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New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America

Renée B. Lettow*

INTRODUCTION ............................................................... 505

I. INITIAL SLOWNESS TO ADOPT NEW TRIAL PROCEDURE IN AMERICA ........................................... 508
   A. English Development of New Trial. ........................... 508
   B. American Indifference to New Trial Procedure in the Colonial Period ................................. 515
   C. Changing Conditions in the Early Republic ............... 518

II. NEW TRIAL: THE LEAST OBJECTIONABLE ALTERNATIVE FOR JUDGES .................................................... 521
   A. Nonsuit and Directed Verdict ............................... 521
   B. Judges Sending Back Jurors to Reconsider Their Verdict .................................................... 522
   C. The Success of New Trial for Verdict Against Law .......... 524

III. NEW TRIAL IN OPERATION: FROM JUROR-PROVIDED INFORMATION TO INDEPENDENT JUDICIAL ASSESSMENT ........ 526
   A. Informal Questioning by Judges and General Verdict with Interrogatories ................................. 527
   B. Special Verdict ............................................. 531
   C. Affidavits of Jurors Used to Impeach Their Verdict .................. 531
   D. New Trial for Verdict Against Evidence .................... 542
   E. The Special Case of Damages ................................ 547
      1. Tort Damages (Including Punitives) .................... 547
      2. Contract Damages ......................................... 552

CONCLUSION ........................................................................ 553

INTRODUCTION

A series of startling jury verdicts (and a steady flow of less spectacular ones) has set fermenting a debate about civil and criminal juries in America. But how far-reaching actual changes in jury procedure might be is very much in question. In this uncertain climate, an historical perspective is reassuring, even rousing. Our jury system is not carved in stone: it has evolved considerably over the centuries, and will continue to develop. Knowing the different forms the judge-jury relationship has taken in the past will make us more aware of the institution's flexibility and perhaps less hesitant to make significant changes. The past also yields more direct lessons. Early nineteenth-century American judges used several techniques for working with juries in civil cases that could be useful today, especially those involving discussions with the jury of the reasons for their verdict.

Judge-jury relations changed dramatically in the nation’s early decades. It is well known that the American civil jury wielded great power in the late eighteenth century, the period of the revolution and the framing of the Constitution and Bill of Rights. What has not been understood is how powerful was the countertrend of the early nineteenth century. Newfound professional confidence and reforms in court structure and reporting transformed judge-jury relations. The authority of the judges to control civil juries reached levels that would astonish modern practitioners.1 But, because the fact-finding role of the jury was exalted in popular political dogma, American judges had to take care not to exercise power too openly. Judges thus resorted most frequently to ordering new trial, a device that allowed them to claim they were simply handing over the case to another jury rather than thwarting jury power altogether. Although new trial’s doctrinal competitors (to use a Darwinian model) had the advantage of greater efficiency, new trial was the only significant procedure to survive because of pro-jury ideological pressure.

American judges made the granting of new trials even more palatable by basing their decision on information drawn from jurors themselves. Judges gathered information directly from the jurors by such methods as questioning jurors informally after they brought in a verdict and by accepting juror affidavits. Gradually, judges exercised their power more independently; while they did not abandon the use of new trial in favor of more efficient procedures, they began to grant new trial for verdict against law or evidence based on their own assessment of the case, without relying on information from the jurors.

Up to this point, we have known relatively little about how new trial gained prominence and how it was used in early nineteenth-century America. The secondary literature dealing with this topic is scarce and, with one exception, not detailed.2 The great transformation in judge-jury relations through use of new trial has gone largely unremarked.

This study draws mainly on appellate reports from a variety of states. In the early nineteenth century, the law reports had only recently been established, and their quality varied. But reports for the principal jurisdictions—Massachusetts, New York, and South Carolina—were thorough. The reporters commonly provided a detailed summary of facts and events at trial, usually followed by arguments of counsel. Judges in these jurisdictions often wrote careful, even learned, opinions. Usually one of the appellate judges had sat as the trial judge in the case, following the nisi prius system, and so could offer information about what had occurred at trial. I call Massachusetts, New York, and South Carolina the principal jurisdic-

1 This Article mainly deals with civil cases and is not concerned with the more vexed question of criminal cases.
2 See Note, The Changing Role of the Jury in the Nineteenth Century, 74 YALE L.J. 170, 180-81 (1964); ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 339-40 (1952); see also Edith Guild Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 313-16 (1966) (discussing new trial in America in 1780s and 90s). The exception is WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 165-72 (2d ed. 1994). Nelson’s study, which deals only with Massachusetts, suggests the importance of judicial structure but fails to recognize the significance of transitional devices such as juror affidavits and informal questioning of jurors.
tions because their cases were most often cited by courts in other states and used as guidance. Not surprisingly, these three states were commercial centers for their regions. As in England, the growth of commerce produced a need for more settled law. The courts of these three jurisdictions were heavily influenced by English law, which the majority of their judges had somehow studied.

In addition to the reporters, two contemporary treatises devoted to the topic shed light on new trial practices. The existence of these substantial treatises written exclusively about early nineteenth-century new trial suggests the importance of the topic. The two treatises neatly contrast. The first, written by distinguished New York lawyer David Graham (1808-1852) and published in 1834, focuses heavily on English and New York cases. Graham's stated goal was "to aid the junior members of the profession, in a branch of practice of daily occurrence," and he rigorously avoided injecting his own opinion. Unfortunately, his organizational and analytic powers left much to be desired. The later work, by Thomas Waterman (1821-1898), was also published in New York and billed as a revision of Graham; he even republished Graham's treatise as his first volume. Waterman noted that the law of new trial had grown so much in the two decades since Graham had written that a new treatise was justified. Major new sections discussed new trial for incorrect evidentiary rulings, for surprise, and for newly discovered evidence. Unlike Graham, Waterman did not hesitate to disclose his own opinion and to suggest reform. He urged that the distinction between fact and law—the separate provinces of the jury and judge—be strictly maintained. His treatise did not limit itself to New York practice, but rather extended to many American jurisdictions.

The research described in this Article ends at mid-century, just before the codifications of civil procedure inspired by New York's Field Code of

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3 Graham was the son of a cultured Presbyterian minister from northern Ireland who became a lawyer after arriving in New York City. Graham, who had received both his general and his legal education from his father, entered into partnership with him in 1829. In 1832, when he was only 24, he published A Treatise on the Practice of the Supreme Court of the State of New York, which was "received with enthusiasm by the profession" and replaced existing books on practice until the code of procedure was promulgated in 1850. In 1834, he was elected an alderman of New York City as a Whig. He published A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York in 1839. In addition to his legal writing, he enjoyed notable success as a courtroom advocate. In 1848, the New York legislature appointed him to be one of the commissioners on practice and pleadings, and he played an active role in drafting the resulting code of civil procedure. 7 DICTIONARY OF AMERICAN BIOGRAPHY 471-72 (Allen Johnson & Dumas Malone eds., 1931) (entry by H.W. Howard Knott).

4 DAVID GRAHAM, AN ESSAY ON NEW TRIALS (New York, Halsted & Voorhies 1834). The work ran through several editions.

5 Id. at v.

6 THOMAS W. WATERMAN, A TREATISE ON THE PRINCIPLES OF LAW AND EQUITY WHICH GOVERN COURTS IN THE GRANTING OF NEW TRIALS IN CASES CIVIL AND CRIMINAL (New York, Banks, Gould & Co. 1855) (3 vols.).

7 Waterman was the son of a Yale-educated district attorney and businessman in Binghamton, New York. He entered Yale College himself in 1838. After three years at Yale, he traveled in England and on the continent for several years. He began practice in New York City in 1848, and wrote extensively and edited legal works throughout his career. Perhaps his best-known work was the three-volume American Chancery Digest, published in 1851, which included state and federal equity decisions and an introduction describing equity courts and their jurisdiction. 10 DICTIONARY OF AMERICAN BIOGRAPHY 555-56 (Dumas Malone ed., 1936) (entry by Vernon L. Wilkinson).

8 2 WATERMAN, supra note 6, at vi.
1848 began to spread. The codes codified the common law of new trials and also gave judges important new powers such as the directed verdict, which was binding and did not require a new trial to enforce.

The Article begins in Part I with a description of English practice relating to new trials, which was the inspiration of many early nineteenth-century American courts. While new trial and various supporting devices—including juror affidavits and informal questioning—were only a few of the many English techniques for controlling juries, American judges singled these out as most in accord with popular American notions of jury power. Part I then recounts the unprecedented authority of American juries in the colonial era and the reasons for it. Juries at that time had the power, if not necessarily the right, to decide the law in civil cases. In part, jury power resulted from colonial court structures. A collegial panel of judges presided at civil trials. Each judge could instruct the jury, and these charges could conflict with each other. Appellate review was usually by trial de novo. Part I next describes important changes in the early nineteenth century that paved the way for adoption of English-style new trial. As judges gained professional confidence, most states adopted court structures more like the modern (and like the English), with a single judge sitting at first instance and appellate review for error by a collegial court. Appellate decisions began to be reported in official reporters. The new court structures and reporting enabled judges to set out the law more clearly, and to determine whether juries had decided according to the law.

Part II explains how new trial became the method of choice for controlling the jury: other methods offended popular conceptions of jury power in a way that the more indirect exercise of judicial authority in new trial did not. Part III details the ways in which judges determined that the jury had decided against law, a necessary precursor to granting a new trial. At first, judges boosted the legitimacy of new trials by relying on jurors for information through techniques such as affidavits or informal questioning. Later, as their professional confidence grew, judges leaned less heavily on these methods and instead relied on their own assessments of the law and evidence in deciding whether to grant new trials. Judges began to grant more new trials for verdict against evidence; if the jury could find whatever version of the facts it wanted, no matter what the evidence, new trial for verdict against law would be worthless. The simultaneous wariness of encroaching too far on jury power and confidence in judicial authority is seen most clearly in damages cases. Although American judges remained reluctant to interfere with jury authority over damages in cases involving personal dignity (such as slander and trivial battery), they grew increasingly willing to overturn jury determinations of economic damages.

I. Initial Slowness to Adopt New Trial Procedure in America

A. English Development of New Trial

The eighteenth- and early nineteenth-century English bench was thoroughly professional and centralized. Popular confidence in the judges' authority aided them in efforts to control juries. Judges were typically
longtime and highly successful courtroom advocates, thoroughly versed in the law. The judges were based in London. Cases were pleaded and judgments entered in collegial courts, but trials were conducted by judges sitting singly. At specified times, each judge would ride out on an assize circuit to hear cases needing trial, an arrangement called the nisi prius system. The total number of judges in the principal common law courts (King’s Bench, Common Pleas, and Exchequer Chamber) was very small—roughly a dozen. As described below, appeals were taken back to London for discussion by the full court. Reports of decisions of the central courts in London became increasingly comprehensive in the eighteenth century.9

In England, juries were rarely given the opportunity to decide questions of law. One method by which judges prevented them from doing so was the reserved case. Where the trial judge had doubts on a point of law (this was not an appeal as of right), he could “reserve” the case to hear the arguments of counsel and to decide the legal issues himself or to seek the opinions of the other common-law judges. Several methods were used to reserve a case. First, after a criminal conviction, the trial judge could simply give prisoners a reprieve until the next term and, in the meantime, consult with the other judges.10 Second, in civil cases11 the judge could direct the jury to find a special verdict, consisting only of the facts, and to submit the question of guilt or liability to the court.12 Third, the jury might convict generally (or, in civil cases, find for one or the other party) subject to the opinion of trial judge or of the twelve judges.13 The judges’ consultations were quite informal and private; Baker notes that they “did not always give their reasons in public, and sometimes failed to reach any decision at all.”14

But how were verdicts against evidence, or mixed questions of law and fact, to be dealt with? Without a method for controlling fact-finding, control over questions of law might be useless. By the middle of the seventeenth century, the practice of granting new trials for erroneous verdicts was clearly established. Before this time, judges used several different methods of keeping juries in check. The oldest of these was the attain.
perjured themselves. If the attaint jury concluded that the trial jurors were guilty, punishments were severe. Partly because of this, and because attaint juries were reluctant to condemn their neighbors on the petty jury, by the sixteenth century the attaint had dwindled away. In its place, judges simply fined or imprisoned jurors. In 1554, the common law judges all agreed that they could not fine or imprison jurors on assize, but in practice they continued to do so and also increasingly bound over jurors to Star Chamber to be dealt with there. The most common reason jurors were sent to Star Chamber was for giving verdicts “contrary to evidence.” The theory underlying Star Chamber’s jurisdiction seemed to be that the jurors had been bribed or otherwise corrupted, Star Chamber having the general task of maintaining the integrity of the justice system. After Star Chamber’s abolition in 1640, the common law judges returned to punishing jurors themselves. They soon devised a new method of jury control.

“"In time courts adopted the method of granting new trials when the verdict was unreasonable, without punishing the jurors." To decide whether to grant a new trial (or, for that matter, whether to punish jurors), judges had to know the information the jurors knew. Judges began to develop rules requiring a juror who knew anything about the case to testify to it in open court.

It was particularly easy to tell if the jurors were in error in damage cases, where specific amounts had to be assigned. The first widely-known decision granting a new trial without punishing jurors was a damages case. In 1655, not long after the abolition of Star Chamber, the Upper

16 Id. at 138-39. Sir Thomas Smith wrote in 1565:
Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen, their neighbors; so that of a long time they had rather pay a mean fine than to appear and make enquest... And if the gentlemen do appear, gladlier they will confirm the first sentence, for the cause which I have said, than go against it.

Id. at 139 (quoting THOMAS SMITH, COMMONWEALTH OF ENGLAND, Bk. 3, ch. 2 (1565)).

17 THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE 140-41 (1985).

18 Id. at 141.

19 Id. at 142; THAYER, supra note 15, at 139. The writer of an early seventeenth-century treatise on Star Chamber noted: “When a corrupt jury had given an injurious verdict, if there had been no remedy but to attaint them by another jury, the wronged party would have had a small remedy, as it is manifested by common experience, no jury having for many years attainted a former.” Id. (quoting WILLIAM HUDSON, A TREATISE ON THE COURT OF STAR CHAMBER, part 1, § 4).

20 16 Car. 1, ch. 10 (1640) (Habeas Corpus Act).

21 THAYER, supra note 15, at 139. Thayer convincingly speculates that common law judges were spurred on to grant new trials not just because of the demise of Star Chamber (and, one might add, Bushell’s Case, see infra text accompanying notes 30-31), but also because of competition from Chancery. In Martyn v. Jackson, 3 Keble 398, 84 Eng. Rep. 787 (K.B. 1674), two judges refused to grant a new trial after Hale, C.J., who had been the trial judge, said that the verdict was against evidence. Rainsford, C.J. thought the new trial should have been granted and warned: “Juries are wilful enough, and denying a new trial here, will but send parties into the Chancery...” Id. at 398, 84 Eng. Rep. at 787-88. See also Bright v. Eynon, 1 Burr. 390, 394, 97 Eng. Rep. 365, 366-67 (K.B. 1757) (Mansfield, C.J.); 3 WILLIAM BLACKSTONE, COMMENTARIES *388 (“[T]he former strictness of the courts of law, in respect of new trials, having driven many parties into equity to be relieved from oppressive verdicts, they are now more liberal in granting them.”).

22 THAYER, supra note 15, at 139.

23 George T. Washington has noted that granting a new trial in a damages case closely resembled the older practice of granting a new writ of inquiry, and may indeed have been suggested by it. George T. Washington, DAMAGES IN CONTRACT AT COMMON LAW, 47 LAW Q. REV. 345, 365 (1931).
Bench (interregnum nomenclature) ordered a new trial in *Wood v. Gunston,* a defamation case. The jury had awarded the plaintiff, who had been called a "traitor," £1,500 damages. A motion was made to set aside the verdict as excessive, and to grant a new trial. After full deliberation, the Upper Bench agreed. Glynn, C.J. announced: "If the court do believe that the jury gave a verdict against their direction they may grant a new trial." He further declared: "[I]t is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new trials upon them . . ." These "miscarriages" had had to do with having been a juror in the same case before or some other impropriety or corruption, not with simply giving a verdict against evidence. Indeed, in *Wood v. Gunston* allegations of juror corruption were swirling in the air. Defendant's counsel argued that the case was "a packed business, else there could not have been so great damages." In setting the verdict aside, Glynn, C.J. noted that "a jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them . . ." These arguments suggest that the old rationale of Star Chamber—of protecting against juror corruption—was still strong.

The practice of granting new trials for verdict against evidence without punishing jurors was soon widely accepted. This acceptance was perhaps encouraged by the 1670 decision in *Bushell's Case,* which closed off the older method of controlling juries; Vaughan, C.J. held that jurors could not be fined or imprisoned for giving a verdict contrary to the instructions of the trial judge.

Damages cases continued to be central in the developing practice of granting new trial. The King's Bench and Common Pleas developed
slightly different rules over the course of the eighteenth century, King’s Bench favoring stricter control over juries. For a while after *Wood v. Gunston*, judges were reluctant to grant new trials where the jury was not guilty of misconduct. (Perhaps this was because of a general revulsion against the reforms of the interregnum. 32) But Holt, C.J. persuaded the King’s Bench to cast aside such reluctance. In the widely-cited 33 case of *Ash v. Ash*, 34 in which Lady Ash was sued for imprisoning her daughter for two or three hours, Holt did not hesitate to overturn the staggering verdict of £2000.

The jury were very shy of giving a reason for their verdict, thinking that they have an absolute despotick power, but I did rectify that mistake, for the jury are to try causes with the assistance of the Judges, and ought to give reasons when required, that, if they go upon any mistake, they may be set right. 35

Thereafter, King’s Bench continued to grant new trials for error without regard to juror misconduct. 36

In contrast to King’s Bench, Common Pleas adopted the “rule of certainty” in damages cases, akin to the requirement for granting a new writ of inquest of damages: 37 the court would only grant a new trial for erroneous assessment of damages if the damages were certain as a matter of law. Led by Pratt, C.J. (Lord Camden), Common Pleas enforced this rule in the civil liberty cases of the 1760s, in which it upheld heavy damages against the defendants. The court announced that where the damages were not certain as a matter of law, jurors were the “constitutional judges” of the amount. 38 This led Common Pleas to distinguish sharply between tort and contract cases. De Grey, C.J.C.P. declared in 1774:

> [T]he same rule does not prevail upon questions of tort, as of contract. In contract the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in torts a

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35 Id. at 357-58, 90 Eng. Rep. at 526.


37 See *supra* note 23.

38 See *Huckle v. Money*, 2 Wilson 205, 205, 95 Eng. Rep. 768, 768 (C.P. 1763) (refusing new trial for excessive damages in assault and imprisonment case against King’s messenger who had been looking for the printer of the *North Briton*, No. 45; jury awarded £300 although it appeared that defendant used plaintiff “very civilly by treating him with beef-steaks and beer, so that he suffered little or no damages” during the six hours he was in custody); *Beardmore v. Carrington*, 2 Wilson 244, 95 Eng. Rep. 790 (C.P. 1764) (refusing new trial for excessive damages in action of trespass and false imprisonment against four King’s messengers who had been looking for author of seditious libels; jury awarded £1000 to plaintiff, who had been held in custody for six days); *Redshaw v. Brook*, 2 Wilson 405, 95 Eng. Rep. 887 (C.P. 1769) (refusing new trial for excessive damages in trespass case against customhouse officers; jury gave £200 damages but it appeared defendants had not done damage to the value of 10s). The plaintiffs were probably aware of the difference in the two courts’ attitudes in deciding to sue in Common Pleas.
greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial.39

Common Pleas’ distinction between tort and contract probably arose out of a desire to provide certainty in the ever-increasing number of commercial cases.40

With the question of contract damages, courts had moved into the realm of granting new trials for verdict against law. English judges jealously protected from jury encroachment their power to determine the law. In the 1734 case of *The King v. Poole*,41 King’s Bench ordered a new trial in a case in which the trial judge certified that the jury found, contrary to the judge’s direction on a point of law, that a mayor of Liverpool was not duly elected. Lord Hardwicke, C.J. vigorously announced: “[T]he general rule is, that if the Judge of Nisi Prius directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial . . . .”42 The rule seems to have been well established even at this early date, since even the prosecutors acknowledged it.43 Lord Hardwicke explained the court’s reasoning:

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greatest consequence to the law of England and to the subject, that these powers of the Judge and jury are kept distinct; [otherwise,] it will prove the confusion and destruction of the law of England.44

Later English judges continued to guard this distinction. In 1818, one jury interrupted the judge as he was about to direct a verdict for the defendant on a point of law, saying that the members were “satisfied.”45 The jurors then brought in a verdict for the plaintiff. Exchequer ordered a new trial because the jury had “misled the judge” into giving up his proper role as expounder of the law.46 In 1827, Best, C.J.C.P. echoed the earlier judges in the arresting case of *Levi v. Milne*.47 An action for libel arose when a sheriff’s officer, looking for a male criminal suspect, barged into a house, saw a lump in a bed, tore off the bedclothes, and found “a female” instead; a newspaper printed “doggerel” on the subject “aided by a wood-cut de-
Best extended this principle to criminal as well as civil cases; he "protest[ed] against juries, even in criminal cases, becoming judges of the law." 52

Judges were somewhat more cautious in setting aside verdicts on liability (as opposed to damages) as against evidence, since fact-finding was long recognized as the peculiar province of the jury. But even in this area judges imposed their will, although the standards they used were not always clear. Blackstone explained that new trial was not granted "where the scales of evidence hang nearly equal: that, which leans against the former verdict, ought always very strongly to preponderate." 53

Verdicts were occasionally set aside when there was evidence on both sides. 54 In some cases, however, judges refused to set verdicts aside if there was some evidence—however weak—for the verdict. 55

It is important to keep in mind that English judges' power to order new trials was only one technique among several they used to control the jury. Judges had and regularly used power to examine witnesses, sum up evidence, instruct in the law, recommend (and sometimes even direct) verdicts, postpone verdicts, informally question jurors before and after verdicts as to their reasoning, and send the jury back to redeliberate. 56

Altogether, the notion of jury trial was fundamentally different from what it is today. Langbein describes the eighteenth-century criminal trial judges' remarks as showing "that they did not regard the jury as an autonomous

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48 Id. at 196, 130 Eng. Rep. at 743.
49 Id. at 197, 130 Eng. Rep. at 744.
50 Id. at 199, 130 Eng. Rep. at 745.
51 Id. at 198-99, 130 Eng. Rep. at 745.
52 Id. at 199, 130 Eng. Rep. at 745. He did acknowledge, however, that a new trial could not be granted if a criminal defendant were acquitted, but only if he were convicted. Id. at 200, 130 Eng. Rep. at 745.
53 3 WILLIAM BLACKSTONE, COMMENTARIES *392.
55 See, e.g., Smith ex dem. Dormer v. Parkhurst, 2 Str. 1105, 93 Eng. Rep. 1061 (K.B. 1739); Smith v. Huggins, 2 Str. 1142, 93 Eng. Rep. 1089 (K.B. 1740); Swain v. Hall, 3 Wils. K.B. 45, 47, 95 Eng. Rep. 924, 925 (K.B. 1770) ("Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the Court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the Court hath never granted new trials . . . .").
56 Langbein, Criminal Trial, supra note 31, at 284-300.
fact-finder. The jury alone rendered the verdict, but the judge had no hesitation about telling the jury how it ought to decide. We find the jury routinely following the judge’s lead in these cases. In the rare case in which he faced a recalcitrant jury, the judge could pull out the weapon of new trial.

B. American Indifference to New Trial Procedure in the Colonial Period

In contrast to their English counterparts, American colonial judges generally exercised little control over juries. New trials were rarely granted, and other mechanisms of control seldom used. This was not, at least until the late eighteenth century, because of a theory of the independence of the jury, but rather by default. Colonial judges simply lacked professional and political authority, as well as institutional mechanisms, to enable them to exercise control effectively. In the late eighteenth century, anti-imperial sentiment among the colonists further lowered the prestige of the judges and boosted that of the jury. But even during this low point of the judges’ power, the power of juries was not absolute.

The judiciary in most colonies followed a basic pattern, although with variations. Massachusetts provides a good example. At the bottom of the Massachusetts judicial pyramid were justices of the peace, who heard the less important civil and criminal cases. Each county had a court of general sessions composed of all its justices of the peace. This court tried certain criminal cases and exercised administrative responsibilities. In addition, Massachusetts had local courts of common pleas, which tried most civil cases. The top layer consisted of a court of general common law jurisdiction, which tried the more important civil cases and felonies and acted as a court of appeals. Often colonies also had a court (or courts) of equity.

The colonial model of judicial structure persisted well into the early republic in some states. The organization of the highest courts, in particular, made it difficult for a coherent body of caselaw to develop and for judges to control juries. Panels of judges from the highest court, or even the entire high court bench, heard cases in original jurisdiction or heard retrials on appeal de novo. This system put several obstacles in the way of developing coherent caselaw. First, judges’ charges were notably ineffectual. When they were not short and sketchy, they were often contradictory. The judges delivered charges to the jury seriatim, and sometimes gave conflicting instructions that they did not bother to reconcile. Jurors could pick the opinion they preferred, making predictability almost impossible. Second, questions of law often arose during the course of the trial, and the judges made final determinations very rapidly and with minimal consultation with each other or of precedent.

Third, because the highest

57 Id. at 285.
58 See, e.g., NELSON, AMERICANIZATION, supra note 2, at 15-16.
60 Horace Gray, Note on Erving v. Cradock, in Josiah Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772, at 569-64 (Boston, Little, Brown, and Company 1868).
61 NELSON, AMERICANIZATION, supra note 2, at 166.
court itself was often making the original determination, further review was thought to be redundant. Mechanisms for preserving questions of law for further review were poor or nonexistent. To these obstacles were added the untrained, poor quality of many judges on the bench. Charles Warren noted: "In all the Colonies, the courts were composed of laymen, with the possible exception of the Chief Justice. It was not until the era of the War of the Revolution that it was deemed necessary or even advisable to have judges learned in the law." Roscoe Pound provides further details: "Two of the three justices of the highest court of New Jersey during the Revolution were not lawyers. Of the three justices in New Hampshire after independence, one was a clergyman and another a physician." Not only the judges' lack of training but also general hostility to imperial rule undermined the judges' authority. It is hardly surprising that the law was highly unpredictable, and jury verdicts were set aside only infrequently.

Despite such circumstances, there is evidence that controls on the jury did exist. Gray wrote that in colonial Massachusetts, "the right of the jury to determine the law was never denied in criminal cases; but was for forty years [in the seventeenth century] alternately recognized and disallowed in civil actions." In 1672, the Massachusetts legislature established an attaint procedure similar to that of England. The losing party could have the first jury tried for attaint by a jury of twenty-four. The procedure proved quite popular, according to Thayer, but was suddenly cut off by statute in 1684. The Massachusetts practice of review de novo in higher courts in effect gave litigants an opportunity for new trials, and Massachusetts lawyers began demanding new trials English style. Massachusetts courts seem to have been more inclined to grant new trials for verdict against evidence than for verdict against law. In New York, some jurists stated

62 Id.
63 CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 3 (1913); see also id. at 8-9.
64 Roscoe Pound, The Formative Era of American Law 92 (1938) (footnotes omitted). Indeed, in some states nonprofessionals sat on the bench long after the Revolution. "A blacksmith sat on the highest court of Rhode Island from 1814 to 1818, and a farmer was chief justice of that state from 1819 to 1826." Id. See also John H. Langbein, Chancellor Kent and the History of Legal Literature, 93 Colum. L. Rev. 547, 557 (1993).
65 NELSON, AMERICANIZATION, supra note 2, at 21; Nelson, Eighteenth-Century Background, supra note 59, at 913.
66 Controls on juries in criminal cases, however, were weak. See Mark D. Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 600-01 (1939). The celebrated seditious libel case of The King v. Zenger (1735) in New York helped to establish the jury's power—although not its right—to decide the law in American criminal cases. Stanley N. Katz, Introduction to James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 1, 29-30 (Stanley N. Katz ed., Belknap Books 1963) (1736). In that case, a jury acquitted the publisher of a dissident New York newspaper of a charge of seditious libel despite a judge's announcement that "if a jury found Zenger not guilty, they would be perjured." James Alexander & William Smith, Complaint to the Committee of the General Assembly of the Colony of New York (New York 1736) (paraphrasing judge), quoted in Introduction to Alexander, supra, at 18.
67 Gray, supra note 60, at 558.
68 Records of Massachusetts, iv, Part 2, 508 (May, 1672).
69 Id.
70 Henderson, supra note 2, at 313.
71 See Angier v. Jackson, Quincy 84 (Mass. 1768).
72 NELSON, AMERICANIZATION, supra note 2, at 27.
that a court could set aside a verdict if the jury ignored the law in a civil case.  

In the 1760s, proponents of jury law-nullifying power in civil cases began to adopt a more strident tone. As conflict between the Crown and the colonists intensified, so did assertions of jury power against the Crown’s judges. In the famous 1761 case of *Erving v. Cradock,* the jury found large damages against a customhouse officer who seized the plaintiff’s ship pursuant to a writ of assistance from the Court of Admiralty, despite the plaintiff’s admission that he was liable to a forfeiture. The verdict was found against the express instructions of the judge on the legal point that a decree of the Court of Admiralty could not be annulled by a common law court.  

Nevertheless, judgment was rendered on the verdict. In the wake of cases such as this, several eminent American lawyers and statesmen famously contended that juries had the right—not just the power—to decide the law as well as the facts in civil cases as well as criminal. In the early 1770s, as relations with England were reaching a crisis point, John Adams argued that it was not only a juror’s “right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court.”  

A decade later, in 1781-82, Thomas Jefferson picked up the refrain:

> [I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.

After yet another decade, Chief Justice John Jay told a civil jury that, although the jury usually decided the facts and the judge the law, the jurors had “a right to take upon [them]selves to judge of both, and to determine the law as well as the fact in controversy.”  

But, as will be seen, by 1793 Jay’s view had become somewhat anomalous. The balance of power between judge and jury was undergoing a rapid shift. Within a decade or two of Jay’s pronouncement, both state and federal courts were freely granting new trial for verdict against law. Gray, in comparing the American revolution with the English revolution of 1688, noted:

> The great constitutional lawyers and judges of either Revolutionary period . . . with one voice maintained the right of the jury upon the general
issue to judge of the law as well as the fact. But they had hardly passed away... when the courts of the new government began to assert as much control over the consciences of the jury, as had been claimed by the most arbitrary Judges of the Monarch whom that Revolution had overthrown.80

C. Changing Conditions in the Early Republic

The Republic began with great public hostility to lawyers, but improvements in the profession led to more confidence and power. The bar pushed through reforms to make the law clearer and more predictable. Three major reforms occurred in tandem: the written opinion, the official state case reporter, and the establishment of appellate courts with little, if any, original jurisdiction. The entire enterprise facilitated taking power from juries and giving it to judges. Together, the three reforms encouraged the articulation of clear legal rules that made the granting of new trials more frequent.

Although lawyers played such a striking part in stirring up resistance to British rule and in developing the new nation, the profession during and after the Revolution was in upheaval. Public hostility toward lawyers flourished. This resentment was both ideological and economic. Many of the most prominent members of the profession had been Tories. The general revulsion against everything English included the common law, but nativists had nothing to replace it with. To make matters worse, many lawyers prospered economically from the aftermath of the Revolution, which left behind numerous legal difficulties to be resolved. The depression following the war also fired resentment: lawyers had a booming business in bankruptcies, foreclosures, and the like.81 Untrained or poorly trained lawyers stepped in to take advantage of the new business. The quality of the judiciary was low; because of the hardship of riding circuit and judges' low salaries, the bench tended to be recruited from the less able members of the profession, if indeed they were professionals at all.82

Concerned and energetic members of the bar acted through local bar associations and the courts to improve the profession’s quality by improving training. By the turn of the century, most states required periods of preparation before admission to the bar. New England states especially favored college-educated applicants by admitting them after a shorter period of preparation. Some states required a few years’ practice in lower courts before admitting lawyers to practice in the higher courts.83 Colleges began to add law courses to their curricula, and private law schools began admitting students.

80 Gray, supra note 60, at 571-72.
82 Ellis, supra note 81, at 116-17; see supra notes 63-64 and accompanying text.
83 W. Raymond Blackard, Requirements for Admission to the Bar in Revolutionary America, 15 Tenn. L. Rev. 116 (1938).
Effective jurists such as James Kent in New York began to address the great uncertainty, bordering on chaos, created by distrust of the English common law. Kent described the state of the law when he was appointed to the New York Supreme Court of Judicature in 1798: "[T]here were no reports or State precedents. . . . We had no law of our own, and nobody knew what it was." Kent worked vigorously to solve this problem by persuading the New York legislature to establish an official court reporter in 1804, and soon filled the position with his able protégé Johnson. Other states instituted similar reforms about the same time. As a result, the states could begin to develop coherent bodies of law. With the help of these appellate reporters, lawyers wrote treatises that helped to define and unify American law.

Together with reforms of professional training and reporting, members of the profession pushed for changes in the judiciary's structure that would improve and clarify the law. As will be discussed below, many states in the late eighteenth and early nineteenth centuries managed, despite popular pressures, to create appellate courts capable of developing a coherent body of law. Economic growth and a professional desire to improve the law were the main causes of these changes in appellate structure. The growth in commerce and in commercial litigation, reformers in several states argued, required a procedural system less wasteful of time and money and a more predictable set of legal rules. Reforms that increased the law's predictability also gave judges more power over juries.

In place of the colonial system of a collegial, nonprofessional trial bench, states tended to create trial courts presided over by a single judge who instructed the jury on all points of law. The judge's rulings could be reserved for appeal to the highest court, which no longer had to rehear the entire case. The appellate decision would be published in a reporter, and a new precedent created for the guidance of future judges. As several authors have discussed, the United States Supreme Court followed this pattern. Single justices rode out on circuit to hear cases tried, and then returned to Washington to hear appeals as a full court. Among the states, Massachusetts provides perhaps the clearest example of the single trial

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84 WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT 117 (Boston, Little, Brown and Company 1898).
85 See Langbein, Chancellor Kent, supra note 64, at 566-84.
86 Connecticut was at the forefront of the movement; in 1784, the legislature passed a law requiring judges of the supreme and superior courts to file written opinions to create "a more perfect and permanent system of common law in this state." ELLIS, supra note 81, at 118. In 1789, Ephraim Kirby published a volume of Connecticut law reports. Several states followed: Pennsylvania (1790), Virginia (1795, for the High Court of Chancery), North Carolina (1797), Kentucky (1803), Massachusetts (1805), New Jersey (1808), Maryland and South Carolina (1809). Id. at 118-19.
88 NELSON, AMERICANIZATION, supra note 2, at 165 (Massachusetts); ELLIS, supra note 81, at 152 (Kentucky), 161 (Pennsylvania).
judge/appellate panel pattern in its 1804 reforms, but other states followed similar trends. With few exceptions, highest courts were made professional—and sometimes even had to be created. In addition, these courts were given more extensive appellate powers, and their original jurisdiction was reduced.

Among the states that followed this path were Kentucky, Pennsylvania, Tennessee, Ohio, and North Carolina. In its 1792 constitution, Kentucky created a supreme tribunal, called the Court of Appeals. A political battle erupted over the grant of original jurisdiction to this court in land title cases, and that original jurisdiction was revoked in 1795. In 1806, Pennsylvania reduced the original jurisdiction of the Supreme Court in civil cases and increased the number of lower courts. Tennessee's Constitution of 1796 made no provision for a supreme court, but the need for such a court "was keenly felt" as important legal rules began to vary widely in different parts of the state. In 1809, the Tennessee legislature passed an act establishing circuit courts and a Supreme Court of Errors and Ap-

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90 Massachusetts Laws of 1804, ch. 105, § 5 (providing that a single judge will preside at trial and that questions of law may be reserved for the full Supreme Judicial Court). See Nelson, Americanization, supra note 2, at 167; Ellis, supra note 81, at 184-229.

91 See Millar, supra note 2, at 839-40 (briefly noting new form of judicial organization in the early 1800s).

92 New York was a notable exception. That state's Constitution of 1777 had carried over from colonial times a small Supreme Court of Judicature (originally with only three judges) with extensive original jurisdiction. Alden Chester, Courts and Lawyers of New York: A History 1609-1925, at 644 (1925). The court of last resort, the Court for the Trial of Impeachments and the Correction of Errors, was modeled on the English House of Lords and consisted of 37 possible members, including the Lieutenant Governor, the state senators, the chancellor, and the judges of the Supreme Court. (The chancellor and the Supreme Court judges could not vote on appeals of their cases, but they could deliver opinions on these appeals.) The majority of the members were not lawyers. Apparently, any member who wanted to could file an opinion. At first, senators rarely pronounced opinions, but as time went on they increasingly did so. Irving Browne, The New York Court of Errors, 29 Am. L. Rev. 321, 321-23 (1895). As a result of the plurality of opinions, it was often impossible to determine the grounds on which the court had decided a case. Id. at 329. The proportion of reversals was quite high; Chancellor Walworth was reversed in 30 of 90 appeals, and the proportion of reversals of the Supreme Court was higher. Id. at 324. The Chancellor and the judges of the Supreme Court did not hesitate to reverse one another. Chester, supra, at 792-97. This system endured until swept away by the Constitution of 1846. Id. at 793.

93 Ky. Const. art. V, § 1 (1792).

94 Act of 1795, 1 Litt. 298, ch. 201. See Ellis, supra note 81, at 136; 2 Humphrey Marshall, The History of Kentucky 156-57, 169 (Frankfort, George S. Robinson 1824); William E. Bivin, The Historical Development of the Kentucky Courts, 47 Ky. L.J. 465, 472 (1959). A populist act passed in 1802 that required trial judges to share decision-making power with lay "assistants" proved to be so damaging to the uniformity and predictability of Kentucky law that it was repealed in 1816. Ellis, supra note 81, at 159-56.

95 Ellis, supra note 81, at 182. The legislature also required the Supreme Court to meet once annually in Pittsburgh and twice in Philadelphia, with the goal of eliminating the need for people in the western part of the state to travel long distances for appeals and of promoting greater uniformity of decisions among the lower courts. Id.

peals. In its Constitution of 1802, Ohio provided for a supreme court, but one with both original and appellate jurisdiction. Gradually (and somewhat unevenly) over the next decade, the original jurisdiction of the supreme court was reduced and the appellate jurisdiction expanded. Although the North Carolina Constitution of 1776 required that the General Assembly appoint a separate supreme court, the legislature merely provided that appeals be heard by the collected members of the highest court of general jurisdiction. Finally, in 1818, the legislature appointed a separate supreme court with appellate jurisdiction.

These changes altered the balance of power between the judge and jury. Newly confident and professionally-trained judges had a trial and appellate system that allowed them to define the law clearly and to know when juries were disregarding it. The changes paved the way for more aggressive use of new trial to control juries.

II. NEW TRIAL: THE LEAST OBJECTIONABLE ALTERNATIVE FOR JUDGES

New trial was not the only possible technique for jury control, but it won out because the alternatives seemed inconsistent with ideas of jury power and independence. As English judges demonstrated, a variety of other methods could be used to influence juries or to take cases away from them altogether. Chief among these in America were nonsuit of the plaintiff and its reverse, directed verdict for the plaintiff, and the more informal mechanism of refusing to accept a verdict and sending jurors back to re-deliberate. But unlike these other methods, new trial gave judges substantial control over outcomes while allowing them to claim that they were merely handing on the question to another jury. Although it was a less efficient option, new trial thus became the method of choice.

A. Nonsuit and Directed Verdict

Nonsuit and directed verdict were two sides of the same coin. If the plaintiff failed to carry his initial burden in presenting his case, the judge could nonsuit him—dismiss the case—before it went to the jury. Con-
versely, if the defense had clearly failed, judges would sometimes "direct" the jury to find for the plaintiff.103

Interestingly, the American practice of nonsuit gave judges more power than the English version; in England, judges could not nonsuit plaintiffs against their will, but in America they could.104 The system presumably worked in England because of the great power of judges in sway- ing jurors' minds and because of the cost-shifting rule. Judges would suggest to the plaintiff that they would instruct the jury in defendant's favor, and costs (including lawyers' fees) would naturally be awarded to the losing party. Plaintiffs thus had incentive to nonsuit themselves. In America, the judges gave themselves more formal power, and nonsuit was an effective device for eliminating whole controversies or weeding out particular claims.

Directed verdict was not nearly so effective. The great weakness of directed verdict before the 1850s was that it was not a final determination. If, despite the judge's direction, the jury persisted in giving a verdict for the defendant, the judge had no recourse but to order a new trial. Many courts (and Waterman) commented that directing a verdict as a final matter was taking the right to trial by jury, and therefore was never done until authorized by statute later in the century.105 Until that time, therefore, new trial was the only means of dealing with a stubborn jury.

B. Judges Sending Back Jurors to Reconsider Their Verdict

As Langbein has noted respecting eighteenth-century criminal trials, English judges had a lively relationship with juries. Judges would question jurors, argue with them, and even send them back to reconsider their ver-

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103 See, e.g., Jackson v. Douglas, 8 Johns. 367, 368 (N.Y. Sup. Ct. 1811) (upholding jury verdict for plaintiffs that was directed by trial judge in a boundary dispute case); see also GRAHAM, supra note 4, at 321 ("And should the judge direct a verdict, without submitting the sufficiency of the evidence to the jury, when it is competent and uncontradicted, it will not be set aside."). Judges could also comment forcefully on the evidence. "Nor will the verdict be disturbed, if the opinion of the judge upon the sufficiency or insufficiency of the testimony be clearly correct, however strongly it may be expressed." Id. at 319.

104 Pratt v. Hull, 13 Johns. 334, 335 (N.Y. Sup. Ct. 1816) (action of assumpsit) ("[The power to nonsuit] must be a power vested in the court. It results, necessarily, from being the judges of the law of the case when no facts are in dispute.") (asserting that trial court had power to nonsuit plaintiff against his will); GRAHAM, supra note 4, at 278. A little over a decade later, New York's Supreme Court expanded the court's ability to order a nonsuit to take into account the increasingly powerful doctrine of new trial:

[It is a matter of common practice to set aside verdicts as against evidence, and sometimes because they are against the weight of evidence. If, therefore, the evidence would not authorize a jury to find a verdict for the plaintiff, or the court would set it aside if so found, as contrary to evidence, in such cases it is the duty of the court to nonsuit the plaintiff.]


105 See 3 WATERMAN, supra note 6, at 739 ("A peremptory direction to the jury to find in a given way, is a clear usurpation on the part of the court, depriving them of all power and discretion."); William Wirt Blume, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555, 560-61 (1950); Hackett, supra note 102, at 132-36 (discussing history of judicial control of juries in English, state, and federal courts).
dict. This last was a powerful tool for persuading a jury to comply with the judge's wishes. American judges, however, with the notable exception of Connecticut judges, tended not to send jurors back for reconsideration.

Connecticut had established this practice quite early, even formalizing it in a statute. The statutory compilation of 1715 gave judges the ability to direct a jury to reconsider its verdict twice, apparently in both civil and criminal cases. If a jury remained obstinate, however, it would prevail. Bruce Mann does not believe this procedure had a profound effect on jury control, since according to him many juries in the colonial period were persistent. But the practice continued in the nineteenth century, and it is unlikely it would have done so if it were ineffectual. Early nineteenth-century Connecticut judges seem to have believed that the practice was effective. In 1822, Judge Zephaniah Swift, in his influential digest of Connecticut law, described the Connecticut practice as almost a dialogue between the judge and jury, very similar to those Langbein has described in English courtrooms:

[If the court disapproves of a jury verdict,] the court may return the jury to a second, and third consideration, and may state to them the ground of the different opinions of the court. This gives the court an opportunity to enter into a full discussion of the testimony, and to express to them, in the opinion of the court, how the case ought to be decided: but if the jury adhere to their verdict on the third consideration, it must be recorded.

In the same year, the Chief Justice of the Supreme Court of Errors claimed that the tool was so powerful that Connecticut courts could afford tighter restrictions on new trials as a result. But new trials were sometimes granted for verdict against evidence even where the trial judge had sent a jury back for a second and third consideration.

107 Some evidence exists that courts in other states could send jurors back for reconsideration. See Robbins v. Windover, 2 Tyl. 11, 14 (Vt. 1802) ("If [the verdict] is against evidence, the Court can send the Jury to a second and third consideration, stating the true points in the cause, detailing and applying the evidence, and affording them the light of their opinion which way the verdict ought to incline."); Hagar v. Weston, 7 Mass. 110, 111 (1810) ("The plaintiff's counsel, when the verdict was returned, and before it was recorded, should have made inquiry whether the jury had considered [a point about when interest on a sum began to accrue] or not. If they had, the Court would not have interfered; if they had not, the Court would have sent them out to consider it."). But these jurisdictions seem not to have used the practice as extensively as Connecticut.
109 DUTTON, supra note 102, at 773.
110 Palmer v. Hyde, 4 Conn. 426, 427 (1822) ("It certainly is proper, in this state, where the judge has the power of returning a jury, on a misdetermination in point of fact, to the third consideration, to restrict new trials, for the above cause, to cases not susceptible of any reasonable doubt.") (Hosmer, C.J.) (denying motion for new trial for verdict against evidence in assumpsit case).
111 See, e.g., Johnson v. Scribner, 6 Conn. 185, 188-89 (1826) (Hosmer, C.J.) (granting new trial in slander case). Hosmer was considerably more receptive to new trial in this later case than in Palmer.
C. The Success of New Trial for Verdict Against Law

The above descriptions of alternative practices show their weaknesses and help to explain why new trial became the dominant method of jury control in the early nineteenth century. Although nonsuit was an effective tool, it ordinarily only applied in the narrow situation in which the plaintiff had failed to present a prima facie case. Directed verdict, because it appeared to encroach too far on jury power, was dependent for its ultimate enforcement on new trial. Sending jurors back to reconsider their verdict appears to have been in regular use in only one jurisdiction with a long history of the practice. As with directed verdict, new trial had to be used where this method failed.

Federal and state constitutional guarantees of jury trial were not considered obstacles to new trial. Indeed, the several legislative confirmations of new trial procedure in the early Republic might be viewed as evidence of the greater American consciousness of and reliance on that technique. The Seventh Amendment’s little-noticed second half prohibits retrial of jury-found facts under some circumstances:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury trial shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.112

Congress rapidly removed any doubt about the constitutionality of new trials by authorizing the procedure in the Judiciary Act of 1789113—giving federal courts “power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law”—and that of 1792114—confirming existing practice after ratification of the Seventh Amendment. Early federal courts continued the common law practice of granting new trial.115 Ten of the original thirteen states soon possessed constitutional guarantees of trial by jury, but none included a specific prohibition on retrial of fact. Many closely tracked the language of the 1776 Virginia Bill of Rights: “That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.”116 Two others, those

112 U.S. Const. amend. VII (emphasis added).
113 Ch. 20, § 17, 1 Stat. 73, 83.
114 Ch. 36, § 2, 1 Stat. 275, 276. Today, the practice is governed by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 59 (allowing district court judges to grant a new trial “in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States”).
115 See, e.g., Johnson v. Harris, 13 F. Cas. 745 (C.C.D.C. 1805) (No. 7388), rev’d on other grounds, 7 U.S. (3 Cranch) 311 (1806); Kohne v. Insurance Co. of N. Am., 14 F. Cas. 838 (C.C.D. Pa. 1804) (No. 7921); see also United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.) (interpreting the phrase “common law” in Seventh Amendment to mean common law of England: “Now, according to the rules of the common law the facts once tried by a jury can never be re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal . . . .”). For criticism of Story’s opinion in Wonson on the ground of original intent, see Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639 (1973).
116 Va. Const. of 1776, Bill of Rights, § 11, in 10 William F. Swindler, Sources and Documents of the United States Constitutions 48, 50 (1979); see also Pa. Const. of 1776, Declara-
of Maryland and New Jersey, explicitly linked the practice of jury trial with continuing the common law of England. Others used different formulations evoking the common law.

Georgia was the only outlier, giving jurors the right to "be judges of law, as well as of fact." In short, with the exception of Georgia, state constitutional guarantees did not pose obstacles to the use of new trial. Several state legislatures followed the Federal Congress in sanctioning the practice of new trial for verdict against law or evidence by statute. American courts were left free, and even sometimes encouraged, to develop the law of new trial.

In England, the motion for new trial was addressed to the court en banc, not to the trial court. Before the reforms of appellate court structure described above, this was also the usual practice in American courts. But once states moved to a more modern court structure, with a single trial judge and review of errors by a separate appellate court, the motion began to be passed upon by the trial court in the first instance. The early nineteenth-century case reports indicate that trial courts were generally first to rule on such motions. In modern American federal practice also, the motion for new trial is first addressed to the trial court, and the same is generally true of state courts.

By the 1830s, new trial for verdict against law was routine. American courts had moved far from the contentions of Adams, Jefferson, and Jay that the jury had the right to decide law as well as fact in civil cases. Graham stated the "general rule, that if the finding of the jury be clearly against law, the verdict will be set aside and a new trial granted." He even apologized for having a separate section on the subject, since the
principle should be so obvious: "It might appear at first sight gratuitous labour to illustrate this head of practice; as it is to be presumed the rule would be, invariably to set aside verdicts against law."\footnote{127} The exceptions he presents for civil cases are minor: no new trial for verdict against law is granted "in trifling actions"\footnote{128} or, occasionally, in "hard actions."\footnote{129} By this point, new trial had largely defeated its Darwinian rivals by virtue of its appearance of retaining jury authority.

## III. New Trial in Operation: From Juror-Provided Information to Independent Judicial Assessment

Judges eased the transition to a regime of more judicial control not merely by favoring new trial over its rivals, but also by relying heavily on information from jurors themselves in deciding to grant new trials. They drew out this information using methods such as informal questioning and juror affidavits. Through these techniques, the jury appeared to retain a voice in the proceedings, which bolstered the legitimacy of new trial. But as American judges grew in professional confidence, they began to cast aside reliance on juror information and instead simply judged for themselves whether the law and evidence warranted a new trial. They became more willing to grant new trial for verdict against evidence, a necessary complement to new trial for verdict against law. Both the judges' newfound confidence and their hesitation to encroach too far on jury power are evident in damages cases: while judges were reluctant to interfere with jury verdicts involving dignitary harms, they freely intervened to correct jury awards of economic damages, which were easily quantified.

It should briefly be noted that one method by which judges expanded the reach of new trial was to transform questions of fact into questions of law. Nelson provides an interesting example of this in comparing two Massachusetts cases involving the same issue but decided at different times.\footnote{130} Issues of damages, especially in contract, were increasingly treated as questions of law.\footnote{131} Standards of sufficiency of evidence were the ultimate method by which issues of fact could be changed to issues of law.\footnote{132} The expansion of law at the expense of fact was by no means uniform, however. In New York, for example, certain questions of fraud moved from being considered mixed questions of fact and law to pure fact.\footnote{133} In general, fact/law distinctions sharpened considerably over the first half of the nine-

\footnote{127} \textit{Id.} \footnote{128} \textit{Id.} at 347. \footnote{129} \textit{Id.} at 353. "Hard" or "penal" civil actions were those that involved damages for dignitary harm, and could involve "exemplary" (punitive) damages. \textit{See infra} text accompanying notes 274-75, 279. \footnote{130} \textsc{Nelson, Americanization, supra} note 2, at 169 (comparing French \textit{v. Read} (1793) with \textit{Baker v. Fales} (1820)). Both cases involved the disposition of the property of a parish that had undergone a religious schism. In the earlier case, the jury was left to decide the question; in the later, the question was treated as a matter of law and decided by the Supreme Judicial Court on a motion for a new trial on the ground of error in the trial court's instructions. \footnote{131} Washington has demonstrated this change in the English context. George T. Washington, \textit{Damages in Contract at Common Law II}, \textit{48} \textit{Law Q. Rev.} 90, 90-91, 106 (1932). \footnote{132} \textit{See infra} Part III.E. \footnote{133} \textsc{Graham, supra} note 4, at 289-90.
teenth century, and legal thought favored strict separation of the provinces of judge and jury.

A. Informal Questioning by Judges and General Verdict with Interrogatories

Informal questioning of jurors was a fixture of English trial courts. English judges apparently felt free to question juries both before and after they declared their verdict. Vaughan described such jury questioning in considerable detail in Bushell’s Case, and on this point there is no reason to doubt him;

True it is, if it fall out upon some special tryal, that the jury being ready to give their verdict, and before it is given, the Judge shall ask, whether they find such a particular thing propounded by him? or whether they find the matter of fact to be such as the witness, or witnesses have depos’d? and the jury answer, they find the matter of fact to be so; if then the Judge shall declare, the matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of the Court; for in that case the jury first declare the fact, as it is found by themselves, to which fact the Judge declares how the law is consequent.

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the Judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or è contrario, and thereupon they rectify their verdict. 134

One leading jurisdiction used a very English method of finding out whether the jury’s verdict had been decided according to law: Massachusetts judges had a regular practice of questioning the jurors informally after they had brought in a verdict. 135 Several other New England states—including New Hampshire, Maine, Rhode Island, and Vermont—followed Massachusetts’s lead. Over the first half of the nineteenth century, the practice gradually metamorphosed into the more formal general verdict with interrogatories.

In 1828, a Massachusetts court decided the case on informal questioning of jurors that was to influence many others: Pierce v. Woodward. 136 The case concerned a parol contract not to compete, and the jury found for the plaintiff with $100 damages. The judge had instructed that damages were to be given only for the period between defendant’s setting up the competing business and the filing of the lawsuit. After the jury brought in its verdict, the judge asked how the jurors had arrived at the figure of $100. The foreman “stated that they could not ascertain the damages for that precise time, it being very difficult to get at a knowledge of the degree of injury

135 In the 1920s, William Wicker briefly described this practice. William H. Wicker, Special Interrogatories to Juries in Civil Cases, 35 Yale L.J. 296, 297 (1926). See generally Edmund M. Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L.J. 575 (1923) (describing the English origins of these practices).
done, and that they gave the sum of 100 dollars, upon an expectation that it would settle the whole matter." In other words, they had chosen a nice round number. In granting a new trial, the court noted that the practice of questioning jurors was long-standing: "The Court are not disposed to disturb verdicts by making unnecessary inquiries, but where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found. Here the principle upon which they proceeded was incorrect."

When they questioned members of the jury, Massachusetts judges relied on the jury members' oaths as jurors. A Massachusetts court noted this rationale in a case a year before Pierce v. Woodward. Two depositions that were inadmissible were apparently delivered to the jury for their deliberations with other papers by mistake. On being asked, all the jurors said that they had not read the two depositions. In refusing to grant a new trial, the court stated: "[A]lthough the . . . jurors were not sworn to testify, yet . . . by their oath to give a true verdict they were as much bound to make true answers in court touching their verdict, as if they had been sworn specifically for that purpose." A judge in a later case emphasized that the practice of asking jurors questions did not depend on the consent of the parties. Rather, it was a discretionary power of the court, "not dangerous or liable to abuse." The judge gave two reasons for its usefulness. First, the jury's verdict might be unclear, or some of the issues left unfound such that the verdict could not be drawn in form without consulting the jury. Second, even after the verdict had been recorded, "it may be important to the due administration of justice or to prevent unnecessary litigation, to ascertain whether certain points have been determined, and how they have been determined."

A few years after Pierce v. Woodward, Massachusetts courts began to fashion a rule that eventually became the general verdict with interrogato-

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137 Id. at 207.
138 Id. at 208. Maine explicitly followed Pierce v. Woodward in allowing informal questioning of jurors about their verdict. In Smith v. Putney, 18 Me. 87 (1841), a court instructed jurors in an action for trespass for carrying away a printing press that, if they found for the plaintiff, they should give as damages only the value of the property taken. The jurors came in with a verdict of $900 for the plaintiff, and the judge asked them how they had arrived at that sum. The jury said that they had found the value of the items taken to be $824, and the difference was for plaintiff's costs. The appellate court ordered a new trial unless the plaintiff was willing to release the difference, and cited Pierce v. Woodward in declaring:

The Court consider that the inquiry made of the jury was correct. It would seem to be a necessary step, in order to prevent injustice, and to enable the Court, in a sensible and proper manner, to determine whether the verdict be conformable to legal principles, provided the inquiry be made at the time of giving in the verdict. Id. at 91. See also Gordon v. Wilkins, 20 Me. 134, 138 (1841) ("The propriety of submitting special questions to be answered by the jury has had the sanction of judicial practice for a long time in this State and in Massachusetts.").
139 Hix v. Drury, 22 Mass. (5 Pick.) 296 (1827).
140 Id. at 301. See also Dorr v. Fenno, 29 Mass. (12 Pick.) 520, 525 (1832) ("The jurors were not called by either party to testify; but in the discharge of their official duty they answered certain inquiries put to them by the Court. They acted as jurors, and not as witnesses—under their official oath, not under an oath to testify.").
141 Dorr, 29 Mass. (12 Pick.) at 526.
142 Id. at 525.
ries. In the 1830 case of Parrott v. Thatcher,\textsuperscript{143} the defendant moved for a new trial for verdict against the evidence and the judge questioned the jury about the grounds of its decision. The foreman stated one ground, but another juror said that he and others had based their verdict on another ground. The judge first held that where a jury verdict might be based on different grounds and a question of sufficiency of the evidence arose, "perhaps it is not improper to ascertain which they adopted, as there may be little or no evidence upon one and sufficient upon the other."\textsuperscript{144} He then addressed the discovery that the jurors had disagreed as to the grounds by taking a radical step: he declared the verdict to be invalid because the jury had not fulfilled the requirement of unanimity.\textsuperscript{145}

By the 1860s, the more informal method of discovering the basis of jury verdicts had been transformed into the more formal general verdict with interrogatories. For example, in an 1866 insurance case the jury was instructed to find a general verdict and to answer several specific questions in addition.\textsuperscript{146} The judge cited several informal questioning cases as support for the practice.\textsuperscript{147} By 1856, Rhode Island was also using the general verdict with interrogatories.\textsuperscript{148} In an action to enforce a mechanics' lien, the jury was asked to give a general verdict and to state specifically when the job had been completed. The headnote to the case echoes Parrott v. Thatcher:

Where two or more grounds of action or of defense are taken under the same issue, it is proper for the court, in its discretion, to direct the jury specially to declare upon what ground their verdict is found; in order to ascertain, whether a particular direction of the court, in matter of law, affected or not the verdict.\textsuperscript{149}

New Hampshire courts also followed the Massachusetts practice, although they distinguished more sharply in some cases between the practice of informal questioning and that of submitting special interrogatories to a jury to be returned with a general verdict. The former practice was held to be within the discretion of the judge, while the latter was held to require the parties' consent. In the 1842 case Walker v. Sawyer, involving trespass for cutting and carrying away a pine tree, the New Hampshire court cited Massachusetts precedent for the proposition that "the court may enquire of the jury touching their verdict, and the grounds upon which they proceeded, for the purpose of ascertaining whether the case

\begin{itemize}
\item \textsuperscript{143} 26 Mass. (9 Pick.) 425 (1830).
\item \textsuperscript{144} Id. at 431.
\item \textsuperscript{145} [I]f it appears that they did not agree upon either of the grounds, I do not see how their verdict can stand, unanimity being required. If there are three distinct grounds upon which an action can be maintained, all independent of each other, and four only of the jury agree upon each, I do not see how they can amalgamate their opinions and make a legal verdict out of them.
\item \textsuperscript{146} Graves v. Washington Marine Ins., 94 Mass. (12 Allen) 391, 396 (1866).
\item \textsuperscript{147} Id. (citing Dorr v. Fenno, 29 Mass. (12 Pick.) 520 (1832)); Spoor v. Spooner, 53 Mass. (12 Met.) 281 (1847)).
\item \textsuperscript{148} See Wheeler v. Schroeder, 4 R.I. 383, 385 (1856).
\item \textsuperscript{149} Id. at 383.
\end{itemize}
has been properly tried.”

Apparently, this power was considered to be within the court’s discretion, and the consent of the parties was not needed. But the judge also declared that in cases in which the jury was to bring in a general verdict, “the court cannot submit a particular question of fact to the jury, to be found and returned by their verdict, except by consent of the parties.” In a case two years later, however, a New Hampshire court allowed the judge greater discretion and blurred the two categories. The case also involved trespass for cutting down and carrying away trees. After a verdict was brought in for the plaintiff but before it was recorded, the judge asked the jury where they had found the boundary between plaintiff’s and defendant’s land to be. The jury gave an answer that corresponded to plaintiff’s arguments. The defendant moved for a new trial on the grounds that such questioning was improper and the information elicited should be disregarded. Emphatically rejecting the motion, the court asserted broad judicial discretion:

The agreed line was a fact found by the jury as much as if they had returned a special verdict to that effect. . . . The right to put the inquiries does not depend upon the consent of the parties, but is a right to be exercised by the court in their discretion.

However, in an 1854 case the court returned to a more limited view of judicial discretion: “[W]here the cause is tried upon the general issue, the court cannot submit particular questions to the jury without the consent of the parties.” This tendency of the New Hampshire courts to submit specific questions to be answered by the jury along with the general verdict only if agreed to by the parties indicates a shift in the judge/lawyer power balance in favor of lawyers. New Hampshire judges for some reason had less confidence in their authority.

But New Hampshire practice hardly diminishes the overall impressiveness of New England judges’ power to get specific answers from juries. In New England states, informal questioning and the later general verdict with interrogatories were powerful tools to help judges determine whether

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150 13 N.H. 191, 196 (1842). The judge had asked the jury, if they found that timber was moved to the defendant’s land within a certain time and if certain other conditions were met, to specify on what day the timber was moved. The jury had not specified a day, and defendant’s counsel requested that the judge ask them why, which he did. The foreman responded that their finding that the land was unimproved rendered the question of when the timber was moved irrelevant. Id. at 193. The trial judge accepted the verdict as according to law, and the appellate court refused a new trial.

151 Id. at 196-97. In Walker v. Sawyer, the judge had questioned the jury at defendant’s counsel’s request, so he could not argue lack of consent.


153 Id. at 556-57 (citing Massachusetts cases). The New Hampshire court lifted words from Parrott v. Thatcher. “When there are two distinct grounds upon which the jury may have found their verdict, the judge may properly inquire of them which ground they adopted, and they are bound by their oaths as jurors to make true answers. If it appear upon such inquiry that they have found it upon an illegal ground, it is well settled that it will be set aside.”

154 Allen, Cummings & Co. v. Aldrich, 29 N.H. 63, 74 (1854) (citing Walker v. Sawyer, 13 N.H. 191 (1842)) (action to recover from husband the cost of goods sold to his wife when she had left his house; verdict for plaintiff). The court did not mention any discretionary power in the court to ask questions without the consent of the parties. The court held that since defendant’s counsel was present in court when the inquiries were made (before the jury was sent out to deliberate), and did not object, he would be presumed to have assented. Id.
a jury verdict conformed to law. These techniques, which drew information directly from juries, helped legitimize judges' increasingly aggressive use of new trial.

B. Special Verdict

The special verdict could also be used to isolate issues of fact from issues of law, and to get a more precise verdict from the jury. This procedure tended to be little used at common law, however, being beset with difficulties. One of the greatest obstacles was the requirement that the verdict cover every issue necessary to support the judgment. If the jury did not find a material fact, the verdict could not be found in favor of the party that might seem to have prevailed. The complexity of the common law made the special verdict a risky business; verdicts could easily turn on technicalities. In contrast, informal questioning and the general verdict with interrogatories were much more flexible and less open to challenge. Judges could simply pick the questions they felt to be most important.

C. Affidavits of Jurors Used to Impeach Their Verdict

Another, more formal way the court could draw information from jurors to determine whether the jury had given a verdict contrary to law was to accept juror affidavits about what had occurred in deliberations. Together with informal questioning, accepting juror affidavits was one of the main ways American judges smoothed the transition to expanded use of new trial. Until the late eighteenth century, this practice had been routine in England. But, as discussed below, a series of decisions by Lord Mansfield beginning in 1770 rejected this technique. English judges thereafter were resolutely opposed to accepting juror affidavits in almost any circumstance. The Americans, although they were cautious of accepting such affidavits, were more willing to tolerate them than the English. (This seems to be yet another example of how American courts sometimes imposed tighter controls on the jury than the English.) Both Graham (1834) and

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155 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2501 (1971); Edson R. Sunderland, Verdicts, General and Special, 29 YALE L.J. 253, 262 (1920); Wicker, supra note 135, at 301.

156 To my knowledge, there is very little secondary literature on the history of juror affidavits. See FLEMING JAMES, JR., CIVIL PROCEDURE § 7.19 (1965) (briefly discussing eighteenth-century English practice and modern American rules); 8 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2349, 2354 (3d ed. 1940) (listing cases from various states, primarily from the second half of the nineteenth century). In contrast to eighteenth and early nineteenth century practice, modern American practice greatly restricts use of juror affidavits. For example, Federal Rule of Evidence 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or to dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.
Waterman (1855) note that the practice had given rise to many conflicting opinions. But whereas Graham was writing at a time when considerable confusion existed on the subject, by Waterman’s time such affidavits were commonly rejected.\textsuperscript{157} A few notable exceptions existed: Tennessee and Virginia remained steadfast in accepting juror affidavits to impeach verdicts. Judges in several states were more willing to accept juror affidavits in criminal cases, and judges in nearly every state were more willing to receive affidavits if they concerned an improper method of determining damages.

Because the practice of accepting juror affidavits may seem alien to modern lawyers, a brief description follows. After the jury gave its verdict, the losing party might canvass the jurors, questioning them as to what occurred during deliberations or elsewhere. If some impropriety or mistake emerged, the losing party could ask if the juror or jurors would be willing to give an affidavit. Alternatively, one or more members of the jury might seek out the losing party to offer their support. The losing party would then move for a new trial and offer to support the motion with juror affidavits. In most of the reported cases, the court found out about the jurors’ affidavits or offers to give affidavits through one of the parties. But occasionally jurors presented themselves independently to the court. In an 1826 New York case,\textsuperscript{158} for example, three jurors presented themselves to the trial court and gave affidavits that they had misread a number in a written agreement between the parties that affected the calculation of damages for assumpsit. “[T]hey did not discover their mistake until the day after the verdict, when it became a subject of anxious inquiry among them how the mistake should be rectified.”\textsuperscript{159} Whatever the circumstances, these juror affidavits were always voluntarily given. The rule against coerced confessions\textsuperscript{160} (and later the privilege against self-incrimination), combined with a general reluctance to compel jurors to give information, seems to have prevented jurors from being required to give testimony against their will.

Before about 1770, the English practice seems to have been well-settled in the opposite direction: in favor of allowing juror affidavits.\textsuperscript{161}

\footnotesize{\textsuperscript{157} See infra notes 174-78 and accompanying text.\textsuperscript{158} Ex parte Caykendoll, 6 Cow. 52 (N.Y. Sup. Ct. 1826).\textsuperscript{159} Id. at 53. Despite the jurors’ concern, the New York Supreme Court refused to admit the affidavits. But see Hague v. Stratton, 8 Va. (1 Call) 84, 87-88 (1786) (granting new trial based on juror affidavit because juror had come forward “without the solicitation of either of the parties”).\textsuperscript{160} The pre-Bushell’s Case rationale that jurors would be punished if they disclosed their own misconduct lingered on. See Prior v. Powers, 1 Keble 811, 83 Eng. Rep. 1257 (K.B. 1665) (new trial, on the ground that verdict was obtained by lot, denied “because it appeared only by pumping a jurymen, who confessed all; but, being against himself, it was not much regarded. Also the Court cannot grant new trial without punishing the jury, which cannot be by this confession against themselves . . .”).\textsuperscript{161} 3 Waterman, supra note 6, at 1429 (“By ancient law and practice, the affidavits of jurors might be received to impeach their verdict.”); see, e.g., Dent v. Hertford, 2 Salkeld 645, 91 Eng. Rep. 546 (K.B. 1696) (“[A] new trial was granted upon affidavit, that the foreman had declared the plaintiff should never have a verdict, whatever witnesses he produced.”); Mellish v. Arnold, Bunbury 51, 145 Eng. Rep. 592 (Ex. 1719) (granting new trial because “jury threw up cross or pile, whether they should give plaintiff three hundred pounds, or five hundred pounds damages”; affidavits were made “by persons who heard the jurymen talk of the matter; and the jurymen did not think fit to make any affidavit to clear themselves”); Parr v. Seames, 1 Barnes 438, 94 Eng. Rep. 995 (C.P. 1734) (on motion to set aside verdict because it was determined by “hustling half-pence in a hat,” based on affidavit by nonjuror that two jurors had confessed, court stayed .}
Blackstone says that "very early in the reign of Charles II new trials were granted upon affidavits."\textsuperscript{162} Blackstone noted that the contemporary practice was that "[i]f the matter be such, as did not or could not appear to the judge who presided at nisi prius, it is disclosed to the court by affidavit . . . ."\textsuperscript{163} As late as 1757, Lord Mansfield was accepting a juror affidavit to prove that a jury foreman delivered a different verdict than the one the jury had agreed on.\textsuperscript{164} However, by 1770 Mansfield reversed the doctrine of allowing juror affidavits. In \textit{Rex v. Almon},\textsuperscript{165} counsel asked that the affidavit of a juror be read to show that he rendered his verdict under a mistake; Lord Mansfield emphatically replied: "You know it can't be read."\textsuperscript{166} Mansfield reinforced his 1770 ruling in the 1785 case of \textit{Vaise v. Delaval},\textsuperscript{167} which Graham described as the "leading case."\textsuperscript{168} Two jurors swore that the jury, being hopelessly divided, agreed to a coin toss, and the plaintiff won. Mansfield announced: "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor . . . ."\textsuperscript{169} Mansfield painted a comical picture of how to get around the resulting loss of information: "but in every such case, the Court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means."\textsuperscript{170} In adopting Mansfield's rule rejecting all juror affidavits in \textit{Owen v. Warburton} in 1807, Common Pleas recognized how grave the loss of information about jury deliberations was likely to be: "It is singular indeed that almost the only evidence of which the case admits should
be shut out . . ."171 The court, however, was concerned with possibilities for manipulation if such affidavits were allowed—such as a situation in which a losing juror who could not persuade his fellow jury members proposed drawing lots, with a view to setting aside the verdict by his own affidavit.172 By the 1780s English practice was thus firmly settled against allowing juror affidavits to overturn verdicts.173 Judges relied on their own notes and reports instead to determine if the verdict was against law or evidence. English judges had sufficient confidence in their authority that they felt comfortable relying on their own assessment, rather than information from jurors, to ensure that verdicts were found in accordance with the law and evidence.

In America, the treatment of juror affidavits seems to have been a significant topic in the first half of the nineteenth century. Both Graham and Waterman had substantial separate sections on receiving the affidavits of jurors to impeach verdicts.174 The two authors, however, describe significantly different doctrines. Graham states a general practice "to reject the affidavits of jurors incriminating themselves."175 But he pronounces that "for the purpose of explaining, correcting and enforcing their verdict, the affidavits of jurors will be received, on motion for a new trial."176 In contrast, Waterman confidently asserts a blanket rule: "It is admitted, notwithstanding a few adjudications to the contrary, that it is now well settled, both in England, and, with the exception of Tennessee, perhaps in every State of this confederacy, that such affidavits cannot be received, and we believe upon correct reasoning."177 But Waterman confesses that the question of whether juror affidavits should be received "to set aside their verdict, has for a great number of years been so doubtful, as to have produced various and conflicting decisions."178

Even in England but especially in America, debate continued as to whether juror affidavits should be allowed to overturn a verdict. Waterman, an ardent opponent of the use of jurors' affidavits to impeach a verdict, gave a concise statement of his reasons:

1st. Because they would tend to defeat their own solemn acts under oath.
2d. Because their admission would open a door to tamper with jurymen

172 Id. at 327, 127 Eng. Rep. at 490.
173 The principle of rejecting juror affidavits extended to cases where a judge directed a verdict, the jury said nothing at the trial, and a juror gave an affidavit stating that the jury did not agree with the judge. Saville v. Lord Farnham, 2 Manning & Ryland 216 (K.B. 1828); see Graham, supra note 4, at 114-15. The principle even reached cases where the entire jury made an affidavit that the prothonotary had made a mistake in adding the jury's damage award. Jackson v. Williamson, 2 T.R. 281, 282, 100 Eng. Rep. 153, 153 (K.B. 1788).
174 Graham, supra note 4, at 111-31; 3 Waterman, supra note 6, at 1428-52.
175 Graham, supra note 4, at 111.
176 Id. at 116 (emphasis added).
177 3 Waterman, supra note 6, at 1429.
178 Id.
after they had given their verdict. 3d. Because they would be the means, in the hands of a dissatisfied juror, to destroy a verdict at any time after he had assented to it.\textsuperscript{179}

Granting new trials based on a juror’s affidavit about misunderstanding the judge’s charge was “exceedingly dangerous” because jurors might well forget their exact understanding days after the event.\textsuperscript{180}

Many judges and commentators recognized, however, that excluding juror affidavits would carry a high cost. As Common Pleas had pointed out, statements from jurors were sometimes virtually the only way to tell if jurors were deciding cases based on the law and evidence. Chitty supported accepting juror affidavits, arguing that reasoned decision-making was a pervasive feature of every aspect of the legal system except the jury:

\begin{quote}
[I]n ordinary cases, not partaking of a criminal or penal nature, it might be desirable that full inquiry should be given into the circumstances under which a jury may have found their verdict, especially when \textit{they express a desire} to explain . . . and in numerous other cases that almost daily occur, or in cases where they are manifestly under some misapprehension. The refusal of inquiry seems to insinuate that in legal supposition it is merely sufficient to have a \textit{verdict}, without regard to its correctness, whereas, in all other stages of an action, each proceeding even of the judges is subject to investigation, and if erroneous may be inquired into and rectified; and it is a principle that each of the several judges in banc, should state his reasons, as well as his opinion.\textsuperscript{181}
\end{quote}

Even Waterman, who so opposed accepting juror affidavits, recognized the dangers created by jury secrecy. He describes one argument as follows:

On the one hand, the preservation of the purity of trial by jury, demands that a verdict which has been obtained by improper means, shall not be permitted to stand; and from the nature of the case, secluded as Juries are during their deliberations, information of misconduct among them can rarely be obtained, except from those of their own body, and therefore the reception of affidavits seems to be necessary in order to disclose facts affecting their demeanor, while making up their verdict.\textsuperscript{182}

Some state judges vigorously joined the debate in favor of juror affidavits. Robert Whyte of Tennessee refuted the usual arguments against juror affidavits. He describes one argument as follows:

\begin{quote}
On the one hand, the preservation of the purity of trial by jury, demands that a verdict which has been obtained by improper means, shall not be permitted to stand; and from the nature of the case, secluded as Juries are during their deliberations, information of misconduct among them can rarely be obtained, except from those of their own body, and therefore the reception of affidavits seems to be necessary in order to disclose facts affecting their demeanor, while making up their verdict.\textsuperscript{182}
\end{quote}

\begin{footnotes}
\textsuperscript{179} Id. at 1428. Waterman took these arguments verbatim from the Tennessee case of Norris v. State, 22 Tenn. (3 Hum.) 333, 334 (1842) (arguments of T.D. Mosely, for the State).

\textsuperscript{180} 3 \textsc{Waterman}, \textit{supra} note 6, at 1438.

\textsuperscript{181} \textsc{Joseph Chitty}, \textit{3 The Practice of the Law in All Its Departments} 920 (Philadelphia, P.H. Nicklin & T. Johnson, American ed. 1836) (London, 2d ed. 1835) (first published London 1834) (footnotes omitted).

\textsuperscript{182} 3 \textsc{Waterman}, \textit{supra} note 6, at 1429. As with the arguments for excluding affidavits, see \textit{supra} note 179, Waterman lifted this rationale verbatim from the Tennessee case of Norris v. State, 22 Tenn. (3 Hum.) 333, 334 (1842). Waterman proposed to get around this difficulty in cases where the jury might misunderstand the judge’s charge by relying on informal questioning after the verdict came in. “The proper time to ascertain whether or not the jury have mistaken the meaning of the charge, is immediately after the verdict is returned, while the jury may be polled.” 3 \textsc{Waterman}, \textit{supra} note 6, at 1458. But, as noted above, this method was not approved in every state.
\end{footnotes}
affidavits in that state's leading case.\textsuperscript{183} He dismissed Mansfield's reliance on "other sources" as reliance on "the ignominious eavesdropper" instead of proper legal channels.\textsuperscript{184} To the argument that jurors would be tampered with, he replied that the same objection applied to every witness, and that in general jurors were above such temptations.\textsuperscript{185} He saved his most sustained attack for the proposition that "public policy forbids that a man should attempt to invalidate what he himself has done; a juror to defeat, to contradict, to impeach the verdict he has given. . . . [A] man shall not be heard to declare his defect of the moral principle, or to avow his own moral turpitude . . . ."\textsuperscript{186} He observed that this was not the public policy of the period before Mansfield. He believed that it was foolish to disqualify someone offering himself as a witness because of his own "moral turpitude." He also assailed Mansfield's rationale of disqualification for interest by pointing out that that rule was disappearing in England and America.\textsuperscript{187}

Nevertheless, opponents of juror affidavits had largely won out by the middle of the century. The cases reveal a general trend of restricting use of juror affidavits. In New York, for example, in the 1805 case \textit{Smith v. Cheetham},\textsuperscript{188} the Supreme Court sanctioned the principle of accepting juror affidavits to show juror misconduct and admitted a constable's affidavit, based partly on juror admissions, that the damages were decided by averaging. But that case was reversed in the 1809 case \textit{Dana v. Tucker},\textsuperscript{189} refusing a new trial where juror affidavits claimed the jury had found the damages by averaging. \textit{Dana} announced a rule that was much followed elsewhere: "[T]he affidavits of jurors are not to be received to impeach a verdict, but they may be admitted in exculpation of the jurors, and in support of their verdict."\textsuperscript{190} But the New York rule was not completely inflexible. In an action for seduction in 1825, \textit{Sargent v. [Deniston]},\textsuperscript{191} the Supreme Court admitted juror affidavits by distinguishing between juror misconception and juror misconception of the rule of damages caused by an inadequate charge. The jury gave $920 damages to the plaintiff. Two jurors swore without contradiction that $900 of those damages was awarded for bringing up the plaintiff's child, which was not supposed to be compensated according to law.\textsuperscript{192} Plaintiff's counsel had argued for such compensation, and the trial court had not indicated otherwise in the charge. Distinguishing \textit{Dana}, the Supreme Court ordered a new trial and held that these affidavits should be accepted because they "are not introduced to show any impropriety in the conduct of the jurors, or that the verdict is not such as they intended; but

\begin{itemize}
  \item \textsuperscript{183} Crawford v. State, 10 Tenn. (2 Yer.) 60 (1821).
  \item \textsuperscript{184} \textit{Id.} at 67. "[T]he jury from their recluse and retired situation are not subject to inspection, nor their proceedings to observation. . . . They themselves are alone adequate to a development of their own conduct and proceedings." \textit{Id.}
  \item \textsuperscript{185} \textit{Id.}
  \item \textsuperscript{186} \textit{Id.} at 67-68.
  \item \textsuperscript{187} \textit{Id.} at 68.
  \item \textsuperscript{188} 3 Cai. R. 57 (N.Y. Sup. Ct. 1805).
  \item \textsuperscript{189} 4 Johns. 487 (N.Y. Sup. Ct. 1809).
  \item \textsuperscript{190} \textit{Id.} (emphasis added).
  \item \textsuperscript{191} 5 Cow. 106 (N.Y. Sup. Ct. 1825).
  \item \textsuperscript{192} In actions for seduction in New York at that time, damages could be given only for "expense [to the master] and loss of service and they allowed nothing for violating the [plaintiff's] chastity or corrupting her morals." \textit{Id.} at 109.
\end{itemize}
to show a misconception of the rule of damages, as derived from the charge of the Judge, taken in connection with the argument of counsel."

After Dana and Sargent, New York courts were extremely reluctant to accept juror affidavits to impeach verdicts except regarding matters that occurred in open court.

Several other states followed New York's approach, sometimes citing Dana v. Tucker explicitly. In 1805, Massachusetts courts were accepting juror affidavits, but a string of later cases established the principle in that state that juror affidavits should be excluded (although not so neatly as Dana in New York). It should be remembered, however, that Massachusetts allowed the judge to make informal inquiries of the jury as to their proceedings. Connecticut also changed its rule in the 1824 case of State v. Freeman. Several jurors offered to testify that during deliberations in a rape trial, one of the jurors said that the defendant had previously raped the alleged victim's mother, which strongly influenced the jury in its decision to convict. Chief Justice Hosmer stated that in Connecticut "it has been the practice to admit such [post-deliberation juror] testimony." He proceeded, however, to overrule the precedents. He quoted Chief Justice Zephaniah Swift's Digest saying that the practice was flawed because of self-incrimination problems and because it enabled a single juror to set aside a verdict. He also cited Dana v. Tucker to show that the weight of Ameri-

193 Id. at 122.
194 See, e.g., Ex parte Caykendell, 6 Cow. 53 (N.Y. Sup. Ct. 1826) (action of assumpsit) (refusing to allow juror affidavits to show they gave incorrect damages because they misread 19 for 9 in agreement between parties); People v. Columbia Common Pleas, 1 Wend. 297 (N.Y. Sup. Ct. 1828) (holding that juror affidavits would not be received to show that jurors expected their verdict to have a different effect).
195 See, e.g., Jackson v. Dickenson, 15 Johns. 309, 317 (N.Y. Sup. Ct. 1818) (accepting juror affidavits "because their affidavits are not as to what transpired while deliberating on their verdict, but as to what took place in open court in returning their verdict, and shows that the clerk made a mistake in entering, or the court in directing, a different verdict. The information afforded by the affidavits of the jurors, is not to impeach, but to support the verdict really given by them.").
196 See Grinnell v. Phillips, 1 Mass. 550 (1805) (two judges against one admitting testimony of a juror that the jury arrived at damages by averaging).
197 In Commonwealth v. Drew, 4 Mass. 391 (1808), one of the jurors, defendant's counsel alleged, did not agree to find the defendant guilty of murder, but only of manslaughter, and believed he must assent to the majority verdict. The court did not inquire into the truth of the allegation. Later Massachusetts cases followed the rule of excluding juror affidavits. See Bridge v. Eggleston, 14 Mass. 245, 247 (1817) (affidavits of jurors not allowed to show they did not agree with verdict but yielded to majority); Lathrop v. Inhabitants of Sharon, 29 Mass. (12 Pick.) 171 (1831) (refusing to inquire whether jury understood judge's instructions); Hannum v. Belchertown, 36 Mass. (19 Pick.) 511, 513 (1837) (refusing to admit juror affidavits to show they had doubled damages) ("The secrecy of the deliberations and discussions of the jury and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to freedom and independence of their decisions."); Murdock v. Sumner, 39 Mass. (22 Pick.) 156, 157 (1839) (in action of trover, defendant moved for new trial based on affidavits of jurors that they made a mistake in assessing the damages; juror affidavits claimed jurors thought they were bound to follow opinion of the one witness testifying on value of goods, whereas if they had exercised their own judgment (as permitted by law), they would have found goods to be worth less; Chief Justice Shaw denied motion).
198 See supra Part III.B.
199 5 Conn. 348 (1824).
200 Id. at 348-49.
201 Id. at 351 (quoting 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 775 (New Haven, S. Converse 1822)).
can authority was against admitting juror testimony to impeach a verdict. Hosmer admitted that "[i]f the question depended merely on equitable grounds, as relative to the immediate parties to the suit, the testimony in question, perhaps ought to be received." But he had to take account of "higher considerations." These included "preserv[in]g the purity of trials by jury":

By this capacity of penetrating into the secrets of the jury-room, an inquisition over the jury, inconsistent with sound policy, as to the manner of their conduct, and even as to the grounds and reasons of their opinions, might ultimately be established, to the injury and dishonor of this mode of trial.

The testimony of the jurors was not allowed, and a new trial was refused. New Hampshire accepted juror affidavits supporting the verdict in some situations but not in others. Some states went so far as to exclude juror affidavits altogether.

In contrast to most other states, Tennessee clearly allowed juror affidavits to be introduced to overturn a verdict. Graham dismissed that state's approach by stating that there "the rule has received a latitude of construction in a capital case, and probably for that very reason, that will hardly comport with the general practice." But Judge Whyte's reasoning in the leading case, Crawford v. State, was broadly framed; it applied to civil cases as well as criminal. In Crawford, a murder case, a juror claimed he was not satisfied with the guilt of the defendant, but agreed to a verdict of guilty because his fellow jurors suggested that the governor would certainly pardon the defendant on the jury's recommendation. Other members of the jury gave affidavits corroborating the claim. The Tennessee Supreme Court ordered a new trial, since the verdict was not "according to legal principles, which require[ ] jurors to be governed by the evidence in finding their verdict, and not extraneous circumstances." In the later case of Booby v. State, Judge Whyte further developed the principle on

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202 Id. at 351.
203 Id. at 352.
204 State v. Hascall, 6 N.H. 352, 361 (1833) (affidavits of jurors are permitted to show that they did not read inadmissible papers, but not to show that they agreed to verdict based solely on law and evidence given at trial).
205 See Robbins v. Windover, 2 Tyl. 11, 14 (Vt. 1802) (laying down categorical rule that affidavits must not be accepted in civil cases, since "[i]f the verdict be contrary to law, the Court can grant a new trial. If it is against evidence, the Court can send the Jury to a second and third consideration."); Willing v. Swasey, 1 Browne 123 (Pa. C.P. 1809) (also laying down categorical rule).
206 GRAHAM, supra note 4, at 120; see also 3 WATERMAN, supra note 6, at 1431 (citing Norris v. State, 22 Tenn. (3 Hum.) 333 (1842)).
207 10 Tenn. (2 Yer.) 60 (1821).
208 In a later opinion, Whyte provided the additional information that the jurors were especially anxious to decide the case because "[i]t was a very busy season of the year, and the pressing interest of the greater part if not of the whole jury, required their presence at home on their plantations . . . ." Booby v. State, 12 Tenn. (4 Yer.) 111, 115 (1833).
209 Crawford, 10 Tenn. (2 Yer.) at 62. Whyte's reasoning is explained at greater length supra text accompanying notes 183-87. Recall that Massachusetts had arrived at the opposite rule in the capital case of Commonwealth v. Drew, 4 Mass. 391 (1808). Supra note 197.
210 12 Tenn. (4 Yer.) 111 (1833). In that case, involving a trial for receiving stolen goods, after the defendant's conviction he alleged that one juror had made a bet on the outcome, and
which new trials would be granted based on juror affidavits. In that case the defendant, convicted for receiving stolen goods, appealed the verdict. The court granted a new trial based on affidavits that one of the jurors stated during deliberations that the defendant had previously stolen a hog, and that the statement had affected the verdict. In granting a new trial, Whyte accepted the affidavits and declared the verdict to be “palpably vicious” and a violation of the state’s confrontation clause.\footnote{211}

Later, however, a new tone crept into Tennessee opinions on juror affidavits. Judge Turley, in the 1836 case \textit{Hudson v. State},\footnote{212} announced that accepting juror affidavits was a “dangerous principle” and that the court was “not disposed to extend it one step beyond what it has already been carried.”\footnote{213} In that case, members of the jury gave affidavits stating that they had based their verdict on inadmissible testimony that the judge had told them to disregard. Turley approved of affidavits in cases where a juror gave information during deliberations, since an affidavit was the only way to know what had occurred. But affidavits would not be accepted regarding evidence the jury was specifically told to disregard.\footnote{214} A few years later, Turley wrote an opinion, \textit{Elledge v. Todd},\footnote{215} in which affidavits were accepted where the jury agreed to arrive at a damages amount by averaging, and a new trial was granted. Waterman cited \textit{Elledge v. Todd} for the general proposition that juror affidavits would be received to show the method by which a jury reached a figure for damages. But in two later cases, the Tennessee Supreme Court refused to allow affidavits to show that the jury misunderstood the judge’s charge.\footnote{216} The Tennessee court apparently was trying to take a practical approach by refusing juror affidavits regarding circumstances—such as refusing to obey instructions to disre-
gard evidence or misunderstanding a judge’s charge—that could reasonably be expected to occur in most cases.

Virginia, like Tennessee, also liberally accepted juror affidavits to overturn verdicts in the early period. In the 1786 case Hague v. Stratton, the Court of Appeals, the highest court of Virginia, granted a new trial because a juror said he had “misunderstood the testimony and its application to the law.” Two of the judges declared that they had “known new trials frequently awarded upon the suggestions of jurymen, that they had mistaken the evidence, or the law,” and that they supported the practice as long as the juror came forward of his own accord and swore an affidavit “without the solicitation of either of the parties.” In 1792, the same court decided in Cochran v. Street to accept the depositions of jurors in a slander case in which the plaintiff was awarded £150. Four of the jurors swore that they were opposed to giving any damages at all but did not dissent because of “a misapprehension of law, and a belief that the opinion of the majority was to prevail”; they were “unacquainted with the duties of jurymen” and deferred to others more experienced. Four other members of the jury corroborated that account. The Court of Appeals granted a new trial. The court admitted that accepting such evidence from jurors was “a delicate business, and should be proceeded in with caution, to prevent the mischief of the jurymen being tampered with,” but said that here so many of the jurors agreed that the mistake in the verdict was clear.

Virginia judges, however, were reluctant to accept juror affidavits unless they believed the verdict was incorrect based on the trial or appellate judges’ own understanding of the law and examination of the evidence. In the 1849 case of Harnsberger’s Administrator v. Kinney, the Court of Appeals announced that “the alleged mistake of the jurors as to the instruction of the Court, did not furnish a sufficient ground to set aside a verdict in all respects fair, and in the judgment of the Court below, in conformity with the evidence.” In the same year, the court set aside a verdict where nine members of the jury claimed in an affidavit that their informal verdict had been translated into an amount of damages greater than they had intended to give. Although the trial court thought that the verdict was in accordance with the law and evidence, the Court of Appeals seemed not to be sure.

Some jurisdictions accepted juror affidavits but, unlike Tennessee and Virginia, refused to specify when juror affidavits would be accepted to impeach verdicts. In the federal courts, for example, Chief Justice Taney explicitly refused to lay down a bright-line rule in 1851: “It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would...
Many jurisdictions were more willing to accept juror affidavits in criminal cases, although some refused even then. The Supreme Court of Ohio, although acknowledging a general ban on juror affidavits, relaxed the rule in criminal cases if a foundation were first laid by independent evidence of the jury's misbehavior.\textsuperscript{227} The Supreme Court of Iowa also held that courts should accept juror affidavits in criminal cases.\textsuperscript{228} Massachusetts courts, however, were unrelenting on this point.\textsuperscript{229}

The one reason for which judges in most states consistently accepted juror affidavits to impeach a verdict was to "show the mode adopted by them in deciding as to the amount of damages."\textsuperscript{230} Even Massachusetts, ordinarily firmly opposed to new trials based on juror affidavits, sometimes allowed them in such cases.\textsuperscript{231} The Superior Court of Delaware allowed acceptance of juror affidavits to show incorrect methods of arriving at damage awards in State v. Layton.\textsuperscript{222} In that case, the jury calculated interest on an estate administration account, and the defendant's counsel asked the court to allow the jury to explain how they had arrived at the figure or to show their calculations, since "a calculation made according to the charge of the court produced a different result."\textsuperscript{233} The trial court insisted that handing over the calculations must be voluntary, and seemed anxious to avoid suggesting that the judge would simply overrule the jury.\textsuperscript{234} The appellate court used a considerably less deferential tone when discussing be impossible to refuse them without violating the plainest principles of justice." United States v. Reid, 59 U.S. (12 How.) 361, 366 (1851) (holding that even if facts stated in juror affidavits were correct, no new trial would result).

227 I have no doubt the general rule of policy, and a just regard to the sanctity of the province in which the jury is appointed to act, are against the reception of such evidence [juror affidavits], in an ordinary case; but in one where life, or even liberty, is threatened by misconduct of the jury, it will readily be conceived that circumstances may exist which would not only admit, but demand, the examination of members of the jury as to their alleged bad behavior.

Farrer v. State, 2 Ohio St. 47, 49, 2 Ward. 54, 56 (1853). Members of the jury had discussed the verdict with people on the street outside the courthouse during deliberations, and had consulted a newspaper that purported to contain the judge's charge to them. The trial concerned murder by poisoning.

228 [W]e have no doubt that in a criminal case, affecting the life and liberty of the accused, the court ought to receive the testimony of jurors as to any palpable misapprehension of the instructions of the court, as no person is so competent as the juror himself, to prove a misunderstanding of the charge of the court . . . .

Packard v. United States, 1 Greene 225, 229 (Iowa 1848). In that case, the Supreme Court of Iowa seemed especially concerned that the jury had not understood the judge's instructions because, although it had convicted the defendant of perjury, "one of the highest crimes in the criminal code," it had sentenced defendant to only a one dollar fine and one hour in prison. Id. 229 See supra note 197 and accompanying text.

230 3 WATERMAN, supra note 6, at 1447 (citing Elledge v. Todd, 20 Tenn. (1 Hum.) 43 (1839)).

231 Whitwell v. Atkinson, 6 Mass. 272 (1810) (declaring new trial to be the remedy for damages alleged to be too small because the jury made a mistake in calculating interest on a promissory note).


233 Id. at 480.

234 No one has the right to demand of the jury the principles or reasons of their verdict; but if the jury choose to return, together with their verdict, a statement of the calculation by which . . . they have arrived at a certain sum, the court would inspect that calculation and point out to the jury any merely clerical error which they had committed, and give the jury an opportunity to correct that error if they please . . . .
judge/jury, relations, declaring that the court could plainly tell from the figure arrived at that the jury had erred.

The jury, therefore, either through mistake or disregard of the law as stated in the charge, returned a verdict against the law and the facts, which the court are bound to correct in the only way that is now left open for the attainment of justice, and that is by setting aside the verdict and ordering a new trial.235

D. New Trial for Verdict Against Evidence

As the use of juror affidavits was closed off in most states, the use of new trial for verdict against evidence grew. Judges no longer relied so heavily on juror's accounts, but rather drew their own conclusions from the evidence. The power to grant new trial for verdict against law was meaningless if juries were free to find whatever version of the facts they wanted, regardless of the evidence. Judges began to take the initiative in regulating jury fact-finding. By the 1830s, judges frequently substituted their own judgment for that of the jury. The earlier practice of accepting juror affidavits legitimated the notion that judges could order new trials; from there, it was but a short step to allowing judges to award new trials without juror affidavits. Judges could appear to be expanding the power of jurors in the majority by refusing to accept affidavits from disgruntled jurors in the minority, while simultaneously expanding the judges' own power of independent review. In state after state, the standard for granting new trials for verdict against evidence was relaxed. Judges were particularly ready to second-guess juries in commercial cases, especially marine and fire insurance cases; these often involved large amounts of money, and predictability in these cases was important to economic interests.

Although judges did not explicitly refer to the growing inadmissibility of juror affidavits as they relaxed the standards for granting new trials for verdict against evidence, several circumstances suggest the link. First, as noted above, some courts were reluctant to accept juror affidavits unless the court determined that the verdict was incorrect based on the court's own examination of the law and evidence.236 Second, when deciding whether to grant a new trial for verdict against evidence, judges often speculated about the jurors' reasons for giving a particular verdict.237 The standard sometimes used in deciding these motions for new trial, particularly early on, was whether the verdict was "so decidedly against an overbearing weight of evidence, that it may easily be discerned at once, that the jury either were mistaken, or were influenced by passion, prejudice or partial-

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235 Id. at 481.
237 To pick one example among many, the judge in an 1828 New York case speculated that "[t]he testimony of [a specific] witness was probably decisive with the jury, especially as the evidence on the other side was either of a negative or circumstantial character. We cannot . . . interfere with this verdict as being against the weight of evidence." Ackley v. Kellogg, 8 Cow. 223, 225 (N.Y. Sup. Ct. 1828).
Mistake, in particular, was exactly the sort of problem juror affidavits formerly might have been used to show. As noted above, most jurisdictions were willing to accept juror affidavits to show a mistake in damage calculations. Third, the timing of the rejection of affidavits and the more generous acceptance of new trial for verdict against evidence often closely coincided in particular states. In South Carolina, for example, the Constitutional Court greatly expanded (if not created) the right to new trial for verdict against evidence in 1813, just one year before it announced it would not accept juror affidavits to impeach verdicts.

Following English practice, American appellate courts typically gave considerable deference to the trial court's determination of whether a verdict was in accordance with the evidence. Appellate judges regularly overturned verdicts when the trial judge reported he was dissatisfied, and were reluctant to do so when the trial judge did not so report. Graham, however, noted that the method of reporting evidence to the appellate court in America differed from that in England. In England, the evidence was reported directly by the trial judge; in America, the report was generally made up by counsel from both sides, and approved by the trial judge. (Trial transcripts were not routinely prepared at this time.) Also, in some jurisdictions such as New York, Supreme Court justices never presided at trial. The result was that the opinion of the American trial judge could not have had the same "controlling influence as in the English courts." Nevertheless, new trials were rarely refused or granted contrary to the opinion of the trial judge.

In 1815, for example, the North Carolina Supreme Court set aside a verdict for the defendant, with no discussion of the evidence, in a case in which the trial judge concluded that the evidence warranted a verdict for the plaintiff with exemplary damages. Most appellate courts, however, examined the reported evidence fairly thoroughly before agreeing with the trial court that a verdict should be overturned. In 1809, the Supreme Court of New York granted a new trial on the ground that the evidence against the defendant was insufficient to support the verdict. The court found that the evidence was "insufficient to support a verdict against the evidence," and that the trial court had erred in not granting a new trial. The court noted that the evidence was "insufficient to support a verdict against the evidence," and that the trial court had erred in not granting a new trial.


See supra notes 215, 220, 230-35 and accompanying text.

Hudson, 5 S.C.L. (3 Brev.) at 342.


See BULLER, supra note 39, at 327 ("If the [trial] judge declare himself satisfied with the verdict, it hath been usual not to grant a new trial on account of its being a verdict against evidence. On the other hand, if he declare himself dissatisfied with the verdict, it is pretty much of course to grant it.").

The New York Supreme Court was then an appellate court, the highest court of professional judges in New York; now this is the name of the New York trial courts of general jurisdiction.

GRAHAM, supra note 4, at 408.

Id.

An exception is Lessee of Fehl v. Good, 2 Binn. 494, 495-96 (Pa. 1810) (although verdict was against the opinion of the trial judge, new trial would not be granted for verdict against evidence because case turned on credibility of witnesses, which was exclusive province of jury).

Harton v. Reavis, 4 N.C. (Car. L. Rep.) 256, 259 (1815).

Court of Pennsylvania declared that, regarding verdict against evidence, "it must be a very strong case indeed, which would induce [the appellate court] to order a new trial, where the judge who tried the case was not dissatisfied with the verdict." The Supreme Judicial Court of Massachusetts firmly upheld the discretion of the trial judge to choose whether or not to report the evidence for review, and linked this discretion with the advent of a more English appellate structure in that state. The Massachusetts court rejected a losing party's claim to an automatic right to have the evidence reported to the appellate court on its motion for new trial for verdict against evidence:

Ever since the adoption of the nisi prius system in this Commonwealth in 1803 and 1804, we have considered it as a settled rule, that it is a question of discretion with the judge at nisi prius, to determine, whether on a motion for new trial, and to set aside a verdict as against evidence, or as against the weight of the evidence, he will report the evidence or not.

A more English court structure had led to English attitudes about verdicts against evidence.

Because appellate courts showed considerable deference to trial courts, the standards adopted to govern new trials for verdict against evidence were partly symbolic. Nevertheless, the general trend was in the direction of adopting a standard favorable to granting new trials. In 1838, the Supreme Judicial Court of Massachusetts described this change:

[F]or a long time it was considered doubtful whether a new trial could be granted, where there was any evidence on both sides, and it was considered that a new trial could only regularly be granted, where the verdict was without evidence or against the whole evidence. It has, however, been extended to cases, where the verdict is clearly against the weight of the evidence, although evidence has been given on both sides.

By 1838, the motion for new trial for verdict against evidence had become common in Massachusetts; the court was moved to note that "the opinion has latterly been gaining ground, that causes are reserved and reported with rather too great facility."

Some early cases announced a standard hostile to granting new trials for verdict against evidence. In 1804, the Supreme Court of New York did
award a new trial for verdict against evidence in a marine insurance case, Mumford v. Smith, but was careful to note: "[W]e would not willingly disturb a verdict ... where there had been a contrariety of testimony, or where the proofs were nearly in equilibrio; perhaps not, unless their decision was most manifestly against the whole of the evidence: such we think is the case here." And indeed, based on the evidence reported, the evidence was heavily one-sided. Another early New York case was similarly hostile to new trial. Some courts declared that when the case turned on the credibility of conflicting witnesses, a new trial would almost always be refused because such determinations were "peculiarly within the province of the jury."

But courts moved away from standards disfavoring new trials, often by means of rather obvious hairsplitting. The focus was often what the jury must have thought. The Supreme Court of Errors of Connecticut, for example, created an exception that swallowed the "evidence on both sides" rule:

The rule that a new trial is not to be granted where there was evidence on both sides of the cause, has no application ... to a case where the weight of testimony on one part has been entirely disregarded, and counterbalanced by the most feeble evidence, or no evidence in effect, on the other.

The court declaimed: "[N]othing is more preposterous than the idea, that the mistaken decision of one jury, a fallible tribunal, may not be corrected, by the reexamination and determination of another." Another transparent transition move was to say, as the Supreme Court of New York did in Jackson v. Sternbergh in 1803, that the "evidence on both sides rule" did not apply when "from the whole that appears, there is well founded reason to believe that justice has not been done." In that case, an ejectment action, the court overturned the verdict where there was considerable contradictory testimony on both sides from unimpeached witnesses. In 1813, the justices of the South Carolina Constitutional Court battled fiercely over whether to abandon the "evidence on both sides" rule in a marine insurance case, Hudson v. Williamson. By a vote of four to two,
they did so, and settled on a "greatly preponderates" standard. Another common formula was "manifestly against the weight of the evidence," which Massachusetts had adopted by 1809. By 1828, the New Jersey Supreme Court was using a "clearly against the weight of the evidence" standard to overturn a verdict where there had been numerous unimpeached witnesses on both sides who flatly contradicted each other. The court reasoned that "the controversy was important" (an action of trespass for flowing water back on plaintiff's mill) and that the evidence was contradictory on points "where the truth is capable of being shewn with certainty; which the parties, on a second trial, may be able to do."

This story of the transition from hostile to favorable standards for granting new trials shows the importance of high-stakes commercial cases, especially insurance cases. Judges did not hesitate to overturn verdicts for plaintiffs recovering on insurance policies; the economic consequences were simply too great to permit juries to inject an element of favoritism or randomness into decision-making. In South Carolina, the first case to adopt a more favorable standard for granting new trials was an 1813 marine insurance case, Hudson v. Williamson, which turned on whether an insured ship was seaworthy when it left port. The same issue arose in the New York case of Mumford v. Smith, also discussed above, where the court overturned the jury's verdict for the plaintiff despite a hostile standard. The Pennsylvania Supreme Court likewise ordered a new trial based on unseaworthiness in an 1816 insurance case. Justice Yeates pronounced that judges should carefully scrutinize verdicts in commercial cases: "Every fair mercantile contract should be performed with the utmost good faith. A new trial must be awarded." Sometimes, however, persistent juries could just wear out judges, as in the well-known 1831 New York case of Fowler v. Aetna Fire Insurance Co. The case turned on whether an insured house was "a frame house filled in with brick" as specified in a fire insurance contract; if not, plaintiff could not recover. The New York Supreme Court had already sent the case back to be retried once before, and the second jury gave a verdict for the plaintiff. A frustrated justice declared he still thought the verdict was against the weight of the evidence, but that two trials were enough.

On the other hand, some courts were reluctant to overturn verdicts in "hard" or penal actions, particularly verdicts for defendants. The rule was well-established that new trials could not be had for verdict against evi-

263 Id. at 351.
265 Hutchinson v. Coleman, 5 Halsted 74, 75 (N.J. 1828).
266 Id. at 82.
268 See also Silva v. Low, 1 Johns. Cas. 184 (N.Y. Sup. Ct. 1799); 1 Johns. Cas. 336 (N.Y. Sup. Ct. 1800) (overturning two consecutive jury verdicts for plaintiff in marine insurance case because of insufficient evidence).
269 Steinmetz v. United States Ins., 2 Serg. & Rawle 293 (Pa. 1816).
270 Id. at 298.
271 7 Wend. 270 (N.Y. Sup. Ct. 1831).
272 Id. at 274.
273 Id.
dence in criminal cases where the defendant was acquitted.\textsuperscript{274} The rule was extended in some jurisdictions to cases considered to be like criminal cases, such as actions for libel or defamation or "other actions vindictive in their nature."\textsuperscript{275} As the Supreme Court of North Carolina put it in 1815 in rejecting this rule, "a notion prevailed that the jury were the uncontrollable judges of the damages [in so-called “penal” or “hard” tort actions], as [the damages] were given for wounded feelings, and the loss of happiness, the extent of which, only the jury could estimate."\textsuperscript{276} The court then noted that the exception seemed no longer to exist in England.\textsuperscript{277} The Connecticut Supreme Court of Errors flatly declared that "[t]he action of slander is not a penal one, nor in the nature of one; although the latter idea has sometimes been acted on."\textsuperscript{278}

**E. The Special Case of Damages**

These differences in the way insurance contract cases and certain types of tort cases were treated for purposes of new trial for verdict against evidence reflects the influence of a special subset of new trial law: damages. Following English law, American judges tended to distinguish sharply between tort cases and contracts cases for purposes of control over damage awards. In tort cases they were much more hesitant to interfere, mainly because such damages were often difficult to measure. Judges did, however, tend to preserve some control over tort damages in exceptional cases based on an "outrage" standard. In contrast, in contracts cases judges frequently ordered new trials for verdict against law if the plaintiff refused to remit a portion. Because contract damages rules were often conclusory, it was frequently easy to tell if the jury had disobeyed the court’s instructions simply by looking at the amount awarded. This vast disparity in the way judges handled the different types of damages cases illustrated both their newfound power and confidence and their continuing reluctance to challenge too directly popular notions of jury power.

1. **Tort Damages (Including Punitives)**

Besides the basic distinction between tort and contract damages, there were further distinctions among different types of torts. Some torts—including slander, libel, malicious prosecution, false imprisonment, seduc-

\textsuperscript{274} In 1721, Hawkins declared that “it is settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal, as it seems that they may a verdict that convicts him, for having been given contrary to evidence and the directions of the judge, or any verdict whatever for mistrial.”\textsuperscript{2} William Hawkins, A Treatise of the Pleas of the Crown, ch. 47, § 12 (London, 2d ed. 1721); see also Thayer, supra note 15, at 177. The doctrine that a new trial could not be had after a criminal defendant was acquitted was known as "autrefois acquit" and ultimately was enshrined in the Double Jeopardy Clause of the Federal Constitution. U.S. Const. amend. V. American state courts adopted this practice. See, e.g., State v. Wright, 7 S.C.L. (2 Tread.) 517, 519 (S.C. Const. Ct. 1814).

\textsuperscript{275} See, e.g., Paddock v. Salisbury, 2 Cow. 811, 815 (N.Y. Sup. Ct. 1824).

\textsuperscript{276} Harton v. Reavis, 4 N.C. (Car. L. Rep.) 256, 258 (1815) (granting new trial after verdict for defendant in slander case).

\textsuperscript{277} Id.

\textsuperscript{278} Johnson v. Scribner, 6 Conn. 184a, 189 (1826) (granting new trial after verdict for defendant in slander case).
tion, and criminal conversation—were considered to be "vindictive" in their nature, and their remedy to be "penal." We have already seen that some courts were reluctant to grant new trials for verdict against evidence in these sorts of cases, especially if the defendant had won at trial.\textsuperscript{279} As will be shown below, courts were even more reluctant to overturn verdicts for plaintiffs in these cases for excessive damages. The cases that follow demonstrate that juries were allowed, and sometimes even encouraged, to give damages beyond compensating for loss in egregious cases; the direct ancestor of our modern punitive damages, these were called "exemplary damages." It is important to note, however, that these torts involved primarily \textit{dignitary} rather than purely \textit{economic} injuries. Courts confessed that damages were particularly hard to measure in dignitary cases. But even in these cases, courts did occasionally overturn verdicts if the damages were outrageously excessive. In contrast, torts that involved primarily economic wrongs—such as trover or damage to property—received more extensive scrutiny from judges, and damages were limited to purely compensatory amounts.

Early nineteenth-century reporters reveal a world in which dignitary concerns—honor and a good name—were far more prized than today. The torts that vindicated those concerns—slander, libel, trivial battery, criminal conversation—were much more frequently brought and were treated with great seriousness by the courts. Judges in these cases were very reluctant to interfere with damages. In case after case, courts admitted that damages were very large, larger than the court might like, but were within the jury's discretion both because they were difficult to measure and because some public policy might be served by large damages. Interestingly, in these cases courts relied even more heavily than usual on English precedents; Graham devotes almost twenty pages to them,\textsuperscript{280} and most of the American cases begin with a recital of the maxims of English judges on the subject.

In this area of the law, New York was the leading jurisdiction, having early compiled an impressive string of slander and libel cases starting with Chief Justice Kent's opinion in \textit{Tillotson v. Cheetham}\textsuperscript{281} in 1806. In \textit{Tillotson}, New York's Secretary of State sued the publisher of a newspaper after being accused of bribing state legislators to vote for the incorporation of a bank. The jury awarded the enormous sum of $1,400, and the defendant moved for new trial for excessive damages.\textsuperscript{282} Kent announced:

\begin{quote}
A case must be very gross, and the recovery enormous, to justify our interposition on a mere question of damages, in an action of slander. We have no standard by which we can measure the just amount, and ascertain the excess. It is a matter resting in the sound discretion of a jury.\textsuperscript{283}
\end{quote}

In contrast to our modern law, Kent felt that because the plaintiff was a high public official and the libel was published in a newspaper, the plaintiff

\textsuperscript{279} See \textit{supra} notes 274-75 and accompanying text.
\textsuperscript{280} \textit{GRAHAM, supra} note 4, at 409-27.
\textsuperscript{281} 2 Johns. 63 (N.Y. Sup. Ct. 1806).
\textsuperscript{282} Id. at 63.
\textsuperscript{283} Id. at 74.
was entitled to more protection, not less.\textsuperscript{284} Kent elaborated on the rule for new trial in slander cases in the also widely-cited case of Coleman v. Southwick\textsuperscript{285} in 1812. He stressed the "great difference between cases of damages which can certainly be seen, and such as are ideal, as between \textit{assumpsit}, \textit{trespass for goods}, \&c., where the sum and value may be measured, and actions of false imprisonment, malicious prosecution, slander, and other personal \textit{torts}, where the damages are a matter of opinion."\textsuperscript{286} He noted that in these latter cases, "[t]he measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances, as the state, degree, quality, trade or profession of the party injured, as well as of the party who did the injury." He then repeated the common formulation: "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption."\textsuperscript{287}

Massachusetts, another leading jurisdiction, followed the same rule as New York in libel and slander cases,\textsuperscript{288} as did South Carolina.\textsuperscript{289} The Massachusetts and South Carolina courts sometimes explicitly took into account the wealth of defendants in deciding not to overturn huge verdicts. In Bodwell v. Osgood,\textsuperscript{290} a Massachusetts schoolmistress sued a wealthy local political figure after he accused her before a school board of unchastity. The jury awarded her $1,400, and the court explained: "The plaintiff being an unprotected female, having nothing whereon to depend but an unblemished reputation, and the defendant being a man of wealth and influence, we cannot say that the damages are clearly exorbitant."\textsuperscript{291} Virginia, ever preoccupied with honor, took the unique step of guaranteeing by statute that a new trial could be had for \textit{insufficient} damages in slander cases.\textsuperscript{292}

A similar concern for the poor or relatively powerless seemed to motivate courts in other types of cases besides slander and libel, especially trespass cases. The Supreme Judicial Court of Massachusetts applauded a large jury verdict where defendants rudely broke into plaintiff's house, evicted his wife and children, and dumped his belongings on the road, despite their probable knowledge that plaintiff was the lawful possessor.\textsuperscript{293} According to the court, the jury had reason to think that defendants supposed

\textsuperscript{284} \textit{Id.}
\textsuperscript{285} 9 Johns. 45 (N.Y. Sup. Ct. 1812).
\textsuperscript{286} \textit{Id.} at 52.
\textsuperscript{287} \textit{Id.} See also Southwick v. Stevens, 10 Johns. 443 (N.Y. Sup. Ct. 1813) (refusing new trial for excessive damages in libel case); Root v. King, 7 Cow. 613 (N.Y. Sup. Ct. 1827) (libel); Cole v. Perry, 8 Cow. 214 (N.Y. Sup. Ct. 1828) (slander); Douglass v. Tousey, 2 Wend. 352 (N.Y. Sup. Ct. 1829) (slander); Ryckman v. Parkins, 9 Wend. 470 (N.Y. Sup. Ct. 1833) (slander).
\textsuperscript{290} 20 Mass. (3 Pick.) 379 (1825).
\textsuperscript{291} \textit{Id.} at 385. See also Shute v. Barrett, 24 Mass. (7 Pick.) 81, 82 (1828) (noting wealth of defendant as reason not to overturn verdict for excessive damages in slander case); Davis v. Davis, 11 S.C.L. (2 Nott & McC.) 80, 83 (S.C. Const. Ct. 1818) (same).
\textsuperscript{292} Rixey v. Ward, 24 Va. (3 Rand.) 472, 473 (1824).
\textsuperscript{293} Reed v. Davis, 21 Mass. (4 Pick.) 215 (1826).
"that the trespass could be committed with impunity on account of the poverty of the plaintiff," and the jurors awarded $500 in damages. The court declared:

The jury seem to us to have manifested a strong sense of the security which the dwellinghouse should afford its lawful possessor. They have proceeded upon higher grounds of damages than those which arise merely from bodily wounds and bruises. They have discovered a determination to vindicate the rights of the poor against the aggressions of power and violence. These motives are sound, and should be cherished . . . .

Similarly, South Carolina's Constitutional Court praised a jury that gave large damages in a trespass case where the defendant had carried off a load of peaches from the female plaintiff's land, "in despite of the feelings of the plaintiff, immediately under her nose, and in opposition to her authority." The court felt that far from being illegal, the large award given by the jurors "redounds much to their credit, as it evinces a feeling on the part of the Jury, friendly to the good order and well being of society, and hostile to acts of violence and force, which [are] the bane of it." The Pennsylvania Supreme Court upheld a damage award of $750 in a trespass case against a sheriff for the misconduct of his officer in executing a writ, announcing that "the happiness of society requires that these officers should be influenced by powerful motives to avoid all acts of rudeness and wanton injury."

Upholding public morality, particularly sexual morality, was also a reason judges gave for not overturning large verdicts. Although juries tended to award vast amounts for criminal conversation (a tort based on adultery, brought by a husband against his wife's lover), judges were particularly unwilling to overturn these awards. After a South Carolina jury brought in a verdict of $5,000 in a criminal conversation case, the Constitutional Court refused to overturn it and proclaimed that the English practice of not granting new trials in such cases "has great intrinsic reason. Examples of chastity have the happiest effects; because man is at least emulous of virtue; while instances of incontinence produce the worst, because the passion that leads to it is universal." The same court upheld an award of $275 in a case of trivial assault. The female defendant, "an old body of upwards of fifty years," had struck the plaintiff, "a young man, hale, hearty, and in
Early American Judge-Jury Relations

earlier the bloom of life."302 The court acknowledged that "[i]t does not appear that any great injury was done to the plaintiff," but nevertheless held that exemplary damages were appropriate, since "[i]t is the only method by which the unruly passions of a vixen, who will not be restrained by a sense of shame or propriety, can be controlled."303 Despite the great reluctance of most courts to grant a new trial for excessive damages in "vindictive" tort cases, they occasionally did so. Graham said: "With us, the passions of the jury and perversity of the verdicts have been chiefly manifested in giving excessive damages, forming one exception to the general rule that new trials will not be granted in hard actions on the ground that the jury have abused their power."304 In two famous cases, courts made use of this exception to protect public officials from having to pay heavy damages. Probably the best-known example of this exception was the 1815 New York case of M'Connell v. Hampton.305 A U.S. military commander was sued for assault and false imprisonment after he ordered a court-martial of a civilian whom he suspected of spying for the British. The jury awarded damages of $9,000. Here, the defendant's wealth seemed not to weigh with the court: "Although the defendant is a man of very large fortune, the plaintiff's injury is not thereby enhanced."306 The court felt that the defendant had made an honest mistake, and that the jury must "have wholly overlooked the critical and delicate situation of the defendant, as a commander of an army upon the frontiers."307 The court concluded that the verdict proceeded from the jury's "intemperance and passion,"308 and accordingly granted a new trial. The Pennsylvania Supreme Court also acted to protect a public official in Kuhn v. North.309 A sheriff was sued for the trespass of his deputy for entering the plaintiff's house and disturbing him in the course of executing a mistaken writ. The jury awarded $950 damages, despite the court's belief that there was "nothing of rudeness in the execution of the process."310 A puzzled justice, who had been the trial judge in the case, said in the appellate opinion that he could not "account for these heavy damages, except on the ground of some misconception of the jury" that "they might indulge an arbitrary discretion."311 He further noted:

[I]f a court has no power to grant a new trial, taking the conduct of the sheriff and his officer to be innocent in point of purity of motive and temperate in its manner, inflicting no unnecessary injury ... then the law itself would soon have an end, [and] no man would be found mad enough to execute its sentences.312

302 Id. at 500.
303 Id.
304 GRAHAM, supra note 4, at 125.
305 12 Johns. 234 (N.Y. Sup. Ct. 1815).
306 Id. at 236.
307 Id. at 238.
308 Id.
309 10 Serg. & Rawle 399 (Pa. 1823).
310 Id. at 409.
311 Id.
312 Id. at 409-10 (distinguishing Hazard v. Israel, 1 Binn. 240 (Pa. 1808), discussed supra notes 298-99 and accompanying text).
In contrast, in tort actions for which the damages were purely economic, courts were much more willing to overturn verdicts. In actions such as trover, courts would readily grant new trials if the damages were either less than or greater than the value of the goods taken. The Missouri Supreme Court, for instance, overturned a verdict of thirty dollars for trover for the value of a horse, where fifty dollars was the lowest figure any witness named for its value. The court fumed: "How the jury arrived at the conclusion that the horse was worth only thirty dollars, it is difficult to conceive. . . . It seems to us very clear that the Circuit Court erred in refusing to grant the plaintiff a new trial." In granting a new trial for excessive damages in a trover action in 1818, the South Carolina Constitutional Court sounded similarly impatient with the jury, and laced its opinion with italics: "It has lately been determined by this Court, in several cases, that a jury cannot give vindictive damages in an action of trover. The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the only true measure."

2. Contract Damages

As noted above, American courts, like English courts, drew a sharp distinction between tort and contract cases for purposes of overturning damage awards. Where damages were fairly easy to measure, courts did not hesitate to step in and correct jury verdicts. Graham confirms that "on questions of contract, or when an ascertained test of the correct amount is furnished, the court interposes the correction with less reluctance than in cases of mere injury . . . ." As Washington pointed out, the rules governing contract damages became steadily more detailed in the eighteenth and early nineteenth centuries, making it easier to determine when the jury had made a mistake. Judges were transforming what had been questions of fact for the jury into questions of law for the court. As in the marine insurance cases, judges probably felt that the issues in contract cases were too central to a commercial economy to be left to a jury's uncontrolled discretion.

Two cases from different regions of the country—South Carolina and Massachusetts—each involving a type of commerce that was central to each region—slaves and industrial manufacturing, respectively—illustrate the point. In 1820, the Constitutional Court of South Carolina had set aside a verdict for plaintiff for breach of warranty of soundness of a slave (a chilling application of contract rules) because of insufficient damages. The slave turned out to have been sick at the time of sale, with a resulting loss of value of twenty-five to thirty percent, but the jury awarded damages of only one cent. In awarding a new trial, the judge declared that the testimony about damages was "clear and uncontradicted, and the jury were not authorized to disregard it, and adopt an arbitrary rule of their own, unsup-

313 Hays v. Thomas, 3 Mo. 181 (1894).
314 Id. at 181.
316 GRAHAM, supra note 4, at 410.
ported by any testimony. A decade later, in what became one of the leading American cases, the Massachusetts Supreme Judicial Court also set aside a verdict for insufficient damages, in this case for breach of a manufacturing contract. In Taunton Manufacturing Co. v. Smith, the defendant had contracted to bleach cotton cloths for the plaintiffs. Plaintiffs alleged that the defendant had omitted certain processes needed for good bleaching, and several of their witnesses testified that, as a result, plaintiffs had lost $1,652. Defendant offered no evidence. The jury then returned a verdict for the plaintiffs with $337 damages, whereupon the plaintiffs moved for a new trial for insufficient damages. The motion was granted, with Chief Justice Parker noting that "there is great reason to believe that the jury labored under some mistake in the estimation of damages, having given not more than one quarter part of what, according to all the evidence, the plaintiffs sustained." Parker distinguished between tort and contract cases, commenting that the power to award new trials for insufficient damages was "rarely exercised, especially in actions for personal wrongs, such as slanders, batteries, and the like. But where the foundation of the action is a breach of contract, and the damages are capable of estimation, if there is a glaring deficiency, justice requires that the case shall be revised."

Although the rationale of certainty might have suggested otherwise, judges were in general more willing to overturn verdicts in contract cases for excessive than for insufficient damages. This was probably partly because remittitur was more widely accepted than additur. As today, courts would simply condition a refusal to grant a new trial on the plaintiff agreeing to deduct a certain amount from the verdict.

Conclusion

Judges exercised their authority over the jury in an increasingly open way in the early nineteenth century, although that authority remained partially cloaked by the new trial device. Instead of acting on juror affidavits, they simply ordered new trials for verdict against evidence. Instead of leaving damages calculations in contracts and economic tort cases to the jury’s discretion, judges carefully scrutinized these awards. The logical outcome of this stricter control was the new codes of procedure, which gave the judge the power to direct a verdict regardless of the jury’s preferences. New trial for verdict against law was the necessary transition phase from revolutionary rhetoric about the civil jury’s power to decide law to the directed verdict.

318 Id. at 518.
319 26 Mass. (9 Pick.) 11 (1831).
320 Id. at 12 (emphasis added); see also Birbeck v. Burrows, 2 Hall 51; White v. Green, 19 Ky. (3 T.B. Mon.) 155 (1826).
322 See, e.g., Evertsen, 2 Wend. at 513.