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ABSTRACT

Over the years much ink has been spilled defining, explaining, and critiquing standards of review. Countless lawyers, judges, and scholars have flyspecked distinctions among questions of law, fact, and discretion in an effort to derive a coherent theory explaining when and whether appellate judges should endeavor to correct trial court error. Most of these theories have been premised on the notion that standards of appellate review, although sometimes ill-defined, are applied based on consistent legal or rational standards. Our research, however, supports those scholars who posit that standards of review are often influenced by extraneous factors not anchored in a coherent legal conception of deference. We observe that across a broad spectrum of cases, different panels of jurists apply standards of review in a disparate manner, influenced by their personal backgrounds. Our research explores numerous aspects of personal background, including prior professional legal experience, length of time on the trial court, gender, and political affiliation. Among these categories, we discovered that only one exhibited a statistically significant impact on the selection and application of the standard of review: the type of prior professional legal experience of panelists. Specifically, we find that the criminal or civil practice background of jurists on a reviewing panel influences ultimate outcomes but also shapes the selection of the standard of review. Based on our findings, we hypothesize that the collective training and experience of a panel in civil or criminal law significantly shapes their analogic reasoning, *i.e.*, their mental model. Consequently, this background factor exerts more influence than others in determining how and when jurists defer to the trial court.

I. INTRODUCTION

One afternoon, two fifteen-year-old boys left their high school campus for lunch.[1] They wound up drinking, getting high, and concocting a plan to raise money for their prom night by robbing a neighborhood market. They went to the market with a borrowed gun that they did not know how to use. The gun had one bullet in the chamber and was jammed in the cocked position. The boys did not hide their faces until after customers left, and then they put on masks and gloves.[2] One of the boys took out the gun, faced the front counter, and the gun went off—killing the store owner. The boys took money from the cash register, dropping almost all of it as they ran away.[3] They fled to a getaway location, but they had locked themselves out. They were easily found by the police, who surreptitiously recorded them acknowledging they were drunk, talking about how they did not try to kill or intend to shoot the store owner, and expressing concerns about what their parents would think. They were charged with murder and second-degree robbery, plus use of a handgun. The juvenile court was tasked with determining whether the boys should be charged as adults. If convicted as adults, the boys would face decades in prison, where they would serve time with actual adults and career criminals. As juveniles, they would be detained with other youthful offenders, and treated with the goal of a full rehabilitation and reintegration into society by age twenty-six. As it happened, their fate turned largely on the appellate standard of review, and how much deference the reviewing court afforded the trial court's decision.

This paper examines appellate standards of review, and how they are applied, because of cases like the one described above, *People v. Superior Court* (*Jones*). Although to some these standards are abstract constructs, they are in practice a matter of great consequence for judges, lawyers, and litigants, like the two teenagers in our example. The standard of review is a measure of how much deference, if any, the reviewing court should afford the trial court's decisions. This measure is critical because it is often outcome determinative. In *Jones*, the standard of review was the difference between deferring to the juvenile court's conclusion—that the boys made a serious and out-of-character mistake by drunkenly carrying out a crime like it was an "idiotic Three Stooges routine"—and reevaluating the evidence, as the reviewing court did, to conclude that the boys were sophisticated criminals who should be tried and punished as adults.[4] As the dissenting justice in *Jones* explained, the deferential standard of review required the juvenile court's decision stand and that the boys not be tried as adults.[5] That is not what happened. The level of deference was the difference, even though the majority and dissent in this example both nominally applied the same standard of review.

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[1] *People v. Jones*, 958 P.2d 393, 395 (Cal. 1998).

[2] *Id*. at 395–96.

[3] *Id*. at 396–97.

[4] *Id*. at 398, 403–04.

[5] *Id*. at 412 (Werdegar, J., dissenting).

The thoughtful and even application of standards of review is key to ensuring fairness and equal justice under law. It is also necessary to preserve both the "basic function of our trial courts and the historic role of the appellate courts."[6] Yet we find that these standards are not evenly applied.

This paper does not advocate for dispensing with standards of review. But it does argue that standards of review have to some extent become mere simulacra, labels devoid of clear meaning that imitate analysis. Our research reflects that standards of review are unevenly applied such that it would be misguided or naïve to presume that "courts reviewing a single issue with the same standard of review should have similar outcomes."[7]

Existing research has demonstrated a realist view, whether premised on judicial background or some other nonlegal consideration, is a better predictor of outcomes in, for example, criminal sentencing, asylum applications, and employment discrimination claims.[8] But no prior empirical research has explored whether, across all case and issue types, application of the first principle of intermediate appellate review is, itself, influenced by *who* is deciding a given case.

This paper demonstrates that, in practice, standards of review are not always applied to guide judicial discretion or ensure a consistent level of deference is afforded to trial court decisions. Our data reflect that extraneous factors, potentially unknown to the litigants and to the deciders themselves, influence selection of standards of review. While it may seem self-evident to some that the background of a decider impacts the decision, studies in this area have focused largely on how judicial background impacts ultimate outcomes in particular case or issue types. For example, how male judges with daughters decide sex-based harassment claims.[9] These studies have not examined how judicial background impacts baseline procedural norms like the standard of review, which apply across all cases and issues.

We examine numerous aspects of personal background, specifically prior professional legal experience, length of time on the trial court, gender, and political affiliation. Of these aspects, in our sample only one had a statistically significant impact on the selection and application of the standard of review: the type of prior professional legal experience of panelists. Specifically, we find that the criminal or civil practice background of jurists on a reviewing panel influences not only ultimate outcomes but also selection of the standard of review. These results reflect

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[6] *Id*. at 697 (Werdegar, J., dissenting).

[7] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 232, 262 (2009).

[8] Shai Danziger, Jonathan Levav & Liora Avniam-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCIS. 6889 (Daniel Kahneman ed. 2011); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter—The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405 (2011); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389–411 (2010); A. Glynn & M. Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?,* 59 AM. J. POL. SCI. 37–54.; Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (Brookings Inst. Press 2006); Gregory Huber & Sanford Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247–263 (2004).

[9] A. Glynn & M. Sen, *supra* note 8.

that, where one law-practice background dominates on a panel, it impacts both the ultimate result and how the panel approaches each issue analytically.

We conclude that panels of jurists with majority civil law experience prior to assuming the bench are most likely overall to apply the de novo standard of review; meaning they are least likely to afford deference to trial court decisions even where they would have the option to do so. While panels with majority criminal law experience prior to assuming the bench are least likely overall to review for abuse of discretion, and in reviewing criminal cases are most likely to review for substantial evidence. While "other background" panels are, overall, most likely to review for abuse of discretion and least likely to review issues de novo; they are also least likely of all panels to reverse issues.

Based on our results, we hypothesize that a panel's collective training and experience in civil or criminal law prior to taking the bench so significantly forms their analogic reasoning, *i.e.*, their mental model,[10] that it, more than other background factors, influences how they view and apply standards of review generally. This type of analogic reasoning is divorced from traditional distinctions among levels of deference. It is also almost certainly unconsciously applied,[11] increasing the likelihood that a decision about the standard of review derives from a mismatched analogy, or past experience, applied to justify a particular outcome. That is, our findings suggest that appellate jurists rely on what may be unreliable mental models in applying the standard of review, rather than on careful reflection and discussion about what level of deference should be afforded in a particular instance.

While our data neither confirms nor rules out strategic deployment of standards of review to "manipulate"[12] the outcome of a particular case, they do suggest that selection and application of standards and overall approach to questions of deference may, in the mass of cases, consciously or unconsciously derive from personal background characteristics of panelists rather than a consistent approach to deference for any specific issue type. This is particularly true where the standard of review is dynamic. That is, the unevenness in application and definition in standards of review may not be entirely a product of the "mood"[13] of a particular case, issue, or jurist, but may reflect that standards are so subjective that by necessity their application turns on extraneous factors like personal background characteristics. In this sense, we agree with scholars who assert that standards of review are too open-textured[14] to be meaningfully or rationally related to a coherent conception of deference, and that their use has

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[10] *See* Micah B. Goldwater & Dedre Gentner, *On the Acquisition of Abstract Knowledge: Structural Alignment and Explication in Learning Causal System Categories*, J. COGNITION 137, 137–38 (2015); Michael S. Gary, Robert E. Wood & Tracey Pillinger, *Enhancing Mental Models, Analogical Transfer, and Performance in Strategic Decision Making*, 33 STRAT. MGMT. J., 1229, 1229–32 (2012); Patrick J. Ryan, *A Mental Model of Civil Procedure*, 28 RUTGERS L.J. 637, 637–39 (1997); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1508–09 (1995–1996).

[11] See Gary, Wood & Pillinger, *supra* note 10, at 1230–31; LoPucki, *supra* note 10, at 1514–15.

[12] Peters, *supra* note 7, at 265.

[13] *Id*. at 248.

[14] Martha S. Davis, Standards of Review: Judicial Review of Discretionary Decisionmaking, 2 J. APP. PRACT. & PROCESS 47, 77–78 (2000).

become an analytical shortcut[15] that, when not explained, undermines the very function of the standards as a limitation on the scope of review. When deployed based on extraneous or nonlegal factors, the standards stray from their role as meaningful analytical principles[16] and become a potential vehicle for jurists to impart their own value judgments, rather than a tool to facilitate the "exercise of self-restraint."[17]

In other words, if courts are going to use standards of review to evaluate cases, these standards should be applied in a way that ensures everyone involved in the appellate process plays by universally understood and accepted rules. If the standards are mere labels untethered from meaningful legal analysis and a coherent conception of deference, they are a useless construct ripe for abuse.

This paper suggests that standards of review need to be reexamined. We argue that appellate advocates should carefully articulate the rationale for affording a particular level of deference, if any, to specific trial court actions, rather than treating the standard of review like boilerplate.[18] We also argue that appellate courts should expressly state their reasons for deferring, or not deferring, to trial court decisions as some scholars have urged for decades.[19] A reasoned, consistent, and logical explanation of why a standard is being selected and how it is being applied by the reviewing court would provide valuable guidance to lawyers, trial judges, and litigants. Cogently explaining a decision, while acknowledging potential unconscious bias or tendencies, requires both intellectual rigor and introspection. It is a far more difficult task than most outside the judiciary understand. But it is the foundation of a fair and equitable judicial system. Increased transparency in decision making would also enhance the legitimacy of appellate court decisions, counteracting the increasingly popular belief that the judiciary is simply another political branch, governed by the arbitrary whims of judges rather than by the rule of law.

In short, we argue that an honest and transparent discussion of the standard of review, and of what level of deference is appropriate in a given case, will lessen or limit the role of nonlegal or extraneous factors in appellate decision making. It will also imbue standards of review with enough substantive meaning that they may stand as a bulwark of due process.

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[15] Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 35–45 (2004).

[16] *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 991–92 (1978) (explaining that factors, such as value judgments and social morals often influence judges' descisions); Fischman & Schanzenbach, *supra* note 8, at 406.

[17] Peters, *supra* note 7, at 235.

[18] Davis, *supra* note 14, at 82–83.

[19] Davis, *supra* note 14, at 82–83; Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 250–51 (1991); Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas—The Fairchild Lecture*, 1994 WIS. L. REV. 9, 11, 22, 27 (1994); Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 1, 27–28 (1975).

II. DEFINING STANDARDS OF REVIEW

Appellate standards of review are a hallmark of modern appellate practice,[20] concretely described in legal textbooks as delineating the scope of appellate review.[21] Over the years much ink has been spilled defining, explaining, and critiquing standards of review, because without some discussion of the applicable standard of review, an appellate brief is deficient on its face.[22] Countless lawyers, judges, and scholars have flyspecked distinctions among questions of law, fact, and discretion in an effort to derive a coherent theory explaining when and whether appellate judges should endeavor to correct trial court error. But the more carefully one examines these clear "standards," the more opaque they become.

One scholar has aptly explained: "The labels identifying the levels or intensity of appellate review sound deceptively simple, but not one of them admits of easy analysis. Indeed, any attempt to deal with standards of review will raise some very difficult questions, such as whether an issue is one of law, fact, or mixed, or of policy or judgment, or determining the exact scope of the issue under review."[23] A review of the scholarship in this area reflects wide consensus that these "standards" are anything but "standard" in nature or application. Some have, for that reason, argued that these standards are nothing more than a mere expediency to avoid deep legal analysis, or a useful tool often misused to "manipulate" outcomes or put a "thumb on the scale."[24]

"Review," however, is meant to circumscribe the role of appellate courts, which are not tasked with "retrying" or "rehearing" each case. Instead, appellate courts accept the factual record developed in the trial courts, and examine that record through different analytical lenses that normatively correlate to different levels of scrutiny, or deference, afforded to trial court decisions.[25] The lens applied, referred to as the "standard of review," is selected, theoretically, based on whether

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[20] Schroeder, *supra* note 19, at 11, 22, 27.

[21] *See, e.g.*, DAVID CRUMP, KEVIN O. LESKE, KEITH W. RIZZARDI, WILLIAM V. DORSANEO, III, REX R. PERSCHBACHER & DEBRA LYN BASSETT, CASES AND MATERIALS ON CIVIL PROCEDURE Ch. 12 (7th ed. 2019); THE CALIFORNIA COURT OF APPEAL STEP BY STEP: CIVIL APPELLATE PRACTICES AND PROCEDURES FOR THE SELF-REPRESENTED IN THE FOURTH APPELLATE DISTRICT DIVISION ONE 5-5, APPENDIX 5 (rev. Jan. 29, 2021), https://www.courts.ca.gov/documents/4dca-Self-Help-Manual-Combined.pdf (last visited Dec. 30, 2021); U.S. CT. OF APPEALS FOR THE NINTH CIR. OFF. OF STAFF ATT'YS., STANDARDS OF REVIEW OUTLINE (rev. 2017), https://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/I.%20Definitions%202017_westlaw.pdf (last visited Dec. 30, 2021).

[22] *James B. v. Super. Ct.*, 35 Cal. App. 4th 1014, 1021 (1st Dist. 1995); *People v. Jackson*, 128 Cal. App. 4th 1009, 1018 (2d Dist. 2005).

[23] Davis, *supra* note 14, at 49.

[24] Perschbacher & Bassett, *supra* note 15, at 35–37; Peters, *supra* note 7, at 255, 265; Jonathan R. Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 118 (2016).

[25] *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011); *see also* Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 2, 19–20, 23, 29 (2011) (using standards of review to measure predictions about "formal model" of law would predict when judges elevate their judgments over other constitutionally significant actors and may reveal part of hidden deliberative process or judicial activism).

issues are factual, legal, or discretionary.[26] As Professor Maurice Rosenberg famously wrote, "[A]ll appellate Gaul is divided into three parts for review purposes: questions of fact, of law and of discretion."[27] But delineating what issues are factual, legal, or discretionary, is easier said than done. Many scholars have suggested that these types of labels, and the standards of review themselves, have "outlived their usefulness in appellate law," because they do not, in practice, correlate to any particular level of deference.[28]

The boilerplate use of the phrase "standard of review" communicates minimal information because, within each standard of review, a variety of "discretionary calls" can be made such that each category actually "describes a range of appellate responses."[29] There are also cases where courts make little attempt to apply a standard of review, or they imply the standard without any discussion or idea content.[30] It is easy to criticize a "standard" applied in this way as merely a post hoc rationalization or "a form of ill-tempered appellate grunting . . . ."[31]

Normatively, the standards are premised on "superior competencies," with the trial court having the most "competence" on factual matters developed in its presence, and the reviewing court the most "competence" in legal matters.[32] But

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[26] 1 MATTHEW BENDER PRACTICE GUIDE: CA CIVIL APPEALS AND WRITS §§ 2.02, 2.04, 2.05, 2.13 (K. Klatchko & B. Shatz eds., Matthew Bender & Co. 2020); *see* David Robertson, THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 577–79, 589–91(Peter Cane & Herbert Kritzer eds. 2010) (examining role of appeals courts and evaluation of adherence to principles of stare decisis and review of error); Steven Wisotsky, PROFESSIONAL JUDGMENT ON APPEAL: BRINGING AND OPPOSING APPEALS 4–14, 17, 59–61, 73–75 (2d ed. 2009) (explaining purpose and scope of appellate review and presumption of correctness and institutional factors favoring affirmance).

[27] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 646 (1971).

[28] Hofer, *supra* note 19, at 250 (1991); *see* Davis, *supra* note 14, at 77.

[29] Davis*, supra* note 14, at 77.

[30] *See*, *e.g.*, *Haworth v. Super. Ct*., 235 P.3d 152, 159 & n.7 (Cal. 2010) (noting that in case relied upon by party, court of appeal "did not analyze issue of which standard of review was applicable; it merely stated in a summary manner that the superior court's decision 'did not constitute an abuse of discretion'"); *People v. Rodriguez*, 971 P.2d 618, 624 (Cal. 1999) ("The Court of Appeal's majority opinion gives no indication that court followed this well-established methodology of appellate review. The opinion does not refer to any standard of review, nor does it explain how, in the majority's view, the normal presumption favoring the judgment was overcome."); *People v. Ochoa*, 19 Cal. 4th 353, 413 (1998) (standard of review "for a claim of undue suggestiveness remains unsettled . . . we declined to specify a standard of review"); *People v. Gordon*, 792 P.2d 251, 263 (Cal. 1990) ("The standard of review applicable to the determination under challenge is not settled.").

[31] Rosenberg, *Judicial Discretion of the Trial Court*, *supra* note 27, at 659; *see* Rosenberg, *supra* note 19, at 23–25 (explaining "good" reasons for deference, like impossibility of monitoring countless trial court rulings and "you are there" reasoning where trial judge "smells the smoke of battle"); Schroeder, *supra* note 19, at 22 ("There is sound justification for deferential review in situations in which the people affected are perceived personally by the trial court in a setting unavailable to an appellate panel."); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 1–4

(describing standards of review as allocating fact-finding authority among courts).

[32] Merrill, *supra* note 25, at 940 (citing, *inter alia*, *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–33 (1991)); MATTHEW BENDER, *supra* note 26, at § 2.15; *see also* Francis R. Fecteau & Jennifer Scro*, Appellate Gaul Revisited: Standards in Search of Definition*, 97 MASS. L. REV. 7, 7–8 (2015) (standards of review difficult conceptually because they "attempt to define the 'proper hierarchical relationship between an appellate court and a trial court'"); *see* Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 215 (2009) ("[J]udicial

categorizing issues in this way, and sorting them along a continuum of deference, is a complex function that goes beyond mere labeling. There are gradations of deference even within each standard of review. These range from pure abuse of discretion to pure issues of law. Pure abuse of discretion, where the trial court's discretion is unbounded by decision-constraining rules, is the "umpire's discretion," or "Grade A" discretion. Where the trial court has this type of discretion, it should essentially be affirmed for any reason. The weakest form of discretion, "dilute discretion," or "Grade D" or "Grade F," applies to purely legal issues, where the trial court's discretion is minimal or nonexistent, and the reviewing court can choose whether to consider the trial court's reasoning or not.[33] As one authority on standards of review has aptly explained: "Discretion is a pervasive yet elusive concept in this context. Despite its pervasiveness, it is hard to grasp hold of just what it means in day-to-day practice."[34]

The consistent use of the term "standard of review" was not widely adopted until the 1960s.[35] Some have described applying standards of review as determining the degree of "wrongness" that a panel will tolerate.[36] "Wrongness," of course, having no concrete definition, but being in the eye of the beholder, is much like the standards themselves. We acknowledge that distinctions between the standards are not always easily drawn and, as our research reflects, their application is not always uniform. In fact, there is significant debate as to whether these "standards" are standard at all and what function they serve in practice.[37]

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discretion can be loosely described as the legal authority to choose; judicial choice within the bounds of justice and the limits of the law . . . Determinations made by judges, although based on the facts and the law, are influenced by the decision-maker's personal opinions, perspective, and quite possibly bias.").

[33] Rosenberg, *supra* note 19, at 14; Rosenberg, *Judicial Discretion of the Trial Court*, *supra* note 27, at 650–51 ("An area of trial court discretion is a pasture in which the trial judge can roam and graze freely rendering rulings his appellate betters might not have made, unless and until the higher court fences off a corner of the pasture by announcing that a rule of law covers the situation and has been violated."); *see* Francis R. Fecteau & Jennifer Scro, *Appellate Gaul Revisited: Standards in Search of Definition*, 97 MASS. L. REV. 7, 12 (2015) (describing abuse of discretion standard as "a kind peacekeeper" mediating between "choices best left to decision-maker hearing evidence" in first instance and rights of litigants to consistent and fair outcomes from legal system as whole not "prey to the failings of whichever mortal happened to render" particular decision).

[34] Rosenberg, *supra* note 19, at 1.

[35] *See* Schroeder, *supra* note 19, at 19–20.

[36] Rosenberg, *supra* note 19, at 9–10. (Distinctions between factual and legal issues have been described in English jurisprudence for centuries, though the distinctions have changed over time, as has the rationale for the scope of an appellate court's corrective function); Sward, *supra* note 31, at 12–13, 19–22 (describing original interest of English monarchy in maintaining political control over legal rights and remedies through de novo review in king's courts and transformation of historical function occasioned by increasing independence of judicial branch and increasing use of bench trials); *see* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 5 CAL. L. REV. 1867, 1867–72, 1920, 1938 (1965) ("The apportionment of decision-making between judge and jurors in the civil jury trial has not received the attention it deserves from the courts. Hampered by the appealing simplicity of utilizing the conclusory terms of law and fact, the courts have neglected to construct an analytical framework capable of delineating, on a meaningful and consistent basis, the role of judge and jury in applying the law in specific cases.").

[37] *See* Sward, *supra* note 31, at 1–2, 3–12, 20–29 (explaining rationale for allocation of authority among courts and "fluid line between fact-finding and law-making" giving reviewing courts "considerable flexibility" in determining which standard of review applied); Roger P. Kerans & Kim M. Willey, STANDARDS OF REVIEW EMPLOYED BY APPELLATE COURTS 44–47 (differentiating between levels of deference); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 12 SEATTLE U. L. REV. 11, 12 (1994) ("It would be difficult to name a significant legal precept that has been treated more cavalierly than standard of review. Some courts invoke it

But in order to examine how standards of review are deployed in practice, we must examine them using the commonly applied labels, rather than trying to assess each issue along a sliding scale of deference described by "wrongness." These "standards" are similar across jurisdictions, although they go by a multiplicity of names. Generally, there are three main standards, or groups of standards, applied in California courts.[38] A de novo, or independent, standard that in theory affords no deference to the trial court on matters of law. A sufficiency of evidence standard that defers to the factual findings made by the fact-finder to the extent they are supported by "substantial evidence."[39] And an abuse of discretion standard, that affords no deference to the trial court on matters of law but affords great deference on all other matters.[40]

The three main groups of standards we describe here govern review of factual, legal, and discretionary decisions. Courts, in theory, use these labels—de novo, substantial evidence, and abuse of discretion—as a shorthand for the degree of deference the appellate court will afford the trial court on a given issue, even

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talismanically to authenticate the rest of their opinions."); Davis, *supra* note 14, at 60–79 (describing "abuse of discretion" as nearly meaningless generic term); Hofer, *supra* note 19, at 235–46 (questioning usefulness of labels and describing history of treating "mixed" issues of law and fact as merely legal); Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 101–03, 106, 129–32 (2005) (Mixed-questions of law and fact should be unmixed and analyzed separately, lack of clarity leaves impression courts can choose whatever standard they wish depending on desired outcome.).

[38] *Crocker Nat'l Bank v. City and Cnty. of S.F.*, 782 P.2d 278, 281 (Cal. 1989); *see People v. Ault*, 95 P.3d 523 (Cal. 2004) (discussing public policy and other factors relevant to determine applicable standard of review); *see* MATTHEW BENDER, *supra* note 26, at § 2.15; Wisotsky, *supra* note 26, at 179–95 (explaining general standards of review and degrees of deference); Steven A. Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW 1-1-1-25 (4th ed. 2000) (explaining general standards of review and degrees of deference); Kerans & Willey, *supra* note 37, 38–41, 71–82, 155–168 (institutional reasons for standards of review, describing five categories of review and reasons for degrees of deference) (We acknowledge that there are other guiding principles of review in certain types of cases, for example, levels of "scrutiny" in constitutional cases, and that these may be treated as standards of review.); *see, e.g.*, Ronald den Otter, JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM 23–30, 53–56 (Cambridge Univ. Press 2009) (To the extent these specific principles or levels of scrutiny can be said to be standards of review, they are encompassed by the general categories analyzed in this paper.).

[39] *See Estate of Bristol*, 143 P.2d 689, 690 (Cal. 1943) (evidentiary conflicts and inferences resolved in favor of upholding trial court verdict); *Estate of Teed*, 247 P.2d 54, 58 (Cal. App. 1952) ("[S]ubstantial evidence" is evidence of "ponderable legal significance."); Merrill, *supra* note 25, at 12–25 (explaining history of standards of review and creative, corrective, and fairness principles underlying their use and allocation of authority among courts); *People v. Johnson*, 606 P.2d 738, 751 (Cal. 1980) ("[S]eemingly sensible substantial evidence rule may be distorted . . . to take 'some strange twists,'" *quoting* ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR 27 (1969).); *see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 150 P.3d 709, 1717 (Cal. 2007) (In mandamus cases de novo review is of agency action, not trial court decision; no deference is shown to trial court.) (It should be noted some courts distinguish between facts found by courts and those found by juries, applying some amount of greater scrutiny to factual decisions by courts, though still reviewing both types of factual decisions under the "substantial evidence" standard of review.); *see* Rosenberg, *Judicial Discretion of the Trial Court*, *supra* note 27, at 645–46.

[40] *See Marriage of Connolly*, 591 P.2d 911, 915 (Cal. 1979) ("Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered."); *Conservatorship of Bower*, 247 Cal. App. 4th 495, 506 (4th Dist. 2016) ("[G]etting the legal standard wrong means that a subsequent decision becomes itself a per se abuse of discretion even if, assuming the wrong standard, the decision is otherwise reasonable."); MATTHEW BENDER, *supra* note 26, at §§ 2.16–2.19.

though these labels themselves may mean slightly different things to different jurists.[41]

By definition, some standards dictate a high degree of deference be given to trial court decisions, while others afford little to no deference. If the labels correspond roughly with the amount of deference afforded to trial court decisions, then different standards of review should, when taken with other factors, predict the likelihood of reversal on appeal.[42] That is, higher degrees of deference should be inversely related to reversal rates. In fact, this normative conception is borne out in our data set.[43] We note that regardless of the standard of review applied in finding "error," in order to reverse a decision a panel must also find that the error was prejudicial[44] and that it resulted in a miscarriage of justice.[45]

III. MEASURING THE IMPACT OF LEGAL-PRACTICE BACKGROUNDS ON ANALYTICAL AND ULTIMATE OUTCOME

A. California Sample

Our sample comes from decisions made by California's intermediate appellate courts. California's highly professionalized judicial system is the largest in the nation, serving a population of more than thirty-nine million people. In this bellwether state, where nearly six million new cases are filed in the trial courts each year, the courts of last resort for the majority of litigants are the state's intermediate appellate courts.[46] The state's 106 intermediate appellate court justices collectively issue nearly 9,000 written opinions yearly, while the state's highest court, the California Supreme Court, issues fewer than 100.[47] Decisions

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[41] *See* Peters, *supra* note 7, at 265 (Extraneous factors impact reversal rates, judges manipulate standard of review when they have difficulty abiding outcome of trial court ruling.); Rosenberg, *supra* note 19, at 19 ("The term, 'abuse of discretion,' . . . is the noise made by an appellate court while delivering a figurative blow to the trial judge's solar plexus. . . 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."); Rosenberg, *supra* note 27, at 646–47 ("[A]buse of discretion . . . universally employed as code words by appellate courts to suggest an amorphous state of mind that is muddy as to meaning but clear as to result: a reversal of the trial court's determination."); Warner, *supra* note 37, at 106; *see generally* Davis, *supra* note 14, at 49–50, 77–80 (concept of discretion and how applied changes over time).

[42] Merrill, *supra* note 25, at 940 (citing, *inter alia*, *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–33 (1991)); Sward, *supra* note 31, at 1–2; MATTHEW BENDER, *supra* note 26, at § 2.15.

[43] Our data reflected a 13.13% reversal rate for issues in our sample reviewed de novo, a 10.88% reversal rate for issues reviewed for substantial evidence, and a 9.35% reversal rate for issues reviewed for abuse of discretion; *see also* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 689–724 (2002) (describing "outcomes analysis" and correlating desired Congressional outcomes with levels of review in agency decisionmaking).

[44] *F.P. v. Monier*, 405 P.3d 1076, 1080 (Cal. 2017).

[45] CAL. CONST. art. VI, § 13.

[46] 2020 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2009-10, 2018-19 1, 3 (Jud. Council of Cal. 2020).

[47] *SCOCA Is Taking Longer to Decide Its Cases,* CAL. CONST. CTR. (May 30, 2023), https://scocablog.com/scoca-is-taking-longer-to-decide-its-cases/ (reflecting SCOCA is issuing far fewer than 100 opinions per year, with only 51 issued in 2022); *id*. at 21 (We note that it is common for petitions for writs of mandate, prohibition, and certiorari and other matters subject to the original jurisdiction of the District Court of Appeal be summarily denied without decision where they do not determine a "cause," *e.g.*, the reviewing court declines to exercise its

made by California's intermediate appellate courts significantly impact the course of law in California, and often have far-reaching ripple effects in state and federal courts throughout the nation. And California courts, like other state courts, handle the types of routine criminal and civil matters impacting the daily lives of most Americans.

Most empirical studies of appellate judicial decision making, however, focus on federal appellate courts, which have circumscribed jurisdiction.[48] Federal courts also apply a broader array of standards of review, or at least they apply more varied names to the standards applied, making it more difficult to study how different types of standards of review are applied in practice. For those reasons, and to minimize any likelihood of differentiation in application of the standard of review that could potentially arise from federal appellate courts considering federal law and the laws of multiple jurisdictions (e.g., the Ninth Circuit Court of Appeals reviews decisions from fifteen districts across eleven different states or territories), we focus only on California's appellate courts.[49]

There are six appellate districts in California, and appeals are assigned among those districts based on geographic boundaries.[50] Within some districts, there are multiple divisions.[51] These intermediate courts hear appeals as of right and original matters, including petitions for writ of mandate, prohibition, and certiorari, among others.[52] As in most appellate courts, regardless of the district or division to which a case is assigned, California's intermediate courts decide cases in panels consisting of three jurists. [53] By court policy and practice, cases are

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jurisdiction. Summary denials where no "cause" was heard do not appear on either published or unpublished statistics as "appeals," but are separately categorized. Further, it is common for appeals to be dismissed prior disposition for one or more procedural reasons, or at the request of one or more parties. Of the appeals that are disposed of on the merits, and where there is a "cause," a formal written opinion with reasons stated is required by the California Constitution.); CAL. CONST. art. VI, § 14.

[48] *See* 28 U.S.C. §§ 1291, 1292, 1331, 1332, 1651.

[49] Because of the size and professionalization of California courts, numerous other scholars have relied on California appellate opinions to illustrate levels of deference and describe standards of review; *see, e.g.*, Schroeder, *supra* note 19, at 11; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, *supra* note 27, at 646–47; Ray A. Brown, *Fact and Law in Judicial Review,* 56 HARV. L. REV. 899, 903–04 (1943).

[50] 1 MATTHEW BENDER PRACTICE GUIDE: CA CIVIL APPEALS AND WRITS, *supra* note 26, at § 2.05; 2020 COURT STATISTICS REPORT, *supra* note 46, at 1–4, 7, 27, 36.

[51] MATTHEW BENDER, *supra* note 26, at § 2.05; 2020 COURT STATISTICS REPORT, *supra* note 46, at 1–4, 7, 27, 36 (For purposes of the analysis in this paper, we assume that any slight differentiation in procedural practices among the districts and divisions has no impact on the analytical or ultimate outcomes analyzed in this paper, as all districts and divisions apply the same law and standards of review.).

[52] Matthew Bender, *supra* note 26, at § 2.04(1)(d).

[53] *Id.* at § 2.04(2)(c*)*; CAL. CONST. art. VI, §§ 3,11, 13 (There is no procedure for *en banc* review within these intermediate courts. Review of any intermediate appellate court decision is in the California Supreme Court, and at that court's discretion. The District Court of Appeal are established in the California Constitution and are split along geographical boundaries established by the Legislature. CAL. CONST. art. VI, §§ 3. Appellate justices are appointed by the governor to a particular District Court of Appeal and Division with the District, in jurisdictions where there are Divisions. These are more particularly identified in the Tables, *infra*.).

randomly assigned to reviewing panels.[54] These panels "review" trial court decisions rather than retry them.[55]

B. Data Collection and Measurement

In considering how the standard of review is applied, we look at each "issue" in an opinion, rather than at each opinion as a whole, recognizing that within each opinion there may be several separate issues, each viewed through the lens of a distinct standard of review. We also differentiate between issues where the standard of review is fixed and where it is, or may be, dynamic. Many issue types are reviewed under a fixed standard. That is, where there is little choice for a panel to make about what standard of review, or more accurately what label, it should use, only a choice about what the ultimate issue outcome will be. For example, all summary judgments in California are subject to de novo review.[56] We distinguish these issues from what we refer to as "dynamic issues," where a panel has latitude in selecting which standard of review to apply.[57] For example, evidentiary rulings are typically reviewed for abuse of discretion, but in some circumstances may be reviewed de novo, or treated as mixed questions of law and

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[54] *See* Table A17; *see also* FIRST DISTRICT COURT OF APPEAL INTERNAL OPERATING PROCEDURES, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/documents/IOP_District1.pdf (last visited Dec. 31, 2020); SECOND DISTRICT COURT OF APPEAL INTERNAL OPERATING PROCEDURES, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/documents/IOP_District2.pdf (last visited Dec. 31, 2020); THIRD DISTRICT COURT OF APPEAL INTERNAL OPERATING PROCEDURES, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/documents/3dca-internal-operating-practives-and-procedures.pdf (last visited Dec. 31, 2020); FOURTH DISTRICT COURT OF APPEAL, DIVISION ONE, INTERNAL OPERATING PROCEDURES, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/documents/3AC-IOPPrevisioneff03242023.pdf (last visited Dec. 31, 2020); FOURTH DISTRICT COURT OF APPEAL, DIVISION THREE, INTERNAL OPERATING PROCEDURES, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/documents/IOP_District4_division3.pdf (last visited Dec. 31, 2020); SIXTH DISTRICT COURT OF APPEAL, INTERNAL OPERATING PROCEDURES, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/documents/IOP_District6.pdf (last visited Dec. 31, 2020) (explaining random assignment of cases based on even distribution according to "weight").

[55] *See* Merrill, *supra* note 25.

[56] *Compare Aguilar v. Atl. Richfield Co*., 24 P.3d 493, 517 (Cal. 2001), *with* Nash, *supra* note 24, at 107–18 (describing asymmetric de novo standard in summary judgments, comparing review of grants of summary judgment to denials).

[57] We examined all "dynamic issues" where our data points to discretion in application of the standard of review. We classify an issue type as "dynamic" if a particular standard of review is applied to that particular issue type in fewer than 90% of instances. Our data reflect that there is no variability in the standard of review when courts identify issues for review as: anti-SLAPP motions (anti-Strategic Lawsuits Against Public Participation under Cal. Code Civ. Pro. § 426.16), facial challenges to the pleadings (*i.e.*, demurrers), constitutional issues (including, *inter alia*, ineffective assistance of counsel claims), instructional error, prosecutorial misconduct, sufficiency of evidence, summary judgment, cases under *People v. Wende*, 600 P.2d 1071 (1979), and writs of prohibition or mandate. When courts identify these issue types our data reflect essentially no variability in the standard of review applied. In addition to the issues we refer to as "dynamic," we posit that "dynamic issues" could also include issues where error is found but commonly found to be harmless, resulting in an affirmance. There were too few of these harmless error issues in our sample, nine in total, to provide separate analysis here. *See generally* J. Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017) (describing results-based harmless error review); D. Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHICAGO L. REV. 511, 575–83 (2004) (discussing reduction of error in harmless error analysis via coherence-based reasoning).

fact.[58] We examine the role of judicial background in applying fixed standards of review in different case types, and whether standards are dynamic.[59]

We also examine whether judicial background impacts reversal rates. We acknowledge that a reviewing court may affirm a trial court's ruling on some, but not all, issues in a given case, and also that factors like workload and dissent-aversion play a role in ultimate outcomes. To minimize the impact of these factors, we have isolated and analyzed each "issue" within an opinion, rather than examining each opinion as a single case with one uniform outcome. Given deferential standards of review, the presumption of correctness, and other factors favoring affirmance, we acknowledge that, as a general matter, case reversal rates are low.[60]

The results of this analysis reflect the outcome of a panel's decision to affirm or reverse each issue in a case, rather than a single jurist's decision on each issue, since the decision that takes effect is from the group.[61] Also, we echo Edwards and Livermore (2009), Epstein et al. (2013), and others, who assert that empirical research must consider panel-level decisions—not individual decision-making.[62] Previous research has analyzed judicial decision-making using the framework of a natural experiment in that cases are randomly assigned to justices.[63] As explained above, the makeup of the three-justice panel and the characteristics of cases and issues are randomly assigned and not subject to any selection effect by individual litigants or counsel. It cannot be assumed that specific judicial background characteristics are randomly assigned. While judges are effectively randomized to cases, one cannot rely on this natural experiment to identify background effects; background characteristics of a judge are not randomly assigned. Similar to Ashenfelter et al. (1995), Peresie (2005), and others,

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[58] *See, e.g.*, *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 773 (2012) ("Except to the extent the trial court bases its ruling on a conclusion of law (which we review de novo), we review its ruling [on] expert testimony for abuse of discretion."); *cf.* Rosenberg, *supra* note 27, at 659 ("'[A]buse of discretion' does not communicate meaning. It is a form of ill-tempered appellate grunting and should be dispensed with.").

[59] Lee Epstein, William M. Landes & Richard Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard Univ. Press 2013) 26-50, 77-94.

[60] *Denham v. Super. Ct.*, 2 Cal. 3d. 557, 564 (1970) ("A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown."); *see, e.g.*, 2020 COURT STATISTICS REPORT, *supra* note 46, at 34 (Statewide reversal rate in California intermediate appellate courts in Fiscal Year 2018-19 was 9% overall, 5% for statewide criminal appeals, 15% for statewide civil appeals, 19% for original proceedings, and 3% for juvenile appeals.).

[61] We note that significant content analysis is required to separate each issue and standard of review. Our early attempts to examine these issues with less granular data, however, produced significantly different and, we opine, misleading results. Initially, we adopted for the purpose of analysis the overall case outcome stated by the panel in each opinion, whether "affirmed," "reversed," or "reversed in part." But the overall self-identified case outcome overlooked numerous decisions on the issues within each case and did not fully reflect any interaction between ultimate outcomes and analytical outcomes measured by the standard of review.

[62] LEE EPSTEIN, WILLIAM M. LANDES & RICHARD POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 144–45 (Harvard Univ. Press 2013); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. J., 1897–1900 (2009).

[63] *See* Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD., 257–59, 266 (1995).

we use econometric techniques to estimate the relationship between specific judicial background characteristics and decision-making outcomes.[64]

We collected data from a random selection of published and unpublished opinions from California's intermediate appellate courts, drawn from two different random time periods. While the U.S. Courts of Appeals Database—used by many scholars conducting empirical research on judicial decision-making—contains only published cases,[65] our database includes both published and unpublished cases. We hypothesize that the publication standards in California are not predictive of whether a jurist or panel will, more likely than not, be influenced by non-legalistic factors in selecting a standard of review, and would therefore not be reflective of the mass of cases being reviewed.[66] We agree with others who have referred to this problem as a type of selection bias,[67] though note that in California's intermediate courts, unlike in federal appellate courts, very few if any cases are resolved via summary disposition. Unlike in federal appellate courts, appeals in California are resolved via a formal written opinion, whether published or not, providing another reason we include both published and unpublished decisions in our sample.[68]

Data was collected from the Judicial Council of California via the California Courts' website.[69] Opinions are posted on a rolling basis, but only the most recent sixty days of opinions are available at any given time. We collected data for approximately sixty consecutive days in each of two different calendar years. From that data set, we randomly selected 500 opinions to analyze, 250 from each period. The text of each opinion was analyzed by the authors, with the assistance of law-student research assistants, and broken down and coded by case and issue type. Cases were classified into three broad categories: civil; criminal; and juvenile. Each issue in a case was separately cataloged along with detailed information about the standard of review applied, whether the issue was reversed, and whether agreement among the panelists was unanimous. Issues were classified into various issue types according to the lists in Table A1. After all issues were

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[64] *See* Ashenfelter, Eisenberg & Schwab, *supra* note 62, at 260, 273; Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. REV., 1762, 1776 (2005).

[65] Mark Hurwitz & Ashlyn Kuersten, *Changes in the Circuits: Exploring the Courts of Appeals Databases and the Federal Appellate Courts*, 96(1) JUDICATURE 23, 27 (2012).

[66] 2020 COURT STATISTICS REPORT, *supra* note 46, 1–4, 7, 27, 36; *Cf.* Stephen L Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L. J. 67, 111 (2004) (asserting unpublished cases are "light-weight"); *see* CAL. CONST. art. VI, § 13; *see generally* CAL. CT. R. 8.1105(b)–(c) (factors for publication); Edwards & Livermore, *supra* note 62, at 1922–23.

[67] *See* Ashenfelter, Eisenberg & Schwab, *supra* note 62.

[68] California appellate courts have the option to issue summary dispositions or memorandum opinions *per curiam*, as opposed to full written opinions, but in practice rarely do so. Typically, summary-type dispositions are reserved for dismissals based on lack of jurisdiction or failure to prosecute, or for writ petitions (*e.g.*, mandate, prohibition, certiorari) denied prior to issuance of an order to show cause or alternative writ. The practice in many federal appellate courts is the opposite; the supermajority of cases are resolved via summary or memorandum disposition issued *per curiam*, while a small subset of cases is resolved by full written opinion. This distinction suggests that California intermediate appellate courts do not treat some cases as more "opinion-worthy," meaning that the impact of judicial background is not limited to high-stakes cases or published cases, but consciously or unconsciously influences all decision-making across all cases.

[69] *Opinions*, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/opinions.htm (last visited Jan. 31, 2022).

coded, the authors conducted random checks from the sample to ensure consistency in issue coding. Notes in the Appendix further clarify how issues were categorized and coded.

Biographical data on judicial officers were collected from profiles published by the Daily Journal and from official biographies published on the California Courts' website.[70] We have limited our examination to those background traits that can be objectively categorized and verified.

C. Analytical Method

We begin by classifying panels into three categories: (1) majority of members have a "criminal law only" background, (2) majority of members have a "civil law only" background, and (3) "other background" compositions.[71] This classification assumes that the judicial background of a panel is a proxy for shared experience or perspective.[72] We then ask the question: Does panel classification impact the choice of standard of review and reversal rates of issues? Furthermore, does a particular aspect of judicial background have an effect for issues of the same type, *e.g.*, criminal practice background reviewing criminal issues?

To answer these questions, we apply propensity score methods.[73] The first step in our analysis is to estimate the probability that each issue is assigned to each of the three background compositions. To do so, we employ multinomial logistic regression, where the predicted probabilities are the relevant propensity scores. The results of these estimations are presented in the Appendix along with the densities of the predicted probabilities for the three background classifications. In the next step, we include the propensity scores and their interactions with indicator variables for the background compositions in a multinomial logistic regression of the applied standard of review. The full estimation results are presented in the Appendix. For the effect on issue reversal, we modify the final step to be a logistic regression. The other factors we use for estimating propensity scores, and use as

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[70] DAILY J., https://www.dailyjournal.com/judicial_profiles (last visited Dec. 31, 2020); *California Courts of Appeal*, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/courtsofappeal.htm (last visited Jan. 31, 2022) (Daily Journal profiles are, primarily, based on reported interviews with judicial officers, though they may also contain data from official biographies, press releases, or curricula vitae, such as those posted on the California Courts' website. All of these sources generally rely on biographical information that is self-reported by judicial officers.).

[71] We define "criminal law only" background to mean that while in law practice, and before taking the bench, a justice practiced criminal law only and did not report any experience practicing any form of civil law. We define "civil law only" background to mean that while in law practice, and before taking the bench, a justice practiced civil law only and did not report any experience practicing criminal law. Civil law, for this purpose, includes all non-criminal law, including but not limited to general civil law, probate, family, and transactional law. We define "other background" such that it includes a mixture of both civil and criminal law practice experience and also nontraditional practice experience that cannot be fairly classified as either civil or criminal law, *e.g.*, law professor. A panel classified as having a "majority" of "criminal law only" panelists will consist of at least two members who have a criminal law only background. A panel classified as having a "majority" of "civil law only" panelists will consist of at least two members who have a civil law only background.

[72] Similar effects have been noted by Boyd, Epstein & Martin, *supra* note 8; Daniel L. Chen, Xing Cui, Lanyu Shang & Junchao Zheng, *What Matters: Agreement Between U.S. Courts of Appeals Judges* 1, 4 (30th Conference on Neural Information Processing Systems 2016), https://ssrn.com/abstract=2839305.

[73] The results of the multinomial logistic and logistic regression analyses without estimated propensity scores are available upon request.

control variables in outcome regressions, are whether or not the plaintiff in the trial court is the respondent on appeal, binary variables specifying the political party of the appointing governors, the number of issues in each case, the cumulative experience of the panel serving on the court of appeal, the trial court experience of the panel (indicator for a member with no trial court experience), the presence of a female justice, and court-by-year fixed effects.

IV. EMPIRICAL RESULTS

A. General Characteristics of the Sample

Table A2 presents descriptive statistics for the full sample of issues analyzed. It reflects that 11.6% of the issues analyzed were reversed. The majority of issues, 53.6%, were reviewed de novo. Considering background characteristics, panels where a majority of justices had a "civil law only" background are the most common, 53.7%; however, the majority of issues are from criminal cases, 54.9%. Also, 26.5% of issues were heard by a panel with a member without trial court experience, and 73.7% of issues had a panel with at least one female member.[74]

B. Legal-Practice Background Impacts Reversal Rates and Selection-and-Application of Standards of Review

The results of our analysis of these data, utilizing the propensity score method described above, are reflected in Table A3. We find that for all issues, reflected in Panel A, "civil law only" majority background panels are eleven percent more likely to apply the de novo standard of review when compared to an "other background" (*i.e.,* not "civil law only "majority or "criminal law only" majority) panels. "Civil law only" majority background panels are 7.8 percentage points less likely to apply the substantial evidence standard when compared to an "other background" panel.[75]

Next, we consider only "dynamic issues" where the data point to discretion in the choice of standard of review, presented in Panel B. If judicial background has an impact on selection of the standard of review, we would expect that the estimates in Panel B would be larger, in absolute terms, than those in Panel A. When looking at these "dynamic issues" where the data point to discretion in application of the standard of review, that expectation is borne out; all estimates maintain their sign, compared to Panel A, but are larger in absolute terms, with the exception of one estimate. In Panel B, panels with a "civil law only" majority background are 18 percentage points less likely to choose to apply the abuse of discretion standard of review and 22 percentage points more likely to choose to review issues de novo, when compared to "other background" panels. "Criminal law only" majority background panels are 23 percentage points less likely to apply an abuse of discretion standard and 20 percentage points more likely to apply a de

[74] In the Appendix we present evidence that panels are effectively randomized cases, as we test for the independence of legal-practice background and case type.

[75] Results are similar when examining only unpublished cases. These results are available from the authors.

novo standard than "other background" panels.[76] In other words, "civil law only" majority background panels are significantly more likely than other panel types to review issues de novo, while "criminal law only" majority background panels are least likely to review issues for abuse of discretion.[77]

Considering only criminal cases, reflected in Panel C, "criminal law only" majority background panels are 17 percentage points less likely to apply abuse of discretion review and are 11 percentage points more likely to perform substantial evidence review, when compared to "other background" panels, and 8 percentage points more likely to do so than "civil law only" majority background panels.

Considering only civil cases, as reflected in Panel D, "civil law only" majority background panels are 26 percentage points less likely to apply substantial evidence review than are "other background" panels, and 21 percentage points more likely to apply the de novo standard than "other background" panels. "Criminal law only" majority panels considering civil cases are 28 percentage points more likely to apply the de novo standard of review than are "other background" panels. These results are consistent with the effects observed in Panels A, B, and C, but should be considered very cautiously (see Table notes).[78]

Moving to the probability of reversal, presented in Table A4, considering all issues, "other background" panels are less likely to reverse an issue, compared to both "civil law only" and "criminal law only" majority background panels, 5.6 and 9.9 percentage points respectively. Considering only "dynamic issues" where the data point to discretion in the choice of standard of review, "other background" panels are less likely to reverse an issue, compared to both "civil law only" and "criminal law only" majority background panels, 7.9 and 15 percentage points respectively.[79] Again, both estimates maintain their sign, but grow in magnitude, suggesting background is an important factor in these analytical choices.[80] As before, civil case estimates must be considered carefully.

C. Political Party Affiliation, Gender, and Trial Court Experience Have No Significant Impact on Selection-and-Application of the Standard of Review

1. Political Party Affiliation Has No Impact on Reversal Rates or Selection-and-Application of the Standard of Review

We begin by analyzing the political party makeup of panels. For each justice, we record the political party affiliation of the individual who appointed the justice to the district court of appeals. Similar to legal-practice background, we specify three types of panels (i) majority Republican-appointed, (ii) majority

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[76] Results are similar when "dynamic" issues are specified as those issue types that have no variance in the applied standard of review. The resulting sample consists of 876 issues. These results are available from the authors.

[77] Using specific issue types, rather than case types, for propensity score and outcome estimations yields similar results. Conditioning on specific issue types is only possible when examining "dynamic issues," since issues that have a fixed standard of review have no variation in the data. The results are reported in the Appendix.

[78] There is very little within-court variation in the chosen standard of review for the civil cases in the sample.

[79] Estimates are smaller when specifying "dynamic" issues as those issue types that have no variance in the applied standard of review. These results are available from the authors.

[80] The results conditioning on specific issue types for "dynamic issues" are reported in the Appendix.

Democratic-appointed, and (iii) other compositions. Republican-appointed majorities decided 48.6% of cases and 50.4% of issues in our sample. Democratic-appointed majority panels decided 41.7% of cases and 41.6% of issues. The results are contained in Table A5 for the standard of review applied, and Table A6 for the probability of reversal.[81] There are no differences in the standard of review applied based on political-party affiliation of the appointer. This holds true in the full sample and the subsample of dynamic issues. Furthermore, Republican-appointed majority panels are no more or less likely to reverse a given issue. Again, this is true in the full and dynamic issues samples.

2. Gender Has No Impact on Reversal Rates or Selection-and-Application of the Standard of Review

The next characteristic we examine is gender. We first analyze differences in standard of review and reversal for panels with and without a female member. Seventy-three percent of all cases, and 73.7% of all issues in our sample, are decided by panels with at least one female member.[82] Next, we examine differences based on whether or not the panel has a majority of female members. In our dataset, 30.9% of cases and 29.2% of issues are decided by panels with a majority of female members.

To do so, we again apply propensity score methods. Since our treatment is binary, however, we apply propensity score matching. We first estimate the probability of each issue being assigned to a panel with a female member, using logistic regression.[83] Next, we match treated and untreated issues based on the predicted probabilities, or propensity scores, using nearest neighbor matching. The Appendix presents the densities of the propensity scores for the raw data and matched samples, for the full sample of data; the covariates' standardized differences and variance ratios are available from the authors. For the probability of reversal, we estimate the average treatment effect as the average of the differences between the issues' outcomes and their matched outcomes. For the selection of standard of review, we follow the same process, except we estimate a multinomial logistic regression on the matched sample in the final stage.

Tables A7 and A8 present results for the presence of a female panelist. There is no evidence, from our method, that standard of review and reversal are affected by the presence of at least one female panelist. Similarly, from Tables A9 and A10, we conclude there are no differences between panels comprised of a majority of female members and other panels. These results must, however, be considered cautiously. There are several court-years with no variation in the presence of a female panelist or having a female majority. For example, there are instances where all panels from a court in a given time period had a female member, and other instances where no panel from a court-year had a female majority.

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[81] Full results for the estimation of propensity scores and outcomes are available from the authors.

[82] As a result, 23.3% of issues are decided by panels comprised of entirely male justices. On the contrary, only 3.8% are decided by fully female panels.

[83] Propensity score estimation results are available from the authors.

3. Trial Court Experience Impacts Reversal Rates, but Not Selection-and-Application of the Standard of Review

We also analyzed trial court experience as a background characteristic. In California's appellate courts, not all justices have experience serving as judges in trial courts. Experience on the trial court, if any, prior to appointment to the court of appeal may function independently of law-practice experience as a background characteristic impacting ultimate and analytical outcomes. For example, trial court experience may provide a different perspective on the level of deference that should be afforded to trial court decisions.

We posit that a panelist with no trial court experience may approach issues applying different heuristics or frames on trial court actions. As a result, we estimate the impact of having at least one member of the three-justice panel with no trial court experience on ultimate issue outcomes as measured by reversal, and on analytical outcomes as measured by application of the standard of review. We utilize the same propensity score methods as for our analysis of gender, with the density plot of the propensity scores in the Appendix.[84]

Our results showing whether issue reversal is impacted by having a panel member with no experience sitting in the trial court are presented in Table A11. While it is difficult to untangle the effects of an individual panelist on the group, our data show that having a member on a given panel with no experience sitting in the trial court before taking the bench in the court of appeal reduces the probability an issue is reversed by 7.9 percentage points. Our data shows, though, that having a member with no experience on a trial court does not affect the choice of the standard of review; see Table A12. That is, there is a significant impact on the ultimate outcome, but not on the analytical outcome.

V. JUDICIAL BACKGROUND IMPACTS SELECTION OF THE STANDARD OF REVIEW AND OVERALL REVERSAL RATES

We have presented evidence that judicial background impacts analytical outcomes, measured by selection of the standard of review, and also ultimate outcomes measured by reversal rates. We admit the point estimates we found are rather large in magnitude. We identify issue types that display variation in the applied standard of review, which we call "dynamic issues." We find that while the legal-practice background of the panel may have an impact on standard of review for all cases, it has a larger effect on standard of review choice, when considering "dynamic issues." It is this change in magnitude that suggests that background is a factor affecting the choice of standard of review.

"Civil law only" background panels are most likely overall to apply the de novo standard of review, meaning they are least likely to afford deference to trial court decisions even where they would have the option to do so when considering "dynamic issues."[85] "Criminal law only" panels are least likely overall to review

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[84] Again, propensity score estimation results are available from the authors.

[85] It is not clear that analytical outcomes are always outcome determinative such that a group, for example, that is more likely to apply a de novo standard will reverse de novo issues at an above-average reversal rate, or a group

for abuse of discretion, and in reviewing criminal cases are most likely to review for substantial evidence. "Other background" panels are, overall, most likely to review for abuse of discretion and least likely to review issues de novo; they are also least likely of all panels to reverse issues.[86]

If standards of review are applied in a formalistic way, there is no accounting for these differences in analytical perspectives and ultimate outcomes. To paraphrase Justice Oliver Wendell Holmes, our results reflect that the life of standards of review has not been logic, but experience. Few appellate opinions directly address the question of "why" a particular standard of review is selected, apart from stating whether an issue is one of law, fact, or pure discretion. "Discretion" is not a fixed concept but "open[s] a thousand doorways to discussion."[87] And the choice between law, fact, and discretion is viewed by some as "only a bit of legalistic mummery designed to conceal from the uninitiated the fact that the courts decide these questions about as they wish."[88] This is problematic. Appeals cannot be reviewed on their merits in a vacuum. Some standard of review must be applied, or the function of the appellate court would be to retry each case. Even in the absence of a discussion of the applicable standard of review by the parties, reviewing courts by necessity must determine what level of deference to apply to the trial court's rulings—or they cannot "review" anything.

Standards of review are, as we described above, theoretically applied as if they were binding "rules." But our research affirms that standards of review are not uniformly applied, nor are they "standard." There are differences in how these rules are applied by different jurists. These results reflect that where one law-practice background dominates on a panel it impacts how the panel approaches the standard of review for each issue. This is not true of the other background characteristics we measured.

We cannot say with certainty what particular aspect of practice background accounts for these differences. It may be linked to attitude,[89] personal values, psychology, or some deference to the expertise of colleagues who are

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more likely to apply an abuse of discretion standard will reverse abuse issue at below-average rates. Further study of this relationship would be possible with a larger issue sample size.

[86] Our data also demonstrate that prior trial court experience impacts reversal rates. Along with the difficulty of understanding the mechanism leading to differences in reversal from having a member without trial court experience, it is very possible there is an interaction with other background characteristics. For example, trial court experience may also enhance the value of law-practice experience as a proxy for superior knowledge of a given subject. A panelist with a "criminal law only" background and ten years of experience on the criminal trial bench may have a very different approach in reviewing criminal law issues than a panelist with no experience on the trial court, regardless of practice background. Measuring this type of effect is not possible with our method and is out of the scope of the present study.

[87] Oliver Wendell Holmes, Jr., *The Common Law (1881)* ("The life of the law has not been logic; it has been experience."), *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 542 (16th ed. 1992); Rosenberg, *supra* note 27, at 635.

[88] Brown, *supra* note 49, at 900.

[89] Jeffrey A. Segal & Alan J. Champlin, *The Attitudinal Model*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 17–23 (Robert M. Howard & Kirk A. Randazzo eds., 2018).

masters of a particular domain.[90] It may also be based on unconscious bias.[91] Any of these factors could influence the analytical framework applied to each issue. Those influences could alter how different panels of jurists distinguish factual and legal issues, how they view their role in the hierarchy of error correction, or whether they utilize standards of review (or degrees of deference) in an outcome-determinative way.[92]

We hypothesize, however, that shared-practice background on a panel facilitates greater consensus about when, and whether, it is permissible or desirable for a reviewing court to interfere or substitute its judgment for that of a lower court.[93] We argue that this consensus is unconscious and based on a shared mental model among civil practitioners and a shared mental model among criminal practitioners, developed through their specific law-practice experience. These are heuristics or models of analogic reasoning, whereby one's prior expertise or experience is mapped onto a subject or problem. [94] That is, decisionmakers often reach solutions by unconsciously analogizing each issue or problem to past experience. These analogies are not perfectly drawn, and often involve oversimplification or mismatch between a given problem and past experience. [95] Yet, these models are a reality of decision-making. As one scholar has opined: "It is mental representations—referred to in the cognitive psychology literature as 'mental models'—not written law, by which lawyers and judges process cases."[96]

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[90] *See* Lawrence S. Wrightsman, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 37–56 (1999) (discussing opinion formation based on psychology values and attitude).

[91] *See generally* Chris Guthrie, Jeffrey J. Rachlinkshi & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (discussing psychology and cognitive biases impacting judicial decision-making).

[92] *See* Timothy Endicott, *Questions of Law*, 114 L. Q. REV. 292, 294, 305 (1998); Kunsch, *supra* note 35, at 21–24, 48–49 (discussing policy considerations in inconsistent application of standards of review); *see also* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalized Judicial Restraint*, 7 N.Y.U. L. REV. 962, 998–1001 (discussing hierarchical structure of appellate review as means to enhance quality of deliberation and discipline lower court judges in federal system); Peters, *supra* note 7, at 265.

[93] *See* Endicott, *supra* note 93, at 292, 294, 305.

[94] Gary, Wood & Pillinger, *supra* note 10, at 1229, 1229–230; Ryan, *supra* note 10, at 638, 658; LoPucki, *supra* note 10, at 1500–02, 1508, 1518; *see* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 264–65 (2017) (describing impact of experience in use of analogic reasoning and mapping onto particular issues or problems); Chad M. Oldfather, *Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role*, 15 J. DISP. RES., 156, 157, 164 (2015) (use of "tacit" knowledge in decisionmaking); Elizabeth Maitland, *Decision-Making and Uncertainty: The Role of Heuristics and Experience in Assessing a Politically Hazardous Environment*, 36 STRATEGIC MGMT. J., 1554, 1555–574 (Oct. 2015) (discussing prior knowledge or experience shaping small world representations or heuristics and analogic reasoning); A. Craig Keller, Katherine T. Smith & L. Murphy Smith, *Do Gender, Educational Level, Religiosity, and Work Experience Affect the Ethical Decision-Making of U.S. Accountants?,* 18 CRITICAL PERSPECTIVES ON ACCOUNTING 299, 303, 311–12 (2007); *see* Tobias Greitemeyer, Felix C. Brodbeck, Stefan Schulz-Hardt & Dieter Frey, *Information Sampling and Group Decision Making: The Effects of an Advocacy Decision Procedure and Task Experience*, 12 J. EXPERIMENTAL PSYCH. 40–41 (2006) (explaining confirmation biases and their influence on group decision-making); Kimberly D. Elsbach, Pamela S. Barr & Andrew B. Hargadon, *Identifying Situated Cognition in Organizations*, 16 ORG. SCI., 422, 428–430 (July–Aug. 2005) (decision-making influenced by individual schemas and decision context resulting in potentially flawed situated cognition); *see also* Ted L. Field, *Hyperactive Judges: An Empirical Study of Judge-Dependent Judicial Hyperactivity in the Federal Circuit*, 38 VT. L. REV. 625, 631–32, 642 (2014) (Judges with prior patent-law experience more comfortable substituting own judgment for district court when reviewing patent cases.).

[95] Gary, Wood & Pillinger, *supra* note 10, at 1229–230; Ryan, *supra* note 10, at 638–39, 648–651.

[96] LoPucki, *supra* note 10, at 1500.

Here, although individuals may understand the world through many types of working mental models, or analogical heuristics, our data suggests that the models premised on past legal experience may have outsized influence over analogic reasoning relative to other mental models premised on, for example, gender, or personal politics.[97] Based on our results, we hypothesize that a panel's collective training and experience in civil or criminal law prior to taking the bench so significantly forms their analogic reasoning that it, more than other background factors, influences how they view and apply standards of review. This type of analogic reasoning is divorced from traditional distinctions among levels of deference. It is also almost certainly unconsciously applied, increasing the likelihood that a decision about the standard of review derives from a mismatched analogy, or past experience, applied to justify a particular outcome.[98]

That is, our findings suggest that appellate jurists rely on what may be unreliable mental models in applying the standard of review, rather than careful reflection and discussion about what level of deference should be afforded in a particular instance.

VI. CONCLUSION

Our research sheds light on the nuanced dynamics underlying standards of review, exposing the need for further examination and analysis. Our hope is that by uncovering the impact of personal backgrounds on the application of the standard of review, we can contribute to a more comprehensive understanding of how the judicial decision-making process operates and how it may be influenced by nonlegal or extraneous factors. The question of why any particular background characteristic influences the selection of a particular standard of review deserves further study.[99] But it is not the key question this paper seeks to answer. Our research, instead, provides empirical evidence demonstrating that the choice to apply a particular standard of review is not a mechanical application of a standard set of rules. Instead, the rules vary based on *who* is doing the analysis, as do the ultimate outcomes resulting directly from the selection and application of the standard of review.

This *Rashomon*-like[100] effect among panels with different practice backgrounds demonstrates that the standards are either so imprecisely defined, or

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[97] *See* Goldwater, *supra* note 10, at 137, 137–39; Gary, Wood & Pillinger, *supra* note 10, at 1231, 1242; Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 899, 911 (2015); Schauer & Spellman, *supra* note 95, at 250, 261–65.

[98] Schauer & Spellman, *supra* note 95, at 265; Field, *supra* note 95, at 630–32; Elsbach, Barr & Hargadon, *supra* note 94, at 429–30; *see* Maitland, *supra* note 94, at 3–4.

[99] Potentially fruitful paths for further research may include similar analyses in other states or replication with larger samples, due to the admittedly noisy estimates from our data and possible interaction effects, or examination of other types of personal background characteristics.

[100] *See, e.g.*, Wendy D. Roth & Jal D. Mehta, *The Rashomon Effect: Combining Positivist and Interpretivist Approaches in the Analysis of Contested Events*, 31 SOC. METHODS & RSCH., 131,131–32 (Nov. 2002) ("Akira Kurosawa's 1950 film *Rashomon* presents four different accounts of a contested event—the murder of a Japanese nobleman and the rape of his wife. As the events are retold from four different points of view, the viewer is left wondering which of the four witnesses was telling the truth and whether a single 'truth' really exists. The film makes clear that there are different truths for these characters, for they are not simply lying to protect themselves

so unevenly applied, that they have become a potential vehicle for jurists to impart their own value judgments, whether consciously or unconsciously. This evidence aligns with the concerns, expressed by numerous scholars, who have decried the use of standards of review as a mere analytical shortcut that imitates substantive analysis,[101] but leaves room for misuse.[102]

In practice, these standards are not consistently applied as review-limiting principles tied to an accepted continuum of deference. Acknowledging this fact and delving deeper into how standards are selected will minimize the likelihood of appellate issues being reviewed through an analytical lens chosen based on nonlegal or extraneous factors. Because these analytical standards currently guide review in intermediate appellate courts and significantly impact reversal rates, their uneven application, or the perception thereof, has potentially significant consequences for the legitimacy of our appellate review process as a whole. As Professor Rosenberg explained decades ago: "Discretion is an unruly concept in a judicial system dedicated to the rule of law, but it can be useful if it is domesticated, understood, and explained. To tame the concept requires no less than to force ourselves to say why it is accorded or withheld, and to say so in a manner that provides assurance for today's case and some guidance for tomorrow's."[103] We agree. As our research demonstrates, it is time "[t]o tame the concept" and reexamine how and why deference is "accorded or withheld."

Many scholars have proposed specific suggestions in an attempt to "tame the concept." For example, Martha Davis opines that appellate practitioners should explain the type of discretionary decisions made by trial courts to "aid" reviewing courts in understanding "why and how much . . . deference should or should not follow."[104] She has further suggested that appellate courts "frame their review by issue, factors, reasoned analogy, and degree of discretion, providing general guidance on the evolving concept of discretion as well as the specific application at hand."[105] Similarly, Professor Rosenberg, as noted above, ranks discretionary decisions on a letter-grade basis, ranging from "uncontrolled choice" by the trial court to "dilute discretion," affording the trial court minimal or no deference at all.[106] We posit that these types of frameworks have not gained traction in appellate opinions because, aside from concerns about judicial economy and workload, the parties, counsel, and the courts underestimate the variability of discretionary calls

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(in fact, the version of each main party to the crime implicates the teller for the murder); rather, they have deceived themselves into believing the version they have told.").

[101] *See* Perschbacher & Bassett, *supra* note 15, at 35–36 (standards of review and harmless error analysis allow "fudging" with legal rules and function as analytic shortcuts to avoid reasoned analysis); Schroeder, *supra* note 19, at 10 (describing standard of review as "a technique which permits the appellate court openly to tolerate a large margin of error in the trial court without ever making a close examination of the trial court's ruling"); Rosenberg, *supra* note 27, at 653 ("One would suppose that since the term discretion can carry a powerful charge of authority, it would be packaged with discriminating purposefulness and deliberate labels. That is not the way it happens.").

[102] *See* Peters, *supra* note 7, at 265 (Judges "manipulate" standards of review when they disagree with lower court rulings.).

[103] Rosenberg, *supra* note 19, at 28.

[104] Davis, *supra* note 14, at 82–83.

[105] *Ibid.*; *accord* Hofer, *supra* note 19, at 231; Sward, *supra* note 31, at 28.

[106] Rosenberg, *supra* note 19, at 10–14.

to be made and how unevenly they apply these "standards". Given that application of the standard of review, as well as a panel's conception of deference, are to some extent influenced by personal background, it is imperative for reviewing courts to provide a cogent legal basis for the level of deference they apply.

We have in this article used *Jones* as an example, not because the outcome of that case is significant, but because it serves as a vivid demonstration of the pivotal role played by the standard of review in a given case and how it can be used to obscure, rather than illuminate, the rationale for a given decision. Reading *Jones,* one wonders whether the majority truly applied the substantial evidence standard of review. That would have required deference to the trial court's findings if they were supported by "substantial evidence" in the record, *i.e.*, evidence of ponderable legal significance. Was the opinion motivated by the facts and law, or by some other unarticulated nonlegal or extraneous factor? Or did the majority, as argued by Justice Werdergar in dissent, simply substitute its opinion for that of the juvenile court? We would not need to speculate if the majority had, instead of merely stating the applicable standard of review, endeavored to explain how the standard was applied.

We echo Davis, Rosenberg, and others, who argue that a consistent decision-making framework be transparently applied to questions of deference. Enhanced transparency and clarity are necessary to mitigate the impact of potential bias and bolster the integrity of the appellate process.[107] Such a framework need not be complicated; it need only involve a conscious effort by reviewing courts to expressly examine when and whether to defer to the trial court. We summarize our suggested framework in three steps. First, determine the applicable standard of review—taking into account legislative intent, historical precedent, practical context, and the specific roles of the trial and appellate courts. Second, explain the standard and how it will be applied. Third, apply the standard by detailing why evidence is, or is not, "substantial," whether there are conflicts in the evidence, whether the trial court made credibility determinations, why a decision is "beyond the bounds of reason," or why no deference should be afforded to the trial court.[108]

Although it seems obvious that this framework, or some similar framework, should be part of every appellate opinion, it often is not. Too many opinions apply the standard like boilerplate, or a "formula" that allows the appellate court to "avoid ever having to explain what the law is," and to "disclose

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[107] *See* Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30–31 (2007) (explaining public perception of "neutrality," *i.e.,* consistent and transparent application of neutral rules, as factor in gauging procedural justice).

[108] This is similar to Martha Davis's suggested framework of questions to evaluate discretionary decisions: "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? 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?"; Davis, *supra* note 14, at 82–83.

who wins without explaining why the losing party lost."[109] This approach leaves much to be desired.

Deferential review safeguards the trial court's institutional role, and acknowledges its expertise, by insulating trial courts from a certain amount of appellate interference. But it should not shield unjust results from scrutiny. Appellate courts have the difficult task of preserving the integrity of the trial court's role while safeguarding against procedural and legal errors and irregularities. The standard of review helps balance these sometimes-inconsistent aims when it is applied thoughtfully, recognizing the need for deference and maintaining the reviewing court's obligation to uphold the law and principles of due process. The questions of deference that underpin these standards are nuanced and should be addressed directly, and with care, to ensure that court proceedings at every level comply with due process and fundamental fairness. Our research demonstrates that judicial backgrounds influence the standard of review. This adds yet another complicating factor to the already complicated deference equation—a factor that needs to be acknowledged if our courts are to achieve results that preserve the integrity of our judicial system.

[109] Schroeder, *supra* note 19, at 10, 18–19, 22.

APPENDIX

Table A1. Issue Classifications

Civil (Including Family, & Probate)	Criminal, & Juvenile
Jurisdiction	Removal of Child
Discovery	Parenting Plan
Demurrer	Finding of Responsibility
Motion for Summary Judgement	Plea
Anti-SLAPP (CCP 425.16 or 425.17)	Statutory Pre-trial Motions
Other Trial Error	Preliminary Hearing
Attorneys' Fees	Constitutional Motions
Motion for New Trial/JNOV	Other Trial Error
Instructional Error	Instructional Error
Other Pre-trial Error	Sentencing
Other Post-trial/Post-appeal	Other Pre-trial Motions
	Other Post-trial/Post-appeal
	Resentencing
	Finding of Factual Innocence

Table A2. Descriptive Statistics

		Issue Level			
VARIABLES	Case Level	Full Sample	Other Majority	Civil Majority	Criminal Majority
Reversed		0.116	0.0896	0.124	0.128
Abuse of Discretion		0.290	0.308	0.291	0.265
De Novo		0.536	0.534	0.539	0.530
Substantial Evidence		0.174	0.158	0.170	0.205
Other Majority	0.242	0.252			
Civil Majority	0.555	0.537			
Criminal Majority	0.203	0.211			
Member No Trial Experience	0.270	0.265	0.262	0.313	0.150
Republican Majority	0.486	0.504	0.674	0.425	0.500
Democratic Majority	0.417	0.416	0.251	0.474	0.466
Civil Case	0.333	0.314	0.297	0.318	0.325
Criminal Case	0.490	0.549	0.563	0.533	0.573
Juvenile Case	0.177	0.137	0.140	0.150	0.103
Plaintiff Not Respondent	0.256	0.236	0.211	0.224	0.295
Female Member	0.730	0.737	0.749	0.792	0.585
Cumulative DCA Experience (years)	50.68	50.66	50.94	54.02	41.79
		(14.04)	(12.13)	(14.43)	(11.06)
Number of Issues	2.287				
	(1.906)				
Observations	492	1,108	279	595	234

Note: Proportions reported, with means for continuous measures. Standard deviations in parentheses for continuous measures. Family and probate cases are included as civil cases. Fourteen issues (1.2% of the entire data) were omitted based on inability to classify the standard of review as either abuse of discretion, de novo, or substantial evidence.

Table A3. Legal-Practice Standard of Review Results

Panel A: All Issues (n = 1,108)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Civil	***-0.0313***	***0.110****	***-0.0782****
	(0.0424)	***(0.0437)***	***(0.0406)***
Criminal	***-0.0895***	***0.0705***	***0.0190***
	(0.0562)	***(0.0597)***	***(0.0612)***
Panel B: Dynamic Issues (n = 640)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Civil	***-0.183*****	***0.223*****	***-0.0398***
	(0.0604)	***(0.0569)***	***(0.0426)***
Criminal	***-0.225*****	***0.196****	***0.0292***
	(0.0854)	***(0.0800)***	***(0.0736)***
Panel C: Criminal Cases (n = 608)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Civil	***-0.105***	***0.0719***	***0.0330***
	(0.0762)	***(0.0725)***	***(0.0339)***
Criminal	***-0.168****	***0.0533***	***0.114****
	(0.0809)	***(0.0889)***	***(0.0570)***
Panel D: Civil Cases (n = 340)[a]			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Civil	***0.0513***	***0.214****	***-0.266*****
	(0.0972)	***(0.0972)***	***(0.0914)***
Criminal	***-0.205****	***0.279****	***-0.0740***
	(0.106)	***(0.117)***	***(0.135)***

Note: Average marginal effects compared to "other background" panels. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1
[a] Uses court and year fixed effects, as opposed to court-by-year fixed effects, and third court is omitted due to lack of variation.

Table A4. Legal-Practice Background Issue Reversal Results

Dependent Variable = Pr(Reversed)				
Background	***All Issues (n = 1,108)***	***Dynamic Issues (n = 640)[a]***	***Criminal Cases (n = 608)[a]***	***Civil Cases (n = 327)[a,b]***
Civil	***0.0558****	***0.0792****	***0.00301***	***0.0672***
	(0.0320)	***(0.0450)***	***(0.0375)***	***(0.0888)***
Criminal	***0.0993*****	***0.149*****	***0.0410***	***0.332*****
	(0.0479)	***(0.0727)***	***(0.0647)***	***(0.153)***

Note: Average marginal effects compared to "other background" panels. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1
[a] Uses court and year fixed effects, as opposed to court-by-year fixed effects.
[b] Third and fourth section two courts are omitted due to lack of variation.

Table A5. Political Affiliation Standard of Review Results

Panel A: All Issues (n = 1,108)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Republican	***-0.00870***	***0.0181***	***-0.00942***
	(0.0389)	***(0.0378)***	***(0.0335)***
Other	***-0.0180***	***-0.0304***	***0.0484***
	(0.0872)	***(0.100)***	***(0.0776)***
Panel B: Dynamic Issues (n = 640)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Republican	***-0.0312***	***-0.00639***	***0.0384***
	(0.0569)	***(0.0486)***	***(0.0362)***
Other	***0.0931***	***-0.147***	***0.0542***
	(0.124)	***(0.122)***	***(0.0697)***

Note: Average marginal effects compared to "Democratic background" panels. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

Table A6. Political Affiliation Issue Reversal Results

Dependent Variable = Pr(Reversed)		
Background	***All Issues (n = 1,108)***	***Dynamic Issues (n = 631)[a]***
Republican	***0.0183***	***0.0682***
	(0.0322)	***(0.0438)***
Other	***-0.0774****	***-0.0397***
	(0.0438)	***(0.0643)***

Note: Average marginal effects compared to "Democratic background" panels. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1
[a] Nine observations are omitted due to lack of variation in reversal for the 6th DCA in the 2018 subsample.

Table A7. Female Panelist Standard of Review Results

Panel A: All Issues (n = 1,028) [a]			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Female Member	***-0.0532***	***0.0650***	***-0.0118***
	(0.0610)	***(0.0589)***	***(0.0497)***
Panel B: Dynamic Issues (n = 574) [b]			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Female Member	***0.0100***	***-0.0269***	***0.0169***
	(0.0717)	***(0.0745)***	***(0.0350)***

Note: Average marginal effects compared to panels without a female member. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

[a] Eighty observations are omitted due to lack of variation in gender within courts.

[b] Sixty six observations are omitted due to lack of variation in gender within courts.

Table A8. Female Panelist Issue Reversal Results

Dependent Variable = Pr(Reversed)		
Background	***All Issues*** [a] ***(n = 1,028)***	***Dynamic Issues*** [b] ***(n = 574)***
Female Member	***0.0313 (0.0322)***	***0.0208 (0.0623)***

Note: Estimated average treatment effect presented. Abadie and Imbens (2006) standard errors in parentheses.
*** p<0.01, ** p<0.05, * p<0.1
[a] Eighty observations are omitted due to lack of variation in gender within courts.
[b] Sixty six observations are omitted due to lack of variation in gender within courts.

Table A9. Female Majority Standard of Review Results

Panel A: All Issues (n = 1,019) [a]			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Female Majority	***-0.0546***	***0.0339***	***0.0207***
	(0.0557)	***(0.0639)***	***(0.0539)***
Panel B: Dynamic Issues (n = 575) [b]			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Female Majority	***-0.0754***	***0.0143***	***0.0611***
	(0.0757)	***(0.0718)***	***(0.0404)***

Note: Average marginal effects compared to panels without a female majority. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

[a] Eighty nine observations are omitted due to lack of variation in gender within courts.

[b] Sixty five observations are omitted due to lack of variation in gender within courts.

Table A10. Female Majority Issue Reversal Results

Dependent Variable = Pr(Reversed)		
Background	***All Issues*** [a] ***(n = 1,019)***	***Dynamic Issues*** [b] ***(n = 575)***
Female Majority	***-0.0127 (0.0206)***	***0.0328 (0.0458)***

Note: Estimated average treatment effect presented. Abadie and Imbens (2006) standard errors in parentheses.
*** p<0.01, ** p<0.05, * p<0.1
[a] Eighty nine observations are omitted due to lack of variation in gender within courts.
[b] Sixty five observations are omitted due to lack of variation in gender within courts.

Table A11. Member Without Trial Experience Issue Reversal Results

Dependent Variable = Pr(Reversed)		
Background	***All Issues (n = 1,004)***	***SoR Choice (n = 573)***
Member w/No Trial Experience	***-0.0786*** (0.0294)***	***-0.0425 (0.0500)***

Note: Estimated average treatment effect presented. Abadie and Imbens (2006) standard errors in parentheses. Uses court and year fixed effects, as opposed to court-by-year fixed effects. Division Three of the Fourth District Court of Appeal is omitted due to no variation in experience in the sample.

*** p<0.01, ** p<0.05, * p<0.1

Table A12. Member Without Trial Experience Standard of Review Results

Panel A: All Issues (n = 588)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Member w/No Trial Experience	***-0.0210***	***-0.0147***	***0.0357***
	(0.0621)	***(0.0673)***	***(0.0580)***
Panel B: Standard of Review Choice (n = 316)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Member w/No Trial Experience	***-0.113***	***0.114***	***-0.00109***
	(0.0825)	***(0.0816)***	***(0.0422)***

Note: Average marginal effects presented. Delta-method standard errors reported in parentheses.
Uses court and year fixed effects, as opposed to court-by-year fixed effects. Division three of the fourth court is omitted due to no variation in experience in the sample.
*** p<0.01, ** p<0.05, * p<0.1

Table A13. Propensity Score Multinomial Logistic Estimations

	All Issues		Dynamic Issues		Criminal Cases		Civil Cases	
VARIABLES	Civil Majority	Criminal Majority	Civil Majority	Criminal Majority	Civil Majority	Criminal Majority	Civil Majority	Criminal Majority
Member No Trial Experience	0.0869	0.607*	0.346	1.302**	0.00346	-0.225	0.273	0.500
	(0.233)	(0.342)	(0.340)	(0.546)	(0.319)	(0.488)	(0.558)	(0.746)
Republican Majority	-1.127***	0.122	-1.583***	0.571	-1.520***	-0.205	-1.658**	-2.467**
	(0.338)	(0.528)	(0.532)	(1.009)	(0.506)	(0.732)	(0.686)	(0.965)
Democratic Majority	0.328	1.350**	0.272	2.585**	0.527	1.172	0.118	0.384
	(0.333)	(0.530)	(0.544)	(1.031)	(0.493)	(0.739)	(0.680)	(0.884)
Civil Case	0.295	-0.660*	0.0314	-1.090**				
	(0.278)	(0.386)	(0.361)	(0.507)				
Criminal Case	0.0770	-0.761**	-0.329	-0.944*				
	(0.272)	(0.367)	(0.387)	(0.506)				
Plaintiff Not Respondent	-0.349	0.521	-0.224	0.447	-0.573	-1.236	-0.341	0.708
	(0.292)	(0.390)	(0.382)	(0.518)	(1.290)	(1.452)	(0.354)	(0.518)
Cumulative DCA Experience	0.0372***	-0.0504***	0.0228*	-0.0854***	0.0737***	-0.0218	-0.00518	-0.126***
	(0.00888)	(0.0127)	(0.0124)	(0.0195)	(0.0153)	(0.0190)	(0.0136)	(0.0250)
Female Member	0.689***	-1.070***	0.983***	-0.879**	0.468	-0.845**	2.719***	-0.338
	(0.222)	(0.278)	(0.321)	(0.415)	(0.319)	(0.384)	(0.561)	(0.592)
Number of Issues	-0.0520*	-0.0899**	-0.0997**	-0.0798	-0.000485	-0.101	-0.103**	-0.0254
	(0.0305)	(0.0449)	(0.0457)	(0.0678)	(0.0490)	(0.0641)	(0.0514)	(0.0818)
Fixed Effects	Court, Year	Court, Year	Court, Year	Court, Year	Court, Year	Court, Year	Court, Year	Court, Year
Constant	-1.262*	2.268**	-0.304	2.290	-3.634***	0.234	1.494	7.301***
	(0.668)	(0.986)	(0.962)	(1.619)	(1.042)	(1.452)	(1.316)	(1.845)
Observations	1,108	1,108	640	640	608	608	340	340

Note: The dependent variable is the background composition of the panel. The comparison group is "other composition." Standard errors in parentheses. *** p<0.01, ** p<0.05, * p<0.1

Table A14. Standard of Review Applied Multinomial Logistic Estimations

	All Issues		Dynamic Issues	
VARIABLES	Abuse of Discretion	Substantial Evidence	Abuse of Discretion	Substantial Evidence
Civil Majority	-0.395	-0.719**	-1.182***	-1.197**
	(0.242)	(0.283)	(0.332)	(0.548)
Criminal Majority	-0.569*	-0.0919	-1.233***	-0.408
	(0.345)	(0.382)	(0.438)	(0.766)
Pr(Civil Majority)	4.882***	4.297*	7.059***	2.544
	(1.611)	(2.259)	(1.764)	(3.490)
Civil Majority x Pr(Civil)	0.230	-3.868***	-2.343*	-1.930
	(1.091)	(1.352)	(1.343)	(2.539)
Criminal Majority x Pr(Civil Majority)	0.357	-5.250**	-2.585	-3.250
	(1.687)	(2.116)	(1.958)	(3.136)
Pr(Criminal Majority)	2.740	5.219**	1.607	1.197
	(1.968)	(2.206)	(2.181)	(3.375)
Civil Majority x Pr(Criminal Majority)	0.704	-6.012***	-0.0679	-3.746
	(1.582)	(1.838)	(1.851)	(2.746)
Criminal Majority x Pr(Criminal Majority)	1.657	-6.173***	0.679	-4.009
	(1.823)	(1.997)	(2.012)	(2.993)
Member No Trial Experience	-0.320	0.149	-0.343	-0.188
	(0.227)	(0.300)	(0.289)	(0.554)
Republican Majority	0.828*	-0.0710	1.349**	0.434
	(0.467)	(0.635)	(0.660)	(1.070)
Democratic Majority	-0.0173	-0.181	0.392	0.0470
	(0.362)	(0.486)	(0.453)	(0.776)

Civil Case	0.673**	0.879**	-0.0396	0.726
	(0.284)	(0.346)	(0.300)	(0.494)
Criminal Case	1.308***	2.558***	0.874***	2.303***
	(0.264)	(0.306)	(0.317)	(0.460)
Plaintiff Not Respondent	0.335	-0.264	0.579*	-0.602
	(0.292)	(0.384)	(0.315)	(0.518)
Cumulative DCA Experience	-0.0255**	-0.0155	-0.0273*	-0.0387*
	(0.0130)	(0.0150)	(0.0141)	(0.0211)
Female Member	-0.344	0.0412	-0.525	-0.340
	(0.336)	(0.363)	(0.386)	(0.582)
Number of Issues	0.0929**	0.138***	0.133***	-0.0428
	(0.0368)	(0.0407)	(0.0419)	(0.0801)
Fixed Effects	Court, Year	Court, Year	Court, Year	Court, Year
Constant	0.795	-0.195	1.845**	-0.363
	(0.849)	(0.975)	(0.865)	(1.712)
Observations	1,108	1,108	640	640

Note: The dependent variable is the standard of review applied. The comparison group is de novo issues. Propensity scores demeaned. Standard errors clustered based on cases in parentheses. *** p<0.01, ** p<0.05, * p<0.1

Table A15. Standard of Review Applied Multinomial Logistic Estimations (continued)

	Criminal Cases		Civil Cases	
VARIABLES	Abuse of Discretion	Substantial Evidence	Abuse of Discretion	Substantial Evidence
Civil Majority	-0.554	0.280	-0.476	-1.776***
	(0.397)	(0.476)	(0.571)	(0.575)
Criminal Majority	-0.887*	0.950*	-1.916**	-1.017
	(0.473)	(0.568)	(0.922)	(0.684)
Pr(Civil Majority)	1.069	-1.875	1.587	4.287*
	(1.722)	(2.031)	(2.155)	(2.561)
Civil Majority x Pr(Civil)	-0.0511	1.346	0.464	-5.600**
	(1.364)	(1.623)	(1.908)	(2.366)
Criminal Majority x Pr(Civil Majority)	0.265	-0.926	6.194	-9.265*
	(1.709)	(1.829)	(5.172)	(5.089)
Pr(Criminal Majority)	1.507	0.496	-0.253	7.906**
	(2.797)	(3.108)	(3.397)	(3.619)
Civil Majority x Pr(Criminal Majority)	-1.647	-0.580	-2.615	-9.138**
	(2.687)	(2.652)	(3.626)	(3.975)
Criminal Majority x Pr(Criminal Majority)	-0.230	-0.527	7.528	-11.36**
	(2.613)	(2.697)	(6.449)	(5.746)
Member No Trial Experience	-0.230	0.303	0.637	0.374
	(0.314)	(0.464)	(0.430)	(0.475)
Republican Majority	0.520	-0.661	-0.253	0.551
	(0.607)	(0.821)	(0.744)	(1.009)
Democratic Majority	0.302	-0.495	-0.0910	0.985
	(0.502)	(0.689)	(0.587)	(0.758)

Plaintiff Not Respondent	1.355*	1.764	0.165	-0.841*
	(0.803)	(1.342)	(0.392)	(0.469)
Cumulative DCA Experience	-0.0106	0.0181	-0.0141	-0.00940
	(0.0211)	(0.0230)	(0.0120)	(0.0173)
Female Member	-0.139	0.472	-0.728	0.00342
	(0.359)	(0.396)	(1.063)	(1.077)
Number of Issues	0.0805	0.183***	0.113*	0.0978
	(0.0643)	(0.0561)	(0.0576)	(0.0713)
Fixed Effects	Court, Year	Court, Year	Court, Year	Court, Year
Constant	-0.00522	-3.205**	1.701	1.334
	(1.492)	(1.493)	(1.243)	(1.532)
Observations	608	608	340	340

Note: The dependent variable is the standard of review applied. The comparison group is de novo issues. Propensity scores demeaned. Standard errors clustered based on cases in parentheses. *** p<0.01, ** p<0.05, * p<0.1

Table A16. Probability of Reversal Logistic Estimations

VARIABLES	All Issues	Dynamic Issues	Criminal Cases	Civil Cases
Civil Majority	0.644	0.760	0.0548	0.504
	(0.423)	(0.505)	(0.688)	(0.699)
Criminal Majority	1.007**	1.231**	0.752	1.932**
	(0.489)	(0.600)	(0.746)	(0.871)
Pr(Civil Majority)	-0.463	-2.086	-1.899	3.827
	(3.132)	(1.879)	(1.784)	(3.121)
Civil Majority x Pr(Civil)	0.937	0.747	3.465	-1.112
	(2.144)	(1.865)	(2.846)	(2.551)
Criminal Majority x Pr(Civil Majority)	1.801	-1.273	3.116	-5.045
	(2.318)	(2.336)	(2.058)	(4.037)
Pr(Criminal Majority)	0.748	-0.934	3.732	2.299
	(2.596)	(2.330)	(3.643)	(5.751)
Civil Majority x Pr(Criminal Majority)	-0.725	0.821	-1.632	1.533
	(2.072)	(2.075)	(3.520)	(5.163)
CriminalMajority x Pr(Criminal Majority)	-1.514	-3.138	-0.991	-7.461
	(2.121)	(2.075)	(2.997)	(7.256)
Member No Trial Experience	-0.278	-0.0756	-0.687	-0.152
	(0.429)	(0.408)	(0.530)	(0.756)
Republican Majority	0.431	-0.329	0.129	0.569
	(0.780)	(0.702)	(0.884)	(1.138)
Democratic Majority	0.119	-0.251	-0.0553	-0.215
	(0.519)	(0.581)	(0.929)	(0.769)
Civil Case	0.0733	-0.598		
	(0.417)	(0.447)		
Criminal Case	0.227	-0.639		
	(0.387)	(0.439)		
Plaintiff Not Respondent	0.957**	1.292***	2.123**	1.038*
	(0.463)	(0.454)	(0.855)	(0.555)
Cumulative DCA Experience	-0.00112	0.00380	0.0327*	-0.0119
	(0.0229)	(0.0115)	(0.0192)	(0.0170)

Female Member	0.0438	0.424	0.575	0.0622
	(0.526)	(0.367)	(0.559)	(1.200)
Number of Issues	-0.0290	-0.0964	-0.0674	0.103
	(0.0483)	(0.0588)	(0.0588)	(0.0668)
Fixed Effects	Court, Year	Court, Year	Court, Year	Court, Year
Constant	-3.596**	-2.894***	-4.902***	-3.616**
	(1.411)	(1.111)	(1.451)	(1.824)
Observations	1,108	640	608	327

Note: The dependent variable is whether the issue was reversed or not. Propensity scores demeaned. Standard errors clustered based on cases in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

Table A17. Independence Tests for Legal-Practice Background and Case Type

Case Level (n = 492)			
	Case Type		
Background	***Civil***	***Criminal***	***Juvenile***
Other	***7.11 %***	***12.4%***	***4.67%***
Civil	***20.9 %***	***25.2%***	***9.35%***
Criminal	***5.28 %***	***11.38%***	***3.66%***
Pearson $\chi^2_4 = 5.878$ ***(p = 0.208)***			
Likelihood-ratio $\chi^2_4 = 5.936$ ***(p = 0.204)***			
Fisher's Exact (p = 0.207)			
Issue Level (1,108)			
	Case Type		
Background	***Civil***	***Criminal***	***Juvenile***
Other	***7.49 %***	***14.2%***	***3.52%***
Civil	***17.1 %***	***28.6%***	***8.03%***
Criminal	***6.86 %***	***12.1%***	***2.17%***
Pearson $\chi^2_4 = 3.698$ ***(p = 0.448)***			
Likelihood-ratio $\chi^2_4 = 3.878$ ***(p = 0.423)***			
Fisher's Exact (p = 0.442)			

Note: All three tests for the independence of legal-practice background and case type have a null hypothesis of independence.

Table A18. Legal-Practice Standard of Review Results Conditioning on Issue Types

Dynamic Issues Choice (n = 640)			
Background	***Pr(Abuse of Discretion)***	***Pr(De Novo)***	***Pr(Substantial Evidence)***
Civil	***-0.116***	***0.147***	***-0.0311***
	(0.0590)	***(0.0592)***	***(0.0443)***
Criminal	***-0.157***	***0.128****	***0.0286***
	(0.0760)	***(0.0731)***	***(0.0636)***

Note: Average marginal effects compared to "other background" panels. Delta-method standard errors reported in parentheses.
*** p<0.01, ** p<0.05, * p<0.1

Table A19. Legal-Practice Background Issue Reversal Results Conditioning on Issue Types

Dependent Variable = Pr(Reversed)	
Background	***Dynamic Issues (n = 640)***
Civil	***0.0583***
	(0.0503)
Criminal	***0.119****
	(0.0695)

Note: Average marginal effects compared to "other background" panels. Delta-method standard errors reported in parentheses. Uses court and year fixed effects, as opposed to court-by-year fixed effects.

*** p<0.01, ** p<0.05, * p<0.1

Figure A1. Densities of Estimated Propensity Scores- Legal-Practice Background

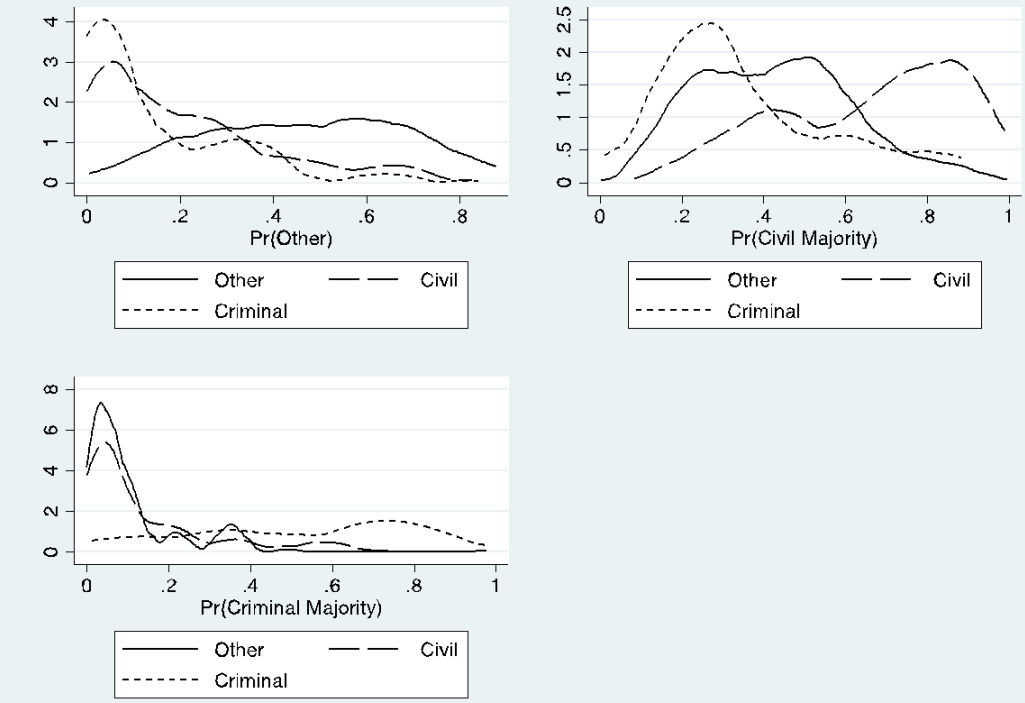


Figure A2. Densities of Estimated Propensity Scores- Political Appointment

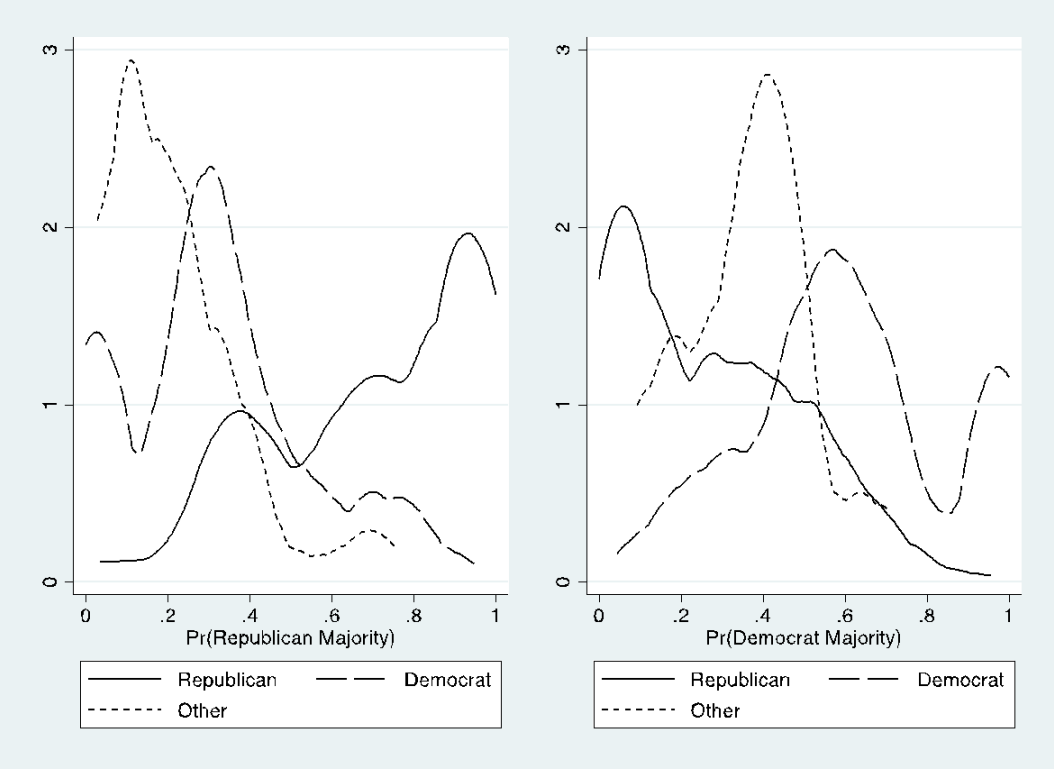


Figure A3. Densities of Estimated Propensity Scores- Female Member

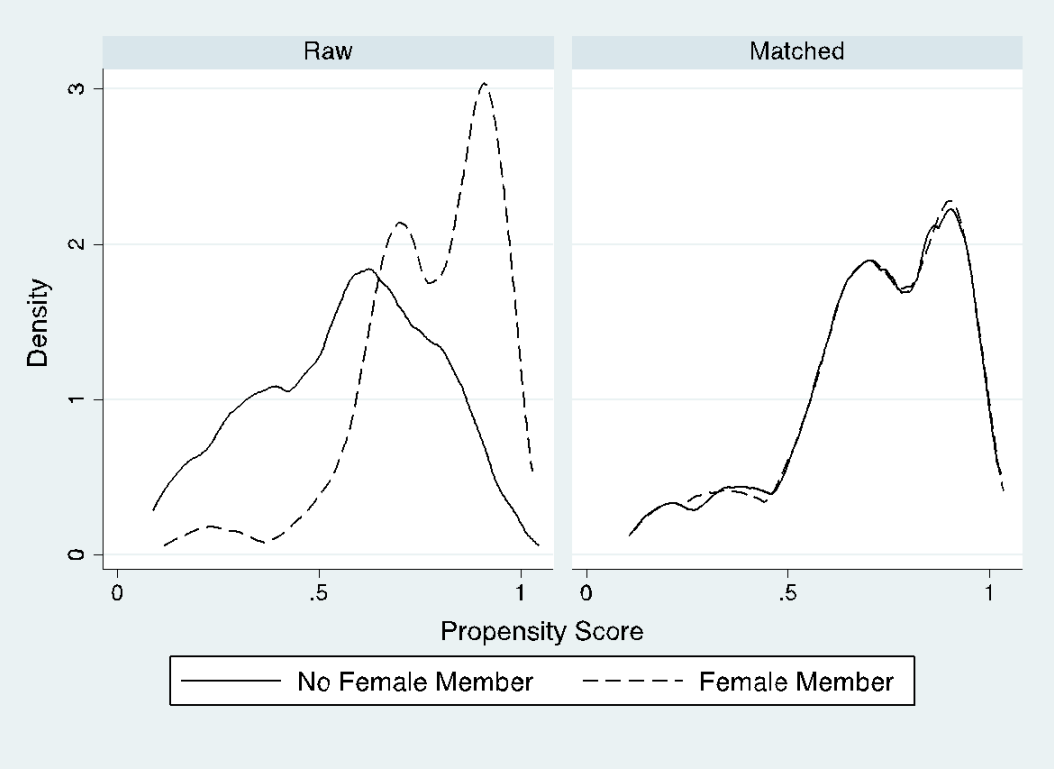
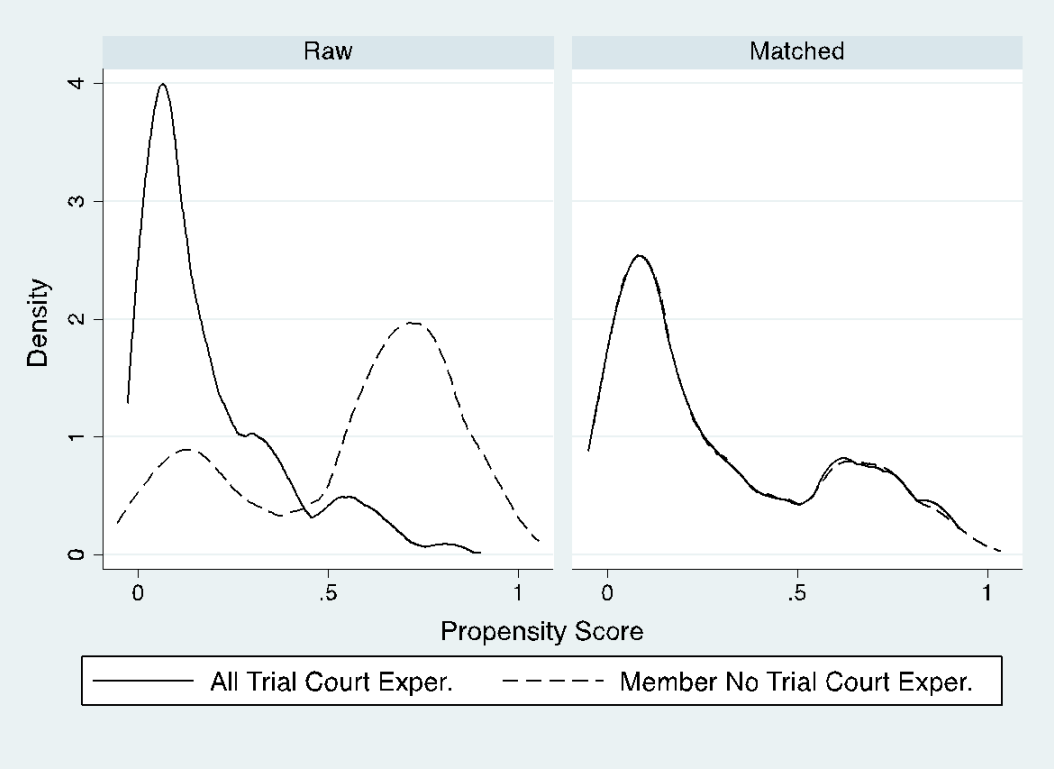


Figure A4. Densities of Estimated Propensity Scores- Female Majority

Figure A5. Densities of Estimated Propensity Scores- Trial Court Experience



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