BLOWING THE WHISTLE ON THE NFL'S NEW INSTANT REPLAY RULE: INDISPUTABLE VISUAL EVIDENCE AND A RECOMMENDED "APPELLATE" MODEL

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The 1999 National Football League (NFL) season ushered in a new instant replay system. The goal according to NFL Commissioner Paul Tagliabue was "to create the most efficient replay system possible."[1] At the heart of the system is the rule that the referee is only to reverse a call where there is "indisputable visual evidence" that the original call was in error.[2] This essay examines the "indisputable visual evidence" rule from the perspective of American jurisprudence in an effort to clarify the rule's standard for referees, players, and fans. It next posits that the standard is not clear and has not been accurately applied. As a result far more calls have been reversed than meet the standard. The essay, therefore, suggests that the "indisputable visual evidence" rule be replaced by a judicial appellate review standard. The essay concludes by explaining why "manifest weight of the evidence" is the appellate standard best suited for instant replay.

I. CURRENT STATUS

A. The Need for Instant Replay

The 1998-1999 NFL season proved without doubt that the league needed some type of replay system. Glaringly incorrect calls cost teams games and ultimately playoff aspirations. For example in a November 29, 1998 game between the Buffalo Bills and the New England Patriots, the Patriots won the game because of an erroneous pass interference call on a last minute "Hail Mary" pass.[3] In a game between the Jets and the Seahawks, a quarterback sneak was ruled a touchdown for the Jets even though the television coverage

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1. *NFL Introduces Instant Replay Technology* (visited Nov. 17, 1999) <http://www.nfl.com/news/990526replaytechnology.html>.

2. *Id.*

3. *See* Curtis Eichelberger, *Former Referee Blasts Current Crop, Dreith Blames Lack of Training*, ARIZ. REPUBLIC, Dec. 25, 1998, at C11.

clearly showed the Jet's quarterback failed to make it into the end zone.[4] This blown call arguably resulted in the Seahawks missing the playoffs. The most egregious officiating error, however, was made before a national audience in a Thanksgiving Day game between the Pittsburgh Steelers and the Detroit Lions. In the infamous coin toss debacle, the referee gave the first overtime possession to the Lions even though the Steelers had called "tails" and the coin came up tails.[5] This allowed the Lions to score the game winning field goal.[6]

The league's position was that technology now held every play call to a higher level of scrutiny.[7] The exasperation felt by the adversely affected teams and the discontent among fans spurred the league to consider instituting instant replay for the 1998-1999 season playoffs.[8] This idea was ultimately not pursued, but the league determined to construct a replay system during the off-season.[9]

B. The System

The instant replay system adopted by the league may be initiated by challenges from either of the head coaches at any time during the game except the final two minutes of each half.[10] Each head coach gets two challenges per game.[11] An official stationed in a replay booth may make a challenge in the final two minutes of each half and in overtime.[12] Each failed challenge will cost a team one time-out.[13] However, if a challenge is upheld, the time-out is restored.[14] Even if successful, the opportunity to challenge is not restored.[15]

All replay reviews are conducted by the referee after consultation with the officials covering the play in question.[16] The referee reviews the digital

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4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* It has likewise been said that the presence of television cameras in courtrooms has undermined the public's faith in the judicial process. *See generally* Ralph E. Roberts, Jr., *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 SMU L. REV. 621 (1998). *See also* Kelly L. Cripe, Comment, *Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235 (1999).
8. *See* Eichelberger, *supra* note 3, at C11.
9. *See id.*
10. *See NFL Introduces Instant Replay Technology*, *supra* note 1.
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*

computer tape of the play on a field-level monitor.[17] The instant replay system allows review of plays in three main areas: "1) sideline, goal line, end zone, and end-line plays; 2) passing plays; 3) and other detectable infractions, such as a runner ruled down not by defensive contact, and the number of players on the field."[18]

The center piece of the new system is the rule that a call stands unless there is "indisputable visual evidence" that "the call should be changed."[19] This rule is crucial because it maintains the credibility of the officials and avoids fickle determinations by the referee. The language "indisputable visual evidence" implies that unless it is "indisputably" clear that the official covering the play was wrong, the call is upheld. This demonstrates and embodies the NFL's belief that officials by and large make the correct call to begin with. It also relieves the reviewing-referee of responsibility to make a de novo call every time there is a challenge. Under this rule, a capricious call by an official will not stand where it is clearly wrong and challenged. Additionally, a challenge will not result in the referee merely replacing his potentially equally fallible judgment for that of the official's.

C. The Stats

"Indisputable visual evidence" suggests that calls should rarely be overturned. Webster's Third New International Dictionary defines "indisputable" as "cannot be disputed or called into question . . . *unquestionable, incontestable, undeniable, indubitable*" and "existing beyond the possibility of doubt or denial."[20] Strategically, coaches will only use one of the two allotted challenges where there is a reason to believe the call might be overturned. This selection of calls to challenge might result in a reversal on an extremely rare basis. This is balanced out to some degree by the desire of coaches to see adverse calls overturned on crucial plays; that is, a coach is more likely to challenge a game-deciding call where there is only a minimal basis for the challenge.[21] Therefore, given the definition of "indisputable," one would seldom expect to see calls overturned. Yet, this is not the case.

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17. *See id.*

18. *Id.*

19. *Id.*

20. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1986) (emphasis added).

21. Jerry Seaman, NFL Senior Director of Officiating, has said that "Replay is for big-ticket plays." Michael Hiestand, *Will Networks Blur NFL'S View? What You See Is What Referees Will Decide From*, USA TODAY, Aug. 10, 1999, at 3C. "Coaches' challenges to on-field calls are limited to just two plays each game and are likely to be used judiciously since teams lose a timeout if the play is upheld." *Id.*

Midway through the 1999 season, NFL executives stated their belief that the instant replay system was working as intended.[22] After 143 games, referees had been asked to review 106 plays, and had reversed thirty-one.[23] Of the 106 reviews, seventy-three had been prompted by a coach's challenge, and thirty-three by replay officials during the final two minutes of a half.[24] "Of the challenges by coaches, [twenty-one had] resulted in the original call being overturned."[25] Of the thirty-three reviews called for by replay officials, ten overturned on-field calls.[26] In total, nearly thirty percent of plays challenged have been overturned. It is hard to believe that thirty percent of the plays had sufficient visual evidence, beyond the possibility of doubt or denial, contrary to the initial call such that the reversal could not be disputed or called into question. Indeed, the fact that a play was initially called one way usually suggests "dispute" and "question" sufficient to prevent the call from being overturned. The fact that calls are being overturned frequently instead of rarely implies a lack of accurate perception of the meaning of the rule.

It is not surprising that there is a lack of understanding as to what "indisputable visual evidence" means and how it should be applied. The term does not have a clear meaning in jurisprudence, let alone in everyday English parlance. This makes it particularly hard for NFL referees to understand the rule's intent and how it is to be administered. NFL referees are already at a rule-applying disadvantage in comparison to referees in other major American professional sports. The NFL is the only major professional sports league with part-time officials, as opposed to full-time officials.[27] The NFL's rank of 112 officials includes three lawyers, six college professors, eight college coaches, two bank presidents, two dentists, a doctor, and a golf pro.[28] Even for those trained in the law, and even more so for those not trained in the law, the part-time commitment might not be sufficient to understand a rule which has no easily apparent meaning.[29]

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22. *See* Leonard Shapiro, *Replay System Gets Positive Reviews*, WASH. POST, Nov. 17, 1999, at D4.

23. *See id.*

24. *See id.*

25. *Id.*

26. *See id.*

27. *See* Nick Charles, *Nothing Official, Should NFL Hire Full-Time Refs?* (visited Sept.7, 1999) <http://cnnsi.com/thenetwork/news/1999/09/06/pageone_nflofficials>.

28. *See id.* Even more impressive, the United States Soccer Federation can boast a law school professor as one of its referees. *See* William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COL. J. EUR. L. 369 (1995).

29. *See* Charles, *supra* note 27.

NFL executives apparently believe a thirty percent reversal rate is appropriate.[30] If so, "indisputable visual evidence" is probably the wrong standard to use and is probably being used incorrectly. In fact the "indisputable visual evidence" standard is a leftover from the troubled instant replay system used by the NFL in 1986.[31] This essay suggests an alternative review standard which more accurately results in this liberal reversal statistic. A standard that accurately results in the correct percentage of calls overturned will give the instant replay rules greater credibility.[32]

D. Indisputable Visual Evidence

Courts have defined, interpreted, and applied laws since their creation. American case law, therefore, seems a logical place to look for guidance in understanding what the NFL's "indisputable visual evidence" standard means. Unfortunately, "indisputable visual evidence" has yet to be used as a legal standard, either by federal or state courts. A case law search for "indisputable evidence," however, turns up a number of results. Regrettably, courts using the term as a legal standard have not clearly defined it. Case law indicates that "indisputable evidence" is a very high bench-mark. This suggests that a thirty percent NFL turnover rate is a misapplication of the standard, as the following survey of cases demonstrates.[33]

In one case, the United States Court of Appeals for the Second Circuit noted that one seeking to establish an agreement not to revoke must prove irrevocability by more than a fair preponderance of the evidence.[34] One of the

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30. *See* Shapiro, *supra* note 22, at D4.

31. *See* Darryll M. Halcomb Lewis and Frank S. Forbes, *A Proposal For a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673, 681 n.47 (1990).

32. Accurate rules which are more precisely applied will also give officials greater protection from those who suggest they be subject to liability for mistaken calls. *See id. See generally* Note, *Sports Liability: Blowing the Whistle on Referees*, 12 PAC. L. J. 937 (1981); Kenneth W. Biedzynski, *Sports Officials Should Only be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11 UNIV. MIAMI ENT. SPORTS L. REV. 375 (1994); Scott Parven, *Judgment Calls -- Sports Officials in Court*, ENT. AND SPORTS LAWYER, Fall 1991, at 9; Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213 (1997). Conversely, it should also be noted that referees may have legal remedy where they are unfairly maligned. *See* Darryll M. Halcomb Lewis, *Defamation of Sports Officials*, 38 WASHBURN L. J. 781, 782 (1999) (exploring the options for defamed sports officials).

33. It should, however, be noted that there is a line of Georgia cases which seem to imply a less rigorous, although still high, standard for indisputable evidence. These cases apparently equate indisputable with "palpable" and "plain." *See, e.g.*, Tallman Pools of Ga., Inc. v. James, 352 S.E.2d 179, 180 (Ga. 1986); Woolbright v. Six Flags Over Ga., Inc., 321 S.E.2d 787, 788 (Ga. 1984); Oglesby v. City of Atlanta, 303 S.E.2d 526, 527 (Ga. 1983).

34. *See* Lamberg v. Callahan, 455 F.2d 1213, 1218 (2d Cir. 1972). *See also* McCabe v. Bagby, 186 F.2d 546, 549 (6th Cir. 1951); Edson v. Parsons, 50 N.E. 265, 268 (N.Y. 1898); Rolls v. Allen, 269

higher standards the court looked to was "the most indisputable evidence."[35] Beyond stating that this standard is higher than a fair preponderance of the evidence, the court did not define it. Apparently this was a high standard, as the court found that an undated joint acknowledgment of "like wills" was insufficient evidence to establish the irrevocability of the previously executed reciprocal wills.[36]

In another case, the United States Court of Appeals for the Third Circuit ruled that an order of a Pennsylvania state court, stamped by the chief clerk of the court, was "indisputable evidence" of the order.[37] Again, this suggests a very high bench-mark.

Most instructive in defining the NFL's standard is a trademark case decided by the United States District Court for the Eastern District of New York.[38] In a 1984 decision, the court interpreted the Lanham Act and the New York law of unfair competition as requiring the moving party to demonstrate "undisputed or indisputable evidence" of actual product confusion in order to obtain summary judgment.[39] Noting that this is a "stringent standard," the court found that although the plaintiff was entitled to damages under New York statutes prohibiting false advertising and deceptive practices, it had failed to demonstrate sufficient evidence to win its summary judgment motion.[40]

"Indisputable evidence" requires more than a mere legitimate, logical, and reasonable inference.[41] Clearly, "indisputable evidence" is a rigorous standard. The Supreme Court of Vermont refused to grant a motion to strike in an automobile accident case because police testimony about the accident did not achieve the status of "indisputable evidence."[42] Even weather bureau reports are not necessarily "indisputable evidence" of prevailing conditions on any particular day.[43] In sum, to constitute "indisputable evidence," as one court in Connecticut found, there can be no question of the evidence "concerning which reasonable minds could differ."[44]

P. 450, 452 (Cal. 1928); *In re* Silverman's Estate, 43 Misc. 2d 909, 911-912 (Surr. Ct. Westchester Co. 1964).

35. *Lamberg*, 455 F.2d at 1218.

36. *See id.* at 1219.

37. *See* O.J. Mayberry v. Petsock, 821 F.2d 179, 183 (3d Cir. 1987).

38. *See* Vitabiotics, Ltd. v. Krupka, C.T.R., 606 F. Supp. 779, 782 (E.D.N.Y. 1984).

39. *Id.* at 786. *See also* Perfect Fit Industries v. Acme Quilting Co., 618 F.2d 950, 955 (2d Cir. 1980); Bally Midway Mfg. Co. v. American Postage Machine, Inc, No. 82 C 2700, 1983 WL 1150, at *3 (E.D.N.Y. Aug. 25, 1983).

40. *Vitabiotics*, 606 F. Supp. at 786.

41. *See* Beyer v. White, 91 A.2d 606, 609 (N.J. 1952).

42. *See* Lambert v. Fuller, 131 Vt. 181, 186, 303 A.2d 471, 474 (1973).

43. *See* Tenney v. Pleasant Realty Corp., 70 A.2d 138, 139 (Conn. 1949).

44. *See id.* *See also* Budaj v. Connecticut Co., 143 A. 527, 528 (Conn. 1928).

II. POSSIBLE STANDARDS FOR A NEW RULE

A new rule for reversing a call on instant replay is clearly needed to remedy the vagueness and misapplication that the current rule evokes. The legal arena's appellate standards provide a good source for potential guidelines.[45] Football, like the law, is defined and controlled by rules and infractions which are decided by a fact-finder.[46] It is likely more than coincidence that legal experts have emerged from the gridiron's ranks, such as Justice Byron White of the United States Supreme Court and Justice Alan Page of the Minnesota Supreme Court. Justice White was a Rhodes scholar, Justice Department official, and has had a very impressive tenure on the Warren, Burger, and Rehnquist Courts.[47] He also played football for the Pittsburgh Pirates (now Steelers) for a league high salary, and led the NFL in rushing yards.[48] Justice Page, currently on the Minnesota Supreme Court, was formerly an Assistant Attorney General of the State of Minnesota. He also was a professional football player for the Minnesota Vikings and Chicago Bears from 1967 through 1981, earning MVP recognition in 1972.[49] It is also telling that the commissioner of football is an attorney.[50]

Indeed, the NFL is no stranger to the legal system. Among other legal activity, the NFL has diligently protected its intellectual property rights in

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45. It should be noted, however, that there are those of the opinion that there has already been too much legal involvement in sports. *See, e.g.*, Simon Gardiner and Alexandra Felix, *Juridification of the Football Field: Strategies for Giving Law the Elbow*, 5 MARQ. SPORTS L.J. 189 (1995).

46. The same is true of baseball. *See* Richard Lempert, *Error Behind the Plate and in the Law*, 59 S. CAL. L. REV. 407 (1986).

47. *See* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE (1998). *See also* Gene R. Nichol, Ruth Bader Ginsburg, and David M. Ebel, *Dedication of the Byron White United States Courthouse*, 66 UNIV. COLO. L. REV. 1 (1995).

48. *See* Hutchinson, *supra* note 47. *See also* John Paul Stevens, *"Cheers!" A Tribute to Justice Byron R. White*, 1994 BYU L. REV. 209.

49. *See* Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care if Athletes Inhale*, 8 MARQ. SPORTS L. J. 75 n.26 (1997); Alan C. Page, *Random Testing of Professional Athletes*, 33 WM. & MARY L. REV. 155 (1991); Bailey Kuklin and Jeffey W. Stempel, *Continuing Classroom Conversation Beyond the Well Placed "Whys?"*, 29 UNIV. TOLEDO L. REV. 59, 96 (1997). To the author's knowledge, other judges who were also football stars include Walter T. Cox III, an All-American football player and Chief Judge of the United States Court of Appeals for the Armed Forces; Robert G. Flanders of the Rhode Island Supreme Court, who had the longest run from scrimmage in a 1968 game between Brown and Yale; and Francis E. Sweeney of the Ohio Supreme Court, who played for the Ottawa Rough Riders of the Canadian Football League from 1956 to 1958.

50. The commissioner of the National Basketball Association is also an attorney. *See* David J. Stern, *Law and Sports*, 66 N.Y. ST. B.J. 44 (1994).

court;[51] it has fought numerous antitrust actions;[52] it has litigated many employment and labor disputes;[53] and it has preserved its broadcast rights.[54]

Of central importance to this essay is the fact that both the law and football have to deal with human fallibility in the observation of fact. As Justice Felix Frankfurter said: "The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."[55] Indeed, one can say the same of football as is said of the law: "[M]isidentifications are commonly understood to be a leading cause of the system's miscarriages of justice."[56] Eyewitness testimony in both the law and in football depends upon the ability of the witness or referee to correctly observe an event, record it in memory, and articulate that recollection.[57] This process may be hampered in both the legal arena and the football arena by such problems as object focus, stress, prior held beliefs, and post-facto suggestions. In a criminal case for instance, a witness' observation may be affected by a focus on a weapon being used, the stress caused by the presence of the weapon, and implied suggestions made by police, lawyers, and the judge.[58] In football the on-site official's observation might be affected by a focus on the football, the stress of the play, the official's belief about how

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51. *See* William J. Hoffman, *Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown With the N.F.L.:* National Football League Properties v. Dallas Cowboys Football Club, et. al., 7 SETON HALL J. SPORTS L. 255 (1997); Jack Achiezer Guggenheim, *Renaming the Redskins (and the Florida State Seminoles?): The Trademark Registration Decision and Alternative Remedies*, 27 FLA. ST. U. L. REV. (1999); Jack Achiezer Guggenheim, *Tigers, Tornadoes and Titans: Trademark Implications of Renaming the National Football League Oilers*, 76 U. DET. MERCY L. REV. 45 (1999).

52. *See* Robert C. Heintel, *The Need for an Alternative to Antitrust Regulation of the National Football League*, 46 CASE W. RES. L. REV. 1033 (1996); Charles E. Brown, *Professional Football and the Antitrust Laws: Impact of* United States Football League v. National Football League *and a Proposal for Change*, 31 ST. LOUIS U. L.J. 1057 (1987).

53. *See* Pamela A. Clark, Brown v. Pro Football, Inc.: *The Supreme Court Benches a Player's Right to Negotiate Salary*, 35 HOUS. L. REV. 571 (1998); Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After* Brown v. Pro Football, Inc., 1 PA. J. LAB. & EMP. L. 297 (1998); Joseph D. Wright, *NFL Contract Negotiations in the Aftermath of* White v. National Football League, 8 DEPAUL J. ART & ENT. L. 115 (1997).

54. *See* Lynne S. Sutphen, *Sports Bars' Interception of the National Football League's Satellite Signals: Controversy or Compromise?*, 2 SETON HALL J. SPORTS L. 203 (1992).

55. United States v. Wade, 388 U.S. 218, 228 (1967).

56. David M. Shofi, *The New York Courts' Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony*, 13 PACE L. REV. 1101, 1141 (1994).

57. *See* William David Gross, Note and Comment, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307, 314 (1999). *See also* Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 55 (1991); Jennifer L. Devenport, et al., *Eyewitness Identification Evidence*, 3 PSYCHOL. PUB. POL'Y & L. 338 (1997); Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 742 (1993).

58. *See* United States v. Norwood, 939 F. Supp. 1132, 1138 (D.N.J. 1996).

certain players are likely to act, and after the fact comments of players, coaches, and fans.

A referee's review of the on-site official's call can easily be analogized to an appellate court's review of a trial court's ruling. The rules that govern football, like those that govern adjudication, are complex. Indeed, it has been said that football reflects the United State's legal culture, and visa versa:

> Our American trial system reflects many of the cultural values encoded in the rules and traditions of professional football: the worship of proceduralism, the attempt to rationalize every aspect of the decision-making process, the distrust of spontaneous action, the heavy preference for managerial control over participants, and above all, the daunting complexity of the rules that such a system requires.[59]

This parallel between the law and football suggests that the legal arena's experience with appellate procedure and standards might be a valuable paradigm for football call-review.

Of the many judicial appellate standards, there are a few which might be suitable for instant replay. These standards must be weighed to determine which would be the most appropriate. Although some distinctions between appellate standards might seem more semantical than substantive, the importance of the standard used should not be underestimated. The standard used determines the challenger's burden, which in turn determines the likelihood of success. There are a number of legal appellate standards that might be appropriate. A survey of the different standards will help to determine which would best serve as the new NFL instant replay rule.

A. De Novo Review

Under the de novo standard of review, an appellate court grants no deference at all to a trial court's determination.[60] Instead, the appellate court conducts an independent review of the issue that is on appeal.[61] However, this does not entail a rehearing or new fact-finding.[62] The de novo standard of review is generally used whenever an issue that is purely a question of law and does not involve a factual determination is adjudicated without a trial.[63] The

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59. William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COLUM. J. EUR. L. 369, 377 (1995).

60. *See* Continental Casualty Co. v. McDowell & Colantoni, Ltd., 668 N.E.2d 59, 62 (Ill. App. Ct. 1996).

61. *See* Owens v. Midwest Tank & Mfg Co., 549 N.E.2d. 774, 776 (Ill. App. Ct. 1989).

62. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984).

63. *See* J. Timothy Eaton, et al., *Standards of Review*, ILL. INST. FOR CONTINUING LEGAL EDUC.,

rationale behind the de novo standard of review is that the appellate court is in as good a position as the trial court when it comes to adjudicating questions of law.[64]

B. Manifest Weight of Evidence

In many state court systems, the "manifest weight of evidence" standard mandates the following: The appellate court is to review all evidence in the light most favorable to the prevailing party at trial. It then may reverse the judgment of the lower court in two situations: first, when an opposite conclusion is clearly apparent, and second, when the court's decision is palpably erroneous and wholly unwarranted.[65] Under the manifest weight of the evidence standard, the appellate court examines whether a contrary verdict is clearly called for, not whether the evidence could have supported a verdict for the appellant.[66] Put simply, the lower court's decision will be reversed only if an opposite conclusion is clearly evident or if the decision appears arbitrary and unsubstantiated by the evidence.[67] The rationale behind the manifest weight of the evidence standard is that the trial court is the sole trier of fact, and the appellate court should defer to the trial court's assessment of the evidence.[68]

C. Clearly Erroneous

In federal court, factual issues are generally reviewed under a clearly erroneous standard. This standard has been codified in Federal Rule of Civil Procedure 52(a).[69] Under the clearly erroneous standard an appellate court will reverse a trial court where, after reviewing all the evidence, the appellate court is "left with the definite and firm conviction that a mistake has been committed."[70] The clearly erroneous standard is considered very difficult to meet.[71] This standard is based on the theory that the trial judge is in a better position to weigh and evaluate the evidence.[72] A challenge will need to show that a critical fact determination has no support in the record or cannot be

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ch. 4, § 5 (1997).

64. *See id.*
65. *See* Pappas v. Fronczak, 618 N.E.2d 878, 881 (Ill. App. Ct. 1993).
66. *See* Tedrowe v. Burlington N. Inc., 511 N.E.2d 798, 801 (Ill. 1987).
67. *See* Maple v. Gustafson, 603 N.E.2d 508, 512 (Ill. 1992).
68. *See* City of Evanston v. Ridgeview House, Inc., 349 N.E.2d 399, 408 (Ill. 1976).
69. *See* FED. R. CIV. P. 52(a).
70. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
71. *See* G. Fred Metos, *Standards of Appellate Review*, 20-DEC CHAMPION 31 (1996).
72. *See id.*

reasonably inferred from the record.[73] Yet, this standard was engineered to allow greater appellate scrutiny and power to "do justice."[74]

D. Abuse of Discretion

Under the abuse of discretion standard, a reviewing court will reverse the judgment of the lower court only when no reasonable person could take the view adopted by the lower court.[75] The abuse of discretion standard is generally used when reviewing areas where the trial court has historically had considerable latitude.[76] In the federal courts the abuse of discretion standard encompasses a number of actual review standards.[77] The deference granted to the trial court depends upon the particular type of ruling involved. The general standard is whether the lower court exceeded the bounds of permissible choice in the circumstances.[78]

E. Ends of Justice Standard

On occasion appellate courts have used an ends of justice standard of review as an alternative to the abuse of discretion standard.[79] The two standards are not markedly different. The ends of justice standard, however, permits the appellate court to examine the equities of the controversy more closely.[80] The overriding consideration under the ends of justice standard is whether the ends of justice are best served by the lower court's determination.[81]

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73. *See id.*

74. Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962). *See also* Steven Alan Childress, *A 1995 Primer on Standards of Review in Federal Civil Appeals*, 161 F.R.D. 123, 127 (1995); Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 670 (1988).

75. *See In re* Marriage of Getautas, 544 N.E.2d 1284, 1287 (Ill. App. Ct. 1989).

76. *See generally* PCx Corp. v. Ross, 568 N.E.2d 311 (Ill. App. Ct. 1991) (denying motion for preliminary injunction to enforce non-competition agreement).

77. *See* American Hosp. Supply Corp. v. Hosp. Prod. Ltd., 780 F.2d 589 (7th Cir. 1986).

78. *See* Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986); *see also* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984).

79. *See* Baltz v. McCormack, 383 N.E.2d 643, 644 (Ill. App. Ct. 1978).

80. *See* People *ex rel.* Reid v. Adkins, 270 N.E.2d 841, 843 (Ill. App. Ct. 1971).

81. *See* Czyzewski v. Gleeson, 364 N.E.2d 557, 560 (Ill. App. Ct. 1977).

III. NEW INSTANT REPLAY RULE

In selecting the new instant replay standard of review, it is necessary to set out the objectives of the new rule. It should be a clear guideline, understandable, and easy to apply. It should maintain and enhance the credibility of NFL officials, and it should alleviate fan frustration over calls which are clearly erroneous. To achieve this balance the NFL should institute the "manifest weight of the evidence" standard as a model for overturning an official's call.

Transposing the manifest weight of the evidence standard to the NFL instant replay system would mean that the referee will reverse the judgment of the on-site official when, upon review of all the evidence in the light most favorable to the prevailing team in the initial call, an opposite conclusion is clearly apparent; or the official's decision is palpably erroneous and wholly unwarranted. This is the appropriate standard of review for the instant replay system because it gives sufficient deference to officials so as not to undermine the fans' faith in the official's ability to usually get the call right, but not so much deference that credibility in calls is undermined by decisions which are clearly wrong but are not reversed.

The manifest weight of the evidence standard provides a more appropriate balance than the other possible standards. It requires less deference and presumption of correctness than does the current indisputable visual evidence standard, or the appellate abuse of discretion standard, or ends of justice standard. This will prevent the ill will that might be generated where a call is not overturned though clearly wrong, because of an over-abundance of deference. The manifest weight of the evidence standard is also a more appropriate standard for the NFL's instant replay system than the de novo standard. A de novo standard and the absence of all deference it entails would suggest that there is little confidence in on-site officials' ability to generally make the right call.

Under the manifest weight of the evidence standard the referee will examine whether a contrary call is clearly called for, not whether the evidence could have supported the opposite call. That is, the official's decision will be reversed only if an opposite conclusion is clearly evident or if the official's decision appears arbitrary and unsubstantiated by the evidence. The rationale behind the manifest weight of the evidence standard is particularly applicable to NFL officiating. The official, like the trial court, is the trier of fact, and the referee, like the appellate court, should generally defer to the initial assessment of the evidence. The on-site official does enjoy the benefit of being present in real time to see the play, and the many things going on around

it; something not fully realized on digital tape.[82] But where the review shows the manifest weight of the evidence is contrary to the initial call, the initial call should be overturned.

CONCLUSION

The NFL's new instant replay rule needs to be modified. Its current "indisputable visual evidence" standard is misunderstood and misapplied. If the NFL is happy with the current rate of overturned calls, it needs to enact a rule which legitimately reaches the current thirty percent frequency of reversal. The legal system's appellate standards provide thought-out, defined, well tested bench-marks. Of the appellate standards of review, the "manifest weight of the evidence" standard encompasses a better balance of deference and the ability to change decisions which is best suited for the NFL's replay system. This transposed standard would allow the NFL to correctly reach optimal respect for officials' ability for reversal, and should be instituted and implemented.

82. *See* Benjamin V. Madison III, *Seeing Can be Deceiving: Photographic Evidence in a Visual Age– How Much Weight Does it Deserve?*, 25 WM. & MARY L. REV. 705, 731-74 (1984). *See also* Karen Martin Campbell, Note, *Role Tape– Admissibility of Videotape Evidence in the Courtroom*, 26 U. MEM. L. REV. 1445, 1462-63 (1996).