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STANDARDS OF REVIEW — LOOKING BEYOND THE LABELS

RONALD R. HOFER*

I. INTRODUCTION

In recent years, the concept of standards of review has come to the fore in appellate circles, often bewildering law students and occasional appellate practitioners. Standards of review prove difficult in both theory and practice. They are not susceptible of easy definition, and few guidelines assist the bench and bar with the practical problem of getting from a particular appellate issue to the appropriate standard of review.

This article endeavors to cast some light upon the three conventional kinds of appellate questions, namely fact, law, and discretion. By doing so, it will provide some benchmarks designed to assist in assigning a particular standard of review to a particular issue.

Finally, this article advocates that appellate courts reject their long-standing reliance upon the three conventional labels in favor of an analysis which affords deference to lower tribunals where they were in a better position to address a question than the appellate court would be. Appellate opinions should acknowledge not only the degree of deference afforded to particular questions, but also the reasons for that deference or lack of it. The bench and bar alike will benefit when opinions employing standards of review explain not only the “what,” but the “why” as well.

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1. The primary focus of this article is upon appellate court review. What theory it contains is applicable to more than just Wisconsin; nevertheless, this article focuses upon Wisconsin law in order to avoid addressing the varying degrees and nuances of deference used in other jurisdictions. See generally, e.g., Brennan, Standards of Appellate Review, 33 Def. L.J. 377 (1984); Childress, Standards of Review in Eleventh Circuit Civil Appeals, 9 Nova L.J. 257 (1985).
II. STANDARDS OF REVIEW

A. Definitions

A standard of review is "a limiting mechanism which defines an appellate court's scope of review,"\(^2\) and hence its power.\(^3\) However, standard of review is far easier to describe than to define. Metaphorically, it sets the height of the hurdles over which an appellant must leap in order to prevail on appeal. One commentator adopts a different metaphor: "[Standards of review] indicate the decibel level at which the appellate advocate play to catch the judicial ear."\(^4\) On a more literal level, standards of review are measures of the degree of deference that appellate courts must pay to lower tribunals, most notably trial courts. In so allocating deference, these standards define the allocation of power between the trial and appellate courts.\(^5\)

Perhaps standards of review are more easily understood by reference to a pointedly narrow and decidedly nontechnical description of the trial and appellate processes. In the course of a trial, a trial judge makes a variety of intermediate rulings. Ultimately, he or she, with or without a jury, resolves the case in some fashion. A disappointed party may then come to an appellate court and urge that court to overthrow the trial court's final judgment or order by raising issues which argue that one or more of the trial court's determinations,\(^6\) either intermediate or ultimate, were erroneous.

The appellate court, bound as it is to the record on appeal,\(^7\) and without benefit of live witnesses or the like, does not review all issues similarly. On some issues, the appellate court defers in large or small measure to the trial court's determination. On others, it pays no deference. Obviously, the more an appellate court defers on an issue, the more difficult it will be for an appellant to prevail. In this process, standards of review identify how much deference is paid to each kind of issue. The wise appellant who knows and states the standard of review for an issue also knows the relative difficulty of the task before him or her. The careful intermediate appellate

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2. Brennan, supra note 1, at 379.
5. See Childress, supra note 1, at 263.
6. Throughout this article, I will use the generic term "determination" to embrace any sort of trial court pronouncement which serves as the gravamen for an issue on appeal.
court that knows and uses the standard of review lessens its own chances of error or reversal.

B. Types

Standards of review classically include two elements: An identification of the type of issue, and the measure of deference paid to that issue. Subject to some hybrids and exceptions, the oft-quoted trichotomy proposed by Professor Rosenberg is still helpful: "[A]ll appellate Gaul is divided into three parts for review purposes: questions of fact, of law and of discretion."\(^8\) The basic measure of deference for each of these types is well settled in Wisconsin: Factual findings of the trial court will not be overturned unless clearly erroneous.\(^9\) "The appellate court may determine questions of law independently with no deference to the conclusions reached by the trial court."\(^10\) An appellate court will sustain a discretionary decision if "the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach."\(^11\)

C. Problems

Were these the alpha and omega of standards of review, the only practical problem remaining, albeit a substantial one, would be the identification of a particular issue as a question of fact, law, or discretion. However, the appellate waters have been long muddied with various exceptions. For example, an appellate court will not defer to a finding of fact if that finding is

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9. Walser Leasing, Inc. v. Simonson, 120 Wis. 2d 458, 461, 355 N.W.2d 545, 546 (Ct. App. 1984). Note that the "clearly erroneous" standard, taken from Wis. STAT. § 805.17(2) (1989-90), has been held to be essentially the same as the great weight and clear preponderance of the evidence standard. See Noll v. Dimicelli's Inc., 115 Wis. 2d 641, 643-44, 340 N.W.2d 575, 577 (Ct. App. 1983).


part of a stipulation\textsuperscript{12} or otherwise undisputed.\textsuperscript{13} Conversely, an appellate court will defer to the legal conclusion of a lower tribunal where that tribunal has some special expertise respecting a particular body of law.\textsuperscript{14} While there are other exceptions, these exceptions do not roil those waters alone. Further confusion arises when we consider a hybrid standard, the "mixed standard."\textsuperscript{15}

We can see from the above discussion that the determination of the measure of deference paid to a particular issue is not reducible to the mere identification of fact, law, or discretion. Now we shall see that getting from a real world issue to the appropriate measure of deference is at least as problematic. That is, the "labeling" of an issue, the classifying of it by type, is not self-evident. Take, for example, a seemingly straightforward appellate issue: "Did the trial court err in determining that X was married before January 1, 1990?" Assume, as background, that X had to have gotten married before January 1, 1990 in order to take under his rich uncle's will. At trial, X's witnesses testified that they were present at the wedding ceremony on December 31, 1989. Others testified that the ceremony was on January 1, 1990. The trial court ruled in X's favor, and Y, the rich uncle's wife, appeals arguing error in the trial court's determination that her nephew was married on December 31, 1989. Conveniently ignoring discretion for the moment, is Y's issue one of fact or law? Although intuition might lead one to conclude that, on its face, it is one of fact, the question could just as readily be one of law. If Y concedes the legality of the ceremony but argues that the ceremony actually occurred on January 1, 1990, rather than on December 31, 1989, then the issue is one of fact to which an appellate court owes considerable deference to the trial court's findings. If, however, Y concedes that X's witnesses were accurate in their recollection, but argues that the ceremony was without legal effect in that it failed to comply with the requisite statute, then the issue is one of law because "the application of a statute to a particular set of facts is a question of

\begin{footnotes}
\item[13] Cf. Boutelle v. Chrislaw, 34 Wis. 2d 665, 673, 150 N.W.2d 486, 490 (1967) (the court is also not bound by a finding based upon undisputed evidence when that finding is essentially a conclusion of law).
\item[14] See Robert Hansen Trucking, Inc. v. LIRC, 126 Wis. 2d 323, 331, 377 N.W.2d 151, 154-55 (1985). Note that while this case refers to deference paid to an administrative agency, much the same process occurs when federal appeals courts defer on legal questions to district courts experienced in the law of the state in which the district court sits. See, e.g., Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967); see also Childress, supra note 1, at 276.
\item[15] See infra note 78 and accompanying text.
\end{footnotes}
law.”

If Y concedes nothing, two issues are then presented, one of fact and one of law. This homely example shows that the leap from the issue to its appropriate standard of review may be far from easy or intuitive.

III. FACT VERSUS LAW

Leaving discretion aside for a moment, let us examine facts versus law in an effort to get beyond the mere labels. At first blush, this distinction might seem self-evident, yet commentators have disputed for decades the boundaries of each, and noted their “delusive simplicity.”

Professor Jaffe saw fact and law as a spectrum, with one shade blending imperceptibly into the other. Elsewhere, the law is seen as growing downward toward “roots of fact” which grow upward to meet it.

Although there is undoubted truth in the United States Supreme Court’s statement that “we [do not] yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion,”

legal scholars have attempted to provide guidelines, at least, toward defining this distinction. The tendency to divide questions along legal and factual lines is “very strong.”

Others have defined questions of law as those that deal with the general body of legal principles; questions of fact deal with “all other phenomena . . . .” The difference between fact and law has been characterized as that between “ought” questions and “is” questions, or between policy and empirical questions.

Still others have employed a result-oriented approach, which may well be approaching its century mark. “[W]hen the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of ‘fact’; and when otherwise disposed, they say it is a question of ‘law.’” Somewhat related is the school of thought that ascribes the labeling process to the appellate courts’ “intuitive appreciation of the law/fact

22. Isaacs, supra note 17, at 3.
23. See Davis, supra note 21, at 208.
25. See Fox, Law and Fact, 12 HARV. L. REV. 545, 551 (1898-99).
But upon what is this "intuition" based? Let us examine how various commentators have defined law and fact.

A. Definitions of "Fact"

Judges and academics alike have waxed eloquently over definitions of these most seminal terms. "Nothing is a question of fact which is not a question of the existence, reality, truth of something; of the rei veritas." Professor Thayer further glossed facts as "indicating things, events, actions, conditions, as happening, existing, really taking place." Professor Bohlen extends the definition beyond the strictly empirical to the subjective as well; facts include "not only the physical facts of the case but also more abstract matters, such as the state of mind of those individuals whose state of mind may be of legal importance."

About facts, or questions of fact, we can say that they involve the "empirical — revolving around actual events, past or future," that they relate to "a person's acts, or his intent in doing such acts," that they are "descriptive" rather than "dispositive," and that they call for proof rather than argument. Also, what might appear singularly self-evident is also worthy of note: A finding of fact is "independent of or anterior to any assertion as to its legal effect."

B. Definitions of "Law"

Definitions of "law" are no less plentiful, yet few boil down to more than "that which is not fact," or "that which involves rules or principles." Law consists of "those rules and standards of general application by which the state regulates human affairs." Those rules and standards optimally should be "generally and uniformly applicable to all persons of like qualities and status and in like circumstances," and should be "capable of being predicated in advance and which [being] so predicated, await proof of the

27. Note, supra note 17, at 173.
29. Id.
31. Note, supra note 17, at 179.
32. Cheese v. Industrial Comm'n, 21 Wis. 2d 8, 15, 123 N.W.2d 553, 557 (1963).
34. Id. at 1304.
35. Jaffe, supra note 18, at 241.
37. Id. at 904 (footnote omitted).
facts necessary for their application." While the principles of law are perceived as existing antecedently to particular facts, the application of those principles occurs only after the facts have been ascertained.

A more pragmatic approach to the fact/law dichotomy begins to take us in an entirely different direction. "The law is what the court knows." More descriptive than definitional, this approach, ringing as it does of the "arguing in a circle" fallacy, at least provides accuracy, if at the expense of utility: The law is what we are accustomed to leave to courts.

C. Law and Fact: A Functional Approach

Our discussion of definitions has thus far taken us, it would seem, little way from a purely intuitive understanding of fact and law. Fact is empirical, it concerns itself with events occurring either in the real world or in the mind, and it is the fodder for the application of law. Law, on the other hand, consists of rules, standards, or principles determined in advance of their application. These definitions, it is submitted, offer insufficient guidance in determining which is which; case law, while of assistance concerning particular factual circumstances, provides little general assistance.

This definitional approach, which Professor Davis labels the "analytical, literal, or conceptual" approach, emphasizes the meanings of "law" and "fact." One looks at the trial court's questioned determination, and measures it against one's articulated or intuitional definitions of "law" and "fact." Once done, the assigned label governs, by and large, the degree of deference to be afforded.

However, a far more workable approach is what Davis terms the "practical, functional, pragmatic or policy approach . . . which attaches these labels [of 'fact' and 'law'] only on the basis of weighing the practical reasons for and against each possible allocation." Though Davis thought that these labels might be too "deeply embedded" in legal literature to be eliminated, he believed that "a recognition of the desirability of a change is helpful to straight thinking."

Here, we begin by asserting that labels of "fact" or "law" are little more than shorthand for measures of deference. Therefore, to know what is fact

38. Bohlen, supra note 30, at 112.
39. See Paul, supra note 19, at 821.
40. Issacs, supra note 17, at 4 (footnote omitted).
41. Issacs, supra note 17, at 12.
42. See Childress, supra note 1, at 275.
43. Davis, supra note 21, at 192.
44. Davis, supra note 21, at 192-93.
45. Davis, supra note 21, at 193.
or law is to know what is or is not deferred to. By seeing what is or is not deferred to, we can begin to glean why deference exists. Now other approaches to the understanding of fact and law become pertinent.

We can begin to understand the "why" of the deference question by looking at case law. "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witness by those who see and hear them."\(^{46}\)

The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print.\(^{47}\)

This functional or practical approach was addressed directly by the Wisconsin Court of Appeals in *State v. Pepin*.\(^{48}\)

The rationale behind all appellate review may be fairly characterized in two extremes: an appellate court will defer in large part to a trial court's determination where the lower court is in a better position to make that determination than is the appellate court; conversely, little or no deference is accorded where the appellate court is as capable of determining the question as is the trial court. Questions of fact are accorded deference because the trial court was present at the reception of evidence and had an opportunity to view the demeanor of witnesses and assess their credibility . . . . Questions of law, on the other hand, are traditionally accorded little or no deference because there is nothing intrinsic to their determination which gives the trial court any advantage over an appellate court.\(^{49}\)

As Professor Davis put it, "those who see and hear the witnesses testify are in a better position to determine some aspects of fact questions than those who are limited to a cold record . . . ."\(^{50}\)

This "better position" analysis is scarcely new;\(^{51}\) yet it is surprisingly neglected as an analytical tool. Its one central advantage as a test for determining whether a question is one of fact or law is a kind of practical clarity:


\(^{48}\) 110 Wis. 2d 431, 328 N.W.2d 898 (Ct. App. 1982).

\(^{49}\) Id. at 435-36, 328 N.W.2d at 900 (citation omitted).

\(^{50}\) Davis, *supra* note 21, at 208.

\(^{51}\) See, e.g., D. WOTHER, *supra* note 3; Brennan, *supra* note 1, at 379; Brown, *supra* note 36, at 927.
If the trial court was in no better position to determine a question, the appellate court need not defer.\textsuperscript{52}

But before we can engage in the application of the better position test, we must examine three other antecedent concerns. First, why do appellate courts not defer to trial courts' conclusions of law? Second, in what ways can a trial court be said to be in a better position to determine a question than would be an appellate court? Third, can deference depend upon any factors other than better position?

1. Why Not Defer on Law?

Perhaps no more need, nor can, be said about this than that questions of law are "traditionally accorded little or no deference because there is nothing intrinsic to their determination which gives the trial court any advantage over an appellate court."\textsuperscript{53} By pointing out that a trial court must have an advantage in order to be deferred to, this statement does make clear that trial courts must yield to their equally advantaged appellate tribunals. Yet, for its implicit "tie goes to the appellate court" conclusion, the quoted statement begs the question of deference in the first instance. Perhaps appellate superiority on "law" stems from a hierarchical model. Judges, rather than juries, answer legal questions because they are "better qualified than the jury to interpret the written language."\textsuperscript{54} So too, then, are appellate judges better qualified than their counterparts on trial bench? Perhaps, if only by dint of numbers; three (or seven or nine) heads are, so hopes the law, better than one. As Swift said, "So naturalists observe, a flea/ Hath smaller fleas that on him prey;/ And these have smaller still to bite 'em/ And so proceed ad infinitum./ Thus every poet, in his kind,/ Is bit by him that comes behind."\textsuperscript{55} For "poet," read "trial judge."

2. What Constitutes "Better Position?"

Second, a question with a more serious answer: What constitutes a "better position?" Here, there are some obvious answers and some less obvious answers. Deference is accorded to determinations founded on the trial court's viewing of the witnesses and on its reception of evidence.\textsuperscript{56}

\textsuperscript{52} The entire question of the degree of deference due to particular questions is beyond the scope of this essay. This essay engages in the fiction that appellate court deference is a binary question; either a determination is deferred to or it is not. The gradations of that deference are irrelevant here.

\textsuperscript{53} Pepin, 110 Wis. 2d at 436, 328 N.W.2d at 900.

\textsuperscript{54} Davis, supra note 21, at § 30.02, at 197.

\textsuperscript{55} SWIFT, ON POETRY. A RHAPSODY (1733).

\textsuperscript{56} See, e.g., Pepin, 110 Wis. 2d at 435-36, 328 N.W.2d at 900.
This deference embraces the trial court's determinations, tacit or overt, on credibility. "It is generally held that whether made by [a] jury, judge, or agency a determination of credibility is nonreviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it." According deference further recognizes the trial court's opportunity to evaluate the demeanor of the witnesses. There can be little question that appellate courts are "ill-suited to consider the variables that go into fact-finding." The deference accorded to the trial court's presence at the reception of testimony extends to reasonable inferences drawn from the credible evidence. The trial court has a "superior opportunity to get 'the feel of the case.'" The deference may be seen rooted in whatever those intangibles are that elude 'print (notably the print of the record on appeal) and that make up the "climate" of the trial.

"Better position" may also account for a notable exception to the principle that appellate courts do not defer to lower tribunals on questions of law. Where an administrative agency has significant expertise in applying a statutory concept to a concrete fact situation, the court reviewing that decision should give weight to the agency's value judgment. Here, the initial tribunal's better position is not based upon its witnessing some particular litigant, witness, or trial. Rather, deference is paid to expertise developed through an agency's experience in implementing the statute. Hence, an administrative agency may be put in a better position than an appellate court by virtue of the agency's repeated administering of a statute.

Thus, better position appears to encompass two different meanings of the word "experience." First, a trial tribunal's better position depends upon its having experienced or "sensed" the trial itself. Second, its better position may depend upon its prior experience, endowing it with superior practical knowledge.

59. D. Walther, supra note 3, at 3-6.
63. See Atchison, Topeka and Santa Fe Ry. Co. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957); see also Rosenberg, Appellate Review, supra note 8, at 183 (pointedly characterizing that case).
64. See Nigbor v. DILHR, 120 Wis. 2d 375, 383-84, 355 N.W.2d 532, 537 (1984). This decision is also notable for the court's indirect eschewing of the fact and law labels; it refers to the question as a "value judgment." Id.
65. For a discussion of this concept, see Drivers Local 695 v. LIRC, 154 Wis. 2d 75, 81-84, 452 N.W.2d 368, 371-72 (1990).
3. Does Deference Depend on Other Factors As Well?

Other reasons than better position are often propounded to account for the deference paid by appellate courts to trial courts. Although addressing the deference paid to discretionary acts, Professor Rosenberg's catalog of the reasons given for deferring bears addressing here.\textsuperscript{66} Rosenberg classifies the first two of these reasons as "bad": judicial economy and morale boosting.\textsuperscript{67} Whether these reasons are, as Rosenberg suggests, somehow suspect is, for our purposes, moot. Judicial economy requires an appellate court to "sign off on a large proportion of the decisions a trial court makes, for otherwise it would never be able to get its work done."\textsuperscript{68} True in practice or not, the rule fails to aid us because, in Rosenberg's words, "it is non-discriminating. It could apply to any and every question."\textsuperscript{69} Morale boosting, no more satisfactory from a functional perspective than is judicial economy, means that trial judges would become demoralized if all their rulings were measured by a \textit{de novo} yardstick. Again, this rule is nondiscriminating. Closely allied with these reasons are the correlatives of finality, which bolsters confidence in the judicial process,\textsuperscript{70} and preservation of lower court legitimacy.\textsuperscript{71}

Regardless of their accuracy, these principles fall to the wayside in a functional analysis. They do not espouse deference because of any quality found in a particular issue. Rather, they are \textit{ex post facto}, arising from larger policy concerns; they arise from the general rather than from the particular.

Rosenberg's two \textit{good} reasons for deference can assist us here. One he calls "the 'you are there' reason,"\textsuperscript{72} basically the same as the "better position" analysis discussed earlier. The other, which might fairly be called an infinite variety principle,\textsuperscript{73} will be discussed at greater length in the context of discretion.

4. A Recap

We have seen that appellate courts do not defer to lower courts' conclusions of law because the lower courts were in no better position to deter-
mine the questions than were the appellate courts. Conversely, appellate courts do defer to lower courts' findings of fact because the lower courts, by virtue of their first-hand viewing of the witnesses and the testimony, were in a better position than appellate courts to determine questions affected by weight and credibility concerns.

We then may test a particular issue whose standard of review is unknown by making several inquiries of it. Was the trial court's determination dependent upon any of the following: (1) An assessment of the credibility of any witnesses? (2) A weighing of conflicting testimony? (3) A weighing of conflicting evidence? and (4) The application of a statute within the particular expertise of that tribunal? Negative answers to all these questions suggest that the issue is one to which little deference should be paid — conventionally, an issue of law. Affirmative answers to any of these questions suggest that the issue is one to which some deference should be paid — conventionally, one of fact.

This sort of functional analysis enables us to see the logic of at least some of the earlier-mentioned apparent anomalies of case law. For example, in Boutelle v. Chrislaw, the Wisconsin Supreme Court began its discussion of the merits of the case with the following statement which tacitly acknowledges a functional or practical approach to questions of law and fact:

This was a trial to the court. A finding of fact made by a trial judge will not be set aside upon appeal unless it is contrary to the great weight and clear preponderance of the evidence. However, this court is not bound by a finding of the trial court which is based upon undisputed evidence when that finding is essentially a conclusion of law.

Here, we can see the functional approach at work. What would seem to be a finding of fact becomes a conclusion of law not because of the nature of the question presented (i.e., a definitional approach), but rather because of the way the question came to the trial court, and the resources available to it for the resolution of that question. Facts accepted by the trial court as undisputed require none of those advantages available (when they are available) to the trial judge: the weighing of testimony, the determination of credibility, and the sifting and winnowing dependent upon the trial judge's experiencing of the trial. In short, the trial judge is in no better position

74. 34 Wis. 2d 665, 150 N.W.2d 486 (1967).
75. Id. at 672-73, 150 N.W.2d at 490.
76. A trial court would presumably be free to reject even undisputed testimony on credibility grounds. Cf. Thiel v. Damrau, 268 Wis. 76, 85, 66 N.W.2d 747, 752 (1954). Were that to happen, an appellate court on review ought to defer to that credibility determination.
to make a finding dependent solely upon such undisputed facts than would be the appellate court, because nothing is lost in translation from trial to appeal. Therefore, the question is one of law because the appellate court can answer it as well as could the trial court. Much the same analysis holds true for stipulated facts.77

D. Mixed Questions of Fact and Law

We come now to a hybrid which a functional approach again aids in explaining: The mixed question. While the concept of mixed questions of fact and law can be traced back some two hundred years,78 scholars have not always agreed as to the treatment of such questions. Thayer viewed them as questions of fact,79 Holmes as questions of law.80 Further, it would appear that they are near allied to the concept, now somewhat outmoded, of ultimate facts.81

But for our purposes, a historical account is less valuable than a practical one. A mixed question of fact and law is one with both factual (i.e., deferential) and legal (i.e., nondeferential) components. The first question to be answered in a mixed question is “what, in fact actually happened . . . .”82 To the extent that this determination is contingent upon the trial court’s better position, it is deferred to. The second question is “whether those facts, as a matter of law, have meaning as a particular legal concept.”83 No deference is afforded to this trial court determination. Conceptually, the “facts” referred to in the second question must be understood as facts as found by the trial court. Viewed in that light, the mixed question standard becomes clear from a functional approach: that part of the trial court’s determination which depended upon the trial court’s better position is deferred to. But the application of that part to an objectified standard of law is an exercise not entirely dependent upon the experience of the trial

77. See, e.g., State v. J.C. Penney Co., 48 Wis. 2d 125, 151, 179 N.W.2d 641, 655 (1970).
78. See K. Davis, supra note 21, § 30.01 at 189-90 and cases cited therein.
80. O. Holmes, Collected Legal Papers at 236 (1920); see also K. Davis, supra note 21, at § 30.02, at 195-96.
81. See Note, supra note 17, at 173-75 and cases cited therein; see also Cointe v. Congregation of St. John the Baptist, 154 Wis. 405, 418, 143 N.W. 180, 186 (1913).
83. Id.
Let us take an example, albeit a loaded one, of an issue to determine how we arrive at a mixed question functionally. Smith strikes pedestrian Jones with his automobile; Jones sues Smith for negligence and wins. Smith appeals, disagreeing with the trial court's determination of negligence. The issue on appeal is: "Was Smith negligent in striking Jones?" An answer to this depends upon two antecedent questions: "Just what did Smith do?" and "Does that conduct correspond to what a reasonable person would have done?"

Concerning the first question, we now inquire whether the trial court was in a better position to make that initial determination than would be an appellate court. This, in turn, depends upon how the circumstances of the accident came out at trial. If the circumstances of the accident were accepted as undisputed, or were stipulated to, no deference is necessary because the trial court was in no better position to decide the facts than would be the appellate court. Therefore, the "findings" concerning the accident itself would be treated as if they were "conclusions of law;" they need not be deferred to. If, on the other hand, witnesses gave differing accounts of the accident, the trial court's position in determining weight and credibility is superior to the appellate court's, and deference ought therefore to be accorded.

Concerning the second question, whether the reasonable person standard is satisfied, again we inquire about "better position." Here, regardless of their source, the facts establishing Smith's conduct are facts as found; the application of those found facts to a legal standard, here the reasonable

84. The mixed question standard, when viewed from the perspective of function, implies a characteristic of the judging process that is equally capable of applying a trial court's findings of fact to a legal standard. It follows that the findings of fact must be assumed to be a complete and perfect rendering of all that the trial court experienced at the trial; how else can we say that the trial court's position, in deciding the question of law, is not superior to the appellate court's? The accuracy of the assumption that the findings of fact inform the appellate court to the same degree that the experience of the trial informed the trial court is open to some question, but is beyond the scope of this essay.
86. See, e.g., Pabst Brewing Co. v. City of Milwaukee, 125 Wis. 2d 437, 444, 272 N.W.2d 680, 684 (Ct. App. 1985).
88. See Boutelle v. Chrislaw, 34 Wis. 2d 665, 672-73, 150 N.W.2d 486, 490 (1967).
89. See State v. J.C. Penney, 48 Wis. 2d 125, 151, 179 N.W.2d 441, 655 (1970).
person standard, is not dependent upon better position. Hence, an appellate court owes it no deference, and we label it a question of law. 91

IV. DISCRETION: A TERTIUM QUID?

Of the appellate triumvirate of fact, law, and discretion, the last is easily the most neglected and the most nebulous. 92 While concepts of fact and law can be grasped intuitively, although imperfectly, the concept of discretion does not provide us with as convenient a handle. Before we attempt to determine some characteristics, or at least signposts, of discretionary acts, let us first examine how discretionary acts are reviewed.

A. Appellate Court Treatment of Discretionary Acts

Leaving aside for the moment the question of what discretionary acts are, let us examine how they are treated on appeal in Wisconsin. A discretionary determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. 93 Discretion is not synonymous with decision making, but rather contemplates a process of reasoning from facts of record and reasonable inferences from them. 94 While the basis for an exercise of discretion should be set forth in the record, 95 it will be upheld if the appellate court can find facts of record which would support the trial judge's decision. 96

An appellate court will not uphold a trial court's discretionary determination if the trial court abuses or misuses its discretion. This occurs if the discretionary determination relies upon an erroneous view of the law, a misapplication of the law, 97 or it is based on irrelevant factors, 98 impermissible factors, 99 or a mistaken view of the evidence. 100

Considering that a discretionary determination is a conclusion having both factual and legal components, 101 the most obvious question is what

91. See Nottelson v. ILHR Dep't, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763, 768 (1980).
92. See Rosenberg, Judicial Discretion, supra note 8, at 635-36.
94. See McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971).
95. State v. Hutnik, 39 Wis. 2d 754, 764, 159 N.W.2d 733, 738 (1968).
96. Maier Constr., Inc. v. Ryan, 81 Wis. 2d 463, 473, 260 N.W.2d 700, 704 (1978) (citations omitted).
97. Id. See also Hutnik, 39 Wis. 2d at 763, 159 N.W.2d at 737.
101. See Hartung, 102 Wis. 2d at 66, 306 N.W.2d at 20-21.
distinguishes a discretionary determination from a mixed question of fact and law? To determine this, we must first examine the characteristics of the discretionary determination.

**B. Hallmarks of Discretion**

Professor Rosenberg identifies the basic idea of discretion as "choice." However, choice is too protean a concept in law to have much utility. Trial judges choose between conflicting versions of the factors in determining a finding of fact. They choose between conflicting arguments in arriving at statutory interpretation, a question of law, and they choose among a variety of possible punishments in meting out sentences, a discretionary determination.

Thus, choice must be defined more particularly. One commentator characterizes that choice as involving not right or wrong, but "better or worse." This approach is consonant with the statement cited by Rosenberg that defines a discretionary question as one with "no fixed principles by which its correctness may be determined."

Perhaps now we may catch a glimmer of the distinction between mixed questions and discretionary ones. In a mixed question, the usual formulation describing the nexus between fact and law is that "whether the facts fulfill a particular legal standard is itself a question of law." Stated functionally, an appellate court is as capable of applying the law to the facts as was the trial court. The legal component of a discretionary determination, however, would seem to be different from that in a question of law. In discretionary matters, presumably, an appellate court defers because it would be disadvantaged in attempting to apply the standard de novo, or to reproduce circumstances under which the trial court applied it initially.

An examination of at least some types of discretionary legal standards bears out this assumption. Some discretionary legal standards or requirements are sufficiently broad or open-ended so that their application is not

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103. *E.g.*, Bucyrus-Erie Co. v. ILHR Dep't., 90 Wis. 2d 408, 417, 280 N.W.2d 142, 146-47 (1979).
susceptible of one "correct" answer; others consist of many parts whose application necessitates a weighing of factors or considerations.

Of the first, or "open-ended," type of discretionary legal standard, which we might call a "no wrong answer" standard, we might take as a good example the Wisconsin discretionary change of venue statute. Section 801.52 of the Wisconsin Statutes, reads: "The court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses."108 Here, the legal standard component is a fine example of a question guided by no fixed principle; "in the interest of justice or for the convenience of the parties or witnesses" are scarcely standards at all, if we view standards as rules against which things (here, the facts) are measured. In any event, it may fairly be said that decisions which are based upon standards as nebulous as the interest of justice or the convenience of parties or witnesses result in better or worse answers, rather than "right or wrong" ones.

Of the second or multifarious type of discretionary legal standard, which we might call a "factor" standard, let us look at criminal sentencing. Three primary factors have been identified as crucial in the discretionary act of sentencing: "the gravity of the offense, the character of the offender, and the need for protection of the public."109 A substantial number of constituent factors, which gloss the three primary factors, have been deemed relevant. They include:

The defendant's personality, character and social traits, the results of a presentence investigation, the vicious or aggravated nature of the crime, the degree of defendant's culpability, the defendant's demeanor at trial, the defendant's age, educational background and employment record, cooperativeness, the defendant's need for close rehabilitative control, and the rights of the public.110

It should be clear that the application of the facts (which, it should be remembered, may not yet have been rendered as findings in any memorandum decision, but rather are to be "found" only as the underpinnings for the discretionary sentencing decision) to the relevant sentencing factors is an exercise particularly dependent upon value judgments, evaluation, and weighing. Again, like the "no wrong answer" standard, with a "factor" standard the trial judge labors in the realm of better or worse, rather than right or wrong.

110. State v. Killory, 73 Wis. 2d 400, 408, 242 N.W.2d 475, 481 (1976) (citing State v. Tew, 54 Wis. 2d 361, 367-68, 195 N.W.2d 615, 619 (1972)).
Both "no wrong answer" and "factor" standards found in discretionary acts are characterized by Professor Rosenberg's cynosure of discretion as choice. The "choice" which characterizes discretion is a choice dependent upon weighing or balancing facts, factors, or a combination of both.

The weighed or balanced choice principle would appear to account for the deference paid in denoting, as discretionary, sentencing, equity, and custody. In sentencing, a nearly infinite range of options is available to the trial court. In equity, the remedies are, again, wide ranging. Finally, in custody, while the number of possible options are frequently small, the underlying factual considerations are manifold and the statutory factors are substantial.

A different facet of discretion is its association with matters of procedure. As Professor Rosenberg stated: "[I]n matters governed by procedural rules, discretion is very often at large." But, as is so often the case with legal terms, "procedure" itself needs a bit of a gloss here to become useful. Procedure here should be seen as what is required to get and keep the trial process (e.g., calendaring, pretrial activity, motion practice, the trial itself, etc.) moving. Again, these are examples of "no fixed principle" standards. In discretionary matters, deference is paid to the trial judge not only in his or her role as auditor/viewer, but as presider as well, respecting circumstances "where not only would it be difficult to prescribe exact and minute regulations, but where the situation itself is not easily reproduced in its original character . . . ." "One of the powers which has always been recognized as inherent in courts . . . has been the right to control its order of business . . . ." Hence, the following procedure-oriented determinations, all central to keeping the trial process moving, are deemed discretionary: enlargement of time to file an answer or complaint.

111. See Rosenberg, Appellate Review, supra note 8, at 175.
112. See Mulder v. Mittelstadt, 120 Wis. 2d 103, 115, 352 N.W.2d 223, 228 (Ct. App. 1984).
114. See Mulder, 120 Wis. 2d at 115, 352 N.W.2d at 228-29.
117. Rosenberg, Appellate Review, supra note 8, at 173; see also Rosenberg, Judicial Discretion, supra note 8, at 653.
118. See sources cited supra note 106.
120. Id. at 23 (quoting Thurmond v. Superior Court, 66 Cal. 2d 836, 839, 427 P.2d 985, 986-87, 59 Cal. Rptr. 273, 274-75, (1967)).
122. Stryker v. Town of La Pointe, 52 Wis. 2d 228, 231-32, 190 N.W.2d 178, 180 (1971).
amendment of pleadings, discovery matters, dismissals for delay, change of venue, motions for mistrial, rulings on admissibility of evidence, competency of expert witnesses, arguments of counsel, and motions for a new trial. In fact, it has been broadly stated that "[t]he conduct of a trial is subject to the exercise of sound judicial discretion by the trial court . . . ."

We can understand the broad grant of deference to trial courts in these discretionary matters from a number of perspectives. First, the legal standards applicable to the above discretionary acts are largely weighed or balanced choices characteristic of discretion generally. Second, the role of the trial judge as presider, maestro, director, overseer, monitor, helmsman, and ringmaster surely underlies some of the deference paid. The difficult task of making quick decisions in the heat of the trial should be, and is, respected. "[Trial judges] are under the disadvantage of often having to make rulings off the cuff, so to speak, in the press and urgency of a trial proceeding . . . ."

Finally, and certainly not least, some of the deference accorded to discretionary acts again goes back to the "better position" principle. The extent to which this is true may be seen in the Pepin case referred to earlier. There, the Wisconsin Court of Appeals applied the "better position" analysis to the question of the admissibility of hearsay evidence, a discretionary question. The appellate court concluded that, because the evidence to be admitted was documentary, and no demeanor evidence at-

126. Wis. STAT. § 801.52 (1989-90); Central Auto Co. v. Reichert, 87 Wis. 2d 9, 15, 273 N.W.2d 360, 363 (Ct. App. 1978).
132. Valiga, 58 Wis. 2d at 253, 206 N.W.2d at 389.
134. See supra notes 56-65 and accompanying text.
135. State v. Pepin, 110 Wis. 2d 431, 328 N.W.2d 898 (Ct. App. 1982).
136. Id. at 435-36, 328 N.W.2d at 900.
137. See State v. Lenarchick, 74 Wis. 2d 425, 450, 247 N.W.2d 80, 93 (1976); see also State v. Buelow, 122 Wis. 2d 465, 476, 363 N.W.2d 255, 261 (Ct. App. 1984).
tended it, the trial court was in no better position to determine trustworthiness that was then appellate court.138

V. CONCLUSION

The labels "question of fact," "question of law," and "discretionary act," have outlived their usefulness in appellate law. While these labels may well be too solidly ensconced in judicial opinions for anyone to expect that lawyers or judges would easily or readily abandon them, we must recognize that these labels no longer invariably indicate how much an appellate court will defer to a determination made by a lower court or administrative body. Rather, as we have seen, an appellate court defers to a determination made below when it has reason to believe that the lower tribunal was, for whatever reason, in a better position to make that particular determination. If, in its review, an appellate court cannot duplicate the conditions present when the lower tribunal initially determined the question at issue, the appellate court should defer, at least to the extent to which the initial determination is unique or irreproducible. What can create an irreproducible decision? There are undoubtedly a variety of causes.

An appellate court cannot reproduce the decision making process if the initial decision was at all dependent upon the decision maker's sensory experience of the hearing or trial. Determinations involving credibility, demeanor of witnesses, or the weight to be given their testimony are justifiably deferred to.

An appellate court cannot reproduce the decision making process if the initial decision maker possessed some special expertise; courts will defer to an administrative agency charged with administering a particular body of statutes where the agency's experience, technical competence, or specialized knowledge aid it in its interpretation or application of a statute.

An appellate court cannot reproduce the decision making process if the initial decision making involved indefinite factors or an indefinite number of factors or options; appellate courts defer to criminal sentencing not only because the sentencing court could have imposed a nearly infinite variety of licit sentences, but also because the sentencing court could have considered, balanced, or even rejected altogether a nearly infinite number of licit factors.

If appellate courts more frequently gave their reasons for deferring or not deferring to determinations made by lower tribunals, appellate lawyers

138. Pepin, 110 Wis. 2d at 439, 328 N.W.2d at 901-02.
could more accurately predict how their issues were likely to be treated on appeal.

A movement in this direction may be found in the cases of *Nigbor v. DILHR*\(^\text{139}\) and *Esparza v. DILHR*.\(^\text{140}\) In *Nigbor*, the Wisconsin Supreme Court commented on the fact/law identification problem in administrative agency value judgments, acknowledged agency expertise and stated that it would defer to them "if they are found to be reasonable."\(^\text{141}\) Similarly, in *Esparza*, the Wisconsin Court of Appeals, citing *Nigbor*, followed this lead, and noted that "[a]lthough the supreme court in *Nigbor* did not expressly abandon the 'fact/law' approach for purposes of judicial review, it obviously chose not to apply it."\(^\text{142}\) Each court avoided the old labels in favor of discussing deference directly.

The law loses nothing by ignoring or abandoning the old labels, as long as appellate courts give reasons for according or not according deference to particular lower tribunal determinations. The law gains clarity, however, because the old labels currently tell us only indirectly about the deference accorded. A direct approach, where appellate courts simply indicate how much they defer and why, would simplify a framework now needlessly convoluted.

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140. *Esparza v. DILHR*, 132 Wis. 2d 401, 393 N.W.2d 98 (Ct. App. 1986).
141. *Nigbor*, 120 Wis. 2d at 383-84, 355 N.W.2d at 537.
142. *Esparza*, 132 Wis. 2d at 406, 393 N.W.2d at 100.