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Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts

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JUDGES AGAINST JURIES—APPELLATE REVIEW OF FEDERAL CIVIL JURY VERDICTS

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During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment[1] right to a jury trial in civil cases. Prior to 1968 the Court regularly granted review in several cases each year to consider the sufficiency of the evidence to support a disputed jury verdict, and in the overwhelming majority of the more recent cases

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1. The seventh amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

did so to reinstate a civil jury verdict that had been overturned by an appellate court. For the last twenty years, however, the Supreme Court has systematically declined to grant review in any case asserting that such a seventh amendment violation had occurred.[2]

This Article seeks to assess the treatment of civil jury verdicts by the federal courts of appeals during the two decades in which the Supreme Court has refused to scrutinize the actions of the circuit courts. Part I summarizes the manner in which the Supreme Court, prior to 1968, aggressively enforced the seventh amendment. Part II, focusing on a one-year period between the fall of 1984 and the fall of 1985, describes the actions of the courts of appeals in resolving the 208 reported cases in which a party challenged the sufficiency of the evidence to support a jury verdict. That analysis demonstrates that appellate reversals of jury factfinding, once a relatively rare event, are now occurring in almost half of all such federal civil appeals. Part III describes the standards currently being utilized by federal appellate courts in passing on requests for judgments nonobstante veredicto (judgment n.o.v.) and explains how those standards diverge from pre-1968 Supreme Court precedents. Part IV discusses the criteria now relied on by the appellate courts in overturning jury verdicts as excessive and analyzes the manner in which those criteria differ from the approach that prevailed prior to 1968.

I. INTRODUCTION: SUPREME COURT ENFORCEMENT OF THE SEVENTH AMENDMENT PRIOR TO 1968

In the early years of the Republic, an era when judicial implementation of most constitutional rights was relatively rare, the courts attached singular importance to enforcing the seventh amendment. In 1819 Justice Johnson admonished that where a citizen's seventh amendment rights had been violated, "the claims of the citizen on the protection of this court are particularly strong."[3] Writing in 1830, Justice Story observed that the framers of the Bill of Rights had regarded as especially vital the inclusion of a guarantee of jury trials in civil cases:

> The trial by jury is justly dear to the American people. . . . One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the

2. *See, e.g.*, Cobb v. Nizami, 851 F.2d 730 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 1177 (1989).

3. Bank of Columbia v. Okely, 17 U.S. (4 Wheat) 235, 240 (1819).

> seventh amendment of the constitution proposed by congress. . . .[4]

Justice Story described as the "more important" portion of the amendment the second clause, which provides that "no fact tried by jury shall be otherwise examinable in any court of the United States than according to the rules of common law."[5]

When the seventh amendment was originally adopted there simply was no procedure which a party could utilize to bring before an appellate court any objection to the sufficiency of the evidence to support a civil jury verdict. In the early nineteenth century a losing party could rely on such an objection only as a ground for a new trial,[6] and the Supreme Court consistently held that a trial judge's action in granting or denying a new trial was a matter of absolute discretion and could not be reviewed on appeal.[7] Over the course of the nineteenth century, however, two new procedural devices, directed verdicts and judgments n.o.v., evolved in the trial courts for disposing of cases in which there was a fatal lack of evidence. The granting or denial of a directed verdict or judgment n.o.v., unlike the disposition of a motion for a new trial, was not regarded as within the absolute discretion of the trial judge[8]

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4. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

5. *Id.* at 447.

6. "The only modes known to the common law to re-examine . . . facts [tried by a jury] are the granting of a new trial by the court where the issue was tried . . . or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings." *Id.* at 448. A venire facias de novo was an order directing a new trial. BLACK'S LAW DICTIONARY 1727 (4th ed. 1951). *Parsons* held that, because the appellate courts were without power to examine the sufficiency of the evidence, it was not error for a trial court to refuse to direct that the testimony at a trial be transcribed. *Parsons*, 28 U.S. at 449.

7. Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 & n.3 (1933) (citing cases). *Cf.* United States v. Johnson, 327 U.S. 106, 111 (1946). In *Parsons*, Justice Story suggested it might well be unconstitutional for Congress to authorize an appellate court to grant a new trial based on a perceived insufficiency of the evidence. *Parsons*, 28 U.S. at 449.

8. The first Supreme Court decision to suggest the existence of review authority on the part of the appellate courts was Hepburn v. Dubois, 37 U.S. (12 Pet.) 345, 376 (1838). In 1840, however, the Court indicated that the appropriate procedure for testing the sufficiency of the evidence was a demurrer to the evidence, a procedure which precluded the moving party from offering any evidence of its own to the jury. Bank of Metropolis v. Guttschlick, 39 U.S. (14 Pet.) 19, 31 (1840). During the subsequent 30 years the Supreme Court repeatedly held that it lacked any authority to consider the sufficiency of the evidence considered by a jury and that only a trial court asked to consider a motion for a new trial could hear objections to the sufficiency of the evidence. Zeller's Lessee v. Eckert, 45 U.S. (4 How.) 228, 298 (1846); Prentice v. Zane's Ass'n, 49 U.S. (8 How.) 470, 486 (1850); Hyde v. Stone, 61 U.S. (20 How.) 170, 176 (1857); Barreda v. Stone, 62 U.S. (21 How.) 146, 167 (1858); Mills v. Smith, 75 U.S. (8 Wall.) 27, 32 (1869); Fowler v. Rathbone, 79 U.S. (12 Wall.) 102, 119 (1871). *Hepburn's* suggestion that the appellate courts could overturn a jury verdict for lack of evidence was revived by Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 447 (1871), and Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 661 (1874). As late as 1879, however, the Court continued to express its earlier view that the appellate courts had no authority to consider objections to the sufficiency of the evidence. New York Cent. R.R. v. Fraloff, 100 U.S. 24, 31 (1879); United States Express Co. v. Ware, 87 U.S. 543, 545 (1875).

and therefore became an issue which could be reviewed on appeal. Thus the emergence of directed verdicts and judgments n.o.v. inevitably brought requests that federal appellate courts evaluate the sufficiency of the evidence on which jury verdicts were based.[9]

The first such case to reach the Supreme Court appears to have been *Hepburn v. Peters* in 1838.[10] The defendants in that action had sought a directed verdict[11] and subsequently asked the Supreme Court to overturn the jury's verdict in favor of the plaintiff. The Court unanimously refused to disturb the jury's verdict, quoting at length Justice Story's account of the framing of the seventh amendment,[12] and denouncing the defendants' argument as a request "to transcend the limits prescribed to our action on questions of fact."[13] During the 130 years that followed, the Supreme Court decided over 150 other cases in which a party sought to attack the sufficiency of the evidence to support an adverse jury verdict.[14] A majority of those cases were heard on writs of certiorari,[15] the Court repeatedly exercising its discretionary jurisdiction to reverse attempts by appellate judges to overturn the factual determinations of juries.

In the years between 1938 and 1968 the Supreme Court was particularly active and vigilant in protecting the factfinding prerogatives of juries from incursions by appellate judges.[16] During these three decades

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9. In the decades following *Improvement Co.* and *Sioux City*, the Court used its review authority only to overturn district court decisions granting directed verdicts or judgments n.o.v. Jones v. East Tennessee R.R., 128 U.S. 443 (1888); Kane v. Northern Cent. Ry., 128 U.S. 91, 92 (1888); Gardner v. Michigan Cent. R.R., 150 U.S. 349, 361 (1893). *Cf.* Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 376-97 (1913) (reversing appellate court order granting judgment n.o.v.). It was not until 1926 that the Supreme Court itself overturned a jury verdict on the ground that the trial court should have directed a verdict. St. Louis-San Francisco Ry. v. Mills, 271 U.S. 344, 347 (1926).

10. 37 U.S. (12 Pet.) 345 (1838).

11. *Id.* at 350.

12. *Id.* at 376.

13. *Id.* at 375.

14. The 52 such cases decided since 1938 are described *infra* at text accompanying notes 17-24. An earlier 34 Federal Employers Liability Act (FELA) cases are cited in Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 548-58 (1957) (Frankfurter, J., dissenting). The author has identified 69 additional Supreme Court cases in which a party asked the Court to grant or uphold, because of a claimed failure of proof, a directed verdict or judgment n.o.v.

15. All of the post-1938 cases and all of the post-1918 FELA cases were heard on writs of certiorari.

16. There is one noteworthy period when the Supreme Court departed from this practice. Between 1925 and 1943 the Court repeatedly overturned jury verdicts; most of those verdicts involved either industrial accidents or veterans' benefits, two of the most politically controversial issues of the era between the world wars. Brady v. Southern Ry., 320 U.S. 476 (1943); Galloway v. United States, 319 U.S. 372 (1943); Bailey v. Central Vt. Ry., 319 U.S. 350 (1943); Pence v. United States, 316 U.S. 332 (1942); Lumbra v. United States, 290 U.S. 551 (1934); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Atchison, T. & S. Fe Ry. v. Toops, 281 U.S. 351 (1930); New York Cent. R.R. v. Ambrose, 280 U.S. 486 (1930); Chicago, M. & St. P. R.R. v. Coogan, 271 U.S. 472 (1926); St. Louis-San Francisco R.R. v. Mills, 271 U.S. 344 (1926); *see*

the Court granted certiorari in twenty-five cases in which a federal court of appeals, because of an asserted lack of evidence, had overturned a jury verdict. The Supreme Court voted to reinstate the jury verdict in twenty-four of these twenty-five cases, thus sustaining the jury's original determination in ninety-six percent of the cases.[17] A similar practice was followed with regard to state jury verdicts in actions filed under the Federal Employers Liability Act (FELA).[18] The right to a jury trial was regarded by the Supreme Court as an essential part of the remedy provided by FELA,[19] and the Court expressly applied to appellate review of state jury verdicts the same restrictions utilized in federal cases.[20] Between 1938 and 1968 the Court granted certiorari in twenty-seven FELA cases in which state appellate courts had overturned jury verdicts, and reinstated twenty-five of those verdicts.[21] During this period, when the Supreme Court agreed to hear a total of fifty-two cases in which an appellate court had reversed a jury verdict or approved a directed verdict, the Court granted certiorari in only two cases in which a petitioner sought to challenge a jury verdict that had been upheld by the lower courts.[22] Justice Douglas explained the Court's practice of regularly agreeing to hear these cases as being required by the "vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment and part and parcel of the remedy under [the

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Ferguson v. Moore-McCormack Lines Inc., 352 U.S. 521, 543-44 (1957) (Frankfurter, J., dissenting) (citing cases). The Roosevelt appointees dissented in the later cases, and in *Lavender* they assembled a new majority to return to the practice of sustaining jury verdicts.

17. A majority of these cases involved actions to enforce FELA. Lists of those FELA cases can be found in Harris v. Pennsylvania R.R., 361 U.S. 15, 20-25 (1959) (Douglas, J., concurring) and Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 549-58 (1957) (Frankfurter, J., dissenting). The Supreme Court has also granted certiorari to reinstate jury verdicts in cases arising under the Clayton Act (Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)), the Sherman Act (Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962)), the Jones Act (Salem v. United States Lines Co., 370 U.S. 31 (1962)), and in cases which were filed in or removed to federal court because of diversity of citizenship (Mercer v. Theriot, 377 U.S. 152 (1964)). A complete list of the 52 cases referred to above is on file with the Wisconsin Law Review.

18. 45 U.S.C. §§ 51-60 (1982).

19. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 508 (1957); Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943).

20. The Court's analyses of FELA verdicts made no distinctions between state and federal verdicts. *See, e.g.*, Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957) (state verdict); Webb v. Illinois Cent. R.R., 352 U.S. 512 (1957) (federal verdict); Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957). Justice Harlan wrote a single dissenting opinion in all three cases, as did Justice Frankfurter. *Herdman*, 352 U.S. at 559 (Harlan, J., dissenting), *id.* at 524 (Frankfurter, J., dissenting). Later in the 1957 term the Court summarily reinstated five state FELA verdicts and two federal FELA verdicts, in each case citing *Rogers*. *See, e.g.*, Shaw v. Atlantic C.L. R.R., 353 U.S. 920 (1957) (state verdict); Thomson v. Texas & Pac. Ry., 353 U.S. 926 (1957) (federal verdict).

21. *See supra* note 16.

22. New York, N.H. & H. R.R. v. Henagan, 364 U.S. 441 (1960); Great Northern Ry. v. Leonidas, 305 U.S. 1 (1938). It appears that the Court granted the petition in *Great Northern* primarily to decide whether the defense of assumption of the risk was available in a FELA case. *Great Northern*, 305 U.S. at 2-3.

FELA]."[23] In *Rogers v. Missouri Pacific Railroad Co.*, the Court insisted that "[s]pecial and important reasons for the grant of certiorari . . . are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."[24]

The Supreme Court's active role in enforcing the seventh amendment was at times criticized by a minority of the Court. In 1943 Justice Roberts dissented from the granting of certiorari to reinstate a FELA jury verdict, arguing that the Supreme Court "d[id] not sit to redress every apparent error"[25] in taking a case from a jury. Five years later in *Wilkerson v. McCarthy*, Justice Frankfurter agreed that the jury verdict there at issue should not have been overturned by the court below, but also argued that the Supreme Court ought not grant certiorari to address the fact-bound issues raised by such seventh amendment claims.[26] In 1957 Justice Frankfurter reiterated that objection in *Rogers v. Missouri Pacific Railroad Co.*[27] and thereafter dissented from the granting of certiorari in almost all[28] of the right to jury trial cases heard by the Supreme Court between 1957 and his retirement in 1962. Between 1962 and 1968, Justices Stewart and Harlan occasionally criticized the practice of hearing such cases,[29] but voiced no such objections in other instances.[30] In the fall of 1968 the practice of policing lower court intrusions on the authority of civil juries was sufficiently accepted and routine that when the Supreme Court granted certiorari in *International Terminal Operating Co. v. Nederl*, it summarily reversed a Second Cir-

23. Harris v. Pennsylvania R.R., 361 U.S. 15, 17 (1959) (concurring opinion). *See also* Moore v. Chesapeake & O. Ry., 340 U.S. 573, 574 (1951) (certiorari granted "to determine whether the province of the jury had been invaded by the action of the District Court" granting judgment n.o.v.); Wilkerson v. McCarthy, 336 U.S. 53, 71 (1949) (Douglas, J., concurring) (court's actions have been necessary to restore "[t]he historic role of the jury").

24. *Rogers*, 352 U.S. at 510. *See also* Wilkerson v. McCarthy, 336 U.S. 53, 69 (1949) (Douglas, J., concurring) (FELA "was not given a friendly reception in the courts. . . . [D]oubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer").

25. Bailey v. Central Vt. R.R., 319 U.S. 350, 354 (1943) (Roberts, J., dissenting). Justice Frankfurter joined in this dissenting opinion.

26. *Wilkerson*, 336 U.S. at 65-68 (Frankfurter, J., concurring).

27. 352 U.S. at 524-58 (Frankfurter, J., dissenting). *See also* Dick v. New York Life Ins. Co., 359 U.S. 437, 447-63 (1959) (Frankfurter, J., dissenting).

28. Justice Frankfurter dissented in a total of 21 such cases. *See, e.g.*, Davis v. Virginian Ry., 361 U.S. 354, 358 (1960) ("For the reasons set forth in his opinion in *Rogers v. Missouri Pacific R. Co.*, . . . Mr. Justice Frankfurter is of the view that the writ of certiorari was improvidently granted."); Shaw v. Atlantic Coast Line R.R., 353 U.S. 920 (1957) ("Mr. Justice Frankfurter is of the opinion that the writ should not be granted. See his dissent in *Rogers v. Missouri Pac. R. Co.* . . .").

29. Davis v. Baltimore & O. R.R., 379 U.S. 671, 672 (1965) (Harlan, J. and Stewart, J., concurring); Mercer v. Theriot, 377 U.S. 152, 156 (1964) (Harlan, J., dissenting); Dennis v. Denver & R.G.W. R.R., 375 U.S. 208, 212 (1963) (Harlan, J., dissenting); Harrison v. Missouri Pac. R.R., 372 U.S. 248, 250 (1963) (Harlan, J. and Stewart, J., concurring).

30. *See, e.g.*, International Terminal Operating Co. v. Nederl, 393 U.S. 74 (1968) (unanimous opinion); Shenker v. Baltimore & O. R.R., 374 U.S. 1, 11 (1963) (Harlan, J. and Stewart, J. joined opinion by Goldberg, J., dissenting on the merits).

cuit decision overturning such a jury verdict.[31] In its brief opinion the Court announced that "[u]nder the Seventh Amendment, th[e disputed factual] issue should have been left to the jury's determination."[32] No member of the Court dissented from this per curiam opinion, or even suggested that the case should have been set down for full briefing and argument.

For most of its history the Supreme Court was equally aggressive in protecting the prerogative of a jury to determine the extent of the injuries suffered by an aggrieved plaintiff. The Court repeatedly refused to authorize the federal appellate courts even to consider objections that particular jury verdicts were excessive. At common law the procedure for raising such an objection was a motion for a new trial, and the Supreme Court consistently insisted that the appellate courts could not review a trial judge's disposition of such motions. The Court expressly held in eleven cases decided between 1879 and 1933 that it lacked the authority even to consider objections to the size of a jury verdict.[33] Despite this series of decisions, the federal courts of appeals commencing around 1950 began to overturn jury verdicts which they regarded as excessive.[34] Responding to that trend, the Supreme Court in 1955

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31. *International Terminal*, 393 U.S. 74.

32. *Id.* at 75.

33. Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-82 (1933):

> The rule that this Court will not review the action of a federal trial court in . . . denying a motion for a new trial for error of fact . . . has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. . . . Sometimes the rule has been rested on . . . the Seventh Amendment.

See also Texas & Pac. Ry. v. Hill, 237 U.S. 208, 215 (1915); Southern Ry. v. Bennett, 233 U.S. 80, 87 (1914); Phoenix Ry. v. Landis, 231 U.S. 578, 587 (1913); Herencia v. Guzman, 219 U.S. 44, 45 (1910); City of Lincoln v. Power, 151 U.S. 436, 437-38 (1894); New York, L.E. & W. R.R. v. Winter, 143 U.S. 60, 75 (1892); Wilson v. Everett, 139 U.S. 616, 621 (1891); Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75 (1889); Railroad Co. v. Fraloff, 100 U.S. 24, 31 (1879).

In Dimick v. Schiedt, 293 U.S. 474 (1935), the Supreme Court concluded that the seventh amendment precluded the federal courts from utilizing the state practice of additur; *Dimick* held that while the lower courts could grant new trials on the ground that the damages awarded were inadequate, those courts could not permit the defendant to avoid that retrial by agreeing to an additional award of damages in an amount determined by the judge. The Supreme Court expressed doubts about the constitutionality of even remittitur and upheld that practice primarily because "the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time." *Id.* at 484-85. "[W]hile for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken similarly to increase the damages. . . ." *Id.* at 487. Prior to *Dimick* there appears to have been only a single instance in which a federal appellate court actually overturned a verdict on grounds of excessiveness. Cobb v. Lepisto, 6 F.2d 128 (9th Cir. 1925).

34. Prior to 1950 only two circuits had asserted the authority to grant a new trial, or a remittitur, on grounds of excessiveness. Cobb v. Lepisto, 6 F.2d 128 (9th Cir. 1925); Virginian Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948). The prevailing view was to the contrary. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2820 (1982). In 1950, in a case in which the defendant had not claimed the damages awarded were excessive, the Supreme Court

granted certiorari in *Neese v. Southern Railway Co.* to consider the constitutionality of a Fourth Circuit decision holding excessive the damages awarded in a FELA case and directing a new trial.[35] The Supreme Court did not decide, however, whether the court of appeals had the authority to review the trial court's denial of a new trial; instead, invoking its traditional practice of refusing to issue unnecessary decisions on constitutional questions, the Court in *Neese* held that the trial judge's action sustaining the jury verdict had sufficient "support in the record."[36] Ten years later in *Grunenthal v. Long Island Railroad*[37] the Supreme Court granted certiorari to consider the same constitutional issue, this time raised by a Second Circuit decision ordering a new trial unless the plaintiff would agree to remit approximately one third of the jury award. Again, however, the Court held that the trial court had not erred in sustaining the original jury verdict, and thus did not decide whether an appellate court could constitutionally overturn a jury verdict as excessive.[38]

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commented, "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case." Affolder v. New York, C. & St. L. R.R., 339 U.S. 96, 101 (1950). A number of circuits read *Affolder* to implicitly authorize appellate review of the size of jury verdicts, a reading that has been severely criticized. 9 C. WRIGHT & A. MILLER, *supra*, § 2820; DeParcq & Wright, *Damages Under the Federal Employers' Liability Act.*, 17 OHIO ST. L.J., 430, 471-72 (1956). By 1968 all 11 courts of appeals agreed that such appellate review was permissible. Grunenthal v. Long Island R.R., 393 U.S. 156, 157 & n.3 (1968).

35. Neese v. Southern Ry., 350 U.S. 77 (1955). The petitioner urged that the seventh amendment precluded the federal appellate courts from granting a new trial on grounds of excessiveness. Brief on Merits for Petitioner at 10, 11, 15, 23, No. 28. The parties disagreed about the meaning of *Affolder*. Brief on Merits for Petitioner at 15-16 (*Affolder* does not permit appellate review of the size of jury verdicts); Brief on Merits for Respondent at 31-32 (*Affolder* does permit appellate review of the size of jury verdicts).

36. *Neese*, 350 U.S. at 77. Two weeks after *Neese* the Supreme Court, by a vote of 5 to 4, reversed summarily and without opinion a Fourth Circuit decision that had overturned as excessive an award of damages by a district judge sitting without a jury. Snyder v. United States, 350 U.S. 906 (1955).

37. 393 U.S. 156 (1968). The first question presented by the petition in *Grunenthal* was, "[w]hether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness." Petition for a Writ of Certiorari at 2, No. 35. The parties expressly disagreed about the meaning of *Affolder*. Brief on Merits for Petitioner at 7; Brief on Merits for Respondent at 18. The respondent in *Grunenthal* acknowledged that there might well be a serious constitutional problem "if the courts of appeals applied the same test that is used by trial judges in ordering remittiturs. For trial judges can set aside jury awards on grounds of excessiveness when in their view . . . the verdict is excessive as a matter of fact." Brief on Merits for Respondent at 13. The respondent expressly acknowledged that, where a district court had upheld a verdict, the appellate courts "must give the benefit of every doubt to the judgment of the trial judge" and could hold a verdict excessive as a matter of law only if "there was no rational view of the evidence that could sustain it." *Id.* at 14.

38. *Grunenthal*, 393 U.S. at 160-62. The majority opinion noted that the Second Circuit standard, which it purported to apply, required appellate courts to defer to the judgment of the trial judge and permitted overturning the verdict as excessive only if the amount of the verdict was not "in any rational manner consistent with the evidence." *Id.* at 160. Justice Stewart, in a dissenting opinion, endorsed the same standard. *Id.* at 164-65. At the oral argument in *Grunenthal* several

The Supreme Court decision in *International Terminal Operating Co. v. Nederl,* reinstating the jury's finding of liability, was issued on October 21, 1968. The Court's decision reinstating the original jury verdict in *Grunenthal* was handed down on November 18, 1968. Neither decision intimated any reservations regarding the Court's century-old practice of closely scrutinizing the actions of appellate court judges who had overturned or reduced jury verdicts in civil cases. Nevertheless, for reasons which have never been explained, that practice came to an abrupt end in the fall of 1968. Not once since October of 1968 has the Supreme Court granted certiorari to consider whether a trial judge or appellate panel violated the seventh amendment by overturning a jury verdict or by directing a new trial or remittitur on the ground that a jury's verdict was excessive. The Court has never undertaken to resolve the constitutional question avoided in *Neese* and *Grunenthal,* or to explain the circumstances, if any, under which an appellate court could overturn an excessive jury verdict.

Although twenty years have passed since the Supreme Court abandoned its traditional role in enforcing the seventh amendment, commentators and lower courts alike have assumed that the Supreme Court's obviously deliberate inaction has had no impact on the practices of lower court judges. Professor Wright and his colleagues assume that requests for judgment n.o.v. will only "sparingly" be granted.[39] Professor Moore asserts that "only in the rare instance" would an appellate court overturn a trial court's decision denying a new trial on grounds of excessiveness.[40] The federal courts of appeals have repeatedly professed that they would not award judgment n.o.v., or direct a

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comments from the Court reflected a similar inclination to give weight to the views of the trial court. Transcript of Oral Argument at 24, No. 35 ("Presumably trial judges see a lot of these cases and have some sense of what sort of a going rate is for pain and suffering. . . ."), 28 ("I gather only one of this [appellate] panel had any trial experience.").

The majority opinion in *Grunenthal* noted with apparent concern the indefiniteness of the standard utilized by the appellate courts in reviewing the amount of jury verdicts. *Grunenthal,* 393 U.S. at 159 & n.4 ("the standard has been variously phrased: 'Common phrases are such as: "grossly excessive," "inordinate," "shocking to the judicial conscience," "outrageously excessive," "so large as to shock the conscience of the court," "monstrous," and many others.' "). Petitioner argued that there was no objective and universally accepted appellate standard for analyzing claims of excessiveness. Brief for Petitioner at 18. Respondent apparently advocated a "no evidence" standard similar to that applied in deeiding on a request for judgment n.o.v., and objected to petitioner's suggestion that a verdict could be overturned only if "monstrous." Brief for Respondent at 13-15 & n.7. At oral argument an unidentified member of the Court expressed doubts as to the feasibility of appellate review of jury verdicts for pain and suffering. Transcript of Oral Argument at 21-22 ("I do not know . . . how you would go about saying that this man's suffering is figured at $5.00 a second or something like that, and would have been entitled to so much and no more. I do not know how you do it.").

39. 9 C. WRIGHT & A. MILLER, *supra* note 34, at § 2524.

40. 6A MOORE'S FEDERAL PRACTICE 59-168 (1986).

remittitur, except in a very small number of extreme cases.[41] These professions of judicial self-restraint, however, are belied by actual practice.

II. The Patterns of Recent Appellate Review

A. Reversal Rates

The controlling Supreme Court decisions, and the early circuit court decisions authorizing appellate review of jury factfinding, expressly contemplated that the appellate courts would overturn such jury verdicts only in rare and extreme cases. In order to assess what has actually occurred in the courts of appeals as a result of the Supreme Court's recent refusal to scrutinize appellate review of jury factfinding, a review was conducted of all published federal appellate decisions for a one-year period from October 1984 through October 1985.[42] The substantial number of opinions studied provide a reasonably representative picture of the manner in which the appellate courts are resolving appeals in which a party attacks the sufficiency of the evidence to support a jury verdict.[43] For the reasons explained below, the rate at which appellate courts are today reversing such verdicts probably exceeds the reversal rate for 1984-1985.[44]

During the year in question there were a total of 208 published opinions in which a federal appellate court resolved one or more challenges to the sufficiency of the evidence supporting a jury verdict.[45] In a substantial number of instances there were several distinct attacks on the jury verdict, most frequently arguments both that the liability decision was unsupported by the evidence and that the amount of the verdict was unreasonably excessive.[46] As a result, the 208 cases actually

41. *See, e.g.*, Dabney v. Montgomery Ward, 761 F.2d 494, 501 (8th Cir. 1985) (appellate courts to overturn jury verdicts for excessiveness only in "rare situations"); Haley v. Pan Am. World Airways, 746 F.2d 311 (5th Cir. 1984) (appellate courts to overturn jury verdicts for excessiveness only in "rare" cases); Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 518 (5th Cir. 1985) ("Cases that justify disregarding the jury's determinations seldom arrive in this Court.").

42. The summary encompasses all opinions in volumes 743 through 774 of the *Federal Reporter Second.* Volume 774 was the most recent reporter in print at the time when research for this article began.

43. During 1985, among appeals decided after either briefing or oral argument, written opinions were issued in 89% of all the cases. Director of the Administrative Office of the United States Courts Annual Reports at 124 (1985).

44. Since the reversal rate is higher for appellate panels which include a judge appointed by President Reagan, the additional Reagan appointments since October 1985 have doubtless increased the overall reversal rate.

45. A list of these cases is on file at the Wisconsin Law Review.

46. *E.g.*, Arceneaux v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498 (11th Cir. 1985). There are also a number of instances in which both parties appealed from the jury's verdict, each arguing that some aspect of that opinion unfavorable to it was not supported by the evidence. *E.g.*, Abeshouse v. Ultragraphics, Inc., 754 F.2d 467 (2d Cir. 1985) (plaintiff appealed

involved 254 separate challenges to the substance of the original verdicts. The 208 appeals occurred in a wide variety of types of cases. One third of these appeals arose out of commercial litigation, particularly securities and antitrust cases.[47] Another third involved personal injury claims, primarily negligence and product liability actions.[48] One fifth of the appeals challenged jury verdicts in cases in which the plaintiffs had alleged that their constitutional rights had been violated.[49] Most of the remaining cases involved discrimination claims, primarily claims under the Age Discrimination in Employment Act.[50] Twelve cases, including four libel actions, did not fit into these four general categories.

Among the 208 cases decided in this period, the appellate courts held in 102 cases that there was insufficient evidence to support the jury's verdict. These reversals included cases in which the appellate courts sustained only part of an appellant's challenge to a verdict, holding, for example, that there was sufficient evidence to uphold the finding of liability, but insufficient evidence to sustain the amount of the verdict. The overall reversal rate is 49.0%,[51] a level impossible to reconcile with either the seventh amendment or the controlling Supreme Court decisions. It is, of course, likely that appellants' attorneys are somewhat selective in choosing the cases in which to challenge the evidentiary basis of jury verdicts, but this extraordinary reversal rate cannot be explained as the result of brilliant case selection by attorneys for appellants. As is noted below, the reversal rate is far higher for some types of cases than for others, and appeals by defendants succeed more than

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jury verdict in favor of two of the named defendants; other defendants appealed size of jury verdict against them).

47. *E.g.*, Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489 (2d Cir. 1985) (breach of contract); Aldrich v. Thomson McKinnon Securities, Inc., 756 F.2d 243 (2d Cir. 1985) (securities); Bonjorno v. Kaiser Aluminum & Chemical Corp., 752 F.2d 802 (3d Cir. 1984); Conan Properties, Inc. v. Conans Pizza, Inc., 752 F.2d 145 (5th Cir. 1985) (trademark infringement).

48. *E.g.*, *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985) (air crash); Armstrong v. Kansas City S. Ry., 752 F.2d 1110 (5th Cir. 1985) (FELA); Bright v. Firestone Tire & Rubber Co., 756 F.2d 19 (6th Cir. 1984) (defective tire); Cole v. Bertsch Vending Co., 766 F.2d 327 (7th Cir. 1985) (automobile accident); Dabney v. Montgomery Ward, 761 F.2d 494 (8th Cir. 1985) (defective furnace); Deakle v. John Graham & Sons, 756 F.2d 821 (11th Cir. 1985) (Jones Act).

49. *E.g.*, Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (police brutality); Bodzin v. City of Dallas, 768 F.2d 722 (5th Cir. 1985) (arrest without probable cause); Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985) (due process); Davis v. West Community Hosp., 755 F.2d 455 (5th Cir. 1985) (free speech, due process).

50. *E.g.*, Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984) (race); Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985) (age); Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340 (7th Cir. 1985) (age and race). Cases involving claims of unconstitutional discrimination are included among the discrimination cases.

51. An analysis of all Fourth Circuit cases from 1985 to the end of 1988 found that that circuit had reversed 35 of the 74 civil jury verdicts in which an appellant challenged the sufficiency of the evidence to support the verdict, a reversal rate of 47%. Petition for Writ of Certiorari, 12-19, Cobb v. Nizami, 851 F.2d 730 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1177 (1989).

twice as often as appeals by plaintiffs. It is simply not to be believed that defense attorneys are twice as good as plaintiffs' attorneys in deciding which verdicts to appeal, or that defense counsel in constitutional lawsuits are consistently more skilled in case selection than are defense counsel in commercial cases. Nor is it possible that the substantial differences in reversal rates among the circuits could be due to regional variations in the abilities of attorneys to ascertain whether a jury verdict was supported by the evidence. The most conclusive evidence that case selection is not the cause of this overall reversal rate is that the likelihood that a jury verdict will be overturned on appeal depends to a substantial degree on the background of the judges who compose the particular appellate panel that decides each case.

An appellant may challenge the sufficiency of the evidence supporting a jury verdict on any one of three grounds. First, an appellant can assert that he or she is entitled to a new trial on the merits of the action.[52] Second, an appellant can argue that he or she was entitled to judgment n.o.v. on the merits of the claim. Third, a defendant can urge that the size of the verdict is excessive, and ask the appellate court to order a new trial unless the plaintiff agrees to an appropriate remittitur. The frequency with which such challenges succeeded on appeal varied substantially. When appellants sought a new trial on the merits, the courts of appeals set aside the jury verdict and ordered such a trial in only 18.5% of all appeals.[53] When an appellant asked the appellate court to grant the more drastic remedy of entering a judgment n.o.v., however, the rate of success was far higher—appellate courts reversed the jury verdict in over thirty-eight percent of such appeals.[54] When an appellant challenged the amount of a jury's verdict, the appellate courts in fifty percent of all appeals overturned that verdict and, in most instances, ordered a remittitur.[55]

The rate at which the appellate courts overturn jury verdicts varies with the subject matter of the litigation. Much criticism of the jury system has focused on the alleged difficulty of jurors in evaluating evidence in complex commercial cases, but the appellate reversal rate in commercial cases is in actual practice lower than in other types of cases:

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52. A small portion of the 208 cases involved appeals from a district court decision granting a new trial or judgment n.o.v. For the purposes of simplicity the text refers to the far more common situation in which the district court upheld the jury's verdict.

53. The appellate courts ordered new trials in only five of 27 such cases; in four of these five cases the appellate courts were merely upholding a district court order for a new trial. Among the 23 appeals from district court orders denying new trials, there is only a single case in which an appellate court ordered a new trial.

54. The appellate courts directed entry of judgment n.o.v. in 67 of 175 such cases.

55. The courts of appeals overturned jury verdicts in 34 of the 68 cases in which those verdicts were challenged. In three instances the appellate courts directed the district court to determine the appropriate amount of the remittitur. *See infra* note 444 and accompanying text.

Appeals Where Verdict Was Reversed or Reduced by Subject Matter of Appeal

Subject Matter	Reversal-Reduction
Commercial	41.0% (28 of 70)
Personal Injury	41.2% (28 of 68)
Constitutional	56.1% (23 of 41)
Discrimination	58.8% (10 of 17)

There is, however, almost no difference in the frequency with which jury verdicts are overturned as excessive:

Verdict Reduction Rate by Subject Matter of Appeal

Subject Matter	Reduction Rate
Commercial	50.0% (12 of 24)
Personal Injury	43.5% (10 of 23)
Constitutional	46.7% (7 of 15)
Discrimination	50.0% (1 of 2)

When challenges to jury verdicts on the merits of the case are analyzed separately, on the other hand, the disparities are more pronounced:

Rate of Reversal on Merits by Subject Matter of Appeal

Subject Matter	Reversal Rate
Commercial	27.4% (17 of 62)
Personal Injury	30.6% (19 of 62)
Constitutional	44.1% (15 of 34)
Discrimination	52.9% (9 of 17)

The particularly high rate of reversal in discrimination cases is all the more extraordinary because these cases, as a group, turn on factual issues far less complex than the other categories of cases. Most of the seventeen discrimination cases were individual actions under the Age Discrimination in Employment Act in which the plaintiff sought to prove that he or she had been fired or demoted because of his or her age. The jury's determination of liability in each case rested on a finding that the relevant officials of the defendant employer had been motivated by an impermissible desire to discriminate on the basis of age, rather than by some legitimate purpose. Members of civil juries, drawing on practical experiences far more diverse than those of federal judges, are particularly well suited to determine the motives of such parties. As a general

matter the witnesses heard by the juries in these cases included the very supervisors whose motives were in dispute. Thus the resolution of these cases turned to a substantial degree on whether the juries found credible the testimony of the officials who insisted they had no intent to discriminate on the basis of age. Given the nature of the factual issues and evidence involved, one would expect that reversals of jury verdicts in discrimination cases would be particularly rare.

The frequency with which the appellate courts overturn jury verdicts is also directly related to whether the jury had accepted the factual contentions of the plaintiff or those of the defendant. In the 179 instances in which the jury returned a verdict in favor of the plaintiff, the courts of appeals reversed for lack of evidence ninety-four times, or 52.5% of the time. But among the thirty-five cases in which a plaintiff appealed a verdict for the defendant, the appellate courts overturned the jury's verdict in only eight of the cases, a twenty-three percent reversal rate. This substantial difference in reversal rates, however, is not present in all categories of cases:

Combined Reversal-Reduction Rate
by Prevailing Party and Subject Matter

Reversal-Reduction Rate

Subject Matter	Verdict for Plaintiff	Verdict for Defendant
Commercial	40.0%	38.5%
Personal Injury	46.6%	7.7%
Constitutional	58.8%	22.2%
Discrimination	58.8%	—

Thus in commercial litigation the appellate courts show no inclination to favor either side. But where a corporate or government defendant is sued by an injured individual, the courts of appeals generally uphold verdicts for the defendants, but reverse verdicts in favor of the plaintiffs.

The rate at which jury verdicts are overturned for excessiveness does not vary with the subject matter of the appeal. The frequency with which remittiturs were ordered, however, did vary with the size of the original jury verdict. In the thirty-six appeals in which a defendant challenged a verdict of under $500,000, the appellate courts held the verdict excessive in eighteen cases, or fifty percent. The reversal rate was approximately the same for verdicts under $100,000—the appellate courts ordered remittiturs in seven of those fifteen cases. Among the twenty-five challenges to verdicts of more than $500,000, however, the verdicts were deemed excessive by the circuit courts in eighteen instances, or

seventy-two percent of the time.[56] There was no significant difference in the remittitur rates within this latter group between verdicts under $1 million and verdicts over $1 million.

The rate at which jury verdicts are overturned on appeal also varies substantially from circuit to circuit. Although in some circuits the reversal rate lacks statistical significance because of the small number of decisions, the overall variation in reversal rates seems too great to be the result of chance:

Reversal-Reduction Rate by Circuit

Circuit	Reversal-Reduction Rate
Ninth	11.1% (1 of 9)
First	22.2% (2 of 9)
Sixth	26.3% (5 of 19)
Eleventh	37.5% (6 of 16)
Tenth	45.5% (5 of 11)
Fifth	45.5% (17 of 37)
Third	50.0% (6 of 12)
Eighth	53.1% (17 of 32)
Seventh	56.7% (17 of 30)
Fourth	63.6% (7 of 11)
District of Columbia	66.7% (4 of 6)
Second	70.0% (7 of 10)
Federal	100.0% (4 of 4)

This difference in reversal rates cannot be explained by differences in the subject matter of the appeals. Discrimination and constitutional cases were three of the nine First Circuit appeals,[57] and two of the ten Second Circuit appeals,[58] but the First Circuit affirmed the finding of liability in all three of its cases, while the Second Circuit reversed the liability finding in both of its cases. As is noted below, a number of differences in the legal standards being applied by the various circuits in determining whether the evidence in a particular case is sufficient to support a jury verdict might explain these varying rates.

In some instances, but not others, the willingness of an appellate court to overturn a jury verdict turned on whether the trial judge had found insufficiencies in the evidence. Among the twenty-seven cases involving a challenge to a trial judge's decision to grant or deny a new

56. There are a number of appeals in which the appellate court upheld the jury verdict without disclosing the size of the challenged verdict.

57. Cazzola v. Codman & Shurtleff, 751 F.2d 53 (1st Cir. 1984); Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985); Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985).

58. Martin v. Citibank, N.A., 762 F.2d 212 (2d Cir. 1985); Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985).

trial on the issue of liability, the appellate courts upheld the trial court's decision in eighty-five percent of the appeals. But where an appellant challenged a trial court's decision to grant or deny a judgment notwithstanding the verdict,[59] or denying a remittitur,[60] the circuit courts overturned the trial judge's decision fifty percent of the time. And where a defendant sought a new trial on the amount of damages, subject to agreement by the plaintiff of an appropriate remittitur, the circuit courts in half of the appeals held that the trial judge had erred in denying a new trial. Thus although the views of the trial court clearly carry considerable weight with regard to the propriety of granting or denying a new trial on liability, the appellate courts evidently attach no significance to the views of the trial judge as to whether a new trial was warranted regarding the amount of damages.

The likelihood that a jury verdict would be overturned was substantially higher if one or more members of the appellate panel had been selected by the Reagan Administration. Panels with no Reagan judges reversed 40.9% of all appeals (thirty-six of eighty-eight), but panels with one or two Reagan judges reversed 55.0% of all the cases they heard (sixty-six of 120).[61] Panels with Reagan judges were more likely to overturn jury verdicts regardless of which party had prevailed and regardless of the subject matter of the appeal.

Reversal-Reduction Rate by Reagan Judges on Panel[62]

Subject of Appeal	No Reagan Judges	1 or 2 Reagan Judges
Verdict on liability for plaintiff	28.8%	50.6%
Verdict on liability for defendant	12.5%	30.4%
Challenge to size of verdict	33.7%	66.7%

There was, however, no consistent difference between panels with a single Reagan judge and panels with two Reagan judges.

There was a similar difference in the dispositions of appeals depending on whether or not the author of the appellate opinion was a Reagan appointee. Opinions written by non-Reagan judges reversed jury verdicts in forty-four percent of all appeals, compared to a reversal rate of 77.3% in opinions written by Reagan judges. The disparity was

59. Judgment n.o.v. was ordered in 69 of the 140 cases in which the district judge had sustained the disputed jury verdict.

60. In all of the 68 cases in which an appellant challenged the size of the jury verdict, the district judge had upheld the disputed award.

61. There were no panels with three Reagan appointees.

62. This analysis does not include eight cases in which the Reagan judge disagreed with the decision of the panel majority.

even greater when an appellant challenged a jury verdict in favor of the plaintiff.

Reversal-Reduction Rate by Anthor of Opinion

Subject of Appeal	Non-Reagan Judges	Reagan Judge
Verdict on liability for plaintiff	33.3%	61.1%
Verdict on liability for defendant	20.0%	33.3%
Verdict challenged as excessive	56.0%	80.0%

Separate dissenting opinions by Reagan judges were also somewhat more likely to favor the defendant.[63]

B. The Demise of the Seventh Amendment

A student who sought to understand the federal judicial system by studying what the circuit courts actually do would probably conclude that federal appellate judges are under no obligation to accept, or even give significant weight to, jury verdicts in civil cases. The overall reversal rate is sufficiently close to fifty percent that an external observer might assume that appellate courts simply decide factual issues de novo. Looking at the areas of greatest judicial activity in these cases, one would have to conclude that the two primary purposes of appellate review of civil jury verdicts were to protect the government from the cross section of the citizenry found on juries, and to protect defendants generally from jury biases in favor of plaintiffs who are members of discrete and insular minorities.[64]

An observer unfamiliar with the United States Constitution would be unlikely to learn by perusing *Federal Reporter Second* that the seventh amendment even existed. On the face of that amendment, every request that an appellate court "re-examine" an issue of "fact tried by a jury" raises a serious constitutional issue. Among the 208 appellate decisions passing on such requests, however, only one majority opinion and one dissent even refer to the existence of the seventh amendment.[65] Those opinions themselves testify to the moribund state of the amendment. In resolving the cross appeals in *Abeshouse v. Ultragraphics, Inc.*,

63. Of the 10 dissents written by Reagan judges, seven favored the defendants. Of the 10 dissents written by non-Reagan judges, four favored the defendants.

64. One appellate opinion expressly holds that motions for judgment n.o.v. are to be granted more readily if made by defendants. Martin v. Joseph Harris Co., Inc., 767 F.2d 296, 302 (6th Cir. 1985).

65. One further case refers to the institution of "trial by jury, enshrined at the Founding in the Bill of Rights." Stacey v. Allied Stores Corp., 768 F.2d 402, 406 (D.C. Cir. 1985).

for example, the Second Circuit refused to overturn a verdict in favor of several defendants, explaining that "to do so would undermine the jury's fact-finding role and trample on the defendant's seventh amendment right to a jury trial." The same opinion, however, contains no reference to the seventh amendment in another section reversing most of the jury's verdict against a remaining defendant; in that section the appellate court explained simply that it believed that "it is clear the evidence would not support" the jury verdict.[66] Judge Tate, dissenting in *In re Air Crash Disaster Near New Orleans,* asserted that the decision of the majority reducing the size of the verdict in that case violated the seventh amendment, but he chose not to rely on or refer to the amendment in another portion of his dissent objecting to the decision of the majority to overturn one of the jury's liability findings.[67] The remaining 206 opinions are entirely devoid of any citation to the seventh amendment; not one of the 102 decisions overturning jury factual determinations even attempts to reconcile that action with the terms of the amendment itself. The average cop on the beat, largely untutored in the law, evidently pays greater heed, or at least lip service, to the constitutional constraints under which he or she acts than do federal appellate judges. Respect for civil jury verdicts, where it exists, seems little more than a local rule of practice; thus one Seventh Circuit decision upholding such a verdict explained that that result was supported by the "great deference . . . accorded to the jury's judgment *in this circuit.*"[68]

The absence of virtually any discussion of the seventh amendment might be understandable if the appellate courts were relying instead on relevant Supreme Court decisions interpreting the amendment. After all, many appellate decisions applying *Miranda v. Arizona*[69] do not discuss by name the fifth or sixth amendments. But despite the existence of several hundred Supreme Court opinions which discuss the constitutional restrictions on appellate review of jury liability findings, only four of the 208 circuit court cases surveyed contain any reference to that body of decisions.[70] The systematic disregard of the entire corpus of Supreme Court seventh amendment jurisprudence is particularly signif-

66. Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 472-73 (2d Cir. 1985).

67. *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151, 1164 (5th Cir. 1985) (dissenting opinion).

68. U.C. Castings v. Knight, 754 F.2d 1363, 1369 (7th Cir. 1985) (quoting Spesco v. General Elec. Co., 719 F.2d 233 (7th Cir. 1983)) (emphasis added).

69. 384 U.S. 436 (1966).

70. Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1213 (7th Cir. 1985) (citing Gunning v. Cooley, 281 U.S. 90 (1930)); Armstrong v. Kansas City Southern Ry. Co., 752 F.2d 1110, 1113 (5th Cir. 1985) (citing Lavender v. Kurn, 327 U.S. 645 (1946) and other decisions); J. Yanan & Associates, Inc. v. Integrity Ins. Co., 771 F.2d 1025, 1034 (7th Cir. 1985) (distinguishing Basham v. Pennsylvania R.R. Co., 372 U.S. 699 (1963), on the ground that it was "in apparent conflict" with Indiana court decisions); Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89, 98 (5th Cir. 1985) (citing Lavender v. Kurn, 327 U.S. 645 (1946)).

icant because the Court's decisions spell out in considerable detail the constitutional restrictions applicable to the appellate courts. In the absence of any discussion of the relevant Supreme Court decisions, it would not be surprising if the actions of appellate panels deviated substantially from the standards mandated by the Court; that, as we shall see, is precisely what has occurred.

The particularly high rate of reversal in constitutional cases strikes at the very heart of the purpose of the seventh amendment. As Chief Justice Rehnquist has noted, the amendment was adopted primarily because the framers feared that judges often could not be relied on to protect the public against abuse and oppression by government officials:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, . . . and thus keep the administration of law in accord with the wishes of the community. . . . Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.[71]

Appellate reversals of jury verdicts are occurring in precisely the kinds of cases in which differences might well exist between the willingness of judges and of juries to protect vigilantly constitutional rights. Appellate panels have repeatedly overturned jury verdicts because the appellate judges were less willing than the jurors who had heard those cases to believe that officials would retaliate against private citizens for criticizing the government,[72] or that police or prison officials would use or tolerate violence,[73] and were less willing than juries to impose liability

71. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

72. Davis v. West Community Hosp., 755 F.2d 455 (5th Cir. 1985); Jurgenson v. Fairfax County, Va., 745 F.2d 868 (4th Cir. 1984); McSureley v. McClellan, 753 F.2d 88, 102-05 (D.C. Cir. 1985); *see also* Neubauer v. City of McAllen, Texas, 766 F.2d 1567 (5th Cir. 1985) (dismissal for union activity); Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) (mayor directed arrest of city commissioners for holding a disputed meeting; verdict reduced); Knapp v. Whitaker, 757 F.2d 827, 846-47 (7th Cir. 1985) (verdict reduced).

73. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Thomas v. Booker, 762 F.2d 654 (8th Cir. 1985). *See also* Madison County Jail Inmates v. Thompson, 773 F.2d 834 (7th Cir. 1985) (damages for cruel and unusual conditions of confinement reduced to $1.00); LeSavage v. White, 755 F.2d 814, 818-20 (11th Cir. 1985) (false arrest); Taliferro v. Augle, 757 F.2d 157 (7th Cir. 1985) (false arrest, beating, destruction of property; verdict reduced); Estate of Davis v. Johnson, 745 F.2d 1066 (7th Cir. 1984) (victim killed in jail by fellow inmate; verdict reduced); Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985) (strip search; verdict reduced).

on cities or high ranking officials rather than just on low level employees.[74] It is, of course, easy to understand how such differences could exist. Federal judges personally have less reason than virtually anyone else in American society to worry about retaliatory firings, police misconduct, or prison conditions, since they cannot be fired and are unlikely ever to be arrested. Holding one of the most exalted government positions in the United States, and preoccupied with theoretical abstractions, such as federalism, comity, and separation of powers, of little concern to the public, federal judges may naturally be more sympathetic to the "plight" of government defendants than are the jurors whose lives are affected by the misconduct of such defendants. But these are precisely the types of differences which led the framers of the Bill of Rights to provide that juries, not judges, should resolve disputed issues of fact in civil cases.

The overall level of appellate reversals has been substantially increased by the addition to the federal bench of circuit judges nominated by the Reagan Administration. This result is not necessarily what one would have expected. The Reagan Justice Department professed that its legal views, and judicial selections, were concerned with judicial restraint and a return to the original intent of the framers of the Constitution.[75] But appellate judges particularly sensitive to such matters would have drastically reduced the frequency with which jury verdicts are overturned, whereas precisely the opposite has occurred. That development may well reflect the adherence of the Reagan Administration and its judicial nominees to social and political views far to the right of the common beliefs of the American public; some of these judges have evidently found it impossible to stand idly by while juries vigorously enforce civil and constitutional rights long criticized by conservatives. The overall record of Reagan appellate judges, however, cannot be explained simply as an attempt to impose such conservative views on more centrist juries, for panels with Reagan nominees are also more likely to overturn verdicts in favor of defendants. Reagan judges cannot, of course, be simultaneously both more pro-plaintiff and more pro-defendant than prior appointees. Rather, the Reagan nominees as a group tend to act as if they had a commission to operate as super-jurors, deciding all cases de novo; the particularly high reversal rates in certain types of cases undoubtedly reflect the differences between jurors

74. Bell v. City of Milwaukee, 746 F.2d 1205, 1266-68 (7th Cir. 1984) (reversing verdict against police chief); Preston v. Smith, 750 F.2d 530, 531 (6th Cir. 1984) (reversing punitive damages against director of department of corrections); Thomas v. Booker, 762 F.2d 654, 659-60 (8th Cir. 1985) (reversing verdict against jail supervisors); Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) (reversing verdict against city).

75. *See* H. SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 5 (1988).

selected at random from a cross section of the community and judge-jurors carefully screened for ideological purity by the Reagan Justice Department.

But the impact of the Reagan appointees has merely aggravated a pre-existing situation. Even among appellate panels with no Reagan judges, jury factual determinations are being overturned at a rate which would have astounded the framers of the seventh amendment. The magnitude of this growing problem has often been obscured by the apparent reasonableness of individual decisions. That plausibility stems at least in part from the fact that the only available description of the evidence in a given case is that provided by the very panel which has resolved to overturn the jury's verdict; the Supreme Court has repeatedly noted that such opinions at times "overlook"[76] critical evidence. The omission of a balanced description of the evidence is apparent in the handful of cases in which a panel member dissented from an opinion overturning a jury verdict. In *Laney v. Coleman Co., Inc.*,[77] for example, the majority opinion reversed an award of punitive damages because it found "no evidence, either direct or circumstantial, that Coleman actually knew of a defect" in the design of the fuel can at issue in that case;[78] Judge Haney, in a dissenting opinion, described evidence demonstrating that the danger of the design involved had been common knowledge for one hundred years and that the defendant itself had for decades known how to design cans to prevent precisely the sort of explosion that had injured the plaintiff.[79] *Laney* makes clear that the descriptions in other appellate opinions of the evidence in the record must be read with considerable skepticism.

Review of a year's worth of these appellate opinions reveals a problem which transcends the statistics described earlier. One could readily mistake many of these decisions for the findings of fact and conclusions of law written by a district judge pursuant to Federal Rule of

76. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 701 (1967); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700 (1962); *see infra* note 376. Blackstone warned: "[I]n settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in . . . by . . . artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." 3 W. BLACKSTONE, COMMENTARIES 380 (1803).

77. 758 F.2d 1299 (8th Cir. 1985).

78. *Id.* at 1305.

79. *Id.* at 1307. In Yopp v. Siegel Trading Co., 770 F.2d 1461 (9th Cir. 1985) (case withdrawn from publication), the court of appeals overturned a jury finding that the defendant broker had "churned" the plaintiffs' securities account, emphasizing that the plaintiff had demonstrated his independence by rejecting some of the broker's recommendations. *Id.* at 1466. Judge Fletcher, in a dissenting opinion, noted there was evidence that the plaintiff had rejected those suggestions "because he had no ready cash to consummate the transactions." *Id.* at 1468.

Civil Procedure 52.[80] Often the fact that the case was even heard by a jury is mentioned only in the introductory paragraph and is never again referred to in the discussion of the merits of the appeal. The opinions read like the earnest efforts of judges attempting to decide what the facts really are, not like limited appellate review of a fact finding process consigned to the jury. This tendency has become so routine that appellate opinions today frequently include express factual findings by the circuit court. In *Bristow v. Daily Press, Inc.*,[81] for example, the jury concluded that the defendant employer had constructively discharged the plaintiff employee by requiring him to work under intolerable conditions. In reversing the verdict, the Fourth Circuit explained:

> It is obvious that Bristow's resignation arose from a particular financial dispute with his supervisors, and that at no time did anyone impose intolerable working conditions with the intent to compel him to retire. *We* cannot . . . conclude that he resigned due to any thing other than universal workaday frustrations.[82]

In *Craft v. Metromedia, Inc.*[83] the jury found that the defendants had made fraudulently inaccurate statements to the plaintiff; the Eighth Circuit concluded, after reviewing the evidence, "*we* are not satisfied that it demonstrates that . . . [the] statements were false."[84] Although not all appellate decisions are this blatant, many of these opinions are cast in terms of what "happened," rather than in terms of a summary of testimony and documentary evidence.[85]

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80. Rule 52 requires a trial judge to "find the facts specially" in cases tried without a jury. FED. R. CIV. P. 52(a).

81. 770 F.2d 1251 (4th Cir. 1985).

82. *Id.* at 1256 (emphasis added).

83. 766 F.2d 1205 (8th Cir. 1985).

84. *Id.* at 1219 (emphasis added); *see also id.* at 1220 ("*we* believe that in her audition interviews with KMBC Craft was concerned essentially with her hair and makeup and not with clothing") (emphasis added); *id.* at 1220 n.17 ("*we* do not believe mere suggestions constitute a 'makeover' ") (emphasis added).

85. Conan Properties Inc. v. Conans Pizza, Inc., 752 F.2d 145, 151 (5th Cir. 1985) ("*we* hold that CPI has not carried its burden of proving that Conans subjectively and knowingly intended to use its mark for the purpose of deriving benefit from CPI's good will") (emphasis added); Estate of Davis v. Johnson, 745 F.2d 1066, 1071 (7th Cir. 1984) ("*we* find it difficult to see how appellant knew that Davis was subject to the 'strong likelihood' of violence. . . .") (emphasis added); Gonzalez v. Volvo of America Corp., 752 F.2d 295, 300 (7th Cir. 1985) ("In *our* opinion . . . the station wagon which defendant furnished to plaintiffs was not dangerous beyond the expectations of ordinary consumers.") (emphasis added); Gumz v. Morrissette, 772 F.2d 1395, 1400 (7th Cir. 1985) (verdict overturned because the excessive force utilized was not "so egregious or intolerable as to shock the conscience of the *court*") (emphasis added); Holley v. Sanyo Mfg. Inc., 771 F.2d 1161, 1168 (8th Cir. 1985) ("*We* believe that Holley's evidence at trial was insufficient to create a prima facie ease.") (emphasis added); Malcak v. Westchester Park Dist., 754 F.2d 239, 244 (7th Cir. 1985) ("*We* hold that the Manual provision was a contract for at will employment. . . . *We* hold that the automatic inclusion of the plaintiff's salary in the annual budget did not create a

A plurality of appellate panels profess an unwillingness to overturn a jury verdict on evidentiary grounds unless the jury at issue arrived at a result which no "reasonable" or "rational"[86] jury could have reached. If the language of these opinions is to be taken seriously, a large number of sitting federal appellate judges believe that a substantial portion of the American public simply is not competent to resolve the often mundane factual issues presented to civil juries. A federal judge who thinks he has learned from experience that juries frequently return "unreasonable" or "irrational" verdicts might well conclude that he should adopt a general practice of deciding de novo any factual issue that had earlier been resolved by a jury. But the insistence by federal judges that many juries are unreasonable or irrational, like the insistence of Soviet apparatchiks that anyone who does not support the Communist Party must be crazy, reveals more about the attitudes of the officials involved than about the judgment or sanity of whose whom they denounce.

The problem involves more than this common, although not universal, disdain for the division of factfinding responsibility established by the seventh amendment. In the decades prior to 1968 the Supreme Court had given specific substance to the admonition of the amendment itself. The Court varied to some extent in its enthusiasm for limiting appellate review of civil jury verdicts, and some doctrines were more fully developed than others. But the Court's decisions on the whole established a framework of legal principles which, if respected, would assure that jury factual determinations would only rarely be overturned on appeal. In the two decades since the Supreme Court abandoned its traditional role in enforcing the seventh amendment, however, the circuit courts have differed widely in their willingness to adhere to those once well-established principles.

III. Appellate Review of Jury Liability Determinations

When the seventh amendment was originally adopted, the modern practices of ordering directed verdicts and granting judgments n.o.v. did not yet exist. The most analogous practice, a demurrer to evi-

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contract for year-to-year employment.") (emphasis added); *id* at 245 ("*We* hold that the individual assurances by the commissioners did not create a contract for continued employment.") (emphasis added); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1217 (7th Cir. 1985) ("*We* agree with the finding of the district court that the plaintiff failed to carry his burden of persuasion establishing that he was terminated because of his age.") (emphasis added); Yopp v. Seigel Trading Co., Inc., 770 F.2d 1461, 1466 (9th Cir. 1985) ("*We* conclude, based on all the evidence before *us*, that Yopp possessed sufficient intelligence and understanding to evaluate his brokers' recommendations. . . .") (emphasis added).

86. *See infra* notes 166-67.

dence,[87] was utilized primarily to attack the legal theory of the non-moving party,[88] rather than to question the sufficiency of the evidence offered by that party to establish some controverted fact.[89] The demurring party was required to admit not only the truthfulness of all evidence offered by the non-moving party, but also the existence of any and all facts which that evidence "conduced" or "tended," even "indirectly," to prove.[90]

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87. Commonly the moving party would submit a statement of the admitted facts; the case would be resolved on the basis of the demurrer if the other party concurred in the statement, or if the court concluded that the statement was as favorable to the non-moving party as was warranted. Once the court accepted such a statement, the jury was discharged, for there were no longer any factual issues for it to resolve. The court would procced to decide, on the basis of the facts admitted, which party was entitled as a matter of law to prevail. Demurrers to evidence under English law are discussed in Cocksedge v. Fanshaw, 99 Eng. Rep. 80 (K.B. 1779); Gibson v. Hunter, 126 Eng. Rep. 499 (1793); Wright v. Pindar, 82 Eng. Rep. 892 (1681). For a discussion of demurrers to evidence in the United States, see Galloway v. United States, 319 U.S. 372, 393-94 (majority opinion), 399-400 (Black, J., dissenting) (1943); Slocum v. New York Life Insurance Co., 228 U.S. 364, 388-92 (majority opinion), 409-17 (Hughes, J., dissenting) (1913). For early examples of such demurrers in the federal courts, see Suydam v. Williamson, 61 U.S. 427 (1857); Fowle v. Common Council of Alexandria, 24 U.S. 320 (1826); Bank of the United States v. Smith, 24 U.S. 171 (1826); Young v. Black, 11 U.S. 565 (1813); Pawling v. United States, 8 U.S. 219 (1808); Pickel v. Isgrigg, 6 F. 676 (C.C.D. Ind. 1881); Johnson v. United States, 13 F. Cas. 868 (C.C.D. Me. 1830); Miller v. Baltimore & O. R.R., 17 F. Cas. 304 (S.D. Ohio 1876); Patty v. Edelin, 18 F. Cas. 1344 (C.C.D.C. 1802). *See generally* Schofield, *New Trials and the Seventh Amendment*, 8 ILL. L. REV. 287, 381, 465 (1913); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 234-39 (1898); S.M. PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE 216-17 (3d ed. Albany 1850); BULLER, TRIALS AT NISI PRIUS 313 (1791).

88. "A demurrer to evidence is . . . regarded in general as analogous to a demurrer upon the facts alleged in pleading." Suydam v. Williamson, 61 U.S. 427, 436 (1857); *see also* Slocum v. New York Life Ins. Co., 228 U.S. 364, 409 (1913) (Hughes, J., dissenting).

89. The Supreme Court commented in *Fowle v. Common Council of Alexandria:*

> [T]he nature of the proceedings upon a demurrer to evidence, seems to have been totally misunderstood in the present case. It is no part of the object of such proceedings, to bring before the Court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the Court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the Court to apply the law to those facts.

Fowle, 24 U.S. at 322. Since under *Fowle* a non-moving party could be compelled to join a demurrer which admitted all facts that a jury could infer from the evidence, it is theoretically possible that litigation over a demurrer might turn on a dispute as to what those facts were. But *Fowle* made clear the Supreme Court's unwillingness to become embroiled in such disputes.

90. The common law required a court at times to examine the evidence to ascertain whether the moving party had admitted in his demurrer every fact he was required to concede, since a non-moving party could only be required to join in a demurrer which included all such facts. Gibson v. Hunter, 126 Eng. Rep. 499 (1793), decided by the House of Lords, made clear that a demurrer was sufficient only if it included every fact supported in any way by the evidence:

> Parol evidence is . . . often loose and indeterminate, often circumstantial. The reason for obliging the party offering evidence . . . to join in demurrer, . . . does not apply to parol evidence which is loose and indeterminate, which may be urged with more or less effect to a Jury, and least of all will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. And yet if . . . the party who demures, will admit

Two newer procedures, directed verdicts[91] and judgments

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the evidence of the fact, the evidence of which fact is loose or indeterminate, or in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, . . . the reasons for compelling the party who offers the evidence to join in demurrer, will . . . apply.

Id. at 509. Where evidence existed which conduced to prove a fact, the moving party could not ask the court to assess the weight of that evidence. "[I]f the matter of fact be uncertainly alleged, or . . . it be doubtful whether it be true or no, because offered to be proved by presumptions or probabilities," the demurrer was not good unless it "confess the matter of fact to be true," and the demurring party could not "refer that to the judgment of the court." *Id.* at 510 (quoting Wright v. Pindar, 82 Eng. Rep. 892 (1681)).

The federal courts faithfully followed the common law standard in the nineteenth century. In *Fowle v. Common Council of Alexandria,* Justice Story expressly relied on *Gibson* in holding that a party demurring to evidence must "distinctly admi[t] upon the *record,* every fact, and every conclusion, which the evidence given for his adversary conduced to prove." *Fowle,* 24 U.S. at 322 (emphasis in original). The existence of any evidence which tended to prove a disputed fact required such an admission, since the courts could not undertake "to weigh the force of testimony or the presumptions arising from the evidence." *Id.* Columbian Insurance Co. v. Catlett, 25 U.S. 383 (1827), decided the next year, reiterated that a demurring party was bound to admit "every fact which the evidence . . . conduced to prove;" in evaluating the scope of the required admission "[t]he evidence is taken most strongly against the party demurring," and the admission must encompass any fact which that evidence conduces to prove even "indirectly." *Id.* at 389.

Other demurrer cases applied a similar standard. Chinoweth v. Lessee of Haskell, 28 U.S. 92, 96 (1830) (demurrer sustainable only if moving party entitled to judgment on "any fair construction of the evidence"); Bank of the United States v. Smith, 24 U.S. 172, 179 (1826) (courts to be "very liberal" in deciding what inferences could be drawn from evidence); Young v. Black, 11 U.S. 565, 568 (1813) (moving party must admit "all the facts which the evidence legally may conduce to prove"); Pawling v. United States, 8 U.S. 219, 222 (1808) (moving party admits "those conclusions of fact which a jury may fairly draw from th[e] testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him. . . ."); Johnson v. United States, 13 F. Cas. 868, 872 (C.C.D. Me. 1830) (Story, J.) ("the party demurring is bound to admit not merely all the facts which the evidence directly establishes, but all which it conduces to prove"). *See also* Slocum v. New York Life Ins. Co., 228 U.S. 364, 388 (1913) (demurring party must admit "every fact which the evidence of his adversary conduces to prove. . . .").

Some authorities suggested that the moving party was obligated to admit all the facts which the other side "attempts to prove," Young v. Black, 11 U.S. 565, 568 (1813), or "the truth of every fact that has been alleged." 3 W. BLACKSTONE, COMMENTARIES 372 (1803). *Fowle* suggests that the non-moving party could be required to join in a demurrer if there was not "any matter of fact in controversy between the parties." *Fowle,* 24 U.S. at 321. *See also Slocum,* 228 U.S. at 409, 417-18 (Hughes, J., dissenting).

91. The Supreme Court first approved the trial court practice of directing verdicts in Parks v. Ross, 52 U.S. 362 (1850). The Court sanctioned the use of a directed verdict because it understood such a motion to be simply a more convenient procedure for raising and resolving the same question framed by a demurrer to evidence; "[i]t answers the same purpose, and should be tested by the same rules." *Id.* at 373. For several decades, in assessing requests for directed verdicts, the Court adhered strictly to the substantive standards for demurrers to evidence.

Beginning in the 1830s the Supreme Court began to face the same issue in a new procedural posture, ruling on arguments that a trial judge had erred in issuing an instruction which referred to or withheld from a jury a particular factual issue. For forty years the Court consistently applied in these cases the same standard utilized in evaluating a demurrer to evidence. In Greenleaf v. Birth, 34 U.S. 292 (1835), the plaintiff had sought an instruction that evidence offered by the defendant "was not sufficient" to establish an affirmative defense. *Id.* at 299. The Supreme Court explained that a federal judge had no authority to give any such instruction:

It is the province of the jury to weigh and decide on the sufficiency of the evidence; and from the words of the instruction it would seem to be conceded, that there was some

n.o.v.[92] were devised as more workable versions of the common law demurrer to evidence,[93] but, as Justice Hughes emphasized, the consti-

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evidence . . ., as the court were asked to instruct the jury that the evidence was not sufficient to prove the fact. Where there is no evidence tending to prove a particular fact, the court are [sic] bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.

Id. In seven other cases, the last decided in 1870, the Court reiterated that a judge could not direct a jury to decide a disputed factual issue in a particular way unless there was literally no evidence which "tended" or "conduced" to support the position of the opposing party. Barney v. Schmeider, 76 U.S. 248, 251 (1869) (directed verdict appropriate if plaintiff "failed to offer any evidence"); Hickman v. Jones, 76 U.S. 197, 201 (1869) (instruction proper only if there is "no evidence" to support the plaintiff's claim, but not if there is "some"); Drakely v. Gregg, 75 U.S. 242, 268 (1868) (issue must be referred to jury if "there was evidence that *tended* to prove the position" of the plaintiff) (emphasis in original); Weightman v. Washington, 66 U.S. 39, 49 (1861) (instruction permissible only if "there is no evidence to sustain the action, or one of its essential elements"); Bank of Metropolis v. Guttschlick, 39 U.S. 19, 31 (1840); United States v. Laub, 37 U.S. 1, 5 (1838) (instruction proper only if there was "no evidence, tending to prove the matter in dispute"); Lessee of Ewing v. Burnet, 36 U.S. 41, 50 (1837) (issue must go to jury "if there was any evidence which conduced to prove" the disputed fact). These decisions were based in part on the unwillingness of the Court, like the refusal of the House of Lords in *Gibson*, to attempt to evaluate the weight or force of relevant evidence. *Weightman*, 66 U.S. at 49; *Bank of Metropolis*, 39 U.S. at 31; *Laub*, 37 U.S. at 5; *Lessee of Ewing*, 36 U.S. at 50. *See also* Sioux City & Pacific R.R. v. Stout, 84 U.S. 657, 663-64 (1873) ("Upon the facts proven . . ., it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn. . . . It is this class of cases . . . that the law commits to the decision of a jury."); *Lessee of Ewing*, 36 U.S. at 50-51:

> [I]f there was any evidence which conduced to prove any fact . . . the court must assume such fact to have been proved; for it is the exclusive province of the jury to decide what facts are proved by competent evidence. It was also [the jury's] province to judge the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; . . . these were matters with which the court could not interfere, . . .

92. At common law, if a trial judge was convinced that a verdict lacked an evidentiary basis, he or she could only order a new trial. In 1913 the Supreme Court held that, where a trial judge had mistakenly rejected a motion for a directed verdict, an appellate court which recognized that error could itself only remand the case for a new trial. Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). In 1935, however, the Supreme Court held in Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935), that a trial judge could defer acting on a motion for a directed verdict until the jury itself had returned its verdict, and could then order entry of a judgment contrary to that of the jury if the judge believed the earlier motion should have been granted. Where resolution of the motion for a directed verdict had thus been reserved, the Court reasoned, an appellate court too could order entry of a judgment inconsistent with the intervening jury verdict. *Id.* at 659-61. The procedure that had been utilized in *Redman* was made universal in 1937 by the adoption of Rule 50 of the Federal Rules of Civil Procedure, which provided that whenever a motion for a directed verdict was denied or not granted the court was "deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." 5A MOORE'S FEDERAL PRACTICE ¶ 50.97 (2d. ed. 1985). The effect of Rule 50 was to authorize both trial judges and appellate courts to direct entry of judgment n.o.v. in any case in which motions for a directed verdict and for judgment n.o.v. had been filed by the party which lost at trial.

93. *See Galloway*, 319 U.S. at 393 n.28; *Slocum*, 228 U.S. at 418, 428 (Hughes, J., dissenting). In 1826 Justice Wheaton described demurrers to evidence as "an unusual and antiquated practice, which this Court, and other Courts, have recently endeavored to discourage, as inconvenient, and calculated to suppress the truth and justice of the cause." *Bank of the United States*, 24 U.S. at 183. The practice also fell into disuse because the courts enjoyed discretion to refuse to entertain even a well pleaded demurrer to evidence. *Young*, 11 U.S. at 568. A demurrer to evidence

tutionality of these procedures depends on close adherence to the substantive standard that existed under the common law practice.[94]

Over the years the Supreme Court has used a variety of formulations to describe the circumstances—be it on a demurrer to evidence, a motion for a directed verdict, or a request for judgment n.o.v.—in which a court could hold that there was a fatal lack of evidence to support a particular claim. The reigning modern formulation dates from the 1946 decision in *Lavender v. Kurn*:[95]

> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. . . . [T]he appellate court's function is exhausted when [an] evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.[96]

This "complete absence of probative facts" standard, which had prevailed in the late nineteenth century,[97] was reiterated by the Court in 1947,[98] 1957,[99] and twice in 1963.[100] When Justice Harlan accused the Court of requiring only a scintilla of evidence,[101] no member of the majority saw fit to deny that characterization. In time even Justice Harlan, among recent justices by far the most willing to overturn jury

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also waived any objections to earlier rulings admitting disputed evidence. Suydam v. Williamson, 61 U.S. 427 (1857). The problems in the old demurrer to evidence are reflected in Rule 50(a), FED. R. CIV. P., which expressly provides that a party which moves for a directed verdict does not waive the right to offer evidence or to a trial by jury if the motion is denied.

94. *Slocum*, 228 U.S. at 401-09 (1913) (Hughes, J., dissenting); *see also Galloway*, 319 U.S. at 402 (Black, J., dissenting); *Slocum*, 228 U.S. at 418, 423 (Hughes, J., dissenting); Pleasants v. Fant, 89 U.S. 116, 121 (1874). In *Galloway* Justice Black asserted in dissent that the Supreme Court was unconstitutionally applying a more stringent standard than had been utilized under a demurrer to evidence. *Galloway*, 319 U.S. at 401-05. The majority opinion denied any such change had occurred, but did not dispute Justice Black's premise that the courts could not require more evidence to support a jury verdict than would have been required in 1793. *Id.* at 395.

95. 327 U.S. 645 (1946).

96. *Id.* at 653.

97. Chicago & Northwestern R.R. v. Ohle, 117 U.S. 123, 129 (1886) (verdict must be upheld because "there was some evidence to support the finding"); Lancaster v. Collins, 115 U.S. 222, 225 (1885) (determination can only be overturned if "there was no evidence to sustain the verdict rendered"); Sinclair v. Cooper, 108 U.S. 352, 360 (1883) (court cannot set aside verdict "unless there is no evidence from which the conclusion of fact can be legally inferred") (citing Parks v. Ross, 52 U.S. 362 (1850)); *see* Texas & Pacific R.R. v. Cox, 145 U.S. 593, 606 (1892) (verdict upheld because there was evidence which "tended to establish" plaintiff's claim); Erhardt v. Steinhardt, 153 U.S. 177, 182 (1894) (verdict upheld because "[t]here was evidence tending to show" that plaintiffs' contentions were correct).

98. Myers v. Reading Co., 331 U.S. 477, 485 (1947).

99. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).

100. Basham v. Pennsylvania R.R., 372 U.S. 699, 700 (1963); Dennis v. Denver & Rio Grande W. R.R., 375 U.S. 208, 210 (1963).

101. Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 564 (1957) (Harlan, J., dissenting).

verdicts, cast his own arguments for doing so in terms of a claim that there was no evidence to support a disputed verdict.[102]

Since *Lavender*, there have been no instances in which the Supreme Court took a case from the jury because the Court thought the weight of the plaintiff's evidence too slight; on the contrary, in every case in which a plaintiff had adduced at least some evidence to support a disputed claim of fact, the Court held that the jury alone should weigh that evidence. The rare instances in which the Supreme Court did overturn a jury verdict, or sustained a directed verdict, fit well within the common law standards for a demurrer to evidence. In *Inman v. Baltimore and Ohio Railroad Co.*[103] and *Herdman v. Pennsylvania Railroad Co.*[104] the parties were in agreement regarding what events had preceded and caused the injuries to the plaintiffs. The question in *Herdman* was whether those facts warranted application of the principle of res ipsa loquitur, and the question in *Inman* was whether the agreed upon circumstances created a duty on the part of the employer to take additional safety precautions—both issues which are often treated as essentially legal. In *Davis v. Virginian Railway Co.*[105] and *New York, New Haven & Hartford Railroad Co. v. Henagan*[106] the Court insisted the record contained literally no evidence to support the jury verdicts at issue. Although such assertions must ordinarily be taken with a grain of salt, in these cases even Justices Black, Douglas and Murphy joined in that characterization. *Davis* appears to be a case in which plaintiff's counsel simply failed to introduce the evidence of general medical practice which is required to establish a medical malpractice claim; *Henagan* presented facts almost identical to *Herdman*,[107] and as a practical matter may have been an unsuccessful attempt to invoke res ipsa loquitur.

The language used by the Supreme Court to describe the limitations imposed by the seventh amendment is, perhaps unavoidably,

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102. Salem v. United States Lines Co., 370 U.S. 31, 40 (1962) (Harlan, J., dissenting); Maynard v. Durham & Southern Ry., 365 U.S. 160, 165-66 (Whittaker, J. and Harlan, J., dissenting); Davis v. Virginian Ry., 361 U.S. 354, 359 (1960) (Harlan, J., dissenting) 360 (Whittaker, J., dissenting) (record lacks "any evidence"); Harris v. Pennsylvania R.R., 361 U.S. 15, 27 (1959) (Harlan, J., dissenting). *See also* Shenker v. Baltimore & O. R.R., 374 U.S. 1, 12-14 (1963) (Goldberg, J., dissenting) ("no evidence"); Inman v. Baltimore & O. R.R., 361 U.S. 138, 142 (1959) (Whittaker, J., concurring) (record lacks even a "scintilla" of evidence); Moore v. Terminal R.R. Ass'n, 358 U.S. 31, 32 (1958) (Whittaker, J., dissenting) (record "does not contain any evidence of negligence").

103. 361 U.S. 138 (1959).

104. 352 U.S. 518 (1957).

105. 361 U.S. 354 (1960).

106. 364 U.S. 441 (1960).

107. In *Henagan* the plaintiff was injured when the train on which he was riding stopped abruptly to avoid hitting a man attempting to commit suicide by standing on the tracks. In *Herdman* the plaintiff was injured when the train on which he was riding stopped abruptly to avoid hitting a car on the tracks.

more evocative than specific, but it provides a key barometer of the Court's determination to preclude or severely limit appellate reconsideration of jury factfinding. Although there have been some shifts in the general formulations articulating the requirements of the seventh amendment, the Court has announced and repeatedly adhered to a number of subsidiary, but decidedly more specific, rules delineating the constitutional limitations on the authority of federal judges to overturn jury verdicts. These rules grew out of the Supreme Court's extensive experience with the enforcement of the seventh amendment, its understanding of the types of factual issues which juries are typically called upon to resolve, and its familiarity with the ways in which overreaching lower court judges have sought to usurp the factfinding responsibilities of juries. This body of well established subsidiary principles, had it been respected by the circuit courts in the years since 1968, would have kept appellate reversals of civil jury verdicts at a relatively low level. An examination of the substance of the 1984-1985 decisions overturning jury verdicts reveals that the circuit courts routinely, and often expressly, disregard the specific constitutional safeguards embodied in the Supreme Court's pre-1968 opinions.

A. Credibility of Witnesses

For almost a century the Supreme Court has repeatedly insisted that jurors alone are to evaluate the demeanor and credibility of witnesses. In its 1891 decision in *Aetna Life Insurance Co. v. Ward,* the Court explained:

> The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men. . . .[108]

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108. Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891).

The Supreme Court has applied a similar rule restricting appellate review of credibility determinations made by a trial judge:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Over the decades that followed, notwithstanding changes in the Supreme Court's view of such matters as the "no evidence" rule, the Court consistently reiterated that a jury's evaluation of credibility could not be reconsidered on appeal.[109]

The general principle announced in *Aetna Life Insurance* has a number of important ramifications that were subsequently elaborated upon by Supreme Court or early circuit court opinions. In cases involving a mix of documentary and testimonial evidence, of course, the jury's unreviewable responsibility for assessing credibility would not by itself be dispositive of the factual disputes at issue. There are circumstances in which the testimony of even the most believable witness could not support a jury verdict: if a witness testified with utter credibility that X had been killed in a car accident, but X subsequently appeared in the courtroom alive and well, no court could sustain a wrongful death verdict on behalf of X's estate.[110] But there are at least four types of situations in which a jury's credibility assessment would at least ordinarily be conclusive of any dispute regarding the sufficiency of the evidence.

First, when two or more witnesses give conflicting testimony concerning a question of fact about which they have personal knowledge, and no documentary or other objective evidence is dispositive of the issue, a jury's decision to believe one witness, and disbelieve the others, must be treated as conclusive.[111] Such a decision may turn on the jury's evaluation of the truthfulness of the conflicting statements, or on its evaluation of the reliability of a witness's observations or memory. Just as demeanor may convince a jury that one of two witnesses is lying, so too the witnesses' bearing on the stand may lead a jury to conclude that one of the witnesses, although sincere, does not fully recall what occurred on the date in question or paid scant attention to the event at issue when it actually occurred.

Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985).

109. Ellis v. Union Pac. R.R., 329 U.S. 649, 653 (1947); Lavender v. Kurn, 327 U.S. 645, 652-53 (1946); Brady v. Southern Ry., 320 U.S. 476, 479 (1943); Galloway v. United States, 319 U.S. 372, 407 (1943) (Black, J., dissenting); Pence v. United States, 316 U.S. 332, 338 (1942); Gunning v. Cooley, 281 U.S. 90, 94 (1930); Baltimore & O. R.R. v. Groeger, 266 U.S. 521, 524 (1925).

110. The Court noted in Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985), in discussing the limits imposed by Rule 52, FED. R. CIV. P., on appellate review of a trial judge's credibility determinations, that "[d]ocuments or objective evidence may contradict the witness' story."

111. Ellis v. Union Pac. R.R., 329 U.S. 649, 653 (1947) ("The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth . . . are questions for the jury."); *cf.* Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985) ("[w]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.")

Second, where only a single witness testifies to a particular fact, a jury may conclude, based on his or her demeanor, not merely that the witness is untrustworthy—that he or she may not know the relevant facts or might not be giving a reliable, accurate report—but that the witness is lying—that he or she does know the relevant facts and is deliberately testifying in a manner that is the opposite of the truth.[112] Learned Hand observed, for this reason, that the testimony of a witness that Y occurred could support a jury finding that Y did not in fact occur. A witness's bearing on the stand may convince a jury

> not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.[113]

What an appellate court may consider "uncontradicted" testimony, a jury might legitimately have regarded as a deliberate misrepresentation of the truth. A reading of the cold transcript of such testimony, like a reading of the text of the automobile advertisements featuring television personality Joe Isuzu, might well lead the reader to conclusions that would seem palpably mistaken to anyone who had actually observed the statements involved.

The Supreme Court faced just this sort of situation in *Sonnentheil v. Christian Moerlein Brewing Co.*[114] That case turned on whether several creditors, who were relying on a deed of trust, had known at the time they accepted the deed that it had been executed by the grantor as part of a scheme to defraud certain third parties. All of the creditors testified that they were unaware of the fraudulent scheme, and there was apparently no other evidence bearing on the extent of their knowledge. The creditors unsuccessfully urged the trial judge to instruct the jury

> that . . . it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent

112. In Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), the majority asserted: "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Id.* at 512. "Discredited" testimony, testimony which the trier of fact regards as unreliable, is quite different from testimony which the trier of fact believes deliberately misstated the truth. The language of *Bose* differs from some earlier opinions suggesting that a finding of contrary fact was impermissible even if the trier of fact "disbelieved" the critical testimony, that is, concluded that it was not truthful. *See* Moore v. Chesapeake & O. Ry., 340 U.S. 573, 576 (1951). *See* WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 237 (disbelieve), 238 (discredit) (1967).

113. Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

114. 172 U.S. 401 (1899).

> in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent.[115]

The Supreme Court held that the issue had properly been submitted to the jury, and upheld the jury's finding that the creditors had had such knowledge.[116] The Court reasoned that the jurors, based on the demeanor and credibility of the creditor witnesses, could have concluded that the creditors were lying when they denied having knowledge of the fraudulent scheme.[117]

Although a jury is entitled to conclude, on the basis of demeanor or other factors, that a witness was deliberately stating the opposite of the truth, it does not follow that a verdict that, for example, a defendant drove negligently should automatically be upheld whenever there is testimony that the defendant had driven in a non-negligent manner. There must be something in the record suggesting that the veracity of the relevant witness had been put at issue and that the jury thus might have based its verdict on a conclusion that the witness was lying. A witness' truthfulness might be called into question by opposing counsel through cross examination or closing argument, or, as in *Sonnentheil,* by the witness himself because of an apparent interest in the outcome of the litigation or because of inconsistencies in his or her statements.[118] Once the truthfulness of such a witness has been put in issue, a jury may infer from his testimony the existence of facts which it believes the witness tried to hide, and an appellate court should not attempt to evaluate the testimony in a different manner.[119]

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115. *Id.* at 406.

116. *Id.* at 408:

> [I]t was possible for the jury to have found that the accepting creditors had knowledge of the fraud at the time of their acceptance. They were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.

(citations omitted).

117. Similarly, the Supreme Court has held in a Title VII case that the testimony of defense witnesses regarding their motives may, although not directly contradicted by another witness, be discredited by "effective cross-examination" or other circumstances "showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10, 256 (1981).

118. It has been suggested that testimony that a particular traffic light was green would not by itself support a jury verdict that the light was red. *See* Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952). That is probably correct, for there would be no reason, without more, to assume the jury based its verdict on an assessment of the credibility of the critical witness.

119. A related problem may arise in the course of jury selection in a capital case. Under Witherspoon v. Illinois, 391 U.S. 510 (1968), as modified by Wainwright v. Witt, 469 U.S. 412 (1985), a juror opposed to the death penalty may not be excluded for cause unless his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 425 (quoting Adams v. Texas, 448 U.S. 38, 45

Third, the jury is necessarily the final arbiter of the meaning of testimony which on a cold record is arguably ambiguous. Twice in recent years this issue has arisen in the context of appellate review of the decisions of trial judges, whose factual findings are for non-constitutional reasons entitled to significant deference. In *Anderson v. City of Bessemer*[120] the plaintiff, in order to establish her claim of sex discrimination, alleged that she, unlike male job applicants, had been asked if her spouse approved of her decision to take a job requiring night work. Although a female interviewer had discussed spousal reaction with a male applicant,[121] the trial court believed that interviewer's statement was a "facetious" comment made in reaction to the questions asked the female plaintiff, and concluded that the plaintiff had in fact been treated differently than men.[122] The court of appeals reversed, insisting that the female interviewer's remarks were not a facetious statement but a serious inquiry to the male applicant about his wife's views.[123] The Supreme Court reinstated the findings of the trial judge, emphasizing that it was for the trier of fact to resolve ambiguities in the meaning of testimony.[124] Similarly, in *Wainwright v. Witt*[125] the Court said it was for the trial judge to decide what a prospective juror meant when she said her views on capital punishment would "interfere" with her sitting on a capital case.[126]

(1980)). In reviewing the exclusion of a disputed juror the Court will defer to the decision of the trial judge, rather than make its own de novo determination, because of the possibility that a trial judge might infer that a juror was misrepresenting his or her willingness to obey the instructions or oath. Some "veniremen . . . may wish to hide their true feelings. . . ." *Id.* at 425. "[T]he manner of the juror while testifying is often times more indicative of the real character of his opinion than his words." *Id.* at 428 n.9 (quoting Reynolds v. United States, 98 U.S. 145, 156-57 (1879)).

120. 470 U.S. 564 (1985).

121. The female interviewer testified as follows:

Q. Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work?

A. You asked if there was any question asked about—I think Donnie was just married, and I think I made the comment to him personally—and your bride won't mind.

Q. So, you asked him yourself about his own wife's reaction?

A. No, no.

Q. That is what you just said.

Anderson v. City of Bessemer, 470 U.S. at 578 n.3.

122. Anderson v. City of Bessemer, 557 F. Supp. 412, 414 (W.D.N.C. 1983).

123. Anderson v. City of Bessemer, 717 F.2d 149, 155 (4th Cir. 1983).

124. *Anderson*, 470 U.S. at 578-79:

> [The female interviewer's] testimony on these matters is not inconsistent with the theory that her remark was not a serious inquiry into whether [the male applicant's] wife approved of his applying for the position. Whether the judge's interpretation is actually correct is impossible to tell from the paper record, but it is easy to imagine that the tone of voice in which the witness related her comment . . . might have conclusively established that the remark was a facetious one.

125. 469 U.S. 412 (1985).

126. *Id.* at 434:

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power

Fourth, a jury's assessment of credibility will often be decisive of any issue regarding the mental state, knowledge, or intent of a witness. Frequently the only person who understands with certainty what a particular individual knew or intended at a given point in time will be the individual himself. In a civil action for tortious interference with a contractual relation, for example, a plaintiff must prove that the defendant knew of the relevant contract and intended to interfere with it.[127] Where the defendant's actual knowledge or motive is in dispute, and the defendant himself takes the stand and testifies about the issue, the jury's resolution of that question—whether the jury believes or disbelieves that critical testimony—will often be conclusive.[128] The decision in *Anderson* regarding whether the female interviewer intended her words to the male applicant as a serious question, and in *Wainwright v. Witt* regarding what the disputed juror actually believed about the death penalty, involved just such disputes about mental states.

Although the subject matter of the jury verdicts overturned on appeal in 1984-1985 is extraordinarily diverse, one issue pervades a large portion of these cases. In the appeals in which a circuit court overturned a civil jury verdict, the most common question about which a jury and appellate panel disagreed concerned the mental state of the defendant or the defendant's employees. The largest number of these cases concerned the motive of the defendant—thus the appellate courts have overturned verdicts that defendants acted for the purpose of discriminating on the basis of race[129] or age,[130] or with an intent to deceive, to defraud,[131] or to retaliate for constitutionally protected

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of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. . . . Thus, whatever ambiguity respondent may find in this record, we think that the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State. . . .

127. PROSSER ON TORTS § 129 (5th ed. 1984).

128. There may, of course, be circumstances in which material evidence is dispositive of the issue, regardless of the testimony. If the plaintiff produces a copy of the contract at issue, discovered in the plaintiff's own files and covered with the plaintiff's fingerprints and hand written notes, a simple claim of ignorance by the plaintiff would not be sufficient to sustain a jury finding on that issue in favor of the plaintiff.

129. Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340, 343-44 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); Martin v. Citibank, N.A., 762 F.2d 212, 217-20 (2d Cir. 1985); Smith v. Monsanto Chem. Co., 770 F.2d 719, 721-24 (8th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986).

130. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1252 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340, 343-44 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1164-68 (8th Cir. 1985); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1213-18 (7th Cir. 1985).

131. Clarkson v. Orkin Exterminating Co., 761 F.2d 189, 191 (4th Cir. 1985); Craft v. Metromedia Inc., 766 F.2d 1205, 1219-21 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986);

speech.[132] The courts of appeals have reversed jury verdicts regarding malice and willfulness[133] or a lack of good faith.[134] The circuit courts have repeatedly thrown out jury verdicts because the appellate judges disagreed with the jury's findings that the defendants knew certain critical facts, such as that products produced by the defendants were dangerous,[135] that the stock options the defendants urged the plaintiff to purchase were a risky investment,[136] that a prison inmate was in danger of physical abuse,[137] that particular employees were black or white,[138] or that their actions were illegal or unconstitutional.[139]

Usually the individual whose knowledge or intent was critical to the case testified in these cases, and the circuit court opinion overturning the jury verdict rested largely on the decision of the appellate judges to credit that pivotal defense testimony.[140] None of these appellate decisions acknowledge, however, that these cases present any issue of credibility; the appellate panels merely recite the evidence supporting the defendants' claims of good faith or ignorance, frequently relying on

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Mackey v. Burke, 751 F.2d 322, 327-29 (10th Cir. 1984); Yopp v. Siegel Trading Co., 770 F.2d 1461, 1464-65 (9th Cir. 1985).

132. McSurely v. McClellan, 753 F.2d 88, 102-03 (D.C. Cir. 1985), *cert. denied,* 474 U.S. 1005 (1985); Neubauer v. City of McAllen, Texas, 766 F.2d 1567, 1573-78 (5th Cir. 1985). *See also* Redic v. Gary H. Watts Realty Co., 762 F.2d 1181, 1187 (4th Cir. 1985) (intent to create a contract).

133. Davis v. West Community Hosp., 755 F.2d 455, 466-67 (5th Cir. 1985); Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 137 (8th Cir. 1985); Lerman v. Flynt Distrib. Co., 745 F.2d 123, 140-41 (2d Cir. 1984); Mr. Chow v. Ste. Jour Azur, S.A., 759 F.2d 219, 230 (2d Cir. 1985); Rorex v. Traynor, 771 F.2d 383, 388 (8th Cir. 1985); Lavicky v. Burnett, 758 F.2d 468, 477 (10th Cir. 1985), *cert. denied,* 474 U.S. 1101 (1986). *See also* Abeshouse v. Ultragraphics, 754 F.2d 467, 472 (2d Cir. 1985) ("innocent" infringement of copyright); J. Yanan Associates v. Integrity Ins. Co., 771 F.2d 1025, 1034-35 (7th Cir. 1985).

134. Delta Rice Mill, Inc. v. General Foods Corp., 763 F.2d 1001, 1003-05 (8th Cir. 1985); Park v. El Paso Board of Realtors, 764 F.2d 1053, 1062 (5th Cir. 1985), *cert. denied,* 474 U.S. 1102 (1986); *cf.* Conan Properties v. Conans Pizza, 752 F.2d 145, 150-51 (5th Cir. 1985); LeSavage v. White, 755 F.2d 814, 821-22 (11th Cir. 1985); United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309-12 (3d Cir. 1985).

135. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1145 (5th Cir. 1985); Laney v. Coleman Co., 758 F.2d 1299, 1305 (8th Cir. 1985).

136. Yopp v. Siegel Trading Co., 770 F.2d 1461, 1464 (9th Cir. 1985).

137. Thomas v. Booker, 762 F.2d 654, 659 (8th Cir. 1985), *cert. denied,* 476 U.S. 1117 (1986).

138. Martin v. Citibank, N.A., 762 F.2d 212, 217-18 (2d Cir. 1985).

139. Lavicky v. Burnett, 758 F.2d 468, 477 (10th Cir. 1985), *cert. denied,* 474 U.S. 1101 (1986); Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 137 (8th Cir. 1985). *See also* Neubauer v. City of McAllen, Texas, 766 F.2d 1567, 1574-75 (5th Cir. 1985) (knowledge that plaintiff had engaged in constitutionally protected union activity); Smith v. Monsanto Chem. Co., 770 F.2d 719, 724 (8th Cir. 1985), *cert. denied,* 475 U.S. 1050 (1986) (knowledge that white workers had engaged in the same practice for which black plaintiff had been dismissed); LeSavage v. White, 755 F.2d 814, 819 (11th Cir. 1985) (knowledge that complaints to police were groundless).

140. *See, e.g.,* Craft v. Metromedia Inc., 766 F.2d 1205, 1219-20 (8th Cir. 1985); Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340, 343-44 (7th Cir. 1985); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1164-68 (8th Cir. 1985); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1214-15 (7th Cir. 1985).

testimony by the defendant or its employees or agents, and then pronounce that evidence too conclusive to permit a verdict for plaintiff. The appeals courts simply never discuss or consider the possibility that the jury might have thought that those key defense witnesses were lying, or at the least untrustworthy.

All of these decision seem flatly inconsistent with the Supreme Court's opinion in *Sonnentheil.* The central issue in dispute in this group of cases concerns the past mental state of a witness; the veracity of that witness is obviously in dispute, since the plaintiff's claim rests on an allegation regarding that mental state, and the witness, ordinarily either a defendant or an employee of the defendant, has an obvious motive for misrepresenting the facts. In ordinary life, if a juror wanted to find out what an individual knew, or why that individual had taken a particular action, the first thing the juror would do would be to question the individual directly, and try to make a personal judgment as to whether the individual had responded truthfully. Credibility evaluations are probably the most common way in which we evaluate the intentions and knowledge of others. If a supervisor testifies that he fired a plaintiff for reasons other than race, and the plaintiff claims that he was fired because of his race, the central issue in the case is whether the supervisor was telling the truth when he was on the stand; it is almost inconceivable that the jury's verdict in such a case, like the verdict in *Sonnentheil,* would not rest, at least in part, on its assessment of the credibility and demeanor of the witness.

The Supreme Court decisions in *Aetna Life Insurance, Sonnentheil,* and their progeny would, if fairly read, largely preclude any appellate reconsideration of the mental state of a party witness. The contrary manner in which many appellate panels are actually dealing with issues of this type today is illustrated by the Seventh Circuit decision in *Christensen v. Equitable Life Assurance Society.*[141] The plaintiff in that case was a long-time management employee whose work had generally been rated as satisfactory; at the age of 52 he was removed from his position and replaced by a younger man. The plaintiff alleged, and the jury found, that the plaintiff had lost his job as a result of intentional discrimination on the basis of age.[142] The court of appeals acknowledged that the evidence adduced by the plaintiff was sufficient to make out a prima facie case of discrimination, but held:

> [t]he record establishes . . . that Equitable rebutted this presumption by articulating legitimate, nondiscriminatory reasons for the action.[143] . . . Evidence submitted by Equitable,

141. 767 F.2d 340 (7th Cir. 1985).
142. *Id.* at 342-43.
143. *Id.* at 343.

> consisting of testimony by Christensen's immediate supervisor and another company executive, *showed* that the company had been concerned about Christensen's job performance for sometime.[144] . . . Equitable *showed* that it considered Christensen only marginally qualified for the very important position he held, and that it wished to replace him with someone it regarded as far better qualified. . . . Christensen utterly failed to meet the burden which shifted to him, once Equitable *showed* a nonpretextual reason for its action, of "demonstrat[ing] that the proffered reason was not the true reason for the employment decision.[145]

It seems never to have occurred to the Seventh Circuit that the jury might have ruled for Christensen because it simply did not believe the pivotal testimony of the company executives who had demoted the plaintiff, and because it regarded the demeanor of those key defense witnesses as demonstrating that their explanations were pretextual.[146]

Although there are a large number of appellate decisions like *Christensen* overturning jury verdicts regarding the mental state of a witness, other appellate panels have recognized that a jury is entitled to reject as not credible the testimony of a key witness, especially where that witness has a stake in the outcome of the litigation. In *Knapp v. Whitaker,*[147] for example, the plaintiff alleged that school board officials had taken various adverse personnel actions in order to punish him for certain activities protected by the first amendment. The defendants insisted that they had taken the disputed actions for legitimate non-retaliatory purposes,[148] but the court of appeals noted that the jury was not obligated to believe that testimony: "The credibility of the witnesses and the weight of the evidence are matters within the purview

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144. *Id.* at 342 (emphasis added).

145. *Id.* at 343 (emphasis added).

146. The Eighth Circuit overturned in a similar fashion a jury finding of age discrimination in Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985). The court summarized at length the testimony of the employer's witnesses and relied on it to conclude that the plaintiff had not been discharged because of his race:

> [E]ven if we were to assume that Holley's evidence established a prima facie case of discrimination, Sanyo articulated nondiscriminatory reasons for the discharge. The evidence demonstrated a careful plan to spread the impact of the layoffs over all groupings of employees based on race, sex, and age. Holley's discharge, which followed from the consolidation of his position with another pursuant to the carefully planned reduction-in-force, was based on a reasonable factor other than age and was for good cause. . . . Holley's evidence . . . makes no showing that Sanyo's articulated reasons for discharge were pretextual.

Id. at 1168. This opinion, which dispenses with any deference to the jury and overtly decides the factual dispute at issue, simply accepts as truthful the testimony of the critical defense witnesses.

147. 757 F.2d 827 (7th Cir. 1985).

148. *Id.* at 844.

of the jury, especially in a case such as this which turns, in large measure, upon the defendants' motive in making certain decisions."[149]

In *Fishman v. Clancy*,[150] another first amendment retaliation case, the First Circuit observed that "where state of mind is crucial to the outcome of a case, jury judgments about credibility are typically thought to be of special importance."[151] In upholding a jury verdict of age discrimination in *Stacey v. Allied Stores Corp.*,[152] the District of Columbia Circuit held that "the jury could have refused to credit the defense . . . that Mr. Stacey's performance was not up to par. . . . [I]t is, of course, elementary that credibility determinations are reserved exclusively to the jury."[153] In *Stacey* the appellate court thought it possible that the jury had chosen to disbelieve the proffered testimony because it was contradicted, in part, by another witness who, "quite unlike" the key defense witness, "had no direct stake in this litigation."[154] In *Hale v. Firestone Tire & Rubber Co.*,[155] the court of appeals believed a credibility issue had been raised by the existence of prior inconsistent statements. In *Cole v. Bertsch Vending Co., Inc.*,[156] the appellate panel held that an arguable lack of candor in statements made by a witness prior to the commencement of the litigation raised such an issue.

Although many appellate opinions simply accept without explanation the veracity of critical testimony inconsistent with the jury's verdict, some cases go further and establish legal rules that expressly *require* juries to treat certain testimony as truthful, regardless of whether the demeanor of the witness may have convinced everyone in the courtroom that he was lying through his teeth. In *La Montagne v. American Convenience Products, Inc.*,[157] the Seventh Circuit held that, in the absence of some substantial evidence to the contrary, "a reasonable jury could not reject [the defendant's] plausible account" of why it had dismissed the plaintiff. In *Marino v. Ballestas*,[158] the Third Circuit held that a jury was required to accept certain "uncontradicted" evidence offered by the plaintiff, rejecting the argument of a dissenting opinion

149. *Id.* at 843.

150. 763 F.2d 485 (1st Cir. 1985).

151. *Id.* at 488 (quoting Stephanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir. 1983)). The court of appeals noted that the district court, in denying a defense motion for judgment n.o.v., had described the critical defendants as neither "particularly good [n]or as particularly forthcoming witnesses." *Id.* at 489.

152. 768 F.2d 402 (D.C. Cir. 1985).

153. *Id.* at 407-08.

154. *Id.* at 408.

155. 756 F.2d 1322, 1337 (8th Cir. 1985) (question of whether the company knew of tire rim defect turned on jury evaluation of the "credibility" and "truthfulness" of a company engineer who testified that he was unaware of the defect).

156. 766 F.2d 327, 332 (7th Cir. 1985).

157. 750 F.2d 1405, 1411 (7th Cir. 1984) (emphasis added).

158. 749 F.2d 162, 168, 171 (3d Cir. 1984).

that the jury could reject the testimony if "it did not find that testimony credible." In *Seidenstein v. National Medical Enterprises, Inc.*,[159] the Fifth Circuit held that when a defendant insisted he had acted in good faith, a jury could infer from his demeanor that the witness was unreliable, and thus disregard his testimony, but that the jury could not conclude that the witness was lying, and thus hold that he had not acted in good faith. These restrictions on juries are not, however, uniformly accepted; other appellate decisions hold that a jury is free to conclude that a witness is not merely untrustworthy, but a liar.[160]

In most of the appellate decisions involving problems of credibility, the courts of appeals have insisted on crediting testimony which the jury may have considered unbelievable. Conversely, appellate panels in several instances have held that the juries erred in accepting testimony which the appellate judges themselves thought was not credible. In *Eyre v McDonough Power Equipment, Inc.*,[161] the Fifth Circuit dismissed as "implausible to a degree approaching the incredible" the testimony of the plaintiff in a product liability case. In *Estate of Davis v. Johnson*,[162] the Seventh Circuit rejected as unreliable testimony that a jail supervisor could have heard the sounds of the beating suffered by the plaintiff inmate:

> [O]ne prisoner in the female holding area said that he heard the sounds of a beating, and one officer stated that such sounds would have to be loud if they were audible to that prisoner. The testimony of the prisoner in the female area, however, is strikingly wanting in detail. In particular, the prisoner was unable to establish accurately the time at which he heard the sounds of a beating. . . . Accordingly, *we believe* that the . . . prisoner['s] testimony was of such inferior quality that it cannot support the jury's verdict on the Section 1983 counts.[163]

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159. 769 F.2d 1100, 1105 (5th Cir. 1985).

160. *See, e.g.*, Molex, Inc. v. Nolen, 759 F.2d 474, 479 (5th Cir. 1985) (although defendant testified he did not know certain information was confidential, "the jury was not required to believe him and did not"); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1445 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005 (1985) ("The employer offered explanations for all of these actions, which were not directly rebutted. The jury was not required to accept these explanations but was entitled to draw its own conclusions. . . .").

161. 755 F.2d 416, 418 (5th Cir. 1985).

162. 745 F.2d 1066 (7th Cir. 1984).

163. *Id.* at 1072 (emphasis added). *See also* Taliferro v. Augle, 757 F.2d 157, 159 (7th Cir. 1985):

> Taliferro's testimony lacked credibility. . . . His unsubstantiated testimony that he had seen Augle at a Nazi rally, wearing a Nazi-style uniform and Hitler mustache, was bizarre. . . . Taliferro's testimony that he was seriously beaten is hard to square with the fact that he waited several days after his release from jail before going to a doctor. . . .

Although these decisions are clearly inconsistent with *Aetna Life Insurance*, other recent appellate decisions have expressly refused to entertain challenges to the credibility of testimony accepted by a jury.[164]

Appellate decisions which reject testimony credited by the jury are particularly egregious violations of the seventh amendment, but they are relatively rare. Considerably more important and common are appellate dispositions of jury verdicts—particularly regarding the mental state of a party witness—which insist on crediting testimony which the jury may have found unbelievable. The rate at which appellate courts are currently reversing civil jury verdicts would be substantially reduced if the courts were to recognize that when a party witness testifies about his or her mental state, the jury's disposition of the case will ordinarily, and properly, turn on its assessment of the credibility of the witness. It makes no sense to suggest, as some courts have, that such testimony is "undisputed"; the very nature of the claims of the opposing party puts the correctness of that testimony in dispute. It makes even less sense to require in employment discrimination cases, where the plaintiff has established a prima facie case of discrimination and the defendant has offered testimony of benign purposes, that the plaintiff produce additional evidence that the purported purpose was a "pretext." Since the prima facie case supports a verdict different than that supported by the defense testimony, such a case necessarily presents a straightforward conflict in the evidence, a conflict which the jury may well resolve in large measure based on its evaluation of the credibility of the defense testimony.[165]

The rate of appellate reversals would also be reduced if the courts were to recognize that jurors will at times draw factual conclusions from the mendacious testimony of a witness with personal knowledge of the disputed facts. To forbid juries to do so would be to establish an

164. Air et Chaleur, S.A. v. Janeway, 757 F.2d 489, 493 (2d Cir. 1985); Armstrong v. Kansas City S. Ry., 752 F.2d 1110, 1113-14 (5th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205, 1279 (7th Cir. 1984); Cazzola v. Codman & Shurtleff, Inc., 751 F.2d 53, 54 (1st Cir. 1984); Dobbs v. Gulf Oil Co., 759 F.2d 1213, 1218 (5th Cir. 1985); Eisenberg v. Gagnon, 766 F.2d 770, 779 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985); Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985); Grogan v. General Maintenance Serviee Co., 763 F.2d 444, 447 (D.C. Cir. 1985); Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1248 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985); Hibma v. Odegaard, 769 F.2d 1147, 1153 (7th Cir. 1985); LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984); Leonard v. Uniroyal, Inc., 765 F.2d 560, 566 (6th Cir. 1985); Molex, Inc. v. Nolen, 759 F.2d 474, 479 (5th Cir. 1985); O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1550 n.8 (11th Cir. 1984); Phillips v. Hardware Wholesalers, Inc., 762 F.2d 46, 48 (6th Cir. 1985); Spanish Action Comm. of Chicago v. City of Chicago, 766 F.2d 315, 319-20 (7th Cir. 1985); Stacey v. Allied Stores Corp., 768 F.2d 402, 407-08 (D.C. Cir. 1985); Tavoulareas v. Piro, 759 F.2d 90, 105 & n.14 (D.C. Cir. 1985); Thomas v. Booker, 762 F.2d 654, 659 (8th Cir.), *cert. denied*, 476 U.S. 1117 (1985); Toth v. Yoder Co., 749 F.2d 1190, 1197 (6th Cir. 1984); Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985).

165. *See* Brown v. Sierra Nevada Memorial Miners Hosp., 849 F.2d 1186, 1192 (9th Cir. 1988); Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595-96 (11th Cir. 1987).

absolute bar to recovery in those cases in which the only witness with direct knowledge of a critical fact, such as the circumstances of an accident, chooses to lie. Such a witness is especially likely to misrepresent the facts, since he or she testifies with the knowledge that no witness could be found to contradict whatever is said. At least where such a witness has a reason to lie—because, for example, the witness or his or her employer is a party to the case—evidence of such a possible motive, in combination with testimony the jury found unbelievable, would fairly support a jury verdict that the facts are the opposite of the account testified to by the disputed witness.

B. Inference Drawing and the Sufficiency of Evidence

The Supreme Court in *Lavendar v. Kurn* directed that a jury verdict be upheld unless there was "a complete absence of probative facts to support the conclusion reached."[166] Although this formulation was at least as symbolic as it was substantive, most federal appellate courts today neither heed the symbol nor adhere to the substance. The largest group of appellate opinions hold that there must be sufficient evidence that a "reasonable" jury might arrive at the verdict in question.[167] A second major group of opinions requires that there be "substantial" evidence supporting a disputed verdict.[168] The third principal category of decisions overturns jury verdicts only where there is "no evidence" to support them.[169] Other standards crop up only occasionally. Thus various panels have required that the evidence be sufficient that a "fair," "impartial,"[170] or "rational"[171] jury could reach the same conclusion as the jury below, or that the verdict not be against the "great weight"

166. Lavendar v. Kurn, 327 U.S. 645, 653 (1946).

167. *See, e.g.*, U.C. Castings Co. v. Knight, 754 F.2d 1363, 1369 (7th Cir. 1985); Conan Properties, Inc. v. Conans Pizza, Inc., 752 F.2d 145, 149 (5th Cir. 1985); DeFranco v. Valley Forge Ins. Co., 754 F.2d 293, 295 (8th Cir. 1985); Haney v. Mizell Memorial Hosp., 744 F.2d 1467, 1478-79 (11th Cir. 1984); Klein v. Sears Roebuck & Co., 773 F.2d 1421, 1424 (4th Cir. 1985); Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir. 1984); Plante v. Hobart Corp., 771 F.2d 617, 618 (1st Cir. 1985); Rhea v. Massey-Ferguson Inc., 767 F.2d 266, 269 (6th Cir. 1985); Romero v. National Rifle Assoc. of Am., 749 F.2d 77, 79-81 (D.C. Cir. 1984).

168. Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498, 1501-02 (11th Cir. 1985); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1256 (6th Cir. 1985); Eyre v. McDonough Power Equipment, Inc., 755 F.2d 416, 420 (5th Cir. 1985); Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); Laney v. Coleman Co., 758 F.2d 1299, 1303 (8th Cir. 1985).

169. Armstrong v. Kansas City S. Ry., 752 F.2d 1110, 1112-14 (5th Cir. 1985); Delevaux v. Ford Motor Co., 764 F.2d 469, 473 (7th Cir. 1985); Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556, 1558 (Fed. Cir. 1985); Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d 219, 230-31 (2d Cir. 1985).

170. Estate of Davis v. Johnson, 745 F.2d 1066, 1070 (7th Cir. 1984).

171. Electro-Miniatures Corp. v. Wendon Co., Inc., 771 F.2d 23, 26-27 (2d Cir. 1985); McKinnon v. City of Berwyn, 750 F.2d 1383, 1391 (7th Cir. 1984).

of the evidence.[172] More than a dozen appellate opinions in 1984-1985 utilize standards that combined several of these criteria. The most common combinations were the "reasonable jury" and "substantial evidence" rules[173] and the "reasonable" and "fair" jury standards.[174] These decisions generally read as though the appellate court believed that the criteria were really alternative formulations of the same legal standard.

There are occasional suggestions that these varying formulas do in fact reflect quite distinct legal rules. For example, a few opinions applying the "reasonable jury" and "substantial evidence" rules expressly disapprove of the "no evidence" standard.[175] Two decisions assert that the constitutional standard for appellate review of jury verdicts is the same as the standard of review under Rule 52 for district judge opinions.[176] One court applying the "substantial evidence" rule insisted that "merely suggestive" evidence will not suffice[177]—a view that certainly seems on its face quite different than the "no evidence" or even "reasonable jury" standards. Yet on the whole these widely varying formulations appear to have little substantive content. Evaluated in the abstract, it would be difficult to explain or understand just what a court meant, for example, by the "reasonable jury" or "substantial evidence"

172. *In re* Corrugated Container Antitrust Litigation, 756 F.2d 411, 418 (5th Cir. 1985); Perry v. Stewart Title Co., 756 F.2d 1197, 1205-06 (5th Cir. 1985).

173. Dixon v. International Harvester Co., 754 F.2d 573, 587 (5th Cir. 1985); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1143 (5th Cir. 1985); Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1245 (8th Cir. 1985); J.E.K. Industries, Inc. v. Shoemaker, 763 F.2d 348, 352-53 (8th Cir. 1985); Keiser v. Coliseum Properties, Inc., 764 F.2d 783, 785 (11th Cir. 1985); Trans-World Manufacturing Corp. v. Al Nyman & Sons, Inc., 750 F.2d 1552, 1560-61 (Fed. Cir. 1984).

174. Grogan v. General Maintenance Service Co., 763 F.2d 444, 447 (D.C. Cir. 1985); Gutierrez v. Exxon Corp., 764 F.2d 399, 402 (5th Cir. 1985); O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1549 (11th Cir. 1984). *See also* Transgo, Inc. v. AJAC Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985) (substantial evidence, reasonable, clear error); Dartez v. Fibreboard Corp., 765 F.2d 456, 469, 471 (5th Cir. 1985) ("any evidence" and "any substantial evidence"); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1137, 1139 (7th Cir. 1985) (rational, reasonable); Okeson v. Tolley School Dist. No. 25, 760 F.2d 864, 868 (8th Cir. 1985) (reasonable, rational, substantial evidence); Park v. El Paso Board of Realtors, 764 F.2d 1053, 1059 (5th Cir. 1985) (substantial evidence, reasonable, fair); Smith v. Monsanto Chemical Co., 770 F.2d 719, 722 (8th Cir. 1985) (reasonable, rational evidence, "all one way"); Smith v. Updegraff, 744 F.2d 1354, 1366 (8th Cir. 1984) (reasonable, rational evidence, "all one way").

175. J.E.K. Industries v. Shoemaker, 763 F.2d 348, 353 (8th Cir. 1985); Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1307 (7th Cir. 1985); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1213 (7th Cir. 1985); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984).

176. Transgo, Inc. v. AJAC Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985); Tullos v. Resource Drilling, Inc., 750 F.2d 380, 385 (5th Cir. 1985).

177. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1413 (7th Cir. 1984). This decision stands in stark contrast to the common law rule that, "[i]f there be circumstantial evidence only slightly tending to prove a fact, the demurring party is required to admit that fact to be absolutely true before the opposite party will be required to join in the demurrer." Pickel v. Isgrigg, 6 F. 676, 678 (C.C.D. Ind. 1881).

standard, or when, if at all, the different formulations might in practice yield different results. The appellate decisions provide no substance to any of these vague formulations. None of the opinions applying the "reasonable jury" standard explain how much evidence a reasonable jury would require; the relevant opinions are every bit as uninformative regarding how much evidence is "substantial evidence." Equally significant, there is no perceptible correlation between the standard which a panel applies and the result which it reaches. Indeed, a review of the appellate decisions strongly suggests that these formulations do not function as legal standards at all, but are merely rhetorical flourishes which open or close each opinion. In decisions concluding that there is "no evidence" to support a jury verdict, that formulation often seems intended to emphasize the weakness of the jury-winner's position, rather than to establish a broad range of situations in which jury verdicts would be upheld.[178] It is common, and perhaps understandable, for appellate opinions in the same circuit to use different formulations.

One can, of course, readily hypothesize cases in which the differences among these standards might well mean something, or construct standards which would have clear, predictable, and distinct meanings. Suppose, for example, that the evidence in a case showed that the decedent in an automobile accident had been run off the road by a negligently driven blue car, and officials at a nearby police roadblock could identify all the blue cars on the road at the time. If the defendant were driving one of two such cars, there would be a one in two chance that he had committed the tort; if there were three such cars, the odds would be one in three, and so on. Odds of one in one hundred might satisfy the no evidence standard, but not the substantial evidence rule; it would be possible, at least in theory, to impart a different specific probability requirement to each of the various alternative formulations. In hypothetical situations of this sort, where it might be feasible to calculate the probability that a jury's verdict was correct, the "no evidence" rule seems particularly unappealing; something would surely be wrong with a rule that required that a motion for a directed verdict be denied so long as there was any probability above zero, even if only one in a million, that a particular defendant was the individual who had negligently injured a plaintiff.

But the actual problems that arise in appellate decisions are nothing like this hypothetical. In the case discussed above, any mathematician could mechanically calculate the probability that the defendant was the tortfeasor; the mathematician would not need to understand anything about automobile accidents, or even know what a car is or what the word "blue" means. In real life, however, the problem faced

178. *See* cases cited *supra* note 169.

by juries and the appellate courts is not the making of such mathematical calculations, but the assessment of evidence in the context of their pre-existing knowledge of and assumptions about the world. In an actual accident case there would be no police roadblock to limit the group of possible tortfeasors; a jury would have to compare the description of the vehicle, for example, "dark, recent model, and sporty" with the defendant's car, say, a brown 1987 Porsche, bearing in mind, for example, what ordinary people mean by the words "sporty" and "recent model," and whether many cars meeting that description existed in the locale involved. Depending on the assumptions and experience of the jury or appellate court, either might conclude that the defendant almost certainly was, or very probably was not, the cause of the accident.

Most factual questions that come before juries involve neither probability calculations nor conflicting testimony from eyewitnesses to the disputed event. The task of the jury, rather, is to decide what occurred by drawing inferences about the disputed events from non-conclusive evidence. Here, too, the circuit courts today clearly depart from the standards previously established by the Supreme Court. The Supreme Court repeatedly emphasized in the past that the process of inference drawing is ordinarily consigned to the jury.[179] More important, the Court has offered a detailed practical explanation of *why* the seventh amendment confers the responsibility for inference drawing on juries rather than judges. In an 1874 decision in *Sioux City & Pacific Railroad Co. v. Stout* the Court observed:

> [I]t is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. . . . It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the

179. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 34-35 (1944) ("It is the jury, not the court, which . . . weighs the contradictory evidence and inferences . . . and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."); Standard Oil Co. v. Brown, 218 U.S. 78, 86 (1910) ("[W]hat the facts were . . . and what conclusions were to be drawn from them were for the jury and cannot be reviewed here."); Hyde v. Booraem & Co., 41 U.S. (16 Pet.) 232, 236 (1842) ("We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury. . . .").

> law to obtain. It is assumed that twelve men know more of the more common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.[180]

What the Court said a century ago about the differing knowledge and experiences of judges and juries is even more true in our own time. With the possible exception of certain monastic orders, there are few groups in America today which have had a narrower personal acquaintance with the common affairs of life than do federal judges. The typical federal judge went directly from college to law school and then to private practice or academia before being elevated to the bench. Few if any federal judges at any point during their adult lives have ever applied for or held a non-legal job, been out of work, had an unpleasant encounter with the police, handed out leaflets, lived on a meager budget or welfare, or seen the inside of a factory, a mine, a social security office, or a prison. The overwhelming majority of federal judges are white men who are necessarily ignorant of many of the day-to-day experiences of minorities and women, and who may be blissfully unaware of the ways in which those experiences are often dramatically different than their own.

The experiences which most federal judges lack are ordinarily vital to the process of drawing inferences from evidence. The significance of testimony or other forms of proof depends largely on the nature of the society within which it arose. Evidence that a defendant was driving on the left side of a two-way street would support an inference of negligence in New York or Florida, but not in England or Australia. The understanding and experiences which a trier of fact brings to a case is often of decisive significance in the selection of inferences to be drawn from the evidence. The importance of that background is critical to the constitutional requirement that fact finding be left in the hands of a jury. So long as the background information relevant to evaluating evidence falls within the probable understanding of the men and women likely to comprise a jury, federal judges should be especially reluctant to differ with the inferences which the jury chose to draw. The reason for that desirable reluctance is more than simply constitutional—as a practical matter judges will often be less competent than jurors to evaluate the evidence.

Considered in light of the Supreme Court's comments in *Stout*, it is readily apparent how and why the appellate courts have gone astray in recent years. In a large number of the instances in which circuit courts have overturned jury verdicts, the appellate panel disagreed with the

180. 84 U.S. (17 Wall.) 657, 663-64 (1874).

inferences which the jury had drawn from the evidence, and in many of these cases the evaluation of the evidence at issue turned largely on a knowledge of "the common affairs of life," knowledge which federal judges were likely to lack.

The largest group of these cases involve problems connected with the workplace and employment. In *Jasperson v. Purolator Courier Corp.*,[181] the plaintiff alleged that she had difficulty obtaining a job because her previous employer had refused, in violation of state law, to provide a letter explaining why she had lost a previous position as a courier guard. The Eighth Circuit held that a jury could not infer that the plaintiff had been injured unless there was express evidence that a particular employer had refused to hire the plaintiff because she had no such letter of recommendation.[182] Members of the jury, who unlike the appellate panel doubtless had considerable actual experience applying for jobs, might well have drawn an inference of injury because they knew from their own lives that employers generally or uniformly look askance at applicants who lack such recommendation letters. Federal judges, on the other hand, are unlikely to have the foggiest idea whether such letters are important when an unemployed worker is looking for a new job.

In *Plante v. Hobart Corp.*[183] and *Powell v. J.I. Posey Co.*[184] the appellate courts held that a jury could not reasonably infer that a factory worker and a nurse, respectively, would have taken greater precautions had the defendants provided them with effective warnings about the dangers of their products. The work experience of ordinary jurors, unlike the jobs held by lawyers and judges, was likely to entail exposure to potentially hazardous equipment, and thus to provide jurors with a direct understanding of how workers respond to warnings about such dangers. In *Bristow v. Daily Press, Inc.*[185] the Fourth Circuit disagreed with and reversed a jury verdict that working conditions on a particular job were so bad that "no reasonable person" would have stayed. A federal judge, whose every job was in all probability safe, comfortable, and handsomely paid, would have no better idea what working conditions would be intolerable to an ordinary man or woman than might the Sultan of Brunei. In *Smith v. Monsanto Chemical Co.*[186] the plaintiff alleged that he was fired because of his race, and attacked as pretextual the employer's argument that he had been dismissed for taking a company towel into the firm's parking lot to wipe off his car. Although

181. 765 F.2d 736 (8th Cir. 1985).
182. *Id.* at 742.
183. 771 F.2d 617 (1st Cir. 1985).
184. 766 F.2d 131 (3d Cir. 1985).
185. 770 F.2d 1251, 1255 (4th Cir. 1985).
186. 770 F.2d 719 (8th Cir. 1985).

the plaintiff proved that white employees regularly took towels out of the plant for the same or similar purposes, the appellate panel insisted that the jury could not infer racial motivation absent additional evidence that the employer knew of this practice.[187] Jurors with personal experience in industrial plants might well have based such an inference on their own knowledge that management officials, as a practical matter, would ordinarily be well aware of the existence of any such employee practice.[188]

Employment discrimination cases combine two types of circumstances which, although unfamiliar to judges, are well within the experiences which jurors ordinarily bring to their deliberations. First, of course, these cases usually arise in plants or offices whose personnel practices are quite unlike anything a lawyer or judge might personally have experienced. Most members of the bar probably have never in their adult lives filled out a job application or sat in the personnel office of a commercial employer, and most have no personal understanding of the typical relationships that exist, for example, between supervisors and workers on a plant floor. Equally important, an appellate panel composed only of white males—as the vast majority of court of appeals panels are—will have no personal experience with discrimination on the basis of race or sex. Jurors who have had such experiences are more likely to be familiar with the telltale comments or attitudes that signal an invidious motive, or with the types of excuses used to explain away such discrimination. A trier of fact must also bring to the evaluation of the evidence some understanding of whether the type of discrimination alleged is widespread or virtually unheard of. A black or female juror who has been on the job market for twenty years can better make that type of judgment than a white male who has spent the same period of time on the bench.

A number of these problems are well illustrated by the issues in *Craft v. Metromedia, Inc.*,[189] the celebrated case involving a female television anchor removed from that position allegedly because the station management believed she was too unattractive and insufficiently deferential to men. The action was tried on a civil fraud theory, the plaintiff claiming that the defendants, in order to recruit her from another station, had falsely represented that they had no intention of insisting on a "makeover" of her appearance. The plaintiff had made clear during her interview for the position that she would not take the

187. *Id.* at 724.

188. *See also* Vippolis v. Village of Haverstraw, 768 F.2d 40 (2d Cir. 1985) (overruling jury inference that police officer would not have utilized unconstitutionally excessive force and engaged in false arrest if the officer had been sent to a police academy, as required by state law, rather than been provided easual on-the-job training).

189. 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

proffered job if a "makeover" were contemplated, having been subjected in an earlier job to such treatment, which she regarded as unprofessional for a journalist. Craft began work in January 1981; by May 1981, Metromedia officials ordered precisely the types of changes she had feared, ultimately issuing a "clothing calendar" specifying what she would wear on a day by day basis. In August 1981, Craft left the station in Kansas City and returned to her old position in California.[190] The case was tried twice before federal juries in St. Louis; both juries contained a significant number of women,[191] and both returned verdicts for the plaintiff.[192] An all-male panel of the Eighth Circuit reversed.

The central claim in *Craft* concerned a deceptive recruiting practice that might well be familiar to jurors but not judges—luring a desired employee into changing jobs, and in Craft's case into moving several thousand miles, with promises the employer intends to disregard once the employee has given up his or her former job and would be in no position to complain. *Craft* also involved a number of issues which the male appellate judges were uniquely ill-equipped to evaluate. The appeal turned in part on whether the changes in appearance sought by the station constituted a "makeover," the term used in the representations made to recruit Craft. The appellate judges suggested, based on their own reading of the record, that many if not all the changes subsequently demanded by the station fell outside of what the parties would have regarded as a "makeover." The male judges seem to have had no idea, as most men would not, that "makeover" has for several decades been a term in common parlance among women and has a fairly well understood meaning that refers to changes large and small in a woman's clothes, jewelry, hair, and cosmetics that are designed to bring about a substantial "improvement" in the woman's physical appearance. Judges Donald Lay, Theodore McMilligan, and John Gibson were certain that changes in clothing were not encompassed within the meaning of the term "makeover";[193] any reader of *Glamour, Cosmopolitan* or *Vogue* would have known otherwise.[194] The term "makeover" also has among women a connotation at least as important as the types of changes encompassed. The fundamental idea implicit in the concept of a makeover, a concept actively encouraged if not invented by fashion magazines and cosmetic manufacturers, is that the overall physical appearance of a woman can be substantially improved by the types of changes encompassed in a "makeover," and that such changes

190. *Id.* at 1208-09.

191. There were four women on the first 12-member jury, and six women on the second 12-member jury. Interview with Dennis Egan, counsel for plaintiff (Oct. 23, 1987).

192. *Craft*, 766 F.2d at 1210.

193. *Id.* at 1220.

194. *See, e.g., Holiday Makeovers to Make you Shine*, GLAMOUR, Dec. 1987, at 194.

in physical appearance ought to be of central importance to the made-over woman. A woman would probably understand that when a prospective female employee expressed objections to any "makeover" by her employers, that employee was not stating that she was committed to her particular hairstyle, makeup, and wardrobe, and would tolerate only modest changes, but that she did not want to work for a station that attached substantial importance to, and would contemplate controlling, whether a television journalist wore designer fashions, a particular number of ruffles and bows, or one rather than two strings of pearls.[195] If that were the meaning of the "no makeover" agreement, as a jury might well have concluded, then even on the Eighth Circuit's view of the remaining facts the jury verdicts in *Craft* would have been proper.

A jury may also be in a better position to draw inferences from the evidence because jurors bring to their deliberations an understanding of relevant local circumstances. In *Pietroniro v. Borough of Oceanport*[196] the plaintiff claimed that municipal officials in a New Jersey city, allegedly acting to further their own financial interests, had denied the plaintiff certain assistance required by federal law in relocating a store that had been closed as a result of urban renewal. The only commercially viable alternative site was apparantly a tract that required a zoning variance before the plaintiff could operate a store there. Although the individual defendants included both the mayor and a member of the city council, the Third Circuit panel—composed of three judges from Pennsylvania—believed that individual defendants and the city itself were powerless to do more for the plaintiff because a legally separate entity—the Oceanport Board of Adjustment—had the authority to grant the needed variance. Neither the mayor nor members of the council served on the Board. A New Jersey jury with an understanding of local political realities, on the other hand, might well have believed that in the real world a mayor and city council could have had significant influence, or even absolute control, over the actions of a local zoning board had those officials sought, as the law required, to assist in the relocation.[197]

In other cases, although the jury might have had no greater understanding of the subject matter than the appellate courts, jurors were at least as competent as judges to draw the critical inferences. In *Gonzalez*

195. *See, e.g., Craft*, 766 F.2d at 1209 n.2, 1214.

196. 764 F.2d 976 (3d Cir. 1985).

197. *See also* Neubauer v. City of McAllen, Texas, 766 F.2d 1567 (5th Cir. 1985) (litigation arising out of attempt to organize police union and related referendum); Park v. El Paso Board of Realtors, 764 F.2d 1053 (5th Cir. 1985) (independence of local board of realtors from realtors themselves); *cf.* White v. Register, 412 U.S. 755, 769-70 (1973) (district judge's decision upheld because it turned on "an intensely local appraisal" of the evidence).

v. Volvo of America Corp.[198] the plaintiff alleged that he was injured because a car manufacturer had failed to provide a warning that its station wagon was unsafe when pulling certain types of trailers. The court of appeals held that the Volvo at issue "was not dangerous beyond the expectations of ordinary consumers," since in deciding whether it was safe to drive the vehicle pulling the trailer, "[i]t is the advice of [trailer lessors], and not the warnings of automobile manufacturers upon which ordinary consumers . . . rely."[199] A panel of jurors would surely have had at least as good an understanding as a panel of judges about how "ordinary consumers" act in such circumstances.[200] In *Estate of Davis v. Johnson*[201] one of the plaintiffs sought damages for loss of society and companionship following the wrongful death of his father. The father had been institutionalized most of his adult life, and the son had seen him on average once a month during visits to the mental institutions where the father lived. The visits had continued throughout the father's life, despite the fact that the father was so severely disabled that he only rarely recognized his son. The jury concluded that the relationship between father and son was sufficiently substantive that the son was entitled to damages, while the appellate judges insisted that the son had "suffered no loss of society or companionship when his father died."[202] It may be difficult for most people to fully understand and appreciate the relationship that might exist between an individual and a severely disabled, even mute, parent, but the personal experiences of judges do not make them any better able than jurors to understand such a painful and difficult situation.

In a number of instances appellate courts and juries differed over whether the actions of defendants were merely negligent, as the judges believed, or were grossly negligent, willful, or deliberate, as the juries concluded.[203] Because of the considerable difficulty in ascertaining the precise mental state of a defendant at a point in the past, one cannot readily imagine circumstances in which, despite clear proof of negligence, a court could say that no reasonable jury could infer gross negligence, willfulness, or even malice. To make such distinctions, a trier of

198. 752 F.2d 295 (7th Cir. 1985).

199. *Id.* at 300. *See also* Conti v. Ford Motor Co., 743 F.2d 195, 198 (3d Cir. 1984) (effect on consumer of additional or more explicit warnings).

200. Since federal judges are considerably wealthier than the average juror, it is quite possible that jurors would be more likely to have had experience renting U-Haul trailers.

201. 745 F.2d 1066 (7th Cir. 1984).

202. *Id.* at 1074.

203. Clarkson v. Orkin Exterminating Co., Inc., 761 F.2d 189, 191 (4th Cir. 1985) (reversing jury finding that misrepresentation was deliberate rather than merely negligent); Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 137 (8th Cir. 1985) (reversing jury finding of willfulness); Lavicky v. Burnett, 758 F.2d 468, 475, 477 (10th Cir. 1985) (affirming jury finding that the defendants did not act in good faith but reversing jury finding of malice); Rorex v. Traynor, 771 F.2d 383, 388 (8th Cir. 1985) (affirming verdict of negligence, but reversing verdict of gross negligence).

fact must evaluate the degree of apparent danger and of unreasonableness involved, and consider whether the levels of both were sufficiently high that the defendant must have foreseen and intended the consequences of his or her actions.[204] Almost by definition, reasonable men and women could disagree over these issues.

In most instances appellate decisions rejecting the inferences drawn by a jury consist largely of a summary of the evidence and an assertion that it fails to meet whatever vague legal standard the panel has announced it will apply. In a few cases, despite repeated Supreme Court admonitions that appellate judges may not attempt to assess the weight of the evidence before the jury,[205] the courts of appeals acknowledge that they have done precisely that.[206] In other instances, to avoid the appearance of having merely reweighed the evidence, the appellate courts have resorted to several analytic, or perhaps merely semantic, devices to justify their actions.

The first of these devices is to assert that the jury's verdict is "speculative,"[207] a perjorative term which suggests that the jury could have had no real idea what the facts were, and must therefore have reached its conclusion by guesswork. An argument that the relevant evidence is weak—an argument on its face insufficient to overcome the restrictions of the seventh amendment—is recast to sound like a far more serious

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204. *See* W. PROSSER & W. KEETON, LAW OF TORTS § 8, at 36 (5th ed. 1984) ("[T]he distinction between intent and negligence obviously is a matter of degree.").

205. *See* Gunning v. Cooley, 281 U.S. 90, 94 (1930) ("Issues that depend on the . . . weight of evidence are to be decided by the jury."); Baltimore & O. R.R. v. Groeger, 266 U.S. 521, 524 (1925) ("The . . . weight and probative value of evidence are to be determined by the jury and not by the judge."); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 91 (1891) ("We have no concern with questions of . . . the weight to be given to the evidence."); Lancaster v. Collins, 115 U.S. 222, 225 (1885) ("this court cannot review the weight of the evidence. . ."); Phoenix Ins. Co. v. Doster, 106 U.S. 30, 32 (1882) ("Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury. . . .").

206. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410-13 (7th Cir. 1984):

> We do . . . weigh the evidence to the extent of determining whether the evidence to support the verdict is *substantial*. . . . We have concluded that none of the three items of evidenee adduced by La Montagne is sufficient by itself to support [the] verdict of age discrimination. In addition, we think that their combined weight is still insufficient. . . . [M]erely suggestive evidence is not substantial evidence.

(emphasis in original). *See also* Keiser v. Coliseum Properties, Inc., 764 F.2d 783, 785 (11th Cir. 1985) (appellate decision turns on the "quality and weight" of evidence supporting the disputed verdict); Gutierrez v. Exxon Corp., 764 F.2d 399, 402 (5th Cir. 1985).

207. Conti v. Ford Motor Co., 743 F.2d 195, 198 (3d Cir. 1984) ("the evidence must be such as to support a reasonable inference, rather than a guess. . . . [T]he jury's conclusion was based on . . . mere speculation"); Romero v. National Rifle Ass'n of Am., Inc., 749 F.2d 77, 81 (D.C. Cir. 1984) ("sheer conjecture"). A number of decisions affirming jury verdicts apply this same standard. Stacey v. Allied Stores Corp., 768 F.2d 400, 409 (D.C. Cir. 1985); J.E.K. Industries, Inc. v. Shoemaker, 763 F.2d 348, 353 (8th Cir. 1985); Air et Chaleur, S.A. v. Janeway, 757 F.2d 489, 493 (2d Cir. 1985); Cazzola v. Codman & Shurtleff, Inc., 751 F.2d 53, 55 (1st Cir. 1984); Delvaux v. Ford Motor Co., 764 F.2d 469, 473 (7th Cir. 1985).

assertion, that the jury, finding the evidence of no value, essentially flipped a coin. Such jury conduct would of course provide a ground for reversal, but no appellate court in the year studied ever seriously suggested that any extrinsic basis existed for believing that the jury literally arrived at its decision in such an arbitrary manner. This approach by appellate courts marks the revival of a doctrine that has been expressly and repeatedly repudiated by the Supreme Court. In *Lavender v. Kurn*[208] the decedent's body was found beside the tracks where he had worked as a switch operator. The administrator of the decedent's estate argued that the death had been caused by a hook extending from a passing train; the railroad contended the decedent had been murdered during a robbery. Since no eyewitness to the death could be found, a state appellate court overturned the jury verdict in favor of the plaintiff, insisting it was a matter of "mere speculation and conjecture" whether the fatal blow had been struck by a train or an assailant.[209] The Supreme Court reversed, explaining:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.[210]

Other Supreme Court decisions have made clear that, where there was some evidence to support the conclusion that an injury was caused by the acts of the defendant, the Court would not entertain any argument that the evidence of causation, although present, was so modest that the actual cause of the injury was a matter of "speculation."[211]

The second recent appellate approach to overruling jury verdicts has been to single out, from among the issues which theoretically might have borne on the disputed inference, one particular subsidiary factual question, to declare that question of controlling legal significance, and then to reverse because the jury winner had failed to adduce evidence specifically addressed to the issue selected. In this manner an appellate court's disagreement with the inferences drawn by the jury is recast to resemble a finding that the prevailing party failed to adduce any evi-

208. 327 U.S. 645 (1946).

209. *Id.* at 651.

210. *Id.* at 653.

211. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 34-35 (1944); Webb v. Illinois Central R.R., 352 U.S. 512, 515-17 (1957); Gallick v. Baltimore & O. R.R., 372 U.S. 108, 112-14 (1963). Justice Harlan attempted without success in 1957 to revive the old speculation doctrine. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 564 (1957) (Harlan, J., dissenting).

dence on a critical and distinct element of his claim. In *Vippolis v. Village of Haverstraw*,[212] for example, city officials chose to disregard a state law requiring police officers to be trained at a police academy; new recruits were simply given a gun and assigned to work for several months with an experienced officer. One such new officer, who was never issued even a police manual, allegedly attacked Vippolis over a minor traffic violation. A jury found the attack unconstitutional and concluded that the city could be held liable because the attack was due to inadequate training. The Second Circuit reversed, insisting that no jury could "rationally" find for the plaintiff absent specific evidence regarding what was taught in the police academy and what the officer had learned through his on-the-job experiences. There was, of course, *some* evidence that the beating was due to city policy; the jury knew not only that the city had policy X rather than the state mandated policy Y, but also that X consisted of on-the-job experience, while Y was a formal training program. The Second Circuit's requirement of more specific information about the details of the program[213] was in effect a holding that no rational jury could infer that an untrained police officer would act less professionally than a graduate of a state police academy. That is a conclusion which a visitor from Mars might well draw from viewing the slapstick *Police Academy* movies, but most natives of this planet know otherwise. Because judges cast opinions of this sort in terms of the prevailing party's failure to adduce certain "essential" information, the language of the decision not only obscures the fact that the appellate court is reversing a jury inference, but also avoids any need for the court to explain why, under the particular circumstances of the case, the evidence that was available could not have supported the jury's conclusion.[214]

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212. 768 F.2d 40 (2d Cir. 1985).

213. *Id.* at 44-45: "For a victim of police brutality to establish the requisite causal connection between his injuries and a municipal policy of inadequate training, he must make some showing that specific deficiencies in the training given police officers led the misbehaving officer to engage in the alleged misconduct."

214. In Bristow v. Daily Press, Inc., 770 F.2d 1251 (4th Cir. 1985), the jury found that, because of the plaintiff's age, his employer had subjected him to a variety of practices that amounted to a constructive discharge. One of the plaintiff's complaints was that he was required to pay the employer approximately $250 to cover part of his customer's uncollectible debts. The court of appeals, in overturning the verdict, dismissed as irrelevant the incident involving the $250 because there was "no evidence" that the employer had not treated other workers in the same manner. *Id.* at 1256. Having thus announced and found a violation of that special additional evidence rule, the appellate panel neither characterized its decision as a rejection of the jury's inferences nor explained how an inference of unfair treatment could not have been based on the other evidence.

The other difficulty with such per se evidence rules is that if the missing evidence had the decisive exculpatory effect theorized by the appellate court, the losing party would surely have introduced it. In *Bristow*, for example, there was no suggestion in the Fourth Circuit opinion that any defense witness had asserted that other employees had ever been required to pay out of their

The third recent approach is to assess the inferential value of the evidence wholly outside of the trial court context in which the jury itself evaluated that evidence. During the one-year period studied, there is not a single instance in which an appellate panel referred to the content of the arguments made by trial counsel either to the jury or to the district judge. The treatment of jury instructions varies considerably. A small number of appellate decisions do rely on the instructions to delineate the factual question at issue;[215] most decisions, however, contain no reference to those instructions, even in circumstances in which the terms of those instructions seem critical to evaluating the sufficiency of the evidence.[216] A third group of opinions takes an even more extreme position, holding that judgment n.o.v. is proper even if the evidence was sufficient under jury instructions that were not challenged at trial, as long as the evidence would have been insufficient under a legal standard which the losing party never advanced in the district court at all.[217]

The Supreme Court has indicated in the past that disputes about the sufficiency of the evidence must be resolved in light of both the jury instructions and the contentions advanced by the parties at trial. In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*[218] a jury, after finding that the injuries of a plaintiff longshoreman were the result of negligence, rejected the claim of the defendant boat owner, Ellerman, for indemnification by the stevedoring company which employed the longshoreman. The court of appcals, assuming that the longshoreman's injuries were the result of unsafe working conditions in the hold of the

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own pockets the debts of their customers. In *Vippolis* the city unsuccessfully tried to introduce evidence about the details of the training program. *Vippolis*, 768 F.2d at 42. Rather than remanding for a new trial to consider what the evidence might show, the appellate court precluded any jury from considering that evidence by holding that the plaintiff had an absolute obligation to introduce it. So far as appears from the opinion in *Vippolis*, no prior Second Circuit decision had ever framed any such requirement.

215. Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 771 (9th Cir. 1984); Lavicky v. Burnett, 758 F.2d 468, 477 (10th Cir. 1985); Rock v. McCoy, 763 F.2d 394, 397 n.3 (10th Cir. 1985).

216. In Gonzalez v. Volvo of Am. Corp., 752 F.2d 295 (7th Cir. 1985), the court of appeals analyzed the evidcnce in light of legal standards found in the *Restatement (Second) of Torts* and Indiana case law. *Id.* at 299-301. Nothing in the opinion indicates, however, whether those standards were embodied in the jury instructions. *See also* Gray v. Manitowoc Co., 771 F.2d 866, 868-70 (5th Cir. 1985) (applying legal standards in *Restatement (Second) of Torts* and Mississippi case law); Llaguno v. Mingey, 763 F.2d 1560, 1567 (7th Cir. 1985) (applying legal standards announced in Supreme Court fourth amendment decisions); Manguia v. Chevron Co., U.S.A., 768 F.2d 649, 652-54 (5th Cir. 1985) (applying legal standards derived from Fifth Circuit decisions interpreting the Jones Act); Plante v. Hobart Corp., 771 F.2d 617, 620 (1st Cir. 1985) (applying legal standard derived from *Restatement (Second) of Torts*); Spence v. Mariehams R/S, 766 F.2d 1504, 1506-07 (11th Cir. 1985) (applying legal standards based on appellate decisions construing Longshoremen and Harbor Workers' Compensation Act).

217. Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 825-26 n.17 (2d Cir. 1984); Hanson v. Ford Motor Co., 278 F.2d 586, 592-93 (8th Cir. 1960).

218. 369 U.S. 355 (1962).

boat, reasoned that the evidence compelled a finding of liability against the stevedoring company for permitting its longshoremen to work in an unsafe place, as well as against the ship owner who had created those unsafe conditions.[219] In reinstating the jury verdict, the Supreme Court expressly evaluated the dispute in light of the jury instructions, which were quoted at length in the Court's opinion. The Court concluded that the jury had been charged that it could also impose liability on an alternative ground of unseaworthiness of the bands holding the bales, a claim on which only the shipowner could have been held liable. The Court emphasized that the ship owner had not objected to this critical instruction, and that the disputes about the safety of the bands had been an issue during the trial.[220] If the issue on appeal is whether there was an adequate basis for the jury's resolution of the issues actually presented to it, the terms of the jury instructions *are* clearly of central importance in defining what factual issue the jury was directed to resolve.[221] If a jury was charged, for example, that liability could be based on mere negligence, it would ordinarily be of no importance whether or not the evidence was sufficient to support an inference of willfulness or malice. The difference between the issues as framed on appeal and as presented to the jury may not be that stark, but where any differences exist, it is the jury instruction which must control. A litigant, of course, is free to challenge a jury instruction on appeal, provided that that issue was presented and preserved below, and to argue, for example, that the instructions incorrectly describe the factual question which the jury should have been asked to decide. But only if such a challenge were sustained on appeal would there be reason to consider whether the evidence would have been sufficient to support a verdict under instructions which might have been but were not given at trial.[222]

It will often be helpful to examine challenges to jury verdicts, as was done in *Atlantic & Gulf*, in light of the specific factual contentions advanced by the parties at trial. The closing arguments of counsel, in particular, can provide an appellate court with an invaluable perspective from which to evaluate appeals concerning the sufficiency of the

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219. Beard v. Ellerman Lines, Ltd., 289 F.2d 201, 207 (3d Cir. 1961).

220. *Atlantic & Gulf*, 369 U.S. at 363-64:

> The question of the manner in which the New York cargo had been stored was prominent in the case; and the trial judge left it to the jury on the question of [the ship owner's] negligence. On the issue of the [stevedore's] liability his charge was no more precise than has been indicated. Yet [the ship owner] did not ask for more on this phase of the controversy. In their requested charge they were no more specific. . . .

221. *See* Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 121-22 (1875) ("It is the duty of a court in its relation to the jury to . . . mak[e] plain to them the issues they are to try . . . [and] instruc[t] them in the rules of law by which th[e] evidence is to be examined and applied. . . .").

222. For the reasons set out below, this is an issue which ought ordinarily be considered in the first instance by the trial judge.

evidence. It is frequently difficult on the basis of the testimony and exhibits alone to understand clearly the nature of the factual disputes which arose at trial. In some cases there will be matters of fact about which the parties agreed, and which thus were simply ignored by both during the presentation of the evidence. Similarly, as the Supreme Court noted in *Wainwright v. Witt*, the evidence actually introduced may suggest to an appellate court the existence of an issue which was not seriously presented or pursued at trial because the attorneys were aware of circumstances which made that line of inquiry clearly unfruitful.[223] By using the closing arguments as a point of departure, an appellate court can minimize the danger that it might resolve the case on the basis of some issue extraneous to the actual factual disputes at trial.

In addition, due deference to the preeminent factfinding role which a jury plays under the seventh amendment dictates that a party be required to present its factual arguments to the jury itself. As a general rule a litigant may not advance on appeal factual or legal contentions not raised and preserved below. A party appealing the denial by a district court of a motion for a directed verdict or judgment n.o.v. must ordinarily confine its brief on appeal to arguments that were first made to the trial judge who heard the motion. Rule 50 of the Federal Rules of Civil Procedure requires that a motion for a directed verdict "shall state the specific grounds therefor."[224] The manifest purpose of this rule—to permit the trial judge to consider in the first instance the contentions of the moving party—would clearly be frustrated if the movant could offer in the appellate courts grounds for reversal which had never been included in its Rule 50 motion.

It is no less important that such factual contentions also be squarely presented to the jury itself. The jury trial will be merely a "tryout on the road," rather than "the main event,"[225] if litigants are permitted to defer framing their factual contentions until the case is on appeal. It seems unlikely that the framers of Rule 50 contemplated that a trial judge presented with a motion for judgment n.o.v. could entertain with regard to the sufficiency of the evidence arguments that had never been presented to the jury itself. In virtually any case it will be

223. Wainwright v. Witt, 469 U.S. 412 (1985), suggests that the lack of an argument or objection by counsel at trial might well reflect a general agreement as to what the facts were. Both the majority, and Justice Stevens in a concurring opinion, indicated that the trial court arguments of counsel were of substantial importance in assessing whether the trial judge erred in his factual finding regarding the mental state of a prospective juror: "[R]espondent's counsel chose not to question Colby himself, or to object to the trial court's excusing her for cause. . . . [F]rom what appears on the record it seems that at the time Colby was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting." *Id.* at 434-35. *See also id.* at 436 n.3 (Stevens, J., concurring).

224. FED. R. CIV. P. 50(a).

225. *Cf.* Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985).

possible for an attorney with a modicum of ingenuity to frame some hypothetical question not addressed by the evidence, or to imagine some possible inference never argued for at the trial itself. The central issue on an appeal from the denial of a motion for a directed verdict or for judgment n.o.v., however, should be the sufficiency of the evidence bearing on the factual disputes actually presented to the jury, not the ability of appellate counsel to conjure up new factual issues, however intriguing, which the jury itself was never asked to decide.

C. Conflicting Evidence

Although the standard for evaluating the probative value of evidence supporting a jury's verdict raises some fine theoretical issues and has been framed in varying ways by the Supreme Court, the Court has found no difficulty in deciding how to treat evidence that tended to support the verdict rejected by the jury. The Supreme Court has repeatedly insisted that an appellate court should simply disregard whatever evidence militated against the verdict actually reached by the jury.[226] If in a given case there was sufficient evidence to support the jury's verdict, any evidence offered by the losing party would merely have created a conflict in the evidence; such conflicts, the Court has reiterated, are always to be resolved by the jury.[227] In *Corinne Mill, Canal & Stock Co. v. Toponce*[228] the jury sustained various claims by the plaintiff employee against his former employer. In upholding the verdict the Supreme Court commented:

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226. Dennis v. Denver & R.G. W. R.R., 375 U.S. 208, 210 (1963) ("[t]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion"); Basham v. Pennsylvania R.R., 372 U.S. 699, 701 (1963) ("[t]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion"); Webb v. Illinois Cent. R.R., 352 U.S. 512, 513-14 (1957) ("[i]n passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to *support*" the verdict) (emphasis added); Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949) ("[i]n passing upon whether there is sufficient evidence to submit an issue to the jury we need look to the evidence and reasonable inferences which tend to *support*" the verdict) (emphasis added); Lavender v. Kurn, 327 U.S. 645, 653 (1946) ("[t]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion"); Lumbra v. United States, 290 U.S. 551, 553 (1934) ("[w]e assume as established by all the facts that the evidence *supporting* petitioner's claims reasonably tends to prove") (emphasis added). *See* Hepburn v. Dubois, 37 U.S. 743, 745 (1838) ("the finding of the jury . . . must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence").

227. Gunning v. Cooley, 281 U.S. 90, 94 (1930) ("Where uncertainty . . . arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury."); Richmond & Danville R.R. v. Powers, 149 U.S. 43, 47 (1893) ("It is true that there was testimony tending to show a different state of facts. . . . But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court. . . .").

228. 152 U.S. 405 (1894).

> It is unnecessary to refer to the testimony which tends to weaken the scope of these . . . statements of the plaintiff . . ., because such conflict presents but a mere question of fact, upon which the verdict of the jury is conclusive. . . . It is unnecessary to consider the contradictory testimony or to attempt to determine the actual facts in reference to this matter. It is enough that the jury by their verdict have practically affirmed the truth of the plaintiff's story.[229]

Although there are some instances in which the Court may have failed in practice to adhere fully to these principles,[230] the Supreme Court has never disavowed or questioned the doctrine that where there is sufficient evidence to support a disputed jury verdict, that verdict cannot be overturned because of contrary evidence offered by the losing party.[231]

These two closely related rules[232]—that conflicts in the evidence are for the jury and that the evidence of the losing party is to be disregarded—have both an historical and a practical basis. In his 1913 opinion proposing that the federal courts regard motions for judgment n.o.v. as a form of deferred demurrer to the evidence,[233] Justice Hughes acknowledged that for constitutional reasons this new type of motion would have to "be tested by the same rules" as a common law demurrer.[234] Justice Hughes correctly observed that a common law demurrer could not rely on "the defendant's evidence . . . to rebut what the other side aimed to establish, and to overthrow the presumptions, arising therefrom, by counter presumptions. . . ."[235] Similarly, Justice Hughes noted, a demurrer to evidence was improper "when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions, so that what the facts are remains uncertain, and may be

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229. *Id.* at 408-09.

230. *See* Brady v. Southern R.R., 320 U.S. 476, 480 (1943); Bowditch v. Boston, 101 U.S. 16 (1880).

231. This principle has its roots in the common law restrictions on a demurrer to evidence. "[I]t is utterly inadmissible to demur to the evidence, when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions." Johnson v. United States, 13 Fed. Cas. 868, 872 (C.C. Mich. 1830).

232. In most cases in which these rules apply, they are both applicable because the evidence offered by the losing party created a conflict in the evidence. It is, of course, conceivable that cases could arise in which only one or the other of the rules was applicable. That might occur if the prevailing party himself offered contradictory testimony, or if only the losing party had offered evidence on a particular issue, such as the existence of an affirmative defense.

233. Slocum v. New York Life Ins. Co., 228 U.S. 364, 400-428 (1913) (dissenting opinion).

234. *Id.* at 418.

235. *Id.* at 413-14 (quoting Fowle v. Alexandria, 11 Wheat 370). At common law a defendant could only offer a demurrer to evidence at the close of the plaintiff's case. *See supra* notes 87-90.

urged with more or less effect to a jury."[236] In 1793 a judge, acting on a demurrer to evidence or in any other way, could not have taken a case from a jury based on evidence offered by a defendant.[237]

In most instances the same rules follow as well from the more general principles regarding credibility and inferences. In the large number of cases in which the losing party seeks to rely on testimony inconsistent with the verdict, the jury's prerogative to disbelieve oral testimony would preclude an appellate court from relying on that evidence. For appellate courts, which only rarely (if ever) can undertake to evaluate the weight of the evidence offered by a prevailing party, the assessment of the comparative weight of contradictory evidence would be virtually impossible. Such an evaluation would require the appellate courts (1) to determine the probative value of the evidence supporting the verdict, (2) to determine the weight of the evidence of the opposing party, (3) to compare the relative weight of the two bodies of evidence, and (4) to fashion and apply some standard regarding how great a disparity in probative weight is sufficient to require reversal of the jury's own verdict. It is, as Justice Black suggested in a related context, inconceivable that judges could in this manner "weigh conflicting evidence with mathematical precision"[238] without intruding upon the constitutional prerogatives of the jury.

Although these two Supreme Court restrictions on appellate review of jury verdicts remain unquestioned in that Court, in the lower courts the rule forbidding consideration of the evidence of the losing party is now virtually a dead letter. The general practice of the appellate courts today is to insist that the correctness of a challenged jury verdict

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236. *Id.* at 415 (quoting Johnson v. United States, 13 Fed. Cas. at 872).

237. It would be possible to hypothesize a situation in which the evidence adduced by a defendant would render absurd a verdict for plaintiff—such as a wrongful death case in which, following testimony about an apparently fatal accident, the purported decedent was brought to the courtroom alive and well. In the real world, however, plaintiffs do not bring or at least juries do not sustain the claims in cases of that sort. None of the 1984-1985 cases studied, and none of the Supreme Court jury trial cases, involve circumstances even approaching that extreme hypothetical. In theory one might permit consideration of defense evidence to deal with such situations, but practical experience demonstrates that those situations do not in fact arise, and that the circuit courts which feel free to consider defense evidence consistently abuse that authority. Under these circumstances it seems far wiser to adhere to the common law rule which precluded consideration of defense evidence on a demurrer to evidence, bearing in mind that where that evidence seems overwhelming a new trial can always be ordered.

Throughout the nineteenth century the Supreme Court insisted that the only way a party challenging the sufficiency of the evidence could obtain relief was by a motion in the trial court for a new trial. Slocum v. New York Life Ins. Co., 228 U.S. 364, 397-98 (1913); Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899); Fowler v. Rathbone, 79 U.S. 102, 119 (1870); Schuchardt v. Allen, 68 U.S. 359, 371 (1863); Barreda v. Silsbee, 62 U.S. 146, 167 (1858); Zeller's Lessee v. Eckhert, 45 U.S. 118, 122 (1845); Parsons v. Bedford, 28 U.S. 443, 448 (1830).

238. Galloway v. United States, 319 U.S. 372, 405 (1943) (dissenting opinion).

is to be assessed by considering "all" the evidence.[239] In the Eleventh Circuit, for example,

> On motions . . . for judgment notwithstanding the verdict the court shall consider all of the evidence—not just that evidence which supports the non-mover's case. . . . If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper.[240]

In the Sixth Circuit reversal of a jury verdict is required if the "rebuttal testimony of defendant's experts . . . completely negated the probativeness of plaintiff's expert's testimony."[241] As a consequence of this approach, appellate panels routinely rely on the evidence of the losing party in overturning jury verdicts,[242] explaining that in their view the

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239. Crawford v. Edmondson, 764 F.2d 479, 487 (7th Cir. 1985); Dallis v. Aetna Life Ins. Co., 768 F.2d 1303, 1305 (11th Cir. 1985); Dixon v. International Harvester Co., 754 F.2d 573, 587 (5th Cir. 1985); Eyre v. McDonough Power Equip., Inc., 755 F.2d 416, 419 (5th Cir. 1985) ("On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just the evidence which supports the nonmover's case. . . ."); Grogan v. General Maintenance Serv. Co., 764 F.2d 444, 447 (D.C. Cir. 1985); Keiser v. Coliseum Properties, Inc., 763 F.2d 783, 785 (11th Cir. 1985) ("On motions . . . for judgment notwithstanding the verdict the Court should consider all of the evidence—not just the evidence which supports the non-mover's case. . . ."); Quaker City Gear Works v. Skil Corp., 747 F.2d 1446, 1454 (Fed. Cir. 1984) ("Under Quaker City's view we would look *only* to evidence in its favor to determine whether 'substantial evidence' supports [the verdict]. . . . The law is clearly to the contrary. . . . [Under] the standard governing the granting or denial of a motion JNOV . . . a court must (1) *consider all the evidence*") (emphasis in original); Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 269 (6th Cir. 1985); Walden v. United States Steel Corp., 759 F.2d 834, 837 (11th Cir. 1985) ("In reviewing the denial of a motion for judgment n.o.v., this court is obligated to consider all the evidence, not just the evidence supporting the non-moving party's case. . . ."); Western Plains Serv. Corp. v. Ponderosa Dev. Corp., 769 F.2d 654, 656 (10th Cir. 1985).

240. Keiser v. Coliseum Properties, Inc., 764 F.2d 783, 785 (11th Cir. 1985) (quoting Federal Kemper Life Assur. Co. v. First Nat'l Bank, 712 F.2d 459 (11th Cir. 1983)).

241. Leonard v. Uniroyal, Inc., 765 F.2d 560 (6th Cir. 1985).

242. In Bodzin v. City of Dallas, 768 F.2d 722 (5th Cir. 1985), the plaintiff was improperly arrested for criminal trespass on private property when he was in fact on a public right of way; in finding probable cause for the arrest, the Fifth Circuit expressly relied on the testimony of the defendants that they had believed in good faith and with justification that plaintiff was on private property. *Id.* at 724-26. *See also* Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340, 342 ("evidence submitted by Equitable, consisting of testimony by Christensen's immediate supervisor and another company executive, showed . . ."), 343 ("Equitable showed . . ."), 344 ("Equitable demonstrated a nonpretextual reason for its action,"); Craft v. Metromedia, Inc., 766 F.2d 1205, 1219 n.16 (8th Cir. 1985) (key officials of defendant "were convinced that the actions they took" did not violate the allegedly fraudulent representations they had made to plaintiff); Dartez v. Fibreboard Corp., 765 F.2d 456, 470 (5th Cir. 1985) (non-dangerousness of defendant's product established by "the deposition testimony of . . . a marketing consultant for Raymark"); Estate of Davis v. Johnson, 745 F.2d 1066, 1071 (7th Cir. 1984) (defendant official and other police officers "explicitly testified" they did not hear assault on decedent, and all "described [the assailant] as placid and 'very docile' "); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1144 (5th Cir. 1985) ("longtime . . . employee" of defendant testified that any asbestos dust generated by firm's

evidence adduced by that losing party was "overwhelming,"[243] when "[b]alanced against"[244] the evidence in support of the verdict. In theory, of course, it might matter whether a circuit was applying a "substantial evidence" rather than a "reasonable person" test. If a jury must be upheld if supported by "substantial evidence," there would seem to be no reason to inquire whether the evidence favoring the opposite conclusion was even more substantial. On the other hand, a "reasonable person" probably would consider all the evidence in deciding whether only one verdict could sensibly be reached. But none of the appellate courts have made such distinctions, and there is no indication that a court's willingness to rely on the evidence of the losing party is controlled or affected by which of these two legal standards has been utilized.

Paradoxically, the appellate courts which insist on considering the evidence of both the winning and losing parties, and which reverse verdicts in reliance on the latter, also routinely profess that only juries can resolve conflicts in the evidence.[245] These two lines of decisions co-exist because the appellate courts seem to regard as presenting "conflicting evidence" only those cases, such as differing accounts by two witnesses to the same event, in which the testimony of witnesses is in direct conflict, and in which one or the other of the witnesses must thus be lying or at least mistaken.[246] But the Supreme Court's holding with regard to conflicting evidence, like the limitations on common law demurrers, was not restricted to this narrow situation, but encompassed the more common case in which the testimony of the witnesses supported different inferences regarding the key disputed factual issue.

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product was too little to cause injury; "overwhelming weight of the evidence" is that that firm's product could not have harmed the plaintiff); *cf.* Leonard v. Uniroyal, Inc., 765 F.2d 560, 566 (6th Cir. 1985) (in another case the "rebuttal testimony of defendant's experts . . . completely negated the probativeness of plaintiff's expert's testimony").

243. Gray v. Manitowoc Co., 771 F.2d 866, 870 (5th Cir. 1985); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1144 (5th Cir. 1985).

244. *Gray*, 771 F.2d at 871.

245. Air et Chaleur, S.A. v. Janeway, 757 F.2d 489, 493 (2d Cir. 1985); Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 136 (8th Cir. 1985); Grogan v. General Maintenance Serv. Co., 763 F.2d 444, 447 (D.C. Cir. 1985); La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1410 (7th Cir. 1984); Rorex v. Traynor, 771 F.2d 383, 387 (8th Cir. 1985).

246. Thomas v. Booker, 762 F.2d 654, 659 (8th Cir. 1985) ("factual conflicts in the evidence"); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1213 (7th Cir. 1985) ("conflicts in the evidence"); Wildman v. Lerner Stores Corp., 771 F.2d 605, 607 (1st Cir. 1985) ("conflicting testimony"); Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498, 1501 (11th Cir. 1985); Haney v. Mizell Memorial Hosp., 744 F.2d 1467, 1479 (11th Cir. 1984); Estate of Davis v. Johnson, 745 F.2d 1066, 1072 (7th Cir. 1984) (evidence supporting inference of liability "of such inferior quality" as to be inadequate when "weighted against" defense testimony supporting contrary inference); J.E.K. Industries, Inc. v. Shoemaker, 763 F.2d 348, 353 (8th Cir. 1985) ("direct factual conflicts"); Rock v. McCoy, 763 F.2d 394, 396 (10th Cir. 1985) ("conflicting evidence"). *But see* Dobbs v. Gulf Oil Co., 759 F.2d 1213, 1218 (5th Cir. 1985) ("jury . . . to weigh conflicting evidence and inferences").

Decisions in the First and Seventh Circuits hold, consistent with the Supreme Court precedents discussed above, that a directed verdict is never permissible in favor of a defendant in any case in which a reasonable person might conclude that the plaintiff has established a prima facie case: "A directed verdict in favor of a defendant . . . is proper only if reasonable people, viewing the facts most favorable to the plaintiff and disregarding conflicting unfavorable testimony, could not conclude that the plaintiff has made out a prima facie case."[247] This rule, which necessarily follows from the Supreme Court decisions regarding defense evidence and evidentiary conflicts, would often be of decisive importance in intentional discrimination cases, where the elements necessary to establish a prima facie case are well understood and frequently present.[248] Another Seventh Circuit decision of the same era, however, acknowledged that the plaintiff who had prevailed at trial had proffered evidence which "made out a prima facie case," but nonetheless reversed the jury verdict on the ground that "the record establishes . . . that [the defendant] rebutted" that prima facie case.[249]

Such inconsistencies, as well as the general tendency to disregard Supreme Court precedents in this area, are understandable in light of the willingness of the lower courts, in contravention of other Supreme Court precedents, to make credibility determinations and assess the inferential weight of evidence. Once the appellate courts were willing to reconsider the jury's assessment of the probative value of the prevailing party's evidence and to credit contrary testimony which the jury might have chosen to disbelieve, it was probably inevitable that those courts would then attempt to weigh those two types of evidence against one another. The last century of Supreme Court jurisprudence is founded on a number of fairly specific premises about differences in the factfinding abilities and roles of juries and judges; in recent years the inclination of the appellate courts has been to try to make their own independent evaluation of which party should have prevailed at trial, and to leave the decision to the jury only where the evidence proffered by the competing parties seems to present a close case.

D. New Trials, Judgments N.O.V., and Deference to the Role of Trial Judges

The major change that has occurred over the course of the last century regarding the role of judges in reviewing evidence is that today,

247. Malcak v. Westchester Park Dist., 754 F.2d 239, 243-44 (7th Cir. 1985) (quoting Crowder v. Lash, 687 F.2d 996, 1002 (7th Cir. 1982)).

248. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

249. Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340, 343 (7th Cir. 1985).

unlike the practice which existed in 1889 or 1789, appellate judges now undertake to pass on the sufficiency of the evidence to support a disputed verdict. Trial judges, on the other hand, have always had some power to do this, although the procedures and standards used by trial judges have evolved over time. In the course of permitting appellate judges to play a role in this process, the Supreme Court laid down two rules rooted in the fact that in 1791 only trial judges had the authority to evaluate the evidence in a jury trial. The Supreme Court required, first, that appellate judges give substantial deference to the trial judge's view of the sufficiency of the evidence, and, second, that the trial judge should often, if not ordinarily, have the preeminent responsibility for deciding whether a defect in the evidence was so serious as to require a judgment n.o.v., or warranted only the granting of a new trial. Today the courts of appeals largely disregard both of these rules.

The Supreme Court had indicated on a number of occasions prior to 1968 that an appellate court should be particularly reluctant to grant a judgment n.o.v. if the district judge who tried the case believed that there was sufficient evidence to support the verdict. In *Patton v. Texas & Pacific Railway Co.* the Court admonished:

> [I]t is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict. . . . [T]he judge is primarily responsible for the just outcome of the trial . . . . He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record. . . . [A]n appellate court will pay large respect to his judgment.[250]

Rule 52[251] of the Federal Rules of Civil Procedure requires appellate deference to the factual findings of a district judge in a non-jury case. The assessment of the sufficiency of the evidence to support a jury verdict, although labeled a "question of law" to retain a patina of constitutionality, is necessarily a fact-bound task. The same policy considerations underlying Rule 52 are applicable when an appellate panel reviews a trial judge's determination that the evidence was sufficient to support

250. 179 U.S. 658, 660 (1901). *See also* Dick v. New York Life Ins. Co., 359 U.S. 437, 447 (1959) ("the district judge, who was intimately concerned with the trial . . . believed that the case should go to the jury"); Wilkerson v. McCarthy, 336 U.S. 53, 74 (1949) (Jackson, J., dissenting); *cf.* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 560 (1931) (deference to concurrent conclusions of jury, trial judge, and court of appeals).

251. FED. R. CIV. P. 52(a):

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially. . . . Findings of fact whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

a jury verdict. The rationale for deference to a trial court's own factual findings, the Supreme Court has explained, includes, but

> is not limited to the superiority of the trial judge's position to make determinations of credibility. . . . [W]ith experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a high cost in diversion of judicial resources.[252]

When a trial judge has concluded that there is sufficient evidence to support a given verdict, and a jury has found that the evidence requires that particular verdict, the chance that both judge and jury will have erred is likely to be small, and substantial deference to their concurrent conclusions is certainly appropriate.[253]

There is today widespread disagreement among the circuit courts regarding whether the views of a trial judge are entitled to any deference in this regard. During the one-year period studied, appellate panels in the First, Seventh, and Eighth Circuits held that deference was appropriate. The Eighth Circuit reasoned in *Herold v. Burlington Northern, Inc.*:

> [w]e must give great credence to the findings of . . . the trial judge. . . . [H]e . . . heard the testimony and reviewed the evidence first hand; many credibility findings must be made in a trial such as this. Appellate courts should be extremely reluctant to interfere with a verdict where . . . an experienced and competent trial judge finds no error in the jury's determination.[254]

Another Eighth Circuit panel suggested that a trial court's rejection of a motion for judgment n.o.v. could be reversed only if "clearly erroneous."[255] A First Circuit decision indicated that such a decision could not be overturned unless the lower court had "abused its discretion."[256]

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252. Anderson v. City of Bessemer, 470 U.S. 564, 574-75 (1985).

253. An appellate court faces a different problem when it is asked to review a trial court order granting a directed verdict or judgment n.o.v. In such a case the correctness of the trial court's action raises a constitutional issue under the seventh amendment, a circumstance requiring independent appellate factfinding. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). Indeed, since it is the district judge who allegedly violated the constitution, it would be uniquely inappropriate to defer to that judge's views about the constitutionality of his or her own conduct.

254. 761 F.2d 1241, 1245 (8th Cir. 1985).

255. Cashman v. Allied Products Corp., 761 F.2d 1250, 1256 (8th Cir. 1985).

256. Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985). *See also* Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303 (7th Cir. 1985) ("the court will rarely conclude that a district court improperly refused to enter judgment notwithstanding the verdict").

During the same one-year period, on the other hand, nine panels in five circuits, including both the First and the Seventh, held that the propriety of granting a motion for judgment n.o.v. was to be considered de novo by the appellate court. In two of the circuits involved, other panels in the same year had applied a deference rule. The First Circuit opinion quoted in the previous paragraph was issued on June 10, 1985; on August 1, 1985, another panel of that circuit—which included one of the same judges who had participated in the earlier decision—held, "We employ the same standard in reviewing the judge's decision on the motion as the trial judge uses in passing on the motion."[257] A Seventh Circuit panel explained, "An appellate court is as well situated as a trial court to make this legal determination and we therefore review the trial court's decision denying the J.N.O.V. motion de novo."[258] Similar decisions are to be found in the Third, Ninth, and Tenth Circuits.[259] All of the decisions applying a deference standard upheld the action of the trail judge, while a number of the nondeference opinions reversed the trial judge's holding; whether the standard affected the outcome, or vice versa, is unclear.

The Supreme Court has also repeatedly emphasized that a court faced with a request for judgment n.o.v. has the authority to order a new trial instead, and should, in any case in which a judgment is set aside, make a considered judgment in choosing between a new trial and judgment n.o.v. In 1947 the Court suggested in *Cone v. West Virginia Pulp & Paper Co.* that only the trial judge could make the choice between a new trial and judgment n.o.v.:

> [A trial judge] . . . can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great

257. Sprague v. Boston & Maine Corp., 769 F.2d 26, 29 (1st Cir. 1985).

258. Spanish Action Comm. of Chicago v. City of Chicago, 766 F.2d 315, 319-20 (7th Cir. 1985). *See also* Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1213 (7th Cir. 1985) ("we review the district court's decision applying the same judgment n.o.v. standard used by the district court judge"); *cf.* La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1410 (7th Cir. 1984) ("A district court's grant of judgment n.o.v. is subject to de novo review; we apply the same standard as the district court.").

259. Eisenberg v. Gagnon, 766 F.2d 770, 779 (3d Cir. 1985) ("On appeal, the appellate court should apply the same standard as the trial court in determining the propriety of judgment n.o.v.") (quoting Danny Kresky Enterprises v. Magid, 716 F.2d 206, 209 (3rd Cir. 1983)); Lavicky v. Burnett, 758 F.2d 468, 476 (10th Cir. 1985) ("The appellate court applies the same standard in reviewing motion for a judgment n.o.v. as the trial court."); Powell v. J.T. Posey, Co., 766 F.2d 131, 134 (3d Cir. 1985) ("On appeal, the appellate court should apply the same standard as the trial court in determining the propriety of judgment n.o.v.") (quoting *Danny Kresky*, 716 F.2d at 209); Tibbs v. Great American Ins. Co., 755 F.2d 1370, 1374 (9th Cir. 1985) ("We review *de novo* the district court's instruction to the jury that it could award punitive damages."); West America Corp. v. Vaughan-Bassett Furniture, 765 F.2d 932, 934 (9th Cir. 1985) ("Review is *de novo*.").

> value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment [n.o.v.] entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart . . . .
>
> Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. . . . [A] litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question.[260]

Under *Cone*, if a court of appeals held that the trial judge erred in refusing to set aside a verdict, the appellate court was required to remand the proceeding to permit the trial judge to exercise his discretion in choosing between judgment n.o.v. and a new trial. In 1967 the Court held in *Neely v. Eby Construction Co., Inc.* that an appellate court had the power to make that choice itself, rejecting the rigid rule of *Cone* for "a more discriminating approach."[261] But *Neely* admonished that there were situations in which the district court rather than the appellate court ought to make the choice, "because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his 'feel' for the overall case." The Supreme Court admonished the circuit courts to be "constantly alert" to the possibility that these "very valid concerns" would dictate that in a particular case the decision between judgment n.o.v. and a new trial "should more appropriately be addressed to the trial court."[262]

The decisions in *Cone* and *Neely* agreed that the law requires a carefully considered judicial choice between judgment n.o.v. and a new trial. *Neely* noted that "where the court of appeals set aside the jury['s] verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated."[263] The need for such a choice derives in part from the terms of Rule 50(b), which direct a trial judge to consider three alternatives when presented with a motion for judgment n.o.v: "the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the

260. 330 U.S. 212, 216-17 (1947).
261. 386 U.S. 317, 326 (1967).
262. *Id.* at 325-26.
263. *Id.* at 327.

entry of judgment as if the requested verdict had been directed."[264] The Supreme Court explained in *Cone:*

> Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. Th[e] . . . "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion between the two alternatives.[265]

In its 1952 decision in *Johnson v. New York, New Haven & Hartford Railroad*[266] the Supreme Court emphasized that an appellate court should not automatically direct entry of judgment n.o.v. in every case in which it thought a directed verdict would have been proper:

> [A] holding that a directed verdict should have been given cannot be the equivalent of a court's entry of judgment for defendant notwithstanding a jury verdict for plaintiff. For after setting aside a verdict as authorized by Rule 50(b), a trial judge may "either" enter a judgment contrary to the verdict "or" order a new trial. The rule thereby requires the exercise of an informed judicial discretion as a condition precedent to a choice between these two alternatives. And this discretion must be exercised by the court, not by its clerk. The Court was told during oral argument that it is the practice in the Second Circuit for the clerk to include in his mandate a direction to the district court to have a judgment entered in favor of a party notwithstanding the verdict where the court reverses a district court's refusal to direct a verdict. A rule or practice of this kind under which a court clerk's mandate would automatically direct entry of a judgment for defendant after court reversal of a plaintiff's judgment could not possibly be the result of the kind of judicial discretion directed by Rule 50(b).[267]

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264. FED. R. CIV. P. 50(b).

265. *Cone*, 330 U.S. at 215.

266. 344 U.S. 48 (1952).

267. *Id.* at 54-55 n.3. The court described with evident approval the practice in another circuit: "The Fifth Circuit emphatically pointed out that mere reversal and remand for proceedings consistent with the opinion did not authorize a trial court to enter judgment notwithstanding

The Supreme Court was "not willing to attribute . . . to the Second Circuit" the improper practice of directing judgment n.o.v. without either considering the alternative of a new trial or remanding the case to the trial court to make that choice.[268]

The practice that the Supreme Court in 1952 thought an unlikely aberration is today the general rule throughout the circuit courts. Out of more than forty cases in nine circuits in which the appellate panel overturned the district court's denial of a motion for judgment n.o.v., there are only two instances in which the appellate panel even purports to consider the possibility of ordering a new trial rather than judgment n.o.v.[269] Far from being "constantly alert" to the possibility that the trial judge should be afforded an opportunity to choose between judgment n.o.v. and a new trial, not a single appellate panel gives the district court authority to make that choice on remand. In cases where the appellate panel overturns the entire verdict, the decisions uniformly direct the lower court to enter judgment for the appellee.[270] Where a verdict is overturned only in part, the appellate court often issues an equally unequivocal direction;[271] in the remaining cases, the appellate opinions—"affirming" certain aspects of the verdict and "reversing," rather

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the verdict; entry of such a judgment was only to be granted as of discretion and after a hearing." *Id.*

268. *Id.*

269. Marino v. Ballestas, 749 F.2d 162, 169-70 (3d Cir. 1984) (citing *Neely* and ordering a new trial); Smith v. Monsanto Chemical Co., 770 F.2d 719, 724 (8th Cir. 1985) ("because Smith has not asserted any grounds entitling him to a new trial, we direct entry of judgment").

270. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1256 (4th Cir. 1985) ("no ADEA suit can be maintained against defendant. The judgment for plaintiff is reversed."); Christensen v. Equitable Life Assur. Soc'y, 767 F.2d 340, 344 (7th Cir. 1985) ("The judgment of the district court is reversed and the cause is remanded for the entry of judgment for the defendant."); Craft v. Metromedia, Inc., 766 F.2d 1205, 1221 (8th Cir. 1985) ("We . . . reverse the judgment entered on the jury verdict . . . and instruct the district court to enter judgment for Metromedia."); Gonzalez v. Volvo of America Corp., 752 F.2d 295, 301 (7th Cir. 1985) ("we reverse the judgment of the district court as to Volvo and remand the case with direction to enter judgment for defendant-appellant"); Gray v. Manitowoc Co., 771 F.2d 866, 871 (5th Cir. 1985) ("The district court erred in refusing to grant defendant's motion for judgment notwithstanding the verdict. We therefore reverse and render the judgment."); Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985) ("The judgment is reversed . . . with directions to enter judgment for the defendants.")

271. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1146 (5th Cir. 1985) ("We reverse the judgment as to Raymark and Standard and enter judgment in their favor."); Bacon v. Patera, 772 F.2d 259, 266 (6th Cir. 1985) ("We remand and instruct the district court to dismiss the judgment in favor of Private Officer, Inc."); Estate of Davis v. Johnson, 745 F.2d 1066, 1075 (7th Cir. 1984) ("The Cause aecordingly is remanded to the district court with instructions to enter judgment for defendant on counts 1, 2, and 3."); Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 137 (8th Cir. 1985) ("We hold that . . . the district court erred in failing to grant Toastmaster a judgment notwithstanding the verdict on the claim for liquidated damages."); Llaguno v. Mingey, 763 F.2d 1560, 1570 (7th Cir. 1985) (case "remanded with instructions to enter judgment for [verdict loser] on count VII"); Madison County Jail Inmates v. Thompson, 773 F.2d 834, 845 (7th Cir. 1985) ("The case is remanded to the district court to enter judgment in favor of the second subclass for nominal damages of $1.00 together with costs."); Rorex v. Traynor, 771 F.2d 383, 388 (8th Cir. 1985) ("the award of punitive damages must be dismissed in its entirety").

merely than vacating, others—leave no doubt that the claims covered by the reversal are to be dismissed.[272] Among the appeals involving district court orders granting motions for judgments n.o.v, there is no indication that the trial court or the circuit court ever considered the possibility of ordering a new trial instead.

A return to the principles of *Cone*, *Neely*, and *Johnson* would serve not merely to assure compliance with the procedure contemplated by Rule 50(b), but also to provide a significant check on the tendency of the appellate courts to intrude upon the factfinding responsibilities of juries. The reason most often given by the Supreme Court for ordering a new trial rather than judgment n.o.v. is to afford the losing party an opportunity to introduce additional evidence at a second trial. That practice has an historical and constitutional basis; following the granting of a common law demurrer to evidence, the unsuccessful plaintiff

272. Air Crash Disaster Near New Orleans (Turgeau) v. Pan Am. World Airways, Inc., 764 F.2d 1084, 1092 (5th Cir. 1983) ("To the extent the judgment of the district court awards damages for [a particular claim], it is reversed. The judgment of the district court is in all other respects affirmed."); Clarkson v. Orkin Exterminating Co., 761 F.2d 189, 192 (4th Cir. 1985) ("reversed in part, affirmed in part, and remanded"); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1260 (6th Cir. 1985) ("The case is affirmed in part, reversed in part, and remanded."); Laney v. Coleman Co., 758 F.2d 1299, 1306 (8th Cir. 1985) ("The judgment below is affirmed with respect to the award of actual damages and is reversed with respect to the award of punitive damages."); Minnesota Timber Producers Ass'ns. v. American Mutual Ins. Co., 766 F.2d 1261, 1268 (8th Cir. 1985); Park v. El Paso Board of Realtors, 764 F.2d 1153, 1170 (4th Cir. 1985); J. Yanan & Associates v. Integrity Ins. Co., 771 F.2d 1025, 1035 (7th Cir. 1985); Air Crash Disaster Near New Orleans, La. (Giancontieri) v. Pan Am. World Airways, Inc., 767 F.2d 1151, 1159-60 (5th Cir. 1985); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1168 (8th Cir. 1985) ("We reverse the judgment entered on the verdict for Holley and remand to the district court with instructions that judgment be entered for Sanyo."); Jasperson v. Purolator Courier Corp., 765 F.2d 736, 742 (8th Cir. 1985) ("We . . . remand with instructions that the district court reduce the award of actual damages . . . to $1.00."); Jurgensen v. Fairfax County, Va., 745 F.2d 868, 890 (4th Cir. 1984) ("the cause is remanded to the district court with directions for the entry of judgment consistent with the decision herein"); Lerman v. Flynt Distributing Co., 745 F.2d 123, 142 (2d Cir. 1984) (plaintiff's complaint "is dismissed"); Malcak v. Westchester Park Dist., 754 F.2d 239, 245 (7th Cir. 1985) ("the due process claim is dismissed with prejudice"); Martin v. Citibank, N.A., 762 F.2d 212, 221 (2d Cir. 1985) (case remanded "with instructions to enter a judgment in aecordance with this opinion"); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 231 (2d Cir. 1985) (case remanded "with instructions to dismiss the complaint"); Owens v. Bourns, Inc., 766 F.2d 145, 151 (4th Cir. 1985) ("We . . . reverse and direct the entry of judgment for defendant."); Pietroniro v. Borough of Oceanport, New Jersey, 764 F.2d 976, 983 (3d Cir. 1985) ("the judgment of the district court will be vacated with directions to enter a judgment in favor of the appellants"); Powell v. J.T. Posey Co., 766 F.2d 131, 135 (3d Cir. 1985) (case "remanded to the district court with a direction to enter an order granting defendant's motion for judgment notwithstanding the verdict"); Vippolis v. Village of Havestraw, 768 F.2d 40, 45 (2d Cir. 1985) (case remanded "with instructions to dismiss the complaint"). *See* Spence v. Mariehamns R/S, 766 F.2d 1504, 1508 (11th Cir. 1985) ("the judgment of the district court denying the defendants' motion for judgment notwithstanding the verdict is reversed"); *cf.* Yopp v. Siegel Trading Co., 770 F.2d 1461, 1467 (9th Cir. 1985) ("reversed"); Seidenstein v. National Medical Enterprises, 769 F.2d 1100, 1107 (5th Cir. 1985) (judgment on slander claim reversed and case remanded "for entry of judgment for appellants on that claim"); Worthen Bank & Trust Co., N.A. v. Utley, 748 F.2d 1269, 1274 (8th Cir. 1984) ("we reverse with directions to grant the motion of Worthen for judgment n.o.v. on the counterclaim").

had an absolute right to take a voluntary nonsuit and refile his or her complaint.[273] The existence of that right reflected the fact that the primary purpose of a nonsuit was to resolve issues of law, not to assess whether the plaintiff had presented an airtight evidentiary case. The Supreme Court noted in *Neely* that appellate courts as well as trial courts are required to respect that right:

> A plaintiff whose jury verdict is set aside by the trial court on defendant's motion for judgment n.o.v. may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. . . . The plaintiff-appellee should have this same opportunity when his verdict is set aside on appeal.[274]

There was a time when the appellate courts expressly framed their opinions to protect that opportunity.[275]

At first blush this opportunity could seem to reflect undue solicitousness for the verdict winner, who, it might be asserted, should have introduced at the first trial sufficient evidence to fill the "gap" subse-

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273. For this reason early Supreme Court decisions stressed that the losing party was entitled to take a voluntary nonsuit and refile his or her complaint following entry of a directed verdict or judgment n.o.v. Slocum v. New York Life Ins. Co., 228 U.S. at 380-81 (judgment n.o.v.), 396-97 (compulsory nonsuit), 398-99 (directed verdict); Pleasants v. Fant, 89 U.S. 116, 122 (1874). The *Slocum* Court regarded the opportunity to refile such a case as among the substantive rights protected by the seventh amendment. *Slocum*, 228 U.S. at 399.

274. *Neely*, 386 U.S. at 328. *See also id.* at 343 (Black, J., dissenting) (new trial appropriate because "[t]he record here clearly reveals that there were gaps in petitioner's case which she might, if given a chance, fill upon a new trial"); Fountain v. Filson, 336 U.S. 681, 683 (1949) (party who won at trial may not "be deprived of any opportunity to remedy the defect which the appellate court discovered in his case"); Galloway v. United States, 319 U.S. 372, 411 (1943) (Black, J., dissenting) (denial of opportunity for new trial unjust because "[p]erhaps, now that the petitioner knows he has insufficient evidence to satisfy a judge even though he may have enough to satisfy a jury, he would be able to fill this . . . gap to meet any judge's demand"); *Pleasants*, 89 U.S. at 122 (where the court has granted a directed verdict "the party can submit to a nonsuit and try his case again if he can strengthen it"). In *Cone* the Court emphasized the historical basis of this practice:

> Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reasons to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payment of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit.

Cone, 330 U.S. at 217 (citing *Pleasants*, 89 U.S. at 122; Jones v. S.E.C., 298 U.S. 1, 19, 20 and cases cited therein).

275. In Theriot v. Mercer, 262 F.2d 754 (5th Cir. 1959), the appellate court, after holding the evidence insufficient to sustain the verdict, remanded the case to the district court "with directions to enter a judgment for the defendant unless plaintiff . . . makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Id.* at 761. *See* United States v. Lyman, 125 F.2d 67 (1st Cir. 1942), 138 F.2d 509 (1st Cir. 1943); Home Owners' Loan Corp. v. Huffman, 134 F.2d 314, 317 (8th Cir. 1943); *cf.* Western Union Telegraph Co. v. Dismang, 106 F.2d 362, 364 (10th Cir. 1939).

quently detected by the trial or appellate court. But the existence of that opportunity is more understandable when one recalls that the jury, which has the preeminent factfinding role under the seventh amendment, did not itself perceive any such critical defect in the evidence. The professed constitutional rationale of judgments n.o.v. is that a decision regarding the insufficiency of the evidence involves only a question of law, and that such decisions merely create fact-intensive legal rules regarding what evidence must be adduced at a particular trial. But ordinarily the essential legal components of a cause of action are made known to a litigant prior to trial; there is more than merely facial unfairness in announcing only after, possibly years after, trial what a party was obligated to prove. The fact that a jury found the evidence persuasive despite the allegedly fatal omission strongly suggests that the omitted evidence was not so obviously essential that the need to introduce it could readily have been foreseen.

The pattern of recent appellate opinions makes clear that the right of a litigant to fill in supposed "gaps" will often provide a significant check on overreaching by the appellate courts. It will always be possible for an appellate court to hypothesize some circumstance, however implausible, which, if present, would render the verdict improper, and then hold that the verdict-waiver had the burden of adducing evidence showing the absence of that circumstance. In *Smith v. Monsanto Chemical Co.*,[276] for example, the central issue was whether, as the jury believed, the black plaintiff had been fired because of his race, or, as his employer maintained, for taking a company towel out to the parking lot to clean his car. In an effort to discredit the company's explanation, the plaintiff adduced evidence that white workers had never been dismissed for engaging in the same practice. The Eight Circuit found this evidence legally insufficient, hypothesizing that management might have been unaware of the practice of white employees and faulting the plaintiff for failing to introduce evidence of such knowledge by company officials.[277] The court of appeals might with equal ease have hypothesized any number of other nondiscriminatory explanations for the same apparent disparity—that there was a change in policy before or after the plaintiff's dismissal, that the whites were given special treatment for some non-racial reasons, such as their youth or record of productivity, that the supervisors who knew of the other towel incidents were intimidated by the union, and so on—and held the evidence defective since the plaintiff had not demonstrated the absence of one or more

276. 770 F.2d 719 (8th Cir. 1985).
277. *Id.* at 722-24.

of these benign explanations.[278] Because problems and appellate abuses of this sort are so case-specific, it is impossible either for the Supreme Court to lay down rules delineating who must prove precisely what, or for a litigant to foresee what an appellate court may subsequently require. Affording a litigant an opportunity to fill in such gaps provides a reasonably workable check on the danger that a court's hypothesized problems will bear no relationship to reality. If a court has correctly identified a factual issue on which the verdict winner can adduce no additional evidence, that may tend to confirm the wisdom of the court's action.[279] On the other hand, if the court's hypothesized benign explanation is largely a figment of the judicial imagination, a litigant will often be able to demonstrate on remand that the court's concern was unwarranted.

Restoration of the principles of *Cone*, *Neely*, and *Johnson* is warranted for a second, somewhat related reason. Federal procedure provides for two devices to correct a jury verdict based on questionable evidence. Where the verdict is not supported by a certain minimum quantum of evidence, judgment n.o.v. is authorized; where the verdict is merely "against the weight of the evidence" a new trial may be ordered. But while it is possible to verbalize different formulas for the type of defect warranting judgments n.o.v. and new trials, the practical difference between those formulations is neither clear nor predictable. In *Smith v. Monsanto Chemical*, for example, it is far from obvious why the verdict should have been held to be unsupported by the evidence, rather than merely against the weight of the evidence. Indeed, it is difficult to imagine how one would explain the differences between these standards, or argue in a situation like *Smith* that the case fit into one category or the other.

The notion that a motion for judgment n.o.v. raises a question of law, and is to be evaluated by a standard quite distinct from that applied to a motion for a new trial, is not merely fiction, it is twentieth-century fiction. In the nineteenth century, when the practice of entering judgments n.o.v. first emerged, the Supreme Court did not maintain there was a sharp difference in the substantive standards for granting a new trial and a judgment n.o.v. Judgment n.o.v., the Court repeatedly suggested, was appropriate when a court concluded that it would be required to grant a new trial if any future jury reached the same verdict. Roughly speaking, judgment n.o.v. was proper whenever it was clear that the verdict-winner could not remedy the evidentiary defect which

278. The practice of requiring a plaintiff to disprove every conceivable benign explanation of a defendant's actions was expressly disapproved by the Supreme Court in Bazemore v. Friday, 478 U.S. 385, 400-01 (1986).

279. Of course, the verdict winner may be unable to adduce such evidence because no evidence exists on either side of the hypothesized issue.

required the granting of a new trial after the first verdict.[280] In that era the Supreme Court expressly recognized that a trial court's disposition of a motion for j.n.o.v., like its action on a motion for a new trial, required the exercise of a degree of discretion.[281]

The practical difficulty in distinguishing between a verdict unsupported by substantial evidence and a verdict against the weight of the evidence often makes the choice between a judgment n.o.v. and a new trial a difficult one. A decision to deny a motion for judgment n.o.v. is, as was noted above,[282] entitled to substantial weight on appeal. The decision of a district court to grant or deny a new trial is accorded such deference that it is virtually unreviewable in the appellate courts.[283] A fortiori the trial judge is likely to be better able to determine whether a verdict is merely against the weight of the evidence or is without any evidentiary basis, and ought ordinarily be permitted to make that determination in the first instance. Recent experience has made clear that language of *Neely* apparently giving appellate courts significant latitude in determining whether to make themselves the choice between a judgment n.o.v. and a new trial, or to remand that decision to the trial court,

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280. McGuire v. Blount, 199 U.S. 142, 148 (1905) ("Where the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its view by granting a new trial."); Griggs v. Houston, 104 U.S. 553, 554 (1882) ("If upon the evidence the jury had brought in a verdict against the defendants it would have been the duty of the court to set it aside and grant a new trial. . . . It was right, therefore, to direct a verdict for the defendants."); Bowditch v. Boston, 101 U.S. 16, 18 (1880) ("Whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court."); Pleasants v. Fant, 89 U.S. 116, 122 (1875) (If the evidence is not "sufficient to justify a verdict . . . then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that . . . the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.").

A long line of decisions, the last of them Patton v. Texas & Pac. Ry., 179 U.S. 658 (1901), utilized the following formulation: "[A] court may withdraw a case from [the jury], and direct a verdict . . . where the evidence . . . is of such conclusive character that the court, in the exercise of sound juridical discretion, would be compelled to set aside a verdict returned in opposition to it." *Id.* at 659-60 (citations omitted). It seems clear that the words "set aside a verdict" refer to the ordering of a new trial, since *Patton* and the cases which it cites were decided prior to the emergence of the practice of ordering judgment n.o.v.

281. Empire State Cattle Co. v. Atchison, Topeka & Santa Fe Ry., 210 U.S. 1, 10 (1908) (district court order granting directed verdict is to be upheld if "the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury"); Herbert v. Butler, 97 U.S. 319, 320 (1877) (if the evidence "is insufficient to sustain a verdict . . . the court is not bound to submit the case to the jury, but may direct them what verdict to render"). *See also Patton*, and cases cited *supra* note 280.

282. *See supra* text accompanying notes 250-53.

283. *See, e.g.*, Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-82 (1933); Wilson v. Everett, 139 U.S. 616 (1891); Schuchardt v. Allens, 68 U.S. 359, 371 (1863).

has resulted in a virtual elimination of such remands. *Neely* needs to be reformulated to require, at the least, that appellate courts must not automatically assume the responsibility for making that choice. Where an appellate court identifies a defect in the evidence which was not perceived by the trial judge, it should leave to the trial court the choice between judgment n.o.v. and a new trial, unless special circumstances make such a remand clearly inappropriate.[284]

The failure of the appellate courts to recognize the desirability of such remands stems in part from the often repeated doctrine that the issue of whether or not judgment n.o.v. should have been awarded is a "question of law." Since in theory the record either is or is not legally insufficient to support the verdict, these decisions seem to assume there simply is no room for discretion and no reason for a remand. But appellate decisions regarding judgments n.o.v. bear absolutely no resemblance to an analysis of a question of law; these decisions are fact-bound analyses which focus exclusively on the evidence in the case and rarely if ever refer to any legal precedents in more than a perfunctory manner. The courts act as though both the legal standards and the weight of the evidence could be determined with precision, as if, for example, a probability of jury error was to be tolerated from 0% to 75%, a new trial ordered if the chance of error was 75.1%-90.0%, and judgment n.o.v. ordered if the likelihood of jury error were 90.1% and above. If such a standard existed, and the likelihood of jury error could be determined to within a tenth of a percent, the attitudes and practices of the appellate courts might make sense. But the disposition of real appeals bears no resemblance to any such mathematically precise model. Given the vagueness of the actual standards and the difficulty of assessing the weight of the evidence, it is easy to imagine in almost any of the decisions in which judgment n.o.v. was ordered that another panel might have thought the verdict was merely against the weight of the evidence, or even that the verdict was sound.

If there is a sharp distinction between judgments n.o.v. and orders for new trials, it lies not so much in the legal standard for awarding each as in the longstanding rule, still respected to a considerable degree in the circuit courts, that a district court's decision to grant or deny a new trial should only rarely be overturned on appeal. From this premise the ap-

284. An analogous procedural rule applies when an appellate court determines that some legal error tainted a trial judge's findings of fact. Such an error precludes affirmance of the trial court decision, but it does not authorize the appellate court to attempt to decide how the factual issues should have been resolved had the error not occurred. Because Rule 52 limits the role of the circuit courts to determining whether the trial judge's findings were clearly erroneous, an appellate panel in such a situation must ordinarily remand the case so that the trial judge can make fresh findings untainted by any legal defect. Pullman Standard Co. v. Swint, 456 U.S. 273, 291-92 (1982).

pellate courts seem to have tacitly reasoned that they cannot order a new trial and that the only correction they can give for a defect in the evidence is judgment n.o.v. The bizarre result of this approach is that the appellate courts, specifically because they are less capable of making a precise evaluation of the evidence, are limited to ordering only the most drastic remedy for the verdict loser. The different institutional capacities of the trial and appellate courts clearly militate in favor of precisely the opposite rule—that appellate courts, having less ability to evaluate the evidence, can say no more than that there seems to be too little evidence to support the verdict, and must ordinarily leave to the more informed judgment of the trial judge the choice between a new trial and judgment n.o.v.

The abandonment of *Cone*, *Neely*, and *Johnson* by the circuit courts is closely related to the high rate of appellate reversal of jury verdicts, although it is less obvious which phenomenon is the cause and which is the effect. As a practical matter, however, when the Supreme Court granted the appellate courts the theoretical authority to choose between judgment n.o.v. and a new trial, it gave the circuit courts the de facto power to make and implement their own determinations regarding which party should win a lawsuit. Under *Cone*, *Neely*, and *Johnson*, on the other hand, the pattern of appellate factfinding described in Part II could not readily have occurred; if the appellate courts were deprived in most instances of the authority to choose between new trials and judgment n.o.v., those courts, lacking the power to decide which party would actually win the lawsuit, might well be far less inclined to tamper with the jury's verdict at all.

Revitalization of *Cone*, *Neely*, and *Johnson* is a practical necessity if appellate compliance with the seventh amendment is to be reestablished. The federal appellate courts, it must be recalled, are the transgressors with which the seventh amendment is concerned. The seventh amendment's "re-examination" clause is the only constitutional guarantee whose prohibitions are directed expressly, and almost exclusively, at judges. When the Supreme Court enforces that amendment, it does not trench upon the results of the political process, but vindicates the constitutionally mandated right of the public to participate in the judicial process. In the absence of Supreme Court action to enforce the seventh amendment—and such enforcement has been utterly absent for the last twenty years—circuit court compliance with the amendment has become entirely voluntary. One would like to think that the appellate courts would not abuse that power, just as one would prefer to believe that Congress would not exceed its constitutional powers if *Marbury v. Madison*[285] were overruled. But if the framers had been.

285. 5 U.S. (1 Cranch) 137 (1803).

willing to rely on the plighted faith of federal appellate judges, they would not have bothered to adopt the seventh amendment at all.

Given the palpable inclination of the appellate courts to overturn jury verdicts in situations in which the verdict loser would fairly be entitled to no more than a new trial, it would be far easier for the Supreme Court to restrict the remedial powers of the appellate courts than try to actively police twelve circuits to bring their standards for ordering judgment n.o.v. into line with constitutional principles. Some general protective rule or rules are an administrative necessity; although the Supreme Court is the court of first resort when a circuit court overturns a jury verdict, the high court simply cannot consider more than a handful of the scores of verdicts overturned each year by federal judges. Because it is impossible for the Supreme Court to review and correct every seventh amendment violation occurring in the circuit courts, the Court has a constitutional obligation to fashion administrative measures that will minimize such abuses. At common law the one clearly accepted method for reconsidering the factual findings of a jury was to submit the issues to a second jury;[286] because an order for a new trial, unlike an order awarding judgment n.o.v., does not ordinarily raise any constitutional questions, resort to the less drastic new trial alternative is supported by the general rule that courts are to avoid constitutional questions. A subsequent jury asked to reconsider the issues heard by the first is unlikely to be handicapped by the narrow experience and abilities which limit the factfinding competence of a judge. On the whole the most reliable institution to reevaluate the sufficiency of the evidence to support a jury's verdict is not an appellate court, or the trial judge, but another jury. If a second jury arrives at a different verdict than the first,

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286. Blackstone noted that the practice of granting new trials to reconsider a verdict against the weight of the evidence had been accepted since the reign of Charles III. 3 W. BLACKSTONE, COMMENTARIES 388-89 (1803). Blackstone, a staunch advocate of jury trials in civil cases, *id.* at 379-81, insisted that the ordering of new trials was consistent with the right to jury trial:

> Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury . . . where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other. . . . Granting new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a re-hearing of the cause before another jury; but with as little prejudice to either party, as if it had never been heard before.

Id. at 390-91. *See* Fowler v. Rathbone, 79 U.S. 102, 119 (1871); Schuchardt v. Allens, 68 U.S. 359, 369-70 (1863); Barreda v. Stone, 62 U.S. (21 How.) 146, 167 (1858) ("[W]hen [evidence is] admitted, the question whether it is sufficient or not is for the jury, and . . . their finding is conclusive, unless a new trial is awarded by the court in which the case is tried, or in the appellate tribunal, for some error of law."); Zeller's Lessee v. Eckert, 45 U.S. (4 How.) 118, 122 (1846) ("We have no concern, on a writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. The law has provided another remedy for errors of this description, namely, a motion in the court below for a new trial. . . ."); Myra Foundation v. United States, 267 F.2d 612, 614 (8th Cir. 1959); Agnew v. Cox, 254 F.2d 263, 267 (8th Cir. 1958).

the result to which the courts were inclined is reached without the constitutional difficulties entailed by the granting of a judgment n.o.v.[287] If, on the other hand, the second jury agrees with the verdict of the first, an injustice of constitutional magnitude is avoided without the necessity of Supreme Court intervention. The concurrent findings of fact of two juries could not plausibly be set aside for want of evidence absent proof of jury bias or other extraordinary circumstances. Since the average civil jury trial takes less than three days, compared to almost eleven months for the typical appeal in a civil case,[288] utilization of new trial orders to resolve doubts about the sufficiency of evidence seems an efficient use of judicial resources.

IV. Appellate Review of the Size of Jury Verdicts

A. Appellate Decisions Overturning "Excessive" Verdicts

1. The Emerging Modern Practice

The large number of appellate decisions overturning jury verdicts as excessive is the result of the radical alteration and expansion of a form of appellate review which until sixty-five years ago did not exist at all. For the first 130 years after the adoption of the seventh amendment, there were only three narrow circumstances under which an appellate court could even consider an objection to the size of a jury verdict. First, a verdict could be overturned on appeal if the size of the verdict, usually together with other circumstances,[289] demonstrated that the

287. *See, e.g.*, Smith v. TransWorld Drilling, 773 F.2d 610, 612 (5th Cir. 1985).

288. 1986 Annual Report of the Director of the Administrative Office of the United States Courts 152 (average civil appeal 10.8 months), 223 (of 5,222 civil jury trials, 3,068 were completed in three days or less).

289. Barry v. Edmunds, 116 U.S. 550, 565 (1886); New York Central & Hudson R.R. v. Fraloff, 100 U.S. 24, 31-32 (1879). This problem appears to have led to the original court practice of granting new trials on the amount of damages. 3 W. Blackstone, *supra* note 286, at 388 ("the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury: apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour"). The first Supreme Court decisions clearly indicating that appellate courts could reverse jury verdicts on this basis are Kennon v. Gilmer, 131 U.S. 22, 29 (1889) and Gila Valley, Globe & N. Ry. v. Hall, 232 U.S. 94 (1914). Prior to 1955 some circuit courts indicated that the only occasion on which they would consider a claim of excessiveness was when an appellant urged that the size of the verdict demonstrated improper jury bias or sympathy. Southern Pac. Co. v. Guthrie, 186 F.2d 926, 928-31 (9th Cir. 1951) (en banc) (appellate authority to reverse for passion and prejudice exists, although authority to reverse for excessiveness may not); Southern Pac. Co. v. Guthrie, 180 F.2d 295, 304 (9th Cir. 1949); Scott v. Baltimore & O. R.R., 151 F.2d 61, 65 & n. 11 (3d Cir. 1945); Earl W. Baker & Co. v. Lagaly, 144 F.2d 344, 347 (10th Cir. 1944) ("The verdict . . . is challenged on the ground of being excessive in amount. . . . When attacked on this ground, a verdict should not be disturbed on appeal unless it is so plainly excessive as to suggest that it was the result of passion or prejudice on the part of the jury."); Houston Coca-Cola Bottling Co. v. Kelley, 131 F.2d 627, 628 (5th Cir.

jury had acted out of passion or prejudice;[290] where such bias was shown, the tainted verdict could not be modified by a remittitur, but required in every case a new trial.[291] Second, the appellate courts would overturn a verdict if the size of the verdict necessarily proved that the jury had disregarded the instructions of the trial court; this doctrine was most frequently applied where the size of the judgment made clear that the jurors had improperly resorted to a compromise verdict.[292] Third, where a jury verdict was the sum of several discrete

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1942); Oklahoma Natural Gas Co. v. McKee, 121 F.2d 583, 586 (10th Cir. 1941) ("In the absence of clear evidence in the record that the verdict was the result of passion and prejudice, this court is without authority to review the amount of verdict in a tort action."); Washington Times Co. v. Bonner, 86 F.2d 836, 849 (D.C. Cir. 1936); Larsen v. Chicago & N.W. Ry., 171 F.2d 841, 845 (7th Cir. 1948); Peitzman v. City of Illmo, 141 F.2d 956, 963 (8th Cir. 1944); Kurn v. Stanfield, 111 F.2d 469, 474 (8th Cir. 1940); Terminal R. Ass'n of St. Louis v. Farris, 69 F.2d 779, 786 (8th Cir. 1934). Before 1955 there were less than a half dozen appellate decisions actually finding that the size of a jury verdict demonstrated bias. Ford Motor Co. v. Mahone, 205 F.2d 267, 273-74 (4th Cir. 1953); Missouri-K.-T. R.R. of Texas v. Ridgway, 191 F.2d 363, 367-68 (8th Cir. 1951); Brabham v. State of Mississippi, 96 F.2d 210, 213-14 (5th Cir. 1938); *cf.* National Surety Co. v. Jean, 61 F.2d 197, 198 (6th Cir. 1932) (appellate decision imputing to trial judge finding of passion and prejudice).

290. *See* Gila Valley, Globe & N. Ry. v. Hall, 232 U.S. 94, 104 (1914):

> [I]f it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case.

Cf. Taliferro v. Augle, 757 F.2d 157, 161 (7th Cir. 1985) (upholding verdict because, inter alia, jury was unlikely to have been influenced by any favoritism towards the unpopular plaintiff). In Missouri-K.-T. R. Co. of Texas v. Ridgway, 191 F.2d 363 (8th Cir. 1951), the appellate panel, while holding that the amount of the disputed verdict was "so excessive as to shock the conscience," declined to find on that basis alone that the jury acted out of passion and prejudice, but based that conclusion on the fact that counsel for plaintiff, in his closing argument, had engaged in misconduct deliberately intended "to arouse the passion and prejudice of the jury." *Id.* at 368-70. *See also* Southern Pac. Co. v. Guthrie, 180 F.2d 295, 304 (9th Cir. 1949) ("Some authorities hold that passion and prejudice may not be inferred from the mere excessiveness of the verdict, proof of appeals to passion and prejudice not appearing in the record.").

291. Minneapolis, St. Paul, & Sault Ste. Marie Ry. v. Moquin, 283 U.S. 520, 521-22 (1931). *See* Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74-75 (1889); Southern Pac. Co. v. Guthrie, 180 F.2d 295, 304 (9th Cir. 1949). A judge holding that a jury acted from improper motives would not necessarily be asserting that the jury had reached the wrong verdict. In Craft v. Metromedia, Inc., 766 F.2d 1205, 1210 (8th Cir. 1985), for example, the trial judge overturned on the basis of possible bias the liability finding of the first jury, but upheld a similar verdict returned by a second jury.

292. The appellate federal courts never doubted their power to order a new trial to correct such jury misconduct. In Pugh v. Bluff City Excursion Co., 177 F.2d 399 (6th Cir. 1910), the plaintiff sought to recover damages caused by the death of her adult son, upon whose earnings she had been entirely dependent. Although the son had been earning $20 a week at the time of his death, the jury returned a verdict of one dollar. The Sixth Circuit, noting that the trial judge had expressly instructed the jury that it could not award only nominal damages, reversed and ordered a new trial:

> The charge of the court . . . to . . . the jury was unexceptionable. . . . It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous pro-

and severable claims, one of which was held on appeal to be legally defective, the appellate courts have long resolved the appeal by upholding the verdict in whatever amount remained after the deduction of the insufficient or unfounded claim.[293]

If the appellate courts were still limited to these three types of review, only a handful of jury verdicts in 1984-1985 would have been overturned because of the amount of the award. Among the fifty-eight appeals challenging the size of a jury verdict, there were only five instances in which the defendant-appellant asserted that the size of the verdict was the result of passion or prejudice, and in every instance the appellate court rejected that argument.[294] In only a single case did the

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> ceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement.

Id. at 401. In the two decades that followed, the Second, Third, and Eighth Circuits agreed that a new trial should be awarded by an appellate court if the size of the verdict indicated that there had been an improper compromise verdict. Miller v. Maryland Casualty Co., 40 F.2d 463, 464-65 (2d Cir. 1930); Stetson v. Stindt, 279 F. 209 (3d Cir. 1922); United Press Ass'ns v. National Newspaper Ass'n, 254 F. 284 (8th Cir. 1918); Glenwood Irr. Co. v. Vallery, 248 F. 483 (8th Cir. 1918). The Third Circuit in *Stetson* held that if a jury returned a verdict lower in amount than the plaintiff's undisputed claim, the defendant was entitled to a new trial—even if the plaintiff were willing to accept the lesser award—because the verdict indicated jury misconduct that might well have prejudiced the defendant.

In 1933 the Supreme Court indicated approval of this line of decisions. In Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933), after a jury awarded the plaintiff only $1.00 in damages, the court of appeals directed a new trial, reasoning that there was no dispute that the plaintiff's financial losses, after consideration of a counterclaim, were at least $18,250. The defendant sought certiorari, arguing that the appellate court had "re-examined the verdict of the jury . . . in violation of the Seventh amendment." *Id.* at 479-80. The Supreme Court, citing several of the circuit court eases referred to above, noted that the plaintiff contended the verdict was "comparable to one in which the award of damages . . . was less than an amount undisputed . . . or was in clear contravention of the instructions of the trial court." *Id.* at 484. Although the majority refused to conclude that there had been any such violation of the instructions, it expressed no doubt that such a violation would provide a basis for a new trial and might be inferred from the amount of the damage award. An inference of disobedience is only possible where the parties do not dispute the size, or the upper or lower limits, of the financial injury. Conversely, a jury verdict inconsistent with some undisputed amount, floor or ceiling, would at least ordinarily violate the court's instructions regarding the appropriate method for calculating damages.

293. *See infra* text accompanying notes 453-63.

294. Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498, 1502 (11th Cir. 1985); Borough v. Duluth, Missabe & Iron Range Ry., 726 F.2d 66 (8th Cir. 1985); Dabney v. Montgomery Ward, 761 F.2d 494, 501 (8th Cir. 1985); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1447 (5th Cir. 1985); Dixon v. International Harvester Co., 754 F.2d 573, 588 (5th Cir. 1985). In *Dixon* the defendant urged that the damages demonstrated passion and prejudice; the Fifth Circuit agreed that the damages were excessive, but made no finding of jury bias, choosing instead to order a remittitur. *Dixon*, 754 F.2d at 590. In five other cases the appellate opinions indicated that an appeal based on a claim of excessiveness could be upheld only if the amount of the verdict was so great as to demonstrate improper jury bias or sympathy. Each of these opinions concluded that the size of the verdict was not sufficient to justify such an inference. Molex, Inc. v. Nolen, 759 F.2d 474, 479-80 (5th Cir. 1985); Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1313-14 (7th Cir. 1985); Rock v. McCoy, 763 F.2d 394, 398 (10th Cir. 1985); T.D.S. Inc. v.

size of the verdict indicate that the jury had disregarded the trial court's instructions, evidently resorting to a compromise verdict.[295] There were but three instances in which an appellant successfully challenged the propriety of any compensatory award for a discrete part of the plaintiff's claims.[296] Today, as in the past, application of these three longstanding types of appellate review are relatively rare. The major controversy in this area of the law concerns whether, if a jury has obeyed the instructions and arrived at a verdict in a fair and unbiased manner, an appellate court can nevertheless direct a new trial merely because the judges believe the jurors made a factual mistake. Today the vast majority of appellate decisions overturning jury verdicts are made on the ground that the jury purportedly made such a good faith error.

The number and rationale of recent decisions overturning "excessive" jury verdicts marks a drastic departure from past practice. The authority of federal trial judges to direct a new trial, or a remittitur, because of excessive damages dates from Justice Story's decision in *Blunt v. Little;* but Story warned that a trial judge's evaluation of a claim of excessiveness was "an exercise of discretion full of delicacy and difficulty," and that, even if excessiveness "should clearly appear," any interference with the size of the jury's verdict would "go to the very limits of the law."[297] Prior to 1933 the Supreme Court had insisted on at least a dozen different occasions that neither the appellate courts nor the Supreme Court itself had any authority to overturn a jury verdict because it appeared either too large or inadequate.[298] In most cases this rule was largely unexplained, although in at least one instance the Court suggested that such appellate review would violate the seventh amendment.[299] During the early decades of the twentieth century, the circuit courts generally agreed that they had no authority to consider a

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Shelby Mutual Ins. Co., 760 F.2d 1520, 1530 n.8 (11th Cir. 1985); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1024-25 (9th Cir. 1985), *cert. denied,* 474 U.S. 1059 (1986).

295. Worthen Bank & Trust Co., N.A. v. Utley, 748 F.2d 1269, 1273 (8th Cir. 1984). This was an action on several promissory notes. The principal and interest due on the loans was concededly $3,473,100.37. The jury returned a verdict in the amount of $2,500,000.

296. *See infra* text accompanying notes 465-67.

297. Blunt v. Little, 3 Fed. Cas. 760, 761-62 (C.C.D. Mass. 1822).

298. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927) (jury verdict on amount of damages "is conclusive"); Texas & Pacific R.R. v. Hill, 237 U.S. 208, 215 (1915); Phoenix R.R. v. Landis, 231 U.S. 578, 581 (1913); Southern R.R. - Carolina Division v. Bennett, 233 U.S. 80, 87 (1914); Herencia v. Guzman, 219 U.S. 44, 45 (1910); City of Lincoln v. Power, 151 U.S. 436, 437-38 (1894); New York, Lake Erie & W. R.R. v. Winter's Administrator, 143 U.S. 60, 75 (1892); Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U.S. 98, 113 (1890); Metropolitan R.R. v. Moore, 121 U.S. 558, 573-75 (1887); Wabash R.R. v. McDaniels, 107 U.S. 454, 456 (1883); New York Central & Hudson River R.R. v. Fraloff, 100 U.S. 24, 31-32 (1879); *see* Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75 (1889).

299. *Metropolitan R.R.,* 121 U.S. at 573 (although in some states appellate courts may overturn a verdict as excessive, "[s]uch a practice in the appellate courts of the United States is perhaps forbidden by the Seventh Amendment").

challenge to the size of a jury verdict.[300] A number of lower court opinions, including one written by then Judge Blackmun, recognized that any appellate review of the size of a jury verdict would pose serious seventh amendment problems because questions regarding the magnitude and value of a plaintiff's injuries raised essentially factual issues.[301] This longstanding insistence that appellate courts could not reconsider a jury's findings regarding the amount of damages weighs heavily against any conclusion that such appellate review was a traditional common law practice.[302]

Between 1924 and 1932, however, six circuit court decisions held that, because the granting of a new trial based on the excessiveness or inadequacy of a verdict was a matter of district court discretion, an appellate court could itself order such a new trial if the trial court's refusal to do so was an "abuse of discretion."[303] In *Fairmont Glass Works,* decided in 1933, the Supreme Court expressly declined to decide whether a trial court's refusal to set aside an allegedly excessive verdict could be reversed on appeal as an "abuse of discretion";[304] that opinion, however, signaled a willingness to at least consider the permissibility of an appellate practice which until then the Supreme Court had repeatedly forbidden. In 1955 in *Neese v. Southern Railroad Co.* the Court again avoided deciding whether appellate courts could review the size of jury verdicts, explaining that a resolution of that constitutional issue was unnecessary since the action of the trial judge in upholding

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300. Ford Motor Co. v. Hotel Woodward Co., 271 F. 625, 630 (2d Cir. 1921); United Press Ass'ns v. National Newspaper Ass'n, 254 F. 284, 285-86 (8th Cir. 1918); Chesapeake & O. Ry. v. Proffitt, 218 F. 23, 28 (4th Cir. 1914); Sun Printing & Publishing Ass'n v. Schenck, 98 F. 925, 930 (2d Cir. 1900); Grand Trunk W. Ry. v. Gilpin, 208 F. 126, 130 (7th Cir. 1913).

301. Solomon Dehydrating Co. v. Guyton, 294 F.2d 439, 446 (8th Cir. 1961); McDonnell v. Timmerman, 269 F.2d 54, 62 (8th Cir. 1959); Myra Foundation v. United States, 267 F.2d 612, 614 (8th Cir. 1959); Agnew v. Cox, 254 F.2d 263, 267 (8th Cir. 1958). In *Solomon* then Judge Blackmun wrote:

> [This court has] . . . stated that the excessiveness of a verdict "is not a question for our consideration" but is a matter directed "solely to the judgment and conscience of the trial judge on a motion for a new trial." . . . In reaching this result we have referred at times to the Seventh Amendment and to the common law as it existed in 1791 upon the Amendment's adoption. . . . [I]n our opinion inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards.

Solomon, 294 F.2d at 446.

302. Dimick v. Schiedt, 293 U.S. 474, 483-85 (1935).

303. W.T. Rawleigh Co. v. Shoultz, 56 F.2d 148, 149 (3d Cir. 1932); Grand Trunk W. Ry. v. Heatlie, 48 F.2d 759, 761 (9th Cir. 1931); Miller v. Maryland Casualty Co., 40 F.2d 463, 465 (2d Cir. 1930); Kos v. Baltimore & O. R.R., 28 F.2d 872, 872-73 (6th Cir. 1928); Cobb v. Lepisto, 6 F.2d 128, 129 (9th Cir. 1925); Detroit Taxicab & Transfer Co. v. Pratt, 2 F.2d 193, 193 (6th Cir. 1924).

304. 287 U.S. 474, 485-86 (1933).

the disputed verdict in that case was not an "abuse of discretion."[305] Implicit in this analysis was an assumption that such appellate review, if constitutional, would be limited to determining whether the trial judge had abused his or her discretion in denying a new trial on the amount of damages. Similarly, in avoiding the same constitutional question in *Grunenthal v. Long Island Railroad Co.* in 1968 the Supreme Court concluded that the disputed verdict in that case had to be upheld even if the appellate courts were at liberty to utilize an abuse of discretion standard.[306]

In the wake of *Fairmont Glass Works* the abuse of discretion standard gradually won general acceptance among the appellate courts.[307] By the time of *Grunenthal* eleven circuits agreed that the appellate courts had such limited authority to review the size of a jury verdict.[308] The circuit courts repeatedly noted the severe restrictions constraining such appellate review. The Second Circuit indicated that an abuse of discretion could virtually never be found except where the verdict differed from the undisputed amount of the damages.[309] One panel, in upholding an "undoubtedly large" verdict for the severely burned victims of a fire, stressed that the trial judge had "observed the injuries of

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305. 350 U.S. 77, 77 (1955).

306. 393 U.S. 156, 159-61 (1968). At the oral argument in *Grunenthal*, one member of the Supreme Court commented: "Presumably trial judges see a lot of these cases and have some sense of what sort of a going rate is for pain and suffering, to put it in those horrible terms, which we have to." Oral Argument, No. 35, October Term 1968, p. 24; *see also id.* at 28 ("I gather only one of this [lower appellate] panel had any trial experience.").

307. Gault v. Poor Sisters of St. Frances, 375 F.2d 539, 551 (6th Cir. 1967); Glazer v. Glazer, 374 F.2d 390, 413 (5th Cir. 1967); Springfield Crusher, Inc. v. Transcontinental Ins. Co., 372 F.2d 125, 127 (3d Cir. 1967); Bankers Life & Casualty Co. v. Kirtley, 307 F.2d 418, 423 (8th Cir. 1962); Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962); Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849, 858 (9th Cir. 1961); Silverman v. Travelers Ins. Co., 277 F.2d 257, 264 (5th Cir. 1960); Hulett v. Brinson, 229 F.2d 22, 25 & n.4 (D.C. Cir. 1955) (citing *Fairmont Glass*); Whiteman v. Pitrie, 220 F.2d 914, 919 (5th Cir. 1955); Kilmer v. Gustason, 211 F.2d 781, 783 (5th Cir. 1954); Fort Worth & Denver Ry. v. Roach, 219 F.2d 351, 352 (5th Cir. 1955); Chicago, Rock Island & Pacific Ry. v. Kifer, 216 F.2d 753, 756-57 (10th Cir. 1954) (citing *Fairmont Glass*); Brest v. Philadelphia Transp. Co., 216 F.2d 331, 332 (3d Cir. 1954); Southern Ry. Co. v. Neese, 216 F.2d 772, 774 (4th Cir. 1954); Baldwin v. Warwick, 213 F.2d 485, 486 (9th Cir. 1954); Bucher v. Krause, 200 F.2d 576, 586-88 (7th Cir. 1952); Trowbridge v. Abrasive Co. of Philadelphia, 190 F.2d 825, 830 (3d Cir. 1951); Smith v. Welch, 189 F.2d 832, 837 (10th Cir. 1951) (citing *Fairmont Glass*); Sebring Trueking Co. v. White, 187 F.2d 486, 486 (6th Cir. 1951); Southern Pac. Co. v. Guthrie, 186 F.2d 926, 927-31 (9th Cir. 1951) (en banc) (citing *Fairmont Glass*); Chicago & N.W. Ry. v. Curl, 178 F.2d 497, 502 (8th Cir. 1949); Spero-Nelson v. Brown, 175 F.2d 86, 89-90 (6th Cir. 1949); Virginian Ry. v. Armentrout, 166 F.2d 400, 407-08 (4th Cir. 1948) (citing *Fairmont Glass*); Consumers Power Co. v. Nash, 164 F.2d 657, 660 (6th Cir. 1947); Dubrock v. Interstate Motor Freight System, 143 F.2d 304, 307 (3d Cir. 1944); Houston Coca-Cola Bottling Co. v. Kelley, 131 F.2d 627, 628 (5th Cir. 1942) (citing *Fairmont Glass*); McCoy v. Cate, 117 F.2d 194, 194 (1st Cir. 1941) (citing *Fairmont Glass*); Dept. of Water & Power v. Anderson, 95 F.2d 577, 586 (9th Cir. 1938) (citing *Fairmont Glass*).

308. *Grunenthal*, 393 U.S. at 157 n.3.

309. Miller v. Maryland Casualty Co., 40 F.2d at 465.

those who survived."[310] Other opinions permitted appellate intervention only if the abuse of discretion were "manifest" or "grave."[311] This language was consistent with the manner in which appellate courts actually evaluated claims that particular verdicts were inadequate or excessive. Prior to *Grunenthal* the appellate courts had purported to find an abuse of discretion in only a handful of cases.[312]

Deference to the views of the trial judge is particularly important because a substantial portion of modern appeals involve challenges to the size of verdicts awarded to the survivors of painful or disfiguring injuries,[313] to the families of those fatally injured,[314] or to plaintiffs claiming emotional harms.[315] The evaluation of the emotional or physical harms suffered by such plaintiffs ordinarily depends upon the opportunity afforded the jury, and trial judge, to actually see the physical injuries or to observe the demeanor of those claiming emotional injuries. The magnitude of the suffering and loss caused by the death of a husband, for example, will vary as widely as does the nature of individual marriages and the degrees of affection, dependence, and companionship involved in each. In ordinary life no sensible person would undertake to assess the intensity of the grief of a widow whom he or she had never met. Personal observation of the testimony of the victim would be equally vital in evaluating the degree of humiliation suffered

310. Consumer Power Co. v. Nash, 164 F.2d at 660. *See also* Grand Trunk W. R. Co. v. Heatlie, 48 F.2d at 761 ("The trial court saw the man. . .").

311. Smith v. Welch, 189 F.2d at 837 ("manifest"); Dubrock v. Interstate Motor Freight System, 143 F.2d at 307 ("manifest"); Houston Coca-Cola Bottling Co. v. Kelley, 131 F.2d at 628 ("grave").

312. Among the decisions cited in notes 303 and 307, *supra*, the appellate courts overturned the jury verdicts only in *Virginian Ry. v. Armentrout* and *Cobb v. Lepisto*.

313. Dabney v. Montgomery Ward, 761 F.2d 494 (8th Cir. 1985); Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985); Herold v. Burlington Northern, Inc., 761 F.2d 1241 (8th Cir. 1985); Hintz v. Jamison, 743 F.2d 535 (7th Cir. 1984); Klein v. Sears Roebuck Co., 773 F.2d 1421 (4th Cir. 1985); Kokesh v. American Steamship Co., 747 F.2d 1092 (6th Cir. 1984); Martell v. Boardwalk Enters., Inc., 748 F.2d 740 (2d Cir. 1984); Prageant v. Pan Am. World Airways, 762 F.2d 1245 (5th Cir. 1985); Rocco v. Johns-Manville Corp., 754 F.2d 110 (3d Cir. 1985); Rymer v. Davis, 754 F.2d 198 (6th Cir. 1985); Stissi v. Interstate & Ocean Transport Co., 765 F.2d 370 (2d Cir. 1985); Woods v. Burlington N. R.R., 768 F.2d 1287 (11th Cir. 1985); Young v. City of New Orleans, 751 F.2d 794 (5th Cir. 1985). The appellate courts overturned the verdicts in only 2 of these 13 cases, *Dixon* and *Martell*.

314. *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1982) (verdict held excessive); Gutierrez v. Exxon Corp., 764 F.2d 399 (5th Cir. 1985) (excessiveness claim rejected); Haley v. Pan Am. World Airways, 746 F.2d 311 (5th Cir. 1984) (verdict held excessive); Klein v. Sears Roebuck Co., 773 F.2d 1421 (4th Cir. 1985) (excessiveness claim rejected); Rocco v. Johns-Manville Corp., 754 F.2d 110 (3d Cir. 1985) (excessiveness claim rejected); Stissi v. Interstate Ocean & Transport Co., 765 F.2d 370 (2d Cir. 1985) (excessiveness claim rejected); Walters v. Mintec/Int'l, 758 F.2d 73 (3d Cir. 1985) (verdict held excessive).

315. *E.g.*, Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985); Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985).

by a black victim of racial discrimination[316] or the female victim of an unconstitutional strip search.[317] Deference to the views of the trial judge is also important because he or she is particularly able to evaluate the size of the verdict in the context of the trial court contentions of the parties.[318]

The great frequency with which appellate courts today overturn jury verdicts is a direct result of a decisive change in the legal standard applied in these cases. In 1984-1985, out of sixty-eight appeals involving a challenge to the size of a verdict, the original "abuse of discretion" standard was applied in only seven cases.[319] Among the thirty-four cases overturning a verdict as excessive, there is not a single instance in which a panel purporting to apply an abuse of discretion standard actually found that such an abuse had occurred.[320] This abandonment of

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316. *Ramsey*, 772 F.2d 1303.

317. *Joan W.*, 771 F.2d 1020.

318. In upholding the verdict in *Joan W.* for emotional injuries caused by a strip search, the district judge explained:

> The matrons testified at trial and the jury could see that two of the matrons were aggressive and hostile. The plaintiff is a physically frail person. . . . The jury well understood what happened in that cell because the plaintiff had a remarkable ability to communicate her feelings and the events that occurred. . . . The jury's reaction to the testimony of the plaintiff was not noticed by the defendant's attorneys. One of the City's attorneys cross-examined the plaintiff in a highly insulting and antagonistic manner. His goal clearly was to make the plaintiff out to be a liar and a "sick" person. He only succeeded in antagonizing the jury. The court has seen two strip search cases tried by members of the Corporation Counsel's office and in both cases the same aggressive, hostile cross-examination tactics were used. While in some cases they may succeed in revealing a plaintiff as a malingerer or worse, they run an enormous risk of focusing the jury's sympathy on the plaintiff. That happened in this case. It would be a mistake to reduce the plaintiff's verdict under these circumstances. A reduction would allow the City's attorneys to continue their use of very aggressive trial tactics in an effort to get low verdicts, without risking a high verdict when those tactics backfire.

Memorandum Opinion and Order, May 22, 1984, No. 83 C 327 (N.D. Ill.). These are indicative of the types of circumstances which may not be apparent from reading a cold record. In *Joan W.*, of course, these critical facts were set out in a written district court opinion; the Seventh Circuit, in overturning the verdict which had been sustained by the trial judge, inexplicably made no reference to any of the circumstances described in the quoted passage. *Joan W.*, 771 F.2d 1020 (7th Cir. 1985).

319. Klein v. Sears Roebuck Co., 773 F.2d 1421, 1428 (4th Cir. 1985); Rymer v. Davis, 754 F.2d 198, 201 (6th Cir. 1985); Michaels v. Michaels, 767 F.2d 1185, 1202 (7th Cir. 1985); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1447-48 (11th Cir. 1985); Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890, 895 (D.C. Cir. 1984); Katch v. Speidel, 746 F.2d 1136, 1143 (6th Cir. 1984); Joan W. v. City of Chicago, 771 F.2d 1020, 1023 (7th Cir. 1985).

320. In Walters v. Mintec/Int'l, 758 F.2d 73 (3d Cir. 1985), the panel held that the denial of a new trial "was not consistent with the sound exercise of discretion." *Id.* at 82. That holding, however, was unrelated to the standard of review actually applied in the opinion. *Id.* at 80 (whether "the verdict is 'so grossly excessive as to shock the judicial conscience' "). The panel in *Joan W.* overturned the disputed verdict, but did not purport to find any abuse of discretion. In *Katch v. Speidel* the Sixth Circuit held that the trial judge had abused his discretion in denying a larger remittitur, but based that decision on defects in the instructions and on its conclusion that the jury "did not understand" the instructions. *Katch*, 746 F.2d at 1142.

the abuse of discretion standard is all the more striking because the same circuits consistently use an abuse of discretion standard to evaluate other requests for new trials.[321] In *Springborn v. American Commercial Barge Lines*[322] the Fifth Circuit applied an abuse of discretion standard in rejecting the plaintiff's request for a new trial on a claim that the jury had rejected, but made no reference to that standard in ordering, at the defendant's behest, a new trial on the amount of damages awarded by the jury on a second claim.

The practice of deferring to the trial court's views regarding the reasonableness of the verdict—a practice implicit in the original abuse of discretion standard and in past years expressly articulated by the circuit courts—has now largely disappeared. In *In re Air Crash Disaster Near New Orleans, La.*,[323] after a jury awarded $1,500,000 to the wife of an air crash victim, the trial judge ordered a remittitur to $1,000,000, which the plaintiff accepted. The court of appeals ruled that even a verdict of $1,000,000 was excessive, and directed a new trial unless the plaintiff agreed to remittitur reducing the verdict to $500,000. The appellate panel, in holding that the lost love, affection, and companionship were worth no more than $500,000, made no reference to the trial judge's view of the evidence in the case, but relied instead on the level of awards which other federal and state appellate judges had been willing to sustain in other cases.[324] Judge Tate, in a dissenting opinion, objected:

> This able and experienced district judge saw and heard the witnesses; unlike appellate judges secluded in their appellate chambers from the ongoing realities of everyday life, he is familiar with the every day monetary evaluation jurors drawn from the community place on varied losses in the multitude of cases tried before him . . .—the multitude of pragmatic jury evaluations of monetary worth appropriate to compensate victims in the ongoing twentieth century world of (what we from yesterday's active law-practice may regard as) inflated values of food, shelters, automobiles, appliances, and, yes, personal injures or losses. Here, the district court did not rubber stamp the jury award; carefully considering the conten-

321. Dixon v. International Harvester Co., 754 F.2d 573, 586 (5th Cir. 1985); Craft v. Metromedia, Inc., 766 F.2d 1205, 1221 (8th Cir. 1985); Abasiekong v. City of Shelby, 744 F.2d 1055, 1059 (4th Cir. 1984); Eyre v. McDonough Power Equip., Inc., 755 F.2d 416, 420 (5th Cir. 1985); Grogan v. General Maintenance Serv. Co., 763 F.2d 444, 447 (D.C. Cir. 1985).

322. 767 F.2d 89 (5th Cir. 1985). *See also* Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985) (applying abuse of discretion standard to request for new trial on liability, but not to request for new trial on damages.)

323. 767 F.2d 1151 (5th Cir. 1985).

324. *Id.* at 1156-57.

> tions of excessiveness, it reduced by remittitur the jury award . . . to $1,000,000. . . .
>
> Our jurisprudence recognizes the better ability of district judges to evaluate excessiveness and requires great deference to the district court's actions with regard to requests for remittitur. . . .
>
> The majority does not discuss the application of this principle to the present appeal.[325]

No comparable account of the importance of deferring to views of the trial judge can be found in any other opinion during the 1984-1985 period.[326] Although most appellate opinions simply ignore the decision of the trial judge, at least one decision expressly asserts that a circuit court is to resolve the matter de novo.[327]

In place of the original abuse of discretion standard, a majority of the circuit decisions now hold that a verdict must be overturned if the appellate courts finds the size of the verdict "shocking"[328] or "grossly excessive."[329] It would be a rather considerable exaggeration to char-

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325. *Id.* at 1162-63 (Tate, J., dissenting).

326. None of the majority opinions holding jury verdicts excessive purport to give weight to the trial judge's finding to the contrary. Among the appellate decisions upholding challenged jury verdicts, four based that conclusion in part on the views of the district court. Dabney v. Montgomery Ward, 761 F.2d 494, 501 (8th Cir. 1985) ("Excessiveness of a verdict is . . . a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards. . . ."); Fishman v. Clancy, 763 F.2d 485, 489-90 (1st Cir. 1985) (in resolving a claim that the verdict was excessive, the appellate court "must accord broad discretion to the trial court's determination because it 'has had the benefit of hearing the testimony, of observing the demeanor of the witnesses and also knows the community and its standards' "); Klein v. Sears Roebuck Co., 773 F.2d 1421, 1428 (4th Cir. 1985) ("As a reviewing court, we cannot say that this evidence was so deficient that the trial judge, intimately familiar with it, abused his discretion by not setting aside the verdict as excessive."); Sprague v. Boston & Maine Corp., 769 F.2d 26, 28 (1st Cir. 1985) ("The trial judge is afforded broad latitude to review jury awards that are asserted to be either excessive or inadequate, for he has both seen the witnesses and heard the testimony. . . .") (footnotes omitted).

327. Deakle v. John Graham & Sons, 756 F.2d 821, 827 (11th Cir. 1985) ("As must a trial court in considering a motion for remittitur, in an appeal from the denial of such a motion we must *independently determine* the maximum possible award that is reasonably supported by the evidence in the record. Any excess must be remitted.") (emphasis added).

328. Approximately one third of the 1984-1985 opinions use this formulation. *E.g.*, Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985); Martell v. Boardwalk Enters., Inc., 748 F.2d 740, 750 (2d Cir. 1984); Rocco v. Johns-Manville Corp., 754 F.2d 110, 113-14 (3d Cir. 1985); *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151, 1155 (5th Cir. 1985); Kokesh v. American Steamship Co., 747 F.2d 1092, 1095-96 (6th Cir. 1984); Knapp v. Whitaker, 757 F.2d 827, 846-47 (7th Cir. 1985); Dabney v. Montgomery Ward, 761 F.2d 494, 501 (8th Cir. 1985); Chalmers v. City of Los Angeles, 762 F.2d 753, 760-61 (9th Cir. 1985); Rock v. McCoy, 763 F.2d 394, 398 (10th Cir. 1985); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1447-48 (11th Cir. 1985).

329. *E.g.*, Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985); Stissi v. Interstate & Ocean Transport Co., 765 F.2d 370, 377 (2d Cir. 1985); Rocco v. Johns-Manville Corp., 754 F.2d 110, 113-14 (3d Cir. 1985); Gutierrez v. Exxon Corp., 764 F.2d 399, 402 (5th Cir. 1985); Taliferro v. Augle, 757 F.2d 157, 161 (7th Cir. 1985); Chalmers v. City of Los Angeles, 762 F.2d 753, 760-61 (9th Cir. 1985); Fields v. Washington Metro. Area Transit Auth., 743 F.2d 890, 895 (D.C. Cir.

acterize these formulations as legal standards. None of the appellate decisions provide any guidance for distinguishing a "shockingly" high verdict from one that is merely "stunningly," "surprisingly," or "very" high. One Fifth Circuit decision acknowledged that an appellate decision applying this formulation could not "be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation."[330] This seems an apt description of the process by which a jury sets the size of a damage award, but it would be absurd to suggest that federal judges have more diverse experiences, or more astute emotions, than do federal juries or trial judges. This very formulation cogently demonstrates the wisdom of the original rule severely limiting appellate scrutiny of the size of damage awards. The unavoidably subjective nature of these judgments virtually guarantees a substantial degree of overreaching if the appellate courts attempt to make their own evaluations. It is hardly to be believed that, confronted with a given record, any two judges would pick the same dollar figure as marking the limit beyond which any additional award would be "gross" or "shocking." Some judges are more readily shocked than others; whether a judge regards an award as gross would necessarily turn on the particular value which he or she attached to family relations, physical abilities, or individual self-respect. The question of whether $100,000 for the loss of a leg or of a husband is inadequate, reasonable, or excessive cannot plausibly be characterized as an issue of law. To the extent, as is often the case, that the evaluation of damages turns on such subjective judgments, an appellate court could undertake to consider claims that a jury was biased or failed to obey the instructions of the trial court. But surely appellate judges have no special competence to determine whether a properly instructed, fair-minded jury had misvalued the lost limb or spouse.

A second, somewhat more intelligible group of appellate decisions apply to damage awards a standard similar to that utilized in disposing of requests for judgments n.o.v. These decisions inquire whether the size of the award is "reasonable,"[331] is supported by "substantial" evi-

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1984). *Fishman*, *Rocco*, and *Chalmers* apply both the "shocking" and "grossly excessive" formulations. Whether these are two alternative standards, or alternative terms for the same standard, is unclear.

330. *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151, 1156 (5th Cir. 1985). *See also* Dixon v. International Harvester Co., 754 F.2d 573, 590 (5th Cir. 1985).

331. U.C. Castings Co. v. Knight, 754 F.2d 1363, 1369 (7th Cir. 1985); Cincinnati Fluid Power, Inc. v. Rexnord, Inc., 773 F.2d 92, 97 (6th Cir. 1985); Gutierrez v. Exxon Corp., 764 F.2d 399, 402 (5th Cir. 1985); Pierce v. Ramsey Winch Co., 753 F.2d 416, 434 (5th Cir. 1985); Deakle v. John Graham and Sons, 756 F.2d 821, 827 (11th Cir. 1985); Dixon v. International Harvester Co., 754 F.2d 573, 590 (5th Cir. 1985); Springborn v. American Commercial Barge Lines, 767 F.2d 89, 94 (5th Cir. 1985). The formulation in *Deakle* most clearly resembles the standard utilized in appeals seeking judgment n.o.v.

dence,[332] or is merely "speculative."[333] Aside from the problems discussed above regarding appellate review of liability determinations, this approach would raise no constitutional problems if the defendant involved had filed a motion for a partial directed verdict, and judgment n.o.v., setting a ceiling on the level of permissible damages. Among the 1984-1985 appeals, however, there is not a single case in which a litigant presented and preserved in this manner an argument as to whether the evidence was sufficient as a matter of law to support a verdict in excess of a given amount. Most appellate opinions proceed as if Rule 50, the seventh amendment, and *Slocum v. New York Life Insurance Co.*[334] were somehow inapplicable when an appellate court was asked to reconsider the findings of a jury regarding the amount of damage suffered by plaintiff.[335]

Where appellate courts evaluate excessiveness claims under a judgment n.o.v. standard, the analyses, as might be expected, are tainted by the same types of overreaching present in ordinary judgment n.o.v. appeals. Juries are at times forbidden to draw inferences absent proof of

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332. Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1260 (6th Cir. 1985); Pierce v. Ramsey Winch Co., 753 F.2d 416, 437-38 (5th Cir. 1985); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1023 (9th Cir. 1985). *See also* Electro-Miniatures Corp. v. Wendon Co., Inc., 771 F.2d 23, 26-27 (2d Cir. 1985) (whether evidence "inadequately" supports the size of the verdict); Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516, 1527 (11th Cir. 1985) (does evidence provide "adequate" support for the size of the verdict); Bell v. City of Milwaukee, 746 F.2d 1205, 1266-68 (7th Cir. 1984) (is evidence "sufficient" to support size of the verdict); Ponderosa System, Inc. v. Brandt, 767 F.2d 668, 670 (10th Cir. 1985) (evidence "sufficient" to support size of the verdict).

333. Abeshouse v. Ultragraphics, Inc., 754 F.2d 467, 470-71 (2d Cir. 1985); U.C. Castings Co. v. Knight, 754 F.2d 1363, 1372-74 (7th Cir. 1985); Collier v. Housing & Portable Engineers Local 101, 761 F.2d 600, 603 (10th Cir. 1985). *See also* Deakle v. John Graham & Sons, 756 F.2d 821, 831 (11th Cir. 1985) ("conjectural"); Taliferro v. Augle, 757 F.2d 157, 162 (7th Cir. 1985) ("fanciful").

334. 228 U.S. 364 (1913).

335. The most striking illustration of this practice is Klein v. Sears Roebuck Co., 773 F.2d 1421 (4th Cir. 1985), in which the court of appeals, acting on a claim of excessiveness, ordered entry of judgment for defendant on the disputed element of damages:

> Sears contends that the trial court committed reversible error by failing to set aside as excessive the jury's award of . . . $104,000 to Claudia [Klein] for loss of consortium. . . . The only evidence pertaining to Claudia's claim of loss of consortium . . . was her testimony about household and personal grooming activities that Steven [Klein] could no longer perform as a result of the accident. . . . While loss of consortium may be inferred in some instances, . . . the Kleins did not offer sufficient evidence upon which that inference could be made. We therefore reverse that portion of the award and instruct the court to enter a judgment for Sears on the consortium claim.

Id. at 1428-29. Nothing in the opinion suggests Sears had moved for a directed verdict or judgment n.o.v. on this element of the damage claim. *Compare* Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985) ("defendants failed to object to the submission of the punitive damages issue to the jury and . . . this omission in itself is ordinarily enough to preclude an argument on appeal that plaintiff produced insufficient evidence to justify punitive damages"); Voekel v. Bennett, 115 F.2d 102, 104 (3d Cir. 1940) (an "element of speculation" is no bar to jury award; "what the deceased might have earned after his death is, of course, to some extent, speculative").

additional facts which jurors might well regard as self-evident. In *Klein v. Sears Roebuck and Co.*,[336] for example, the Fourth Circuit held that a wife had not suffered any loss of consortium as a result of an accident which severed two fingers of her husband's hand and largely disabled his right arm; the appellate court held the record insufficient to sustain any award for the wife because there was no evidence regarding how, if at all, those injuries might adversely affect the wife. A life-long hermit who had been raised by wolves might have needed such evidence to figure out whether and in what manner such injuries to a husband might affect a wife, but jurors who had lived with other human beings would well understand the consequences of the disability at issue. In *Taliferro v. Augle*[337] the defendant police officers had, without justification, arrested and beaten the plaintiff and destroyed the only copies of several manuscripts he had written; the plaintiff sought $25,000 for physical injury, $100,000 for emotional distress, and $50,000 for the lost manuscripts, and the jury awarded a total of $47,000. The Seventh Circuit denounced all of these figures as "fanciful," arguing that the plaintiff had failed to offer evidence "to establish an objective basis for quantifying the loss." The appellate court did not deign to explain what type of evidence could be found that would "quantify" the injury caused by a beating. Other appellate opinions expressly rely on factual assumptions the jury might well have disagreed with. In *Walters v. Mintec/International*[338] the Third Circuit expressly presumed that the emotional pain suffered by the ten-and twelve-year-old children of a deceased accident victim "would tend to dissipate over time"; a rational jury could certainly have concluded, on the other hand, that a child might feel more acutely the loss of a parent as he or she grew older and better able to understand the significance of the death.

The Eleventh Circuit decision in *Deakle v. John Graham & Sons*[339] illustrates the lengths to which appellate courts can go in refinding subsidiary facts in order to overturn a jury award as excessive. The plaintiff in *Deakle*, a twenty-nine year-old ship captain, had been seriously injured on the job; on appeal his employer challenged as excessive the jury award of $400,000 for lost future wages.[340] The Eleventh Circuit opinion was, in that panel's own words, "a careful and detailed comparison of Deakle's income before and after"[341] the injury. The appellate court, noting that Deakle's pre-injury salary was $21,560, expressly assumed

336. 773 F.2d 1421 (4th Cir. 1985).
337. 757 F.2d 157 (7th Cir. 1985).
338. 758 F.2d 73, 82 (3d Cir. 1985).
339. 756 F.2d 821 (11th Cir. 1985).
340. The actual award was discounted to present value by the clerk of the district court. *Id.* at 832.
341. *Id.* at 827.

that the relatively young plaintiff would never have received any merit or seniority-based raises during the rest of this career as a ship captain, explaining that "the evidence in the record fails to establish with any degree of precision the actual monetary gains that would have resulted."[342] During the three years following the injury, Deakle had earned $5,044, $15,142 and $19,141.[343] Without any consideration of the reasons for these variations in his income, the appellate panel insisted on using the highest of these figures, rather than Deakle's average post-injury wage, explaining, "*[w]e* can safely presume that the injured Deakle will earn, at a minimum, $19,141 in each year . . . since he earned precisely this amount in 1983."[344] Although Deakle had offered evidence that his life expectancy was forty-four additional years, the court of appeals held that the lost wages should be calculated on the assumption that Deakle would have retired at age sixty-five after working only thirty-six additional years.[345] The court of appeals, in comparing plaintiff's 1980 pre-injury salary with his 1983 post-injury salary, refused to make any adjustment for the intervening inflation.[346] It seemed of no consequence to the appellate judges in *Deakle* that the trial jury, with the acquiescence of the district judge, might well have resolved some or all of these subsidiary factual issues differently.

The Eleventh Circuit decision in *Deakle* bears a decided resemblance to the Fourth Circuit decision summarily overturned by the Supreme Court in *Neese v. Southern Railway*.[347] The action in *Neese* was brought on behalf of the parents of a twenty-two year-old railroad worker killed in an accident. The decedent prior to his death had lived with and provided substantial financial support to his parents, and the parents had expected to rely heavily on his support after his father retired. The jury returned a verdict of $50,000, which the trial judge upheld. In declaring that verdict excessive, the Fourth Circuit made its own findings and assumptions about the subsidiary facts. Neese's mother testified that she expected her son would contribute $2,500 per year after her husband retired; the Fourth Circuit curtly dismissed that testimony: "In view of the circumstances was this expectation reasonable? We think not."[348] The court of appeals made its own calculations

342. *Id.* at 829 n.4.

343. *Id.* at 828.

344. *Id.* at 831 (emphasis added).

345. *Id.* at 832.

346. *Id.* at 832 n.15. The court's footnote asserts that inflation-based wage changes in the years used for comparisons "have already been accounted for," citing notes 4, 8, and 11. Those notes, however, expressly *refused* to account for such adjustments, terming them speculative. Between 1980 and 1983 prices rose approximately 19%. 20 STATISTICAL ABSTRACT OF THE UNITED STATES 468 (1985).

347. 350 U.S. 77 (1955), *rev'g* Southern Ry. v. Neese, 216 F.2d 772 (4th Cir. 1954).

348. *Neese*, 216 F.2d at 775.

"on an assumption that Neese would have contributed . . . one-fourth . . . of the . . . salary he could have reasonably expected to make in the future."[349] The court also assumed that [i]f he continued in his present work, he would probably have attained a salary of $4,300.00 per year, the gross salary his father received for the same position at the age of sixty."[350] Proceeding from the premise that Neese would have worked until at least the year 2000 and would never earn more than $4,300 a year, the Fourth Circuit concluded that the $50,000 award was "far beyond the pale of any reasonable probability and entirely without support in the record."[351] The appellate panel's assumption that there would be no changes in wage rates during the decades after 1954 was indefensible when posited, and completely wrong in retrospect. The jury, which was undoubtedly familiar with inflation rates that had averaged over seven percent annually in the years after World War II,[352] arrived at an award which was an entirely reasonable estimate of what Neese would have contributed to his parents' support had he survived.[353] The Fourth Circuit's finding of excessiveness, which the Supreme Court properly reversed, was based on reassessment of the subsidiary facts which not only intruded on the province of the jury, but also proved far less accurate than the jury's own evaluation of the evidence.

Even the sort of appellate factfinding utilized in *Deakle,* and implicitly condemned by the Supreme Court in *Neese,* could not provide a basis for overturning jury awards for injuries which cannot readily be quantified or calculated, such as pain, suffering, and physical and emotional injuries. The extremely subjective nature of damage assessments for such injuries prompted the appellate courts in the past to be especially reluctant to review such awards at all.[354] More recently, however, a number of appellate panels have attempted to review such awards by

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349. *Id.*

350. *Id.*

351. *Id.* at 776.

352. 20 STATISTICAL ABSTRACT OF THE UNITED STATES 468 (1985).

353. Between 1960 and 1975 median individual income rose from $4,080 to $11,845. *Id.* at 452. Since Neese's mother was only 47 when he died, she could have expected to live well into the 1980s. *See id.* at 69.

354. Scott v. Baltimore & O. R.R., 151 F.2d 61, 64-65 (3d Cir. 1945) ("Insofar as the award of damages . . . consists of compensation for pain and suffering it is, obviously, nothing that an appellate court can, or a trial court for that matter, measure by a yardstick as to whether the jury has given too much or too little."); Dubrock v. Interstate Motor Freight Sys., 143 F.2d 304, 308 (3d Cir. 1944) ("Courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness where the damages are unliquidated and there is no fixed measure of mathematical certainty. . . . This is particularly significant with respect to damages in tort actions for personal injuries."); Zarek v. Fredericks, 138 F.2d 689, 691 (3d Cir. 1943) ("It must be borne in mind that the injuries were non-pecuniary in their nature and to measure them by a yardstick of dollars is a difficult task at best. That is the jury's function."). This approach is still accepted by some modern decisions. *See, e.g.,* Dabney v. Montgomery Ward & Co., Inc., 761 F.2d 494, 501 (8th Cir. 1985)

comparing the size of the disputed verdict with verdicts returned, or upheld, in other cases.[355] This approach, which evidently has been rejected by the Eighth Circuit,[356] poses a number of serious and ultimately unsolvable problems.

The Fifth Circuit practice is to compare the challenged verdict with verdicts returned by federal and state courts in the state in which the case was originally tried. This apparently plausible approach has led to some fairly bizarre results. On July 1, 1985, a Fifth Circuit panel upheld a verdict of one million dollars for mental anguish and loss of companionship to the parents of an adult worker killed in a Texas drilling accident.[357] The court relied on a Texas verdict of equal size several years earlier, and indicated that large verdicts for the parents of a minor child would be even more readily sustainable.[358] On August 12, 1985, another panel of the same circuit overturned as excessive an award of $400,000 for the loss of a minor child in a Louisiana air crash, holding that $250,000 was the maximum amount that could be sustained.[359] The second decision turned primarily on the fact that the largest Louisiana court award to the parent of a deceased child was $150,000.[360] The death of a child somehow causes four times as much harm to his or her parents if the child dies west of the Louisiana-Texas state line. The ostensible Fifth Circuit rule is that a disputed verdict is to be compared with what other juries have awarded, not with what verdicts have been upheld on appeal.[361] In the Louisiana plane crash case, however, the panel suggested that its $250,000 ceiling was justified by a prior Fifth Circuit decision reducing a jury verdict in favor of the parent of a deceased child from $350,000 to $200,000.[362] The Second Circuit, at least in diversity cases, deems excessive any verdict which exceeds "that which could be sustained were the case before the highest court of the

("An appellate court should be extremely hesitant to overturn a verdict which includes damages for pain and suffering.").

355. *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151, 1155-58 (5th Cir. 1985); Dixon v. International Harvester Co., 754 F.2d 573, 588-90 (5th Cir. 1985); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1144 (7th Cir. 1985); Haley v. Pan Am. World Airways, 746 F.2d 311, 317-18 (5th Cir. 1984); Joan W. v. City of Chicago, 771 F.2d 1020, 1023-25 (7th Cir. 1985); Martell v. Boardwalk Enters., Inc., 748 F.2d 740, 750-53 (2d Cir. 1984); Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303, 1313-14 (7th Cir. 1985).

356. Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1248 (8th Cir. 1985) ("Defendant argues that juries in similar cases have awarded significantly lower amounts. But comparisons are not particularly helpful. Each case must be evaluated on its own merits.").

357. Gutierrez v. Exxon Corp., 764 F.2d 399 (5th Cir. 1985).

358. *Id.* at 403.

359. *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985).

360. *Id.* at 1156. *See also* Haley v. Pan Am. World Airways, 746 F.2d 311, 317-19 (5th Cir. 1984) (reducing a verdict for the death of child from $350,000 to $200,000 based on comparison with Louisiana jury verdicts).

361. *Air Crash Disaster*, 767 F.2d at 1155.

362. *Id.* at 1157.

state whose substantive law gives rise to the claim,"[363] and thus considers the levels to which state jury verdicts have been *reduced* by state judges.[364] It is, at the least, difficult to understand how federal judges can assess the extent of their authority under the seventh amendment by looking to the practices of state judges, who, so far as the federal constitution is concerned, are free to re-examine any fact found by a state jury.

This comparative approach poses considerable difficulties when a plaintiff has suffered injuries which are clearly different in kind from those involved in prior verdicts. In *Dixon v. International Harvester Co.*[365] the jury awarded $2.8 million to a plaintiff who had suffered

> [loss of] both testicles, complete avulsion of his femoral artery and vein, avulsion of the majority of the skin on his penis, severing of his femoral nerve, tearing away of entire skin on his abdomen from his groin to his navel, extensive pain and suffering . . . immediately following the accident . . . and . . . following surgery, arterial replacement and grafting of skin.[366]

The Fifth Circuit compared this award to a state jury verdict of $1 million for burns covering thirty-eight percent of the plaintiff's body, held the $2.8 million award excessive, and reduced it to $892,000.[367] How the appellate panel arrived at the latter figure, and gauged the comparative level of pain and anguish caused by the two quite different injuries, was not explained. In *Douglass v. Hustler Magazine, Inc.*[368] the defendant magazine published without permission several nude photographs that had been taken of the plaintiff for *Playboy* magazine; the *Hustler* publication depicted Douglass as a lesbian, wrecked her modeling career in Chicago, and triggered a series of obscene phone calls. The jury returned a verdict of $300,000 for emotional distress. Breezily denouncing that verdict as "absurd" and "ridiculous," Judge Posner explained:

> In *Time Inc. v. Firestone*, 424 U.S. 448 . . . (1976), a libel case . . . in which the plaintiff sought damages for emotional distress . . . the Supreme Court upheld an award of $100,000 in compensatory damages. . . . [A] false accusation of adultery

363. Martell v. Boardwalk Enters., Inc., 748 F.2d 740, 750 (2d Cir. 1984) (quoting Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468, 472 (8th Cir. 1977)).

364. *Id.* at 752-54.

365. 754 F.2d 573 (5th Cir. 1985).

366. *Id.* at 588.

367. *Id.* at 589-90.

368. 769 F.2d 1128 (7th Cir. 1985).

> made in a reputable national magazine is more likely to cause distress than what Hustler did to Douglass.[369]

Judge Posner did not explain how he knew that a woman would be more distressed by being called an adulteress than by being depicted as a lesbian; this does not seem to be an issue about which middle-aged male federal judges would have any particular expertise.

Even when the injuries in a given appeal are similar in type to those in prior cases, differences in the details of the harms and the circumstances of the victims inevitably make a comparison of the verdicts difficult if not impossible. The problems inherent in such comparisons were sharply illustrated by *Joan W. v. City of Chicago*,[370] one of a series of cases arising out of the practice of the Chicago police of strip searching women arrested for minor offenses. The particular circumstances of *Joan W.* were described by the court of appeals as follows:

> Joan, a physician in her mid-thirties practicing in Chicago, was arrested for a traffic violation on January 28, 1978. Pursuant to a City policy that was subsequently declared unconstitutional . . . five female police department employees ("the matrons"), strip searched her.
>
> During the search, Joan was forced to remove her clothing and to expose the vaginal and anal areas of her body. The matrons threatened her when she initially refused to comply, used vulgar language, and laughed at her. Joan testified that the incident caused her emotional distress that manifested itself in reduced socializing, poor work performance, paranoia, suicidal feelings, depression, and an inability to disrobe in any place other than a closet. She introduced evidence tending to show that she was peculiarly sensitive to the kind of physical violation she had endured because she was a private person who even during high school gym classes could not completely disrobe in front of others and was conscious of her physical disabilities caused by her chronic arthritis.[371]

The six member jury, which included one woman,[372] awarded $112,000 in damages. An all male panel of the Seventh Circuit reversed the award as "flagrantly extravagant."[373]

The Seventh Circuit opinion made a serious attempt to explain why the verdict in previous cases could bear on the propriety of a larger

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369. *Id.* at 1144.
370. 771 F.2d 1020 (7th Cir. 1985).
371. *Id.* at 1021-22.
372. Interview with R. Peter Carey, attorney for the plaintiff (Dec. 18, 1987).
373. *Joan W.*, 771 F.2d at 1025.

verdict in a later case; that effort demonstrated the indefensibility of the entire practice. After observing that verdicts in previous strip search cases had not exceeded $60,000, the panel explained:

> The emotional distress and trauma claimed by Joan W. was not qualitatively more severe than that claimed by the [prior] plaintiffs. . . . In other words, when the evidence of the injuries suffered by those other women is compared to that claimed by Joan, there is no difference in kind among them. . . . [T]he jury award of $112,000 for damages is flagrantly extravagant and out of line with the other strip search cases. . . . [W]here the award is not rationally proportionate to awards asserted in similar cases for injuries that are no different in kind from those suffered by the plaintiff, then the award is excessive.[374]

The panel's analysis proceeds through four equally implausible steps. First, the court started with a presumption that the size of the verdicts in the previous cases were correct and binding on Joan W., an unusual use of offensive collateral estoppel since Joan W. was not a party in any of those earlier proceedings. Second, the panel made a factual comparison of the injuries in *Joan W.* and the earlier cases to see if they were "different in kind."[375] The circuit court's analysis of this factual issue ignored the views of the trial judge regarding the factual differences between the searches and the resulting injuries in *Joan W.* and in earlier cases, and disregarded the fact that the jury in *Joan W.* itself was not, of course, told about the size of earlier verdicts or asked to make any decision as to whether those other searches were factually distinguishable. The Seventh Circuit's description of the search in *Joan W.* omits a number of key circumstances that undoubtedly influenced both the jury and the trial judge.[376] The ease with which comparisons of cases can be

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374. *Id.*

375. *Id.* at 1023-25.

376. In upholding the jury verdict in *Joan W.*, the trial judge explained:

> The search was conducted in a highly degrading way—well beyond the so-called visual search which was expressly permitted by the City's policy. . . . The matrons testified at trial and the jury could see that two of the matrons were aggressive and hostile. The plaintiff . . . told the matrons that she was a doctor. That resulted in increased jeering and insults. It appeared that the matrons had a single goal: to force the doctor to comply with their will, by ridiculing, shouting, taunting, threatening. They used demeaning language, for example, using vulgar terms for parts of the plaintiff's body. The matrons forced her repeatedly to squat and push her fingers into her vagina and rectum, all the time yelling to her that she was not doing it good enough, forcing her to weep and bend to their will.

Memorandum Opinion and Order, *Joan W.*, No. 83-C-327 (May 22, 1984). The Seventh Circuit opinion contains no reference to the insertion of fingers into Joan W.'s vagina and rectum, but suggests that she was required only to "bend over and spread her buttocks and vagina," apparently on only a single occasion. *Joan W.*, 771 F.2d at 1024. The appellate opinion makes no mention of the shouting or weeping described by the trial judge, and omits the fact that the vulgar language used referred to the plaintiff's body parts.

manipulated is illustrated by the panel's insistence in *Joan W.* that the circumstances of that case were "not different in kind" from the search earlier at issue in *Levka v. City of Chicago.*[377] In *Levka* itself the same city defendant had successfully argued that the search and injuries in *Joan W.* were *more* egregious than in *Levka,* emphasizing that Joan W., but not Levka, had been forced to insert her fingers into her own vagina and rectum.[378] The Seventh Circuit decision in *Joan W.* on the other hand, quite deliberately omitted any mention of the body cavity search that had occurred in that case. The panel members in *Joan W.,* none of whom had witnessed the testimony of any of the strip search victims, proclaimed that "[t]he emotional distress and trauma claimed by Joan W. was not qualitatively more severe than that claimed by the four [earlier] plaintiffs."[379] Third, the panel in *Joan W.* denounced the jury for having returned a verdict "not rationally proportionate" to the verdict in those prior cases. The proportionality requirement was evidently quite precise, for the court of appeals held excessive any verdict more than twenty-five percent above the highest comparison verdict. It does not appear to have occurred to the Seventh Circuit that "rational" juries might differ widely as to the proper monetary evaluation of a particular emotional or physical injury.[380] Fourth, having overturned the $112,000 verdict because it was disproportionate to the verdicts in earlier similar cases, the Seventh Circuit calculated the appropriate remittitur; at this stage the court of appeals acknowledged that the circumstances of Joan W.—"the taunting of Joan" and "Joan's particular sensitivities to this kind of abuse"—would "rationally" justify "some differences" in the verdicts. The court of appeals proceeded to make its own determination of the magnitude of the additional injury involved, and ordered a remittitur to reduce the award to $75,000.[381]

The Seventh Circuit's treatment of the remittitur in *Joan W.* demonstrates what should have been obvious in any event—that there will often be significant differences, except in wrongful death cases, in what was done to the plaintiff, and there will virtually always be differences in the degree of physical or emotional injuries that resulted. Prior to the

377. *Joan W.*, 771 F.2d at 1024 (citing Levka v. City of Chicago, 748 F.2d 421 (7th Cir. 1983)).

378. Brief for Appellant, Maria Levka v. City of Chicago, No. 84-1055.

379. *Joan W.*, 771 F.2d at 1025.

380. In Dabney v. Montgomery Ward & Co., 761 F.2d 494 (8th Cir. 1985), the first jury to hear the case awarded the plaintiff $1,000,000 for severe burns caused by a defective heater; at a second trial the subsequent jury evaluated those injuries at $2,000,000. *Id.* at 497. The Eighth Circuit rejected the defendant's argument that the second verdict was excessive because it was twice as large as the first. "We must expect substantial disparities among juries as to what constitutes adequate compensation for certain types of pain and suffering." *Id.* at 501 (quoting Vansike v. Union Pac. R.R., 725 F.2d 1146, 1150 (8th Cir. 1984)).

381. *Joan W.*, 771 F.2d at 1025.

appeal in *Joan W.* there had been nine other jury verdicts in strip search cases. All of these involved an intrusive and indefensible search of a particularly demeaning sort, but the verdicts varied enormously in size: $3,300, $15,000, $15,000, $25,000, $25,000, $30,000, $45,000, $50,000, and $60,000.[382] The largest of these verdicts was eighteen times higher than the lowest figure; if one assumes that all these verdicts were correct, and that differences in the details of each strip search could justify disparities of that magnitude, it is entirely possible that other differences could warrant a verdict of $112,000, slightly less than twice as high as the $60,000 verdict.

In overturning the appellate verdict in *Joan W.*, the panel emphasized that, "Joan . . . never sought psychiatric experience or other counseling. . . . Subsequent to the strip search, Joan became the chief resident at the hospital where she was employed and is now successfully practicing medicine."[383] These facts might weigh heavily against the $112,000 if a trier of fact assumed that sexual mistreatment does no serious harm to a woman except in those cases where the victim is so emotionally devastated that she needs psychiatric help, or that pursuing a successful career is such an extraordinary feat for a woman that no woman could do so if she had suffered any serious emotional injuries. A reasonable jury, on the other hand, might well have proceeded on very different assumptions and have regarded Joan W.'s professional success and lack of psychiatric treatment as largely irrelevant to the magnitude of the emotional injuries which she had suffered.

Joan W. also illustrates once again the danger that appellate judges will lack the experience and sensitivity necessary to resolve the factual issues presented by these cases. If one indulges in the Seventh Circuit's assumption that prior decisions establish some sort of a base-line figure, the critical problem is to determine how much more Joan W. was injured because of her particular sensitivity to this sort of outrageous treatment and because in her case the search was accompanied by various aggravating factors. The jury in *Joan W.*, which included several male jurors and which actually heard and saw Joan W. testify, concluded that her injuries were $52,000 greater than the previous $60,000 verdict; the three appellate judges, all of whom were men and none of whom had witnessed the critical testimony, thought the difference in injuries equaled $15,000. Two of the judges in *Joan W.* also participated in *Douglass v. Hustler Magazine*, where they noted with approval the award of $100,000 (in 1976 dollars) to a society matron because of a news account suggesting she had committed adultery. *Joan W.* and *Douglass* were decided within two months of one another. The implicit

382. *Id.* at 1023-24.
383. *Id.* at 1025.

conclusion of Judges Posner and Eschbach that a woman would suffer far greater emotional harm from a printed suggestion of adultery than from a strip search by a pack of jeering police matrons, is one with which, to say the least, a rational jury could surely disagree.

Although most appellate findings of excessiveness are based either on this sort of comparative analysis or on a redetermination of critical subsidiary facts, the courts use a number of other approaches as well. Several decisions determine whether a verdict is excessive by calculating the award to which a verdict would have to be reduced by remittitur, and then comparing that "maximum recovery" to the actual jury verdict;[384] calculating the remittitur in order to determine if a verdict is excessive bears a certain resemblance to the Queen of Hearts' predilection for conducting the trial after the execution. In *Martell v. Boardwalk Enterprises, Inc.*[385] the Second Circuit held the evidence "woefully insufficient to support any substantial portion of an award of $2,000,000" and then reduced the award by remittitur to $1.2 million.[386] The eourt did not explain how $1.2 million could be characterized as less than a "substantial portion" of $2 million. In *Douglass v. Hustler Magazine, Inc.*, [387] Judge Posner found the jury's calculation of lost income fatally flawed because of the jury's apparent failure to discount the plaintiff's actual lost earnings to take into account the risk aversion of "most people";[388] in the Seventh Circuit the Constitution evidently now incorporates at least some of the doctrines of the Chicago school of economics.

In disposing of challenges to particular punitive damage awards, the appellate courts use a number of drastically different standards depending, it appears, on whether the panel intends to overturn or uphold the awards. In the opinions overturning punitive awards, the circuit courts simply make their own de novo determination regarding the size of the award needed to punish and deter the misconduct involved, and

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384. *E.g.*, Deakle v. John Graham & Sons, 756 F.2d 821, 827 (11th Cir. 1985).

385. 748 F.2d 740 (2d Cir. 1984).

386. *Id.* at 754.

387. 769 F.2d 1128 (7th Cir. 1985).

388. *Id.* at 1143:

> An award of damages is a sum certain. If it is intended to replace a stream of earnings that is highly uncertain—surely an understatement in discussing earnings in the field of entertainment—then risk aversion should be taken into account in computing the discount (interest) rate. . . . This adjustment is needed to reflect the preference of a risk-averse individual for a smaller amount, received with certainty, to a larger expected amount that is subject to great uncertainty. (Most people are risk averse in relation to substantial financial matters, though many people drawn to economically risky occupations such as entertainment must be less so.) The expert and the jury ignored this point.

Id. at 1143.

order a remittitur to that level;[389] there is generally no suggestion that the district court abused its discretion, or that the trial judge had any discretion to exercise.[390] Opinions sustaining punitive awards, on the other hand, insist that juries enjoy considerable discretion in determining the size of such verdicts,[391] or hold that punitive awards may only be reversed if the jury acted out of passion and prejudice.[392] In *Fishman v. Clancy*[393] the First Circuit reasoned that variations in the amount of punitive damages awarded in that case against various defendants demonstrated the jury "had carefully considered the question of punitive damages";[394] in *Bell v. City of Milwaukee*,[395] on the other hand, the Seventh Circuit held that such differences were a fatal "disparity," and ordered a remittitur to bring the awards into "rough conformity."[396] *Fishman* also held that a large punitive award was appropriate because the compensatory damages were too small to discourage future violations;[397] *Hollins v. Powell*,[398] on the other hand, directed a reduction of the punitive award precisely because it was high in comparison to the quite modest compensatory award. The only pattern in these cases suggests the existence of an unspoken per se rule, based solely on the status of the parties, as to the maximum size of an acceptable punitive damage award. In non-commercial cases, all punitive awards under $100,000 were upheld,[399] and all such awards over $100,000 were held exces-

389. Aldrich v. Thomson McKinnon Sec., Inc., 756 F.2d 243, 249 (2d Cir. 1985) ("[W]e are convinced, on this record, that $3 million goes considerably beyond what may fairly be justified in order to discourage repetition of Thomson McKinnon's . . . conduct, or instances of such conduct by other brokerage firms."); Bell v. City of Milwaukee, 746 F.2d 1205, 1267 (7th Cir. 1984) ("We hold that a punitive damage award against Shaffer of $50,000 will fulfill the punitive damage policies of punishment and deterrence."); Hollins v. Powell, 773 F.2d 191, 198 (8th Cir. 1985) ("We believe an award of $2,000 would serve the purpose of punishing Powell for his callous indifference to the plaintiff's constitutional rights, and also satisfy the deterrent purpose of punitive damages. . . ."); Ramsey v. American Air Filter Co., 772 F.2d 1303, 1314 (7th Cir. 1985) ("[T]his court concludes that the $150,000.00 punitive damage award should be reduced to $20,000.00.").

390. *But see* Morrill v. Becton, Dickinson & Co., 747 F.2d 1217, 1224-25 (8th Cir. 1984) (noting role of jury and trial court, but reducing punitive award from $20 million to $3 million without any accompanying explanation).

391. Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 767 F.2d 1498, 1503 (11th Cir. 1985); Fishman v. Clancy, 763 F.2d 485, 489-90 (1st Cir. 1985); Molex, Inc. v. Nolen, 759 F.2d 474, 480 (5th Cir. 1985); Rymer v. Davis, 754 F.2d 198, 201 (6th Cir. 1985).

392. T.D.S. Inc. v. Shelby Mutual Ins. Co., 760 F.2d 1520, 1530 (11th Cir. 1985); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1024 (9th Cir. 1985).

393. 763 F.2d 485 (1st Cir. 1985).

394. *Id.* at 490.

395. 746 F.2d 1205 (7th Cir. 1984).

396. *Id.* at 1267.

397. *Fishman*, 763 F.2d at 489-90.

398. 773 F.2d 191, 197-98 (8th Cir. 1985).

399. *Fishman*, 763 F.2d 485; *Rymer*, 754 F.2d 1303; Taliferro v. Augle, 757 F.2d 157, 162-63 (7th Cir 1985).

sive.[400] In commercial cases, all awards above $2.5 million were overturned,[401] while the awards below that figure were all sustained.[402] There seems general agreement only on the principle that the punitive award should not be so large as to destroy a defendant economically.

2. THE ABUSE OF DISCRETION STANDARD

The frequency and manner in which jury verdicts were held "excessive" in 1984-1985 demonstrate the ease with which an appellate power to review jury verdicts can be abused. At best these abuses turn on judicial redeterminations of subsidiary facts found by the jury; at worst judges have become embroiled in the decidedly non-legal task of deciding the monetary value of a lost limb or loved one. If it were necessary to choose between no appellate review of claims of excessiveness and the type of review now in vogue, a return to the pre-1930 absolute bar to such review would probably reduce the number of unjust results and certainly would reduce the number of constitutional transgressions. The problem with the abuse of discretion standard—the standard considered in *Neese* and *Grunenthal*—is not that it was applied and found wanting, but that it simply is not being applied at all.

Appellate decisions merely announcing the adoption of, or a return to, the abuse of discretion standard would not necessarily bring about a substantial change in current practice. If, as has been seen, the circuit courts can so massage the facts and legal standards as to declare that there is "no evidence" of liability in a case replete with relevant evidence, it would be no great task to label as an "abuse of discretion" virtually any district court decision with which an appellate panel happened to disagree. In order to effectively delineate a type of review less sweeping than exists today, the abuse of discretion standard must be given sufficiently definite and principled content to constrain appellate courts from routinely overturning any verdicts that they may happen to think are too high.

a. Financial injuries

The evaluation of evidence regarding the magnitude of a financial injury often, perhaps ordinarily, involves judgments similar to those which a jury makes in determining liability. A jury may be asked to resolve a question of historical fact (for example, how much was Smith earning a year?), to decide what would have happened but for certain

400. *Bell*, 746 F.2d 1205; *Hollins*, 773 F.2d 191; *Ramsey*, 772 F.2d 1303.

401. *Arceneaux*, 767 F.2d 1498; *Molex*, 759 F.2d 474; *Transgo*, 768 F.2d 1001; *T.D.S.*, 760 F.2d 1520.

402. *Aldrich*, 756 F.2d 243; *Morrill*, 747 F.2d 1217.

events (for example, how much would Smith have earned next year?), to resolve disputes between experts (for example, how much was Smith's building worth?),[403] or to perform certain mathematical calculations based on these subsidiary findings. The factual determinations may be difficult, but at least some of the underlying evidence will ordinarily involve specific dollar amounts. Deciding how much income Smith lost in 1985, or will lose in 1990, is a qualitatively different and easier task than deciding the value of Smith's leg or Smith's child.

Faced with a series of financial injury cases requiring both the finding of subsidiary facts and the performance of mathematical calculations, many appellate courts have blithely undertaken to revisit and redecide those subsidiary factual issues, thereby engaging in many of the same improper practices common in evaluating requests for judgment n.o.v. But if, as the seventh amendment clearly requires, judgment n.o.v. standards (liberal or otherwise) cannot be applied on appeal absent the requisite motions before and after the jury verdict, the appellate courts must not, under the guise of searching for an abuse of discretion, engage in the same type of review that would be constitutionally permissible only in evaluating denials of motions for a directed verdict and judgment n.o.v.

It might be theoretically possible, having delineated the degree of review permissible regarding a judgment n.o.v., to formulate a standard for abuse of discretion review which, while permitting reversal of some erroneous factual findings, is considerably more stringent. One could hypothesize, for example, that on a judgment n.o.v. appeal, a verdict would require "substantial" evidence, whereas in an abuse of discretion appeal merely "significant" evidence or a "scintilla" would suffice. But given the enormous difficulties already encountered in defining just when a verdict can be overturned on a judgment n.o.v. appeal, it is implausible in the extreme to suggest that a clear and manageable additional standard could be formulated which lay somewhere between no review and judgment n.o.v. review. The gossamer distinctions between such standards, even if intelligible to an academic, would be wholly inadequate to constrain or inhibit appellate judges intent upon redetermining the size of a jury verdict.

In the absence of motions for both a directed verdict and judgment n.o.v., therefore, the appellate courts should be flatly forbidden to reconsider the subsidiary factual findings underlying a jury's determination regarding the appropriate size of a verdict. This rule, which effectively conforms modern practice to eighteenth-century common law procedure, does not carry an unreasonable risk of excessive verdicts. Where a defendant believes that the evidence entitles it as a matter of

403. *E.g.*, Morton Butler Timber Co. v. United States, 91 F.2d 884, 890 (6th Cir. 1937).

law to prevail on some subsidiary question bearing on the size of the verdict, the defendant is free to offer motions for a partial directed verdict and judgment n.o.v.[404] Thus in a case involving a claim for lost salary, a defendant could ask for a partial directed verdict instructing the jury, for example, that the plaintiff made $200 a week prior to the injury at issue, that the plaintiff would never have received any raises, that the plaintiff can now earn $100 a week, or that the plaintiff must be assumed to retire in ten years. The formulation of such motions will not only preserve for appeal any arguments the defendant has regarding the subsidiary factual issues, but will often help to focus the trial court and jury on the specific factual issues in need of resolution.

The task of the jury, the trial court, and the circuit court could all be rationalized and simplified if, in a case involving the application of mathematical calculations to subsidiary facts, the jury were asked to make distinct factual findings regarding each of the relevant facts—for example, what Smith made in the past? what he can earn now? how long he will work? and so forth. Faced with the need to make such distinct findings, a jury is more likely to understand clearly its responsibilities, and the very structure of the required findings could provide a safeguard against a verdict colored by improper bias or sympathy. If, in a judgment n.o.v. appeal, an appellate court overturns some subsidiary finding, the existence of the remaining findings may make it possible to recalculate the award without need for a new jury (for example, if the jury found Smith would have worked ten more years, but Smith and all the other witnesses agreed he would have retired in five), simplify the calculation of a remittitur (for example, based on the largest number of work years for which there is any evidentiary support), or limit the issues that must be referred to a new jury (for example, how much longer would Smith have worked?).

Absent appropriate motions for a directed verdict and judgment n.o.v., however, an appellate court should not inquire into the sufficiency of the evidence to support the plaintiff's contentions regarding any subsidiary facts. So long as there was a genuine dispute between the parties regarding a subsidiary factual question bearing on the size of the award, an appellate court should not be permitted to re-examine the jury's disposition of that dispute. An appellate court could, however, re-examine any mathematical calculations; whether two plus two equals three is not a question of fact, at common law or otherwise. The ability of the appellate courts to perform such computations will in some instances enable them to discern, and correct, other types of errors. An appellate court utilizing such calculations will at times be able

404. Such a motion was filed, for example, in Springfield Crusher, Inc. v. Transcontinental Ins. Co., 372 F.2d 125, 125 (3d Cir. 1967).

to ascertain what subsidiary facts were found, or would have to have been found, in order to arrive at the jury's verdict. In *Springborn v. American Commercial Barge Lines*,[405] for example, a jury awarded the plaintiff seaman, who had been injured on a barge, $75,000 for maintenance and cure. The cure claim encompassed necessary medical treatment, and maintenance was to include a reasonable amount for food and lodging until the seaman reached the point of maximum recovery. The Fifth Circuit noted that the amount of the cure, $13,000, was not in dispute,[406] leaving an award of $62,000 for maintenance. The only witness regarding the period of recovery, plaintiff's own doctor, testified that it would end by September 1983. The court of appeals, noting that the plaintiff claimed 598 total days of maintenance, calculated that the jury award amounted to $103 a day for food and lodging, or over $35,000 a year. The plaintiff, understandably, had never asserted that he needed $103 a day and had in fact claimed no more than $28.59 a day.[407] These calculations in *Springborn* demonstrated that the jury either did not understand or had chosen to disregard the relevant instructions. In such a case the failure to obey the instructions—not an appellate finding of excessiveness—would be the appropriate basis for overturning the verdict.[408]

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405. 767 F.2d 89 (5th Cir. 1985).

406. *Id.* at 94 n.13.

407. *Id.* at 95-96 n.18.

408. In Martell v. Boardwalk Enters., 748 F.2d 740 (2d Cir. 1984), the jury awarded $489,000 to the father of a teenage boy who lost his leg in an accident. The award was to cover both expenses incurred as a result of the injury and the reduced value of the child's services to the parent. The Second Circuit, accepting the father's claim of $265,000 in expenditures, calculated the award for lost services at $224,000. Since the boy was 17 at the time of the injury, and the jury had been charged that the father was entitled to his services until he was 21, the court of appeals concluded that the award was the equivalent of $56,000 a year. It is inconceivable that the plaintiff seriously claimed, or that the jury actually believed, that the chores performed by a teenage boy were worth $56,000 a year; here, as in *Springborn*, the calculation shows that the jury could not have arrived at its verdict in compliance with the instructions, but must have based its verdicts on some other unauthorized theory.

In Springfield Crusher, Inc. v. Transcontinental Ins. Co., 372 F.2d 125 (3d Cir. 1967), the plaintiff sued on an indemnification policy covering a damaged piece of machinery. The agreed upon original value of the machinery was $25,800, and the plaintiff conceded that it had depreciated in value by at least $860. The jury nonetheless awarded $25,700, the limit of liability under the insurance policy. In ordering a new trial on damages, the Third Circuit explained:

> [T]he damage award . . . exceeded the maximum amount recoverable under the evidence viewed in the light most favorable to plaintiff. . . . It seems reasonable to presume that the jury's decision resulted from either a disregard of the testimony as to the cash value of the equipment at the time of the accident or a misunderstanding as to the legal principles applicable in the determination of the issue of damages.

Id. at 126.

b. Non-financial injuries

Recent experience has demonstrated with great force the wisdom of judges of an earlier generation who were unwilling to attempt to reevaluate a jury's award for physical and emotional injuries.[409] In 1984-1985 appellate panels, having undertaken that task, held that federal juries had overestimated the value of a father,[410] a son,[411] a leg,[412] and two testicles,[413] and had incorrectly assessed the emotional injury caused by a strip search,[414] by racial discrimination,[415] by being depicted as a lesbian,[416] and by retaliation against an employee for engaging in unpopular speech.[417] The process of evaluating such injury claims poses problems totally unlike the calculation of lost wages. There is no standard by which to measure degrees of physical suffering or mental anguish, and no rate of exchange to convert such misery into dollars and cents. Insurance companies write policies setting specific values on some claims of this sort, but it is impossible to imagine any sort of objective, rule-bound criteria for determining the value of such losses.

The inherently subjective nature of the assessment of damages in these cases requires the exercise of considerable discretion on the part of the jury; as the Eighth Circuit has noted, reasonable juries might well award quite different verdicts for the same injuries.[418] Where the litigants disagree about the size of a claim for lost wages, however, there is at least in theory a correct answer; judges should defer to the jury's verdict in a financial injury case because common sense—and the seventh amendment—compel the conclusion that the jury is the most reliable institution for finding that answer. But where the value of a lost limb must be put in monetary terms, there simply is no one "correct" value. The jury itself must exercise considerable discretion in fixing the amount of the verdict; the trial judge in turn exercises broad discretion in approving or rejecting the jury's action. This double exercise of discretion seems inconsistent with virtually any direct appellate review of these verdicts. An appellate court asked to overturn a verdict previously

409. *See, e.g.*, Armit v. Loveland, 115 F.2d 308, 314 (3d Cir. 1940); Larsen v. Chicago & N.W. Ry., 171 F.2d 841, 845 (7th Cir. 1948); Fritz v. Pennsylvania R.R., 185 F.2d 31, 36-37 (7th Cir. 1950).

410. *In re* Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985); Walters v. Mintec/Int'l, 758 F.2d 73 (3d Cir. 1985).

411. Haley v. Pan Am. World Airways, 746 F.2d 311 (5th Cir. 1984).

412. Martell v. Boardwalk Enters., 748 F.2d 740 (2d Cir. 1984).

413. Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985).

414. Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985).

415. Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985).

416. Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985).

417. Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).

418. *See supra* note 356.

accepted by the trial judge would have to find that the trial court abused its discretion when it failed to hold that the jury abused *its* discretion.

A generation ago Judge Stephens of the Ninth Circuit, arguing for appellate scrutiny of awards such as these, urged that appellate reversal would surely be warranted if a jury returned "a million dollar judgment for the loss of a little finger."[419] None of the verdicts reviewed or overturned in 1984-1985, however, involved such manifestly absurd figures; on the whole the appellate courts are simply fine tuning verdicts which, given the subjective nature of the decisions involved, were not self-evidently unreasonable. In *Joan W. v. City of Chicago,* for example, the Seventh Circuit reduced the jury verdict thirty-three percent, from $112,000 to $75,000.[420] In most instances in which the appellate courts fixed the amount of the remittitur, the verdict deemed appropriate by the appellate panel was at least half the size of the original verdict.[421] Given the wide degree of latitude necessarily involved in the evaluation of these damage claims, it is hard to see how a double abuse of discretion could be involved if the original jury was that close to what the appellate court thought was the maximum permissible verdict.[422]

The inclination of modern judges to tamper with such verdicts is at odds with the broad degree of deference that was accorded to jury verdicts in the eighteenth century. In *Beardmore v. Carrington*[423] an English jury awarded one thousand pounds to a printer who had been improperly imprisoned for six days and whose private papers had been seized and examined by royal officials. In 1764, when *Beardmore* was decided, a thousand pounds had a value equal to more than $1 million in 1988 dollars.[424] In upholding that award, Chief Justice Pratt explained:

> Can we say £1,000 are monstrous damages as against him who has granted an illegal warrant to [an arresting officer] who enters into a man's house and prys into all his secret and private affairs, and carries him from his house and business and imprisons him for six days; . . . can anybody say that a guinea per diem is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's

419. Southern Pac. Co. v. Guthrie, 186 F.2d 926, 934 (9th Cir. 1951) (Stephens, J., dissenting).

420. Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985).

421. See the table of remittiturs set out at the end of this article.

422. "[T]o reverse the judgment we must conclude that the trial court abused its discretion in failing to conclude that the jury abused its discretion in returning a verdict of the magnitude of the one here involved." Bucher v. Krause, 200 F.2d 576, 587 (7th Cir. 1952).

423. 2 Wils. K.B. 244, 95 Eng. Rep. 790 (1764).

424. In this era the annual wage of a coachman or other servant was approximately ten pounds. *See* Cormack, *The Ledgers of Sir Joshua Reynolds*, 42 WALPOLE SOC'Y 105 (1968-1970).

> subjects; we cannot say the damages of £1,000 are enormous.[425]

If, as the historical element of the seventh amendment requires, *Beardmore* is accepted as indicative of the range of verdicts which cannot be overturned by a judge, none of the verdicts deemed excessive in 1984-1985 would be even close to the extraordinary amounts that an appellate court could disapprove as excessive.

The clearest indication of how far present standards depart from eighteenth-century practice is the appeal in *Taliferro v. Augle*,[426] the facts of which bear a considerable resemblance to *Beardmore* itself. The plaintiff in *Taliferro*, a political dissident, was arrested, beaten by the police, and held in jail for "several days"; the police seized and subsequently destroyed several manuscripts which Taliferro was carrying at the time of his arrest.[427] The jury returned a verdict of $47,000 in damages, but the Seventh Circuit held that $25,000 was "the highest compensatory damages that can be justified on this record."[428] Judge Posner reasoned that the papers seized and destroyed by the police were primarily of "sentimental value," rather than being financially valuable, publishable manuscripts, and that Taliferro had failed "to establish an objective basis for quantifying" the injuries caused by the beating, imprisonment, and seizure.[429] Although precisely the same things could have been said of Beardmore's claims, Judge Posner overturned as excessive in *Taliferro* a verdict less than one-twentieth the size of the verdict upheld two centuries earlier by Chief Justice Pratt in *Beardmore*.

Measured against the award sustained in *Beardmore*, none of the 1984-1985 verdicts could be deemed excessive. There might be some justification in theory for leaving open the possibility that an appellate court, finding a double abuse of discretion, could hold a verdict excessive in some bizarre hypothetical case such as that imagined by Judge Stephens. There is, however, little indication that such indefensible verdicts are being returned by juries or accepted by trial judges, and considerable evidence that appellate judges will abuse any power to overturn as excessive jury verdicts for non-financial injuries. This appellate authority has proved, on the whole, to be a constitutionally dangerous solution to a problem that does not appear to exist. The best course of action at this juncture would be to abandon altogether the appellate

425. 2 Wils. K.B. at 250, 95 Eng. Rep. at 793-94. The Supreme Court quoted this passage with approval in Barry v. Edmunds, 116 U.S. 550, 566 (1886).

426. 757 F.2d 157 (7th Cir. 1985).

427. *Id.* at 159. The status of the criminal charges on which Tallifero had been arrested was unclear. *Id.*

428. *Id.* at 162.

429. *Id.*

practice of entertaining claims that verdicts for non-financial injuries were excessive.

The appellate courts should limit their scrutiny of such verdicts to inquiring whether the size of the verdict, especially in conjunction with other factors, indicates improper conduct on the part of the jury. *Douglass v. Hustler Magazine, Inc.* might well be such a case; although the size of the verdict itself in *Douglass* seems unobjectionable by *Beardmore* standards, the magnitude of the award may well have been affected by the improper decision of the trial judge to permit the plaintiffs to show the jury slides of 128 particularly vile photographs and cartoons that had appeared in various issues of the defendant magazine.[430] In *Hollins v. Powell*[431] the plaintiffs were awarded $75,000 each for false arrest and imprisonment lasting one to four hours; again the size of the verdict is not troublesome in light of *Beardmore*; since there was evidence the arrests had caused medical and employment problems and had been ordered by a mayor to prevent members of a city agency from conducting a meeting.[432] The Eighth Circuit's opinion, however, indicates it may have been concerned that the jury was influenced by the fact that the mayor was black.[433] In such a case it would be preferable for the appellate court to squarely address the question of jury bias, rather than attempt, as the Eighth Circuit did in *Hollins*, to make its own determination as to the monetary value of the essentially non-financial injuries involved.

c. Punitive damages

It is almost impossible to make a reasoned assessment of whether juries are awarding excessive punitive damages, or of whether appellate courts are overreaching in reducing such awards. These two difficulties both stem from the absence of any meaningful legal standards by which to determine the amount of a punitive award. The general formulation found in the appellate decisions—that punitive damages should be sufficient to punish or deter the misconduct at issue—is as devoid of substantive content as would be a similar standard for fixing criminal sentences would be, and is at least equally dangerous. In the absence of more specific guidance, this vague formulation confers upon both juries and judges the sort of standardless discretion condemned in *Furman v. Georgia*,[434] virtually inviting juries to punish unpopular defendants,

430. *Douglass*, 769 F.2d at 1141-42.
431. 773 F.2d 191 (8th Cir. 1985).
432. *Id.* at 193.
433. *Id.* at 197.
434. 408 U.S. 238 (1972).

and extending an equally tempting invitation to judges[435] anxious to protect some particular group of defendants. The problem is one which federal judges cannot solve in some instances, since in diversity cases the standard for punitive awards is governed by state law. Nonetheless, federal courts ought to begin to formulate more specific guidelines for federal claims, in part, at least, in the hope that this action will prompt state courts to adopt similar standards, or at least some standards.

Judicial guidelines for assessing punitive damages might sensibly proceed along the following lines. A jury ought first determine whether the purpose of the defendant's misconduct was to injure the plaintiff, or to obtain benefits for the defendant, or both. The size of the award should, in turn, be proportionate to the profit the defendant sought to realize, or the harm the defendant sought to inflict. To be meaningful, the standard must include some specific ratio, to be contained in the jury instructions, between the contemplated benefit or profit and the punitive award. A plausible figure might be a ratio of two to one, the formula utilized by Congress in the antitrust laws.[436] A jury would be free to award a lower amount if the degree of culpability were modest, and forbidden to impose punitive damages so great that they would destroy the defendant financially.[437] Conversely, a larger award would be appropriate if the ordinary calculation would yield a verdict so modest that it could not affect the conduct of the defendant or others similarly situated, or if the misconduct at issue entailed such a small risk of detection that any future wrongdoer would likely discount substantially the danger of any punitive award.[438]

d. Remittiturs

A generation ago, when appellate scrutiny of the size of jury verdicts was first seriously proposed, the general practice of defendants was to ask only that the appellate courts award a new trial.[439] The

435. Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), noted that this lack of standards made it difficult to find any legitimate basis for ruling excessive an award of punitive damages: "[T]here is no rule prescribing a proportion, ratio or relationship between [punitive damages] and actual compensatory damages. . . . There being no yardstick, no definite unit of measure, which can be applied to punitive damages, we may not arbitrarily declare the verdict excessive." *Id.* at 587-88 (footnote omitted).

436. 15 U.S.C. § 15 (1982). Similar suggestions can be found in K. Geller & M. Levy, *The Constitutionality of Punitive Damages.* A.B.A. J., Dec. 1, 1987, at 88.

437. *See, e.g.*, Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) (overturning $500,000 punitive award against individual already in financial difficulty).

438. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (police coverup of unconstitutional killing); Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303 (7th Cir. 1985) (intentional racial discrimination in employment).

439. *See, e.g.*, Chicago Rock Island & Pac. Ry. v. Kifer, 216 F.2d 753, 756 (10th Cir. 1954); Brest v. Philadelphia Transp. Co., 216 F.2d 331, 331 (3d Cir. 1954); Glendenning Motor-

Fourth Circuit decision in *Neese v. Southern Railway*,[440] the first case in which the Supreme Court considered the constitutionality of appellate review of the size of jury verdicts, had merely ordered a new trial.[441] Other appellate decisions of this era provided the same relief from the disputed verdict.[442] The reluctance of defendants to seek, and of appellate courts to order, remittiturs was doubtless the result of the strong language in the 1935 decision in *Dimick v. Schiedt*.[443] That case expressed grave constitutional reservations about any proposal to extend the use of remittitur beyond the contours of that practice as it existed in the nineteenth century, an era when only trial judges, not appellate judges, ordered remittiturs to correct excessive verdicts.

Today appellate courts which find a jury verdict excessive virtually always fix the amount of the remittitur themselves, without affording the trial court any authority to consider that issue. Among the 1984-1985 appeals there are only three instances in which the district court was authorized to determine the amount of the remittitur, and in each case the appellate opinion made specific findings which largely determined what the remittitur would have to be.[444] Indeed, the issue on these appeals often seems to be not whether there ought to be a new trial on damages, but simply whether the defendant is entitled to an order of remittitur. Frequently the defendant appears to have appealed for the sole and express purpose of winning a remittitur order from the circuit court.[445] In the opinions themselves the discussion of whether the original award was excessive, and of the level to which the award should be reduced by remittitur, are inextricably intertwined.

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ways, Inc. v. Anderson, 213 F.2d 432, 437 (8th Cir. 1954); Bucher v. Krause, 200 F.2d 576, 585 (7th Cir. 1953).

440. 216 F.2d 772 (4th Cir. 1954).

441. The facts in *Neese* are discussed *supra* at notes 347-53 and accompanying text.

442. Glazer v. Glazer, 374 F.2d 390, 414 (5th Cir. 1967) (district court to consider possible remittitur or retrial); Springfield Crusher, Inc. v. Transcontinental Ins. Co., 372 F.2d 125, 126-27 (3d Cir. 1967); Compania Trasatlantica Espanola, S.A. v. Melendez Torres, 358 F.2d 209, 214 (1st Cir. 1966); Plumbers & Steamfitters Union Local No. 598 v. Dillon, 255 F.2d 820, 824 (9th Cir. 1958); Whiteman v. Pitrie, 220 F.2d 914, 919 (4th Cir. 1955); Missouri-K.-T.-Ry. of Texas v. Ridgway, 191 F.2d 363, 370 (8th Cir. 1951); Virginian Ry. v. Armentrout, 166 F.2d 400, 409 (4th Cir. 1948); *but cf.* Cobb v. Lepisto, 6 F.2d 128, 130 (9th Cir. 1925).

443. 293 U.S. 474 (1935). "[T]his court . . . must be alert to see that a doubtful precedent not be extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." *Id.* at 485.

444. Deakle v. John E. Graham & Sons, 756 F.2d 821, 832-34 (11th Cir. 1985) (fixing lost wages at $2,419 per year for 36 years, remanding for calculation of discount to present value); Knapp v. Whitaker, 757 F.2d 827, 847 (7th Cir. 1985) (ordering district court to set remittitur between $200,000 and $400,000); Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89, 96 (5th Cir. 1985) (fixing maintenance at $14 a day, reducing days for which maintenance payable, remanding for determination of remittitur).

445. Taliferro v. Augle, 757 F.2d 157, 161 (7th Cir. 1985); T.D.S. Inc. v. Shelby Mutual Ins. Co., 760 F.2d 1520, 1529 (11th Cir. 1985); Strobl v. New York Mercantile Exch., 768 F.2d 22, 24 (2d Cir. 1985).

In *Grunenthal v. Long Island R.R.*[446] the Second Circuit held excessive a jury verdict of $305,000 to a railroad employee whose foot was crushed in a job-related accident, and ordered a new trial unless the plaintiff agreed to a remittitur reducing the award to $200,000. After summarizing the evidence regarding Grunenthal's pain and suffering and lost wages, the court of appeals sustained the claim of excessiveness and simultaneously fixed the amount of the remittitur in a single conclusory sentence:

> [G]iving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello* [v. Long Island R.R., 289 F.2d 797 (2d Cir. 1961)], where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.[447]

The Supreme Court reversed, finding no abuse of discretion by the trial judge in accepting the $305,000 verdict; the Court did not address the issues of whether and how an appellate court might correct any such abuse of discretion by itself ordering a remittitur. At the oral argument in *Grunethal,* however, members of the Supreme Court expressed grave concern about how an appellate judge could go about calculating the amount of a remittitur.[448]

The problem which concerned the Court in *Grunenthal* arises in any case in which an appellate court attempts to fix the amount of a remittitur, especially for non-financial injuries. It is one thing to suggest, as Judge Stephens did a generation ago, that a plaintiff's finger is not worth $1 million, and quite another to decide how much the lost finger was worth or what precise dollar amount marks the boundary between sustainable and excessive awards for a given loss. In the years since *Grunenthal* the appellate courts, perhaps understandably, have made little progress in explaining how they arrived at particular remittitur figures. In some instances the figure is entirely unexplained;[449] in other cases, as in *Grunenthal*, the size of the remittitur follows a sum-

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446. 388 F.2d 480 (2d Cir.), *rev'd,* 393 U.S. 156 (1968).

447. *Id.* at 484. Judge Hays, in a dissenting opinion, treated the question of excessiveness and of the authority of the appellate court to direct a remittitur as if they were the same issue. *Id.* at 485 (Hays, J., dissenting).

448. Oral argument, No. 35, October Term 1968, at 21-22:

> There was no attempt at analysis in the Court of Appeals. I do not know how you would go about it . . . how you would go about saying that this man's suffering is figured at $5.00 a second or something like that, and would have been entitled to so much and no more. I do not know how you do it. But the Court of Appeals here made no attempt to do it, as I see it, they just said that is too much.

Id. at 27. "I don't know what they meant to do. They took a figure of $200,000. They didn't justify it one way or the other."

449. *Air Crash,* 767 F.2d 740; *Aldrich,* 756 F.2d 243; *Morrill,* 747 F.2d 1217.

mary of the evidence without any serious effort to relate the evidence to the remittitur. In *Dixon v. International Harvester Co.*[450] the Fifth Circuit held that $500,000 was the highest award that would be "reasonable" for the plaintiff's physical injuries and then added fifty percent out of deference to the jury. In *Haley v. Pan American World Airways*[451] another Fifth Circuit panel identified the highest previous state jury award for the death of a son and then increased that figure by one third. Neither panel explained how it had arrived at the particular percentage modification.

If the abuse of discretion standard once again became the rule of decision in these cases, the appellate practice of directing a specific remittitur would of necessity come to an end. If the determination whether to order a new trial on grounds of excessiveness is a matter of trial court discretion, surely the calculation of the appropriate amount of a remittitur, indeed the decision whether to attempt to fix a remittitur at all, is equally discretionary. In resolving the new trial motion, the trial judge decides whether the jury's verdict was against the weight of the evidence; in determining the size of any remittitur, the judge decides what hypothetical verdict would be low enough that it would not be against the weight of the evidence. It cannot conceivably be the case that the first issue is a matter of discretion, while the second issue is entirely a question of law which an appellate court can address *nisi prius*. Once an appellate court finds that the trial judge abused his or her discretion in denying a new trial on damages, the role of the circuit court should ordinarily come to an end. The question of what remittitur to order ought to be remanded to the district court so that the trial judge, enlightened by the appellate panel's analysis of the new trial issue, can exercise his or her discretion in determining the size of the appropriate remittitur or in deciding whether the amount of the damages is too indefinite to permit the fixing of a remittitur at all.

B. Appellate Review of Multi-Part Damage Awards

A claim for a particular item of damages, like a specific cause of action, may be insufficient as a matter of law, or may be tried in such a way that the resulting verdict is tainted by reversible legal error. When a single jury returns a verdict for two types of damages or on two causes of action, one proper and the other unsound, the resulting verdict will ordinarily[452] be too high to sustain. If, for example, the victim of an assault won damages for both lost wages and medical expenses, and the

450. 754 F.2d 573, 590 (5th Cir. 1985).

451. 746 F.2d 311, 319 (5th Cir. 1984).

452. The verdict would not be too high if the two causes of action provided alternative liability theories on which a plaintiff based his or her claim for redress for the same resulting injury.

award for medical expenses was held improper as a matter of law, the total amount of damages awarded by the jury would be too great to uphold on appeal. There would, on the other hand, be no defect in the jury's award of damages for lost wages. Thus, there would be no reason to overturn the damages awarded for the lost wages if that award could be separated from the award for medical expenses.

The Supreme Court first recognized in 1829 that this problem could be resolved by directing the verdict winner, as a condition of avoiding a retrial, to remit that specific part of the total damage award that was improper as a matter of law. In *Bank of Kentucky v. Ashley*[453] the jury returned a verdict of $6,350 in favor of the plaintiffs based on sixty-eight unpaid bank notes; on appeal it was shown that the plaintiffs had only alleged that there were sixty-seven unpaid notes. The plaintiffs offered to remit the $50 amount of the sixty-eighth bank note in order to preserve their verdict, and the Supreme Court permitted them to do so. Although the jury had returned a single verdict encompassing both the well pled sixty-seven claims and the defective sixty-eighth claim, it was possible to ascertain what portion of the verdict was based on the sixty-seven notes since the general verdict was simply a sum of the face value of each of the notes.[454]

In *New Orleans Insurance Association v. Piaggo*[455] the Supreme Court ordered such a remittitur on its own initiative, rather than at the request of the verdict winner. The jury in that case, on a claim by the ship owner against the insurer of the vessel, had awarded a three-part verdict: $7,000 for the lost vessel, $5,700 for its contents, and $5,000 in special damages for the unjustified refusal of the insurer to make payment on the policy, together with interest on the first two items.[456] The Court held that as a matter of law the plaintiff was not entitled to recover any special damages, his only redress for the delay in payment being interest, but the Court rejected the defendant's request for a new trial. The Supreme Court reasoned that the separate portions of the verdict were like special or distinct verdicts, and that an appellate court could reverse one such verdict while affirming the others; the Court

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453. 27 U.S. (2 Pet.) 127 (1829).

454.

> [T]he . . . judgment for $6,350 . . . is error; but the plaintiffs now move for leave to cure it, by entering a remittitur of the debt so omitted and damages *pro tanto*. . . . That the party would have had a right to remit in the court below cannot be questioned. . . . [T]he right extends . . . to several causes of action, distinct debts, distinct acres of land, and distinct pleas. . . . This court, therefore, thinks itself authorized to make a precedent in furtherance of justice. . . . The . . . [plaintiffs] will be permitted to enter the remittitur, and upon such entry the judgment will be affirmed.

Id. at 127-28.

455. 83 U.S. 378 (1873).

456. *Id.* at 385-86.

therefore modified the judgment "by disallowing the sum of $5,000 damages . . . and the interest allowed on the same."[457] In *Phillips and Colby Construction Co. v. Seymour*[458] the jury returned a general verdict of $107,353.44 and a special verdict, on a separate claim, of $11,708. The Supreme Court, finding the claim underlying the special verdict to be outside of the scope of the original complaint, directed the lower court to "set aside" the special verdict and "to enter a judgment in favor of plaintiffs on the general verdict."[459]

In the Supreme Court decisions applying this principle it was possible, on the face of either the pleadings or verdict, to distinguish that portion of the judgment which the verdict winner was entitled to retain. The lower courts in the first half of this century sensibly recognized that a remittitur would be equally appropriate in any case in which some other portion of the record in a case provided a means of distinguishing the unsound claim or damage element from the balance of the award. In *United States Potash Co. v. McNutt*[460] the plaintiff sought payment for services he had rendered to a mining company. The plaintiff advanced two distinct claims, one seeking the fair value of his services and the other based on the terms of a written agreement with the firm; the trial court instructed the jury that the plaintiff was not limited to the fee provided for by the terms of the agreement, and the jury awarded him $238,666.66. The court of appeals held, however, that plaintiff's compensation was limited by the terms of the agreement; under that agreement plaintiff's compensation would have been no more than $60,653.98.[461] The Tenth Circuit noted that, in ordering a remittitur to the lower amount, it had not undertaken to reconsider any factual question resolved by the jury:

> After one fair trial on the controlling issue . . . we are reluctant to send the cause back for another trial of the same issue. The Seventh Amendment requires one jury trial and not two. [W]e are not barred from an order of remittitur . . . if the excess of

457. *Id.* at 389.

458. 91 U.S. 646 (1876).

459. *Id.* at 656. The Court gave the plaintiffs a "reasonable time" to remit the amount of the special verdict and thus avoid the award of costs in the Supreme Court. *Id. See also* Kennon v. Gilmer, 131 U.S. 22 (1889):

> [I]f the pleadings and the verdict afforded . . . the means of distinguishing part of the plaintiff's claim from the rest, this court might affirm the judgment on the plaintiff's now remitting that part. . . . But this court has no authority to pass upon any question of fact involved in the consideration of the motion for a new trial.

Id. at 29.

460. 70 F.2d 126 (10th Cir. 1934).

461. The agreement provided for a fee of 10% of the funds raised from certain investors; a total of $606,539.80 was raised. *Id.* at 128.

> the judgment is merely a matter of computation, and does not involve a determination of a disputed question of fact.[462]

Other circuit court opinions ordered such remittiturs after concluding that the trial court should have granted a motion for a directed verdict on one of several distinct claims on which the jury subsequently ruled for the plaintiff.[463]

Although these decisions raised no substantial constitutional problems, by the mid-1980s the appellate courts had developed a hybrid practice combining elements of the principles of *Bank of Kentucky* and of the standard of review utilized in evaluating a request for judgment n.o.v.[464] In three similar cases, the Second Circuit ,[465] the Tenth

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462. *Id.* at 132. The panel added: "The Seventh Amendment prohibits a court from substituting its judgment on a question of fact for that of a jury; computing 10 per cent. of $606,653.98 involves no question of judgment, and a jury need not be impaneled to make the calculation." *Id.*

463. *See, e.g.*, Texas Co. v. Christian, 177 F.2d 759 (5th Cir. 1949); St. Paul Fire & Marine Ins. Co. v. Eldracher, 33 F.2d 675, 683 (8th Cir. 1929); Becker Bros. v. United States, 7 F.2d 3, 8-9 (2d Cir. 1925); *cf.* Hulett v. Brinson, 229 F.2d 22, 24 (D.C. Cir. 1956).

464. In Southern Pac. Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951) (en banc), the court of appeals distinguished a claim of excessiveness, which might fall outside the authority of an appellate court to consider, from an appeal

> in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced. Such total want of evidence upon a portion of the case would give rise to a question of law in the same manner in which a question of law is presented when, upon motion for a directed verdict, there appears an insufficiency of evidence as to the whole case.

Id. at 931.

It is unclear whether the Ninth Circuit believed an appellate court could address such a "question of law" if the defendant had failed to seek a directed verdict regarding the damage claim that allegedly lacked any evidentiary support.

465. In Abeshouse v. Ultragraphics, Inc., 754 F.2d 467 (2d Cir. 1985), a copyright infringement action, the jury awarded the plaintiffs $55,368 against Ultragraphics, of which approximately $37,268 represented profits illicitly gained by the defendant and $18,100 represented profits lost by the plaintiffs. The Second Circuit overturned the award for lost profits. The plaintiffs-appellees, creators of a poster solution to Rubik's Cube, had licensed Ultragraphics to distribute the poster in North America; Ultragraphics illicitly produced and sold 21,000 copies of a modified poster of its own and sold rights to it to an English publisher. In overturning the lost profits award, the court of appeals explained:

> Appellees argue that the jury's award . . . represents actual damages, in the form of compensation for profits appellees would have earned by selling 20,000 of their own posters directly to the public for between $4.50 and $5.50. However, during the period in which Ultragraphics sold most of the infringing posters, appellees were bound by the agreement making Ultragraphics the exclusive distributor of "The Cube Solution" poster in North America. Furthermore, upon the expiration of this agreement, appellees granted Ideal Toy Co. a two-year license to produce and market the poster. Appellees failed to present any evidence that under these two agreements they would have been allowed to make direct sales themselves or that, even if permitted, they would have been equipped to do so. Similarly, appellees failed to offer any evidence suggesting they might actually have done business in foreign markets. . . . Appellees also contend that the jury awarded them actual damages, by compensating them for "damage to the reputation of the posters resulting from the inferior quality of the infringing posters." . . . However, appellees did not offer any proof that the terms of their two-year exclusive license to Ideal

Circuit[466] and the Eleventh[467] Circuit, resolving defense challenges to

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> Toy had been affected by Ultragraphics' conduct. . . . These claims were thus too speculative to support any award of actual damages."

Id. at 470-71.

This analysis involves many of the problems discussed in Part III. A jury that actually compared the original and infringing poster might have inferred from that direct evidence that the inferior quality of the latter poster would have undermined consumer interest generally in posters of this sort. A jury that included one or more Rubik's Cube afficionados would certainly have been better able to make that judgment than a panel of judges none of whom had ever tried to solve the puzzle. Similarly, a jury's assessment of the value of the poster to Cube owners would necessarily have colored its judgment about the ease with which the plaintiffs-appellees could themselves have marketed the poster in North America or abroad. The Second Circuit opinion is based in part on an after-the-fact creation of rules requiring the plaintiff to have proved directly facts which the jury might have inferred from circumstantial evidence in the record. It is particularly difficult to understand the appellate court's argument that the plaintiffs had failed to prove that direct sales by the plaintiffs were permitted under the agreement with Ideal Toy. If the agreement were in the record, this argument is almost certainly unsound, since the permissibility of such sales would presumably be clear on the face of the agreement. If the agreement were not in the record, it seems unreasonable for the appellate panel to fashion after the fact an absolute rule that the plaintiff had to prove direct sales were permitted, rather than requiring the defendant to prove that such sales were forbidden. The argument that the jury's verdict was "speculative" is discussed *supra* at text accompanying notes 207-11.

466. In Collier v. Hoisting & Portable Engineers Local Union No. 101, 761 F.2d 600 (10th Cir. 1985), the plaintiff, a contractor doing work at an Owens-Corning plant, was the target of illegal secondary picketing. When the picketing caused difficulties with its own employees, Owens-Corning terminated plaintiff's contract and allegedly refused to award him any further contracts. "There was evidence that the officials of Owens-Corning responded to threats that their plant would be shut down if plaintiff's work was not stopped." *Id.* at 603. The Tenth Circuit upheld the award for profits lost on the terminated contract, but overturned a portion of the jury verdict that reflected profits lost because of Owens-Corning's permanent refusal to use plaintiff's services:

> Owens-Corning told [plaintiff] shortly after the incident . . . that there would be no more jobs for plaintiff until plaintiff had his problems with the union straightened out. . . . [P]laintiff made no inquiries as to available jobs after the conversations shortly after the ineident and made no other attempts to work for the Company. There was a lapse of time of 52 months from the incident until the suit and plaintiff claimed $1,200 per month for this period. This was his average monthly profit on Owens-Corning's jobs before the incident. The jury awarded approximately such an amount. We must hold that the proof of damages after the completion of the job in progress was "speculative and uncertain". . . . The only damages established were the loss on the job in progress. The unlawful acts of Local 1290 had an adverse effect on the relationship plaintiff had established with Owens-Corning. But the proof of damages was speculative at best in the absence of any effort on the part of plaintiff to obtain any jobs.

Id. at 603.

There seems nothing the least bit speculative about the jury's award. Owens-Corning told plaintiff unequivocally that it would not do business with him until his labor problems were "straightened out," and the union made it equally clear that those problems would continue until he agreed to unionize the disputed position at issue. *Id.* Under these circumstances, it was fairly certain that Owens-Corning's ban on plaintiff would continue unless he agreed to the union's demands and that further application by him for work at Owens-Corning would have been entirely pointless.

467. In T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520 (11th Cir. 1985), a jury found that the defendant had wrongfully refused to pay out the proceeds of a fire insurance policy on a restaurant. The restaurant business was owned by the plaintiff, T.D.S. Inc., which held title to personal property in the building; the building in which the restaurant was located was owned by a

the size of jury verdicts, held that a distinct portion of each verdict had to be overturned because that part of the verdict was not reasonably supported by the evidence. These decisions would have been unexceptionable if the defendant had sought a directed verdict to forbid the jury to consider the defective damage claim, and had submitted a motion for judgment n.o.v. on that issue following the verdict. But in each instance the defendants had not filed such motions, but had simply moved, after the juries returned their verdicts, for new trials on the grounds that the verdicts were excessive.

This hybrid practice is tainted by two distinct, but equally fatal, constitutional flaws. First, these decisions disregard the different substantive standard appropriate when an appellate court is asked to direct entry of a judgment n.o.v. and when it is asked to order a new trial. For the reasons explained above, where judgment n.o.v. is sought on appeal, the circuit court is theoretically considering whether the trial judge should have granted a directed verdict prior to jury consideration of the evidence. A district court could, of course, grant a partial directed verdict, ordering the jury to make no monetary award on a particular damage or liability claim. In such a situation, the appellate court has the same authority as the trial court to assess what facts the evidence fairly conduced to prove, bearing in mind the constraints discussed in Part III. As the Supreme Court repeatedly has emphasized,[468] however, in the absence of motions for a directed verdict and judgment n.o.v., the circuit courts may only consider whether the district judge should have granted a motion for a new trial. The appellate court is not authorized to make its own assessment of the evidence, not even the narrow assess-

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third party. Mr. and Mrs. Starr, the sole shareholders in T.D.S. Inc., had an option allowing them, at an apparently attractive price, to purchase the building in which the restaurant was located.

T.D.S. was awarded $88,000 in damages for lost personal property and $12,000 for damages to leasehold improvements; neither of these awards was disputed on appeal. The jury also awarded $420,000 in special compensatory damages for lost business opportunities; this award was based on three distinct claims—the value of the restaurant business itself, the value of the option to purchase the building involved, and the injury to the credit reputation of T.D.S. The Eleventh Circuit held that only the first claim could be sustained. The appellate panel explained:

> [T]he special damage award could not properly be predicated on the option to purchase the . . . building, even though there was much testimony concerning the value of the option itself as well as the value of the real estate which it secured. The option was owned by the Starrs individually, not by TDS, the only party-plaintiff in this action. We thus cannot hold that the Starrs' loss of the ability to exercise the option is equivalent to TDS's loss of a valuable business opportunity.

Id. at 1533 (emphasis omitted). While the evidence might not have compelled an inference that the option represented a business opportunity for T.D.S., a jury surely could have inferred that was the substance of the option; since the Starrs had chosen to hold through T.D.S. title to the personal property involved in the restaurant business, it would have been reasonable to infer that real property would have been acquired and held in the same manner.

468. Johnson v. New York, New Haven & Hartford R.R., 344 U.S. 48, 50 (1952) (and cases cited).

ment appropriate on a motion for judgment n.o.v., but may consider only whether the trial judge abused his or her discretion in denying the requested new trial. Although it is far from clear what constitutes an abuse of discretion, the appellate courts have generally[469] agreed that the circumstances in which a circuit court can find an abuse of discretion, and order a new trial, are far narrower than the circumstances in which a circuit court can order judgment n.o.v. In 1984-1985, district court orders granting or denying new trials were overturned on appeal far less frequently than district court orders granting or denying motions for judgment n.o.v.[470]

The second difficulty derives from the fact that in two of the three cases at issue, the appellate courts, having found defects in the evidence supporting one claim, directed by way of remedy that the entire case be retried unless the plaintiff agreed to remit the award for the disputed claim.[471] Because these appeals were not premised on motions for directed verdicts and judgments n.o.v., the appellate courts could not order judgments n.o.v. on the defective claims, but rather were limited to directing new trials on those issues. Thus the plaintiffs were entitled both to new trials on the disputed claims and to affirmance of the other claims. The effect of the remittitur order, however, is to force plaintiffs to forfeit one of these rights. If the plaintiffs wanted an affirmance of the undisputed claims, they had to agree to the remittitur and a forfeiture of their rights to new trials on the disputed claims, effectively converting new trial orders into judgments n.o.v., a consequence the appellate courts could not constitutionally have ordered directly. If plaintiffs exercised their right to new trials on the disputed claims and thus rejected remittiturs, the appellate courts would reverse and remand the undisputed claims for new trials, even though there was no pretense that any independent constitutional bases existed for overturning those portions of the juries' verdicts. Thus the use of remittitur orders in cases of this sort departs substantially from past practice and involves two distinct violations of the seventh amendment.

V. Conclusion

The last twenty years have been, deliberately or inadvertently, a unique constitutional experiment demonstrating the practical significance and legal importance of the seventh admendment. In the absence of any Supreme Court scrutiny or intervention, the circuit courts have been free to work their will on civil jury verdicts. This protracted sus-

469. *See supra* text accompanying notes 280-83.

470. *See supra* text aceompanying notes 53-55.

471. Abeshouse v. Ultragraphics, Inc., 754 F.2d at 471; T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d at 1533.

pension of enforcement of the seventh amendment has tested the extent of the inherent self-restraint on the part of judges given the raw power to overrule any jury verdict with which they happened to disagree. The experiment, and the result, bear a decided resemblance to William Golding's *Lord of the Flies*.

We now know, at considerable cost to the litigants of the last two decades, something we did not know in 1968—that left to their own devices, a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box. We also have today a substantial body of evidence demonstrating that appellate judges are in important ways less competent factfinders than ordinary jurors, and that judicial superjuries are, on the whole, significantly more pro-government and pro-defendant than the juries selected from the populace as a whole. The original concerns of the framers of the seventh amendment may, to a significant degree, be shrouded in the mists of time, or impossible to translate readily into modern terms, but the practical importance of the amendment is now clear beyond peradventure.

The twenty year de facto suspension of the seventh amendment, regrettable though it was, has been an event of singular importance in constitutional history, a development which, like the Sedition Act of 1798 or the abuses of the McCarthy years, may ultimately serve to reinvigorate the fundamental principles temporarily trampled underfoot. Recent experience has demonstrated with considerable force the wisdom of Justice Douglas' insistence in *Harris v. Pennsylvania Railroad Co.*[472] that the Supreme Court make liberal use of its discretionary jurisdiction to enforce on the circuit courts the restrictions of the seventh amendment. Two centuries ago Blackstone warned that the right to jury trial, and the freedoms which it protected, were imperiled by

> [e]very new tribunal, erected for the decision of facts, without the intervention of a jury. . . . It is therefore . . . a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to its ancient dignity if at all impaired . . . and above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible preferences, may in time imperceptibly undermine this best preservative of English liberty.[473]

472. 361 U.S. 15, 17 (1959) (concurring opinion).
473. 3 W. BLACKSTONE, COMMENTARIES 379-80 (1803 ed.).

The evisceration of the right to jury trial which has become commonplace in the circuit courts is now entirely perceptible; the need for Supreme Court action to restore the vitality of the seventh amendment is equally clear.

Respect for the constitutionally protected right of trial by jury need not, indeed could not, be premised on the view that juries are never unreasonable or unfair, or that there is thus simply no need to accord to judges the authority to correct such mistakes. Clearly juries are capable of error and may at times tip the scales of justice to favor the party or legal principle they prefer. But to give judges the ability to "correct" such mistakes is necessarily to give judges the power to override sound jury decisions in order to obtain a result preferred by the judiciary. In framing the rules regarding appellate review of jury verdicts, we must choose to run either the risk of misjudgment by juries or the risk of overreaching by judges. The seventh amendment mandates that that choice be made in favor of trusting to the decisions of juries.

REMITTITUR ORDERS 1984-1985

Case	Award for	Jury	District Court	Court of Appeals
Abeshouse v. Ultragraphics, 754 F.2d 467 (2d Cir. 1985)	Lost profits	$ 18,100	$ 18,100	$ 11,395
In re Air Crash Disaster Near New Orleans, La., 767 F.2d 1151 (5th Cir. 1985)	Lost love and companionship from wrongful death of wife	1,500,000	1,000,000	500,000
	Lost love and compansionship for each of three sons	400,000	400,000	250,000
Aldrich v. Thomson McKinnon Securities, Inc., 756 F.2d 243 (2d Cir. 1985)	Punitive damages for stock fraud and churning	$3,000,000	$3,000,000	$1,500,000
Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984)	Punitive damages for coverup of unconstitutional killing	350,000	350,000	50,000

Case	Award for	Jury	District Court	Court of Appeals
Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985)	Husband's pain and suffering, wife's loss of consortium	$2,821,871	$2,821,871	$ 892,139
Haley v. Pan Am. Airways, Inc., 746 F.2d 311 (5th Cir. 1984)	Loss of love and companionship of deceased son	350,000	350,000	200,000
Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985)	False arrest	75,000	75,000	10,000
	Punitive damages	500,000	500,000	2,000
Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985)	Emotional injury caused by strip search	112,000	112,000	75,000
Katch v. Speidel, 746 F.2d 1136 (6th Cir. 1984)	Lost wages	1,534,000	1,190,789	389,000
K-B Trucking Co. v. Riss International Corp., 763 F.2d 1148 (10th Cir. 1985)	Loss due to commercial fraud	48,724	48,724	29,000
Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740 (2d Cir. 1984)	Loss of leg	2,000,000	2,000,000	800,000
	Loss of services of 16-year-old son	224,000	24,000	40,000
Morrill v. Becton, Dickinson & Co., 747 F.2d 1217 (8th Cir. 1984)	Damages for commercial fraud	3,000,000	3,000,000	2,125,000
	Punitive damages	20,000,000	20,000,000	3,000,000
Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985)	Emotional distress	75,000	75,000	35,000
	Punitive damages	150,000	150,000	20,000
Stewart & Stevens Services, Inc. v. Pickard, 749 F.2d 635 (11th Cir. 1984)	Cost of repairs to defective engines	500,000	500,000	295,000

Case	Award for	Jury	District Court	Court of Appeals
Taliferro v. Augle, 757 F.2d 157 (7th Cir. 1985)	Pain and suffering, physical injury, medical expenses and lost property	47,000	47,000	25,000
T.D.S. Inc. v. Shelby Mutual Ins. Co., 760 F.2d 1520 (11th Cir. 1985)	Special financial damages	420,000	420,000	225,000
Walters v. Mintec/International, 758 F.2d 73 (3d Cir. 1985)	Lost support, guidance, and companionship of deceascd father	250,000	250,000	25,000