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Directions for Directed Verdicts: 
A Compass for Federal Courts

Edward H. Cooper*

Directed verdicts, and their hang-fire cousins judgments notwithstanding the verdict,¹ are among the most fundamental tools used by judges to control juries. Exercise of this control in an individual case inherently involves a large measure of careful judgment, tailoring general principles of deference to jury freedom to the unique facts before the court. Many of the various and frequently confusing phrases used in an attempt to establish guiding standards provide no more help than this general statement. For many of the problems, nothing more can be said.

* Associate Professor of Law, University of Minnesota.

1. Since the standards for entering judgment notwithstanding the verdict are the same as the standards for directing a verdict, the discussion throughout will refer only to directed verdicts. Appellate courts are increasingly insisting on the advantages of obtaining an actual verdict, e.g., Campbell v. Oliva, 424 F.2d 1244, 1251-52 (6th Cir. 1970), so in practice it is likely that more and more of the rulings actually will occur in the form of grant or denial of judgment notwithstanding the verdict. The primary advantages of allowing the jury to return its own verdict are that the jury may very well reach the result the judge thinks is required, thereby sparing the need to make what may be a difficult determination of the appropriateness of a directed verdict, and that, if the trial judge should chance to be wrong in his determination that the case is appropriate for judicial disposition, the results of the first trial can be salvaged if it is otherwise free from reversible error.

Direction before the jury has a chance to return a verdict, however, has advantages which ensure its continued employment. The more obvious advantages lie in the direction of "efficiency"—the directed verdict obviates the need for argument, instructions, and what may be lengthy jury deliberation. Some cases may call so clearly for a directed verdict that these advantages easily outweigh the potential advantages of judgment notwithstanding the verdict; at the extreme are cases disposed of by directed verdict on the basis of opening statements of counsel at trial, e.g., Morgan v. Koch, 419 F.2d 993, 999 (7th Cir. 1969). An advantage more difficult to evaluate is that direction before the jury has had an opportunity to deliberate changes the nature of the confrontation between judge and jury. Although the directed verdict is a clear exercise of a control which might have been avoided by awaiting rendition of the verdict, there is an offsetting uncertainty whether the control has functioned so as to do anything more than expedite a result which any jury would inevitably reach anyway. Judgments notwithstanding the verdict, on the other hand, place the fact of control in stark relief—the jury's actual verdict has been superseded by an exercise of judicial power. Long-run acceptability of our combined judge-jury system of adjudication may well be best served by retaining, and using, both options.
More can be said, and indeed has been said often and at length, about some of the most fundamental problems. None of the extensive literature, however, has analyzed together, in depth, the details of all the separate problems capable of such reasoned elaboration. Since these problems are interdependent as well as independent, much is lost in approaching them separately. Perhaps more importantly, a clear statement of the functions and limitations of directed verdicts is a necessary prelude to any effective attempt to determine whether federal courts should use state or federal standards in diversity litigation. This article is intended to create, within the limits suggested by current decisions, a general analytic framework for directed verdict problems in the federal courts. This purpose requires acceptance of the basic premise that civil jury trial is a desirable institution, worthy of the constitutional protection it enjoys. Quite apart from the impropriety of effecting constitutional amendment by drastic judicial expansion of directed verdict practices, it is clear that any radical alteration of the jury's role, or its abolition, could be accomplished much more effectively and fairly by other means.

Few, if any, of the specific conclusions built into the general framework are entirely novel or startling; many of them will be familiar to some readers, others to other readers. Those who confidently agree with the conclusions in one area may profitably skip on to the next. As a general roadmap, the exposition begins in Part I with an exploration of the proposition that there are no rigidly definite directed verdict standards to be found in the Constitution; a general policy of respect is about the most that can be developed with any secure foundation. Part II explores specific problems of the jury's function with respect to choosing the direct testimony to be credited, inferring facts from the accepted testimony, and applying the law to the direct and inferential facts thus found. The most important conclusion offered is that the appropriate exercise of judicial control in these areas properly depends heavily on the nature of the factual uncertainties and legal rules involved on all the evidence in specific cases: general statements of deference to the jury cloak widely different degrees of deference according to the perceived consequences of possible jury error. Part III then suggests that once the present federal standards are identified, and the underlying policies un-

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2. For obvious reasons, no attempt has been made to canvass all of the recent federal decisions. Enough have been surveyed, however, to establish firm foundations for much of what follows.
derstood, it becomes apparent that in diversity litigation they should be applied in lieu of conflicting state standards only with respect to general rules controlling the evaluation of credibility. All else should be referred to state practice.

I. GENERALITIES OF PURPOSE AND HISTORY

A. THE BASIC PROBLEM

Juries are admittedly, even vauntedly, tyros at the task of adjudication.3 And the adjudicatory task set for them is one of immense intellectual challenge. The central difficulty of recreating historic data—of “finding” facts which often have never been known and which cannot be known with certainty at the time of decision—requires a literally unattainable combination of experience, intuition, understanding and luck, no matter who is trying the case. Jurors additionally are charged with the burden of comprehending instructions on the law, often involving concepts which boggle the minds of students, confuse experienced practitioners, and narrowly divide the opinions of outstanding judges. Application of uncertainly comprehended law to imperfectly induced or deduced fact is a final chore of no mean demands. The jury, moreover, must perform these separate duties so as to produce a unanimous result. Difficult as the task is, a verdict ordinarily is produced, and ordinarily it is effective to terminate the lawsuit. The merciful obscurity of the verdict commonly alleviates the embarrassment which might result from any detailed knowledge of a jury’s chosen means of discharging its duties. Many cases remain, however, in which either the prospect of a particular verdict or its actual rendition is in itself enough to impugn the jury’s performance. Directed verdicts are the basic means for controlling jury performance in such cases.4 This control is exercised, as it must be, by the only other public


4. The same function could conceivably be discharged solely by exercise of the power to grant repeated new trials until some jury should return a verdict in agreement with the views of the judge. The obvious unfairness of such a procedure to the parties, and the heavy burden an unseemly parade of successive trials would impose on the
participants in the litigation—the judges, trial and appellate.

The contemporary problem of directed verdicts is the problem of developing and enforcing the standards limiting this power of judicial control. Since judges are experts in adjudication by training and experience, at least as compared to jurors, it might be urged that the limits on their power of control should be wide. The extreme reach of such power, short of simply abolishing any effective jury function, would allow a judge to dictate the result whenever he prefers one outcome of the suit to another. This extreme has never been approached in formal statement and probably has seldom been realized in actual application. Indeed, judges instead have veered a zigzag pattern, at times approaching rather close to the opposite extreme, at which the jury is denied the right to dispose of a case only when there is literally nothing to support the position of one party.

Such strict limits on the judicial power to control jury verdicts have been developed in large measure because of the preferred position assigned to the jury by Constitution and tradition. The preservation of jury trial by the seventh amendment includes the basic division of functions ascribing the task of factfinding to the jury and the task of lawgiving to the judges. The immediate result of this division is that judges have assumed a very narrow role in limiting jury factfinding, acting to control the jury only when a factual determination opposed to that made by the judge is, in some varying and uncertain sense, very probably wrong.

Factfinding freedom, further, has had the additional consequence of carrying with it a largely unintended, but unavoidably high, degree of jury freedom with respect to following and applying the law. This consequence has followed because no one has been able to devise a system for limiting the jury to its primary factfinding chore. In most cases, the variety of factual issues and the number of possible combinations of findings make it impossible even for judge and litigants to frame adequately detailed, alternative specific findings, much less ask the jury to gen-

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5. “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 a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII.

erate such findings on its own. Simple examination of a respectable set of findings of fact prepared by a judge trying a case without a jury, and reflection on the number of implicitly rejected alternative findings, should demonstrate the complexity of the task involved. Even if such findings could somehow be prepared with adequate completeness in the heat of litigation, asking jurors to reach unanimous acceptance of such findings, instead of simple concurrence in the general justice of a general verdict, or a partly degeneralized special verdict, could impose unwise loads on the system. Since the jury's findings of fact thus cannot be adequately communicated to the judge, the alternative has been accepted that the judge must communicate his learning in the law to the jury. Without any system to check on the jury's understanding of the judge's instructions, or on their application of the instructions to the unknown facts they have found, the result is that for all practical purposes the jury has a large degree of freedom to misunderstand, misapply or wilfully ignore the law.

The vital justification for the institution of directed verdicts is found in the need to provide at least some minimal device for preserving the integrity of the legal rules given by the judges. (It need hardly be added that very often the legal rules transmitted by the judges have their ultimate source in legislative, rather than judicial, rulemaking.) At some point, undefinable in the abstract, it must become clear that a particular jury verdict would represent not a finding of facts which justify that result but a failure, for whatever reason, to apply the legal rules to the facts as they "must have been" found. As a homely example, a plaintiff might demand damages on the ground that the defendant had hurt her feelings by failing to say "good morning" as they passed in the street. A jury verdict for the plaintiff, following a trial at which nothing else was claimed and at which proper instructions were given on the law, could scarcely result from jury findings on the truth or falsity of the asserted failure to give greeting. The legal rules that there is no duty to give greeting, and no duty to pay damages unless violation of some judicially

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7. One reflection of the difficulty of the chore of preparing findings of fact may be found in the running battle appellate courts wage with trial judges over the advisability of adopting findings prepared by counsel. See, e.g., United States v. El Paso Nat. Gas Co., 376 U.S. 651, 656-57 (1964); In re Las Colinas, Inc., 426 F.2d 1005, 1008-10 (1st Cir. 1970).
sanctioned duty can be shown, are to some extent made jury-proof by the directed verdict.

One of the major shortcomings of the directed verdict as a device for preserving the integrity of legal rules is that it depends upon the preliminary determination that the jury "must" find the facts in a certain way; whenever it cannot be said, within the accepted limits of judicial reticence, that the jury could not find facts sufficient to warrant invocation of a particular legal rule, the jury is given its factfinding, law-applying chore without any means of determining whether it has so found the facts or has instead worked an intentional or unintentional change in the law. Under current approaches, directed verdicts simply cannot be used to ensure rigid obedience to the law by jurors. Matters are complicated further, moreover, by the fact that, despite the bromide that judges decide the law, juries have an avowed function in generating little "one-case" rules of law in many areas—refining the standard of reasonable care is simply the most common example—and often are urged to have as well a clandestine function of improving the law as given by the judges to keep it more in tune with current community values. Even if directed verdicts could be used to ensure rigid obedience to the law, in short, courts would not always wish to use them so.

These twin functions of limiting jury freedom in factfinding and law application are patently incapable of translation into definite standards automatically determining the appropriateness of directing a verdict in a particular case. No one has ever pretended otherwise. The most that can be sought are helpful expressions of the appropriate degree of judicial self-limitation and particular answers to some of the most common underlying problems. History must provide the starting point in this quest. The constitutional measure of the right to jury trial is in large part one of history; even apart from constitutional compulsion, an important part of the purpose in limiting judicial inroads on jury functioning is the preservation of traditional methods of adjudication for want of any consensus on better ways of doing things. The following summary of current historical knowledge, however, will show that history provides little more by way of answers than the caution that has already been posited: protection of the jury's function requires that juries be left a large, but undefined and clearly not unlimited, scope of freedom in discharging their tasks. Once this point is examined, the stage should be set for a restatement of the general judicial ap-
approach and for the ensuing examination of the particular problems of credibility, inference, and application which are at least capable of further analysis.

B. History


"Preservation" of the right of jury trial has been taken to mean that the measure of the right should be sought in the practices of the common law courts at the time of adoption of the seventh amendment in 1791. As will be noted at somewhat greater length below, this measure has generally been applied to allow reforms of the details of trial procedure in ways which may substantially affect the jury's discharge of its duties, so long as the fundamental factfinding function is not usurped by the judges. The basic historic difficulty posed by directed verdict practices is that there had not emerged, by 1791, either the detail or more than the approximate substance of a parallel method of judicial control.

Tardy emergence of means of judicial control adapted to the needs of jury trial as a contemporary institution is almost certainly due in major part to the gradual evolution of the nature of the jury. Originally responsible for deciding cases on the basis of the individual knowledge of the facts possessed by the jurors themselves, it only gradually developed into a body responsible for deciding solely on the basis of evidence produced in court. Bushell's Case, decided in 1670, reflects the slow pace of this growth. In freeing on habeas corpus the jurors imprisoned for failure to follow a London Sessions Court's directions to convict William Penn and another for "unlawful assemblies and tumults," the Court of Common Pleas noted that since the jurors could have decided the case on the basis of their own knowledge of the facts, the original court could not say on the basis of the evidence offered at trial that the result of conviction must follow as a matter of law. Around the close of the century, however, it was becoming established that the jury should reach its verdict not as a body of witnesses but solely by judging evidence offered in court. With a principle of such recent growth, it is not sur-

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12. See, e.g., Blume, Origin and Development of the Directed Ver-
prising that fully developed means for confining the jury to decision within the reasonable reach of the facts offered in evidence at trial had not emerged by 1791. So Professor Scott long ago observed that “[t]he methods of controlling the jury grew up in a haphazard sort of way. Most of them grew up at a time when the jurors still had a right to decide upon their own knowledge, as well as upon the evidence, a right which in the eighteenth century became obsolete.”

This pattern of growth by itself suggests that 1791 practices should not be adopted as setting the final definitions of the methods and extent of judicial control.

2. **Methods of Control.**

Turning first to the methods by which judicial control was effected, there did exist in 1791 a practice of “directing” juries as to the verdict which should be returned. Although it is not entirely clear, apparently the direction was simply a particularly clear way of combining instructions on the law with advice on the facts—the jury was told, in effect, that the court was of the view that, on the facts shown at trial as combined with the law, one party or the other was entitled to recover. While the jury was apparently thought to be under a duty to obey the instruction, the remedy for disobedience was a new trial. Since obedience was expected and ordinarily must have followed, thereby finally terminating the case, the device is of course something considerably more potent than simply waiting for the jury’s verdict and then setting it aside if against the court’s views. On the other hand, the limited effect of the sanction makes this form of directed verdict a considerably less efficient means of control than the modern version.

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16. Compare the observation in Galloway v. United States, 319 U.S. 372, 391 n.23 (1943), that while the conception of directing a verdict was not entirely unknown to eighteenth century common law, “there is no reason to believe that the notion at that time even approximated in character the present directed verdict.” Perhaps surprisingly, it was only in 1963 that the Federal Rules of Civil Procedure were amended to provide expressly that “[t]he order of the court granting a motion for a directed verdict is effective without any assent of the jury.” Fed. R. Civ. P. 50(a).
New trials were given not only as a sanction for failure to follow the court's directions, but more importantly, also on the ground that the verdict was against the evidence at trial. While this device was well established by 1791, its differences from the directed verdict are so apparent as to need no further elaboration.

The third primary method of control in well-established use in 1791 was the demurrer to the evidence. Something will be said below about the uncertainty surrounding the sufficiency of the evidence standards for granting the demurrer. For the moment, the procedural distinctions between the demurrer and a modern directed verdict are all that need be noted. The consequence of demurring to the evidence was to deprive the demurring party of any chance to have the case considered by the jury; by demurring, he admitted the truth of his opponent's case, and all that his opponent's proof reasonably tended to prove, and posed the question of law whether upon the facts as thus admitted his opponent was entitled to recover. The admission was binding—the answer to the question of law was the end of the case.

Under modern practice, of course, denial of a motion for directed verdict does not end matters but simply paves the way for a jury determination. The jury remains perfectly free to find facts quite different from those the court is obliged to assume in passing on the motion.

Several other devices aimed at controlling the factfinding function of the jury are of small enough importance for present purposes that they need only be enumerated. The attainant was used to some extent in the early colonies, but its traces had vanished everywhere by 1791. The nonsuit had not really grown into the compulsory nonsuit most closely approaching directed verdicts; judgments notwithstanding the verdict and motions in arrest of judgment were used to test the sufficiency of the plead-
ings after the verdict; and some measure of control over legal issues was attained by the use of special verdicts and a "case reserved."\textsuperscript{21} None of these offers any persuasive analogy or help for modern directed verdicts.

3. \textit{Jury as Judges of Law.}

Before turning to the problem of historic standards for measuring the sufficiency of evidence to go to the jury, it is necessary to consider the rather brief fling in the American colonies of the doctrine that juries have the right to determine the law as well as the facts. If followed today, this doctrine would eliminate the primary function of directed verdicts. Even if the court could tell the jury that it must take certain facts as established, the case would have to be left for a jury determination of the law applicable to the facts, and there would be scant room for controlling jury redetermination of the facts as well as the law. The embarrassing aspect of this doctrine is that it reached its fullest development at the time of the adoption of the seventh amendment.

By far the most important stage in the development of the notion that juries are entitled to determine the law for themselves came in \textit{Georgia v. Brailsford}.\textsuperscript{22} The State of Georgia had instituted an original action in the Supreme Court to enforce a claim under state statutes providing for confiscation of debts due to British subjects or to persons subject to confiscation of their property in other states by the laws of such states.\textsuperscript{23} The case was tried before a jury, and the charge of the Court to the jury was delivered by Chief Justice Jay, with the remark that it was fortunate to find the Court of unanimous opinion. During the course of the charge, it was noted that the facts of the case were not in dispute, so that the only remaining point was to settle the law. The jury was told that the opinion of the Court was that the defendants should win, since the state statute did not have

\begin{itemize}
\item \textsuperscript{21} Details as to these practices, and the various colonial treatment of them, may be found in Henderson, \textit{supra} note 14.
\item \textsuperscript{22} 3 U.S. (3 Dall.) 1 (1794).
\item \textsuperscript{23} The case began with an original bill in equity filed in the Supreme Court. The defendants in the Supreme Court, Brailsford, Powell, and Hopton, had obtained judgment for the money in question in a suit in the United States circuit court in Georgia. The state was denied leave to intervene in those proceedings, and sought injunctive relief in the Supreme Court against disposition of any money that might be collected by execution on the judgment. \textit{See} \textit{Georgia v. Brailsford}, 2 U.S. (2 Dall.) 415, 419 (1793). The reporter notes that "[a]n amicable action was accordingly entered and tried at the bar of the Supreme Court..." \textit{Id}. 
\end{itemize}
the effect claimed by the state. Continuing from that point, the charge admonished the jury of the "good old rule" that questions of fact are in the province of the jury, and questions of law in the province of the court, and went on:

But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy . . . . [Although we do not doubt that you will pay respect to the opinion of the Court,] still both objects are lawfully within your power of decision.24

The charge concluded with the observation that it had been suggested that the jury should give consideration to the fact that recovery could not mean much to the state, while it would impose a considerable burden on the defendants, but that the jury should not consider this, for "if the money belongs to her, she ought to have it."25

The Court's charge has been set out at some length, and emphasized, for the purpose of illustrating that however "anomalous" it may seem today,26 there is little reason to believe that it was not the considered judgment of the Court and in accord with a doctrine which was not at all novel.27 The charge does not represent a simple statement that the jury, in returning a general verdict, has power to disregard the law even though it has no right to do so. Instead, it begins with a statement of the Court's views of the law, exhorts the jury to pay them respectful heed, but clearly admits of the jury's "lawful right" to find the law is something else; it even concludes with a statement that if—contrary to the Court's opinion—Georgia is entitled to the money, "she ought to have it."

24. 3 U.S. (3 Dall.) 4 (1794) (emphasis added).
25. Id. at 5.
26. After noting that the decision seems extraordinary doctrine a scant century later, Thayer suggests that it "is, perhaps, partly explained by the practical difficulties existing at that period, in controlling the verdicts of juries in trials at bar, and by the lack of learning on the bench." J. THAYER, supra note 12, at 254. See also Henderson, supra note 14, at 317-18: the decision "is an anomaly unless we assume that Chief Justice Jay in his own mind distinguished sharply between the 'power of decision' and the right to decide."
27. In Sparf v. United States, 156 U.S. 51, 64-65 (1895), the Court seems to approve the suggestion of Mr. Justice Curtis in United States v. Morris, 26 F. Cas. 1323, 1334 (No. 15,815), 1 Curtis 23, 58 (D. Mass. 1851), that perhaps the charge of the Court was incorrectly reported. The answer of the dissenting opinion is persuasive, although it is not framed in quite the same way as the answer offered in the text. See 156 U.S. at 154-58.
The most impressive examination of the late eighteenth-century notion that juries should be judges of the law suggests several reasons for its popularity. There was, first, a strong sentiment in favor of the jury as a check on manipulation of the law as an instrument of royal despotism, shared both in England and the colonies. In the colonies there was added the understandable preference for colonial juries over royal judges. Many of the judges were not lawyers, and, even if the judge should happen to be one, there was an underlying distrust of legal experts. Natural rights theories, further, suggested that principles of natural justice were more important than accepted notions of law and that such principles were accessible to the ordinary man.28

Whatever its sources, the theory of the jury's right to make the law soon disappeared in civil cases, and has now all but vanished in criminal cases as well.29 Judges were quick to find ways to reestablish their traditional authority over the law, often flying in the face of express statutory or constitutional provisions.30 At the same time, in parallel and almost certainly interreacting steps, courts were developing the directed verdict or analogous devices to ensure some measure of effective control over the law in civil cases.31

Today it would be accepted on all sides that juries are duty-bound to follow the law as laid down in judicial instructions. We

28. See Note, The Changing Role of the Jury in the Nineteenth Century, 74 YALE L.J. 170, 171-73 (1964). It is concluded that “[j]udging from the limited sources available, the right of the jury to decide questions of law was widely recognized in the colonies.” A similar list of factors is set out in Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV. 582, 584, 591 (1939). See also A. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTIONS 57-58 (1956).

29. Maryland appears to have the last functional doctrine of jury lawgiving freedom. Md. Const. art. 15, § 5 provides that, subject to the power of the court to pass on the sufficiency of the evidence to sustain a conviction, “the Jury shall be the Judges of Law” in criminal cases. See the discussions of this provision in Wyley v. Warden, 372 F.2d 742 (4th Cir.), cert. denied, 389 U.S. 863 (1967); Prescott, Juries as Judges of the Law, 60 Md. St. Bar Ass'n 246 (1955). One of the delightful consequences is that counsel are free to argue the law to the jury. See, e.g., Phillips v. State, 6 Md. App. 56, 250 A.2d 111 (1969); cf. Brady v. Maryland, 373 U.S. 83 (1963).

30. The story is told in Howe, supra note 28. Professor Howe concluded that “[w]hat seems discreditable to the judiciary in the story . . . is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions.” Id. at 616.

31. A study of Massachusetts practice points out that the directed verdict developed as a device to prevent the jury from making its own determination of the law in the same decade, 1850-1860, as it was finally
trust, at least in theory, to application of known law, not the divine or profane magic of jury wisdom. But if the measure of the right to jury trial is to be one of common law practice in 1791, which included a right of jury lawgiving, how can this principle, and the directed verdicts which depend on it, be reconciled with that practice?

One slightly shoddy source of support for present practice can be found in the doctrine that the 1791 common law which controls the seventh amendment is the law of England, without regard to colonial practice. This rule has been unequivocally stated by the Supreme Court, largely on the ground that colonial practices were too widely divergent to afford any sufficient guide for constitutional doctrine. One minor objection to this approach is that the Court at times has considered colonial practices as at least some help in determining the meaning of the amendment. A more important objection might be that it is simply bad constitutional doctrine to seek the meaning of the amendment by excluding from consideration a widespread, if transient, contemporary practice which may have been very much in the minds of the framers.

There is no entirely satisfactory response to this objection. Nonetheless, it has clearly been accepted that the Constitution preserves the factfinding core of jury trial and does not preserve a right of jury lawgiving. Since this result squares so clearly with the only rational or even tolerable role for the jury today, further discussion may be pretermitted in favor of a brief review of the process by which the Supreme Court approved the modern

settled that the jury had no right to make its own determinations of the law in criminal cases, and that the directed verdict was clearly seen as a way to keep questions of law out of the jury's power. Note, supra note 28, at 183-85.

34. The diversity of colonial practices was urged by defenders of the Constitution as one of the primary difficulties making it impossible to draft a constitutional provision preserving the right to civil jury trial. See The Federalist No. 83 (Hamilton). It may be added that a corresponding difficulty is found in attempting to form any accurate notion as to what colonial practices actually were, particularly in such areas as judicial control of jury factfinding. See Henderson, supra note 14.
directed verdict as a method of control more effective than any of the methods known to the practice of 1791.

4. Effective Directed Verdict Procedure.

The Supreme Court resolved the problem raised by the lack of precise common law precedent for the modern directed verdict procedure in the masterful, if slightly slippery, opinion in *Galloway v. United States.* The primary basis for the decision is found in the Court's statement of the proper method of applying the seventh amendment preservation of jury trial. Following a position adopted in earlier opinions upholding the use of interrogatories accompanying a general verdict and the use of a special master's report as evidence for consideration by the jury, the Court ruled that the vital aspect of jury trial is that the jury be allowed to perform the factfinding part of adjudication. Procedural reforms designed to facilitate the jury's factfinding function, or to improve it, are not invalidated by the fact that they may limit the jury's freedom or desire to find the facts arbitrarily or ignorantly, or to disregard the law. Common law precedent for preventing jury consideration of an issue which lacks adequate evidential support exists in the demurrer to the evidence. Directed verdicts simply continue this function without the penalty that the movant must sacrifice the right to go to the jury if the judge is unable to say that the jury must so find them.

Mr. Justice Black objected to this approach, apparently on the ground that the availability of a directed verdict motion without the penalty of loss of the right to go to the jury if the motion fails has created an instrument which makes it too easy to get a judicial evaluation of the evidence and which accordingly increases the frequency of rulings withdrawing a case from the jury. Just how far he intended to carry this objection was left unclear. He commended as an "excellent discussion of the history of the directed verdict" an article which concluded that any

39. As suggested by the Court, one of the methods by which judges have traditionally controlled the factfinding performance of juries has been through the rules on admissibility of evidence, "yet it would hardly be maintained that the broader rules of admissibility now prevalent offend the Seventh Amendment because at the time of its adoption evidence now admitted would have been excluded." 319 U.S. at 390 n.22.
40. Hackett, *Has a Trial Judge of a United States Court the
federal directed verdict practice must be unconstitutional. Pref-
atory to the statement of his view of the maximum reach of ju-
dicial power, he noted that a verdict should be directed, "if at all,"
only in very limited circumstances. But there is no clear state-
ment that directed verdicts are simply unconstitutional.

The majority response to the protest that directed verdict
motions are at least constitutionally questionable because they
are likely to be made much more freely than demurrers to the evi-
dence is unduly facile. The basic notion offered is that a motion
for new trial was historically available, so history allows consid-
eration of the facts by both judge and jury, while the demurrer
to the evidence establishes the historic validity of precluding any
jury consideration of the facts. Surely, it is reasoned, the
seventh amendment does not prohibit a combination of these fea-
tures in a motion which enables the judge to prevent the jury
from considering the facts, but which allows the jury to consider
the facts if the judge finds it appropriate. As pleasing as the
result is, it might be wished that it had been left to the more di-
rect proposition that preserving the constitutional right to jury
trial does not require the historic gamble of demurrer to the evi-
dence or the historic waste of a useless new trial.

Constitutional permission of directed verdicts simply sets the
stage for the major inquiry. Everyone knows that the Constitu-
tion allows directed verdicts, even if no one can quite say why;
no one knows any articulable standards defining the constitu-
tional limits of such judicial control. Statements of the appro-
priate standards have varied widely over the course of the past
century or so. Practice in applying the standards varies as
widely at the present time. The following examination of the
general statements of appropriate standards is undertaken with
the purpose of urging that it would be mistaken to hold that the
Constitution can somehow be taken as prescribing a definite
standard limiting the scope of a procedure unknown at the time
of its adoption. It is hoped to set the stage as well for the ensu-
ing discussion of some specific issues arising in directed verdict
practice and of the very specific problem of the standards to be
applied by federal courts in diversity cases.

Right To Direct a Verdict, 24 YALE L.J. 127 (1914), cited at 319 U.S. 402
n.13. Hackett's general approach is summarized in his statement that
"the right of a trial by jury is to be preserved by a stability of pro-

41. 319 U.S. at 407.

42. Id. at 392-94.
5. **General Standards.**

a. In Statement.

Measuring the sufficiency of evidence to raise a question for jury determination was approached in *Galloway* as a matter not fairly referable to history. A brief reminder of the main stages of judicial statement should be enough to support this approach.

The original method of statement, as might be expected, was that as the directed verdict was a means of accomplishing essentially the same result as the demurrer to the evidence, its availability should be "tested by the same rules." However nicely this may seem to respond to the historic orientation of the right to jury trial, it really answers very little because of the obscurity of the tests used on the demurrer. It has, for example, been asserted that the test of sufficiency of the evidence was essentially the same as the modern "substantiality" test. In similar vein, Thayer applauded the demise of the demurrer on the ground that "it is more than likely that the just line between the duties of court and jury was often overstepped." On the other hand, it seems fairly clear that the nature of the demurrer as an admission of the opponent's proof and everything it reasonably tended to prove precluded—at least in theory—any consideration of the effects of the evidence offered by the movant, a point as to which it will be urged below that modern practice clearly differs.

Closely associated with this reference of standards to the demurrer to the evidence is the common supposition that nineteenth century courts followed a "scintilla" rule which required a case to be submitted to the jury if there was any evidence whatever to support the position of the party opposing the motion for directed verdict. There is no question that most courts soon

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43. Id. at 395.
44. Parks v. Ross, 52 U.S. (11 How.) 362, 373 (1850). The Court characterized the requirement as one of evidence "legally sufficient" to establish the facts in issue.
48. See text accompanying notes 141-60 infra.
49. James characterizes the scintilla rule as a "judicial legend,"
abandoned any such rule in favor of a broader, if variously phrased standard based upon the inquiry whether there was evidence "upon which a jury can properly proceed to find a verdict for the party producing it." 50 This in turn soon yielded to frequent statements that a verdict might appropriately be directed whenever the trial court would be obliged to set aside a contrary verdict as against the weight of the evidence. 51

Statements today remain as varied, even among federal appellate courts, as they have been over the course of history. It is not at all uncommon to find courts stating that a directed verdict is appropriate only if there is no evidence, and that the case must be submitted to the jury if there is any evidence supporting a party's case. 52 None of the current opinions, however, gives any reason to suppose that the standard actually applied accords with the statement, with the possible exception of some of the opinions applying the Federal Employers Liability Act 53 discussed below. 54

noting quite properly that if there ever was such a rule it has nearly vanished. F. James, Civil Procedure 272 (1965). Alabama, at least, still says that it follows the scintilla rule; see, e.g., Huff v. Vulcan Life & Acc. Ins. Co., 281 Ala. 615, 206 So. 2d 861 (1968). One of the most thorough examinations of the vicissitudes of the rule in a single state is Danner, The Scintilla Rule in Ohio, 7 U. Cin. L. Rev. 237 (1933), written the year before the Ohio Supreme Court abandoned the rule in Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246 (1934).

50. Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871) (emphasis added). The Court's explicit rejection of the scintilla rule could be classified as dictum by those who care, since its conclusion was that there was no evidence whatever to support the position asserted to be fit for jury consideration. Id. at 449.


52. E.g., Warner v. Billups Eastern Petroleum Co., 406 F.2d 1058, 1059 (4th Cir. 1969). Mr. Justice Black may very well mean to apply this standard literally as a constitutional command that a verdict may be directed only if there is no evidence to support submission to the jury. See Warner v. Kewanee Mach. & Conveyor Co., 398 U.S. 906, 908 (1970) (dissenting from denial of certiorari).

An interesting contrast is offered by Little v. Bankers Life & Cas. Co., 426 F.2d 509, 510-11 (5th Cir. 1970). There the court noted the general rule that it cannot consider the sufficiency of the evidence to go to the jury on a point decided adversely to the appellant when no motion was made for a directed verdict, and concluded that it was accordingly limited to the question whether there was "any evidence supporting the submission of the . . . issue and the jury's finding . . . ." See also Oliveras v. American Export Isbrandtsen Lines, 431 F.2d 814, 816-17 (2d Cir. 1970); compare First Nat'l Bank v. SBA, 429 F.2d 280, 283-84 (5th Cir. 1970).


54. See text accompanying notes 67-76 infra.
At the other end of the spectrum, statements may still frequently be found equating the standards of sufficiency of the evidence to withstand a directed verdict with the standards allowing a trial judge to make a discretionary determination to award a new trial because a verdict is against the great weight of the evidence.\(^5\) The Tenth Circuit has carried this position to the point of stating that it will not superimpose its judgment on that of the trial judge unless his judgment was "clearly wrong."\(^5\)

Some of the Tenth Circuit decisions, indeed, appear to approve directed verdicts in circumstances where only a test approaching that actually used for granting a new trial would justify that result.\(^5\) It seems safe to say that all of the other federal appellate courts would agree that the vast difference in consequences between granting a new trial and directing a verdict finally terminating the suit entails a marked difference in the relevant standards.\(^5\)

The most common current approach is often dubbed the "substantial evidence" test and is stated in terms close to those recently employed by the Fifth Circuit: directed verdict motions should be denied "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions."\(^5\) A concise statement of the attitude taken in approaching this question may be borrowed from an opinion of the Fourth Circuit, requiring that

\(^{55}\) E.g., Carroll v. Seaboard Air Line R.R., 371 F.2d 903, 904 (4th Cir. 1967); Wachovia Bank & Trust Co. v. United States, 288 F.2d 750, 757 (4th Cir. 1961).

\(^{56}\) Compare Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 120 (1874), affirming a directed verdict, although the Court remarked that it would be difficult to find error in submitting the case to the jury with proper instructions. Most courts, of course, treat the appropriateness of a directed verdict as a "question of law" admitting of no room for discretion in any court.

\(^{57}\) Although it is of course extremely difficult to be confident of such statements on the basis of reported opinions, two decisions may be hazarded as examples: Giblin v. Beeler, 396 F.2d 584 (10th Cir. 1968); Meeker v. Rizley, 346 F.2d 521 (10th Cir. 1965). See text accompanying notes 166, 167 infra. As might be expected, other opinions of the same court describe the conventional standard. E.g., Taylor v. National Trailer Convoy, Inc., 433 F.2d 569, 571-72 (10th Cir. 1970).

\(^{58}\) E.g., 5 J. MOORE, FEDERAL PRACTICE ¶ 50.03[2] (2d ed. 1966).

the evidence must be considered in the light most favorable to
the party against whom the directed verdict or the judgment
n.o.v. is asked, . . . any conflict in evidence must be resolved in
his favor and . . . every conclusion or inference that can be
legitimately drawn therefrom in his behalf must be drawn.60

In essence, this approach represents an attempt to limit the
jury to its factfinding function by inquiring what is "reason-
able." Traditional respect for the jury and its constitutional
benison requires that it be allowed to find whatever facts are
reasonably suggested by the evidence. The impossibility of
defining reasonableness requires that the scope of freedom be left
large. But at some point the possibility that twelve jurors may
find the facts "unreasonably," and the much greater probability
that twelve jurors can misunderstand or happily ignore the law,
permits and requires judicial control.61 The general statements
ordinarily adopted by the courts are simply a way of stating that
the fundamental tenet of control must be one of minimum inter-
ference.

b. Procrustean or Multifarious Standards?

The fundamental dilemma of judicial control in its applica-
tion is that of reconciling the principle of minimum interference
with the obdurate need for some measure of control. Much of the
difficulty lies in the inevitable need for the sound exercise of
particularized judgment. But there are broader difficulties as
well, including the crucial uncertainty whether the same degree
of minimum interference is uniformly appropriate regardless of
the nature of the case, or whether judges should feel freer to in-
terfere in some cases than in others.

Help in resolving the uniformity question may be found by
reflecting on the reasons underlying the jury’s preferred position.
For the policy of deep respect for jury decisional freedom does
not need to be referred to the mysterious requirements of the

61. It is not uncommon to scout the "reasonableness" notion of di-
rected verdict standards on the ground that it leads presumably rea-
sonable judges to disagree with presumably reasonable jurors and even
among themselves. See, e.g., L. Green, Judge and Jury 389 (1930),
where it is observed that frequently a jury returns a verdict which is
accepted by the trial judge as the basis for judgment, affirmed by an
intermediate appellate court and then finally set aside by a divided su-
preme court. This complaint misconceives the purpose of the test.
Courts are not seeking to find what is reasonable but only to create a
particularized definition, for the facts of the case before them, of the
outermost bounds of reasonableness. This question is of course a very
difficult one, depending in part on the personal experience and imagina-
Constitution alone. Whether or not the civil jury should be preserved by the Constitution, several reasons in support of its preservation are commonly agreed upon and deserve consideration in spinning out its constitutional consequences.

Among the reasons for favoring jury trial, one of the most troublesome in terms of directed verdict standards is the desire to have the jury effect some improvement in the law, at least for particular cases, notwithstanding rejection of a general policy of jury lawgiving freedom. This problem will be pursued at some length in the later discussion of jury freedom in applying the law. For the moment, it should suffice to anticipate the conclusion: in many cases, the directed verdict standard appropriately includes an allowance for reasonable jury lawmaking as well as reasonable jury factfinding.

Another highly important purpose of jury trial is found in the circumstance that, although jurors are no longer to decide on the basis of particular knowledge of the immediate case before them, they are supposed to bring to their task a vast wealth of more generalized practical information of the world that far exceeds anything available to a single judge. It should be obvious that however difficult it may be to reach any abstract definition of the appropriate jury contribution, it may vary enormously from case to case. Jurors are thought to have so much to contribute to the evaluation of many kinds of behavior that they are accorded avowed lawmaking functions in determining what is "reasonable" in the light of common experience in an enormous variety of common transactions. Jurors probably have very little indeed to contribute to an evaluation of the "obviousness" of a patented improvement in computer circuitry.

A third major function of the jury lies in improving the acceptability of adjudication. However the quality of their product would be measured on a hypothetical scale of justice, it is often thought that use of the jury enables judges to perform a trial role
which is more acceptable to both parties, and that the end result is likely to be more acceptable as well. This function may be particularly important in the not inconsiderable number of cases which are not really capable of rational decision—a jury can terminate the case with a blessedly oracular verdict which requires no embarrassing explanations.

Various other roles are occasionally assigned to the jury. One is that of protecting litigants against venal or simply incompetent judges. Another is that jury service is a valuable means of educating citizens; yet another is that the jury is the most commonly available means of participating in the workings of democratic government.

Taking these various jury functions as a springboard, it should be possible to restate a variety of considerations which counsel that no attempt should be made to find in the seventh amendment a rigid prescription of a single standard of judicial deference applicable to all jury-tried cases alike.

First is the fact that history, formally recognized as the primary measure of the seventh amendment right, simply does not provide any meaningful guidance in measuring the sufficiency of a case for jury determination. Second, and closely related, is the simple fact that it would be impossible to implement a uniform standard in a uniform manner, no matter how it were stated. Courts historically have been unable to fashion a uniform standard; courts today are equally helpless. Third, there are a great many other devices of jury control which could be used to shape the result desired by the judge, often with considerable effect. Rulings on the admissibility of evidence, comments on the evidence, the way instructions are framed, the judge's own mien and behavior during trial and a host of other tools are available to influence the jury. There is little effective appellate control over a broad range of trial court behavior in these areas. Forcing adoption of a single directed verdict standard might force

64. See, e.g., Wolf, Trial by Jury: A Sociological Analysis, 1966 Wis. L. Rev. 820. Some control over potential jury caprice may well be necessary if the institution is to be acceptable at all. See, e.g., JOINER, supra note 63, at 19.

65. Dean Green has espoused a contrary view, suggesting that appellate courts have developed so many means of control that both trial judge and jury have been reduced virtually to automata. See Green, Jury Trial and Mr. Justice Black, 65 Yale L.J. 482, 486 (1956). This conclusion seems considerably overdrawn; certainly perusal of a few hundred directed verdict cases, selected almost at random, suggests that appellate courts are allowing many rather questionable jury verdicts to stand.
trial judges to wield their other controls with more vigor, perhaps leading in some cases to results which would not be accepted under proper standards as a directed verdict but which are accepted as the verdict of the jury, even though the jury was artificially forced along a path which would not otherwise have been followed. Finally, apart from such negative reasons, there are excellent reasons for supposing that the nature of the jury’s sound contribution varies enormously across the spectrum of cases triable as of right to a jury. It has already been suggested by way of example that members of the jury may have a great deal to contribute to understanding and evaluating some fact situations and very little to contribute with respect to others. This proposition may be generalized to a certain extent by observing that as life, law and litigation become more complex, so do the tasks entrusted to juries. Juries may be trusted to handle routine litigation with a small measure of judicial supervision; according a parallel degree of freedom in more complex cases far beyond the reasonable comprehension of anyone, regardless of the nature of the legal difficulties and factual uncertainties involved, makes no sense whatever.

One of the currently popular areas focusing interest on the question of uniform standards involves litigation under the Federal Employers Liability Act. Supreme Court opinions dealing with the sufficiency of an injured worker’s case for jury consideration have opened a wide vista of jury speculation, both in the area of fact and in the area of legal evaluation of the facts found. Many circuit courts of appeal have announced that the directed verdict standards found in FELA cases are unique and do not control other cases. Professor Wright, one of the leading commentators on federal practice, characterizes the ques-

66. E.g., P. DeVLIN, Trial by Jury 65 (rev. ed. 1966); Green, supra note 65, at 484. There is very little indication that courts are willing to consider the suitability of jury trial as an element in determining the contemporary scope of the seventh amendment in defining the nature of issues triable to a jury. But cf. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).


68. The leading recent discussion comparing FELA standards with “ordinary” standards, and concluding that FELA decisions are not controlling in other cases, is Boeing Co. v. Shipman, 411 F.2d 365, 370-73 (5th Cir. 1969) (en banc), overruling Planters Mfg. Co. v. Protection
tion of the applicability of the FELA decisions to other sorts of litigation as one of the major unanswered directed verdict problems. While he offers no firm conclusion, his summary of arguments in favor of applying the same standard to all federal court litigation may be somewhat freely rendered as follows: First, and foremost, the opinions in FELA cases frequently refer to the historic role of the jury and to the seventh amendment without any indication that FELA cases deserve or receive distinctive treatment. The Court has, indeed, relied on legislative history as indicating that Congress intended seventh amendment standards to govern the relationship between judge and jury in FELA cases. Added support for this proposition may be found in various non-FELA opinions in which the Court has referred to FELA opinions as if they established the general test of directed verdicts; has said that, as in FELA cases, jury trial is part of the remedy; has said that the seventh amendment prohibits interference by directed verdict where the evidence raises a jury question; and has reversed per curiam the substitution of judi-


71. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698 & n.6 (1962) (private antitrust litigation, referring to FELA decisions, among others, in stating the appropriate standards for directed verdicts); Dick v. New York Life Ins. Co., 359 U.S. 437, 445 n.8 (1959) (referring to FELA cases as references for the federal directed verdict standards, while refusing to determine whether the federal standards should be applied in diversity litigation).


cial determination for jury determination. Finally, it may be urged that the seventh amendment would not allow the Court or Congress to establish different measures of judicial control for different types of cases—that preservation of the right to trial by jury requires trial to a jury which is subject to a sufficient measure of judicial control to preserve its common law character, no more and no less.

Close examination, however, reveals that none of these cases establish a rigidly binding approach to the limitations placed by the seventh amendment on directed verdicts. Instead, they stand for no more than the proposition that the seventh amendment requires that there be no undue intrusion on the jury's sphere. So much should be obvious in any event. And the question whether the due extent of intrusion may vary from situation to situation remains unanswered.

By way of brief anticipation of the later discussion of the appropriate sphere of jury freedom, it is no secret that FELA cases involve special reasons for allowing juries a wide discretion in fact inference and in law application. The principle of com-

74. 2B W. BARRON & A. HOLTZOFF, supra note 69, at § 1075, p. 403 n.53.20.

75. This argument would draw support primarily from the decision in Herron v. Southern Pac. Co., 283 U.S. 91 (1931). There the Court refused to bind a federal diversity court to a state constitutional provision prohibiting directed verdicts in certain circumstances, ruling that the state prohibition would be inconsistent with the role of the federal judge. The federal judge, that is, is "not a mere moderator, but is the governor of the trial"; the sense of trial by jury, as preserved in the Constitution, is not simply trial before twelve men, but trial before twelve men "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside their verdict if in his opinion it is against the law or the evidence." Id. at 95, citing Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1898). The current impact of the Herron decision is discussed below; see text accompanying notes 257-62 infra.

76. Compare the statement of Judge Haynsworth in Manaia v. Potomac Elec. Power Co., 268 F.2d 793, 798-99 (4th Cir.), cert. denied, 361 U.S. 913 (1959). In affirming judgment n.o.v. for the defendant, and rejecting a claim that the judgment violated the plaintiff's rights under the seventh amendment, he noted:

Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power and conscientious and objective in its exercise . . . . The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this.
pensation without fault for industrial accidents is widely accepted; the antiquated reliance on principles of negligence in the FELA is tolerated only because the negligence principle has been so far attenuated in its application by judges and juries alike (and perhaps because jury awards are more attractive in the eyes of injured workmen or their unions and lawyers than scheduled benefits). The consequence of a mistaken denial of recovery for the injured plaintiff is disaster; the consequence of a verdict imposing liability after dispensing with any real requirement of negligence is that one more easily anticipated cost is added to the many costs of railroading. Although it sometimes may seem that railroads are less than ideally situated for absorbing or redistributing extra costs, there can be no question that they are far better situated than their injured workmen. That the seventh amendment is appropriately applied to preserve this area for jury justice does not mean that it is appropriately applied to require allowing an equivalent scope of jury freedom in areas where it may be more capricious or arbitrary.

The suggestion that the tightness of judicial control should depend on the nature of the uncertainties and the danger of wrong consequences involved in a particular situation will be explored further in Part II. The present discussion is aimed simply at establishing the relevance of the exploration of the specifics of jury freedom with regard to the credibility of witnesses, inferences of fact from testimonial fact, and law application—there is no simple seventh amendment commandment precluding examination of the many different problems involved. Likewise, it is hoped to establish that the seventh amendment does not command a simple answer to the question of applying state directed verdict standards in federal diversity litigation; there is room to inquire whether there is ever reason to depart from federal standards. With so much anticipation, these matters may now be examined.

II. SPECIFICS OF CREDIBILITY, INFERENCE, AND APPLICATION

A. INTRODUCTION

General statement of a principle of minimum interference with jury functions is scant help in addressing a concrete problem. Although in the end there is no magic formula for disposing of a real, living case, there are various general problems which at least admit of further analysis. The most convenient
framework for approaching these problems breaks them down into three main areas following a model of rational disposition of adversary litigation conducted along our traditional lines. First, the trier must determine what testimony he believes. Second, taking the testimonial facts so established, it is frequently necessary to go beyond them in the half-logical, half-intuitive process of "inferring" other facts which have not been the subject of direct testimony. Finally, once all of the facts have been puzzled out in one way or the other, it is necessary to plug those facts into the applicable legal rules or standards to determine the outcome of the case. Discussion will largely focus on these three steps as if they were separate stages. But it is obvious that they are not separate, even in theory. Tentative belief in a testimonial fact, for instance, may ultimately be rejected because it is thought inconsistent with the inferences drawn from other testimonial facts or even because the inferences it suggests by itself are thought unreasonable. Likewise, the strength of the belief in any particular testimonial proposition will influence the nature of the consequences drawn from it—a fact strongly believed may often carry much further than one believed only as the least unlikely in an array of improbable alternatives. Likewise, the requirements of the legal rules will shape the direction of the inference processes and may even have some justifiable impact on the determination of facts, direct or inferential.

Beyond this theoretical interdependence of the steps suggested, it is clear that jury decisional processes seldom follow any such model. Determination of a case is apt to be considerably more direct and simple. Nonetheless, the model is of considerable aid in approaching directed verdict problems because it forces attention into the paths necessary to implement the principle of minimum intrusion in as reasoned a manner as possible. If the question concerns the boundaries of reasonable decision, the best way of finding them is by attacking separately the reasonable boundaries of jury freedom to accept or reject testimony, of jury freedom to go beyond direct testimony in its factfinding quest, and of jury freedom in applying the law.

B. CREDIBILITY

The right to determine the credibility of witnesses lies at the core of the jury's factfinding function. If there is a conflict in

77. A lengthy and thorough examination of the general problems encountered in judicial control of jury credibility determinations is
direct testimony, it is clear that the jury must be allowed to de-
termine which witnesses to believe, even if it chooses to believe
a single witness of dubious credentials in preference to twenty
witnesses of unassailed integrity. No matter how difficult, a de-
cision between them must somehow be made. Since there is as
yet no set of intellectual lie-detecting rules which can enable a
judge to rule that no jury could reasonably come out one way
rather than another, the principle of minimum intrusion on the
jury's function is thus easily sufficient to justify the jury's gen-
eral freedom. To be sure, a verdict which apparently rests on
a determination to credit the single witness may very well rest
on quite different factors. This risk is simply one illustration
of the necessary consequences of the initial assumption that juries
will follow the decisional model employed in tracing the bound-
aries of reasonable decision.

Some specific possibilities of judicial control, however, are
set within the framework of this broad general freedom with re-
spect to credibility. Conceptually the most useful of these possi-
bilities is that of limiting the jury's freedom to disregard the un-
contradicted, unimpeached testimony of disinterested witnesses.
Establishing a rule that such testimony must be credited may
not dispose of a great many cases by directed verdict. Its impli-
cations are nonetheless useful in attempting to redefine some of
the most commonly mooted issues of judicial control. This issue

found in Dow, Judicial Determination of Credibility in Jury-Tried Ac-
tions, 38 Neb. L. Rev. 835 (1959). Particularly useful are the repeated
themes that the basic approach should be that of seeking some reasoned
basis for a judicial ruling that a jury cannot reasonably credit, or dis-
credit, certain testimony; and that determinations of credibility are in-
extricably interwoven with other parts of the decisional process.

78. Judges occasionally still resort to the notion that when all
else fails, resort should be had to counting the number of witnesses on
each side. See, e.g., Rodi v. Dean, 138 F.2d 309, 310-11 (7th Cir. 1943);
Zurich Ins. Co. v. Oglesby, 217 F. Supp. 180, 183 (W.D. Va. 1963); Caron
v. Franke, 121 F. Supp. 958 (W.D.N.Y. 1954). This approach has been
so thoroughly debunked, see 7 J. Wigmore, supra note 63, § 2033, that
it may be that such judicial statements are simply chosen as a more
polite course than a statement that the minority of witnesses were dis-
believed on other grounds. Of course it is possible that jurors, too, re-
sort to witness counting when all else fails. A very small degree of
insight may be afforded by Cohen, Cooper & Thorne, Les Degres d'Evi-

79. Cf. Bevan, Albert, Loiseaux, Mayfield, & Wright, Jury Be-
behavior as a Function of the Prestige of the Foreman and the Nature of
His Leadership, 7 J. Pub. L. 419, 444 (1958). In the moot trials reported
there, jurors divided about evenly on the credibility of the different wit-
nesses and proceeded to resolve the issues on other grounds such as the
age of the plaintiff and her financial insecurity.
is thus examined at the outset, as a prelude to the issues arising when the assumptions of disinterest and lack of contradiction are relaxed, and to the corollary issues of the evidence which may be considered on motion for directed verdict, directing a verdict for the party who has the burden of persuasion and similar matters.

1. *Uncontradicted, Unimpeached, Uninterested Testimony.*

It is important in setting the framework for a discussion of the jury's role with respect to the credibility of uncontradicted, unimpeached, uninterested testimony to be certain that the case is one in which there is no implied contradiction to be found in the circumstances surrounding the matter of direct testimony. All of the discussion of this issue will assume that there is no such contradiction. As a model of such a case, there may be assumed a collision between two cars. Each car was driven by a lone driver; neither driver survived the crash. Examination of the remains of the cars has indicated no hint of mechanical malfunction in either. The debris left by the impact was scattered in such a way that no one claims that the location of the point of impact can be inferred from it. One witness, a highway patrolman, testifies to the event. He testifies that he had followed the car driven by the defendant's decedent for a distance of two miles along a straight highway under ideal driving conditions, that the car was being driven at a very high rate of speed and that it had twice veered from one side of the road to the other. This car had been on its own side of the road for approximately a mile before the moment of the accident; immediately before the collision, however, it swerved directly into the oncoming lane of traffic and collided with the car driven by the plaintiff's decedent.

Several courts have said that a jury should be allowed to disbelieve the sole witness. Many more have made it clear that the jury must accept his testimony.\(^8\) It is submitted that the majority rule is correct, for a wide variety of reasons which, because they are essentially negative, may be appreciated most easily after examining the contrary arguments.\(^1\)

Two major arguments can be advanced in support of the


\(^1\) In some small number of situations, a quick answer may be found in the fact that both parties are agreed that the testimony of the witness should be accepted. This notion of “admission,” however, is use-
minority rule that the jury should be allowed to determine the credibility of all direct testimony. The first is that much direct testimony, no matter how sincerely believed, is simply wrong. In a single apt phrase, "the testimony of any witness describes the combination of himself and the event." There is no need to review the literature here. Lawyers have long known in a general way the facts that are gradually being subjected to greater psychological precision: witnesses often err in their ability to perceive events, in their subsequent recollection of them, and in their ability to communicate to others their frequently distorted recollections of often mistaken perceptions. One simple possibility, for instance, is that the patrolman in the example case saw the accident as he did only because he had anticipated it when he saw the approaching car.

The inability of human observers to record, retain and relate perfectly given the best of will is subject to the further difficulty that human will may itself add further distortions, either through outright lying or through a more or less unconscious process of discarding and supplementing memories until they have been accommodated to the presently desirable contours.

The difficulties involved in measuring the abilities of a witness to perform the various chores required in testifying to past events have led to occasional suggestions that expert witnesses be allowed to testify as to the credibility of other witnesses, preferably on the basis of detailed extracurial examination and testing, but possibly on the basis of courtroom observation if nothing more satisfactory is possible. Although it seems unlikely that such suggestions will soon be accepted with regard to expert

Less when a party insists that the credibility of the testimony should be evaluated by the jury. The admission concept is explored in Dow, supra note 77, at 841, 864, 873-76.


83. Several easily accessible works explore the difficulties. In addition to Weinstein, supra note 82, see J. Marshall, Law and Psychology in Conflict (1968); Haward, Some Psychological Aspects of Oral Evidence, 3 British J. of Criminology 342 (1963); Marshall, Evidence, Psychology and the Trial: Some Challenges to Law, 63 Colum. L. Rev. 197 (1963); Rokes, Psychological Factors Governing the Credibility of Witnesses, 1968 Ins. L.J. 84, 150, 269 (1968).

84. It has been suggested that "perjury is more readily committed in accident litigation than in other types of cases." Baer, The Relative Roles of Legal Rules and Non-Legal Factors in Accident Litigation, 31 N.C.L. Rev. 46, 67-68 (1952).

85. References to the early literature can be readily found in more recent writings. See, e.g., J. Frank, Courts on Trial 100 (1949); Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggeste
testimony ranging beyond fairly gross defects in ability or personality, they do underscore the weight of the argument that a proposition is not necessarily true merely because a witness is willing to assert it.

The second major argument advanced in support of allowing jury freedom to reject uncontradicted, unimpeached testimony of an uninterested witness is that the jury should be able to rely on the demeanor of the witness. In the jargon of the social sciences, "there is frequently posited a relationship between the manner of a witness' verbal, gesticulative, facial, and gross postural behavior and the conclusions . . . [the] jury . . . draw from his testimony." presumably such demeanor "evidence" is logically relevant in two different ways—first as a basis for determining whether the witness is consciously trying to depart from the truth, and second as an index of his probable ability to know and tell the truth.

The question raised by these arguments in favor of jury freedom may be simply stated. It is clear that much testimony, whether or not honestly given, bears scant relationship to the underlying reality. People are accustomed to judge both the truthfulness and the abilities of other people by outward appearances. Is a jury, then, likely to make fewer mistakes if it is allowed free rein to reject uncontradicted testimony which is not at odds with any known facts, and which is given by an uninterested witness who has not been impeached in any way, than if it is required to accept such testimony? Several considerations suggest that more, not fewer, mistakes would result.

Practical knowledge of the influence of demeanor on credibility judgments, and the accuracy of its influence, is hard to come by. The Chicago Jury Project so far has not been able to report any conclusions on the factors leading juries to whatever

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86. Fishman, Some Current Research Needs in the Psychology of Testimony, 13 J. Social Issues 60, 64 (1957). Lawyers are likely to feel more comfortable with a lawyerly definition by way of example; see, e.g., Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 257 (1967): "[T]he candor and forthrightness of the witness, his hesitancy or willingness to testify, his evasion or concealment, his poise or frustration, and his emotional reaction to questions indicated through his demeanor and conduct on the witness stand also aid in determining the credit to be given his testimony."
estimates of credibility they make. There is, however, some little information on the influence of demeanor on others. Psychiatrists discussing the possibility of expert testimony on the credibility of witnesses regularly emphasize that a useful diagnosis requires intensive consultation and that attempts to reach conclusions solely on the basis of courtroom demeanor rest on a very weak foundation. Judges occasionally announce their own rules of thumb for measuring credibility; almost invariably the rules are so patently absurd as to cast serious doubts on the rationality of the judges’ decisional processes. Probably the best known example is found in the instruction of one trial judge to a jury that if a witness wipes his hands while testifying, it is “almost always an indication of lying. Why it should be so we don’t know, but that is the fact.” Even Judge Frank, a leading champion of the importance of allowing credibility determinations to be based on courtroom demeanor, admits that “occasionally there are astonishing revelations of absurd rules-of-thumb some trial judges use” in evaluating demeanor. There may well be double value in the suggestion of an NLRB trial examiner that it is far better for the trier who observes the witnesses not to explain the criteria used in evaluating their credibility.

Such quasi-empirical data are barely supplemented by a few beginning essays at psychological experimentation to determine

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87. “There is today almost no real knowledge about how credibility judgments are formed, and a moment’s introspection is sufficient to remind us how mysterious must be this process . . . .” H. Kalven & H. Zeisel, The American Jury 169 (1966). See generally id. at 168-81, 381-90. In comparing juries with judges, the only measurable distinction was that juries may tend to be more willing to credit defendants accused of serious crimes who have unblemished prior records. Id. at 177-81.

88. See, e.g., Davidson, Appraisal of the Witness, 110 Am. J. of Psychiatry 481 (1954); Tuchler, supra note 85.

89. Quercia v. United States, 289 U.S. 466, 468 (1933). Judge Frank found such a rule of thumb outrageous; see J. Frank, supra note 85, at 335; Wigmore characterized the decision of the Supreme Court, reversing the trial court, as a “singular blunder.” J. Wigmore, The Science of Judicial Proof 603 n.1 (1937). Wigmore’s examples of other “quite worthwhile rules of thumb” rise no higher. See id. at 802-09.

90. J. Frank, supra note 85, at 247.


Not only would it not serve any useful purpose but it would unduly prolong and add nothing to a decision to describe a witness as having a furtive look, a nervous twitch, a flushed face or perspiring freely. Those indicia are better left unsaid in the hope that judgment as to such matters should be left to the sense and experience of the one who observed the witnesses, guided, of course, by acceptable standards.
the effects of demeanor on the accuracy of judgment. Although
the area is one in need of much more intensive attention and
the situations constructed for the experiments clearly cannot be
equated with the situation surrounding actual jury deliberation,
the few tentative findings dramatically underscore the fear sug-
gested by the judges' own statements. For what the psycholo-
gists have found so far is that, as compared to persons making
judgments based on recordings or transcripts of the same testi-
mony, persons making judgments on the basis of observation of the
"witnesses" form significantly less accurate judgments. In
short, the much-despised cold record of appellate review actually
may be the least distorted of all possible bases for judgment.

Abstract analysis readily suggests several reasons why se-
vere difficulty is encountered in attempting to rely on witnesses'
demeanor in discovering the truth. As a beginning proposition,
the old-fashioned confidence that "few people have the ability to
conceal their perjury" is giving way more and more to the rec-
ognition that many people can successfully conceal their perjury
even from themselves—by the time they come to testify to the lie,
they believe it sincerely.

Perhaps more important to the overall use of demeanor as

92. The need for research is concisely summarized in Fishman,
supra note 86, at 64-65.
93. Perhaps the most instructive study is Marston, Studies in Test-
recent work is reported in Maier & Thurber, Accuracy of Judgments of Deception When an Interview is Watched, Heard, and Read, 21 PERSON-
NEL PSYCH. 23 (1968); Maier & Janzen, Reliability of Reasons Used in Making Judgments of Honesty & Dishonesty, 25 PERCEPTUAL & MOTOR
SKILLS 141 (1967).

Slight additional help may be found in Fernberger, Can an Emotion
Be Accurately Judged by its Facial Expression Alone?, 20 J. CRIM. L. & CRIMINOLOGY 554 (1930), concluding that "judgments of the emotional
states in others are in the nature of social meanings dependent more
upon the stimulus situation than upon anything else." Id. at 564. If
jurors are not equipped by experience to evaluate accurately the
"stimulus situation" confronting witnesses at trial, this conclusion
would carry over.

A nonclinical observation of interest is reported in 1948 SCOTS LAW
TIMES (News) 91-92: "There is something to be said in favor of a
dispassionate examination of the written record. One may miss the
high lights, but one can see the evidence steadily and see it whole.
One may miss the clash of battle, but at any rate the dust of the arena
has settled."
94. See M. BROWN, LEGAL PSYCHOLOGY 106 (1926); see also J. EHR-
95. See, e.g., J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 33-36
(1966); Slovenko, Witnesses, Psychiatry and the Credibility of Testi-
a guide to decision is the lack of experience with the trial setting in which demeanor is generated. Jurors have ample experience, it can be assumed, with judging the demeanor of others in ordinary life situations; they ordinarily have little experience, frequently none, in evaluating demeanor in the stress created by trial.

One of the simplest parts of the trial pressure problem is that the witness is thrust very much to center-stage; and there is ample justification for the everyday observation that “the effect of an audience is to slow down the mental and physical performance of an individual.” Emotions are aroused, mistakes result and create new emotions, and the process feeds on itself.

This audience effect is of course tremendously complicated because all the participants are aware of it. At one level, complication follows from the fact that lawyers are fully aware of the importance of demeanor, have their own traditions as to “good” and “bad” demeanor, and attempt to see to it that their witnesses’ honest stories are not lost because of correctible idiosyncrasies of demeanor. Whether careful rehearsal is called horseshedding, coaching, or something else, the result is that courtroom demeanor is often the result of conscious attempts to shape it.

Quite apart from lawyers’ efforts, witnesses can hardly avoid coaching themselves, deliberately attempting to present the best possible face to the courtroom world. Most people have considerable practice at this sort of exercise in other settings; few have much practice at controlling their own demeanor in the setting of an adversary trial. The result of such efforts may be a witness who is literally too good to be true—even though he is in fact testifying as accurately as any witness who ever followed an oath. Conversely, a witness testifying accurately may be so uncomfortable about the anticipated legal consequences of his testimony as to appear the worst sort of liar; it is even conceivable that a witness who feels honor-bound to tell the truth may still

96. Haward, supra note 83, at 352.
97. Various aspects of witness preparation, and its effects, are reflected in 3 M. Belli, Modern Trials 2544 n.41 (1954); M. Brown, supra note 94, at 112; 2 F. Busch, Law & Tactics in Jury Trials 529 (1959); 3 Id. 1, 127-28, 509-10 (1960); J. Frank, supra note 85, at 81-83; Fishman, supra note 86, at 64-65.
98. A typical observation is offered in Trail v. Village of Elk River, — Minn. —, 175 N.W.2d 916, 922-23 (1970)—the witness’ testimony “reveals such an unusually acute recollection of the facts and so articulate a presentation of them . . . that this testimony can be seriously questioned . . . .”
be willing to tell it in such a way that he hopes no one will believe him. The intermediate shadings of fear, embarrassment and eagerness to have done with things hardly need cataloguing.

Pressures resulting from the gravity of the trial occasion are probably inevitable. But our adversary mode of trial serves to exacerbate the problems confronting witnesses and jury almost beyond measure. The witness is faced with the chore of telling his story in response to questions following a pattern often far removed from his own natural narration instincts. Even the well-rehearsed pattern is apt to be interrupted by objections and other bewildering procedural arcana. Then comes cross-examination, a wonderful truth-discovering engine which is habitually misused for the purpose of attacking and discrediting the witness by any means available within the broad ranges of the legally and ethically permissible, if not occasionally beyond. 99

Witness reactions to such procedures may be of small value in evaluating their credibility, particularly to jurors who themselves have scant experience in measuring demeanor under such circumstances. The problem is further accentuated, however, by the overall pattern of the trial. First one part of the story is told, then another; one side tries its version, then the other tries its own. Small wonder that many students of the problems of credibility conclude helplessly that our modes of adversary procedure make the jury's task nearly impossible. 100 A particularly biting edge may be honed on the blade, however, by asking whether really significant changes could be made in the basic procedural framework without discarding the civil jury. The combination of an investigative rather than adversary system with jury trial might be even less suited to any of the goals

99. Cf. Slovenko, supra note 95, at 15, where it is pointed out that among the difficulties faced by an expert psychiatrist in attempting to evaluate a witness solely on the basis of courtroom performance is the fact that [t]he aura of cross-examination (with its implication of hostility and adversity of interest) provides an emotional climate far different from the ideal psychiatric interview. The witness feels attacked and abused, and this immediately elicits defense mechanisms that can only shut out or distort pertinent psychiatric material.

served by public adjudication, whether they be finding the truth, “economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system, or tranquilizing disputants.”

One final step remains in tracing out the theoretical difficulties of the jury's task in evaluating credibility. In a very real sense, jurors are in the position of being witnesses of the witnesses and are subject to all of the same probabilities of distortion in perception and recollection as other witnesses. When they come to the stage of deliberation, these difficulties may be reduced or accentuated. Since they function as a group, group abilities may cover some of the individual mistakes in perception and recall, but the group decisional process may also contribute its own distortions.

In short, there are many reasons for hesitating to put much confidence in the ability of juries to discover the truth by discerning evaluation of witness demeanor. The jury's main factfinding advantages lie in the contribution of a variety of everyday experience in the world; ordinary experience seems to offer little help in the adjudicatory task of assessing credibility. Any attempt to draw from the lessons of ordinary experience, indeed, may simply make matters worse, unless the lesson is the wise one that the courtroom situation is like nothing the juror has previously encountered. Given such difficulties, where have the courts come out in formulating the limits of control by directed verdict?

In the casebook-celebrated opinion in *Dyer v. MacDougall*, Judge Learned Hand suggested that, theoretically, juries should not only be allowed to disbelieve uncontradicted, unimpeached testimony but should also be allowed to conclude from their disbeliefs and demeanor of the witness that the truth is in fact the opposite of the testimony. In terms of the hypothetical case sketched above, this would mean that if the sole eyewitness testified that the car of the plaintiff's decedent had swerved into the lane occupied by the car of the defendant's decedent, the jury could nonetheless find that the plaintiff had carried its burden.

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101. This list is taken from *Weinstein*, supra note 82, at 241.
102. See, e.g., *J. Frank*, supra note 95, at 22; *J. Marshall*, supra note 95, at 90–95.
103. See, e.g., *P. Devlin*, supra note 86, at 140.
104. See, e.g., *J. Marshall*, supra note 95, at 94; *Haward*, supra note 83, at 353.
105. 201 F.2d 265 (2d Cir. 1952).
of proving that the accident happened on the opposite side of the road. Judge Hand rejected this theoretical possibility on the ground that, if it were allowed, it could be allowed only in cases in which the trial judge determined that there was enough in the "demeanor evidence" to justify such a finding and that there could not be effective appellate review of the trial judge's ruling. It is rather difficult to understand from the opinion why it was assumed that the trial judge should be able to determine whether the particular case was suitable for such an exercise of jury wisdom. Once the theoretical possibility is admitted, the general principle of minimizing intrusion on the jury's functions, and the observation that the "best" witness may be the least trustworthy of all, would suggest that all cases should be allowed to go to the jury. This conclusion would effectively abolish directed verdicts: as soon as a litigant could discover what must be established to fall within a recognizable rule of law, he could get to the jury merely by producing witnesses who testified that none of the necessary events had occurred. Presumably few litigants would anticipate sufficient possibilities of victory to undertake such a hazardous task, and fewer juries would accept the invitation to lawlessness tendered by whatever factors of sympathy encouraged the litigant to undertake the gamble. However small the risks may be, there seems no reason to allow them ever to be run. With the exception of a single inexplicable statement by the Supreme Court, distortedly quoting from Dyer v. MacDougall, federal courts accordingly have been unanimous in reject-

106. It is not necessary to follow the principle that the jury may sometimes consider demeanor in evaluating uncontradicted testimony to the conclusion that they must always be allowed to do so. Conceptually, an intermediate stage is easily definable in which both trial and appellate judges ask the same question: given the nature of the testimony, in all of the aspects reflected on the cold paper record, is it sufficiently weak that it should be subjected to the jury's appraisal of demeanor? In form, at least, this approach would not require the trial judge to evaluate the demeanor of the particular witnesses in the particular case; focus would instead be on the quality of the evidence in some more abstract sense. This sort of approach seems a bit too rarified for practical application.


108. NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962). The Court quotes the portion of Judge Hand's opinion establishing the logical proposition that disbelief in a witness' testimony arising from his demeanor may be used to establish a belief in the contrary proposition. It does not go on to note that Judge Hand found this logical possibility an insufficient basis for judicial action.

In other opinions, the Court has squarely taken the position that "disbelief of the . . . testimony would not supply a want of proof."
ing the possibility there suggested, frequently without even recognizing the theoretical problem. Some courts, led by the Second Circuit, have nonetheless been willing to state that the jury at least has the right to reject all oral testimony, no matter how purely disinterested, uncontradicted and unimpeached. The majority, however, adhere to the proposition that demeanor is not to be trusted even this far, and require jury acceptance of such testimony. Commentators are similarly divided. Wigmore is actually


110. See, e.g., Brinks v. Chesapeake & O. Ry., 398 F.2d 889, 893 (6th Cir. 1968); Bennett v. Wood, 271 F.2d 349, 352 (8th Cir. 1959).

111. Two of the clearest expressions are found in Purcell v. Waterman S.S. Corp., 221 F.2d 953 (2d Cir. 1955), a per curiam opinion redolent of the style of Judge Learned Hand; and Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 79-80 (2d Cir. 1949), penned by Judge Frank. The Second Circuit may be wavering from this view. See, e.g., Simbless v. Maynard, 427 F.2d 1, 5 (2d Cir. 1970), where the court rules that, at a minimum, the evidence to be considered on a motion for directed verdict is all the evidence favoring the opponent of the motion plus all the “uncontradicted, unimpeached evidence unfavorable to him.” The only reason for considering such testimony must be that the jury would be required to believe it; see text accompanying notes 141-60 infra.

112. See, e.g., Chicago, R.I. & P. Ry. v. Howell, 401 F.2d 752 (10th Cir. 1968) (dictum); Chicago & N.W. Ry. v. Strand, 300 F.2d 521 (8th Cir. 1962); Walton v. Owens, 244 F.2d 383, 388 (5th Cir. 1957); Reed v. Murphy, 232 F.2d 668, 674 n.10 (5th Cir.), cert. denied, 352 U.S. 831
inconsistent on the subject, announcing in one passage that the jury has the right to disregard any testimony it chooses not to credit\textsuperscript{113} and approving in another passage the proposition that in appropriate circumstances a jury may be compelled to accept even the testimony of interested witnesses.\textsuperscript{114} Other writers have suggested a rule like that implied (and perhaps impliedly rejected) in \textit{Dyer v. MacDougall}, allowing a trial judge to direct a verdict only when he can determine that there is nothing in the demeanor of the witness which would justify a reasonable jury in discrediting his testimony.\textsuperscript{115}

The arguments canvassed above suggest that the majority rule of enforced belief is the proper one. Such a rule leads to mistaken decision when the witness is mistaken, as often happens, or is simply lying. But if jurors are left free to reject testimony where the only reasonable basis for disbelief is the demeanor of one or more witnesses, the great difficulty of the task and the unfamiliarity of the setting suggest that perhaps more mistakes will be made and that there is little reason indeed to suspect that fewer mistakes will result. Nor is there any significant reason to suspect that trial judges, even though more experienced, are likely to do better. And overriding the speculative nature of the possibility that juries can by some sophisticated process improve on the results of a flat rule is the fact that often they simply will not try. A general verdict which apparently is based on rejection of uncontradicted testimony will often be based not on calculations of credibility, but simply on misunderstanding, misapplication or wilful rejection of the law. It might be urged that, since juries may improve the law by ignoring it, they should nonetheless have broad freedom, or at least freedom in areas of law which are in need of some contemporaneous community tuning. The more reasonable conclusion appears to be that the law-preserving rule of directed verdicts requires the majority rule.\textsuperscript{116}

\textsuperscript{113} 7 J. WIGMORE, EVIDENCE § 2034, at 260-61 (3d ed. 1940). Earlier, it is stated that “[t]he witness' demeanor, . . . is always assumed to be in evidence.” 3 Id. at § 946.

\textsuperscript{114} 9 Id. at § 2495.


\textsuperscript{116} See F. JAMES, CIVIL PROCEDURE 279-80 (1965).

Perhaps it should be noted that some courts follow varying versions of a rule that a party is bound by his own testimony to the extent that it is unfavorable to him. There is no reason to bind a party by testimony
2. Interested Testimony.

One of the reasons why the rule just explored may not serve to dispose of many cases by directed verdict is that frequently the relevant testimony is provided by a witness who is not disinterested. There does not appear to be any significant reason to suppose that juries are better able to utilize demeanor in evaluating the testimony of interested witnesses than in evaluating that of disinterested witnesses. But there is considerably greater reason to suppose that decisions based on compelled belief of such testimony will be mistaken. However high current levels of perjury may be, the peak which would be reached if parties to a suit knew that they could automatically win by direct testimony to crucial facts—and could defeat an opponent’s possibly perjured testimony only by providing contrary direct testimony—would be breathtaking. And the volume of honestly intended, but deluded, self-serving testimony would remain, as it is now, beyond calculation. No one would champion a rule which requires belief of anything an interested witness might say.

Beginning from this point, the initial problem to be faced in differentiating the rules to be applied to interested testimony lies in determining when a witness should be considered to be interested. It might be held that all willing witnesses are interested, simply because they identify with the side which has trusted them by offering their testimony. Presumably such a level of interest is too low to be taken into account. Likewise, the general interest any witness has in maintaining his own sense of integrity and consistency by repeating in court testimony he has previously given should not be enough to warrant departure from the rules which apply to disinterested witnesses. Although

as to matters which are potentially within the perception of other witnesses, and courts generally do not apply the rule when there is a conflict in testimony as to such matters. See Canadian Pac. Ry. Co. v. Sullivan, 126 F.2d 433, 440 (1st Cir.), cert. denied, 316 U.S. 696 (1942); Dow, supra note 77, at 872; but see Bolam v. Louisville & N.R.R., 295 F.2d 809, 811-12 (6th Cir. 1961). An interesting testing example is Brown v. Poland, 325 F.2d 984 (10th Cir. 1963), where the plaintiff testified that at the time of the accident he had the right to control and direct his wife’s driving, and the trial court accordingly charged the jury that her negligence was imputed to the plaintiff. The basis urged for ignoring the plaintiff’s own testimony was testimony by a psychiatrist that the plaintiff had a dependent personality and his trial testimony simply compensated for his personality inadequacies. The appellate court was unimpressed.

little more should be required, it remains difficult to know where to suggest a line. It would be possible to urge that any shared community of interest, even on a very general and abstract plane, should be enough; social, economic, political, ethnic, sexual, and other "classes" could be constructed, for instance, which would frequently separate the litigants from each other and assign the crucial witness to some class in common with the party favored by his testimony. The possibility of bias and the resulting distortions of testimony cannot be denied. Nonetheless, "interest" at such levels of abstraction would often involve too low a level of danger to justify altering the permissible scope of jury freedom. There may remain situations of such intense group consciousness that they should be taken to place a witness in the interested category. Similarly, more particular forms of involvement between a witness and a party or issue involved in the actual case should readily be found to invoke the rules applied to interested witnesses. Simple friendship, for instance, involves sufficient pressures to warrant such treatment.

The Supreme Court has provided a pair of rulings which are useful to introduce the next step of the problem. In a much-quoted decision of seventy years ago, it announced that although a jury may not disbelieve unimpeached and uncontradicted witnesses, "the mere fact that the witness is interested in the result of the suit is . . . sufficient to require the credibility of his testimony to be submitted to the jury . . . ." Scarcely more than thirty years later, however, it announced that the many broad statements that the jury is at liberty to reject testimony solely on the ground of the witness' interest "cannot be accepted without qualification" and ruled that in the case before it the jury was bound to accept the testimony of one of the defendant's employees. The lesson suggested by these statements can stand as a fair indication of general practice—sometimes a jury is compelled to believe the testimony of interested witnesses; sometimes it is not. Unhappily, the only general guide that can be offered is that the courts are seeking to enforce the general directed verdict approach of attempting to discover what a reasonable jury

118. See, e.g., Ramos v. Matson Nav. Co., 316 F.2d 128, 132 (9th Cir. 1963) (corroboration of a supposedly injured seaman's story could be rejected on the ground that the witness "was helping a fellow seaman by telling a fictitious story").
basic point is simply that courts frequently compel acceptance of interested testimony, again often with good reason.

A few hard cases may suffice to close out the discussion. As it happens, all were tried without juries; each would pose as difficult a problem if it were tried to a jury and the question was framed in the directed verdict context.\textsuperscript{128} In one a taxpayer and the sister of her tax consultant testified that a petition for redetermination was mailed at the appropriate time and that the necessary stamped certified mail receipt had been obtained. The receipt was lost; the appellate court ruled that it was appropriate for the Tax Court to reject the interested testimony.\textsuperscript{129} In another, the way was left open to reject the testimony of a canner that in 1944 he was packing 27 percent more berries in his cans than in 1942, so his 1944 prices should not be controlled by reference to his 1942 prices.\textsuperscript{130} In another case, on the other hand, a petitioner for habeas corpus testified that prior to his guilty plea he had not been advised of his right to counsel; the court ruled that, although the court docket noted that he had been advised of his rights, and an affidavit of the sentencing judge stated that while he could not recall the particular case he always advised defendants of their rights, the prisoner’s testimony must be accepted.\textsuperscript{131} Finally, there are many cases involving testimony of applicants attempting to get into this country on the basis of citizenship, allowing rejection of their testimony even though there

\textsuperscript{128} Although appellate courts ordinarily accord a broader scope to jury factfinding than they allow trial judges under the “clearly erroneous” standard of Rule 52 of the Federal Rules of Civil Procedure, there seems little reason to distinguish between judge and jury in most of the present problems. The tradition of jury freedom may be offset by the greater adjudicating experience of the trial judge; there seems no reason to allow the judge less freedom than the jury enjoys.

\textsuperscript{129} Wood v. Commissioner, 338 F.2d 602 (9th Cir. 1964).

\textsuperscript{130} Chamberlain v. Flemming, 160 F.2d 804, 807 (8th Cir. 1947).

\textsuperscript{131} Browning v. Crouse, 356 F.2d 178 (10th Cir.), cert. denied, 384 U.S. 973 (1966). A strange contrast is provided by Gallegos v. Cox, 358 F.2d 703 (10th Cir.), cert. denied, 385 U.S. 869 (1966), where the same judge wrote for the court that uncontradicted testimony by a petitioner for habeas corpus relief that his guilty plea was not made knowingly and understandably could be rejected as so inherently improbable as to be unworthy of belief. Lujan v. United States, 431 F.2d 871 (5th Cir. 1970), a case remarkably similar to Browning v. Crouse, rules simply that the trier of facts is not bound to accept the petitioner’s testimony “even if uncontradicted.”
is no substantial contradictory showing. All of these cases seem hard because they combine obvious temptations to perjury with a significant degree of difficulty in obtaining disinterested corroborating testimony and involve a high degree of danger of oppressive government action. Whatever other value they may have, they should support the conclusion that there really cannot be a flat directed verdict rule of either mandatory acceptance or free rejection of interested testimony.

3. Circumstantial Contradiction.

Directly contradictory testimony almost always raises a jury question. Circumstantial contradiction can likewise make it clear that the credibility of testimony which is not directly contradicted should be left to the jury, even though it is otherwise unimpeached and emanates from a disinterested witness. Inferences from the circumstances established by the testimony of others, or of the witness himself, may conflict either with the direct testimony or with inferences which can be drawn from it. Probably all courts would today accept the proposition that such conflict is sufficient to make the credibility of the direct testimony a jury question at some point far short of rendering the testimony inherently improbable. So too the one-time notion that circumstantial evidence is not sufficient to raise a jury question when there is contradictory direct testimony seems properly abandoned, at least in the federal courts.

As might be expected, there is very little more to be said about this subject which does not embrace the entire subject of

132. The honorable ancestor of these cases is Quock Ting v. United States, 140 U.S. 417, 424 (1891). See also Lau Ah Yew v. Dulles, 257 F.2d 744, 746 (9th Cir. 1958); but cf. Nishikawa v. Dulles, 356 U.S. 129 (1958), rev'g 235 F.2d 135 (9th Cir. 1956). Some special corroboration requirements were adopted by statute for some claims of right to enter or remain in the United States not arising out of citizenship by birth; see 7 J. WIGMORE, supra note 113, § 2066, at 379-80.

133. Among the more entertaining illustrative cases are Donald v. Zack Meyer's T.V. Sales & Service, 426 F.2d 1027 (5th Cir. 1970); Chicago, R.I. & P. Ry. v. Howell, 401 F.2d 752 (10th Cir. 1968); Urban Redevelopment Corp. v. Commissioner, 294 F.2d 752 (10th Cir. 1961) (reviewing findings of the Tax Court); Johnson v. Baltimore & O. Ry., 208 F.2d 633 (3d Cir. 1953), cert. denied, 347 U.S. 943 (1954); The Roona v. Guy F. Atkinson Co., 173 F.2d 661, 665 (9th Cir. 1949) (reviewing findings of a judge); Shapiro v. Rubens, 166 F.2d 659 (7th Cir. 1948) (reviewing trial court findings). A case which deserves to be ranked as a modern-day classic is Powers v. Continental Cas. Co., 301 F.2d 386 (8th Cir. 1962).

might reasonably do in circumstances where no more definite rule can be laid down.\textsuperscript{121}

Exemplification by a few cases may be the easiest method of illustrating the correctness of the current approach. One of the most commonly encountered situations in which courts announce, and follow, a rule of free disbelief is that of testimony by taxpayers as to their motives in undertaking various transactions calculated, if not designed, to reduce their tax liabilities.\textsuperscript{122}

Given the frequently low level of societal pressures to honesty in such situations, a policy of free disbelief seems eminently sound. Likewise, in situations where a witness is called upon to testify to what would have been done if something else had not first occurred, the slope down into comfortable certainty that the favorable thing would have been done is so easy that a policy of free disbelief seems incontestable. So, for instance, an insurance medical examiner asked to testify whether a life insurance policy would have issued on a given medical showing if the applicant had not died while the application was pending need not be automatically believed.\textsuperscript{123} Examples could be multiplied; the point seems sufficiently made that there are many situations in which interested testimony may properly be rejected without other showing to support its rejection.

On the other side of the coin lie many cases requiring that a jury accept interested testimony. At times the justification

\begin{itemize}
\item \textsuperscript{121} One typically backward statement of a very common approach is found in Taylor v. Bair, 414 F.2d 815, 818-19 (5th Cir. 1969), where the court first announces that the mere fact of interest is generally sufficient to take the case to the jury, and then finds an “exception” where the testimony really is uncontradicted and “is clear, direct, and positive as well as being free from contradiction, inaccuracies, and circumstances tending to cast suspicion on it.”
\item Other statements amounting essentially to a “reasonable man” approach to the problem may be found in Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 126 A.2d 323 (1956); 9 J. WIGMORE, supra note 113, § 2495, at 306, quoting extensively from the superb opinion in Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585 (1929).
\item \textsuperscript{122} See, e.g., Glimco v. Commissioner, 397 F.2d 537, 540-41 (7th Cir.), cert. denied, 393 U.S. 981 (1968); Goldman v. Commissioner, 388 F.2d 476, 479 (6th Cir. 1967); Breland v. United States, 323 F.2d 492 (5th Cir. 1963). Occasionally, however, courts require acceptance of even taxpayer testimony, e.g., Dudley v. United States, 428 F.2d 1196, 1201-02 (9th Cir. 1970); Southeastern Canteen Co. v. Commissioner, 410 F.2d 615, 623-25 (6th Cir.), cert. denied, 396 U.S. 833 (1969) (circumstantial corroboration supports the result); Nicholas v. Davis, 204 F.2d 200, 202 (10th Cir. 1953).
\end{itemize}
seems clearly found in the fact that if the testimony were untrue, it could easily be contradicted.\textsuperscript{124} As a first approximation, indeed, it may be accepted that in all situations where it would be easy for the opposing party to offer at least some contradictory evidence if the interested testimony were untrue, the interested testimony should be accepted if no such showing is attempted.\textsuperscript{126}

Beyond the cases of failure to adduce easily available evidence lie cases of strong circumstantial corroboration. In one compelling case, Mexican sellers of sisal testified that they would not have sold to the bankrupt purchasing firm if they had realized it had acquired the name of the firm they had formerly dealt with. Corroboration was found in the fact that under Mexican law it would have been illegal to sell to the bankrupt if the facts had been known.\textsuperscript{126} As before, examples could be multiplied;\textsuperscript{127} the

\textsuperscript{124} Chesapeake & O. Ry. v. Martin, 283 U.S. 209, 216 (1931) stresses this factor.


\textsuperscript{126} Potucek v. Cordelaria Lourdes, 310 F.2d 527 (10th Cir. 1962), cert. denied, 372 U.S. 930 (1963). As a bankruptcy case, involving a petition in reclamation, the matter was tried to a referee rather than a jury. As suggested in note 128 infra, the same result should follow in a jury trial. Compare Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 1970 CCH Trade Cases ¶ 73,069 (D. Del. 1970).

\textsuperscript{127} See, e.g., Brinks v. Chesapeake & O. Ry., 398 F.2d 889 (6th Cir. 1968); Thornton v. Buchmann, 392 F.2d 870, 873-74 (7th Cir. 1968); Reitan v. Travelers Indemn. Co., 267 F.2d 66 (7th Cir. 1959); Texas Co. v. Hood, 161 F.2d 618, 620 (5th Cir.), cert. denied, 332 U.S. 829 (1947). An extreme example of the lengths to which the principle is sometimes carried is Myers v. Day & Zimmermann, Inc., 427 F.2d 248, 252 (5th Cir. 1970), where the court ruled that a plaintiff was entitled to a directed verdict that he had carried his burden of proving he did not know of the hole he fell into by testifying that he did not know of it. Cf. Dickinson v. United States, 346 U.S. 369 (1953), ruling that a draft board must accept a registrant's testimony of entitlement to a ministerial classification where there is no incompatible evidence.

Expert witnesses provide a good testing example. There are many statements that experts need not be believed by a jury, e.g., Campbell v. TVA, 421 F.2d 293, 297 (5th Cir. 1969); Franks v. National Dairy Prods. Corp., 414 F.2d 682, 685 (5th Cir. 1969); Remington Arms Co. v. Wilkins, 387 F.2d 48, 54 (5th Cir. 1967) ("It is said that according to the laws of science it should be impossible for a bumblebee to fly, but it flies nevertheless"). With all these statements, the same court has nevertheless ruled—as it surely must—that uncontradicted expert testimony as to the fact and basic nature of severe personal injuries must be accepted by a jury; see Parker v. Wideman, 380 F.2d 433 (5th Cir. 1967). More recently, it has ruled that uncontradicted expert medical testimony must be accepted where it "bears on technical questions of medical causation beyond the competence of lay determination." Webster v. Offshore Food Serv., Inc., 434 F.2d 1191, 1193 (5th Cir. 1970). Some courts profess a general principle that experts must be believed, absent contradiction, but in opinions finding sufficient circumstantial con-
jury freedom to draw inferences from direct testimony. Although the general rule requiring that jurors accept genuinely uncontradicted testimony is supported by strong considerations, it is not universally accepted, and there is reasonable room to urge that it is not of overwhelming importance. When circumstantial contradiction creeps into the picture, accordingly, the general rule should be reduced to a caution that direct testimony, otherwise uncontradicted and unimpeached, should be accorded considerable respect in weighing the sufficiency of inferentially contradictory circumstantial evidence. And as already noted, in such cases the process of drawing inferences and determining which witnesses and what testimony to believe is a single interrelated task, not a pair of discrete mental operations.

4. Corollaries and Miscellany.

a. Directing for Proponent.

In large part, the permissibility of directing a verdict for a party bearing the burden of persuasion is controlled by the rules just canvassed. To the extent that the case is made out by oral testimony which the jury is not at liberty to disbelieve, a verdict may be directed.135 The cases frequently involve situations where no challenge is raised as to the truth of the facts established by the testimony,136 but there are also cases in which the party opposing the motion has clearly sought to challenge the credibility of the controlling testimony.137

Questions of appropriate inferences and law application are apt to be involved in a proponent's motion as well, particularly where a directed verdict is sought on a major issue such as liability. Because of this admixture, it is common to find in the cases the statement that a verdict may be directed for the party

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135. The nexus between the rules has been drawn frequently. See, e.g., F. James, supra note 116, at 279–80; Sunderland, Directing a Verdict for the Party Having the Burden of Proof, 11 Mich. L. Rev. 198 (1913); Note, supra note 115.


137. A clear example may be found in Norfolk So. Ry. v. Davis Frozen Foods, Inc., 195 F.2d 682 (4th Cir. 1952). See also Colonial Refrigerated Transp. Inc. v. Mitchell, 403 F.2d 541, 547 & n.11 (5th Cir. 1968). Cf. Dickinson v. United States, 346 U.S. 389 (1953), where the Court ruled that absent proof "incompatible" with the draft registrant's testimony of activities entitling him to ministerial status, the testimony must be accepted.
having the burden of persuasion only when the evidence is “overwhelming.”\textsuperscript{138} Here too it is clear that it is proper to direct a verdict, although there may of course be cases which seem a questionable exercise of the power.\textsuperscript{139} The issues differ little from other issues of judicial control of the inferential and law application functions and may be approached on the basis suggested below.\textsuperscript{140}

b. Evidence Considered.

A second corollary governing the evidence to be considered on a motion for directed verdict would seem to follow from the principles just examined as clearly as the first corollary that a verdict may be directed for the party having the burden of persuasion. The court must, at a minimum, consider all of the evidence favorable to the party opposing the motion which the jury may believe, and must in addition consider all of the unfavorable evidence which the jury must believe.\textsuperscript{141} Consideration of anything less would seem so plainly inconsistent with the basic principles of compelled belief as to require no further discussion, were it not for the opinion of the Supreme Court in \textit{Wilkerson v. McCarthy}.\textsuperscript{142} There, citing no authority, Mr. Justice Black stated that it is “the established rule” that the court “need look only to the evidence and reasonable inferences which tend to support the case of a litigant” against whom a directed verdict is sought.\textsuperscript{143} This statement has caused sufficient consternation to warrant further examination than it would seem, in principle, to merit.

The most important reason for disregarding the literal sweep of the Court’s statement in \textit{Wilkerson} is that the Court was not faced with any unfavorable evidence of a sort which the jury should be compelled to believe. The particular matter of direct
fact giving rise to implications which the Court thought to be controlling was the frequency of use by railroad yard employees in general of a certain plank, surrounded by guard chains, spanning the repair pit into which the plaintiff fell. There was direct testimony that yard employees frequently used the plank; there was also contrary direct testimony. The Court ruled simply that the jury could believe the testimony of frequent use rather than the contrary testimony. So much the general rules of jury freedom in crediting conflicting testimony clearly mandate. The Court’s statement that consideration should be given only to the favorable evidence is thus an accurate response to the needs of the case before it, and it need not mean that the same approach is appropriate when there is unfavorable evidence which a jury should not be allowed to ignore.

Later Supreme Court opinions shed little light on the meaning the Court may attach to its loose phrase in Wilkerson. The statement has, to be sure, been quoted. But some opinions strongly suggest that the Court is in fact willing to consider all of the evidence in the record in passing on a directed verdict issue. Notwithstanding this obscurity, distinguished commentators have suggested that, pending authoritative clarification, lower federal courts should consider only the evidence favoring the party opposing a motion for directed verdict. Since lower

144. A similar analysis of the Wilkerson opinion is forcefully presented by Judge Rives’ dissent from the en banc majority opinion in Boeing Co. v. Shipman, 411 F.2d 365, 381-82 (5th Cir. 1969).
147. See, e.g., First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 277 (1968), where the Court affirmed summary judgment for an antitrust defendant after observing that the showing made by the plaintiff was such that “given no contrary evidence, a jury question might well be presented,” because of the “overwhelming amount of contrary evidence.” Cf. Illinois Cent. R.R. v. Norfolk & W. Ry., 385 U.S. 57, 66 (1966), equating the standard of reviewing administrative determinations upon the record considered as a whole with the standard for directing a jury verdict.
federal courts are in fact regularly indulging the habit of considering all the evidence.\textsuperscript{149} it may be worthwhile to begin with an examination of the situations where no one is likely to contend for literal application of an approach considering only the parts of the evidence favorable to the party opposing the motion, and then to work on to the more general problem.

The clearest situation would be that of a witness who testifies that “the traffic light was red—I mean green” and who adamantly insists thereafter that it was green and that his original statement was simply a nervous slip of the tongue. If there is no other evidence that the light was red, the fact that one part of the evidence favors the party opposing a motion to direct the jury that it may not find the light was red should not be sufficient to defeat the motion.\textsuperscript{150} Closely analogous situations are provided by the witness who testifies that she did not hear the train blow its whistle but then adds that she seldom hears the train whistle because she has become accustomed to its regular sound and does not mean to say that it did not blow on the particular occasion in question;\textsuperscript{151} and by the little old lady who repeatedly testifies that she did not know what happened to cause the idling car to leap the curb when she slid across the seat behind the wheel but is then led on cross-examination to say that she did not put her foot on a pedal and hold it down.\textsuperscript{152} The respective courts seem clearly right in ruling that the juries could not use such testimony to defeat otherwise uncontradicted testimony that the whistle was blown; nor to find that the car had jumped the curb because a defective throttle remained stuck open after a foot hit it and was removed, even though there was no showing that that

\begin{footnotesize}
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  \item 149. See text accompanying notes 154-56 infra.
  \item 150. This and related examples are thoroughly examined in Dow, supra note 134, at 843-49.
  \item 151. See Hummel v. New York Cent. R.R., 117 Ind. App. 22, 66 N.E. 2d 901 (1946). Many courts generalize this sort of situation into a rule that negative testimony to the nonoccurrence of a situation cannot prevail over positive testimony of its occurrence; see Dow, supra note 134, at 856-58. At a minimum, this approach must rest on compelled acceptance of testimony to the occurrence and should be governed by the appropriate rules. It frequently goes beyond this minimum to compel rejection of testimony of the nonoccurrence by witnesses who do not mean to say that they do not know whether it occurred, on the ground that they were not consciously attempting to measure the occurrence. See, e.g., Brinks v. Chesapeake & O. Ry., 398 F.2d 880, 893 (6th Cir. 1968) (one of many train whistle cases). Such decisions are obviously on thin theoretical ice, although the practical soundness of the results is generally beyond cavil.
  \item 152. See General Motors Corp. v. Muncy, 367 F.2d 493, 498 (5th Cir. 1966), cert. denied, 386 U.S. 1037 (1967).
\end{itemize}
\end{footnotesize}
car or others like it had ever had a similar experience.

Rulings that testimony which would be sufficient standing alone cannot be accepted because contrary to physical facts, even those established by other testimony rather than immutable scientific law, are such familiar examples of considering evidence unfavorable to the party opposing the motion as to require no more than marginal comment. 153

Going beyond these clear situations, it seems highly significant that statements can be found in virtually all of the federal courts of appeals that "all" of the evidence must be considered, albeit in the light most favorable to the party opposing the motion. 154 There are, largely because of Wilkerson, contrary statements in some of these courts; 155 in many of the cases, however, these contrary statements seem to have had as little bearing on

153. One of the most frequent applications of the "physical facts" rule which does not rest on testimony beyond that of the witness is found in the common rule that testimony that the witness stopped and looked, saw there was nothing coming and then immediately got hit by a train cannot be accepted. See, e.g., Gutiérrez v. Union Pac. R.R., 372 F.2d 121, 122 (10th Cir. 1966); Baltimore & O. Ry. v. Joseph, 112 F.2d 518 (6th Cir. 1940), cert. denied, 312 U.S. 682 (1941). Properly applied, the rule includes room for a different result when there is some reasonable explanation for failing to see the train; see Wisnewski v. Baltimore & O. Ry., 186 F.2d 538 (3d Cir. 1951).

The same approach is frequently taken when proof of the facts found to be inconsistent with the witness' testimony is adduced by other witnesses. Highly questionable cases in which federal courts have followed such an approach include Carstens Plumbing & Heating Co. v. Epley, 425 F.2d 830, 835 (8th Cir. 1965); Peters v. Fitzpatrick, 310 F.2d 704 (7th Cir. 1962); O'Connor v. Pennsylvania R.R., 398 F.2d 911 (2d Cir. 1968). A thoroughly desirable note of caution is sounded in Born v. Osendorf, 329 F.2d 669, 672 (8th Cir. 1964).

154. Two recent leading opinions examining the question thoroughly are Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970), and Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1968) (en banc). See also Wilkins v. Hogan, 425 F.2d 1022 (10th Cir. 1970); Hannigan v. Sears, Roebuck & Co., 410 F.2d 285 (7th Cir.), cert. denied, 396 U.S. 902 (1969); Schneider v. Chrysler Motors Corp., 401 F.2d 549, 555 (6th Cir. 1968); Uniform Oil Co. v. Phillips Petroleum Co., 400 F.2d 287, 288 (9th Cir. 1968); State Farm Mut. Ins. Co. v. Borg, 396 F.2d 740, 742 n.2 (8th Cir. 1968); Ledwin v. Metropolitan Life Ins. Co., 394 F.2d 608, 613 (3d Cir. 1968); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 656 & n.6 (1st Cir.), cert. denied, 368 U.S. 931 (1961); Grooms v. Minute Maid, 287 F.2d 541, 543 (4th Cir. 1960); cf. Smith v. Illinois Cent. R.R., 394 F.2d 545, 559 (6th Cir. 1968) (following state law).

155. Opinions in the Seventh Circuit provide a particularly fruitful source of contrary statements. See, e.g., Casko v. Elgin, J. & E. Ry., 361 F.2d 748, 749 (7th Cir. 1966) ("part" of the evidence test—FELA case); Marmo v. Chicago, R.I. & P.R.R., 350 F.2d 236, 238 (7th Cir. 1965) (same); McKay v. Upson-Walton Co., 317 F.2d 826, 828 (7th Cir. 1963) ("all" the evidence); Lyons v. J.C. Penney Co., 316 F.2d 753 (7th Cir. 1963).
the result as in Wilkerson itself, and in some of them it is transparent that the court then went on to consider all of the evidence.156

In short, it seems clear that it would be absurd to apply literally a rule requiring consideration of only the parts of the evidence favorable to the party opposing a directed verdict motion, that most courts have recognized the logic of considering parts of the evidence unfavorable to that party, and that nothing in Wilkerson required a different approach. The foundation for requiring consideration of all unfavorable evidence which a jury would be required to credit seems unshakable.

It would be logically possible to go further than the rule here proposed, and to allow consideration of all of the evidence including the unfavorable evidence which the jury is not required to believe. Courts following a "new trial" standard for directed verdicts would of course take such an approach.157 Even short of that commodious standard, it would be possible to determine that at some point jury reliance on a case which would be sufficient standing alone becomes too unreasonable to be tolerated because the opposing case seems so much stronger, even though it is not based on such evidence as the jury would have to accept if the party seeking the directed verdict had the burden of persuasion.158 If the process of defining the limits on jury free-

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156. A particularly clear example is Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), cert. denied, 391 U.S. 913 (1968).


158. Such an approach seems to be suggested in Hyman & Newhouse, Standards for Preferred Freedoms: Beyond the First, 60 Nw. U.L. Rev. 1, 19 (1965); cf. Jaffe, Judicial Review: Substantial Evidence on the Whole Record, 64 HARV. L. REV. 1233, 1240, 1245-47 (1951). The Second Circuit has recently drawn a sharp line between an approach which permits consideration of all of the evidence, whose appropriateness it did not determine, and an approach permitting consideration of "uncontradicted, unimpeached" evidence unfavorable to the party opposing the directed verdict motion as well as the evidence favorable to that party. Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970). Needless to say, federal courts have occasionally decided cases on a basis which requires that evidence which would be sufficient standing alone be disregarded because of contrary testimony deemed much more persuasive by the court. See, e.g., Gudgel v. Southern Shippers, Inc., 387 F.2d 723, 726, 727 (7th Cir. 1967); Fore v. Southern Ry., 178 F.2d 349 (4th Cir. 1949) (a considerably more sympathetic example).
dom were entirely one of identifying the area of reasonable probability in the midst of uncertainty, this approach should be taken. Contrary evidence surely bears on the probable veracity of testimony. Nonetheless, this approach seems inappropriate. The effect, whatever the form of statement, is an intrusion on the credibility function inconsistent with the jury's recognized freedom to reject all testimony which is contradicted directly or by reasonable inference, and to credit any testimony which is not preposterous. Whether this freedom is rational depends on all the unknowns surrounding the jury's credibility function; the controlling consideration is that the freedom cannot conclusively be found irrational. On motion for directed verdict, then, the jury must be accorded the privilege of discrediting all of the evidence opposing the case which, by hypothesis, is sufficient standing by itself. Once this is done, the sufficient case remains alone and must be submitted to the jury.

c. Miscellany.

Current summary judgment practices are directly blessed by the rule of mandatory belief defined above. If a jury must be allowed at trial to utilize a witness' demeanor as the sole basis for rejecting his testimony, there would be a very strong basis for arguing that summary judgment may never be granted for a party who would have the burden of persuasion at trial on the basis of a showing which would, at trial, take the form of oral testimony. There might still be room for responding that the

159. A more obscure way of phrasing the same conclusion would be that the direct testimony favorable to the party opposing the motion for directed verdict and favorable inferences drawn from it are, if sufficient alone to make out a case for the jury, likewise sufficient direct or circumstantial contradiction to obviate any possible requirement that the evidence favoring the moving party be credited.

160. It goes with only footnote saying that once the evidence to be considered on the motion has been defined, it must be tested by the general interference-minimizing approach. All of the reasonable inferences favorable to the party who wishes to go to the jury must be assumed, as must be any additional inputs the jury may contribute by way of general factual knowledge or law application.

general equation of summary judgment standards with directed verdict standards\textsuperscript{162} is only a first approximation, and that the seventh amendment allows the gain of "efficient" pretrial disposition to offset loss of the jury determination which would be required if the same showing were advanced at trial. Although some courts may at times approach such a response as a matter of practical application, the difficulties with it are too obvious to require further comment.\textsuperscript{163}

Finally, the rule of compelled belief should be set against the rules which in some fashion deny the right to believe direct testimony or compel that it be disbelieved. In various circumstances, courts still require that testimony be corroborated before it may be accepted as sufficient to establish some particular proposition.\textsuperscript{164} More dramatic illustrations are provided by cases which, without purporting to follow any generalized rule such as the corroboration rules or even the principles governing testimony "contrary to physical fact," determine that direct testimony simply may not be accepted. In some of these cases, the contrary evidence is very strong, the evidence rejected by the court is very weak, and there are peculiar dangers of presumably misplaced jury sympathy.\textsuperscript{165} In others, the most that can be guessed is that the odor of duplicity or self-serving is simply too strong for judicial nostrils.\textsuperscript{166} A few of the decisions may be subject to explanation only on the basis of the judicially favored status of one of the parties.\textsuperscript{167} No attempt will be made here to develop an

\footnotesize{\textsuperscript{162} See 6 J. Moore, Federal Practice §§ 56.02[10] (2d ed. 1965).}

\footnotesize{\textsuperscript{163} General treatment of the credibility problems resulting from summary judgment motions may be found in 6 Id. § 56.15[4]; Asbill & Snell, Summary Judgment Under the Federal Rules—When an Issue of Fact Is Presented, 51 Mich. L. Rev. 1143, 1148-54 (1953); Bauman, A Rationale of Summary Judgment, 33 Ind. L.J. 467 (1958); Dow, supra note 134, at 901-04; Note, Summary Judgment Under Federal Rule of Civil Procedure 56—A Need for a Clarifying Amendment, 48 Iowa L. Rev. 453, 462-63, 468 (1963).}

\footnotesize{\textsuperscript{164} See generally 7 J. Wigmore, Evidence §§ 2030-75 (3d ed. 1940). An interesting historical vignette is provided by McBratney, The One Witness Rule in Massachusetts, 2 Am. J. Legal His. 155 (1958).}

\footnotesize{\textsuperscript{165} See, e.g., Haskins v. Point Towing Co., 421 F.2d 532 (3d Cir. 1970); Fischer Constr. Co. v. Fireman's Fund Ins. Co., 420 F.2d 271 (10th Cir. 1969); General Motors Corp. v. Muncy, 367 F.2d 493, 498 (5th Cir. 1966), cert. denied, 386 U.S. 1037 (1967).}

\footnotesize{\textsuperscript{166} See, e.g., Giblin v. Beeler, 396 F.2d 584, 587-88 (10th Cir. 1968).}

\footnotesize{\textsuperscript{167} A possible example of this situation is found in Meeker v. Rizley, 346 F.2d 521 (10th Cir. 1965). The court notes, id. at 525 n.1, that the plaintiff testified that the defendant sheriff told plaintiff that he would shoot him, beat him, keep him in jail and throw the key away if plaintiff did not register as a criminal for the national census. Af-}
acceptable rationale for this form of judicial control. The cases first cited provide examples which seem to justify a reserve power of this nature to ensure reasonable decision; the cases last cited demonstrate that great care needs to be taken with this, just as with other, bases for judicial control.

C. Inference

1. Interrelations.

In the actual decisional process, the task of drawing inferences from facts established by direct testimony is inevitably intertwined with the task of determining which direct testimonial facts to believe. Various parts of the direct testimony may be credited initially, only to be discredited after comparing their implications with the inferences drawn from other direct testimony thought to be more credit-worthy. Alternatively, no initial credibility judgments may be made at all, the process being carried on as a single seamless whole. In either case, the choice between conflicting items of direct testimony may rest on some factor bearing directly on credibility or on an estimate of the correspondence of the competing direct or inferred facts with the jury's concepts of common sense and everyday experiential probabilities.

So too, the tasks of crediting direct testimony and drawing inferences from it may be intertwined in the decisional process with the task of law application. In part, this process is entirely legitimate—the perceived legal implications of some direct or inferential facts may preclude the need for determining the credibility or implications of other portions of the direct testimony. And in part the process may be the spurious one of matching the express or implicit fact determinations to the needs of the applicable rules of law. Many would add that the actual decisional process, particularly in the case of jury decisions, is apt to omit any such complicated involvements in favor of a more direct determination of who should win, and how much.

For purposes of directed verdicts, much of this complication can be left behind. As has been established, the principle of minimum intrusion requires beginning from the assumption that the jury will believe only the parts of the direct testimony most

[firming a directed verdict for the defendants, the court then says in the body of the opinion that "evidence is lacking to establish that Meeker was forced by threats of great bodily harm and at gun point to sign the national census as a criminal in custody." Id. at 527.]
favorable to the party opposing the directed verdict motion, as well as such other parts of the testimony as they are compelled to accept. There is some need, of course, to examine possible inferential [circumstantial] contradictions in determining whether the jury is obliged to accept testimony which is not directly contradicted. And the maximum permissible reaches of legitimate inference obviously must enter into the determination whether any particular piece of direct testimony is favorable or unfavorable to the party opposing the motion. Each of these processes, fortunately, seems subject to the same principles and difficulties as the overriding problems of inference posed by a directed verdict motion. This conclusion makes it possible to focus discussion entirely on the nature of the judge’s function in determining the permissible scope of jury inference freedom on the basis of such direct testimonial facts as must be taken as established for purposes of the directed verdict motion.

2. Unique Circumstances.

It is commonplace that in large part the problem of defining the range of reasonable inference is dependent on the unique circumstances of each particular case. No self-applying rule can be offered for determining what inferences are reasonable. General statements of the approach to be taken to such problems may nonetheless be helpful in establishing the mood of judicial control and in suggesting the possibility of a more helpful method of analysis. The common form of expression adopted by federal courts has changed significantly in recent years, in a way which affords an easy introduction to the problem of inference control, so the cases will be used as a framework for a more elaborate statement of the basic difficulty before suggesting a possibly useful way of restating it.

Much of the judicial discussion is, inevitably, centered on application of the civil “preponderance of the evidence” measure of the burden of persuasion. One common approach to the sufficiency of circumstantial evidence has been to state that a case must be sufficient to support an “actual belief” in the truth of the essential propositions. A slightly more useful approach was

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once common in the federal courts, implicitly recognizing that
decision—"belief"—must depend on some sort of balance of
competing probabilities but insisting that circumstantial evidence
is not sufficient "where proven facts give equal support to each
of two inconsistent inferences," only one of which would support
the desired jury finding. Current federal courts have shifted away from this approach to an even more nebulous form
of statement, primarily on the ground that judges should not pre-
sume to instruct juries on the basis of a determination that, to
the judicial eye, conflicting inferences are equally probable. In this
view, "the very essence" of the jury's function "is to select from
among conflicting inferences and conclusions that which it con-
siders most reasonable." Although courts still occasionally
announce the "equal inferences" rule, it seems clear that the
newer view is more generally adhered to, and that recurring state-
ments of the older view are often belied by the decisions accom-
panying them or adopted to cover up some other basis for deci-
sion.

Terse statements of the foundations of the newer view of the
jury's function may be found in the observations that courts
simply lack the ability to say whether two or more reasonable
inferences are equal, or that the very fact that inferences seem
equal to a judge is strong evidence that other reasonable men
might rationally regard one as more probable than the other.
A more elaborate statement of the justification would focus on
the reasons for deference to the jury. The process of inference,
after all, is one which must depend not only on the matters in
evidence but also on application to the evidence of general knowl-
dge of life at loose and in the large. Much of the value of the

169. Surely the best-known announcement of this principle must be
170. Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944),
quoted in the much weaker factual context of Sentilles v. Inter-Carib-
bean Shipping Corp., 361 U.S. 107, 110 (1959). Each case is an FELA
decision; the approach adopted by the Court is followed by other courts
in ordinary litigation; see notes 173-75 infra.
171. See, e.g., Calvert v. Katy Taxi, Inc., 413 F.2d 841, 844 (2d
Cir. 1969).
172. Such a case may be Pittman v. West Am. Ins. Co., 299 F.2d
405, 411 (5th Cir. 1962), where it looks very much as if the equal infer-
ences concept was employed in lieu of a determination (whether or not
warranted) that the sole evidence relied upon to avert a directed verdict
was too incredible to be believed.
174. Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1066-67
(4th Cir. 1969).
jury is thought to lie precisely in bringing such general knowledge to bear on problems with a collective earthy wisdom which a single, often cloistered judge cannot command.\textsuperscript{176}

Perversely, the reason for honoring the jury's contribution to the inference process provides simultaneously the need for imposing the restraint of a more refined, if abstract, judicial second guess. Jury wisdom is often drawn from pure but unknown wells; it also is often drawn from wilful disregard of the law, prejudice,\textsuperscript{176} or simple ignorance or superstition.\textsuperscript{177} So, in one common situation often giving rise to judicial control, it is frequently held that the fact that a patron "slipped and fell" on an object on a store floor does not, without more, support an inference that the object was placed there by an agent of the store or was left there so long as to make it unreasonable for the store not to have discovered it.\textsuperscript{178} The notion is that a finding of liability would not be based on any evidence—although little more evidence may be needed to turn the balance—\textsuperscript{179} but on some less worthy consideration.

The difficulties of exercising the power of judicial control in responding to the inference dilemma may be illustrated by a few examples left to footnote annotation.\textsuperscript{180} It should be ap-

\begin{footnotes}
\item[175.] An elegant statement of this principle may be found in Hyman & Newhouse, \textit{Standards for Preferred Freedoms: Beyond the First}, 60 Nw. U.L. Rev. 1, 13 n.38, 15 (1965). See also Ball, supra note 168, at 829.

\item[176.] See Weinstein, supra note 168, at 233-35.

\item[177.] See, e.g., Weltmer v. Bishop, 171 Mo. 110, 71 S.W. 187 (1902), \textit{writ dismissed}, 191 U.S. 560 (1903), reversing judgment entered on a jury verdict for defamation of the plaintiff's "magnetic healing" services, on the ground that the jury simply could not be allowed to reject the defense that indeed the services were worthless.

\item[178.] See, e.g., Joye v. Great Atl. & Pac. Tea Co., 405 F.2d 464 (4th Cir. 1968).

\item[179.] See, e.g., Rumsey v. Great Atl. & Pac. Tea Corp., 408 F.2d 89 (3d Cir. 1969) (\textit{en banc}).

\item[180.] One of the most easily impugned applications of attempted judicial control is the rule against drawing an inference from an inference; see F. James, \textit{Civil Procedure} 276 (1965). Nonetheless, courts occasionally invoke this notion in all seriousness; see, e.g., Crown Cork & Seal Co. v. Morton Pharmaceuticals, Inc., 417 F.2d 921 (6th Cir. 1969) (evidence of an unvarying practice to send an order acknowledgment form might support an inference that one was sent in this case but could not support the further inference that it was received).

Compelled inferences likewise lead to highly questionable results. So in Prudential Ins. Co. of Am. v. Schroeder, 414 F.2d 1316 (5th Cir. 1969), \textit{cert. denied}, 396 U.S. 1058 (1970), the court ruled that a jury could not conclude that the insured decedent had met an accidental death in an automobile collision because of evidence that the car had been driven erratically for half a mile before it left the road. The jury would have to conclude from the car's behavior, according to the court, that
parent, even without example, that very little can be said in the
abstract about the best method for determining the strength of
the inferential possibilities, or probabilities, suggested by the evi-
dence in a particular case. There may be some help for juries
in allowing more explicit testimony by experts on general proba-
bility methods or on specific probabilities in a particular factual
setting, although even here there are obvious reasons for pro-
ceeding with much caution. There seems to be little help inde-
ead for a judge confronted with the task of determining whether
the inferences sought to be drawn from the evidence are so im-
probable as to be forbidden to the jury. This lack of clear con-
trolling standards means that judicial decision in any particular

the driver must have been disabled and that accordingly the cause of
the disability was the cause of the crash. For want of any showing
that the disability was accidentally caused, the jury's verdict and judg-
ment for the plaintiff were reversed.

Recent examples of very close decisions, all requiring judgment not-
withstanding a jury verdict to the contrary, include Armstrong v. Com-
merce Tankers Corp., 423 F.2d 957 (2d Cir. 1970); Ruthig v. Saginaw
Transfer Co., 337 F.2d 393 (7th Cir. 1964); Bruce Lincoln-Mercury, Inc.
v. Universal C.I.T. Credit Corp., 325 F.2d 2 (3d Cir. 1963). There
seems to be little need to spread out the details of these or other decisions in an
attempt to point up the difficulty which should be obvious on reading
them. Readers doubtless can supply their own favorite examples in
any event.

181. General treatments of the utility of a probability approach to
decision making include Ball, supra note 168; Cullison, supra note 168;
Finkelstein & Fairley, A Bayesian Approach to Identification Evidence,
83 Harv. L. Rev. 489 (1970); Kaplan, Decision Theory and the Factfinding
Process, 20 Stan. L. Rev. 1065 (1968). Perhaps the boldest suggestion is
that of Finkelstein and Fairley that expert testimony be received as to
the application of probability theory in a particular case, based upon a
broad range of hypothetical prior probabilities a jury might derive from
the evidence in the case, as the basis for deriving a further probability
figure on the addition of further (statistical or looser probability) evi-
dence. 83 Harv. L. Rev. at 502-09. They conclude that, at a minimum,
jurors forced to make a quantitative estimate of their suspicions will
consider the evidence more carefully and rationally. A somewhat com-
parable suggestion that jurors may share a general human trait to
underestimate the probable strength of their inferences is advanced in
Kaplan, Decision Theory and Reasonable Doubt, in COMMUNICATIONS
SCIENCES AND THE LAW: REFLECTIONS FROM THE JURIMETRICS CONFERENCE
251, 258 (L. Allen & M. Caldwell eds. 1965). It is further suggested that
juries may in some way be made to function more accurately by forcing
a more analytic approach to the decisional task, but that this cannot
be extended to the point of requiring an elaborate probability analysis
of the evidence. Id. at 258-59. See also Broun & Kelly, Playing the
Cullison, supra note 168; Kingston, The Law of Probabilities and the
Credibility of Witnesses and Evidence, 15 J. For. Scr. 18, 22 (1970) (sug-
gesting that pseudo-objective estimates of probability may well cause
more confusion than clarity).
case involves an inescapably large element of freedom to give effect to various notions of policy and expediency. In part, this freedom and uncertainty counsel that great care be exercised in limiting the range of inferences held available to the jury. In broader part, however, the range of judicial freedom raises the question whether the desirable degree of uncertainty left open to jury resolution (or speculation) may depend on the nature of the uncertainty involved. The proposition offered below is that in fact juries are allowed to determine uncertainties of much higher order in some areas than in others, and that this approach is entirely proper.


Decision between alternatives ordinarily involves a consideration of the expected desirability of each alternative and the expected losses resulting from a mistaken decision. Few people would willingly wager one thousand dollars for a ten percent chance of winning eleven hundred dollars and a ninety percent chance of losing all. The choice between competing inferences, and ultimately between competing possible verdicts resolving the questions of liability in a civil action, is subject to similar analysis. Decision must rest on an evaluation of the degree of uncertainty, the gains from correct decision, and the losses from mistaken decision. Much of this evaluation, however, is at least formally provided for judge or jury by legal rules for resolving uncertainty, cast in the form of rules as to the burdens of production and persuasion. If the standard of proof embodied in the "preponderance of the evidence" requirement applied to most issues is equated, as it often is, with any probability greater than fifty percent, there is an implied judgment about the relative losses resulting from a mistaken verdict for the proponent of the issue (here identified, for simplicity, as the plaintiff) and from a mistaken verdict for the defendant. The judgment, simply, is that a mistaken denial of recovery to a deserving plaintiff is just as costly as a mistaken imposition of liability on an innocent defendant. Literal acceptance of this proposition would leave

182. See Bagalay, supra note 148, at 1062-64; Hyman & Newhouse, supra note 175, at 15; James, Functions of Judges and Jury in Negligence Cases, 58 YALE L.J. 667, 674 (1949).


184. This initial proposition is clearly developed in Ball, supra note 168, at 816-24. The textual discussion below examines the adequacy of the assumption that in all cases the loss resulting from a mistaken
the problem of judicial control of jury inferences at the point examined above: every case presents a unique problem, judges should be wary of undue intrusion on the jury's legitimate contributions to the task, and little more can be said. Short reflection, however, reveals that this description of the operation of the burden rules, and the concomitant directed verdict functions is inadequate both as a practical description of what actually happens and as a conceptual prescription for what ideally should happen.

On the plane of description of actual decisional processes, one of the obvious failings of the determinations implicit in the model just sketched is that it builds on the premise inherent in most legal rules that a choice must be made between only two possible decisions—a "yes" decision in which a determination of liability is accompanied by an effort to award a full measure of damages or other relief, or a "no" decision in which a determination of no liability results in a denial of any relief whatever. Judges as well as juries, however, often resolve uncertainty in a quite different way, compromising between a full "yes" or "no" answer by rendering a judgment for partial relief corresponding to an inability to reconcile an uncertain evaluation of the "facts" with an absolute decision either way. The bets of justice can be hedged just as other bets. It may very well be argued that this sort of decision making often represents an optimal adjustment to uncertainty, superior to the flat choice required by a legal theory which superstitiously chooses to ignore the fact that legal administration is incapable of discovering absolute truth. The price of this approach, however, is that, if honestly followed, it allows only partial justice in any case short of the very rare one in which absolute certainty is genuinely justified. Accordingly, it will be

verdict for the plaintiff is equal to the loss resulting from a mistaken imposition of liability on the defendant. If this assumption is accepted, however, there seems to be little need to worry about the decision to decide all evenly balanced cases against the party chosen by the burden of persuasion rules. As examined in the ensuing textual discussion, it seems unlikely that many cases are really decided on the basis of a determination that probabilities are precisely equal. When that is the basis for decision, moreover, the allocation of the burden often rests on the justifiable notion that governmental sanctions should not be employed to redistribute private losses unless there is some affirmative basis for supposing that government justice will not be injustice. In other cases, allocation of the burden reflects some other policy justifying the result as a means of encouraging diligent trial preparation by parties with superior access to proof, of handicapping positions which are legally tolerated but not favored or of otherwise (at least in desire) improving the litigational process.
assumed that no general allowance should be made in the formal rules for the fact of compromise decisions; they are noted only to show that the formal model is only a formal model.

A more fundamental practical difficulty with the "more probable than not" approach to the resolution of indecision is that it suggests the possibility of a precision which is simply unattainable. It may very well be more helpful to juries to tell them to decide by a balance of the probabilities than by a preponderance of the evidence; it seems wildly unlikely that the calculus of jury decision can ever lead to a determination that the probability of liability is 0.50, or 0.51. Instead, instructions on the burden of proof are designed to assist the jury in reaching a conclusion where they feel that their uncertainty is too high to justify a resolution of the controversy submitted to them. This assistance is in part simply a caution that care should be taken and in part a reassurance that there is an acceptable general rule for disposing of cases where reason fails. It is not an assistance which can narrow the frequently broad range of uncertainty within which a jury may justifiably find itself unable to reach a unanimous decision either way. Even more clearly, it is not an assistance which amounts to an effective control of the actual level of probability a jury will require as a predicate for a finding of liability.

Neither of these practical inadequacies of the formal concept of the burden of persuasion has immediate consequences for directed verdict practices. The failure to take account of compromise may be ignored for the same reason that legal rules may justifiably seek to preclude compromise. And the difficulties in describing the balance of decision in close cases are by definition encountered only in cases which were, initially, properly submitted to the jury under the general rules already outlined.

The conceptual limitations on the adequacy of the formal model of the burden of persuasion, on the other hand, do have implications for directed verdict practices. Acceptance of the equal probability basis for decision rests, as noted, on the assumption that the loss resulting from a mistaken decision for the party bearing the burden is equal to the loss resulting from a mistaken decision for the other party. This assumption is unsound. There is no reason to suppose that the importance of the respective losses is equal, and little reason to suppose that courts

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are incapable of developing rules on some other basis.

Scholars who have examined the difficulties of judicial decision making in terms of probability theory frequently agree that, as in other matters, it is appropriate to vary the strength of the showing required as a basis for action according to the circumstances of the particular situation. Stated most baldly, the proposition is that in some circumstances a plaintiff should be allowed to recover on a showing amounting to less than a preponderance of the evidence because a mistaken denial of recovery is so disastrous that its possibility overwhelms the stronger probability that the decision is mistakenly imposing liability on the defendant. The converse proposition may be true as well, of course; because it is implicit in the decisions imposing a standard of proof higher than a simple preponderance of the evidence, there is less need of justification, but it should be noted that the same phenomenon may occur when the burden of proof is the ordinary one.

Juries are notoriously prone to accept a showing based on less than an equal probability of liability. The position urged here is that judges likewise take this approach in evaluating the appropriateness of directing a verdict and that it is proper for them to do so. Two lines of exemplification will be offered to support this position. One will proceed by an examination of the appropriateness of resting decision solely on an apparently accurate probability showing, seeking to establish that the nature of the uncertainty involved weighs heavily on the acceptable level of uncertainty. The other will involve a more amorphous set of examples drawn from a variety of cases, seeking to establish a different range of uncertainties which may also be subject to unequal thresholds of acceptable probability.

The first illustration in the first series may be borrowed from a real case. The plaintiff, an employee in an automobile service center, was badly injured by the explosion of a tubeless tire he was mounting on a wheel rim. Evidence is available that be-

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187. Cf. Young & Co. v. Shea, 397 F.2d 185, 188 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969), where the court ruled that in proceedings for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. (1964), the claimant has the burden of proving his case but must only prove it by a standard lower than the preponderance of the evidence. The court admits that it is unable to "ascribe a legal label" to this sort of burden.
between 75 and 80 percent of the tires sold at the center are manufactured by the defendant. If there is no other evidence that the tire involved in this particular incident was manufactured by the defendant, should the case be allowed to go to the jury? The court said it should not. Very often this approach may be justified on the ground that it should be possible for the parties to find something beyond the bare statistic, and they should be encouraged to do so. But suppose there really is nothing more to be done—the plaintiff can show that he was unconscious after the accident and that diligent attempts to identify the tire made since the accident have failed. If there is a temptation to allow that case to go to the jury, is the temptation as strong if the plaintiff can show only that he was hit by a taxicab and that the defendant owns four of the five taxicabs licensed to operate in the town where the accident occurred? Whatever the reaction to these possibilities, what of the case where the defendant manufactured only 45 percent of the tires?

One range of uncertainty, in short, is that concerning the identity of the actor involved in the transaction affecting the plaintiff. The hazards of mistaken identification are so great, resulting in the imposition of liability on a defendant who had no connection whatever with the incident involved, that courts are very reluctant indeed to allow jury resolution of uncertainty even when there is a very persuasive showing that the plaintiff's requested resolution is indeed more probable than not.

A second range of uncertainty may involve the question whether an identified actor has done anything which the law recognizes as the basis for imposing liability. It might be shown, for instance, that the defendant manufactured all of the tires sold at the service center; that with all due diligence nothing could be found out about the reason for the explosion of this particular tire, because the carcass has disappeared; and that on the 100 occasions on which tires of this model, made by this defendant, have exploded, 55 of the explosions resulted from a defect in the tire and 45 resulted from carelessness of the person mount-

188. Guenther v. Armstrong Rubber Co., 406 F.2d 1315, 1318 (3d Cir. 1969). The statement is purest dictum, since the court ruled that there was other adequate evidence to support a jury submission of the question.

189. See Ball, supra note 168, at 823.

190. Cf. Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N.E.2d 754 (1945). A taxicab company is substituted for a bus line to avoid as far as possible a compensating tendency to resolve uncertainties against a presumably rich or insured defendant. See text following note 194 infra.
ing the tire. Most courts would be uncomfortable about allowing such a case to go to a jury; it seems likely that many would not.

Further down the scale of importance come cases in which there is a clearly sufficient showing as to the identity of the actor and a similar showing as to liability-incurring conduct, but uncertainty as to the causal connection between the conduct and the injury. In one newly famous case, a claimant sought workmen's compensation benefits on the ground that her husband's death from cancer was caused by his fall from an ice cream truck. This claim was supported by expert testimony which the court accepted as establishing a "mathematical likelihood that the employee's death was causally related to his accident." Nonetheless, it was found insufficient.191 Whether or not most courts would agree with this particular example,192 it illustrates a category of uncertainty whose mistaken resolution most would agree is less serious than the categories just examined.

One final category may be offered. Assessment of damages, given a sufficient showing of the identity of the defendant, his wrongful conduct and its causal connection with the plaintiff's claimed injury, is an area in which courts allow jury determination on the basis of very slender showings. In part this approach is a result of necessity; once the possibility of periodically reviewed serial awards is rejected, for instance, measurement of future damages must often depend on such probability calculations as life expectancy.193 In part, however, this approach results from a quite explicit determination by the courts that once the fact of liability is established it is better to err on the side of mistaken overcompensation than on the side of mistaken undercompensation.194


192. As suggested in the text below, one important ground for questioning the result is that workmen's compensation cases should be determined on grounds applicable to insurance problems generally and may appropriately involve acceptance of a much greater level of uncertainty. See text following note 194 infra.

193. See Ball, supra note 168, at 814. The willingness to accept a high level of uncertainty is underscored by the common rule that mortality tables may be introduced notwithstanding a showing of the ill health of the person whose probable life span is in question. See, e.g., Kershaw v. Sterling Drug, Inc., 415 F.2d 1009, 1012 (5th Cir. 1969); Kanelos v. Kettler, 406 F.2d 951, 956 n.30 (D.C. Cir. 1968).

194. This proposition is so familiar in so many fields of law that
The perhaps incomplete ranking of uncertainties just offered is one way of testing the proposition that courts should allow jury resolution of greater or smaller levels of uncertainty according to the nature of the consequences resulting from a mistaken decision. Another way of testing the proposition may be found in examining a few cases for examples of other policies, attached to particular areas of the law, which may likewise affect the desirable degree of jury freedom to speculate.

The first example that may be offered is one already explored in Part I. In FELA cases, as there set out, the consequences of a mistaken denial of recovery are grave indeed for the individual affected. The consequences of a mistaken imposition of liability, on the other hand, may be comparatively minor, particularly as such mistakes become sufficiently generalized to be insured against in one way or another. Decisions allowing a patently broad scope of jury freedom to speculate as to the existence of fault, and its causal connection with the plaintiff's injury, are thus entirely appropriate. In effect, such decisions admit that a jury may properly return a verdict for the plaintiff even though it would not be reasonable to infer a probability of liability as high as 50 percent. The same principle suggests that in other cases where the defendant has a high ability to spread losses, or indeed is immediately engaged in the insurance business, a similar degree of jury latitude is appropriate.

At the other end of the spectrum, there may be a variety of reasons for restricting the permissible scope of jury inference to limits more narrow than would result from an honest "preponderance of the evidence" approach to the sufficiency of the evidence to induce reasonable persuasion. Perhaps the broadest category of justification for such an approach may be found in areas involving the intentional formation or alteration of legal relationships in which it is important that people be able to rely on some degree of stability in their planning. As a single ex-

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The curious, however, may find ample illustration in federal antitrust doctrine, even though the dangers of undercompensation are substantially mitigated by the provision for mandatory trebling of the damages found. See, e.g., Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 887 (1st Cir. 1966): "Precise computation of damages can rarely be derived from the complexities of antitrust litigation. This court has recognized that older standards requiring 'certainty' of damages have given way to 'proof of losses which border on the speculative, in order to implement the policy of the antitrust laws.'" See generally Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969).
ample, there may be offered a case in which an insured changed the beneficiary on his life insurance policy from his former wife to his paramour. There was ample showing that the insured was in a state of psychosis and alcoholism leaving him susceptible to the exertion of undue influence and that the new beneficiary had excellent opportunity to exert it. Nonetheless, the court ruled that, absent any direct showing of attempted influence, it was erroneous to submit the issue to the jury.195 It would be difficult to say that only an unreasonable jury could infer the exercise of undue influence; the justification for the ruling seems to lie rather in the importance of stability in such matters and in the danger of jury prejudice in choosing between paramour and one-time wife.

Inferential freedom may likewise be narrowed because of the involvement of judicially favored or disfavored rights. The strong current favor for free expression, for instance, has led to an obvious narrowing of the scope of permissible inference in determining whether there has been a showing of the "actual malice" required to support a defamation action brought by a public figure.196 Judicial disfavor of the defense of contributory negligence, on the other hand, seems the only acceptable justification for a recent decision refusing to allow a jury to infer, on the basis of a showing that the deceased driver's blood-alcohol content was such that he would not be in any condition to drive, that the passengers in the car were guilty of contributory negligence in riding with him.197

The foregoing examples have been offered in an attempt to demonstrate that directed verdict standards are properly framed to allow or deny jury disposition of inferential uncertainties on the basis of criteria other than the reasonableness of a determination that the legally required findings are more probable than not. If this is accepted, the problem of understanding the scope of jury inference allowed in different cases, and of measuring the appropriateness of a directed verdict in a particular case, is at least seen to be different than the problem suggested by a general

196. See, e.g., Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). In Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970), two of three judges joined a concurring opinion suggesting that at trial, the judge must make a factual determination of the actual malice issue, and may allow the jury to determine it only if the judge finds that actual malice has been shown.
statement that every case is factually unique and that everything depends on an application of inferential reason to the unique facts. Judges may nonetheless do well to continue to bury these considerations under a blanket of just such generalities. Reticence may be justified in part because litigation continues to serve a witch-doctor function, and it would lose much of its perhaps dwindling acceptability if it were frankly confessed that ordinarily courts cannot really know what happened once upon a time and are prepared to act in states of ignorance which vary according to individual circumstances.

A closely related reason for resorting to generalized expression is found in the close relationship between inferential freedom and freedom to change the law. Some of the examples offered depend on considerations which are not formally incorporated in the relevant legal rules. The most poignant way of stating the resulting dilemma is to observe that some of the reasons for altering the permissible scope of inference depend upon matters which are formally ruled irrelevant. As a rather fanciful example, a court would clearly rule inadmissible evidence that an injured FELA plaintiff enjoyed a net worth several times greater than that of his railroad employer. Preclusion of such evidence means that a broad scope of inference freedom may be allowed, and used, in situations where the basic justification is absent.\footnote{198} The jury, in short, may be led to act on the basis of the inferred existence of facts which could be readily disproved if legal rules recognized their relevance.

However deeply they may be buried, at any rate, the reasons for allowing broad jury freedom of inference are inextricably entwined with the final problem of jury freedom, that of defining the situations in which courts may legitimately be swayed by the desirability of allowing juries to develop or alter the law formally adhered to by the judges.

D. Law Application

It was urged above that the need to ensure proper application of the law provides the primary justification for the institution of judicial control through directed verdicts. Paradoxically, one of the justifications for limiting the scope of judicial control is found in the importance of the jury's contributions in applying or even modifying the law.

\footnote{198} This difficulty is explored at length in Cullison, \textit{supra} note 168, at 582–87.
Much of the jury’s contribution to law application needs no explication. The law of negligence has long been accepted as the outstanding illustration of an area in which courts are unable to formulate detailed rules in advance but must instead rely on a general standard. Application of this general standard involves generation of a unique rule, good only for the particular case in which it is generated. Juries, with their supposed broad fund of common knowledge of the ways of hypothetical reasonably prudent people, are given a broad freedom to develop this particular one-case rule with the hope that they may do a better job than the judges can do. Directed verdict practice is shaped accordingly.

More difficulty is encountered in defending the possibility that the jury may have something positive to contribute in applying apparently rigid legal rules which take no formal account of the possibility of individualized adjustment. Ordinarily the function of law application in such instances is indeed left to the jury by default because of the problems of communication outlined earlier. The result often may be a failure of justice resulting from a verdict, untouchable by directed verdict or new trial controls, which rests on failure to understand the law or a failure even to attempt to understand it.

Jury verdicts in disregard of the law, however, may not always involve a failure of justice. Justice of course requires some approach to equal administration of the law in like cases and a reasonable level of predictability. But it also requires some approach to an ultimately “fair” disposition of individual controversies. Jury trial is often defended as a contemporary institution on the ground that the application of formally absolute rules should be attuned to reality by a continuing community control exercised on a case-by-case basis. Lord Devlin has elegantly described the role the jury may play in this area, as a group which

199. This view of the jury’s contribution is not universally shared. See, e.g., P. Devlin, Trial by Jury 141-43 (rev. ed. 1966) (suggesting that many “carelessness” cases belong to recurring types, and that judges are better equipped to dispose of such matters than juries).

200. It is frequently suggested that juries simply cannot understand the complicated legal instructions often thrust upon them. See, e.g., 5 J. Moore, supra note 162, ¶ 38.02[1], at 15; Farley, Instructions to Juries—Their Role in the Judicial Process, 42 Yale L.J. 194 (1932); Hunter, Law in the Jury Room, 2 Ohio St. L.J. 1 (1935). But see Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1655 (1964). Once the case is submitted to the jury, moreover, there is often nothing to prevent them from deciding it “on any basis whatever which appeals to their own minds, tastes, prejudices, or emotions.” James, supra note 182, at 680.
attributes some—but not overriding—importance to the law, which renders its decision "in a word and without a reason," and which is thereby able to bring disposition of the particular case "near to the aequum et bonum . . . without injuring the fabric of the law."\(^{201}\)

In civil cases, this sense of the importance of the jury's contribution is apt to run deepest in tort litigation, where there is often a close affinity to parallel criminal prohibitions and a significantly lower level of danger to predictability and stability.\(^{202}\) Directed verdict practices doubtless do reflect such notions, in spasmodic and uncertain fashion, by encompassing some allowance for jury tempering of the law.

The factors involved in admitting this sort of flexibility into the law application process frequently may overlap the factors explored in the parallel area of inference freedom. More leeway may be given if the plaintiff is badly injured and in great need, if the defendant enjoys a capacity for spreading losses which the law does not take into account, and so on.\(^{203}\) But there are crucial differences between jury freedom in applying the law, when such freedom is not built into the legal rules themselves, and jury freedom in drawing factual inferences.

One way of approaching the differences is to recall the suggestion that it frequently may be difficult to announce openly that the permissible scope of jury freedom depends upon the relative gravity of the risk run in acting on a very possibly mistaken determination. However difficult that may be, surely it must be that much more difficult to announce that the permissible de-

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201. P. Devlin, supra note 199, at 151-58. It is suggested that the very limited availability of jury trial as a matter of right under current British practice is tailored so that jury trial is available only when the element of predictability is of little importance.

202. See, e.g., 5 J. Moore, supra note 162, at 17. Compare L. Green, Judges & Jury 122-23 (1930), suggesting that the jury "probably rendered the most important of its scanty service to legal science in civil cases" by steadfastly ignoring the law declared by the judges in cases dealing with liability for work-related injuries. A thorough-going proposal for reform, founded on notions such as these, is that juries simply be left free to decide cases "as reasonably just persons acting reasonably," following a trial entirely free of present technical rules of evidence, parties in interest, and so on. See White, The Reasonably Just Man, 5 Houston L. Rev. 575 (1968).

gree of jury freedom depends in part on the extent to which the court is concerned with preserving the integrity of the particular legal rules involved, whether initially created by judges or legislatures.\textsuperscript{204} Any open attempt to evaluate the relative desirability of legal rules so well established that they must be charged to the jury must encounter obvious difficulties.

The difficulty of open announcement and application is compounded by the more fundamental difficulty that the dangers of jury lawlessness are here quite unchecked. Jury ignorance and prejudice may interfere with decisions as to credibility and with the inferences drawn from the credited testimony, but there is a modest check in the evidence and the common experience jurors are supposed to bring to its evaluation. Jury ignorance and prejudice are left free to run rampant when it becomes a question of allowing jurors to disregard legal rules whose foundation they can understand only dimly, if at all. Justice by plebiscite can be an unredeemably ugly monster.\textsuperscript{205} Some slight help may be found in relaxing the directed verdict standards which would otherwise apply to allow jury adjustment of the law only in situations where the danger of the more common forms of prejudice are minimized. The dangers are nonetheless great.

Finally, jury departure from the law must remain a spasmodic and uncertain thing. Some juries will, presumably, loyally adhere to the court's instructions to follow the law pronounced by the court. The result may at times accord with the strength of the individualized factors making it just to depart from the general law; it may often degenerate into a capriciously different treatment of cases which should be treated alike. On a longer range view, moreover, the possibility of relying on jury justice may operate to retard the emergence of desirable new legal doctrines which judges would be forced to adopt if they were not free to throw responsibility for achieving justice over

\textsuperscript{204} Cf. Law v. Converse, 419 F.2d 38, 42-43 (3d Cir. 1969), upholding a refusal to allow argument that the jury might properly disregard the law. The court noted that a realistic acknowledgment that "there are many elements which creep into a jury's deliberations contrary to the principles which govern them" does not "justify exalting the jury's wayward action into a principle of law which is to be expounded to it in advance of its deliberations. . . . [T]here can be no justifiable claim that because the disregard of the rules which bind a jury sometimes expresses a community sense of justice, a party therefore has the right to declare to a jury that it is its legal function to flout the law and disregard the judge."

to the jury.

No attempt will be made here to offer a justification for exercising varying degrees of control over jury law application in terms which can be elaborated into any semblance of guiding standards. The underlying notions seem intractable to more than the nebulous general observation that directed verdict standards do in fact vary, at least on occasion, according to varying estimates of the importance of preventing jury tampering with the legal rules involved. This observation may have some small utility as a defeatist category for explaining decisions that might otherwise seem inexplicable. It is of great importance, however, as the final piece of a framework for the immediately ensuing analysis of the problems raised by diversity litigation in the federal courts.

III. STANDARDS IN DIVERSITY CASES

A. Present Position

No settled answer has yet been given to the question whether state or federal standards should be used to measure the sufficiency of the evidence for jury consideration in cases brought in federal courts because of diversity jurisdiction. Clearly, state law must be looked to for a definition of the matters which must be proved to establish a claim governed by state law. Equally clearly, state standards for measuring the sufficiency of the evidence frequently either are the same as federal standards or lead to the same conclusions in a particular case, notwithstanding differences in abstract statement. Nonetheless, there inevitably occur cases in which it is clear beyond evasion that a different result is commanded by state standards than by federal standards. Opposite choices between the competing standards have been made by different courts of appeals, and the Supreme Court has explicitly avoided making a choice.

206. State standards may vary along any of the dimensions of the directed verdict problem. State courts may allow generally greater jury latitude—Alabama, for instance, continues to adhere at least in statement to the "scintilla" rule; see Huff v. Vulcan Life & Acc. Ins. Co., 281 Ala. 615, 206 So. 2d 861 (1968); Scott v. Southern Coach & Body Co., 280 Ala. 670, 197 So. 2d 775 (1967). Likewise, they may allow juries to reject uncontradicted testimony regardless of the circumstances; see, e.g., Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961). On the other hand, state courts may consider more of the evidence than would federal courts in determining the reasonableness of a jury verdict; see, e.g., Pedrick v. Peoria & E.R.R., 37 Ill. 2d 494, 229 N.E.2d 504 (1967) (containing a lengthy list of various state standards). Federal courts
DIRECTED VERDICTS

Turning first to the Supreme Court's efforts in this area, its two most recent pronouncements are that the choice between state and federal standards is a difficult one, which need not be made to dispose of the particular cases involved. Only a short while earlier, to be sure, the Court had announced that its 1940 decision in *Stoner v. New York Life Insurance Company* had established that federal courts should follow state standards of sufficiency of the evidence "to raise a jury question whether the state-created right was established," but the later position is clearly right in the implied ruling that *Stoner* did not involve such a determination.

Lack of controlling guidance from the Supreme Court has, not unpredictably, left the various courts of appeals split not only occasionally note the clear differences in standards in deciding particular cases. See, e.g., Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 878 (5th Cir.), cert. denied, 389 U.S. 930 (1967). The court's statement in *Planters* of the need for choice is not affected by its subsequent rejection of the position that federal standards found in FELA cases are equally applicable to diversity cases. See Boeing Co. v. Shipman, 411 F.2d 365, 373 n.9 (5th Cir. 1969), again rejecting reliance on state standards, this time because they allowed more rather than less jury freedom.


208. 311 U.S. 464 (1940).


210. See 5 J. Moors, supra note 161, § 38.10. As a brief statement, the case involved a federal trial held by the court without a jury, based on a claim of total disability within the meaning of four insurance policies. In state court suits brought for benefits claimed with respect to earlier periods, state appellate courts twice had ruled that there was sufficient evidence to take the claim to a jury, although final jury verdicts had not yet been rendered in any of the state suits. The record in the federal trial consisted of the actual record of one of the state trials, plus some additional evidence favorable to the claimant. The trial court held that the claimant was disabled; the court of appeals reversed, apparently relying primarily on the ground that there was no need to respect the determinations by intermediate state appellate courts as to the definition of total disability. In reversing the federal court of appeals, the Supreme Court spoke clearly only to the point that deference must be given to determinations of state law by state appellate courts and concluded that apparently the state supreme court would likewise conclude that a finding of total disability would be supported by the evidence. No directed verdict question was before the Court; the issue was approached primarily as one of "law"; there are at least overtones of a "law of the case" sort of notion that the litigants should be bound by prior decisions that there was sufficient evidence to support a finding of total disability; nothing in the opinion deals with the problems of jury control in diversity litigation.
between themselves but also among the decisions in a single circuit over time. Everyone has a pet list assigning the different courts to the categories of following federal standards, following state standards or following the lead of the Supreme Court in refusing to decide on the ground that no difference in result is prescribed by state or federal standards.\textsuperscript{211} There is no apparent harm in appending a reasonably current nose-count below, if it is recognized that the citations could be proliferated and that there is still ample opportunity for change in the position taken by many of the courts.\textsuperscript{212} Examination of the comments annexed

\begin{quote}
211. See e.g., 2B W. BARRON & A. HOLTOFF, FEDERAL PRACTICE & PROCEEDURES §§ 871.1 & 1072 (C. Wright ed. 1961); 5 J. MOORE, supra note 162, ¶¶ 38.10 & 50.06; Bagalay, Directed Verdicts and the Right to Trial by Jury in Federal Courts, 42 Texas L. Rev. 1053, 1057 (1964).

212. In addition to the decisions cited in the authorities noted above, most of the courts of appeals have provided useful current opinions, as follows:

Second Circuit: At the time this is written, the most current pronouncement is Simblest v. Maynard, 427 F.2d 1 (1970), noting that the issue has been bypassed in the court’s recent decisions. See also Calvert v. Katy Taxi, Inc., 413 F.2d 841, 846 (1969), stating that federal courts have the power to formulate their own standards but that the court has so far elected to honor state standards.


Sixth Circuit: Most opinions follow state standards, frequently without mentioning the possibility of some other approach. See, e.g., Thompson v. Illinois Cent. R.R., 423 F.2d 1287 (1970); Gilreath v. Southern Ry., 332 F.2d 158, 162 n.4 (1963) (no reason to reexamine the problem where a peculiar state practice is involved). In Lones v. Detroit, T. & I.R.R., 398 F.2d 914, 918-19 (1968), cert. denied, 393 U.S. 1063 (1969), however, it is suggested that reexamination of the court’s position may be appropriate when the circumstances of an actual difference between state and federal standards so require.

Seventh Circuit: This circuit follows federal standards. See, e.g., Gudgel v. Southern Shippers, Inc., 387 F.2d 723, 725 (1967).

Eighth Circuit: Eighth Circuit opinions have long followed the course of avoiding decision on the ground that state and federal standards are similar. See, e.g., Schneider v. Chrysler Motors Corp., 401 F.2d 549, 554-55 (1968); Rochester Civic Theatre, Inc. v. Ramsay, 368
to the list should support an observation that there is some drift toward applying federal standards; courts which formerly respected state standards now tend to find that there is no need to determine the issue, and some courts have entrenched their commitment to the federal standards. A more important observation is that almost invariably the opinions approach the question as if it were unitary—either all questions of the sufficiency of the evidence must be resolved by reference to federal standards or all must be resolved by reference to state standards.

Commentators, for once, seem to be following the same drift as the courts. Most opt for application of federal standards.213 Discussion, moreover, is again ordinarily cast in the mold of an assumption that reference should be had to either federal or state standards for answering all of the different problems of sufficiency.

The position urged here is that federal courts may apply

F.2d 748, 753 (1966). At times this leads to statements of a federal standard which would be extremely difficult to recognize as the federal standard if the court had not so labelled it. See, e.g., Grand Island Grain Co. v. Roush Mobile Home Sales, Inc., 391 F.2d 35, 41-43 (1968).


Tenth Circuit: Again, the court's express pronouncements are that federal law controls. See, e.g., Kiner v. Northcutt, 424 F.2d 222, 223 (1970); Weeks v. Latter-Day Saints Hospital, 418 F.2d 1035 (1969); Chicago, R.I. & P. Ry. v. Howell, 401 F.2d 752 (1968). And again, opinions can be found in which the sufficiency of evidence is expressly measured against the requirements of state opinions. See, e.g., Union Pac. R.R. v. Lumbert, 401 F.2d 699 (1968).

appropriately follow their own standards of the sufficiency of evidence to go to the jury with respect to at least most of the problems surrounding jury evaluation of witness credibility. Problems of jury freedom with respect to drawing inferences from the evidence and applying the law to the facts, however, should almost invariably be referred to state standards. Support for this position will be sought first in a demonstration that there is no constitutional command to follow federal standards and then in a detailed examination of the reasons why the general policies commanding deference to state law in diversity litigation require a significant measure of respect for state directed verdict standards. The heart of the position advanced will be the simple proposition that directed verdict standards are too intimately bound up with clearly "substantive" state concerns to be ignored.

B. CONSTITUTIONAL FREEDOM

It has occasionally been urged that the problem of choosing between different directed verdict standards in diversity cases could be avoided by incorporating the seventh amendment right to jury trial into the due process clause of the fourteenth amendment. If state courts were bound to follow the same standards as federal courts, there could indeed be no problem of choice. Several reasons, however, counsel against embracing this solution.

There is, of course, a long history of express refusal to hold state courts bound by the seventh amendment. Although this history obviously cannot be relied upon with absolute confidence, particularly in view of the recent extension to state courts of the sixth amendment right to trial by jury in criminal prosecutions, it at least suggests that some good reason should be required before intruding a new, and rigidly historical, requirement on the states. Whether or not they are accepted, there are excellent reasons for doubting the utility of modern civil jury trial, particularly as to some of the types of cases embraced by


215. Citation of cases is unnecessary. It may be noted, however, that federal courts have been extremely reluctant to impose even absolute minimum requirements of sufficiency of proof under a more general due process requirement. See, e.g., Wood v. Conneaut Lake Park, Inc., 386 F.2d 121 (3d Cir. 1967), cert. denied, 391 U.S. 907 (1968); cf. Delia v. Court of Common Pleas of Cuyahoga County, 418 F.2d 205 (6th Cir. 1969).

the seventh amendment right. The need for experimentation with alternative forms of trial, free of any need to use a jury or to wander so far from historical doctrines of substance and procedure as to avoid the historical test, stands as an insurmountable barrier to any honest determination that there are now sufficiently compelling reasons to shackle the states to the accidental growth pattern of this centuries-old institution.217

Incorporation, moreover, would resolve the dilemma of choosing between state and federal standards only if it were concluded that the seventh amendment commands the standards presently followed by the federal courts. It was shown above218 that any conclusion that current federal standards are so blessed by constitutional commandment cannot rest in history, but must rest in the proud confidence of truth newly discovered. Little more can be safely drawn from the constitution than the general principle that judicial intrusion must not go so far as to negative the essential functions of the jury. Judicial hesitancy and confusion as to the nature of the federal standard might thus suggest that the fashionable pronouncements of the moment should not be foisted off on the states. More important, however, are the positive reasons for honoring state court determinations of the division between judge and jury. Since these reasons are of vital importance in directly examining the choice problem, they will be postponed to that discussion. For the moment, it is enough to note that there is simply no reason adequate to bind state courts to a uniform federal constitutional measure of the sufficiency of evidence for jury determination.

An alternative constitutional route might also be found to lead to the conclusion that federal courts must follow federal directed verdict standards. Patently, the seventh amendment applies to all trials in federal courts, whether the basis for jurisdiction is diversity or something else.219 Several commentators

217. A related ground for worry might be that incorporation would lead to dilution of the federal right in order to allow some measure of freedom to state courts. Compare Williams v. Florida, 399 U.S. 78, 118, 129-33 (1970) (Harlan, J., concurring in part and dissenting in part). This concern is likely to trouble only those few hardy souls who can sincerely believe that every detail of present federal jury practice is essential to preserve an effective lay contribution to the administration of civil justice.

218. See text accompanying notes 43-76 supra.

have urged that, given the application of the seventh amendment, its directed verdict standards must follow. Here again, the response is two-fold: the seventh amendment should not be found to embrace standards which control particular choices within any probable range of choice between current federal and state standards; and affirmative reasons for following state standards in some areas ought to be weighed carefully. A brief statement of the principles which should govern the choice of state or federal law in diversity litigation should suffice to pave the way for an examination of these affirmative reasons for deference.

C. SUGGESTED APPROACH

1. Erie Restated.

Since the decision in Erie v. Tompkins has meant different things to different people, it is wise to preface any discussion of its application to a particular set of problems with a statement of the underlying assumptions employed.

The most fundamental concept underlying the requirement of deference to state law in diversity litigation is that the existence of "two or more inconsistent sets of directions, without means of resolving the inconsistencies," applicable to the same ongoing, nonlitigative primary conduct according to the often unpredictable accident of diversity jurisdiction, is "hostile to the reign of law." The very concept of law requires that there be a single controlling source of authoritative rules. This purpose, however, could be served by holding state courts bound to honor the rules announced by federal courts in deciding diversity cases. Erie thus rests as well on the premise that diversity cases.

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222. 304 U.S. 64 (1938).

223. H.M. Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954). See also id. at 505-06.


225. Compare Kurland, Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases, 67 Yale L.J. 187, 188-204 (1957); cf. Note, Federal Common Law and Article III: A Jurisdictional Approach to Erie, 74 Yale L.J. 325 (1964). It is occasionally sug-
jurisdiction was not meant to confer such power on the federal courts. This conclusion seems to follow easily enough as to areas of activity which would be beyond the legislative power of Congress, if indeed there are any such areas.\textsuperscript{226} Even as to areas which are subject to regulation if Congress should act, however—and \textit{Erie} itself surely involved such an area—this conclusion is supported by a judgment that delegation of power in our federal system to the federal legislative branch does not automatically entail a corresponding delegation of power to the judicial branch, particularly if the power is assumed only according to the hap-hazard needs of diversity litigation.\textsuperscript{227}

Preservation of state power to formulate rules governing primary conduct does not end with the prescriptive content of the state rules. Remedial doctrines may be inseparably bound up with the primary rules in a wide variety of ways. Adoption of a treble-damages sanction, for instance, may be obviously designed to control primary conduct directly. Definition of the primary rules themselves, moreover, may be affected by the remedial choices made in formulating them—broadly general concepts.

\textsuperscript{226} Judge Friendly offers as an example a rule abolishing charitable immunity; Friendly, \textit{In Praise of Erie—and of the New Federal Common Law}, 39 N.Y.U.L. Rev. 382, 394–95 (1964). Although it may be that Congress could not abolish the particular defense of charitable immunity without undertaking some broader regulation of tort law or charitable activities, it seems most unlikely that adroit use of the commerce power and the power to prescribe eligibility for federal tax benefits could not accomplish this result as part of a broader scheme. Perhaps a regulation prescribing the height at which all residential lawns must be mowed would defy efforts to define a sufficient source of federal power.

\textsuperscript{227} This judgment may be supported not only by abstract principles of federalism but also by interpreting the Rules of Decision Act, 28 U.S.C. § 1652 (1964), as demonstrating a congressional judgment that its powers should not be shared with the judiciary. The strength of this position is aptly appraised in Friendly, \textit{supra} note 226, at 388–91. Other clear statements of the divergence between judicial and congressional power may be found in, e.g., Hill, \textit{The Erie Doctrine and the Constitution}, 53 Nw. U.L. Rev. 427, 439–43 (1958); Quigley, \textit{Congressional Repair of the Erie Derailment}, 60 Mich. L. Rev. 1031, 1059 (1962). One response has been to suggest that it may be appropriate for Congress to delegate basically common-law decisional powers to federal courts with respect to particular areas, following the model created by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1964). See J.S. Wright, \textit{The Federal Courts and the Nature and Quality of State Law}, 13 Wayne L. Rev. 317 (1967). Such delegation would not depend on diversity jurisdiction, and would lead to judicially developed rules binding on state as well as federal courts.
might be incorporated in a statute entrusted to an administrative agency for initial enforcement when quite different standards would be adopted if courts were to be original enforcing agencies, and so on. In many instances it may be difficult to discern the connections between remedial and primary doctrines so obvious in these examples. The possibility of interdependence is nonetheless sufficiently important to justify respect for the state way of doing things until some countervailing federal interest is made out.228

The source of the countervailing interest which allows federal courts to follow their own devices and desires in some aspects of diversity litigation must be found in the assumption that there is some purpose in continuing the statutory grant of diversity jurisdiction. Whether the purpose is found in vague concern that outstate litigants should be protected against the reality or fear of prejudice in local tribunals or in an earthier concern that outstaters should not be subjected to the occasionally deplorable inadequacies of state procedure, it leads to a conclusion that federal courts should be able to afford better justice free of abject servility to state procedure. Given this premise, it is also fair to assume that there is some room for implementing a desire that federal courts should be able to function effectively, under their own concept of sound procedure and without the confusing need to mingle state and federal procedures.229 Together, these considerations make it clear that federal courts should not be hamstrung by a fear that they may reach different results than would state courts or that their different methods of doing things may cause litigants to "shop" for a federal forum. Quite the con-

228. With sufficient charity, it may be possible to read this series of concepts into the Supreme Court's latest pronouncement that the policy of Erie, so far as it affects areas not involved with the Federal Rules of Civil Procedure, is to avoid "inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 460, 468 (1965). The other announced policy, the need to discourage "forum-shopping," is considered at text accompanying note 230 infra.

229. The pithiest statement of this principle is that "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction," and may properly consider its own interests in doing things in its own ways. Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525, 537 (1958). It seems quite probable that this concern is carried too far in the broad statements in Hanna v. Plumer, 380 U.S. 460, 469-74 (1965), requiring application of any Federal Rule of Civil Procedure regardless of the intrusion on state interests, unless the intrusion is so great as to invalidate the rule for all litigation in the federal courts. See, e.g., McCoid, Hanna v. Plumer: The Erie Doctrine Changes Shape, 51 Va. L. Rev. 884 (1965).
trary, federal courts may properly seek to achieve a better outcome in cases within the diversity jurisdiction and thereby encourage litigants to resort to them. 230

2. General Choice.

The difficulty with choosing between state and federal directed verdict standards is that both sides of the Erie policy are involved. State rules may be strongly bound up with primary state rules; federal courts may claim a strong interest in affording sound justice by controlling possibly wayward local juries.

The significance of differing state standards of jury control may be approached initially in the general terms used earlier in approaching directed verdict problems at large. A state rule which reflects a greater degree of jury freedom than would be allowed by federal courts carries with it a determination that formal rules of state law are not as important in comparison to the possibility of more individualized justice as the federal courts would determine under their general standards. Conversely, a state rule which accords the jury less freedom carries with it a desire that the jury be held more closely to the formal legal rules. The very substance of state primary rules may be formulated in reliance on the degree of jury freedom allowed in state proceedings. Ordinarily it will prove impossible to determine whether any particular state rule has been thus affected by the state courts' directed verdict rules; the state courts and legislatures themselves develop rules against the general background of their overall procedure, and presumably seldom consider such matters explicitly. Without more, this impossibility would counsel that federal courts treat state directed verdict standards as "bound up" with all state primary rules and adopt the state standards in toto. 231

Unfortunately, there is more to the problem. In Byrd v. Blue Ridge Rural Electrical Cooperative, 232 the Court made it clear that even in diversity cases federal courts may assert an affirmative interest in preserving their own customary division of functions between judge and jury. The Court's decision went only to the question whether a particular issue should be deter-

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230. This point has been made well and often. See, e.g., Degnan, The Law of Federal Evidence Reform, 76 Harv. L. Rev. 275, 280 (1962); H.M. Hart, supra note 223, at 512; Hill, supra note 227, at 454.

231. A clear statement of this principle is Morgan, supra note 213, at 171-77.

mined by judge or jury, assuming the presence of sufficient evidence to avoid a directed verdict if the issue were triable to the jury. And the choice to follow the federal division of functions was based on the assumption that the state division was in no way "bound up" with the primary state rules. Nonetheless, it is clear that the federal courts find a similar independent interest in following federal standards for dividing judge and jury functions by means of directed verdicts. Accordingly, some balance must be found between the competing interests.

Returning to the general statement of state interests, it is extremely difficult to conjure up a situation in which disregard of state directed verdict standards would interfere with private planning of primary activity, legitimately or otherwise. The general state interest in controlling jury freedom, however, does extend beyond the general interest in maintaining the purity—or prostitution—of state legal rules. Directed verdict standards may additionally be adopted with a more or less deliberate intent to benefit identifiable classes of litigants. Just as federal standards are binding on state courts entertaining FELA litigation, for obvious reasons, so comparable state rules may reflect comparable state concerns. Less clear, but no less definite, ideas of the just scope of social attempts to redistribute private losses are involved as well. Preserving state law against legislative intrusion by federal courts is thus highly important, even if not of demonstrably constitutional dimensions.

When federal practice would result in allowing a jury to determine issues which would be controlled by a state court, the intrusion on these state interests might be softened by the substitute control powers of a federal judge to comment on the weight of the evidence and credibility of witnesses, and to grant a new trial. Comment, however, does not always control, even if it is made; new trials are not always granted; and the burden of a new trial—which may or may not lead to a different verdict—is not inconsiderable. And such substitute controls are of no help whatever when state practice would allow jury determination of

234. Id. at 1065.
235. See, e.g., Hill, supra note 227, at 541, 576-77.
a matter a federal court proposes to decide finally by directed verdict.

The supposed federal interest against upsetting the ordinary relationships between judge and jury in federal courts, moreover, is hardly of vital importance if viewed simply as a matter of procedural convenience and uniformity. Measurable differences between state and federal standards are apt to occur in only a small minority of diversity cases. When the state standard is in fact identifiably different, there should ordinarily be little difficulty in discovering the difference. The question will almost always be one of applying the standards of the state in which the federal court sits, moreover, so the possible initial difficulties should be mastered in short order. Finally, directed verdict standards are so little implicated with the integrity of the body of federal procedure that they are not even mentioned in the Federal Rules of Civil Procedure.238

More profound justification for following federal standards may be found in the purposes of diversity jurisdiction to avoid local unfairness. Federal court juries are local juries, perhaps drawn from a less parochial area than many state juries, but still subject to the dangers of prejudice and unfairness which may be thought to justify the diversity jurisdiction.239 Control of such prejudices through directed verdicts, rather than the less effective new trial device, properly represents a significant justification for looking to the federal standards.240

If these competing interests must be balanced in the abstraction of the general concepts just explored, the choice must seem difficult and largely a matter of taste. Some general guidance might be found in the decisions which establish that state rules as to burden of proof and presumptions must be followed.241 It

238. Since Rule 50 of the Federal Rules of Civil Procedure provides only for the procedure by which motions must be made for directed verdicts and for judgments notwithstanding the verdict, it is clear that the mandate of Hanna v. Plumer, 380 U.S. 460 (1965), that controlling effect must be given to any applicable Federal Rule, does not affect the present problem.


is no mere coincidence that the competing interests in these areas can be described in approximately the same terms as those used above. Burden of production rules are enforced by directed verdict if the burden is not carried. Burden of persuasion rules identify the party who must lose when the proof is too uncertain to admit of reasonable resolution either way. Presumptions operate in the same ways. All control the fact finding functions of juries. All are frequently designed to serve purposes other than disposition of the immediate factual problem before the court. There is thus a persuasive argument that state directed verdict standards are at least as much implicated with the broader state lawmaking function as the burdens of proof and presumptions and should likewise be honored.242

Fortunately, the choice between state and federal directed verdict standards need not be left to expression in such broad terms. Particularized exploration in terms of the categories of credibility, inference and law application examined above should serve both to reduce the task to more manageable proportions and to suggest that the balance need not always be struck in the same way. The examples offered below should also help to give concrete meaning to the importance of the choice.

   a. Credibility.

   Federal courts generally should be able to follow their own rules for controlling jury evaluations of credibility. Such rules are as closely allied to the federal interest in achieving a fair disposition of litigation, potentially superior to the outcome which might be reached under state rules, as any other aspects of di-


242. See, e.g., 5 J. Moore, supra note 213, ¶ 50.06, at 2350 (limiting the analogy to inference problems); Gorrell & Weed, Erie Railroad: Ten Years After, 9 Ohio St. L.J. 276, 281-83 (1948). The obvious dangers of intruding on state practices, and the intimate relation to directed verdict problems, may be underscored by reflecting on the probable results of the occasional suggestion that federal courts, freed from state directed verdict practices, should likewise be free to ignore state res ipsa loquitur doctrines. See Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 853-54 (5th Cir. 1967), cert. denied, 391 U.S. 913 (1968).

It is clear that the Supreme Court is not prepared to be overwhelmed by the analogy to burden of proof rules and presumptions. In Dick v. New York Life Ins. Co., 359 U.S. 437 (1959), it simultaneously announced that state presumptions must be followed and that there was no need to determine whether state directed verdict practices must likewise be followed.
rected verdict practice. They may, further, be designed to fit the capacities of federal court juries and to jibe with the surrounding devices of jury control through rules of evidence and judicial comment on the evidence. Such rules, finally, are apt to be developed as general guides cutting across most varieties of litigation and accordingly are apt to be free from intimate involvement with any particular primary state rules. A recognizable federal interest and weak state interest thus suggest use of the federal rule. If in some particular situation a state credibility rule appears to be tailored as a limitation upon, or facilitation of, a particular state right or remedy, on the other hand, the state rule might be followed.

Although the cases are far from uniform, they at least suggest the proposed pattern. In terms of the problems discussed above, it has been squarely held that a diversity court may require a jury to credit uncontradicted testimony notwithstanding a contrary state rule and similarly may direct a verdict for a party with the burden of proof despite a contrary state practice. So too, it has been said that a federal court need not honor a state rule that "negative" testimony cannot be considered in the face of positive testimony.

Dictum in another case illustrates well the need to avoid a flat rule even in this area. Texas follows a "discovered peril" rule in negligence cases and has a rule that a jury is not bound by a defendant's statement as to when he discovered the danger and his


244. See generally 5 J. Moore, supra note 213, § 50.06, at 2350, suggesting that federal rules should control credibility determinations, while inference problems might be left to state law.

245. Gatby v. Altoona Av. Corp., 407 F.2d 443, 445 (3d Cir. 1968, 1969). The decision of the same court applying state rules as to belief of uncontradicted testimony in Hanley v. Heckler, 380 F.2d 986 (3d Cir. 1967), led to a result comparable to that which should be reached under federal law and did not expressly consider the matter.


247. Pass v. Firestone Tire & Rubber Co., 242 F.2d 914, 919 (5th Cir. 1957). But see Dixie Ohio Express Co. v. Foston, 170 F.2d 446, 450-51 (5th Cir. 1948), apparently relying in part on the same state statute. Roanoke City Mills, Inc. v. Wikelchel, 208 F.2d 66 (5th Cir. 1953) follows a silly state rule that a party is bound by the most unfavorable version of his own testimony; yet in Employer's Liability Assur. Corp. v. Thomas, 293 F.2d 110, 112 (5th Cir. 1961), a nonjury case, the same court had the grace to rule that state cases relating to the quality and credibility of proof are irrelevant, since "this is a matter which is governed by federal law." See also Abernathy v. Southern Pac. Co., 426 F.2d 512, 514 (5th Cir. 1970).
efforts to avert it. Surely it is right for a federal court to say that this is the sort of state rule which, even though it goes only to the question of credibility, is so obviously bound up with the state primary rule that it should be followed in federal courts.\textsuperscript{248}

b. Inference.

State rules controlling the inference function should be followed whenever they differ from the corresponding federal rules. The federal interest in following the federal rules seems substantially the same as the federal interest in following the federal credibility rules. The state interest in adherence to peculiar state inference rules, however, is more than enough to overcome this federal interest.

State rules defining the permissible scope of jury inference are much more likely to be associated with specific doctrines of primary law than are credibility rulings. This association is often so close that the inference rule is in fact part of the substantive rules;\textsuperscript{249} the permissive inference doctrines ordinarily subsumed under the \textit{res ipsa loquitur} label, for instance, are surely intrinsically involved with general negligence rules. Even when it can be said confidently that the inference rules are independent of the conceptual content of the primary rules, they can affect the primary rules vitally. It was shown above that decisions as to the desirable scope of inferential freedom are inescapably affected by an assessment of the competing dangers of mistaken decisions either way. Such assessments by state courts, in the context of state law, represent an evaluation of the interests affected by the primary rules, and more particularly by judicial application of the primary rules, which is as important as the primary rules themselves. On a more practical level, in addition, it has already been noted that the degree of administrative control over application of the primary rules resulting from state inference rules may figure importantly in development of the primary rules.

State inference rules may also be developed in more general terms, without any specific association with particular primary

\textsuperscript{248} Abernathy v. Southern Pac. Co., 426 F.2d 512, 514 (5th Cir. 1970). The statement is dictum because there was evidence contrary to the testimony relied upon by the defendant.

\textsuperscript{249} Cf. Evans v. S. J. Groves & Sons Co., 315 F.2d 335, 342 n.2 (2d Cir. 1963). The court applied state law on the sufficiency of evidence of vehicular skidding as evidence of negligence, without deciding whether state law must be followed, noting that the state law could be regarded either as one relating to the distribution of power between judge and jury or "as a substantive rule."
rules. The most likely instance of divergence between state and federal practice is found when states continue to adhere to some version of the rule that a jury should not be allowed to choose between "equal probabilities." While the state interest in such rules is not as great as in situations where there is a more immediate relationship to a specific primary rule, the arguments just applied to the specific inference rules apply here as well, albeit in diluted form.

Judicial pronouncements afford reasonable support for reliance on state inference rules, although the generally confusing and contradictory nature of statements in this area prevents any firm reliance on the attractive ones. Several decisions can be found relying explicitly on general state inference rules, even in courts which generally proclaim a policy of applying federal directed verdict standards. One example should suffice to illustrate the purpose of honoring more specific state rules as well.

Several states adhere to a version of the "incontrovertible physical facts" doctrine which requires a finding of contributory negligence despite testimony by the driver of an automobile that he stopped, looked, saw nothing and drove across the empty tracks only to be hit by a train. Employing such a state rule may be justified, without regard to what the federal rule might be thought to be (it is probably the same), on the ground adopted by one court: "The . . . doctrine, sometimes referred to as a rule of evidence, is in reality decisional law . . . which affects the substantive rights of the parties."

An especially attractive illustration of the pull toward state standards may be offered as a final argument. North Carolina allows a plaintiff who has been nonsuited because of a deficiency of evidence to commence suit again. When confronted with a second suit brought on the same proof as had been expressly held inadequate by a state court, can there be any doubt that a diversity court should adopt the state ruling? The same problem may be

250. Examinations of such divergences between state and federal law may be found in, e.g., Feldman, supra note 213; Note, supra note 221.
252. E.g., Wilkins v. Hogan, 425 F.2d 1022, 1025 (10th Cir. 1970); Union Pac. R.R. v. Lumbert, 401 F.2d 699 (10th Cir. 1968). For general pronouncements by this court, see note 212 supra.
presented elsewhere, in less glaring form, whenever simultaneous litigation in state and federal courts arising out of the same transaction results in substantially identical records. Divergent rulings really present the same problems as a unique federal litigation, but the embarrassment of the clear challenge to state law underscores the wisdom of adhering to state standards across the board.

As always, questions of inference control are allied with questions of law application. The proposition that state inference standards should be honored because of their effects on the development of state primary law is thus also implicated with, and supported by, the discussion of control over jury law application.

c. Law Application.

State directed verdict standards which affect the scope of jury freedom in applying the law seem so obviously a part of state primary rules as to require no discussion. A state court may “purposely create a rule of law which it expects to be modified by jury action;” outmoded rules may be retained far beyond any useful life for similar reasons. The state determination that jury justice may be better than judge justice would be completely thwarted if the formal rule were applied without regard to the anticipated jury freedom.

The clearest illustration of this principle is perversely found in a case which may deny it. In *Herron v. Southern Pacific Company*, the Supreme Court came to grips with a provision in the Arizona State Constitution requiring that in all cases the defense of contributory negligence be left to the jury. In those pre-*Erie* days, the Court ruled that a federal diversity court could apply its own standards to direct a verdict for the defendant without regard to the state rule. The state rule was found to be too importantly related to the right to jury control to be regarded as a mere rule of procedure, which would be referred to the state practice by the Conformity Act. The Rules of Decision Act was likewise found inapplicable, without any clearer statement than that the appropriate performance of the characteristic functions of a federal trial judge could not be altered by state law. Nothing what-

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257. 283 U.S. 91 (1931).
258. Act of June 1, 1872, ch. 255, § 5.
ever was said about the fact that the state procedure was plainly a modification of the formally announced rules of negligence law. Neither was anything said expressly resting decision on any supposed requirement of the seventh amendment.

Since *Erie*, it might be thought that there could be no question as to the demise of *Herron*. Nonetheless, the Supreme Court has cited it with apparent approval. And at least two courts of appeals have expressly refused to follow identical state rules, relying on the seventh amendment or a more general notion that federal courts should apply their own directed verdict standards. These decisions are plainly wrong. Whatever vague notions might otherwise be found in the seventh amendment to require judicial control of jury law application must be founded primarily in concern for maintaining the purity of the legal rules involved. When the authoritative source of those rules has chosen to delegate some part of the lawmaking function to a jury, returning in a particular area closer to the lawmaking freedom juries were often allowed in 1791, there is neither historical nor theoretical justification for imposing a different federal concept.

Similar principles are involved, although in a less dramatic way, in other areas. State decisions involving the degree of control a judge should attempt to exercise over a jury's measurement of relative degrees of negligence under a comparative negligence statute, for instance, are so plainly bound up with the statute as to require implicit federal obedience. Other examples surely exist as well.

Converse problems may also occur, in areas where it is clear that state courts impose tighter reins on jury lawmaking freedom than would federal courts. Although one suspicious writer has labeled some of these state rules "false substantive doctrine" deliberately designed to avoid the right to jury trial, the reasons for honoring a clear state rule, once it is understood, are the same as before.

IV. CONCLUSION

The seventh amendment commands federal judges to accord

respective freedom to jury deliberations. It does not sanctify any particular linguistic formulation of the standards elaborating its basic command. It does not even prescribe mandatory answers to the relatively restricted range of control questions susceptible of categorical answer. Federal courts may legitimately accord greater factfinding and law applying freedom to juries in some areas than in others, depending on the strength of the desire to keep pure the legal rules involved and on the nature of the consequences of jury error. In diversity litigation, this constitutional freedom should be exercised to honor divergent state rules in the area of factual inference, in the area of law application, and in any areas of credibility determination that may be closely bound up with related state primary rules.