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“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

— Abraham Lincoln (1850)


* * *

Abraham Lincoln assumed the presidency on the eve of this nation’s darkest hour, earning much renown — bestowed posthumously and enhanced over time — for his courage and strong sense of moral duty during that tumultuous period. It was his commitment to unity and a lasting peace that landed Lincoln in the pantheon of our greatest presidents.

Lincoln’s commitment to conciliation while president — whenever possible — was a characteristic he largely cultivated as a formidable trial attorney, a span that dwarfed his time as president. (See Illustration 1). In total, Lincoln spent 40 percent of his life as a practicing lawyer, but only 10 percent in elected political office. It was as a lawyer that he honed his skills at compromise and developed a keen ability to forge alliances among individuals and factions of competing egos, interests, and agendas.

Lincoln had a deep and intuitive understanding that lawsuits can stir up the worst in people, pit neighbor against neighbor, divide families and splinter whole communities. He preferred settlement as an alternative to litigation, a preference that has been shared by generations of lawyers who, like him, have succeeded without resort to abusive litigation tactics. Lincoln would be repulsed by some aspects of today’s legal landscape: “scorched earth” litigation tactics, a win-at-all-costs attitude and a lack of civility masquerading as the zealous practice of law. Such tactics are not inescapable characteristics of a litigation practice.

**Lincoln’s Legal Career**

Four significant points emerge when examining Lincoln’s legal career: first, Lincoln employed and advocated, more than 150 years ago, tools such as settlement and mediation that are subsumed today under the phrase “alternative dispute resolution” (ADR); second, as a lawyer, Lincoln encouraged the peaceful resolution of disputes by not charging his clients for cases that settled on the courthouse steps; third, Lincoln was such a proponent of non-adversarial settlement that he wrote a speech intended for lawyers that actually discouraged litigation; and lastly, Lincoln’s personal and professional life demonstrated a profound sense of morality and justice, evidenced not only by his significant acts as president, but also by his commitment to resolve disputes through non-adversarial means as a lawyer.

1. *Team of Rivals: The Political Genius of Abraham Lincoln*, by Doris Kearns Goodwin, brilliantly illustrates Lincoln’s capacity to forge alliances among the unlikeliest of allies — disgruntled presidential candidates — in a single-minded determination to marshal their talents to preserve the Union and win the war. “So, in the end, the feuding cabinet members, with the exception of Chase, remained loyal to their President, who met rivalry and irritability with kindness and defused their tensions with humor.” Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln*, 526 (Simon & Shuster 2005). And “[w]hile working to sustain the spirits of his cabinet, Lincoln also tried to soothe the incessant bickering and occasional resentment among his generals.” Id. at 527.

2. Historians cannot confirm whether this speech was ever given, but do confirm that these were Lincoln’s words. Dr. Michelle A. Krowl, “Civil War and Reconstruction Specialist,” Lecture at the 18th Annual Lincoln Forum: Lincoln Treasures at the Library of Congress: A Virtual Tour (Nov. 17, 2013).
Although the acronym “ADR” came about over a century after Lincoln’s death, the practice among civil litigators of resorting to such tools as settlement and mediation was well established among the American bar before the Civil War. In fact, Abraham Lincoln appears to have embraced a non-adversarial strategy in his law practice. In doing so, Lincoln appealed to “the better angels of our nature.” And he urged his clients to act in their own best interests even when a settlement would reduce or eliminate the fee Lincoln could collect. This moral sensibility — to do what is best for his clients and for society — manifest not only throughout his legal career but also during his presidency, is what we enduringly admire.

Lincoln’s life — particularly his career as a lawyer — is a lesson in the values of decency and civility.

Guy C. Fraker’s detailed study of Lincoln’s legal career reveals that Lincoln, a respected trial lawyer, actively assumed the role of peacemaker, mediator and settler of lawsuits according to his case-load demands. Between 1836 (when Lincoln began to practice law) and 1860 (when Lincoln ceased his practice to assume the presidency), he was involved in more than 5,000 legal matters in state and federal courts in Illinois. Nearly half of those cases involved suits for debt, while the remainder dealt predominantly with slander, title to land, minor tort claims and — most lucratively — railroad litigation. About 33 percent of Lincoln’s cases were dismissed, most because they settled. Thus, Lincoln settled more than 1,600 cases in the course of his career and plainly championed compromise as an alternative to trial.

LINCOLN AS JUDGE

Lincoln also served as a judge. In frontier Illinois, when the Circuit Court Judge was unavailable, he would appoint a lawyer to serve in his stead. Judge David Davis, serving as the Circuit Court Judge during Lincoln’s time, chose Lincoln to attend to his judicial duties whenever he could not — a privilege that never extended to any of the other 20 available attorneys. As judge, Lincoln presided over more than 256 cases. That breadth of experience and perspective undoubtedly shaped Lincoln’s understanding of the human condition, complicated by all its imperfections, frailties and vulnerabilities.

LINCOLN AS PEACEMAKER

The Illinois of Lincoln’s day was a gritty frontier, having achieved statehood in 1818. Lincoln lived in the state capital, Springfield, in central Illinois, “where the state’s talented and aggressive entrepreneurs and developers lived, as well as its most influential politicians, presenting at once a place of opportunity and possibility.”

Chicago, by comparison, was but a glint at the time. Central Illinois was an environment in which there was extensive interaction between lawyers and their clients before, during and even after a legal

3. Abraham Lincoln, First Inaugural Address (March 4, 1861).
6. Frank J. Williams, Judging Lincoln, 100 (S. Ill. Univ. Press 2007). Supreme Court Chief Justice Williams (ret.), perhaps inspired by Lincoln’s lead, established the highly successful Rhode Island Supreme Court Appellate Mediation Program in Providence, Rhode Island. Nine retired judges serve at no cost to the public.
9. An analysis of the Illinois Eighth Circuit judges’ dockets discloses that Lincoln sat for at least 256 cases in Judge Davis’s stead. In 1854, Lincoln’s handwriting appeared on the docket for three cases. In 1856, Lincoln sat for 46 cases. By 1857, Lincoln took Judge Davis’s place on the bench for 138 cases. In 1858 and 1859, Lincoln sat for 35 and 34 cases, respectively. John J. Duff, A. Lincoln Prairie Lawyer, 298–99 (Bramhall House 1960). See also Frank J. Williams, Chief Justice (ret.), R.I. Supreme Court, Address to Massachusetts’ s Worcester County Judges and Bar Association (Feb. 18, 2011), and to Middlesex County Superior Court Judges and staff (May 17, 2013).
10. Fraker, supra note 5, at 10–11. For example, as attorney Fraker’s meticulous research discloses, the Eighth Judicial Circuit (in which Springfield was located and Lincoln practiced law) “covered 15, then 14, counties. The population of these counties in 1840 was 69,100 (Cook County, which includes the City of Chicago, had a population of only 10,200; in 1850, total population was 107,000 (Cook 43,300), and in 1860, 223,700 (Cook, 145,000).” Id. at 10.
In this milieu, Lincoln understood both the social and economic costs of a lawsuit as well as the turmoil it could foment. The identification of these costs likely led him to embrace mediation as a way to settle disputes in a manner agreeable to all parties involved and, in so doing, maintain community harmony. Lincoln “was in his element while handling lawsuits based on local disputes; the locality of these disputes favored mediation and compromise.” His profound awareness and understanding of social needs allowed him to advance his strong commitment to peaceful settlement, for he recognized that non-adversarial dispute resolution led to the best outcome for all affected by the conflict.

Lincoln’s first case showed his willingness, even early in his career, to mediate. Lincoln and John T. Stuart, his mentor at the time (Lincoln was not yet licensed as a lawyer), represented David Wooldridge, the defendant in a series of cases brought by James P. Hawthorn. Wooldridge and Hawthorn were both farmers, but by the summer of 1836, their relationship had deteriorated to the point that Hawthorn sued Wooldridge for trespass, personal injuries and trespass *vi et armis*. Hawthorn also filed a replevin action against Wooldridge, asking for the return of one yoke of steers and a prairie plough that he claimed Wooldridge had wrongfully detained. This raised the total value of the claims against Wooldridge to $700. A jury found Wooldridge liable in Hawthorn’s personal injury lawsuit, but limited damages to $36. Five months later, Hawthorn and Wooldridge agreed to dismiss all three remaining lawsuits and split the court costs: Wooldridge paying court costs in one case, Hawthorn in the other, and each party splitting the costs in the last suit. The settlement and division of costs in Lincoln’s first case marks the starting point of his community-oriented practice.

Lincoln’s own hardscrabble existence as a farmer, Mississippi River flat-boatman and manager of a general store contributed to his approach to litigation. These roles endowed him with insight into human nature and argumentation. “He had learned the important lesson that there are at least two sides to every controversy, that there is usually some merit on each side of every dispute . . . . He had acquired a knowledge of men by means of which he understood the motives [of the human condition].” Contemporaries described Lincoln as follows:

> [S]omeone who felt too much; historians would attribute this to a difficult childhood and his innate ability to empathize with other people. He possessed an extraordinary empathy, the gift or curse of putting himself in the place of another to experience what they were feeling, to understand their motives and desires.

Engrained in Lincoln was a “faith in the worth and fundamental goodness of . . . people,” as well as a profound respect for a nation where ordinary people might control their own destiny.

The futility of anger, which he ascertained at a young age, imbued Lincoln with this faith. Having lost his mother as a child, Lincoln taught himself to resist antagonistic feelings, to steer clear of quarrels and to scarcely harbor resentment. In an 1862 letter, Lincoln outlined his own personal code of conduct: “I shall do nothing in malice. What I deal with is too vast for malicious dealing.” He consistently embodied this code of conduct, as a lawyer and as president, one example of which was Lincoln’s relationship with Secretary of the Treasury, Salmon P. Chase, who schemed (behind Lincoln’s back, or so Chase thought) to eliminate Lincoln as a candidate for the 1864 Republican re-nomination. Despite Chase’s disloyalty and chicanery, Lincoln made a conciliatory overture by later nominating Chase for Chief Justice of the United States Supreme Court. In short, Lincoln possessed the rare quality to rise above petty political bickering and bitter factionalism.

12. *Id.* at 102.
13. *Id.* at 75.
14. *Id.*
15. *Id.* at 76.
21. *Id.* Of course, such a nomination also ensured the end of Chase’s political career.
Lincoln was also fiercely scrupulous and expected his fellow attorneys to comport themselves equivalently. By 1850, Lincoln had been a member of the Illinois bar for 14 years. He had amassed an impressive résumé through representing both plaintiffs and defendants, as well as serving as formal and informal partner to a lawyer of record, agent, executor, mediator and administrator in more than 2,000 cases. Lincoln exhorted his fellow lawyers to “resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do, in advance, consent to be a knave.”

Lincoln was similarly passionate about another important truth: some things, though legally right, are not morally right. In one instance, after conferring with a potential client on a collection case he believed could wreak untold havoc, Lincoln flatly refused to take the case. In doing so, he reportedly said:

“Yes, there is no reasonable doubt but that I can gain your case for you. I can set a whole neighborhood at loggerheads; I can distress a widowed mother and her six fatherless children, and thereby get for you $600 which you seem to have a legal claim to; but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember some things that are legally right are not morally right. I shall not take your case — but I will give you a little advice for which I will charge you nothing. You seem to be a sprightly, energetic man, I would advise you to try your hand at making $600 in some other way.”

**Preference for Settlement**

Lincoln’s skill at settlement may be displayed best in slander lawsuits. In Mark Steiner’s study of Lincoln’s law practice, he observed that Lincoln often acted as a peacemaker in these emotionally charged cases. Lincoln, in effect, “helped to restore peace to the ‘neighborhood’ through his efforts to mediate and settle slander lawsuits.” In a frontier society, men sued for slander because of salacious allegations regarding their sexual reputations. These kinds of allegations could drastically affect a woman’s standing in the community, which in turn could affect her marriage prospects and her future economic well-being. Thus, when a woman was accused of promiscuity, she often had to defend her reputation by suing for slander. As was the case for men, if an apology was granted, the suit was typically dismissed.

One of the most prominent examples of Lincoln’s commitment to compromise was a slander case recalled by Urbana lawyer Henry Clay Whitney. As one of the defendant’s lawyers, Lincoln “made most strenuous and earnest efforts to compromise the case, which was accomplished by reason, solely, of his exertions.” A French Catholic priest, who accused another priest of perjury, defended the suit. Once the suit was filed, both sides remained intransigent, and indeed, each priest’s respective neighborhood became embroiled in the legal battle. The case was tried but resulted in two mistrials, at which point Lincoln intervened, for he “abhorred that class of litigation, in which [there] was no utility, and he used his utmost influence with all parties, and finally effected a compromise.”

Lincoln prepared an agreement of dismissal, through which the defendant recanted his accusation and the parties agreed to divide the suit. This case best exemplifies Lincoln’s approach to mediating these types of cases: “truth is generally the best vindication against slander.”

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23. *Id.*
24. *Id.*
26. *Dirck, supra* note 22, at 113 (citation omitted).
27. Steiner, *supra* note 11, at 85-100.
28. *Id.*
30. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
Likewise, in commercial disputes, Lincoln has been praised for his discouragement of dubious litigation and his penchant for peacemaking. In an 1850 case in which Lincoln represented Abram Bale in a dispute for $1,000 worth of wheat, Lincoln wrote the following to his client: “I sincerely hope you will settle it. I think you can if you will, for I have always found [the plaintiff] a fair man in his dealings.” As to his legal fees, Lincoln said, “I will charge nothing for what I have done, and thank you to boot.” He advised his client that “by settling, you will most likely get your money sooner and with much less trouble and expense.” Bale’s case settled. This letter confirms Lincoln’s mindfulness of the enduring advantages of ADR — speed, economy and stress avoidance — that have gone unchanged to this day.

The chief aspect of Lincoln’s law practice was debt litigation. Money was scarce in frontier Illinois; about 700 of his 2,100 debt collection cases settled. His standard compromise was to accept partial payment with a year’s forbearance to pay the remainder. This was an exceedingly challenging resolution to the case, as the dominant moral and legal position of the day disdained persons who did not fully pay their debts. In these cases, Lincoln frequently counseled his clients to attempt an arrangement out of court to satisfy all parties. In one case, Lincoln revealed his commitment to amicable settlement by sacrificing his own fee. “The payee of the note did write me that he had written Allard on the subject of the note in your hands,” he wrote his client in 1854, and “if the letter does... agree to take $110 and my fee, settle the matter that way.”

In fact, when clients did not pursue what Lincoln thought to be a reasonable settlement, he could be unyielding. In 1859, he took a case for Peter Ambos, the treasurer of the Columbus Machine Manufacturing Company, who wanted to collect on five promissory notes, totaling more than $10,000, owed by James Barret. Lincoln tried to work with Barret, whom he felt was “an honest and honorable man,” to sell some assets and satisfy Ambos by making payments on the debt while avoiding trial. He felt that the total amount of the debt could not be collected soon, but that it would be paid eventually and faster than “trying to force it through by the law in a lump.” Ambos, however, refused to settle for anything less than the entire amount. Lincoln finally suggested that Ambos get a different lawyer, writing that he would “very gladly surrender the charge of the case to anyone [Ambos] would designate, without charging anything for the much trouble [Lincoln had] already had.”

Lincoln also showcased his ability to resolve disputes outside of the courtroom in numerous assault cases. In October 1856, he persuaded Edward Barrett to accept a five-year prison sentence at hard labor for stabbing a man to death. Further, in an 1842 case, People v. Patterson, Lincoln successfully argued that his client was subject to “mental alienation” when he attacked another man with an axe.

**LINCOLN’S FEE DISPUTE WITH THE RAILROAD**

Lincoln held to his principles in his own fee-related dispute with the Illinois Central Railroad. Senator Stephen Douglas charged Lincoln with soliciting $5,000 from the railroad to finance Lincoln’s political campaign against him. Lincoln described the dispute: “[T]he railroad company employed me as one of their lawyers in the case... I was not upon a salary and no agreement was made as to the amount of fee. The railroad company finally [won] the case. The decision, I thought, and still think, was worth half a million dollars to them. I wanted them to pay me $5,000, and they wanted to pay me about $500. I sued them and got the $5,000.”

Although there are varying accounts about how Lincoln secured this fee, the accepted version is that he had sued the railroad company for payment of the work he had done on their behalf in a lawsuit. Lincoln was prepared to take the depositions of several high-powered lawyers in Illinois who would affirm that Lincoln’s efforts on behalf of the railroad company produced an extraordinary result and merited a sizable fee. The railroad, presumably not desiring a hostile enemy in Lincoln if he were to become a United States Senator, would not defend the suit. Therefore, this lawsuit became a friendly suit, although it had to be tried before two juries. In an extraordinary concession, the railroad company’s counsel allowed Lincoln to put into evidence a statement signed by several eminent lawyers in which they concurred that the fee sought was not unfair. A jury ultimately found for Lincoln in the amount of $4,800 — the highest fee he ever received. By strategically using the courts in what was essentially a pro forma trial, Lincoln disproved Douglas’s allegation and obtained his largest fee as an attorney.

35. Billings, supra note 8, at 257.
36. Id.
37. Id.
38. Dirick, supra note 22, at 67.
39. Id.
40. Id.
41. Id. at 68.
42. Id.
43. Id. at 113.
46. Lincoln’s nineteenth-century sum of $500,000 translates to over $15 million in today’s dollars. See http://www.wolframalpha.com/input/?i=%24500000+in+1858 (last visited June 26, 2015).
47. Abraham Lincoln, Speech at Carthage, Ill. (Oct. 22, 1858).
48. Steiner, supra note 11, at 170–77.
Lincoln’s many years representing the Illinois Central Railroad showed that he could capably negotiate settlements beyond the scope of his immediate community. The railroad faced considerable hostility from citizen-jurors, evinced by the fact that, of the 14 cases brought by landowners to trial, Lincoln only secured two victories. Lincoln tried to mediate these disputes, cautioning the secretary of the Illinois Central that “a stitch in time may save nine,” though the railroad often failed to heed his advice. And so, Lincoln ended up representing the railroad in court over its failure to build or maintain fences along its line. On yet another occasion, the railroad ceded to Lincoln’s counsel, and Lincoln was able to successfully negotiate a settlement in *Dye v. Illinois Central*. Dye had sued the railroad for trespass and claimed damages amounting to $500. Lincoln artfully crafted a resolution in which Dye agreed to “waive all damages for the want of making and maintaining the fence” and to “accept as sufficient” the “already made” fence; the railroad agreed to pay Dye $100 and costs.

**Lincoln’s Enduring Influence**

Former President of the American Bar Association Jerome J. Shestack concluded that “Lincoln’s place in history derives not from his abilities as a lawyer but from his qualities as [a] human being and his seminal achievements as president. Still, he was a lawyer of whom the bar could be proud.”

Abraham Lincoln may not have known the term “ADR,” but he certainly understood and captured its essence. He discerned the advantages of a negotiated settlement — speed, efficiency and risk avoidance. By promoting compromise, avoiding the uncertainty and expense of full-blown litigation, as well as inspiring and elevating societal expectations, Lincoln’s alternative methods for peaceful settlement presaged today’s use of ADR. The ADR lessons to be drawn from Lincoln’s career can also be found in the careers of innumerable Massachusetts lawyers who have for generations succeeded by putting their clients’ interests ahead of their own, and who have conducted themselves personally and professionally with decency, civility, and honesty.

The legal profession today is undergoing economic turmoil and significant change. The American system of legal education is itself struggling to adapt to new realities, as enrollments decline and the legal profession looks less attractive as a career choice. How should a young lawyer act in this brave new legal world? Emulate Lincoln. You’ll be in good company, the company of honest lawyers who put the best interests of their clients first.

49. *Id.* at 144-45.
50. *Id.* at 143.
52. Steiner, supra note 11, at 144.
53. *Id.* at 19.
54. The authors wish to thank Attorneys Katherine McCann, Jared N. Ballin, Vincent N. DePalo and Louisa E. Gibbs (New England School of Law ’14), as well as Phillip Myles Zabriskie, Martin Sabounjian and Sam Gold (Tufts University ’15) for their contributions to this article. The authors also wish to acknowledge their appreciation to Superior Court Justice John C. Cratsley (ret.), a leading light in the use of ADR for over two generations in Massachusetts’s trial courts. Finally, deep and significant appreciation flows to Hon. Frank J. Williams, Chief Justice of the Rhode Island Supreme Court (ret.) and founding and current chairman of the nationally-respected Lincoln Forum, who suggested this topic as an area of inquiry, and who has inspired Lincoln scholars and Lincoln enthusiasts for many, many years.
I. INTRODUCTION

Judges function in a hierarchical system, whereby an appellate panel reviews the rulings and decisions of judges in the trial courts to determine whether there was error and whether that error had a substantial impact on the outcome of the case. While the decisions of trial judges dispose of the controversy between the litigants and become the leading edge of the common law, it is not until the thesis-testing process of appellate review and reporting that the work of the trial court becomes incorporated into the jurisdiction-wide body of law. Thus, the judicial branch functions synergistically. The word synergy means “combined action or operation;” a synergism is “the interaction of individual agents such that the total effect is greater than the sum of its individual effects.” Judicial synergy, then, suggests that the effect is a combined judicial force that is more than what would be created by simply adding the sum of individual efforts.

This article intends to explore whether any tension within this judicial synergy between the trial and appellate benches may be due, at least in part, to standards of appellate review that are overly broad and imprecise. We argue that the indeterminate nature of appellate standards of review, especially the “abuse of discretion” standard, are difficult to grasp precisely because they attempt to define the “proper hierarchical relationship between an appellate court and a trial court.”

Judge Robert E. Keeton said in the opening sentences of his 1999 book on judging in the American legal system, “Judging is choice. Choice is power.” Appellate review considers not only the correctness of those choices, but also is designed to ensure the uniform application of law and the appropriateness of lower court procedures for the handling of the case. Consequently, rather than a source of derision, appellate standards of review should be viewed as a somewhat imperfect attempt to delineate those choices best left to the trial and appellate courts respectively.

II. A SYNERGY BORN OF TENSION: UNDERSTANDING THE RELATIONSHIP BETWEEN TRIAL AND APPELLATE COURTS

There are thousands of cases handled by judges each year, in every jurisdiction, and each case may involve scores, or hundreds, of rulings. Trials are the product of combined human involvement, and are fast-paced, sometimes messy, and laden with the need for quick reactions by judges. Advocacy is uneven, and sometimes ineffective and unhelpful. Judge Henry T. Lummus, who spent about 25 years as a trial court judge before going onto the Supreme Judicial Court (SJC), observed that we must depend upon the trial court for the doing of justice according to the law in particular cases: “No judicial system can be stronger than its trial judges. A learned and brilliant court of last resort can give the system a high reputation abroad, but that reputation will be hollow unless nearly equal merit is found in the trial court.” Indeed, Judge Keeton aptly described the challenges of the trial judge as follows:

3. Id.
6. It is important to note that while the focus of this article’s study of the complexity of appellate review standards is on Massachusetts courts and cases, our observations can readily be applied to other jurisdictions.
Judging tends to be burdensome in one way or another. If choices are too easy, making them becomes repetitive and boring. In present circumstances, however, judging is more likely to be burdensome in another way: the load of cases is heavy. Delays produced by excessive caseloads encourage more settlements. The small percentage of cases left for decision, after settlements have disposed of the great majority, are selectively the most difficult. The judge’s choices are often hard and must be made under time pressures. Judging in these circumstances is both difficult and challenging, but less fulfilling than it might have been if each judge were free to take more time for reflection about each issue that must be decided.

Recognizing the unique challenges of the trial judge, appellate review does not consider the correctness of every decision of the trial judge in a case; appellate courts simply cannot provide a report card on the whole of every trial. Similarly, Justice Joseph R. Nolan of the SJC wrote that “it is not enough to demonstrate error without demonstrating that such error is prejudicial. Harmless error is error but it has no appellate consequences.”

In states such as Massachusetts, with two levels of appellate review, development of the law rests primarily with the court of last resort, here the SJC, which has largely discretionary jurisdiction. It is not the purpose of this article to explore this type of appellate review. Rather, we focus on “error correction,” since this is where most disharmony, misunderstanding, and unpredictability exist.

III. The Maze of Appellate Standards

One recurring source of unpredictability for advocates and tension between the trial and appellate courts is the lack of clarity concerning standards of review. A standard of review is “a limiting mechanism which defines an appellate court’s scope of review.” It is the measure of the degree of deference that appellate courts may pay to lower courts, thereby defining the allocation of power between trial and appellate courts.

Marquette Law Professor Chad Oldfather observed that the review process is neither straightforward nor settled, because under our system of jurisprudence, it is neither simplistic nor mechanical. Other commentators have noted that, because law is often indeterminate, decision-making must, therefore, occur interstitially, where there may be neither clearly right nor clearly wrong decisions; the process of identifying error thus becomes more difficult. We know that if judicial error was viewed simply as the failure to implement governing law correctly, reversal would be required whenever the trial court made an error. But we know that there is more to error correction than this over-simplistic and mechanical view suggests; instead, we must consider and apply customary standards of review.

A. The Muddle of Law and Fact

Columbia Law Professor Maurice Rosenberg opens one of his seminal articles on the appellate review of trial court decisions by analogy to Caesar: “[a]ll appellate Gaul, the trial judge would say, is divided into three parts: review of facts, review of law, and review of discretion.” But the determination of the degree of deference is not easily reducible to whether the choice is factual, legal, or discretionary, for as we know, there are also mixed questions. While in our view, it is the appellate review of the exercise of a trial judge’s discretion that gives rise to the most misunderstanding, review of the trial...
judge’s determination of facts and appropriate legal standards can offer its own unique challenges.

In the abstract, the rule can be stated simply: While “[t]he judge’s legal conclusions are reviewed de novo,”22 “findings of fact shall not be set aside unless clearly erroneous.”23 In practice, however, as Law Professor Nathan Isaacs suggested, the boundary between questions of fact and law has a “delusive simplicity.”24 Similarly, Law Professor Louis Jaffe saw “law and fact as a spectrum, with one shade blending imperceptibly into the other.”25 Even the Supreme Court stated in a 1982 decision that it “[did not] yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”26

In attempting to riddle out the “delusive simplicity” of law and fact, at least one scholar has suggested that policy reasons are the true driving force between distinguishing legal and factual questions.24 Thus, “the more effective advocate is the one who advances better and sounder policy reasons for a particular standard of review instead of arguing the metaphysics of the issues.”29 Indeed, as Judge Richard Posner wrote for the United States Court of Appeals for the Seventh Circuit, “‘Law’ and ‘fact’ do not in legal discourse denote pre-existing things; they express policy-grounded legal conclusions. We ought to ask what is gained and what lost by appellate second-guessing of a federal district judge’s determination.” Consequently, for some guidance on this issue, we must turn to the underlying policy justifications for the respective reviews of law and fact:

Questions of fact are accorded deference because the trial court was present at the reception of evidence and had an opportunity to view the demeanor of witnesses and assess their credibility . . . . Questions of law, on the other hand, are traditionally accorded little or no deference because there is nothing intrinsic to their determination which gives the trial court any advantage over an appellate court.31

Following the above principles, appellate courts give the greatest deference to a trial judge’s findings of fact, given that he or she viewed the evidence firsthand. While law “consists of rules, standards, or principles determined in advance of their application,” “[f]act is empirical, it concerns itself with events occurring either in the real world or in the mind, and it is the fodder for the application of law.” Professor Richard R. Hofer helpfully collected a series of scholarly attempts to define “facts” in this respect. For example, in 1898, Professor James Bradley Thayer described facts as: “indicating

things, events, actions, conditions, as happening, existing, really taking place.” Professor Francis H. Bohlen then extended the definition beyond the strictly empirical to the subjective, to include “not only the physical facts of the case but also more abstract matters, such as the state of mind of those individuals whose state of mind may be of legal importance.” Professor Jaffe offered that a finding of fact is “independent of or anterior to any assertion as to its legal effect.”

By contrast, de novo review, which affords the least deference to decisions of the trial court, applies when the choices made at trial are legal and not factual, such as with any judgment that results from a record that consists only of documents — summary judgment for example, or motions to dismiss, on the civil side, or a “McCarthy” motion testing the sufficiency of evidence produced before a grand jury in support of an indictment, or a motion to suppress on the four corners of a search warrant, on the criminal side. In this sense, de novo review gives appellate courts the freedom to clarify and resolve legal issues. As Justice Cardozo observed:

It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. . . . Much more important, however, is the second task which the system serves, namely the filling of the gaps which are found in every positive law in greater or less measure. . . . The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision. . . . The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. . . . We reach the land of mystery when constitution and statute are silent, and the judge must look to the common law for the rule that fits the case.

Review is de novo because an appellate court can examine the record on appeal as if it were a trial court, but where no findings of fact or credibility determinations are made. As with other standards of review, appellate courts are not bound by the trial judge’s legal conclusions. Some may question how the same record can lead to different choices. We must keep in mind that de novo review tests not only the choice of law, but how that choice is applied. If, as Justice Cardozo asserted, the trial judge is the “inter

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29. Id. at 373.
30. Weidner v. Thieret, 866 F.2d 958, 961 (7th Cir. 1989).
32. Id. at 237.
33. Id. at 236.
34. Id. (quoting James Bradley Thayer, A Preliminary Treatise on Evidence At The Common Law, 191 (1898)).
35. Id. (quoting Francis H. Bohlen, “Mixed Questions of Law and Fact,” 72 U. Pa. L. Rev. 111, 112 (1924)).
for the community and its sense of law and order,” then the question remains whether with de novo review there is an implicit assumption that the appellate courts are better equipped to address issues of law. This implicit assumption is perhaps another source of tension between the trial and appellate courts, for if appellate courts, with the luxury of time and panel review, are not considered to be in a better position to answer questions of law, why not defer to the trial judge’s legal rulings? In answering this very question Professor Hofer turned to poetry: “‘So naturalists observe, a flea! Hath smaller fleas that on him prey;/ And these have smaller still to bite ’em/ And so proceed ad infinitum./ Thus every poet, in his kind,/ Is bit by him that comes behind.’ For ‘poet,’ read ‘trial judge.”

B. The Elusive Abuse of Discretion Standard

“The better part of valor is discretion . . . .”
William Shakespeare, Henry IV, Part I, Act V, Scene 4

This leads then to perhaps the most difficult standard to grasp, that of abuse of discretion. 41 Unfortunately, the word “abuse” carries a negative connotation, similar to legal error and clearly erroneous findings of fact, but also has undertones of a misuse of power. 42 When a discretionary decision of a trial judge is affirmed, the opinion sometimes is cast in the double negative, that the appellant has not shown that judge abused her discretion, instead of the positive, that the judge appropriately exercised her discretion.

Professor Rosenberg noted that the concept of discretion was both pervasive and elusive, with degrees of deference that range from almost irreversible to quite diluted. 43 As such, “[d]iscretion is one of the most exercised and least understood of trial court or agency activities — a very basic activity that must be understood in all areas of decisionmaking and administrative, criminal, and civil appeals, and one of the most difficult to address rationally.”44 In Davis v. Boston Elevated Railway Co., the SJC best articulated a definition of discretion:

> It commonly and rightly is said that such a motion is addressed to the discretion of the court. By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking.

An exhibition of unguided will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just.

Still, the problem remains as to what this type of careful decision-making looks like in practice; why “abuse of discretion” appears to mean different things in different contexts. 45 In fact, Rosenberg argues that courts should abandon the phrase, describing it as follows:

> It is the noise made by an appellate court while delivering a figurative blow to the trial judge’s solar plexus. It is a way of saying to the trial judge, “this one’s on you.”

The term has no meaning or idea content that I have ever been able to discern. It is just a way of recording the delivery of a punch to the judicial midriff.

But abuse of discretion is not merely “a form of ill-tempered appellate grunting”; 46 rather, it is a standard that is meant to fairly address a diverse range of choices. The evolution of the abuse of discretion standard reflects the evolution of the law itself. As judges review more cases, they become better at recognizing the hallmarks of those choices that are “enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice.” 47 In turn, those hallmarks eventually become integrated into the standard itself. The markers of those careful, thoughtful choices become articulable legal standards, set forth in either caselaw, rules of procedure, or statutes, creating a kind of “checklist” that a judge must go through for the appellate court to discern no abuse of discretion. 48 As a judge’s choices move from “unguided” procedural questions and courtroom

40. Hofer, supra note 16, at 239 (quoting Jonathan Swift, On Poetry: A Rhapsody (1733)).
42. See In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954) (“Abuse of discretion is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors.”).
43. Rosenberg, Appellate Review, supra note 1, at 176–77; Maurice Rosenberg, “Judicial Discretion of the Trial Court, Viewed from Above,” 22 Syracuse L. Rev. 635, 650 (1971) [hereinafter Rosenberg, Judicial Discretion]. We would like to make special note of Professor Rosenberg’s two seminal articles, Appellate Review and “Judicial Discretion,” which contributed greatly to this section. Like Judge Friendly, we have “borrowed outrageously from [these] splendid article[s].” Hon. Henry J. Friendly, “Indiscretion About Discretion,” 31 Emory L. J. 747, 756 n.29 (1982).
45. 235 Mass. 482 (1920).
46. Id. at 496-97.
47. See Andrew M. Mead, “Abuse of Discretion: Maine’s Application of a Malleable Appellate Standard,” 57 Me. L. Rev. 519, 520 (2005) (“It is a highly flexible and malleable term that is applied to widely differing circumstances with equally differing results.”); Davis, supra note 44, at 77-78; Friendly, supra note 43, at 763 (“There are a half dozen different definitions of ‘abuse of discretion,’ ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.”).
50. See Davis, 235 Mass. at 496-97; Friendly, supra note 43, at 772; Rosenberg, Judicial Discretion, supra note 43, at 664.
51. See Johnson v. United States, 398 A.2d 354, 363 (D.C. 1979) (“The components of the appellate court’s review for abuse of discretion serve a dual purpose, for they not only act as measuring rods by which we may determine whether the trial court’s action was proper, but, in their recital, they also indicate to the trial court the factors of which it should be aware in the course of its discretionary decision-making.”)(emphasis added). See also Davis, supra note 44, at 81-82; Mead, supra note 47, at 528.
management issues to more “guided” determinations of legal rights and resolution of legal questions, the “checklist” becomes longer and appellate courts afford less deference to the judge’s choices. 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 to today’s case and some guidance for tomorrow’s.

Appellate courts are most deferential to unguided choices, meaning that the rules of substantive law do not constrain the decision. In effect, a trial judge’s discretion is unguided when legal standards or requirements are sufficiently broad or open-ended so that their application is not susceptible to one “correct” answer. Although unguided choices are afforded great deference, the standard “abuse of discretion,” always contains a guard against arbitrariness and is never so broad as to allow an error of law.

To start, the concept of unguided discretion can be most readily seen in cases reviewing “the scheduling of trial . . . and scope of discovery and protective orders.” In these cases, judges’ orders are rarely determined to be an abuse of discretion, mainly because they typically involve courtroom management. Therefore, there are no additional legal standards or factors that the judges must show they

52. See Davis, supra note 44, at 52-53; Friendly, supra note 43, at 772; Rosenberg, Judicial Discretion, supra note 43, at 664.
53. Rosenberg, Appellate Review, supra note 1, at 182; Rosenberg, Judicial Discretion, supra note 43, at 664-65. See Mark P. Painter and Paula L. Welker, “Abuse of Discretion: What Should it Mean Under Ohio Law?” 29 Ohio N.U. L. Rev. 209, 212 (2002) (“How much deference should be given to the trial judge’s exercise of his or her discretion is directly related to why the trial court was given discretion in the first place.”).
54. See Friendly, supra note 43, at 760-61; Rosenberg, Judicial Discretion, supra note 43, at 663. There are, of course, exceptions to the general rule that the more specific legal standard constraining the trial judge’s decision, the less deference will be due. See Post, supra note 41, at 210. Professor Post argues that Friendly’s and Rosenberg’s assumption that “as weak discretion increases, the possibility of effective appellate control correspondingly diminishes,” is inaccurate. Post, supra note 41, at 213. Instead, Post posits that “appellate courts can exercise strict control of trial court decision making even when applying general standards, and, conversely, there are situations (although rare) when appellate courts give only cursory review to judgments controlled by the most specific and mechanical of legal rules.” Id. As an example, Post points out that “appellate courts commonly both accord the decisions of juries great deference and ask them to make those decisions pursuant to strict and rigorous rules of law.” Id. at 213 n.386.
55. Friendly, supra note 43, at 764 (“The justifications for committing decisions to the discretion of the trial court are not uniform, and may vary with the specific types of decisions. Although the standard of review in such instances is generally framed as ‘abuse of discretion,’ in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court’s discretion in the first instance.” (quoting U.S. v. Criden, 648 F.2d 814, 817 (3d Cir. 1981))).
56. Rosenberg, Appellate Review, supra note 1, at 185.
57. See Friendly, supra note 43, at 765; Rosenberg, Judicial Discretion, supra note 43, at 636-67. See also Post, supra note 41, at 210 (citing Henry P. Kaufman, Judicial Discretion, 17 Am. L. Rev. 567, 567 (1883)).
properly considered.65 These types of choices are rarely reversed because it is far easier for a decision to be simply “not arbitrary” rather than “not arbitrary because the decision properly considered factor X, Y and Z.”66

Accordingly, because of the relatively low hurdle a trial judge must jump to properly exercise discretion in highly unguided decisions, these choices are almost universally upheld. For example, in Beaufry v. Cliff Smith & Assoc.,65 the Appeals Court concluded that a trial judge’s mid-trial decision to allow a plaintiff’s witness to testify as an expert did not constitute an abuse of discretion.66 In so concluding, the court noted the “great deference” owed to trial judges with respect to discovery and the admission of evidence.67 The court also noted that “[a]n objecting party’s burden to show an abuse of discretion regarding the admission of even seriously prejudicial relevant evidence is a heavy one which can be sustained only by a showing that ‘no conscientious judge, acting intelligently, could have taken the view expressed by him.”68 Indeed, for these types of choices a judge does not necessarily need to articulate his or her reasoning for the order.69

These types of courtroom management decisions are afforded the most deference because they encompass both markers for a wide degree of deference. First, there is no specific legal standard constraining the judge’s decision; there are no precise legal rules or factors to apply in deciding whether to call a witness out of order or to schedule a trial. Second, the trial judge who “smells the smoke of battle” is in the best position to handle these decisions.70 Thus, a wider range of deference is granted because of the necessity of a court to control its order of business and to keep cases moving.71

From this starting point, a judge’s exercise of discretion becomes increasingly constrained by different legal factors, which, in turn are used as the marker of a proper exercise of that discretion. Guided discretion is when the range of choices is more constrained and the judge must consult some legal rules that might apply, the application of which necessitates a weighing of factors or considerations.72 Chief Justice John Marshall stated that most discretionary choices are not left to unbridled “inclination but to its judgment; and its judgment is to be guided by sound legal principles.”73

However, this “in between discretion,”74 or what Professor Rosenberg refers to as “Grade B discretion,” can be a source of much frustration. It is within this murky terrain that an appellate court is most likely to be charged with doing what it is not supposed to do, namely, making its own choice, second-guessing and substituting its judgment for that of the trial judge, and failing to give respect to the choice made by the trial judge in the exercise of discretion.

Yet, even within this wide range of discretion, there are indicators that will generally place certain choices closer to one end of the discretion spectrum. As mentioned above, these two factors that will generally result in greater deference to the judge’s opinion are: (1) whether the legal standards that constrain the judge’s choice are imprecise; and (2) whether the choice touches on areas traditionally left to the judgment of the trial judge given his position with respect to the evidence.

For example, the entry or removal of a default judgment is given wide discretion, but certain factors or standards nonetheless constrain the judge’s choice. In Greenleaf v. Massachusetts Bay Transportation Authority,75 the Appeals Court noted that the entry or removal of a default was “committed to the sound discretion of the trial judge,” but nonetheless detailed the factors that a judge properly exercising discretion should consider, including “the relative clarity of which it appears that the judgment was unjust, the relative fault of parties, and the balance to be struck.”76 The court also explained the particular balancing the trial judge must perform: “The considerations to be balanced in deciding a default question for failure to make discovery are, on one hand, a concern about giving parties their day in court, and, on the other, not so blunting the ruling that they may be ignored ‘with impunity.”’77

Thus, the high deference given to a judge’s entry or removal of a default corresponds to the flexible and somewhat amorphous standard that dictates how the judge should make his or her choice.78 The same can be said about other choices where the standard applied to review these decisions gives the judge much freedom. For instance, in Castellucci v. United States Fidelity & Guaranty Co.,79 the SJC noted that that “[Rule 15(a) of the Massachusetts Rules of Civil Procedure] eliminated the once broad discretionary authority of a judge to deny a motion to amend a pleading.”80 But Rule 15(a) still allows for much freedom in that a judge can allow a motion

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63. See Friendly, supra note 43, at 765; Rosenberg, Appellate Review, supra note 1, at 173-74.
64. See Painter & Welker, supra note 53, at 213 (“Reviewing courts should afford less deference to trial court judgments in these situations because case law, rules, or statutes have set out clearly established principles, rules or factors to consider.”).
66. Id. at 485.
67. Id.
68. Id. at 485 n.10 (quoting Commonwealth v. Medeiros, 395 Mass. 336, 351 (1985)).
70. In re Bushkin Associates, Inc., 864 F.2d 241, 246 (1st Cir. 1989) (“[T]he district judge is on the front lines, with the smoke of battle pent up in his nostrils.”); Rosenberg, Judicial Discretion, supra note 43, at 664.
71. See Greenleaf, 22 Mass. App. Ct. at 429. See also Washington Hosp. Ctr. v. Cheeks, 394 F.2d 964, 965-56 (D.C. Cir. 1968) (“The District Judge must, of course, have broad discretion since he is in a far better position to evaluate the situation than are we.”).
72. Davis, supra note 44, at 52; Rosenberg, Judicial Discretion, supra note 43, at 637-68.
74. Rosenberg, Appellate Review, supra note 1, at 177.
76. Id. at 429.
77. Id. at 429-30.
78. Cf. Painter & Welker, supra note 53, at 213 (“Less deference is necessary because a reviewing court is in just as good a position as the trial judge to determine whether the trial court considered the principles, rules, or factors correctly, considered inappropriate factors or principles, or misapplied the law.”).
80. Id. at 289.
to amend “when justice so requires.”91 This has been interpreted to mean that a judge cannot deny a motion to amend without “good reason.”92 Such reasons include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . futility of amendment, etc.”93 Moreover, a judge can take into account prejudice to the other party: the “touchstone for abuse of that discretion is extremely rare, especially where, as here, the motion comes at trial.”94 In this context, the “you are there” principle.95 Appellate courts will also give “a substantial measure of respect to the trial judge’s ruling whenever it is based on facts or circumstances that are critical to decision and that the record imperfectly conveys.”96 As Judge Friendly noted in Noonan v. Cunard Steamship Co.,97 the reasons for deferring to the trial judge’s exercise of discretion include “his observation of the witnesses, his superior opportunity to ‘get the feel of the case.’ . . . and the impracticability of framing a rule of decision where many disparate factors must be weighed.”98 Accordingly, an appellate court will give more deference to a judge’s choices when these factors are present.99

For example, orders on motions for new trial in criminal cases are a type of “Grade B,” or guided discretion, in that a judge “may grant a new trial at any time if it appears that justice may not have been done,” and make “such findings of fact as are necessary to resolve the defendant’s allegations of error of law.”100 Additionally, in motions for new trial based on newly discovered evidence, the judge “must find there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial.”101 In fact, unlike the highly unguided decisions discussed above, a case will be remanded if there is a need for further findings on a motion for new trial.102 Within this guided discretion standard, however, appellate courts afford a heightened “special” deference to the decisions of a motion judge who was also the trial judge, because of the “you are there” principle.103 In Commonwealth v. Dascalakis,104 the SJC explained that the considerations inherent in ruling on a motion for new trial “are likely to be more accurately weighed and a wise and just decision rendered by the magistrate who presided throughout the trial than by anyone else.”105

Ultimately, the “abuse of discretion” standard is difficult to grasp because it is meant to assess a wide variety of choices.106 This variety should be recognized as a reflection of the law’s attempt to fairly address a wide range of issues.107 As Judge Friendly wrote:

The rulemakers gave the district courts discretion; but after enough of them had decided always to exercise it the same way, a way that the court of appeals deemed appropriate, the channel of discretion had narrowed, and a court of appeals should keep a judge from steering outside it rather than allow disparate results on the same facts.108

In this way, the “abuse of discretion” standard acts as a kind of peacekeeper. It is an attempt to delineate those choices best left to the decision-maker hearing the evidence firsthand, while at the same time assuring “litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system.”109

84. Id. at 550 n.3.
86. 375 F.2d 69 (2d Cir. 1967).
87. Id. at 71 (citations omitted).
88. Mary M. Schroeder, “Appellate Justice Today: Fairness or Formulas, The Fairchild Lecture,” 1994 Wis. L. Rev. 9, 22 (1994) (“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.”).
93. 246 Mass. 12 (1923).
94. Id. at 33.
95. Indeed, the SJC recently noted in L.L. v. Commonwealth, that the often used formulation of “abuse of discretion,” i.e., that “no conscientious judge, acting intelligently, could honestly have taken the view expressed by him,” had “earned its retirement.” 470 Mass. 169, 185 n.27 (2014) (citing Commonwealth v. Ira L., 439 Mass. 805, 809 (2003) (quoting Commonwealth v. Bys, 370 Mass. 350, 361 (1976), and Davis v. Boston Elevated Ry. Co., 235 Mass. 482, 502 (1920))). Instead, “we think it more accurate to say that a judge’s discretionary decision constitutes an abuse of discretion where we conclude the judge made a “clear error of judgment in weighing” the factors relevant to the decision, see Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008) (citation omitted), such that the decision falls outside the range of reasonable alternatives. See Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 168–69 (2d Cir. 2001); Adoption of Mariano, 77 Mass. App. Ct. 656, 660 (2010).” Id.
96. Friendly, supra note 43, at 764 (“When I began working on this lecture, I thought these wildly different definitions of abuse of discretion could not be defended and that we ought to pick one . . . and apply it across the board. Study has led me to conclude that the differences are not only defensible but essential. Some cases call for application of the abuse of discretion standard in a ‘broad’ sense and others in a ‘narrow’ one.”).
97. Id. at 772.
98. Paul D. Carrington et al., Justice on Appeal 2 (1976). Whether abuse of discretion succeeds at this goal is an open question. Judge Mary Schroeder laments how the “exigencies of the times” push appellate courts to “develop generic factors for the trial court to weigh” and “adopt deferential standards of review” that permit appellate courts “to do everything except decide whether the case at bar was rightly decided.” Schroeder, supra note 88, at 27. As she states, “This modern jurisprudence, to put it bluntly, illustrates the maxim ‘Don’t decide—duck.’” Id.
99. Indeed, Judge Schroeder noted that a Lexis search for the phrase “review for abuse of discretion” in the Ninth Circuit opinions since 1970 resulted in six cases in 1972, but 362 cases in 1992. Id. at 19. See Mead, supra note 47, at 529–30 (showing a similar rise in the use of the phrase “abuse of discretion” in Maine courts.).
IV. CONCLUSION

What then do we offer by way of conclusion? Judging not only involves choosing how to fill the many gaps that often exist in law and in fact, but also requires reasoned choices on the trial level, and appropriate judicial restraint on the appellate, depending upon whether the question is of law, fact, or discretion. We recognize that the choices made by trial judges are neither straightforward nor simple; nor is the review process, given that the standards range from a high degree of deference to little or no deference. Because the choices made by trial judges, and the corresponding standards of review, are themselves broad ranging and indeterminate, it would serve for all judges to be more precise in the language chosen to communicate them. If the well-worn label “abuse of discretion” is to be continued in use, care must be shown to explain what is meant. As early as 1890, Professor Thayer wrote:

[A]s our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation and research that clearness of thought will not help us powerfully in grasping it. If terms in common legal use are used exactly, it is well to know it; if they are used inexacty, it is well to know just how they are used.99

Justice Oliver Wendell Holmes echoed this sentiment when he wrote, in a dissenting opinion, that “[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”100

With this aim in mind, practitioners and judges alike should look to the underlying policies behind the standards of review. Certain choices like findings of fact, credibility determinations, or courtroom management decisions are best left to the trial judge who is in the best position to make these choices. By contrast, the trial judge’s application of law and certain exercises of discretion that involve the weighing of specific legal factors are given a stricter review to ensure that the enforcement of legal principles is consistent. In navigating that curious middle ground that seems to baffle judges and lawyers alike, one would be best served in trying to understand why a high or low degree of deference would be justified in that particular situation: does the trial judge have to properly consider a number of specific legal factors, or is the trial judge guided by a fluid legal standard? Is there something to be gained by the trial judge’s ability to see the evidence firsthand, or is the appellate court in the same position with a cold record? By asking these questions, some clarity can be gleaned from the seemingly arbitrary application of different review standards. In this way, appellate standards of review can be more than a source of condemnation and frustration, and instead be viewed as an admittedly imperfect, but nonetheless valid, attempt to aid judges of the trial and appellate benches in the collective delivery of justice.

CASE COMMENT


Criminal Law: Discontinuing medication, even if the defendant knows that it will result in his committing crimes, does not deprive him of the ability to claim lack of substantial capacity.

Can someone choose to be insane? And if so, can he later claim insanity as a legally cognizable defense to his actions? In a pair of cases from 2010 and 2011, the Supreme Judicial Court (SJC) effectively answered “yes” to the first question, and “no” to the second: more precisely, if a defendant suffers from a mental illness that is not severe enough to negate criminal responsibility on its own (i.e., it does not render him legally insane), and he consumes illegal drugs or alcohol which he knows, or should know, will push him “over the edge” — meaning he will “lose substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law” — then he has forfeited the insanity defense.1 In other words, even if when committing the crime the defendant lacks the “substantial capacity” described above, “[t]he source of the lack of substantial capacity” means that he is nonetheless criminally responsible for his actions.2 In contrast, if the defendant’s mental illness “by itself, causes a lack of substantial capacity, the defendant’s consumption of alcohol or drugs does not lead to forfeiture of an otherwise valid defense of lack of criminal responsibility[,]”3 because the consumption did not cause the defendant to lack substantial capacity;4 he was going to lack it regardless, because of his mental illness.

Against this backdrop, the Massachusetts Appeals Court confronted an intriguing factual situation in 2014: a defendant who, the trial judge and finder-of-fact found, “knew that if he didn’t take his medication he was likely to commit further crimes and [who] went ahead anyway and stopped taking his medication [and then committed a crime].”5 The Appeals Court decided that if the defendant lacked substantial capacity when he committed the crime, the fact that his failure to take his prescribed medication caused his loss of capacity (and that he knew this was likely to occur) does not prevent him from claiming a lack of capacity as a defense; it treated not taking prescription drugs differently, as a matter of law, than taking illicit drugs or consuming alcohol. In doing so, the Appeals Court raised fascinating issues worthy of consideration and discussion by legal practitioners, mental health professionals, and the public at large.

This issue arose on appeal after the defendant was convicted after a bench trial of indecent assault and battery.6 During Thursday evening rush hour, the defendant stepped onto the Green Line subway train at Copley Station.7 He sidled up “very close” to the victim, “touching her arm.”8 As the train was en route to the next stop, he “touched the victim between her legs on her upper thigh, within two inches of her genital area[,]”9 She pushed him away and verbally warned him to mind his hands.10 Although she had not been planning to do so, the victim exited the subway at the next stop; the defendant left the train as well.11 He then walked out of the station, and she boarded the next train, resuming her interrupted commute.12 After the victim reported the crime, Massachusetts Bay Transportation Authority (MBTA) transit officers used videotape footage and information from the defendant’s transit card to identify him.13

The defendant asserted the affirmative defense of lack of criminal responsibility, claiming that “he was unable to conform his conduct to the requirements of the law.”14 He called a psychiatrist who testified that she had previously diagnosed him with schizophrenia, and that he had been hospitalized by court order several times in the recent past for psychiatric stabilization.15 She also testified that the defendant suffers from “frotteurism,” meaning he has a “paraphilic interest in rubbing against a non-consenting person for sexual gratification.”16 She noted that “[w]hen [the defendant] willingly takes his medication his symptoms are muted although never in complete remission.”17 The judge found the defendant criminally responsible because “the defendant was aware that if he failed to take

3. Id. at 431 (emphasis supplied).
5. See id. at 389.
6. Id. at 381.
7. Id. at 382.
8. Id.
10. Id.
11. Id.
12. Id.
13. Id.
15. Id. at 383-84.
16. Id. at 385 (internal quotation marks omitted).
17. Id. (internal quotation marks omitted).
his medication, it would result in this [criminal] behavior[,]" yet he "stopped taking his medication" nevertheless. 18

On appeal, the commonwealth argued that the trial judge was correct: the defendant knew that discontinuing his medication would cause him to lose substantial capacity, similar to those who consume drugs or alcohol knowing it will cause them to lose substantial capacity. 19 In other words, he cannot claim his lack of substantial capacity as a defense, because he himself was responsible for his lack of capacity. The Appeals Court rejected this analogy, finding this defendant distinct, as a matter of law, from the defendant who uses drugs or imbibes alcohol; it stated that inquiring into the source of the defendant’s lack of substantial capacity was legal error when the allegation is “that the defendant’s lack of criminal responsibility arises only from a failure to take prescribed medication.” 20 In explaining why the commonwealth’s proffered analogy was inapt, the court discussed four distinct factors, each of which merits discussion.

First, the Appeals Court stated that “mentally ill people fail to take prescribed medication for a myriad of reasons, including, for example, side effects that may be otherwise dangerous to their health.” 21 This empirical claim appears accurate (the court provided reputable citation 22), but its relevance is certainly debatable: assuming it is true, does it provide a basis for distinguishing between prescription-taking behavior and drinking-or-taking-drugs behavior? Innumerable reasons motivate the latter course, as well, from alcoholism, drug addiction, and attempted self-medication, to arguably more culpable reasons such as thrill-seeking. 23 Addiction itself can have many causes, and courts have recognized that it certainly does not fit easily alongside the notion of voluntariness. 24 This ground fails to persuasively articulate a distinction between the law’s differing approaches to these two classes of defendants.

Next, the court relied on the fact that “some people are unable to obtain the appropriate medication because of lack of money or access to medical care, or problems with necessary paperwork such as may have occurred in this case.” 25 This distinction is persuasive, to a point: if a defendant could not afford his medication, depriving him of an otherwise-available defense because of it seems to punish poverty. 26 However, the rule articulated in Shin does not depend on the defendant’s proving a lack of resources, or stonewalling by an insurance bureaucracy. As such, this ground, at best, suggests that Shin’s statement on this point is overbroad.

Third, the Appeals Court asserted a categorical distinction between taking drugs (or consuming alcohol) and not taking a prescription. 27 The law occasionally relies on a difference between action and inaction, 28 but the distinction always suffers from the problem of requiring a choice between competing definitions: many inactions can be characterized as actions. 29 Here, instead of the defendant not taking his medication, the defendant could be characterized as discontinuing his medication regime, or getting on a subway car unmedicated. The latter characterization would be in line with imposing tort liability on an epileptic driver who heads onto the highway having not taken his medication that day, knowing that he poses a grave risk to the public. 30 The action as opposed to inaction distinction could also result in one defendant

18. Id. at 386 (internal quotation marks omitted).
19. This argument might be somewhat analogous to the “clean hands” doctrine from equity, through which a plaintiff, having an otherwise meritorious claim, is not entitled to relief because of his prior bad acts “respecting the precise subject as to which he invokes relief.” Loud v. Pendergrass, 206 Mass. 122, 124 (1910). The analogy is not terribly persuasive, as “clean hands” embodies “an equitable principle, and generally has no application to an action at law.” Sagesse v. Kelley, 445 Mass. 434, 444 (2005). However, as providing an insanity defense is not constitutionally required, as yet, courts might not be precluded from incorporating equitable principles into their doctrines respecting such a defense.

21. Id. at 388 (citing Guardianship of L.H., 84 Mass. App. Ct. 711, 724 n.3 (2014) (Agnes, J., dissenting)).
23. See generally, e.g., Annabel Boys, John Marsden and John Strang, “Understanding Reasons for Drug Use Amongst Young People: A Functional Perspective,” 16 Health Educ. Res. 457 (2001) (examining the reasons young people use illegal drugs and alcohol). For example, researchers have found “strong evidence that young people use psycho-active drugs for a range of distinct purposes, not purely dependent on the drug’s specific effects. Overall, the top five functions were to ‘help relax’, ‘get intoxicated’, ‘keep going’, ‘enhance activity’ and ‘feel better.’” Id. at 468.
24. See, e.g., U.S. v. Moore, 486 F.2d 1139, 1149-50 (D.C. Cir. 1973) (Wilkey, J., concurring) (noting that “addiction is the physical craving to have the drug, a craving which can arise from a number of different causes, not all of them voluntary or even self-induced.”) (internal footnote omitted).
26. In the voluntary intoxication context, when addiction is involved, there is a somewhat analogous issue — a defendant could not afford to attend a rehabilitation or detoxification program, for example — but such relevance is more attenuated, involving one more causal link: with voluntary intoxication, poverty might mean a lack of access to care, which would lead to increased chance of use, causing a forfeiture of the lack of substantial capacity defense; here, poverty can result in an inability to obtain medication, directly resulting in a lack of substantial capacity, without the defendant’s superseding action of consuming the illicit substance (like in the voluntary intoxication context). Further, there are free-of-charge rehabilitation programs, such as Alcoholics Anonymous or Narcotics Anonymous, but no such free-pharmaceutical-distribution programs.
27. Shin, 86 Mass. App. Ct. at 388 (“A decision not to take a prescribed medicine, though it may be ill-advised, is different in kind from a decision to ingest alcohol or drugs that are not prescribed”). The Appeals Court did not rely on the illegality of the drugs (compared to the non-criminalized state of not being medicated) in making this distinction, nor could it, as consuming alcohol remains legal.
28. Cf., e.g., Restatement (Second) of Torts §314 (1965) (stating that “[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.”).
29. Chief Justice Roberts, for one, has struggled with this problem, noting that, at least “[t]o an economist, . . . there is no difference between activity and inactivity,” and suggesting that “metaphysical philosophers” might also reject such distinction. Nat’l Fed’n of Indep. Bus. v. Sebelius, ___ U.S. __ , 132 S.Ct. 2566, 2589 (2012).
30. Cf. People v. Decina, 2 N.Y.2d 133, 139-40 (1956) (stating defendant’s demurrer should not have been granted, where the defendant knew he was subject to epileptic attacks and seizures that might strike at any time [and] . . . knew that a moving motor vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction.”).
being judged criminally responsible and another not, despite both, at the same time, discontinuing pharmaceutical treatment. On a more fundamental level, refusing to deprive the defendant of the insanity defense on the basis of inaction (not taking his medication), but doing so on the basis of action (consuming alcohol or illegal drugs), suggests that the Appeals Court was relying on an unarticulated principle, namely that the commonwealth (or at least the common law) does not or cannot criminally punish inaction; that principle — inaction as a get-out-of-jail-free card — is contradicted by, among other examples, the law of criminal negligence, and criminal penalties for tax evasion (i.e., not paying taxes). The distinction between action and inaction might be valid as applied to the respective defendants in Shin and in Berry, but it rests on shaky theoretical ground: it might prove difficult to resolve future appeals in a consistent and defensible manner.

Finally, according to the court, the specter of evidentiary problems counseled against inquiring into the reasons animating the defendant’s failure to take his medications: “some medications work better than others, or take time to become effective, and the difficulty of discerning when, exactly, someone stopped taking medication and what his mental state was at that time would be challenging at best.” This rationale appears fairly strong, as evidentiary difficulties permeate the would-be doctrine. First, a jury would need to determine that, while taking the medication, a defendant is criminally responsible for his actions; in other words, that when properly medicated, he retains substantial capacity to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his actions. Second, they must find that he made a conscious choice to stop taking his medications, which he knew or should have known would push him “over the edge” into incapacity. This could presumably occur anywhere on the spectrum from missing a single dose to discontinuing medication indefinitely. Third, a jury would need to find that the defendant’s not taking the medication actually caused him to lose substantial capacity. Each of these inquiries is fraught with complexity — for judges, juries and lawyers — and help from medical professionals is unlikely to aid the process, but will instead probably result in a battle of the experts.

However, the difficulty of the fact-finding here does not appear to be different in kind from that involved when a criminal defendant suffering from mental illness consumes alcohol or illegal drugs: there, too, “some [drugs] [intoxicate] [more severely than others, or take time to become [intoxicating], and the difficulty of discerning when, exactly, someone [started] taking [drugs] and what his mental state was at that time would be challenging at best.” A California Supreme Court case supports this point: a trial court had ruled that “insanity was no defense because it was not of a settled and permanent nature, and, in addition, was produced by the [defendant’s] voluntary ingestion of hallucinatory drugs,” but the appellate court disagreed, stating that when “insanity is the result of long continued intoxication” — meaning LSD used 50 to 100 times in the months preceding the offense — the defendant is entitled to the insanity defense as long as “the insanity was of a settled nature,” as opposed to “temporary” intoxication. (The California legislature subsequently reversed this ruling.)

In addition to the above distinctions, the Appeals Court in Shin expressed a concern with the “logical extreme” of a ruling to the contrary, allowing the commonwealth to argue “that every mentally ill defendant who had ever taken helpful medication in the past, but discontinued it, was criminally responsible.” This might have been the true Pandora’s box that the court did not want to open; if

31. If the crucial distinction is the (asserted) absence of action, per Shin the Appeals Court, if presented with the question, might treat the removal of an intrathecal device (IUD), serving the same medical function as an orally-ingested pill, as categorically different than not taking the pill. Cf. e.g., Isabel V. Sawhill, “Beyond Marriage,” N.Y. Times, Sept. 13, 2014, at SR1 (describing IUDs as an alternative method of birth control to oral contraceptives, serving the same function).

32. See, e.g., Commonwealth v. Robinson, 74 Mass. App. Ct. 752, 759 (2009) (stating that “[w]anton or reckless conduct may occur by act or omission where there is a duty to act and the failure to so act provides a high degree of likelihood that substantial harm will result to another.”) (emphasis added) (internal citations and quotation marks omitted).

33. See Mass. Gen. Laws ch. 62C, §73(a) (2008) (stating that “[a]ny person who willfully attempts in any manner to evade or defeat any tax . . . [is] guilty of a felony and [subject to fines or imprisonment].”).


36. Id. at 432-33.

37. See id.


39. See, e.g., Joel Cooper, Elizabeth A. Bennett, Holly L. Sukel, “Complex scientific testimony: How do jurors make decisions?”, 20 L. AND HUMAN BEHAV. 579 (1996) (investigating how, exactly, jurors choose between competing claims by experts; finding that their decision-making process, specifically the extent to which they rely on the relative strength of each expert’s credentials, depends on the degree of complexity of the expert testimony).


41. See generally Larry W. Myers, “The Battle of the Experts: A New Approach to an Old Problem in Medical Testimony,” 44 Neb. L. Rev. 539 (1965) (describing such phenomenon; discussing the appointment of neutral experts as a solution).

42. Which is (by supposition) the exact same doctrinal inquiry described above. The more general point is that inquiring into the source of a lack of substantial capacity is always problematic. Cf. Bonnie, supra note 19, at 669 (quoting Monrad Paulsen, “Intoxication as a Defense to Crime,” 1961 U. ILL. L. F. 1, 22-23 (1961)) (stating “[t]he give the genesis of mental disorder a legal effect is to put upon the processes of litigation an impossible task. If the full exculpatory effect of mental disease were denied to those illnesses which are related to uncontrolled choices in life, many cases other than those of the alcoholics would be involved. We need only recall that general paresis [a type of dementia] was a not-uncommon consequence of syphilis.”).


44. People v. Kelly, 10 Cal. 3d. 565, 571 (1973) (internal quotation marks omitted).

45. Id. at 577.

46. California enacted legislation barring “use of one’s voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicants have worn off.” People v. Robinson, 72 Cal. Rptr. 2d 832, 836 (1999).
not taking one’s prescribed pills is characterized as discontinuing medical treatment, then how would Massachusetts courts sensibly distinguish between a defendant stopping a regime of medication, discontinuing a course of cognitive therapy, or ending a prescribed morning workout regime, all of which are legitimate medical treatments for various mental illnesses? At first blush, such a ruling seems to burden defendants suffering from mental illness more than those who do not, punishing the former if they stray from their treatment plans. On the other hand, Shin’s rule might give short shrift to the argument that “a decent respect for the dignity of [mentally ill] persons requires that they be held accountable for their wrongdoing.” The doctrine of self-defense suggests the potential for a third way for the courts to resolve the above tension.

In Massachusetts, when a defendant raises a claim either of self-defense or lack of criminal responsibility, the commonwealth must disprove it beyond a reasonable doubt. One way the commonwealth can disprove a self-defense claim is to show that the defendant did not “avail[] himself of all proper means to avoid physical combat before resorting to the use of deadly force,” which can easily be re-framed as punishing the defendant for inaction, something the Shin court appeared reluctant to do. For example, the SJC affirmed the defendant’s conviction in Commonwealth v. Hart because he “failed to take measures to avoid physical combat before resorting to deadly force.” This inquiry is factually difficult, and could raise the same problem elucidated in Shin — that “every [self-defending] defendant who had [any plausible way to avoid a physical altercation] but [chose not to] was criminally responsible.” However, the courts have cabin’d such an inquiry to when the defendant had a “reasonable means of escape.” Similarly, the Appeals Court could have announced a rule that a defendant is entitled to plead lack of criminal responsibility unless he knowingly and unreasonably discontinued a successful medication treatment and such discontinuation was not itself a symptom of defendant’s mental illness. Such a rule would accord with self-defense doctrine, and would provide more ex-ante deterrence by affecting the calculus of someone deciding whether to discontinue his medication, potentially decreasing the number of victims in these types of cases. However, it would also require a too-personal inquiry into the subjective reasons for a defendant’s discontinuing treatment, one that is impervious to the objective analysis required by the reasonableness criterion — after all, this is someone’s intensely personal medical decision: it is inherently more worthy of protection from governmental interrogation and a jury’s judgment than a fight-or-flight choice. And it would unleash the power of the state in mandating compliance with the treatments prescribed by psychiatrists or therapists, potentially transforming the doctor-patient relationship and its notion of informed consent: if a patient disagreed with his diagnosis but could not afford a second opinion, he would need to choose between acquiescing or risking criminal liability (more precisely, he would risk losing the affirmative defense of lack of capacity). Finally, compared to self-defense, the defendant’s medical decision-making might involve fewer outside factors that outside witnesses can attest to; once the defendant’s right not to testify is taken into account, such evidentiary issues seem daunting. In other words, given our current system, maybe Shin’s rule is the only sensible one.

Shin exemplified the courts’ wrestling with issues of mental illness and criminal responsibility. As our understanding of the complexity of mental and physical processes underpinning decision-making continually evolves, the courts will continue to struggle to incorporate this new knowledge into the existing paradigm of criminal law, with its binary determination of criminal responsibility. Such struggles might eventually prove akin to an attempt to “force a square peg [of mental illness] into a round hole [of the binary determination of criminal responsibility],” necessitating a broader re-thinking of both the criminal justice and mental health systems.

Michael Pierce

48. See, e.g., Emily Anthes, A Change of Mind, 515 NATURE 185 (2014) (stating that “data has been accumulating” that “cognitive [behavioral] therapy” has been successful in treating depression).


50. Bonnie, supra note 19, at 595.

51. Cf. e.g., W. LaFave and A. Scott, Substantive Criminal Law 428 (stating that “[i]n some respects, at least, the insanity defense is like self-defense and other defenses”).

52. See, e.g., Commonwealth v. Berry, 457 Mass. 602, 617 (2010). Note that this burden of proof varies considerably from state to state; in fact, “[i]n two-thirds of the states [with an insanity defense], the defendant also bears the burden of persuasion, usually by a preponderance of the evidence.” Bonnie, supra note 19, at 604.


56. Hart, 428 Mass. at 616 (emphasis added) (internal citations omitted).

57. Deterrence “is forward-looking in the sense of preventing or reducing the incidence of future offensive behavior.” Bonnie, supra note 19, at 16 (citing Kyron Huigens, “The Dead End of Deterrence, and Beyond,” 41 WM. AND MARY L. REV. 943, 945 (2000)). The empirical extent of such deterrence among the relevant population — those dealing with mental illness wavering on whether to continue their medication regime — is certainly debatable, and might be a trivial amount.

58. See, e.g., Commonwealth v. Vallejo, 455 Mass. 72, 78 (2009) (referring to defendants’ “constitutional right to remain silent under the Fifth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights”).

59. See Bonnie, supra note 19, at 596 (noting that “the prevailing clinical understanding is not easily translated into concepts of interest to the criminal law, mainly because scientific study of the human mind is fundamentally unconcerned with questions of blameworthiness and responsibility” and that “the law is in an important sense faced with an either/or choice [because] questions of degree can be taken into account in grading and sentencing, but the defendant either is guilty or is not guilty of committing a crime”).

60. Ecker v. United States, 575 F.3d 70, 77 (1st Cir. 2009).

61. See R. George Wright, “Pulling on the Thread of the Insanity Defense,” 59 VILL. L. REV. 221, 221 (2014) (suggesting that “judicially pulling at the apparently loose thread of the insanity defense is likely to be at best futile”).

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Soon after the attacks of September 11, 2001, the National Security Agency, acting at the direction of President George W. Bush, began gathering information about huge volumes of domestic and international telephone and Internet communications. From that point forward, the National Security Agency (NSA) collected information about virtually every telephone call made in the United States. That information — metadata to use the technical term — includes such things as the telephone number from which the call originated, the number to which it was placed, the length of the call, the time of day it was made and other like material. Once collected, the information was stored for at least five years. The quantity of data accrued over that period was enormous, for the program daily captured the metadata from billions of telephone calls. Moreover, virtually all of the information was irrelevant. Indeed, during the 14 years of the program’s existence, it interrupted only one terrorist activity that would otherwise have gone undetected.

Our knowledge of the extent and nature of current governmental surveillance activities is often the product of unauthorized leaks. The first revelations came in 2005 in a series of New York Times articles by Eric Lichtblau and James Risen. Others followed, including some in 2010 after an Army private provided 700,000 classified documents to an organization known as “WikiLeak.” But the mother lode came in June, 2013, through disclosures by Edward Snowden, an employee of NSA contractor Booz Allen Hamilton. Over a 10-day period that June, Snowden’s disclosures were reported in articles written by Glenn Greenwald and Ewen MacAskill in The Guardian, and by Barton Gellman in The Washington Post. Later, Laura Poitras, who had facilitated the connection between Snowden, Greenwald and MacAskill and who participated in reporting for some of the articles, released a documentary film entitled CitizenFour that focused on Snowden and his disclosures. For their work, Poitras, Greenwald, MacAskill and Gellman received Long Island University’s prestigious George Polk Award for national security reporting. The Guardian and The Washington Post received the Pulitzer Prize for Public Service and CitizenFour received the 2015 Academy Award for a documentary feature.

No Place to Hide: Edward Snowden, the NSA and the U.S. Surveillance State is Greenwald’s take on the events surrounding the disclosures and the impact on civil liberties flowing from the government’s surveillance activities. The book sits on four pillars. The first involves Greenwald’s activities from the time Snowden first contacted him through publication of The Guardian articles. Then follows his analysis of some of the documents Snowden provided and their implications for the scope and purpose of NSA surveillance activities. Discussion of documents is followed by commentary on the social cost of widespread governmental surveillance. The book ends with Greenwald’s critique of the criticism he received from other writers and publications and the timidity, or worse, he believes these writers and publications routinely display when it comes to reporting on issues touching on national security.

2. Section 215 Report at 12.
6. “CitizenFour” was the name Snowden used in his first email to Poitras.
7. The title comes from a statement made by Senator Frank Church, Chair of the Senate Select Committee on Governmental Operations with Respect to Intelligence Activities in 1975, in which he opined that technology possessed by the United States government, if used improperly, would enable the government to destroy all traces of privacy and monitor everything with the result that “there would be no place to hide.” The title is also reminiscent of the famous exchange between William Roper and Thomas More in Robert Bolt’s A Man for All Seasons.
8. The print version of the book contains no index, source notes or documents. Instead, a page at the end invites the reader to go to http://glengreenwald.net to obtain those materials. At the website, one finds a full and rich index, source notes and documents or excerpts from documents discussed in the book. The e-book version contains the source notes, an index which, perhaps understandably, has no pagination, but none of the documents found on the website.
The straight-line version of the narrative with which the book opens is essentially this: in December, 2012, Greenwald, a columnist for The Guardian (a British newspaper with a United States edition and offices in New York City) and a long-time writer on governmental affairs, received an unsolicited email from Snowden, whom he had never met and who called himself “Cincinnatus.” In the email, Cincinnatus stated that he wanted to share important information with Greenwald but would not do so unless Greenwald installed specified encryption software on his computer. Greenwald did not install the software and communications from Cincinnatus dried up. About 10 weeks later, however, Greenwald heard from Poitras whom he had known for several years. It turned out that Snowden had also contacted Poitras. Unlike Greenwald, she had exchanged a series of emails with Snowden and had come to the conclusion that he had some “extremely secretive incriminating documents about the U.S. government spying on its own citizens and the rest of the world.” After several conversations with Poitras and lengthy telephone conversations with Snowden, whose true identity he did not then know, Greenwald agreed with Poitras’s assessment of the material Snowden was offering and decided that he wanted to participate in writing articles about that material.

By the time Greenwald made his decision, Snowden had left his home in Hawaii and was in Hong Kong. After consulting with The Guardian, Greenwald, Poitras and MacAskill, a staff reporter whom The Guardian had assigned to the story, went to Hong Kong to meet him. Meet him they did, and the revelations began. The revelations included new details about a metadata collection program that had evolved from the program about which Risen and Lichtblau had written eight years earlier. The new program had been authorized under Section 215 of the Patriot Act by the Foreign Intelligence Surveillance Court, a body created in 1978 as part of the Foreign Intelligence Surveillance Act (FISA). Snowden’s disclosures also included details of a companion program carried out under Section 702 of the Act, which was added in 2008. Under one aspect of that program, often referred to as PRISM, internet service providers in the United States are required to give the NSA all information they have about communications to and from email addresses the NSA designates. No telephone calls are involved in that aspect of the program but they are involved in the other, or “upstream,” aspect. There, the NSA requires companies that control communications infrastructure — for example switches, routers, servers and the like — to provide all information, including the content of telephone calls, they have about communications involving designated individuals. No warrants are required for either program. The focus of both is on foreign persons outside the United States but the collection efforts sweep in a great deal of information about communications in which individuals inside the United States, citizens and others, participate.

Over 10 days in early June, 2013, the revelations poured out in articles Greenwald wrote for The Guardian and Sellman, who had remained in the United States, wrote for the Washington Post. Near the end, they wrote an article disclosing for the first time that Snowden was the leaker. That revelation produced a furious media search to locate Snowden and, ultimately, to his departure from Hong Kong. His immediate destination turned out to be Moscow where, in August, 2014, he was granted a three-year visa that keeps him in a limbo status until his ultimate destination is determined.

Greenwald follows his account of the Hong Kong events with an 80-page analysis of what he views as some of the most important documents Snowden released. The analysis contains excerpts from PowerPoint slides, emails and other documents interspersed with Greenwald’s description of what they mean and the significance they have for understanding the breadth of the overall surveillance programs. In many cases, Greenwald’s interpretive guidance is essential, for the documents themselves are often so cryptic or so filled with acronyms and jargon that translations are essential for any attempt at comprehension.

Analysis concluded, Greenwald lays out his view of the social cost of a surveillance system like the one the NSA undertook. He makes a strong case for the proposition that collection of metadata regarding telephone conversations can be hugely intrusive even if the content of the conversations is not captured. Systematic capturing of that metadata, he urges, can provide information about contacts and networks that are capable of revealing highly intimate details of an individual’s life. Beyond that, he describes how the very existence of deeply probing state surveillance systems can chill a broad range of social interactions and prevent a freely flourishing exchange of ideas, particularly ideas lying outside the mainstream.

Greenwald ends his narrative with a heavy fusillade aimed at journalists and journals that criticized either Snowden or him for the actions they took in connection with the disclosures. Here, Greenwald leaves no doubt that he views Snowden as an extraordinary hero who was willing to sacrifice himself, his career and even his freedom for a cause in which he deeply believed. His critique also suggests that he holds essentially the same heroic view of himself and his role in the disclosures, though he makes no suggestion that


11. The evolution is described in Section 215 Report at 37-56.


14. PRISM is actually the database in which the collected information is stored, not the program itself. Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 7 (July 2, 2014) (hereafter Section 702 Report), at 1 n.3.

15. Id.

16. Section 702 Report at 7. “The [upstream] collection . . . does not occur at the local telephone company or email provider with whom the targeted person interacts (which may be foreign telephone or Internet companies, which the government cannot compel to comply with a Section 702 directive), but instead occurs ‘upstream’ in the flow of communications between communication service providers.” Id. at 123.

17. Section 702 Report at 6-8.

18. No Place to Hide at 83.

he is prepared, or in a just society should be prepared, to make any sacrifices remotely resembling those that Snowden freely embraced.

Embedded in this book are questions about the appropriate balance between privacy and security in an increasingly wired world. Where that balance lies is a topic of enormous importance, one that deserves informed, vigorous and thorough public discussion and debate. We have seen those debates throughout our history. In recent times, they flourished after revelations about surveillance carried out under the United States Army’s domestic intelligence program at Fort Holabird. They followed revelations about operations of Watergate burglars, the FBI’s counterintelligence program, or COINTELPRO, which was conducted from 1956 through 1971, and a decade-long CIA domestic spy operation. Those revelations led to creation of the FISA and the FISA court. Similar debates flared anew following Risen and Lichtblau’s 2005 reports in the New York Times.

Snowden’s disclosures produced the same kind of intense debate. In January, 2014, the Privacy and Civil Liberties Oversight Board, an independent bipartisan agency within the executive branch established in 2007, concluded that “Section 215 does not provide an adequate legal basis to support the [NSA’s metadata] program.” More recently, the United States Court of Appeals for the Second Circuit reached the same conclusion, and the USA Freedom Act of 2015, signed by President Obama on June 2, 2015, replaced the section with new provisions that are much more protective of individual privacy. The new legislation, however, did not touch FISA Section 702.

The debate continues because we have a constantly evolving need to find the increasingly ill-defined boundary between privacy and civil liberties, on the one hand, and security on the other. In thinking about that boundary, it would be foolishly to ignore the fact that our highly wired and interconnected existence can facilitate and amplify real threats to safety. One does not have to stray far from the front pages of the daily paper, newscast or blog to understand that. But it would be equally foolhardy to abandon all restraint and, secure in the belief that we have nothing to hide, allow the government to do whatever it deems appropriate to protect us from lurking dangers.

There is, however, little hint of any debate, or even the legitimacy of any debate, on the pages Greenwald has written. This is the work of a true believer for whom nuance is an unfamiliar concept. Snowden is a hero, the United States government is evil and that’s about it. Joining Snowden on the pedestal is Greenwald himself and, mounted somewhat lower, Poitras. Nobody else, we are told, had the courage to facilitate Snowden’s disclosures the way Greenwald did, not even three-time Pulitzer Prize winner Barton Gellman, who declined to join Greenwald and Poitras in Hong Kong and instead took the advice of Washington Post lawyers and worked from Washington. The Washington Post itself lies in “the belly of the Beltway media beast, embodying all the worst attributes of United States political media: excessive closeness to the government, reverence for the institutions of the national security state, routine exclusion of dissenting voices.” The New York Times occupies about the same position in Greenwald’s pantheon of demons, as do David Brooks, Jeffrey Toobin, Hendrick Hertzberg and many other established journalists who, in Greenwald’s view, “devote their careers to venerating the country’s most powerful official — the president, who is the NSA’s commander-in-chief — and defending his political party.”

Greenwald’s iconoclastic self-congratulation is off-putting and unfortunate, for it may cause readers to put down the book before getting to what he has to say about the social harms surveillance systems inevitably produce. There, he is often eloquent and insightful as he talks not only about the problems those systems create for targeted individuals but also about the chilling effect they have on free public discourse. His pervasive self-congratulatory air and lack of nuance also weakens his credibility when he discusses both the meaning and the impact of particular documents Snowden disclosed, particularly documents that would be almost meaningless without the assistance of a trusted decoder. And his constant position in the center of his own spotlight ultimately weakens the strength of his narrative about how Snowden came to his disclosure decisions, about the role played by Poitras, and about the extraordinary events surrounding the disclosures that took place in Hong Kong during the summer of 2013.

22. See Austin Anderson, The Terrorist Surveillance Program: Assessing the Legality of the Unknown (2012), http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Anderson.pdf
25. American Civil Liberties Union v. Clapper, 785 F.3d 787 (2nd Cir. 2015).
26. Section 702 Report at 11; see also id. at 11-13, 134-39.
27. No Place to Hide at 57.
28. No Place to Hide at 54. Ironically, Greenwald later criticizes the Post for being too aggressive in an article it published about the NSA and Internet companies, saying that his own article on the same subject had a “more cautious tone, prominently touting the Internet companies’ vehement denials.” No Place to Hide at 77.
29. No Place to Hide at 55.
31. No Place to Hide at 222; see Jeffrey Toobin, “Edward Snowden is No Hero,” The New Yorker, June 10, 2013.
33. No Place to Hide at 196.
In the end, though, nuance doesn’t galvanize. Over the past 15 years, all of us have participated in one way or another in extraordinary changes to the way we acquire, store, disseminate and exchange information about virtually every aspect of daily life. Those changes are likely to continue at ever increasing speed. The enormous convenience the changes produce has the power to blind us to the deeply intrusive surveillance they enable. The past decade’s revelations about surveillance have produced corrective legislation and some pushback from industry, but even so, new surveillance methods continually emerge. At this point, a concerted national discussion about what we are doing and why is essential, and in that discussion the absence of nuance may in fact produce the most appropriately nuanced result.

James F. McHugh


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