on the actual courtroom proceedings.[128] The Law Court has stated: "We give considerable deference to the presiding justice's decision on such a motion because of his familiarity with the case and his superior position to evaluate the credibility and good faith of the parties who appeared before him."[129]

In *Crossley v. Taylor*,[130] the Law Court reviewed the decision of a district court judge which denied plaintiff's motion to allow a late notice of appeal.[131] Three days had elapsed since the time when his appeal should have been filed.[132] The court noted the usual deference to the trial judge's discretion, but noted that it was not the trial judge who actually ruled on the motion. As such, the court seemed to suggest that less deference should be given to the decision. The court ultimately determined—virtually as a matter of law—that excusable neglect was demonstrated and the denial of his motion was an abuse of discretion. Accordingly, references to the "trial judge" do not necessarily equate to "trial court judge."[133]

IV. CONCLUSIONS AND RECOMMENDATIONS

A discussion of the abuse of discretion standard could extend without end, but this Article cannot. Although this Article presents instances of confusing language and occasionally conflicting holdings, it must be said that the application of the abuse of discretion standard by the Law Court—particularly in recent history—is quite commendable. Virtually any decision by the Law Court these days commences with a clear identification of the appellate standard of review. It is followed by a detailed description of the facts. It concludes by stating whether the trial court decision can be sustained under the applicable standard of review.

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125. *See* Phillips v. E. Me. Med. Ctr., in which the dissent notes:

> When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion can not [sic] be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law.

565 A.2d 306, 310 (Me. 1989) (citing Young v. Carignan, 152 Me. 332, 337, 129 A.2d 216, 218 (1957) (quoting Rioux v. Portland Water Dist., 132 Me. 307, 309, 170 A. 63, 64 (1934))).

126. Estate of Davis, 509 A.2d 1175 (Me. 1986).

127. *Id.* at 1178.

128. *See, e.g.*, Fleet Mortgage Corp. v. Cobb, 611 A.2d 565, 566 (Me. 1992); Gregory v. City of Calais, 2001 ME 82, ¶ 9, 771 A.2d 383, 386.

129. Porges v. Reid, 423 A.2d 542, 544 (Me. 1980).

130. 2004 ME 37, 845 A.2d 574.

131. *Id.* at 574.

132. *Id.* at 574-75 (stating that the district court clerk apparently cited incorrect appeal deadlines in her communications to plaintiff's counsel).

133. It is not clear whether the court would have found an abuse of discretion if the decision had been made by the actual trial judge and a greater degree of deference allowed.

This process creates many independent lines of caselaw where the degree of deference in each particular line is established. In some instances the degree of deference is still evolving; in others it has been static for many years. This is precisely the process that Professors Rosenberg, Childress, and Davis mention in their scholarly dissertations.[134] Although the legal community can take pride in the fact that Maine is clearly in the mainstream application of this process, the question remains: Can the application of the abuse of discretion standard be improved or clarified?

As a trial judge, I am appreciative of any appellate court's sensitivity toward my feelings upon having a decision reversed. I appreciate their kind gesture in attempting to banish the word "abuse" from the abuse of discretion standard. However, in the larger scheme of things, I fear that any benefit gained from this approach may be outweighed by the confusion and difficulty that this change of terminology may create.

Like it or not, the term "abuse of discretion" is well established as a legal term of art. Its purpose—although not always its meaning—is understood by lawyers and judges across the land. As noted above, the degree of deference to be accorded to a trial judge's decision in any particular circumstance can be gleaned only from a careful review of appellate decisions construing earlier cases with identical facts and identical standards of review. In this age of electronic legal research by "terms and connectors" searches, any change of terms may cause an erstwhile researcher to miss an entire body of caselaw. A researcher looking for "abuse of discretion" cases will miss "sustainable exercise of discretion" cases, and vice versa.[135] So, to my kindhearted appellate colleagues, thank you for your gesture. But I will be perfectly fine if you stand by the traditional language—and I hope you will.[136]

After noting the Law Court's careful recitation of the standard of appellate review at the outset of each of its decisions these days, I randomly reviewed briefs filed in Law Court appeals and noted the lawyers are not quite as diligent. As noted earlier in this Article, most commentators suggest that the appellate standard of review may be the most important argument a lawyer can make. Perhaps the court will consider amending the Rules of Appellate Procedure to add a provision, as reflected in the federal rules, requiring the parties to specify the standard of review at the outset of their arguments and support it with appropriate authority.

As noted above, the court creates narrow lines of caselaw construing the abuse of discretion standard which establish varying degrees of deference. In other words, the court says, in effect: "These are the facts. Upon these facts, we find no abuse of discretion." However, the decisions seldom explain *why* this is not an abuse of discretion. The reader gains no insight into the court's reasoning process. He or she knows that another case with identical facts will produce the same result, but

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134. *See supra* Part II.

135. One solution—though practically unworkable—would be to drop a footnote in every instance where "sustainable exercise of discretion" is mentioned and state: "This is the appellate standard formerly known as abuse of discretion."

136. On a related note, I fear that a unitary abuse of discretion standard as espoused by the U.S. Supreme Court in *Pierce v. Underwood,* 487 U.S. 552, 552-53 (1988), may also create confusion despite the fact that it is predicated upon a firm base of logic. Professor Rosenberg's three traditional appellate standards of review offer consistency and relative clarity in application. As such, I favor their continued use.

that is of little assistance when the facts vary from the decided case. By ruling in this fashion, the court follows the time honored practice of deciding appeals upon the narrowest grounds possible. The court thus avoids making sweeping pronouncements or offering final (and often unworkable) definitions. However, the body of law that results is an enormously complex knot of minute threads that are sometimes exceedingly difficult to untangle.

As a trial judge, I would welcome the court embellishing its decisions with some explanation of why a particular set of circumstances constitutes an abuse of discretion. However, I am aware that by inviting the court to illustrate its reasoning process, I am also inviting the court to paint itself into corners on occasions. I understand that this suggestion is not likely to be enthusiastically embraced by the court. Instead, I offer another approach—radical, I am sure in the view of many—to clarify and improve the abuse of discretion standard.

The key concept in the abuse of discretion standard is deference.[137] As noted above, the term "abuse of discretion" does not have a single meaning within the law. Instead, it is a conduit for the pronouncement of the degree of deference which an appellate court will afford to a trial court in any given set of circumstances. The levels of deference established to date are many.

I propose that we quantify and standardize them.

As we know, there are well-established standards of proof: probable cause, preponderance, clear and convincing, beyond a reasonable doubt, and so on. Each of these standards of proof has a clear meaning to lawyers; each has a body of caselaw which defines its parameters.

We can do the same with the levels of deference within the abuse of discretion standard. While I would hesitate to boldly propose the specific terminology for the incremental steps of deference, it would presumably reflect the increasing levels of deference to which the appellate court will subscribe in each particular circumstance.[138]

Following this approach, an appellate decision regarding a trial court's decision to take a witness out of order would read something like: "The court's decision is reviewed under the extremely deferential application of the abuse of discretion standard." Or in a case which involves significant policy issues, a decision might state: "The court's decision is reviewed under the minimally deferential application of the abuse of discretion standard."

The parceling of the abuse of discretion standard into pre-defined levels of deference may diminish the appellate court's prerogative to redraw the "circle of discretion"[139] on a case-by-case basis, but it would contribute greatly needed clarity and simplicity to a complex area of the law. By establishing a consistent terminology, the court could demystify the abuse of discretion standard and allow judges and practitioners to more fully and effectively undertake their duties. I suspect that I speak for both groups when I say that any effort to promote consistency and clarity in this difficult area of the law would be gratefully received.

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137. Indeed, if the courts of this country couched their earliest decisions in terms of deference rather than "abuse of discretion," much of this discussion might not be taking place now.

138. For example, four gradations could be established: minimally, moderately, highly, and extremely deferential.

139. *See supra* Part II, fig. 1.

AUTHOR'S NOTE

As I searched through a virtual ocean of cases, only a tiny sampling of which are cited in this Article, looking for the true meaning of "abuse of discretion," I began to feel a kinship with seekers of the Holy Grail. Although I frequently questioned the existence of the object of my quest, as a matter of faith I have not given up the search.

A.M.M.