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Studying the significance of standard of review

A pretty amazing event occurred in 1969 — for the first time ever, man walked on the moon.

But something equally amazing occurred that year in law: no opinion issued by either the Illinois Supreme Court or Appellate Court ever once used the phrase "standard of review."

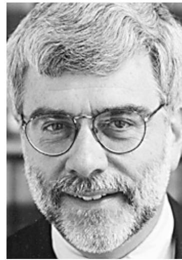
As James Thurber once said, "You could look it up."

As you know, it should be impossible for an appellate court to decide any issue without first establishing the proper standard of review. That's because a standard of review is the "degree of deference given by the reviewing court to the decision under review." Martha S. Davis and Steven A. Childress, "Standards of Review in Criminal Appeals," 60 Tulane L. Rev. 461, 465 (1986). If appellate review is analogized to using a microscope to examine a lower court's decision, then the standard of review can be described as the "power of the lens" through which the appellate court views the decision. Robert L. Byer, "Judge Aldisert's Contribution to Appellate Methodology," 48 Univ. of Pittsburgh L. Rev. xvi (1987). For example, appellate courts give great deference to lower courts on issues such as fact-finding; on the other hand, they give no deference to lower courts' decisions on legal issues.

In theory, the selection of the proper standard of review should often dictate the appellate court's decision. Yet lawyers have often wondered whether this actually is true. In "chicken or the egg" style, the question has been: "Which comes first — the standard of review or the decision?"

Interestingly, a new law review article by prominent Illinois appellate lawyer Timothy J. Storm presents results of an empirical study of Illinois civil cases confirming that the selection of the standard of review may often be outcome-determinitive. Timothy J. Storm, "The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court," 34 Southern Illinois University Law Journal 73 (2009).

For many years, the state of the law in Illinois appellate courts on standard of



Criminal Procedure

By Timothy P. O'Neill

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review issues was, in a word, embarrassing. Since there was no requirement that practitioners had to discuss standards of review in their briefs, Illinois appellate court opinions often — as, for example, in its entire 1969 output — simply skipped the issue entirely.

And when they did discuss standards of review, it was actually worse. Picture a giant salt shaker with hundreds of grains of salt containing the phrase "manifestly erroneous." Illinois appellate courts' idea of using standards of review was to take a finished opinion and just sprinkle a lot of references to "manifestly erroneous" throughout the opinion. Any issue — legal, factual, anything — seemed to be governed by a "manifestly erroneous" standard. And there was rarely an explanation as to why this was the proper standard of review for the issue in question. The appellate courts' mindless use of the phrase "manifestly erroneous" took the concept of "boiler-plate" to a whole new level.

What changed? In 1997, an amendment to Supreme Court Rule 341 provided that in its brief, "The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." Ill. Sup. Ct. Rule 341 (h)(3).

Since appellate attorneys were now forced to confront and to brief standard of review issues, Illinois appellate courts were likewise compelled for the first time to actually think about them. Changes have come slowly, but surely.

For example, on review of a Fourth Amendment suppression of evidence decision, Illinois courts in the past had ostensibly vetted any legal or factual issue under the ubiquitous "manifestly erroneous" standard. Now, however, Illinois appellate courts wisely divide the issue into two parts. People v Cosby, 231 Ill.2d 262, 271 (2008); People v Luedemann, 222 Ill.2d 530 (2006). First, in reviewing factual findings made by the trial judge, the appellate court accords proper deference by reversing only if the findings are against the manifest weight of the evidence. On the other hand, a reviewing court "'remains free to undertake its own assessment of the facts in relation to the issues,'" and therefore the trial court's ultimate legal ruling as to whether suppression is allowed is reviewed under the totally non-deferential de novo standard. Cosby, 231 Ill.2d at 271, quoting Luedemann, 222 Ill.2d at 542-543.

The Illinois Supreme Court made a similar change in reviewing the suppression of statements. The appellate court reviews the trial judge's factual findings and credibility determinations under a manifestly erroneous standard; yet it uses de novo review for the ultimate legal issue of whether the statement should have been suppressed. People v Richardson, 234 Ill.2d 233 (2009); In re G.O., 191 Ill.2d 37 (2000).

Even as the Illinois appellate courts' discussions of standards of review have become increasingly sophisticated, there is always the nagging fear that judges do not use standards of review in the proper way. Ideally, determining the proper standard of review should not only precede a judge's decision on the merits of any issue — it should also drive the actual decision. The concern, however, is that appellate courts may use the standard of review merely as an afterthought — the whipped cream and cherry placed on top of the already completed decision.

Storm's new article sheds some much needed light on this issue. Storm conducted a survey of civil decisions issued during a three year period by all five districts of the

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Illinois Appellate Court. Its purpose was to determine whether there was a correlation between the standard of review applied and the affirmance/reversal rates. If standards of review are being correctly applied, you would expect to see the percentage of affirmances rise as you progress from the least deferential standard (i.e., de novo) to the most deferential (i.e., abuse of discretion).

Storm's survey confirms this is true: "In sum, the study clearly indicates that application of standards of review that grant less deference to the lower court's decision regularly yield lower affirmance rates." At 103. The study compiled the average statewide affirmance rates during a period of three years. From "de novo" to "manifest weight of the evidence" to "abuse of discretion," the affirmance rate increased from 62 percent to 73 percent to 75 percent, respectively. (103-104)

Storm's conclusions are similar to those found in a recent study of both civil and criminal decisions from the U.S. Circuit Court of Appeals. Professor Corey Yung of The John Marshall Law School examined thousands of cases decided in 2008 by 11 different federal circuits. From "de novo" to "abuse of discretion" to "clear error" the affirmance rates increased from 74 percent to 85 percent to 88 percent, respectively. Corey Rayburn Yung, "Judged By the Company You Keep: An Empirical Study of the Ideologies of Federal Judges," 51 Boston College Law Review (forthcoming 2010).

Standards of review matter. And Illinois courts have been doing a good job over the last decade in improving them.

So what is the Illinois criminal standard of review most in need of change right now?

Simple. It is the standard used to review a trial court's decision after an evidentiary hearing on a post-conviction petition. Currently an appellate court reviews this under a "manifestly erro neous" standard. People v Johnson, 206 Ill.2d 348, 357 (2002). This is a throw-back to the days when "manifestly erroneous" seemingly covered every issue in Illinois.

It makes no sense in this context. By definition, a post-conviction petition raises constitutional issues. 725 ILCS 5/122. There is no reason why the trial judge's rulings on constitutional issues should be presumed correct. The Illinois Supreme Court should use the same bifurcated standard it now uses to review suppression hearings: a deferential "manifest error" standard for fact-findings and de novo review for legal issues.

We now know empirically that the selection of the standard of review can determine the outcome of an appeal. It is a subject that continues to deserve the serious attention of both bench and bar.

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