

JUDICIAL NULLIFICATION OF THE RIGHT TO TRIAL BY JURY BY  
“EVOLVING” STANDARDS OF APPELLATE REVIEW

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## I. INTRODUCTION

This Article will explore the standards and scope of appellate review as employed by federal and Texas courts and their relationship to the right to trial by jury under the Texas Constitution and under the Seventh Amendment of the Constitution of the United States. It will identify and discuss trends in both standards of review and scope of review employed by federal and Texas appellate courts which effectively nullify the right to trial by jury. The Article will conclude with a call for judicial self-restraint and for a more objective means to protect the right to trial by jury.

## II. THE RELATIONSHIP OF STANDARDS OF REVIEW TO THE RIGHT TO TRIAL BY JURY

### A. *The Fundamental Nature of the Right to Trial by Jury.*

The transcendent importance of the right to trial by jury was well described by Professor Gerald Powell:

The right to a jury trial is a fundamental right granted to all United States citizens by the Seventh Amendment of the United States constitution and to all Texas citizens by Article 1, Section 15 and Article 5, Section 10 of the Texas Constitution. The right to trial by jury was so sacred to our founding fathers that it almost prevented ratification of America's Constitution. Only after a promise to add a bill of rights, which included a 'right to trial by jury,' was the Constitution ratified.

The fundamental right to trial by jury is even more precious in Texas. In the Texas Declaration of Independence, Grievance Three complains that the Mexican Government "has failed and refused to secure, on a firm basis, the right of trial by jury that palladium of civil liberty, and the only safe guarantee for the life, liberty, and property of a citizen." To safeguard against this intrusion into a citizen's individual rights, the Texas Constitution references the right to trial by jury in six sections, whereas the Federal Constitution makes reference to this right only

one time. The right to a jury trial is of vital interest to the public.<sup>1</sup>

The importance of the right to a trial by jury in civil cases was also eloquently defended by the late Chief Justice of the United States William Rehnquist when he stated, “The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”<sup>2</sup> Indeed, it is fair to say that the “tyranny” from which American and Texas citizens sought constitutional protection was, at least in part, from the judiciary itself.

The Seventh Amendment of the United States Constitution guarantees not only the right to trial by jury in civil cases but also states that “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.”<sup>3</sup> This provision is frequently referred to as the “reexamination” clause. Professor William V. Dorsaneo, III, states, “Although academic focus has been more heavily concentrated on the existence of the right to trial by jury under the first clause of the Seventh Amendment, the essential character of the right is more directly addressed in the reexamination clause.”<sup>4</sup> It is for this reason that Justice Story characterized the reexamination clause as “more important” than the remainder of the Seventh Amendment.<sup>5</sup>

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<sup>1</sup>Brief for Gerald R. Powell as Amicus Curiae Supporting Respondents, *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006) (No. 03-0737) (quoting THE DECLARATION OF INDEPENDENCE (Repub. Tex. 1836), reprinted in H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–97, 1065 (Austin, Gammel Book Co. 1898)) (footnotes omitted), available at <http://www.supreme.courts.state.tx.us/ebriefs/03/03073708.pdf>. Professor Powell is the Abner V. McCall Professor of Law and Evidence at the Baylor University School of Law, Waco, Texas. Professor Powell has also discussed several of the issues raised here. See also Gerald R. Powell, *The Texas Civil Jury Trial and the California Condor: Endangered Species?*, in SOAKING UP SOME CLE: A SOUTH PADRE LITIGATION SEMINAR (2007).

<sup>2</sup>*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

<sup>3</sup>U.S. CONST. amend. VII.

<sup>4</sup>William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1698 (2001) [hereinafter Dorsaneo I]; see generally William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497 (2000) [hereinafter Dorsaneo II]. Professor Dorsaneo is the Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Southern Methodist University School of Law, Dallas, Texas.

<sup>5</sup>See *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830); see also *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (The reexamination clause “not only

Those who drafted the constitutions of the United States and the State of Texas were well aware that the legal system both constitutions created would be heavily influenced by judges who were often individuals with higher levels of education and specialized training in the law. To prevent outcome determinative decision making by elitist or even aristocratic judges, the founders gave each citizen the right to trial by jury. The right to trial by jury was intended to guarantee the dispositive facts of a citizen's case would be determined not by a person or persons with the lofty pedigree of a judge but instead by diverse members of the community who would serve as the collective conscience of the community. The fundamental social compact of the federal and state constitutions thus represents a studied attempt to limit the authority of judges to decide cases in a manner of their own choosing and simultaneously requires judges to respect and uphold the verdicts of juries whether or not a judge finds a particular verdict pleasing. The right to trial by jury is a direct protection against the tyranny of potential elitism or aristocratic decision making by the judicial officers of the government itself. Of course, the guardians of the right to trial by jury are, of necessity, judges. The founders believed by accepting the oath of allegiance to the Constitution of the United States and of the State of Texas, a judge would be constitutionally bound to respect and protect the rights of trial by jury.

This Article examines whether our federal and state judges are in fact guarding the right to trial by jury, or by judicially changing the appellate standards of review, have some judges become the foxes who guard the hen house? Thus, it is vitally important to understand what an appellate standard of review should be, how it should be applied, and to compare the historical standard to current appellate decision making.

### *B. The Functions of Standards and Scope of Review.*

In general, the "standard of review" used by an appellate court to review the sufficiency of evidence in the trial court essentially refers to the level of deference the appellate court must afford the finding of the trier of fact.<sup>6</sup> When the fact finder is a jury, the standard of review must also comply with the federal and state constitutional requirements of the right to trial by jury.

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preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law.").

<sup>6</sup>W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 359 (1998) [hereinafter Hall I].

Within this analytical framework a standard of review should answer two legal questions: (1) Did the trial court commit an error of law; and (2) does that error require reversal?

The “scope of review” is distinct from but integral to the “standard of review.” Whereas “the standard of review is the formula a reviewing court uses to determine whether the trial court erred . . . the scope of review describes that portion of the appellate record a reviewing court may examine to determine whether the trial court erred.”<sup>7</sup>

For Texas practitioners, Mr. Wendell W. Hall of San Antonio has written two compendium articles cataloging the standard of review for virtually every ruling a Texas trial court could conceivably make.<sup>8</sup> Professors Steven Alan Childress and Martha S. Davis have also compiled a comprehensive two-volume monograph on the same subject for the federal courts.<sup>9</sup>

Professor Dorsaneo, who has written prolifically in this area, has accurately stated the profound importance of the standards of judicial review of jury verdicts

Despite the fact that the subject of evidentiary review of jury findings by appellate courts has received scant attention in academic literature, there is probably no single legal subject that is more important to the administration of justice than the standards of judicial review of verdicts, judgments, and other orders based on the sufficiency of the evidence presented at a hearing or trial. This subject is important because it imposes principled constraints on all

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<sup>7</sup> *Id.*

<sup>8</sup> See generally W. Wendell Hall, *Standards of Review in Civil Appeals*, 21 ST. MARY'S L.J. 865, 910–16 (1990); Hall I, *supra* note 6, at 478–79. Professor Elaine Carlson also has an excellent collection of controlling Texas authorities. See Elaine Grafton Carlson, *Appropriate Standard of Review*, in 6 TEXAS CIVIL PRACTICE § 40:6 (2d ed. 1998) (standards generally); Elaine Grafton Carlson, *Review of Legal Sufficiency*, in 6 TEXAS CIVIL PRACTICE § 44:9 (2d ed. 1998) (legal sufficiency); Elaine Grafton Carlson, *Review of Factual Sufficiency*, in 6 TEXAS CIVIL PRACTICE § 44:10 (2d ed. 1998) (factual sufficiency). Professor Elaine Grafton Carlson is the Stanley J. Krist Distinguished Professor of Law at the South Texas College of Law, Houston, Texas.

<sup>9</sup> 1 & 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (3d ed. 1999). Professor Childress is a Professor of Law at the Tulane Law School, New Orleans, Louisiana. Professor Davis is a Professor of Law at the Thurgood Marshall School of Law, Texas Southern University, Houston, Texas.

of the institutional actors who perform the work of deciding cases in the litigation process.<sup>10</sup>

Unless a standard of review is stated and applied in objective terms, it fails to impose principled constraints on the ability of an individual judge to decide a case to his or her own liking in a manner contrary to the standard he or she is supposedly following. As the following discussion establishes, the evolution of standards of review and the scope of review are deeply interconnected with the protection of the right to trial by jury. Tracing the origin and development of traditional standards of legal and factual sufficiency review is essentially an exposition of numerous original efforts by the Supreme Courts of the United States and of Texas to establish rules of law which attempt to insure that the right to trial by jury will remain inviolate, particularly from encroachment by judicial officers of the state or federal government.

### III. THE TEXAS STANDARDS OF REVIEW

“The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence.”<sup>11</sup> The late Justice Oliver Wendell Holmes was certainly accurate in describing the development of the law in Texas.

#### A. *Establishment of the Traditional Standards of Review in Texas.*

Texas standards of review for sufficiency of evidence involve two distinct subjects: legal sufficiency and factual sufficiency. In general, legal sufficiency issues involve no-evidence complaints, or complaints that the evidence conclusively establishes an ultimate issue of fact in a manner contrary to the verdict of the jury.<sup>12</sup> Factual sufficiency issues ordinarily involve a complaint that a fact finding, although supported by legally sufficient evidence, is nonetheless so contrary to the great weight and preponderance of the evidence that it is clearly wrong or manifestly unjust.<sup>13</sup> As discussed below, legal sufficiency complaints may be

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<sup>10</sup>Dorsaneo I, *supra* note 4, at 1736.

<sup>11</sup>OLIVER W. HOLMES, *THE COMMON LAW* 120 (1881).

<sup>12</sup>Elaine Grafton Carlson, *Review of Legal Sufficiency*, in 6 *TEXAS CIVIL PRACTICE* § 44:9 (2d ed. 1998).

<sup>13</sup>*Id.* § 44:10.

addressed in any court in Texas including the Supreme Court of Texas. Factual sufficiency complaints, however, may only be addressed in the trial court through its power to grant a new trial or by the court of appeals but not by the Texas Supreme Court.

1. Cases prior to the constitutional amendments of 1891.

Prior to 1891 there were essentially two lines of case authority relating to the power of the Texas Supreme Court to set aside a jury verdict on evidentiary sufficiency grounds. The first line of cases begins in 1849 with *Carter v. Carter*.<sup>14</sup> *Carter* categorically rejected the notion that a trial or appellate court could weigh evidence to determine its sufficiency. Later cases, however, would ultimately allow a very limited type of sufficiency review but only when required to prevent manifest injustice.

The court held in *Carter*:

The court must determine upon the *admissibility* of the evidence, but it is the exclusive province of the jury to judge of the *weight* to which it is entitled. If the evidence is admissible, as conducing in any degree to maintain the issue, whether it shall *satisfy* the jury of the truth of the fact which it conduces to prove, is a question which must of necessity belong to them to determine; and though it might not be sufficient to satisfy the mind of the judge, sitting as a chancellor, to decide the facts, yet if it has satisfied the jury, the court, and especially an appellate court, will not set aside their verdict merely because the evidence might not be deemed by a chancellor *sufficient* proof of the disputed fact. That would be to trench upon the right of trial by jury in this class of cases. It would be in effect to hold the verdict legal and effectual only in case it was in accordance with the opinion of the judge, but to render it a nullity, and of consequence to deny the right of a party to have the trial of the fact by a jury unless they should arrive at a conclusion in accordance with the opinion of the judge.<sup>15</sup>

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<sup>14</sup>5 Tex. 93 (1849).

<sup>15</sup>*Id.* at 100-01.

In 1856 in *Love v. Barber*, the supreme court held that even though “[t]he evidence . . . palpably and entirely fails to support the verdict of the jury,” it could not render judgment contrary to the verdict of the jury.<sup>16</sup> In 1857, the Supreme Court of Texas reaffirmed Carter in *Branch v. Dever*, stating:

It was for the jury to weigh the evidence, and decide whether he had violated his instructions; and it is not enough that their verdict may appear to be contrary to the weight of evidence. It was not without evidence to support it; and is not, therefore, contrary to the evidence. It was a case of conflict of evidence; and the Court did not err in refusing a new trial.<sup>17</sup>

The next year, however, in *Chandler v. Meckling*, the court appeared to rethink its sufficiency analysis by stating, “It will not do for the court to say that there is some evidence in support of the verdict, and it must stand. In such case, the true question must be, is the evidence reasonably sufficient to satisfy the mind of the truth of the allegations?”<sup>18</sup>

In 1869, the court decided the case of *City of San Antonio v. Lane*, and stated:

When there is no evidence competent to support a material issue, it is not error to charge the jury to find for the plaintiff. The rule can not apply unless there be evidence to weigh. If there be any evidence, is a question for the judge. Its sufficiency rests with the jury.<sup>19</sup>

Still later in 1869, the Texas Supreme Court reaffirmed but modified Carter in *A.J. Ward & Co. v. Bledsoe*.<sup>20</sup> In *A.J. Ward*, the court affirmatively deplored the fact that a chancellor was not available to make difficult factual determinations in an extremely complicated case. Nonetheless the court held:

Still, the doctrine has been uniformly maintained by an almost unbroken series of opinions, that the task of

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<sup>16</sup> 17 Tex. 312, 320 (1856).

<sup>17</sup> 18 Tex. 611, 614–15 (1857).

<sup>18</sup> 22 Tex. 36, 42 (1858).

<sup>19</sup> 32 Tex. 405, 416 (1869) (citation omitted).

<sup>20</sup> 32 Tex. 251 (1869).

interfering with the verdicts of juries is a delicate one, under a system which so jealously arrogates the right of a jury to be the exclusive judge of the weight of evidence in all cases submitted for its deliberation. It has been the constant and unvarying practice of this court, and of all courts, where the trial by jury is an adjunct of the judicial system, never to disturb a verdict if any testimony was adduced upon the trial upon which a jury might base its finding. This practice is founded upon the rule that the jury is the exclusive judge of the facts of the case—or, in other words, of the weight of the evidence. It is only in cases where the verdict appears, *at the first blush*, to be so palpably wrong, oppressive, unjust, and subversive of legal right, that a court can vindicate its action in depriving a party of this imprescriptible, inviolable and constitutional right of trial by jury, when the amount in controversy exceeds ten dollars. If a court could always interfere and set aside a verdict, upon its own judgment that it was not sustained by the weight of evidence, the trial by jury would be a mere bagatelle, and a useless appendage of the court.<sup>21</sup>

*A.J. Ward* appears to modify *Carter* to permit limited sufficiency review only when the verdict was manifestly unjust, thus creating the legal basis for the language now expressed in Texas Rule of Civil Procedure 324(b)(3). In 1890, the Supreme Court of Texas decided *Missouri Pacific Railway Co. v. Somers*.<sup>22</sup> At the time of the *Somers* decision, shortly before the constitutional amendments in 1891, the supreme court still retained both legal and factual sufficiency jurisdiction. In *Somers* the supreme court held:

Although this court has the power to review a case upon the facts, and to set aside a verdict which has evidence to support it, that power has been reluctantly exercised. But it is the right and duty of the court to set aside a verdict, when it is against such a preponderance of the evidence, that it is clearly wrong.<sup>23</sup>

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<sup>21</sup> *Id.* at 253–54.

<sup>22</sup> 78 Tex. 439, 14 S.W. 779 (1890).

<sup>23</sup> *Id.* at 779. *Somers* is of questionable authority. It relied on one case that was decided after the Civil War by what is often referred to as the Reconstruction era court. Former Justice Ted

2. The 1891 amendments to the Texas Constitution and 100 years of case law.

In 1891, the Texas Constitution was amended in two important ways. The first was to create what was then known as the courts of civil appeals investing those courts with appellate jurisdiction. The second was to state that “[t]he decision of said [courts of civil appeals] shall be conclusive upon all questions of fact brought before them on appeal or error.”<sup>24</sup> The latter provision is oftentimes referred to in Texas as the “factual conclusivity clause.”

The factual conclusivity clause was first interpreted by the Supreme Court of Texas in 1898 in *Choate v. San Antonio & A.P. Railway Co.*<sup>25</sup> *Choate* first held that a no evidence issue presented a question of law, not of fact.<sup>26</sup> Therefore, it followed that the decision of the court of civil appeals upon such a question was subject to review by the Supreme Court of Texas.

However, the supreme court went on to hold:

Nor do we concur in the opinion that the courts of civil appeals have the right to conclusively determine the facts of any case. Our bill of rights contains the emphatic declaration that “the right of trial by jury shall remain inviolate.” It is the province of the jury to determine questions of fact; but it is in the power of the trial judge to set aside the finding, and to award a new trial. The court of civil appeals has the same power upon appeal. But clearly the trial court cannot set aside the verdict of the jury, and substitute its finding, instead of the finding of a jury, and render judgment accordingly. To say that the court of civil appeals may do so, when there is any conflict in the evidence, is to concede to that court a power over the facts greater than that possessed by the judge who heard the evidence, who had the witnesses before him, and had the

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Robertson, dissenting in *Cropper v. Caterpillar Tractor Co.*, noted, “Reliance upon authority from this era [the Civil War and Reconstruction] should be discouraged. Official matters of the State of Texas were in disarray and the decisions of this court are generally thought to be less authoritative from that time period.” 754 S.W.2d 646, 654 (Tex. 1988) (Robertson, J., dissenting). See also James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279 (1959).

<sup>24</sup>TEX. CONST. art. V, § 6.

<sup>25</sup>91 Tex. 406, 44 S.W. 69 (1898).

<sup>26</sup>*Id.* at 69.

opportunity of judging of their credibility by their appearance and manner of testifying. It is a grave misapprehension to suppose that either the recent amendments to the judiciary article of the constitution, or the statutes passed in pursuance thereof, were intended to confer such power.<sup>27</sup>

*Choate* thus held the factual conclusivity clause did not function as a grant of authority to the courts of civil appeals, but rather was instead an express limitation upon the judicial authority of the Supreme Court of Texas. *Choate* in effect held that the factual conclusivity clause limited the jurisdiction of the Supreme Court of Texas solely to questions of law and simultaneously prohibited the supreme court from reviewing or redeciding factual questions that had been “conclusively” resolved by the court of civil appeals. In *Choate*, Chief Justice Gaines concluded:

It is contrary to the genius of our institutions, as well as to the letter and spirit of every constitution ever adopted in this state, to suppose that it was ever intended to substitute the judgment of the appellate courts upon the facts of a case in place of that of the jury, and to make the determination of these courts final.<sup>28</sup>

The Texas Supreme Court made the respective roles of juries and judges in the Texas judicial system even more clear in *Benoit v. Wilson*.<sup>29</sup> There the court stated:

The jury, not the court, is the fact finding body. The court is never permitted to substitute its findings and conclusions for that of the jury. The jury is the exclusive judge of the facts proved, the credibility of the witnesses and the weight to be given to their testimony.<sup>30</sup>

In 1952, the supreme court issued a per curiam opinion authorizing the courts of civil appeals (but not the supreme court) to consider and weigh all of the evidence in a case, including evidence contrary to the verdict, solely for the purpose of remanding the case for a new trial. In *In re King's*

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<sup>27</sup> *Id.* (citing TEX. CONST. art. I, § 15).

<sup>28</sup> *Id.* at 70.

<sup>29</sup> 150 Tex. 273, 239 S.W.2d 792 (1951).

<sup>30</sup> *Id.* at 796.

*Estate*, the petitioner had urged the court of civil appeals to remand the case for a new trial on the ground that the verdict was “so contrary to the overwhelming weight of all the evidence as to be clearly wrong and unjust.”<sup>31</sup> The court of civil appeals erroneously treated the *In re King’s Estate* issue as a no evidence complaint, holding that the existence of any evidence of probative force in support of the verdict determines that the verdict is not contrary to the overwhelming weight of all the evidence, and such a finding is conclusive and binding on both the trial court and the appellate court.<sup>32</sup> Reversing, the supreme court held:

That rule, like the rule whereby the reviewing court looks only to the evidence favorable to the verdict, and the rule of whether reasonable minds could differ, applies, and applies only, to the question of whether the evidence as a matter of law requires a conclusion contrary to the verdict. Such tests are not applicable to the question [of factual sufficiency] under consideration. The latter is one of fact. It is not infrequently described as a question of “sufficiency” of the evidence. The question requires the Court of Civil Appeals, in the exercise of its peculiar powers under the constitution and Texas Rules of Civil Procedure . . . to consider and weigh all of the evidence in the case and to set aside the verdict and remand the cause for a new trial, if it thus concludes that the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust—this, regardless of whether the record contains some “evidence of probative force” in support of the verdict. . . . The evidence supporting the verdict is to be weighed along with the other evidence in the case, including that which is contrary to the verdict.<sup>33</sup>

The court continued:

It is, indeed, not simple to describe the intellectual process to be followed by the Court of Civil Appeals in passing on the fact question—to specify just how a verdict may be supported by evidence of probative force and at the

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<sup>31</sup> 150 Tex. 662, 244 S.W.2d 660, 661 (1952).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citations omitted).

same time be on all the evidence so clearly unjust as to require a new trial. But Article 5, § 6 of the Constitution, Vernon's Ann. St., is no more to be ignored than any other part of that document, and that provision, with the decisions, statutes and rules based upon it, requires the Court of Civil Appeals, upon proper assignment, to consider the fact question of weight and preponderance of all the evidence and to order or deny a new trial accordingly as to the verdict may thus appear to it clearly unjust or otherwise. This is the meaning given the constitutional phrase "all questions of fact brought before them on appeal or error" . . . . But for that interpretation there would be no "questions of fact" for the Court of Civil Appeals to determine, since it cannot, save as a matter of law on conclusive evidence or lack of evidence, determine factual issues as a basis for rendering judgment.<sup>34</sup>

*In re King's Estate* should actually have addressed only a very narrow legal issue. When the supreme court determined that the court of civil appeals had incorrectly treated the appellant's complaint as a question of law as opposed to a question of fact, no further discussion of a hypothetical "factual sufficiency" issue was required. Nonetheless, two cases were cited by the supreme court as authority for the court of civil appeals to "weigh" evidence. The first was *Hall Music Co. v. Robinson*.<sup>35</sup> The only holding of the court in *Hall Music* was that a particular assignment of error allowed review solely of a question of law, that is whether there was or was not evidence to support the verdict. The court held that since the appellant's complaint related only a question of law, the question of the sufficiency of the evidence, being one of fact, was not before the court, and the court of civil appeals was not authorized to decide it.<sup>36</sup> *Hall Music* in no way authorized the courts of civil appeals to weigh evidence. The second decision relied on by the supreme court in *In re King's Estate* was *Wisdom v. Smith*.<sup>37</sup> In *Wisdom*, according to the supreme court, "[T]he Court of Civil Appeals apparently assumed that it had jurisdiction to pass upon the sufficiency of the evidence to sustain the trial court's judgment, and also to

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<sup>34</sup> *Id.* at 662.

<sup>35</sup> 117 Tex. 261, 1 S.W.2d 857 (1928).

<sup>36</sup> *Id.* at 857.

<sup>37</sup> 146 Tex. 420, 209 S.W.2d 164 (1948).

make original findings of fact where such findings were not expressly made by the district court.”<sup>38</sup>

Rejecting this contention, the court unequivocally held in *Wisdom* that the court of civil appeals had no authority to make its own findings of fact and had no jurisdiction to determine original questions of fact in any case on appeal.<sup>39</sup> *Wisdom* did not remotely suggest that the court of civil appeals had any authority or power to weigh evidence. Thus, close analysis of *In re King’s Estate* reveals its holding that courts of civil appeals could weigh conflicting evidence, although only for the limited purpose of remanding for a new trial, was not only classic obiter dicta because its discussion of factual sufficiency was legally unnecessary to its decision, but also because the opinion was unsupported by the very precedent upon which it relied. Nonetheless, apparently without careful analysis, the opinion of *In re King’s Estate* has been cited countless times as the law in Texas, however incorrectly the case was originally decided.

In 1985, the Supreme Court of Texas decided *Dyson v. Olin Corp.*<sup>40</sup> In *Dyson*, the court of appeals determined there was insufficient evidence to support the jury’s finding of gross negligence and remanded the case for a new trial.<sup>41</sup> The supreme court reversed, holding the court of appeals had applied an incorrect legal sufficiency standard of review in violation of *Burk Royalty Co. v. Walls*.<sup>42</sup> Concurring, Justice Robertson joined by Justice Ray expressed the first public concern that the application of Article V, Section 6, the factual conclusivity clause, might transgress the right to trial by jury. He stated:

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<sup>38</sup> *Id.* at 166. This result was also consistent with the commandments of the U.S. Constitution as interpreted by the Supreme Court of the United States. *Accord* *Hetzel v. Prince William County, Va.*, 523 U.S. 208 (1998) (holding the right to trial by jury precludes any court from itself determining an amount of damages in a manner contrary to that found by the jury and imposing that result on the parties by remittitur); *see* *Kennon v. Gilmer*, 131 U.S. 22, 27–28 (1889) (holding a judgment reducing the amount of the verdict “without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict, before rendering judgment for the rest, was irregular, and, so far as we are informed, under precedented”); *see also* *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

<sup>39</sup> *Wisdom*, 209 S.W.2d at 166.

<sup>40</sup> 692 S.W.2d 456 (Tex. 1985).

<sup>41</sup> *Id.* at 456.

<sup>42</sup> *Id.*; 616 S.W.2d 911, 922 (Tex. 1981).

We should not interpret the nebulous provision of article V, section 6 in such a way as to diminish or impair this constitutional guarantee of jury trial.

The jury, not the court, is the fact finding body. The court is never permitted to substitute its findings and conclusions for that of a jury. The jury is the exclusive judge of the facts proved, the credibility of the witnesses and the weight to be given to their testimony.

Courts are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable. “Trial by record before an appellate court, even assuming an accurate record and conscientious review, has little resemblance to a jury trial.” Some would argue that there exists a distinction between a court reviewing the sufficiency of the evidence and a court substituting its thought processes. However, it is extremely difficult to articulate what the possible distinction could be. I conclude that it is a distinction which exists in semantics and theory only but which does not exist in reality. If a court is weighing the evidence, then it is substituting its thought processes.

It is not of controlling significance that on “insufficiency” points a court of appeals can only remand for new trial; such action still represents a serious infringement of the *inviolable* right to trial by jury. A jury trial is of little importance if an appellate court can remand until it gets a jury to agree with it.<sup>43</sup>

This concern by Justice Robertson, that any factual sufficiency review by a court of appeals constitutes a substitution of the court’s thought process for that of the jury and thereby infringes on the constitutional right of jury trial, continued to be raised in a trilogy of cases on which the supreme court granted writ of error and heard argument the same day. They were *Pool v. Ford Motor Co.*,<sup>44</sup> *Cropper v. Caterpillar Tractor*

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<sup>43</sup> *Dyson*, 692 S.W.2d at 458–59 (quoting *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792, 796 (1951)) (citations omitted).

<sup>44</sup> 715 S.W.2d 629 (Tex. 1986).

*Co.*,<sup>45</sup> and *Hurlbut v. Gulf Atlantic Life Insurance Co.*<sup>46</sup> In *Pool, Cropper*, and *Hurlbut* the respective courts of appeals had found the jury's negative answers to defensive issues were against the great weight and preponderance of the evidence, requiring a new trial.

In *Pool*, the court acknowledged the inherent tension between protecting the constitutionally guaranteed inviolate right of trial by jury while simultaneously recognizing that decisions of the courts of appeals shall be constitutionally conclusive on all questions of fact. Writing for the majority, Justice Kilgarlin stated:

[This] argument is not a novel one. Indeed, shortly after the 1891 adoption of the amendment creating the then courts of civil appeals and delineating their jurisdiction, this court recognized the potential constitutional conflict and sought to strike a balance.

In essence, Chief Justice Gaines, speaking for the court in *Choate*, wrote that it was in the province of the jury to determine questions of fact but it was in the power of courts of civil appeals to set aside the finding and to award a new trial.<sup>47</sup>

Justice Kilgarlin continued:

While a cogent argument may be made in support of the right to hold that insufficient evidence exists to uphold a jury's affirmative finding, it becomes more difficult to rationalize why, when a jury fails to find a fact from a preponderance of the evidence, that non-finding should be set aside on a great weight and preponderance standard. That does appear to be allowing a substitution of thought processes.<sup>48</sup>

In order that this court may in the future determine if a correct standard of review of factual insufficiency points has been utilized, courts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the

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<sup>45</sup> 754 S.W.2d 646 (Tex. 1988).

<sup>46</sup> 749 S.W.2d 762 (Tex. 1987). The author was counsel for the petitioners in that case.

<sup>47</sup> *Pool*, 715 S.W.2d at 633 (citation omitted).

<sup>48</sup> *Id.* at 634.

evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. It is only in this way that we will be able to determine if the requirements of *In [r]e King's Estate* have been satisfied.<sup>49</sup>

In *Cropper*, the court discussed the standards of factual and legal sufficiency review in Texas yet declined to change or modify that precedent. Instead, the court stated:

It is well established that an appellate court cannot merely substitute its judgment for that of a jury, because the court cannot exercise its constitutional authority to the detriment of the right of trial by jury, which is of equal constitutional stature. It has been suggested that when a court of appeals engages in determining whether a jury's "non-finding" is against the great weight and preponderance of the evidence, it must necessarily substitute its thought process, if not its "judgment," for that of the jury.

....

[Nevertheless, the] right of trial by jury and appellate court review of fact questions have peacefully co-existed for almost one hundred and fifty years, and are thoroughly rooted in our constitution and judicial system. Aside from the inescapable fact that this court cannot amend the Constitution, we are not prepared to sacrifice either for the benefit of the other.<sup>50</sup>

In *Hurlbut*, Justice Robertson dissented, joined by Justices Ray and Mauzy, arguing that this traditional balance between the right of jury trial and the right of remand from the court of appeals for new trial should be reexamined in order to fully protect the right of jury trial. He stated:

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<sup>49</sup> *Id.* at 635.

<sup>50</sup> *Cropper*, 754 S.W.2d at 651–52.

If two out of three judges sitting on an appellate panel can reweigh the evidence and undo the work of a jury who listened in person to all the evidence, then it can no longer be said that the right of trial by jury is “inviolable.” Instead, that right is debased and diminished.<sup>51</sup>

Justice Robertson continued:

The Constitution itself says nothing about allowing courts of appeals to weigh the evidence in a case or about giving them the power to review for sufficiency of the evidence. It is this court which has engrafted this meaning onto the nebulous and indeterminate language of article V, section 6. In doing so, we ourselves have created the conflict and have permitted an unconstitutional infringement upon the right of trial by jury.

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However, I now conclude that permitting courts of appeals to engage in a process of weighing the evidence is in reality allowing them to substitute their own thought processes for those of the jury. Any distinction between the two is a distinction that exists in semantics only and not in practice. No matter how many ways we try to articulate a standard, the reality is that a judge simply cannot engage in a process of weighing all the evidence without engaging in the same process as the jury. This is wrong. The jury, not the court, is the fact finding body; and the jury is the exclusive judge of the credibility of witnesses and the weight to be given their testimony.

....

This issue goes to the heart of how our society distributes power. As a people, we have chosen by our social compact to place power over the resolution of factual disputes in the hands of common citizens rather than in the hands of an elite group of judges. Along with the right to vote, the right of trial by jury is one of the ways our society

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<sup>51</sup> *Hurlbut*, 749 S.W.2d at 769 (Robertson, J., dissenting).

disperses power rather than concentrating it in the hands of a few.

It is our job as judges to ensure the preservation to the people of the rights guaranteed in the constitution. Moreover, we must ensure that those rights retain real meaning and do not become mere formalisms. To the people of our state, a jury trial is more than a ceremonial symbol of political freedom; it is a process with real meaning. We cannot permit this right to deteriorate to the point that a jury verdict is allowed to stand only if it agrees with the view of the evidence taken by appellate judges.<sup>52</sup>

Despite these concerns over potential infringement of the fundamental right of jury trial, in the 100 years after enactment of the 1891 constitutional amendments, the supreme court continued to seek a balance between the constitutional provisions. The constitutional right of trial by jury was recognized as a fundamental right to be scrupulously protected, subject to the power of the courts of appeal (but not the supreme court) to review the evidence for factual sufficiency and remand for a new jury trial to avoid manifest injustice (but not to substitute its own factual findings in place of the jury's verdict).

*B. Historical Development of Standard of Review for Sufficiency in Particular Cases.*

Before examining the most recent Texas Supreme Court opinions regarding the standards of review for legal sufficiency and factual sufficiency, it is crucial to understand the historical development of the standards of review in Texas. The traditional standards for legal sufficiency review and factual sufficiency review are discussed first, followed by the history of how the supreme court has traditionally addressed standard of review questions in the more difficult categories of gross negligence cases, bad faith cases, and cases requiring clear and convincing evidence.

1. The traditional standard for legal sufficiency review.

The traditional legal sufficiency standard of review in Texas requires the appellate court to consider only the evidence and reasonable inferences

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<sup>52</sup>*Id.* at 770–71.

which support the finding of the trier of fact and to disregard all evidence and inferences to the contrary.<sup>53</sup> Although the case of *Garza v. Alviar*<sup>54</sup> is one of the cases commonly cited for the traditional standard of legal sufficiency review, in actuality the roots of the traditional standard of review for legal sufficiency in Texas go back to at least 1896 in *Choate v. San Antonio & A.P. Railway Co.*, where the court stated:

We therefore conclude that the evidence, viewed in its most favorable light in favor of the plaintiff, would not justify a jury in finding that the defendant was, upon the occasion, guilty of any negligence, and that, therefore, the court of civil appeals rightly held that under the same evidence the trial court ought to instruct the jury for the defendant.<sup>55</sup>

The traditional legal sufficiency standard of review has fundamentally adhered to the original concept stated in *Choate* but has been further refined over the years. The court's decision in *Cartwright v. Canode* is still instructive:

This court cannot reverse a judgment because the preponderance of the evidence is against the jury's conclusion.

The rule by which this court must be governed is well stated thus:

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the courts.

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<sup>53</sup> See *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997); *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182 (Tex. 1995); see also Elaine Grafton Carlson, *Review of Factual Sufficiency*, in 6 TEXAS CIVIL PRACTICE § 44:9 (2d ed. 1998); Hall I, *supra* note 6, at 478–79 n.853.

<sup>54</sup> 395 S.W.2d 821, 823 (Tex. 1965).

<sup>55</sup> 90 Tex. 82, 36 S.W. 247, 249–50 (1896), *opinion set aside on reh'g*, 90 Tex. 82, 37 S.W. 319 (1896).

In passing upon this question, we must reject all evidence favorable to the plaintiffs in error, and consider only the facts and circumstances which tend to sustain the verdict, and if the jury, in an honest and impartial effort to arrive at the truth, might have reached the conclusion embodied in this verdict, this court cannot set it aside. In considering this question, we must take into account all of the facts and circumstances attending the transaction.<sup>56</sup>

In addition to a thorough exposition of the rule itself, *Cartwright v. Canode* gives lie to a later criticism of the traditional standard for legal sufficiency review. That criticism is that the traditional standard does not consider all of the evidence in the record before making a sufficiency determination. *Cartwright* unambiguously holds that in order to make a proper legal sufficiency determination, the court should in the first instance take into account all of the facts and circumstances of the case under consideration.<sup>57</sup> Only after it has done so can the court properly determine what evidence and inferences can be considered to be favorable to the trier of fact and what evidence and inferences would be contrary to the jury's verdict and should be disregarded.

The supreme court restated the same principles in 1928 in *Austin v. Cochran*, "Of course, in determining the question of law whether there is any evidence or not, it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature."<sup>58</sup>

Likewise, in *Renfro Drug Co. v. Lewis*, citing *Austin v. Cochran* and *Cartwright v. Canode*, the supreme court again stated, "[I]t is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature."<sup>59</sup>

Therefore, under the traditional standard of review for legal sufficiency in Texas, if there is any evidence of probative force, that is more than a scintilla, a legal sufficiency challenge must fail.

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<sup>56</sup> 106 Tex. 502, 171 S.W. 696, 697–98 (1914) (citation omitted).

<sup>57</sup> *Id.* at 698.

<sup>58</sup> 2 S.W.2d 831, 832 (Tex. Comm'n App. 1928).

<sup>59</sup> 149 Tex. 507, 235 S.W.2d 609, 613 (1950) (citing *Austin v. Cochran*, 2 S.W.2d 831 (Tex. 1928); *Cartwright v. Canode*, 106 Tex. 502, 171 S.W. 696 (1914)).

## 2. The traditional standard for factual sufficiency review.

Traditional review of the factual sufficiency of the evidence may be performed by the trial court in deciding a motion for new trial or by the court of appeals in deciding whether to remand for new trial. The traditional factual sufficiency review seeks to determine whether, even if there is evidence of probative force to support the jury's verdict, the finding is nonetheless so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.<sup>60</sup> Under the traditional standard of factual sufficiency review, if the court of appeals has applied the correct legal standard in its determination of factual sufficiency, its determination is final because of the factual conclusivity clause of the Texas Constitution.<sup>61</sup>

If the proper procedural prerequisites have been satisfied when a legal sufficiency complaint is sustained, ordinarily judgment is rendered in favor of the complaining party. However, when a factual sufficiency complaint is sustained, the trial court can only order a new trial or the court of appeals can only remand the case for a new trial.<sup>62</sup>

## 3. Traditional application of legal sufficiency review in gross negligence cases.

In *Burk Royalty Co. v. Walls*, the Texas Supreme Court confronted the difficult question of the proper standard of review and scope of review in gross negligence cases.<sup>63</sup> Justice Spears writing for the majority traced the development of the Texas definition of gross negligence from very early Texas jurisprudence, with an exhaustive history of both the standard and scope of review in such cases. The court defined the standard of review for legal sufficiency in gross negligence cases as follows:

In testing a jury finding of gross negligence, the same  
no evidence test should apply as to any other fact issue.  
The plaintiff has the burden to prove that the defendant was

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<sup>60</sup> *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

<sup>61</sup> See TEX. GOV'T. CODE ANN. § 22.225 (Vernon 2004 & Supp. 2007); *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

<sup>62</sup> See *Gulf, Colo. & Santa Fe Ry. Co. v. Deen*, 158 Tex. 466, 312 S.W.2d 933, 937 (1958), *mandamus granted*, 358 U.S. 57 (1958) (per curiam); see also Elaine Grafton Carlson, *Legal Sufficiency of Evidence*, in 6 TEXAS CIVIL PRACTICE § 33:11 (2d ed. 1998).

<sup>63</sup> 616 S.W.2d 911 (Tex. 1981).

grossly negligent. If the jury finds gross negligence, the defendant has the burden of establishing that there is *no evidence* to support the finding. The “some care” test utilized in prior workers’ compensation cases improperly reverses that burden. Under the “some care” test the defendant, instead of proving there is *no evidence* to support the verdict, would show there is *some* evidence that does not support the jury finding of gross negligence, i.e., entire want of care. The burden is thus shifted to the plaintiff to negate the existence of some care. This is almost an impossible task since anything may amount to some care. Moreover, the “some care” test does violence to the rule for testing the legal insufficiency of the evidence which requires that only the evidence viewed in its most favorable light and tending to support the jury’s finding may be considered. The jury, after all, does not have to believe evidence that “some care” was exercised. When there is *some* evidence of defendant’s entire want of care and also *some* evidence of “some care” by the defendant, the jury finding of gross negligence through entire want of care resolves the issue, and the appellate court is bound by the finding in testing for legal insufficiency.<sup>64</sup>

The court in *Burk Royalty* noted, however, that the court should look to all the surrounding facts and circumstances, not just individual elements or facts, in a legal sufficiency review.<sup>65</sup> In doing so, the court addressed a potential conflict in applying a traditional no evidence test while requiring a consideration of all the facts and evidence:<sup>66</sup>

At first glance there may appear to be some conflict in utilizing the traditional no evidence test and considering all

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<sup>64</sup> *Id.* at 920–21.

<sup>65</sup> *Id.* at 922.

<sup>66</sup> The supreme court’s holding that it should look to all the surrounding facts and circumstances is actually not a “conflict” but is completely consistent with its earlier articulation of the same principle in *Cartwright v. Canode*, which held that in order to make a proper legal sufficiency determination, the court should in the first instance take into account all of the facts and circumstances of the case under consideration before determining what evidence and inferences can be considered to be favorable to the trier of fact and what evidence and inferences would be contrary to the jury’s verdict and should be disregarded. *Cartwright v. Canode*, 106 Tex. 502, 171 S.W. 696, 698 (1914).

the facts and circumstances to determine gross negligence. The *McPhearson* and *Harbin* cases indicate that the existence of gross negligence need not rest upon a single, act or omission, but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence. A mental state may be inferred from actions. All actions or circumstances indicating a state of mind amounting to a conscious indifference must be examined in deciding if there is some evidence of gross negligence.<sup>67</sup>

Concurring in *Burk Royalty*, Chief Justice Greenhill expressed his concern with that portion of the traditional no evidence standard of review which disregards all evidence unfavorable to the jury's answer. He concluded that in determining the defendant's state of mind and conscious indifference, "the reviewing court must look at all the facts."<sup>68</sup>

Dissenting in *Burk Royalty*, Justice McGee rejected the majority's analysis entirely:

"Entire want of care" is now a misnomer. By changing the scope of review for gross negligence, we have also changed the way that we define gross negligence. The Court's opinion leaves us with a definition of gross negligence that is called an "entire want of care," but evidence of care by the defendant becomes irrelevant to determine if gross negligence has been established. If, on review, we disregard all evidence of care, we are clearly permitting recovery for less than an entire want of care. The established distinction between ordinary negligence and gross negligence has disappeared. This is particularly true if the reviewing court considers evidence of an employee's conduct which was not found to be gross negligence by the jury, as has been done in this case.<sup>69</sup>

Of course, an "entire want of care" was not really the complete definition of gross negligence at issue in the case. The true question was

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<sup>67</sup> *Burk Royalty Co.*, 616 S.W.2d at 922.

<sup>68</sup> *Id.* at 926.

<sup>69</sup> *Id.* at 927-28.

whether the evidence showed “that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.”<sup>70</sup> The dissent wanted the supreme court to have the power to reverse and render a jury’s decision on conscious indifference if any evidence of care could be found, exactly as pointed out by the majority. Such a result would have vastly increased the supreme court’s ability to review and nullify the decision of a jury.

Almost ten years later, in a case dealing with jury findings of alter ego rather than gross negligence, Justice Nathan Hecht reasserted this *Burk Royalty* dissenting argument in his own dissent in *Mancorp, Inc. v. Culpepper*.<sup>71</sup> In *Mancorp* the majority rejected a legal sufficiency challenge to the jury finding of alter ego. Relying upon the concurring opinion of Chief Justice Greenhill and the dissenting opinion of Justice McGee in *Burk Royalty*, and as a foreshadowing of opinions to come, Justice Hecht proposed that the legal sufficiency standard of review should require review and consideration of all the evidence, not just the evidence and inferences in a light most favorable to the challenged finding.<sup>72</sup>

#### 4. Traditional application of legal sufficiency review in bad faith cases.

Although Justice Hecht in 1990 was unable to command a majority, the same arguments he expressed in *Mancorp* were repeated in several of his dissents related to the judicially created doctrine of bad faith in Texas. Indeed his dissatisfaction with bad faith and the traditional legal standard of review boiled over in his dissent in *State Farm Lloyds v. Nicolau*.<sup>73</sup> In that dissent, Justice Hecht compared the tort of bad faith to randomly firing an assault weapon into a crowd of innocent people and went on to state:

For plaintiffs, bad faith is more like Hollywood television’s Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you can play whenever you want, and if you win you hit the jackpot—tens, maybe hundreds, of thousands of dollars for the awful mental

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<sup>70</sup> *Id.* at 927 (emphasis omitted).

<sup>71</sup> 802 S.W.2d 226, 232 n.1 (Tex. 1990).

<sup>72</sup> *Id.*

<sup>73</sup> 951 S.W.2d 444 (Tex. 1997).

anguish that invariably seems to accompany denial of even the smallest insurance claim, and millions in punitive damages. And like the lottery, bad faith liability is paid ultimately by the public. Insurance companies have not been authorized to print their own currency; the money to pay successful plaintiffs and their attorneys comes from policyholders, and they obtain the money to pay premiums from wages or sales. In effect, bad faith is a levy on everyone to benefit a few—what some have called a tort tax.<sup>74</sup>

Justice Hecht's dissent in *Nicolau* echoed his objection in *Mancorp* to the legal restraint that the traditional legal sufficiency review imposed on the supreme court's ability to reverse a jury verdict on a no evidence challenge. He articulated the same argument in a concurring opinion in *Universe Life Insurance Co. v. Giles*:

The difficulty in applying this no-evidence standard in bad-faith cases is this. If, on the one hand, a judgment for bad faith may be supported by nothing more than the absence of evidence of a reasonable basis for denying or delaying a claim, then no judgment can be reversed for want of evidence. If all the evidence of a reasonable basis for the insurer's actions—evidence that does not support a verdict of no reasonable basis—is disregarded, then there will never be any evidence of a reasonable basis. If, on the other hand, a judgment for bad faith must be supported by evidence negating the existence of any reasonable basis, then no judgment can survive review. No plaintiff can disprove every reasonable basis conceivable for denying or delaying a claim. Inasmuch as these are the only two alternatives—either affirm every bad-faith finding or reverse every bad-faith finding—we have quite properly referred to the problem as a logical “conundrum.”<sup>75</sup>

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<sup>74</sup> *Id.* at 453–54.

<sup>75</sup> 950 S.W.2d 48, 74 (1997).

Giles sought to clarify both the tort of bad faith first recognized in *Arnold v. National County Mutual Fire Insurance Co.*,<sup>76</sup> and the quantum and quality of proof necessary to support a bad faith finding. In two decisions the court had previously explained in some detail how the traditional legal sufficiency test should be properly applied in bad faith cases.<sup>77</sup> The majority in *Giles* addressed the concerns raised by Justice Hecht by restating the standard for bad faith in positive terms based on liability being “reasonably clear,” as opposed to the absence of a “reasonable basis” for denial.<sup>78</sup> Justice Hecht responded by arguing that the “reasonably clear” standard should be decided by the court as a question of law rather than by the jury as a question of fact.<sup>79</sup> The majority specifically and emphatically rejected this alternative method of taking the decision away from the jury:

We have long recognized that the Texas Constitution confers an exceptionally broad jury trial right upon litigants. And we have warned that courts must not lightly deprive our people of this right by taking an issue away from the jury. A court may be entitled to decide an issue as a matter of law when there is no conflict in the evidence, but when there is evidence on either side, the issue is a fact question. Justice Hecht’s concurring opinion identifies no circumstances that make a jury unsuited to decide whether an insurer has denied or delayed payment of a claim after its liability has become reasonably clear.<sup>80</sup>

The majority was correct in *Giles* to note that abolition of the traditional standard of legal sufficiency review would make it far easier for the Supreme Court of Texas to reverse jury verdicts with which a majority of the justices did not personally agree. The majority’s analysis in *Giles* was also correct for other reasons. First, the traditional standard of review of legal sufficiency itself is an objective standard of review. It does not allow or permit the subjective opinions or individual assessments of individual

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<sup>76</sup>725 S.W.2d 165 (Tex. 1987); see also *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994).

<sup>77</sup>*Lyons v. Millers Cas. Ins. Co. of Tex.*, 866 S.W.2d 597, 600 (Tex. 1993); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Dominguez*, 873 S.W.2d 373, 376 (Tex. 1994).

<sup>78</sup>See *Giles*, 950 S.W.2d at 56.

<sup>79</sup>*Id.* at 71 (Hecht, J., concurring).

<sup>80</sup>*Id.* at 56 (citations omitted).

justices to cloud or affect the proper disposition of the case. All that is required under the traditional legal sufficiency standards is for the court, after having considered the entire case and all relevant circumstances, to determine what evidence and inferences are favorable to the fact finder's determination and what evidence and inferences are not. Second, proper application of the traditional standard for legal sufficiency is also objective. Only the evidence and inferences which support the verdict or finding of fact are to be considered and all evidence or inferences which are contrary to the verdict are to be disregarded. Thus both the standard and its application compel the reviewing court to objectively identify whether any evidence would support the verdict including any inferences favorable to it without regard to whether other evidence or inferences in the record might be to the contrary. As the court noted in *Cartwright v. Canode*, in a legal sufficiency challenge, the Supreme Court of Texas is not authorized to reverse a jury's verdict or a finding of fact simply because the evidence may preponderate against the finding.<sup>81</sup> This traditional standard of review assures that any evidence of probative force, that is any evidence which is more than a scintilla, is sufficient to uphold the verdict against a legal sufficiency challenge.

Additionally, the traditional standard of review requires the reviewing court to observe and respect the difference between legal and factual sufficiency under the Texas Constitution. The traditional standard strictly limits the power of the supreme court to reverse a jury verdict with which it does not agree by leaving it solely to the courts of appeal to weigh the factual sufficiency of the evidence. Because of the factual conclusivity clause, only a complaint that the evidence is legally insufficient or that the court of appeals applied an incorrect standard in evaluating factual sufficiency can be decided by the Supreme Court of Texas. The traditional legal sufficiency review standard thus enforces the constitutional prohibition against the supreme court's usurpation of the "factually conclusive" portion of the jurisdiction of the courts of appeals.

##### 5. History of the standard of review in cases requiring clear and convincing evidence.

Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or

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<sup>81</sup> 106 Tex. 402, 171 S.W. 696, 697 (1914).

conviction as to the truth of allegations sought to be established.”<sup>82</sup> The meaning of “clear and convincing evidence” as a burden of proof for the factfinder or as a standard for appellate review has nonetheless, at times, has proved to be problematic for Texas courts.

Historically, the Texas Supreme Court treated the requirement of clear and convincing evidence as guidance for the trial judge and intermediate appellate courts in making factual sufficiency reviews, and not as a standard to be given to the jury as a burden of proof or as a basis for legal sufficiency reviews by the supreme court.

More than fifty years ago, in *Sanders v. Harder*, the supreme court squarely rejected the contention that a standard of “clear and convincing” evidence should be submitted to the jury:

In our blended system the field in which that rule operates is very narrow. In practical effect [“clear and convincing evidence”] is but an admonition to the judge to exercise great caution in weighing the evidence. No doctrine is more firmly established than that issues of fact are resolved from a preponderance of the evidence, and special issues requiring a higher degree of proof than a preponderance of the evidence may not be submitted to a jury.<sup>83</sup>

Ten years later, the Supreme Court of Texas rejected the notion that it had jurisdiction, because of the factual conclusivity clause, to even consider whether evidence was “clear and convincing.” In *Omohundro v. Matthews*, the court stated:

Finally, it is contended by Omohundro that the jury’s findings to certain special issues are not supported by clear and convincing evidence. This court has no jurisdiction of these questions. The sufficiency of the evidence, in so far as measuring its weight and preponderance, is a question of fact; and this court has no jurisdiction over fact questions. The clear and convincing test is but another method of measuring the weight of the credible evidence, and thus is also a fact question.<sup>84</sup>

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<sup>82</sup> State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

<sup>83</sup> 148 Tex. 593, 227 S.W.2d 206, 209 (1950).

<sup>84</sup> 161 Tex. 367, 341 S.W.2d 401, 410–11 (1960) (citing *Sanders v. Harder*, 148 Tex. 593, 227 S.W.2d 206 (1950)).

In 1975, relying on *Sanders* and *Omohundro*, the supreme court considered and rejected a proposal that a third standard of appellate review for clear and convincing evidence was appropriate or even permissible. In *Meadows v. Green*, the court stated:

In reaching its decision the Court of Civil Appeals has sought to apply a third standard of reviewing the evidence presented at trial—the “clear and convincing” standard. In Texas there are but two standards by which evidence is reviewed: factual sufficiency and legal sufficiency. The requirement of clear and convincing evidence is merely another method of stating that a cause of action must be supported by factually sufficient evidence.<sup>85</sup>

The Texas case law until this point essentially established three tenets: the requirement of clear and convincing evidence did not change the burden of proof for the factfinder at trial, which remained preponderance of the evidence in civil cases; the requirement of clear and convincing evidence was a means of guidance for a factual sufficiency review, which could not be made by the supreme court due to the factual conclusivity clause; and a clear and convincing requirement did not change the standard of review for legal sufficiency, which remained under the traditional legal sufficiency standard of review.

Beginning in 1979, however, the Supreme Court of Texas first required the use of a clear and convincing standard for the trial burden of proof in an involuntary mental health commitment proceeding because it was mandated to do so on remand by the United States Supreme Court.<sup>86</sup> The court subsequently required clear and convincing evidence to meet the burden of proof in parental termination cases in 1980,<sup>87</sup> and in defamation cases in 1984 in *Doubleday & Co. v. Rogers*<sup>88</sup> and again in 1989 in *Casso v. Brand*.<sup>89</sup> In both *Doubleday* and *Casso*, the Supreme Court of Texas used its common law power to adopt this standard based on the Supreme Court of the United States’ holding in *New York Times Co. v. Sullivan*.<sup>90</sup>

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<sup>85</sup> 524 S.W.2d 509, 510 (Tex. 1975) (citations omitted).

<sup>86</sup> *Addington*, 588 S.W.2d at 570.

<sup>87</sup> *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

<sup>88</sup> 674 S.W.2d 751 (Tex. 1984).

<sup>89</sup> 776 S.W.2d 551, 554 (Tex. 1989).

<sup>90</sup> 376 U.S. 254, 270 (1964).

Through these years, with one exception, the Texas Supreme Court's grafting of a clear and convincing evidence standard into the burden of proof at trial was limited to cases involving "fundamental constitutional rights"<sup>91</sup> or "quasi-criminal wrongdoing"<sup>92</sup> because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money."<sup>93</sup> The only exception is a 1988 case, *Somer v. Bogart*, in which the Dallas Court of Appeals held the trial court committed error when it failed to require clear and convincing evidence in the burden of proof to establish a parole trust.<sup>94</sup> In its per curiam opinion, the supreme court stated tersely, "We approve the holding of the court of appeals that the burden of proof in refuting the presumption of gift is by clear and convincing evidence."<sup>95</sup> The court has never relied on *Somer v. Bogart* since it was written.<sup>96</sup>

With the introduction of a clear and convincing evidence standard into the burden of proof at trial for certain types of cases,<sup>97</sup> the court had to address whether the standard of review in those cases had changed. In 1989, in a case involving a question of paternity as a predicate to an illegitimate child maintaining a wrongful death action for the death of the putative father, the supreme court held that the alleged child would have to prove the biological relationship by clear and convincing evidence, but that the heightened burden of proof at trial did not change the standard for legal sufficiency of the evidence.<sup>98</sup> For a legal sufficiency review of a no

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<sup>91</sup> *In re G.M.*, 596 S.W.2d at 846.

<sup>92</sup> *Addington v. Texas*, 441 U.S. 418, 424 (1979).

<sup>93</sup> *Id.*

<sup>94</sup> 749 S.W.2d 202, 205 (Tex. App.—Dallas 1988), *writ denied*, 762 S.W.2d 577 (Tex. 1988) (per curiam).

<sup>95</sup> *Bogart v. Somer*, 762 S.W.2d 577, 577 (Tex. 1988).

<sup>96</sup> Nonetheless, former Chief Justice Phillips cryptically mentions the case in his defenses of the *City of Keller* opinion. See discussion *infra* Part IV.B.3; Thomas R. Phillips & Martha G. Newton, *Evolving Notions of "No Evidence"*, in PRACTICE BEFORE THE TEXAS SUPREME COURT ch. 12.3, at 3 (State Bar of Tex. 2007). For a discussion of how *Somer v. Bogart* strays from the other statements of the Texas Supreme Court regarding use of a clear and convincing standard in the burden of proof, see Bill Vance, *The Clear and Convincing Evidence Standard in Texas: A Critique*, 48 BAYLOR L. REV. 391, 407–08 (1996).

<sup>97</sup> Cases for which there is a clear and convincing standard in the burden of proof at trial include both those cases which the Texas Supreme Court has judicially recognized as requiring that burden, as well as those cases made legislatively subject to a clear and convincing burden of proof.

<sup>98</sup> *Garza v. Maverick Mkt., Inc.*, 768 S.W.2d 273, 276 (Tex. 1989).

evidence (directed verdict) holding, a court must still “consider all of the evidence in the light most favorable to the plaintiff, disregarding all contrary evidence and inferences.”<sup>99</sup>

In 1994, in *Ellis County State Bank v. Kever*, the supreme court again rejected a proposed “heightened standard of review” for a requirement of clear and convincing evidence in malicious prosecution cases.<sup>100</sup> The court stated, “This Court has explained the occasional suggestion that facts must be established by ‘clear and convincing evidence’ as ‘but an admonition to the judge to exercise great caution in weighing the evidence.’”<sup>101</sup> The requirement of clear and convincing evidence is merely another method of stating that a cause of action must be supported by factually sufficient evidence.<sup>102</sup>

In response to the majority opinion in *Ellis County State Bank* which rejected a heightened standard for review of clear and convincing evidence in malicious prosecution cases, Justice Hecht dissented:

This higher appellate standard, applied to a review of the legal sufficiency of the evidence, should not require a weighing of the evidence. In the usual case, evidence is legally sufficient to support liability if it is more than a scintilla, that is, if there is at least some probative evidence, no matter how small. Applying this higher standard to malicious prosecution cases, liability would be sustained only if the supporting evidence is clear, convincing, positive and satisfactory. Probative evidence which does not meet this standard would not be legally sufficient for liability.

This Court has applied a heightened clear-and-convincing standard of evidentiary review in *Doubleday & Co. v. Rogers*, in reviewing the evidence of malice in a defamation case. There the standard was required by the United States Constitution. The Court did not consider that applying the standard required a weighing of the evidence which the Texas Constitution commits exclusively to the

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<sup>99</sup> *Id.* (quoting *Jones v. Tarrant Util. Co.*, 638 S.W.2d 98, 102 (Tex. 1982)).

<sup>100</sup> 888 S.W.2d 790 (Tex. 1994).

<sup>101</sup> *Id.* at 793 (citations omitted).

<sup>102</sup> *Id.* at 792 n.5 (quoting *State v. Turner*, 556 S.W.2d 565 (Tex. 1977)).

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courts of appeals, or it would have remanded the case to that court to perform the required review. There is no reason why the Court could not perform the same review in other cases.<sup>103</sup>

Responding to Justice Hecht's ruminations in his dissent and rejecting that rationale, the majority in *Ellis County State Bank* stated:

Agreeing with the Court that we should impose neither a higher burden of proof at trial nor a detailing requirement on appeal, Justice Hecht nevertheless suggests that future actions might be resolved through application of a "higher standard of evidentiary review in malicious prosecution cases." This approach has apparently never been discussed by any court or commentator in the history of Texas jurisprudence, nor was it urged or even implied as a basis for reversal by the Bank. Until today's writing, appellate review has addressed either the factual or legal sufficiency of the evidence presented at trial.

The role of this Court is, of course, constitutionally limited. As we wrote recently in *Browning-Ferris v. Reyna*:

We review only to ensure the proper application of legal standards by other courts and to determine whether there is some evidence which provides a legal basis for a finding. . . . If more than a scintilla of such evidence exists, the claim is sufficient as a matter of law, and any challenges go merely to the weight to be accorded the evidence. Indeed, evidence that we might well have discounted, had we been serving as jurors ourselves, cannot now be judicially erased from the record. We are not empowered to convert some evidence into no evidence.<sup>104</sup>

The majority further responded:

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<sup>103</sup> *Id.* at 801 (citations omitted).

<sup>104</sup> *Id.* at 795 (quoting 865 S.W.2d 925, 927–28 (Tex. 1993)).

Though it is claimed that under a heightened level of review this Court need not weigh the evidence, Justice Hecht proceeds to suggest precisely that, thus blurring the line between factual and legal sufficiency review. Today we preserve our traditional appellate standard of review in accordance with the Texas Constitution rather than pursuing this unreserved and unwise proposed course.<sup>105</sup>

Two years after *Ellis County State Bank*, in 1996, Justice Bill Vance of the Tenth Court of Appeals authored an excellent review of Texas case law regarding the judicial review of cases requiring clear and convincing evidence.<sup>106</sup> In his article, Justice Vance collected virtually all Texas authority on the subject. Justice Vance illustrated the historically consistent stance of the Texas Supreme Court regarding the standard of review for the sufficiency of evidence in cases requiring clear and convincing evidence—the standard of review for legal sufficiency is the same whether the burden of proof at trial was proof by a preponderance of the evidence or by clear and convincing evidence. Historically, since the “requirement of clear and convincing evidence is merely another method of stating that a cause of action must be supported by factually sufficient evidence,”<sup>107</sup> Justice Vance proposed a heightened standard of review for factual sufficiency in cases involving the clear and convincing burden of proof, but he specifically rejected the wisdom of any change in the standard of review for legal sufficiency:

The current standard for review of the legal sufficiency of the evidence in civil cases is whether *any* evidence of probative force supports the finding made by the factfinder. That standard can be logically applied to appellate review of findings regardless of whether the quantum of proof required at trial was (1) preponderance of the evidence or (2) clear and convincing evidence. If no evidence of probative force supports a finding, then the finding should be disregarded by the reviewing court, and if proper procedural steps have been taken, the judgment should be reversed and rendered for the other party. Likewise, the

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<sup>105</sup> *Id.* at 796 (citations omitted).

<sup>106</sup> See generally Vance, *supra* note 96.

<sup>107</sup> *Ellis County State Bank*, 888 S.W.2d at 793 (citing *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975) (per curiam)).

*Sterner*<sup>108</sup> method of analyzing conclusive-evidence challenges applies when such an assertion is made by a party who had the burden of proof on the issue in question, no matter what standard was submitted at trial. If the evidence conclusively establishes the fact as a matter of law, then it is established under either the preponderance of the evidence standard or the clear and convincing evidence standard.<sup>109</sup>

Justice Vance did make a specific proposal for a heightened standard of factual sufficiency review of an affirmative jury answer:

In such an instance, the reviewing court should set aside the finding only if a review of all the evidence, both for and against the finding, demonstrates that the evidence in support of the finding is so weak or so overwhelmed by opposing evidence that a rational jury could not have found that it was highly probable that the fact was true.<sup>110</sup>

As to the factual sufficiency standard of review for a negative answer or a failure to find, Justice Vance suggested as the standard that “the reviewing court should sustain the failure to find unless a review of all of the evidence demonstrates that a rational jury could have found only that it was highly probable that the fact existed.”<sup>111</sup>

In 1998, Professor Carlson, recognizing the quandary that appellate review of clear and convincing evidence presented, urged the supreme court to “revisit the question, and expressly approve or disapprove the developing case law recognizing a third standard of appellate review of the

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<sup>108</sup> *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) (A reviewing court should examine the record for evidence that supports the jury’s negative answer to a question, while ignoring all evidence to the contrary. If evidence that supports the negative answer exists in the record, then the inquiry ends. But if no evidence exists to support the answer, then the entire record must be examined to determine if the contrary proposition is established as a matter of law.).

<sup>109</sup> Vance, *supra* note 96, at 413–14.

<sup>110</sup> *Id.* at 415.

<sup>111</sup> *Id.* Justice Vance’s proposed standard of review based on the language “highly probable” was later specifically rejected by the Supreme Court of Texas in *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002), but the remainder of Justice Vance’s rationale has never been addressed by the Supreme Court of Texas.

evidence.”<sup>112</sup> Some thought the Supreme Court of Texas had answered Professor Carlson in 2000 by rejecting a third standard of review in *Huckabee v. Time Warner Entertainment Co.*<sup>113</sup> In *Huckabee*, the supreme court expressly declined to adopt the clear and convincing requirement of proof in a defamation case at the summary judgment stage of the proceeding and also cautioned the trial court not to weigh evidence when ruling on motions for summary judgment.<sup>114</sup> As things would ultimately turn out, *Huckabee* was only a lull before a looming constitutional hurricane.

#### IV. THE HEIGHTENED STANDARD OF REVIEW ARRIVES IN TEXAS

##### A. *Creation of a New Standard.*

###### 1. *In re C.H.*

The first actual statement of a so-called heightened standard of review in Texas appeared in a case involving the termination of parental rights.<sup>115</sup> The stated issue in *In re C.H.* was the appropriate standard of review for factual sufficiency of evidence findings in parental termination cases in which the burden of proof at trial was by clear and convincing evidence.<sup>116</sup> The trial court terminated the parental rights of both parents based on a jury verdict.<sup>117</sup> The court of appeals determined there was legally sufficient evidence to support the termination but nonetheless found the evidence was factually insufficient to support the finding that termination was in the best interest of the child under the Texas Family Code.<sup>118</sup> In particular, the court of appeals held that the requirement of clear and convincing evidence required the State to prove it was “highly probable” that the termination of parental rights was in the child’s best interest.<sup>119</sup>

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<sup>112</sup> Elaine Grafton Carlson, *Review on Agreed Statement or Agreed Record*, in 6 TEXAS CIVIL PRACTICE § 44:12 (2d ed. 1998).

<sup>113</sup> 19 S.W.3d 413 (Tex. 2000).

<sup>114</sup> *Id.* at 421.

<sup>115</sup> *See In re C.H.*, 89 S.W.3d 17 (Tex. 2002).

<sup>116</sup> *Id.* at 18.

<sup>117</sup> *Id.* at 19.

<sup>118</sup> *Id.* at 21.

<sup>119</sup> *In re C.H.* 25 S.W.3d 38, 57 (Tex. App.—El Paso 2000, pet. granted), *rev'd*, 89 S.W.3d 17 (Tex. 2002)

Reversing, the supreme court held that the correct standard for review of termination findings was “whether the evidence is such that a fact-finder could reasonably form a firm belief or conviction about the truth of the State’s allegations.”<sup>120</sup> In so doing, the supreme court specifically rejected the standard proposed by several courts of appeals to the effect that clear and convincing evidence required proof that was “highly probable.”<sup>121</sup> Moreover, the court stated, “We emphasize that, as appellate courts apply the standard we announce today, they must maintain the respective constitutional roles of juries and appellate courts. An appellate court’s review must not be so rigorous that the only fact-findings that could withstand review are those established beyond a reasonable doubt.”<sup>122</sup>

The supreme court also reversed the court of appeal’s finding that the evidence was factually insufficient, stating, “But the court did not fully account for the evidence that supported the jury’s verdict—particularly evidence bearing upon Robert’s historical deficiencies in parenting and current criminal proclivities.”<sup>123</sup> The supreme court held the court of appeals “disregarded much of the evidence supporting the finding that termination would be in C.H.’s best interest, and failed to clearly explain why it concluded a reasonable jury could not form a firm conviction or belief from all the evidence that termination would be in C.H.’s best interest.”<sup>124</sup> Importantly, the supreme court expressly recognized in *In re C.H.* that it did not have jurisdiction to conduct a factual sufficiency review, but only to insure that the courts of appeals adhered to the proper legal standard.<sup>125</sup>

Nonetheless, the court also rejected the State’s contention that the formulation of the so-called heightened standard of review would blur or ignore the Constitutional distinction between legal and factual sufficiency review.<sup>126</sup> In so holding, the supreme court simply ignored without discussion its previous holding in *Keever* that it would not permit a blurring of the distinction between factual or legal sufficiency review by permitting a third or heightened standard of review. The court held that traditional factual sufficiency review was inadequate when “evidence is more than a

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<sup>120</sup> *In re C.H.*, 89 S.W.3d at 25.

<sup>121</sup> *Id.* at 26.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 27.

<sup>124</sup> *Id.* at 28–29.

<sup>125</sup> *Id.* at 28.

<sup>126</sup> *Id.* at 25.

preponderance (more likely than not) but is not clear and convincing.”<sup>127</sup> It then held, without further analysis or citation of authority, that as a matter of “logic,” a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance of evidence.<sup>128</sup> The underlying support or basis for this “logic” was not provided by the court.<sup>129</sup>

## 2. *In re J.F.C.*

*In re J.F.C.* also involved a trial court judgment based on a jury verdict terminating parental rights.<sup>130</sup> *In re J.F.C.* repeated many of the holdings of *In re C.H.* and incorporated from *In re C.H.* the rejection of “standards that retain the traditional factual sufficiency standard while attempting to accommodate the clear-and-convincing burden of proof.”<sup>131</sup> However, the court then went further, holding in *In re J.F.C.* that the same logic that required its holding in *In re C.H.* as to factual sufficiency somehow also applied to the traditional legal sufficiency standard of review. This time the court sought to justify its analysis by analogy to the decision of the United States Supreme Court in *Jackson v. Virginia*.<sup>132</sup> In making this leap in *In re J.F.C.*, the court acknowledged:

The distinction between legal and factual sufficiency when the burden of proof is clear and convincing evidence may be a fine one in some cases, but there is a distinction in how the evidence is reviewed. In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder’s conclusions and the role of a court conducting a legal sufficiency review, looking at the

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> In *In re C.H.*, the supreme court did not mention or overrule any of its precedent in which the court had consistently rejected a third or heightened standard of review whether based on the quantum and quality of proof or for clear and convincing evidence.

<sup>130</sup> See *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002).

<sup>131</sup> *Id.* at 264 (citing *In re C.H.*, 89 S.W.3d at 26).

<sup>132</sup> *Id.* at 265; see also *Jackson v. Virginia*, 443 U.S. 307 (1979); *infra* Part V.D.2 (discussing *Jackson* in detail).

evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.<sup>133</sup>

Next, while apparently attempting to simultaneously state a standard of review for factual sufficiency in clear and convincing evidence cases, the court made the following somewhat tautological statement:

A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient.<sup>134</sup>

*In re J.F.C.* is remarkable for a number of reasons. First, as the dissent notes, the question of whether or not there was legally sufficient evidence to support the trial court's express or deemed finding that termination was in the best interest of the children was never raised, briefed, or even mentioned at any stage of the proceeding by any of the parties. Also, this issue was not found by the court to present fundamental error. Therefore, the issue of legal sufficiency was not properly before the supreme court for discussion or decision at all.<sup>135</sup> Second, apart from describing the distinction between factual and legal sufficiency review as "fine" in some cases, the court's stated standard of review for factual sufficiency is, with respect, almost unintelligible. It neither states how factual sufficiency review in such cases is procedurally or substantively different from legal sufficiency review, how

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<sup>133</sup> *In re J.F.C.*, 96 S.W.3d at 266.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

it should be conducted, or why factual or legal sufficiency review should be different assuming the original “logic” advanced by the court in support of its decision in *In re C.H.* was correct. The court also does not provide any explanation as to why “[d]isregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.”<sup>136</sup> Finally, insofar as the opinion of the court considers itself to be bottomed on the decision of the United States Supreme Court in *Jackson v. Virginia*, it seriously misunderstood that decision. *Jackson v. Virginia* unambiguously holds that a federal court in a habeas corpus proceeding should review the entire record including all the evidence.<sup>137</sup> That decision is, in part, a scope of review holding.<sup>138</sup> However, the United States Supreme Court in *Jackson* also held that the appellate court when doing so is absolutely prohibited from reweighing the evidence or making credibility determinations, which is a standard of review holding.<sup>139</sup> In fact, *Jackson* directly undercuts the rationale for *In re J.F.C.* insofar as *In re J.F.C.* suggests or implies that an appellate court is free to reweigh or compare the evidence for and against a finding the use of a so-called heightened standard of review. Further, *Jackson* specifically requires that the evidence must be considered in a light most favorable to the verdict.<sup>140</sup> *Jackson v. Virginia* will be discussed further.<sup>141</sup>

### 3. *In re L.M.I.*

Shortly after *In re J.F.C.*, the Texas Supreme Court decided *In re L.M.I.*<sup>142</sup> The issue in *In re L.M.I.* concerned the trial court’s denial of a motion to revoke a relinquishment affidavit in a parental termination case. In part, the father claimed he could not understand the affidavit he had signed because he did not read or write the English language. This provoked a bitter dissent from Justice Hecht joined by Chief Justice Jefferson. The majority’s opinion by Justice O’Neill, in response, stated:

A brief response to the dissenting justices’ depiction of the record in this case is warranted. Both dissents

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<sup>136</sup> *Id.*

<sup>137</sup> See discussion *infra* Part V.D.2.

<sup>138</sup> *Id.*

<sup>139</sup> See *Jackson v. Virginia*, 443 U.S. 307, 320 (1979).

<sup>140</sup> *Id.* at 319–20.

<sup>141</sup> See discussion *infra* Part V.D.2.

<sup>142</sup> *In re L.M.I.*, 119 S.W.3d 707 (Tex. 2003).

effectively second-guess the trial court's resolution of a factual dispute by relying on evidence that is either disputed, or that the court could easily have rejected as not credible. Even under the standard we articulated in *In re J.F.C.*, this reweighing of the evidence is improper. And in a case like this, where so much turns on the witnesses' credibility and state of mind, appellate factfinding is particularly dangerous.<sup>143</sup>

Thus, in 2003, a majority of the Supreme Court of Texas expressly disapproved of reweighing of evidence under the *In re J.F.C.* standard, such as it was.<sup>144</sup> Yet in less than one year, the majority opinion in *In re L.M.I.* would be ignored and cast aside without discussion.

### *B. Development and Application of the Heightened Standard.*

#### 1. Defamation Cases: *Bentley v. Bunton*.

The Texas Supreme Court's direction for its heightened standard of review in defamation cases became manifest in the celebrated case of *Bentley v. Bunton*.<sup>145</sup> In order to fully understand the *Bentley* opinion, a basic review of the facts is required. For a period of several months, Joe Ed Bunton hosted a talk show on a public access television channel in Palestine, Texas.<sup>146</sup> Over a period of months, Bunton directly and indirectly accused the Honorable Bascom W. Bentley, III, a local district judge, of being "corrupt."<sup>147</sup> A co-host on Bentley's program, Colonel Jackie Gates, expressed general agreement on a number of occasions with Bunton's accusations but never himself used the word "corrupt."<sup>148</sup> Based upon what the Supreme Court described as "conclusive proof" that the accusations were both false and defamatory and based on jury findings that the defendants acted with actual malice and a specific intent to cause Judge Bentley injury, the trial court rendered judgment in accordance with the jury

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<sup>143</sup> *Id.* at 712 (citations omitted)

<sup>144</sup> *In re L.M.I.* was consistent with the supreme court's earlier admonition in *Huckabee* that trial courts should not "weigh" evidence in deciding summary judgments in defamation cases. See *supra* text accompanying note 129.

<sup>145</sup> *Bentley v. Bunton*, 94 S.W.3d 561, 596–97 (Tex. 2002).

<sup>146</sup> *Id.* at 568.

<sup>147</sup> *Id.* at 569.

<sup>148</sup> *Id.* at 567.

verdict for actual and punitive damages against each defendant.<sup>149</sup> The trial court, however, disregarded the jury's finding that the defendants had conspired to defame Bentley and refused to hold them jointly liable.<sup>150</sup> The court of appeals affirmed the judgment against Bentley but reversed the judgment against Gates.<sup>151</sup> The supreme court granted review but was unable to generate a majority opinion.<sup>152</sup> Accordingly, the plurality opinion of Justice Hecht combined with the concurring opinion of Chief Justice Phillips to reverse the case.

Several holdings of the *Bentley* plurality are profoundly relevant to the standard of review in defamation, mental anguish, and punitive damages cases. In *Bentley*, the supreme court reviewed all the evidence in the case, in virtually microscopic detail. After citation to a number of decisions by the Supreme Court of the United States from the 1980s, most notably *Bose Corp. v. Consumers Union of United States, Inc.*<sup>153</sup> and *Harte-Hanks Communications, Inc. v. Connaughton*,<sup>154</sup> Justice Hecht's plurality stated:

The independent review required by the First Amendment is unlike the evidentiary review to which appellate courts are accustomed in that the deference to be given the fact finder's determinations is limited. Indeed, the Supreme Court has stated that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." On questions of law we ordinarily do not defer to a lower court at all. But the sufficiency of disputed evidence to support a finding cannot be treated as a pure question of law when there are issues of credibility. No constitutional imperative can enable appellate courts to do the impossible—make crucial credibility determinations without the benefit of seeing witnesses' demeanor. If the First Amendment precluded consideration of credibility, the defendant would almost always be a sure winner as long as he could bring himself to testify in his own favor.

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 566.

<sup>153</sup> *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

<sup>154</sup> *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989).

His assertions as to his own state of mind, if they could not be disbelieved on appeal, would surely prevent proof of actual malice by clear and convincing evidence absent a “smoking gun”—something like a defendant’s confession on the verge of making a statement that he did not believe it to be true. . . . The independent review on appeal required by the First Amendment does not forbid any deference to a fact finder’s determinations; it limits that deference. How far is the difficulty.<sup>155</sup>

Justice Hecht then went on to state:

We are constrained, of course, to follow this same approach. Hence, an independent review of evidence of actual malice should begin with a determination of what evidence the jury must have found incredible. In *Harte-Hanks*, that evidence comprised the defendant’s self-serving assertions regarding its motives and its belief in the truth of its statements. As long as the jury’s credibility determinations are reasonable,<sup>156</sup> that evidence is to be ignored. Next, undisputed facts should be identified. In *Harte-Hanks*, those facts included the denial of Thompson’s allegations by Connaughton and others, and the improbability of those allegations given other facts and what the Supreme Court itself could tell from Thompson’s taped interview was an obvious lack of credibility. Finally, a determination must be made whether the undisputed evidence along with any other evidence that the jury could have believed provides clear and convincing proof of actual malice.<sup>157</sup>

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<sup>155</sup> *Bentley*, 94 S.W.3d at 597–98 (quoting *Harte-Hanks*, 491 U.S. at 685).

<sup>156</sup> Justice Hecht does not provide any explanation or precedent to support the assertion that a credibility determination by a jury should or must or appear to be “reasonable” to a reviewing court. He also does not explain how the reviewing court is able to identify a particular credibility determination made by the jury or how the court could determine how or why the jury reached its decision. Perhaps this is because previously such matters were recognized as “not susceptible of legal definition,” as the Court stated in *Carter*. See discussion *supra* Part III.A.1.

<sup>157</sup> *Bentley*, 94 S.W.3d at 599. In a legal sufficiency review in Texas, before *Bentley*, there simply was no rule of law that a jury finding as to credibility need be acceptable, agreeable, or “reasonable” to a reviewing court. *Id.*

Far more alarming than its holding on the defamation issue was the plurality's management of the jury's damage award. In *Bentley*, the jury awarded seven million dollars in mental anguish damages, and \$150,000 for damage to character and reputation. This award was attacked in the court of appeals for excessiveness. The court of appeals concluded, "There is nothing in the record to suggest that the jury was guided by anything other than a conscientious consideration of the evidence and the instructions of the trial court. We conclude that the evidence is legally and factually sufficient to support the jury's award of \$7,150,000."<sup>158</sup>

Before *Bentley*, the standard of review for excessive damage complaints in Texas was factual sufficiency of the evidence.<sup>159</sup> Moreover, the standard of review for suggesting remittitur was also factual sufficiency.<sup>160</sup> Likewise, before *Bentley* the determination of whether actual or punitive damages were excessive or whether remittiturs should be suggested were also factual determinations which were final in the court of appeals. The Supreme Court of Texas had consistently held that it lacked jurisdiction to consider excessiveness complaints or to suggest remittiturs.<sup>161</sup>

All this precedent was swept aside without mention in *Bentley*. Instead, the plurality observed apparently as a matter of its own policy judgment that:

Damage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment. This case is a prime example. The jury's

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<sup>158</sup> *Id.* at 623 (citations omitted).

<sup>159</sup> *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847-48 (Tex. 1990); *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986).

<sup>160</sup> *Rose*, 801 S.W.2d at 847-48; *see also* *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

<sup>161</sup> *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983); *Sweet v. Port Terminal R.R. Ass'n*, 653 S.W.2d 291, 295 (Tex. 1983); *Hall v. Villarreal Dev. Corp.*, 522 S.W.2d 195, 195 (Tex. 1975). Notwithstanding all this precedent, the supreme court now regularly instructs the courts of appeals to consider remittitur and if a remittitur cannot be determined, to remand the case to the trial court. For example, the supreme court held:

We believe the proper course in this instance is to remand to the court of appeals to consider remittitur as to expenses for which expert testimony is required. If the court of appeals concludes a proper remittitur cannot be determined, then the case should be remanded to the trial court for a new trial.

*Guevara v. Ferrer*, No. 05-1100, 50 Tex. Sup. Ct. J. 1182, 2007 WL 2457760, at \*6 (Aug. 13, 2007). *See also supra* text accompanying note 38.

award of \$7 million in mental anguish damages strongly suggests its disapprobation of Bunton's conduct more than a fair assessment of Bentley's injury. The possibility that a jury may exercise such broad discretion in determining the amount to be awarded unrestrained by meaningful appellate review poses a real threat to all members of the media.<sup>162</sup>

The Supreme Court of Texas in *Bentley* proceeded to announce a completely new rule of law in defamation cases:

Accordingly, we conclude that the First Amendment requires appellate review of amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant. Exercising that review in this case, we conclude that while the record supports Bentley's recovery of some amount of mental anguish damages, it does not support the amount of those damages found by the jury.<sup>163</sup>

After reciting in some detail the depth and magnitude of the damages actually sustained by Judge Bentley, the Court then dismissed all that evidence apparently based purely on the personal judgment or sensibilities of the plurality members or both:

But all of this is no evidence that Bentley suffered mental anguish damages in the amount of \$7 million, more than forty times the amount awarded him for damage to his reputation. The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support.

The other amounts of actual damages found by the jury are well within a range that the evidence supports. We do not consider whether the awards were unreasonable; that issue was for the lower courts. We conclude only that no evidence permitted the jury to make the findings it did.<sup>164</sup>

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<sup>162</sup> *Bentley*, 94 S.W.3d at 605.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 607.

Concluding its review of the case, the supreme court reversed and remanded the case to the court of appeals to “reconsider the excessiveness of the jury’s award of mental anguish damages against Bunton in view of this opinion. It may be that Bentley’s action against him must be retried, but the court of appeals is free to suggest a remittitur.”<sup>165</sup>

Not surprisingly, the plurality opinion in *Bentley* drew a blistering dissent from Justice James Baker. In his dissent, Justice Baker pointed out that the ostensible basis for this new standard of review of actual damages in defamation cases was itself drawn from only a non-binding plurality language opinion in *Gertz v. Robert Welch, Inc.*<sup>166</sup> The language from *Gertz* neither compels nor supports the Bentley plurality’s de novo standard. *Gertz* involved a private defamation case which did not require a finding of actual malice. Justice Baker pointed out the Supreme Court of the United States itself did not interpret the *Gertz* decision as the Supreme Court of Texas had done in *Bentley*. In fact, the Supreme Court of the United States later stated that *Gertz* made it clear that States could base awards on elements other than injuries to reputation, specifically listing “personal humiliation and mental anguish and suffering” as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault.<sup>167</sup> Justice Baker also noted that *Time, Inc.* did not “impose upon the States any limitations as to how, within their own judicial system, factfinding tasks are to be allocated.”<sup>168</sup> Justice Baker argued that all the Constitution of the United States required is for the state to provide reasonable methods for making factual determinations to be certain that some element of the state court system determines that the defendants are in fact at fault.<sup>169</sup> Justice Baker pointed out that the existing Texas standard for factual sufficiency review was more than sufficient to give a meaningful appellate review of a defamation finding or an award of actual damages, and particularly findings that require the proof of actual malice to support the imposition of punitive damages.<sup>170</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 621 (Baker, J., dissenting); see also 418 U.S. 323 (1974).

<sup>167</sup> See *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976).

<sup>168</sup> *Bentley*, 94 S.W.3d at 623 (Baker, J., dissenting) (citing *Time, Inc.*, 424 U.S. at 461).

<sup>169</sup> *Id.* (Baker, J., dissenting) (citing *Time*, 424 U.S. at 464).

<sup>170</sup> Justice Baker concluded his dissent, after quoting Sir Walter Scott in *Marmion*: “Óh what a tangled web we weave, When first we practise to deceive!” by stating: “The Court’s writing is nothing more than an epistle of the First Amendment Gospel according to Justice Hecht, the effect

To be clear, the Supreme Court of Texas in *Bentley* articulates not just one but two new standards of heightened appellate review in reference to defamation cases. The first is essentially a de novo review of the evidence to determine the legal sufficiency of the evidence as to the defamation itself. The second, and far more alarming, is a previously unknown standard of review for the amounts of awards for non-economic damages in defamation cases to ostensibly insure that any recovery only compensates the plaintiff for actual injuries and is “not a disguised disapproval of the defendant.”<sup>171</sup> This second or “super” heightened level of appellate review for amounts of damages is not only unprecedented, it is breathtaking in scope. Although denominated as a standard or type of review as to amounts of damage, the Court actually states no real standard of review at all. Additionally, the court is unable to articulate how as a matter of logic or otherwise how it could possibly hope to determine whether an award of damages “is not a disguised disapproval of the defendant.” The only precedent cited by the Court for this astounding proposition is *Gertz*.<sup>172</sup>

A closer review of *Gertz* reveals that it does not remotely support the Court’s holding in *Bentley*. *Gertz* involved a suit by a private lawyer who had represented the family of a child who was shot and killed by a Chicago policeman. The respondent published “American Opinion,” a monthly periodical of John Birch Society.<sup>173</sup> The article in American Opinion falsely stated that: (1) Gertz had a criminal record, and (2) that Gertz had orchestrated the 1968 riots at the Democratic National Convention. Likewise, there was no factual basis for the article’s claim that Gertz was a “Leninist,” a “Communist-fronter,” or that Gertz had ever been a member of any Marxist organization.<sup>174</sup> The trial court determined that the charges against Gertz constituted libel per se and submitted to the jury only the question of damages. The jury returned a verdict of \$50,000.<sup>175</sup> For reasons that are unclear from the opinion, the district court nonetheless concluded the *New York Times* standard governed the case even though Gertz was not a public official or a public figure and thus rendered

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of which is to transmogrify Texas law about reviewing mental anguish damage awards in defamation cases.” *Id.* at 624 (Baker, J., dissenting).

<sup>171</sup> *Id.* at 605.

<sup>172</sup> The Court in *Bentley* also fails completely to support its claim that traditional standards of review are “not meaningful” or are in any way insufficient to protect First Amendment Rights. *Id.*

<sup>173</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

<sup>174</sup> *Id.* at 326.

<sup>175</sup> *Id.* at 329.

judgment as a matter of law for the respondent.<sup>176</sup> The constitutional holding in *Gertz* was actually very narrow: “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”<sup>177</sup>

Concerning the question of damages or compensation, the Court stated:

[W]e endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.<sup>178</sup>

Still referring to presumed damages in libel law, the Court stated:

Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

. . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 347.

<sup>178</sup> *Id.* at 348–49.

define “actual injury,” as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.<sup>179</sup>

The Court went on to reject the recovery of punitive damages in defamation cases unless the plaintiff meets the more demanding standard of proof of actual malice or reckless disregard falsity required by *New York Times v. Sullivan*.<sup>180</sup>

Therefore, when viewed objectively, *Gertz* simply has no application to the Bentley’s mental anguish damage claim at all. First, *Gertz* involved a private plaintiff who recovered damages for injurious falsehood. *Gertz* had no burden of proof beyond establishing the falsity of the charges made against him. By comparison, *Bentley* involved a public official whose case was submitted upon the *New York Times v. Sullivan* standard and which also involved a jury finding of malice based on clear and convincing evidence. Second, the *Gertz* opinion’s statements regarding unbridled jury discretion concerned presumed damages, not actual damages. In *Bentley* specific elements of actual damage were submitted to the jury and found favorably toward Judge Bentley including mental anguish and injury to reputation. Third, the Court in *Gertz* made no holding nor even suggested that any appellate court can or should attempt to review a jury verdict to determine whether it represents disguised disapproval of the defendant. The United States Supreme Court in *Gertz* intimates no procedure or means of undertaking such a determination, nor for that matter does the Supreme Court of Texas in *Bentley*. Finally, by assigning to itself a previously unknown prerogative or duty to determine the mental processes of juries as to disguised disapproval in regard to the determination of actual damages, the Supreme Court of Texas ignores the bedrock assumption of the Supreme Court of the United States in both *Gertz* and in *Time, Inc.* That

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<sup>179</sup> *Id.* at 349–50.

<sup>180</sup> *Id.* at 350.

assumption is that (except as to presumed damages) there are ample traditional safeguards to prevent excessive actual or punitive damages in defamation cases including as in Texas: (1) instructions to the jury; (2) the ability of the trial court to grant a new trial or order remittitur; and (3) the requirements of the Courts of Appeals to review the record to be certain the evidence supports any award the jurors made.<sup>181</sup> Last, and perhaps most obviously, neither *Gertz* nor *Time, Inc.* can or do direct the Supreme Court of Texas to violate the mandatory provisions of the Texas Constitution which directly forbid the Supreme Court from making its own determinations as to the factual sufficiency of evidence.

While it might be argued that the court of appeals in *Bentley* may not have been specific enough in its analysis as to why it did not find the jury's award of mental anguish damages to be excessive, at most that oversight would require a *Pool* type remand to require the court of appeals to set forth the evidentiary basis for its reasoning.<sup>182</sup> Such an error did not authorize, and the Texas Constitution clearly does not permit, the Supreme Court of Texas to circumvent the factual sufficiency jurisdiction of the court of appeals by making its own *de novo* and *ipse dixit* determinations to the contrary.

Most regrettably, the strident statements in the court's plurality opinion in *Bentley* cast grave doubt on the objectiveness of any of its determinations. The fact that the amount of mental anguish damages is more than forty times the amount the jury awarded for damage to a judge's reputation means absolutely nothing. Unless the Supreme Court of Texas revises post facto centuries of Texas common law on actual damages, there simply is no requirement that an award of mental anguish damages in a defamation case should or must bear any particular ratio to awards of separate elements of damage such as loss of reputation. Indeed, if the evidence in *Bentley* had been viewed in a light most favorable to the verdict, it might just as logically have been assumed that the jury, the trial judge, and the court of appeals (who are or at least should be the final fact finders in Texas), reasonably and firmly believed Judge Bentley's greatest

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<sup>181</sup> Contrary to the Court's analysis in *Bentley*, the United States Supreme Court has never in *Gertz* or otherwise attempted to mandate how Texas courts should perform their core judicial functions within the jurisdictional limitations of a state constitution. Specifically, in *Time, Inc. v. Firestone*, decided two years after *Gertz*, the Supreme Court stated, "The First and Fourteenth Amendments do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated." 424 U.S. 448, 461 (1976).

<sup>182</sup> See *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986).

loss was the mental anguish he suffered as the result of months and years of being defamed in his local community despite his years of honest and dedicated public service.

The supreme court disregards all those fact determinations in a sentence: “The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support.”<sup>183</sup> Yet the court contradicts itself legally and factually in the next paragraph when it states, “We do not consider whether the awards were unreasonable; that issue was for the lower courts.”<sup>184</sup> Moreover, by recognizing that the question of whether the award was unreasonable or excessive was “for the lower courts;” the court acknowledges what it had just denied: that is the determination of excessiveness or unreasonableness is, under Texas law, a matter relating to the factual sufficiency of the evidence. As to that subject, the jurisdiction of the court of appeals is final, assuming the court of appeals has applied the correct legal standard. Finally, in another departure from precedent, the supreme court placed its thumb firmly on the scales against Judge Bentley by openly suggesting that the case may have to be “retried” or the court of appeals is “free” to suggest remittitur. The Supreme Court of Texas simply has no jurisdiction to make any such holding or to suggest any such action.<sup>185</sup> *Bentley* simply: (1) ignores the factual conclusivity provision of the Texas Constitution; (2) does not indulge any or all reasonable inferences in favor of the verdict but instead sets forth subjective conclusions as to the evidence which directly contradict the damage portion of the verdict; and (3) also ignores the limitations on its own jurisdiction by suggesting remittiturs and by attempting to compel or coerce the court of appeals to comply with the result it desires.

To the objective observer, the result in *Bentley* is even more startling when one considers its pedigree. The language in *Gertz* seized upon by the plurality in *Bentley* has existed since 1974. At no time since then has any court, anywhere, ever attempted to articulate a standard of individualized review of actual damage awards in defamation cases before the Supreme Court of Texas did so in *Bentley*. If this somehow was the law all along as Justice Hecht apparently suggests in *Bentley*, it seems strange that the Supreme Court of Texas was unable to recognize and espouse such a major

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<sup>183</sup> *Bentley v. Bunton*, 94 S.W.3d 561, 607 (Tex. 2002).

<sup>184</sup> *Id.* And of course the lower court had already held the damage award was neither excessive nor unreasonable. *Id.* at 606.

<sup>185</sup> See discussion *supra* Part IV.A.1.

and startling rule of law for more than thirty-eight years. In the end, *Bentley* appears to be nothing more than a result looking for a rationale. Even more troubling is the transparent mental gymnastics by which the Supreme Court of Texas, as a matter of Texas common law, recharacterizes the question of excessiveness or unreasonableness from its foundation as a question of factual sufficiency under Texas law to suddenly become a question of law based on the United States Constitution.<sup>186</sup> This machination is perversely necessary only if the rule must assure a result in which the Supreme Court of Texas has the last word. Otherwise, even the “transmogrified” *Bentley* standard of actual damages review could easily be accommodated by the existing factual sufficiency jurisdiction of the court of appeals.

The opinion in *Bentley*, particularly regarding its treatment of Judge Bentley’s mental anguish damages, is disturbing for another reason. *Bentley* is consistent with the trend of the present majority of the court and most notably Justice Hecht himself to question, if not to judicially nullify, mental anguish damage awards in any significant amount. The reader will no doubt recall Justice Hecht’s polemic vitriol in *Nicolau* about those “awful mental anguish damages” that accompanied bad faith.<sup>187</sup> Recall also Justice Hecht’s unprecedented opinion in *Saenz v. Fidelity & Guaranty Insurance Underwriters* which also sought to change the standard of factual sufficiency issue review into a legal sufficiency review by suggesting that the Supreme Court has an independent obligation (and jurisdiction) to determine whether there is evidence to support the “amount” of mental anguish damages found by the jury, in addition to evidence of the existence of mental anguish itself.<sup>188</sup>

## 2. Punitive Damages: *Southwestern Bell Telephone Co. v. Garza*

*Southwestern Bell Telephone Co. v. Garza* was a worker’s compensation retaliation claim under the Texas Labor Code section 451.001(1).<sup>189</sup> In *Garza*, Justice Hecht and the Texas Supreme Court took

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<sup>186</sup> See discussion *infra* Part IX.A. (discussing the propensity of the Texas Supreme Court to recharacterize the meaning of established legal terms).

<sup>187</sup> See discussion *supra* Part III.B.4.

<sup>188</sup> *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996). In some ways, *Saenz* forecast the result desired and ultimately achieved by Justice Hecht in his *Bentley* plurality opinion.

<sup>189</sup> *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 607 (Tex. 2004).

the “logic” of *In re C.H.* and the *Jackson v. Virginia* “analogy” in *In re J.F.C.* to an entirely new level. *Jackson v. Virginia* was again cited as authority by the Court in *Garza*. Further “analogizing” the requirement of “clear and convincing evidence” to the constitutional requirement of “convincing clarity of evidence of actual malice” in *New York Times Co. v. Sullivan*, the Supreme Court of Texas laid claim to the prerogative, if not the duty, to weigh evidence as a part of its logical or constitutional duty to review and reverse punitive damage awards. In doing so, Justice Hecht was quite honest to reveal that he was directly weighing the evidence:

Viewing all of this evidence—as well as the evidence we have detailed earlier along with the entire record—in the light most favorable to the verdict, we cannot conclude that a reasonable trier of fact could form a firm belief or conviction that SWBT acted toward Garza with ill will, spite, evil motive, or purposeful injury. While there are some indications that it might have done so, there are a great many others that it did not. At most, the record reflects that SWBT mishandled the situation; it does not produce a reasonable conviction that SWBT intended to punish Garza without cause.<sup>190</sup>

*Garza* further reasoned that the Texas Constitutional limitation on factual sufficiency review by the supreme court no longer applied since the question of whether or not the evidence was factually sufficient under the new heightened standard was now to be determined as a question of law.<sup>191</sup>

*Garza* contains the same central deficiencies as *In re C.H.* and *In re J.F.C.* The Court in *Garza* simply ignores its own decision, only one year earlier in *In re L.M.I.* and also in *Huckabee* where the majority expressly disapproved of reweighing evidence. Next, *Garza* does not announce any objective standard by which the court can determine whether the finder of fact could or could not form a firm belief or conviction as to any particular fact. Further, *Garza* reinforces the notion that the Supreme Court of Texas will determine for itself on an ad hoc basis whether the trier of fact was reasonable as to its factual findings again without any objective standards or limitation to define or guide its determination of such reasonableness.

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<sup>190</sup> *Id.* at 628–29. There was direct, eyewitness’s testimony in *Garza* that Garza was told he had been disciplined for filing a worker’s compensation claim. *Id.* at 613–14.

<sup>191</sup> *Id.* at 627.

Next, *Garza* with its heightened review rubric dispenses entirely with a traditional requirement that all reasonable inferences and intendments should be indulged in favor of a jury's verdict. Finally, *Garza* effectively removes any traditional restraint on review imposed by the factual conclusivity clause because classic legal questions of fact or factual sufficiency are simply renamed as questions of law.

### 3. The Reweighing of Evidence As a "Scope of Review": *City of Keller v. Wilson*.

The Texas Supreme Court next used the "scope of review" to extend the supreme court's reach, again allowing it to weigh the evidence to reverse and render judgment contrary to the jury's verdict. *City of Keller v. Wilson* was an inverse condemnation case in which the Wilsons contended the city knew that their land was substantially certain to be flooded as the result of the City's approval of the plans of an adjoining developer.<sup>192</sup> The record contained the following proof: (1) the Wilsons produced competent expert testimony that the revised plan was certain to create flooding; (2) the City admittedly knew that development would increase runoff and that the ditch it had approved in the developer's earlier plan would channel water directly onto the Wilsons' property, also establishing that flooding could result; (3) the City did not explain why the master plan originally required a drainage ditch across the Wilsons' property but the revised plan did not, thus allowing jurors to infer the city knew the omission would cause flooding; and, (4) an adjacent landowner had demanded that the City provide indemnity in the event of flooding of the Wilsons' property.<sup>193</sup> Indeed most of this evidence was undisputed. In opposition, the City justified its actions based on the certifications of three engineers who had made written statements that flooding was uncertain or would not occur.<sup>194</sup>

Based on this record, after the court of appeals had concluded that there was legally and factually sufficient evidence to support the jury's verdict, the supreme court concluded on a legal sufficiency review that there was no evidence to support the verdict.<sup>195</sup> The court reached that conclusion by

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<sup>192</sup> *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005).

<sup>193</sup> *Id.* at 807–10.

<sup>194</sup> *Id.* at 808. These certifications were actually only general certifications that the planned development complied with the City's ordinances. There was no evidence that the certifications actually stated anything specifically regarding flooding.

<sup>195</sup> *Id.* at 830.

holding that the court of appeals had applied an improper scope of review, concluding that the intermediate court had considered evidence which legally could not be considered and ignored evidence which legally could not be disregarded.<sup>196</sup>

In *City of Keller*, the supreme court restates the standard for a legal sufficiency review as “view[ing] the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.”<sup>197</sup> It is in the application of that stated standard, however, where the court departs from historical precedent by substituting its own inferences from disputed evidence to render a judgment contrary to the jury’s verdict.

The *City of Keller* opinion is presented as being based on the late Chief Justice Robert Calvert’s famous law review article.<sup>198</sup> The court begins with what it refers to as “contrary evidence that cannot be disregard.”<sup>199</sup> As examples of such evidence, the court lists: contextual evidence,<sup>200</sup> competency evidence,<sup>201</sup> circumstantial equal evidence,<sup>202</sup> conclusive evidence,<sup>203</sup> clear-and-convincing evidence,<sup>204</sup> and consciousness evidence.<sup>205</sup>

With regard to the category of contextual evidence, *City of Keller* is largely historical. It is certainly true that in reviewing findings for legal sufficiency the reviewing court must, of course, consider fully the context in which all of the events occur.<sup>206</sup> This includes defamation cases, contract cases, or for that matter any case. It is also, of course, true that evidence cannot be taken out of context in order to support a verdict.<sup>207</sup> None of this discussion is particularly novel. Yet Justice Brister’s conclusion is much different than the cases he cites: “Thus, if evidence may be legally

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 807.

<sup>198</sup> See Robert W. Calvert, “No Evidence” & “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361 (1960).

<sup>199</sup> *City of Keller*, 168 S.W.3d at 810.

<sup>200</sup> *Id.* at 811.

<sup>201</sup> *Id.* at 812.

<sup>202</sup> *Id.* at 813.

<sup>203</sup> *Id.* at 814.

<sup>204</sup> *Id.* at 817.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 810.

<sup>207</sup> *Id.* at 812.

sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict."<sup>208</sup>

To the extent this statement means that a reviewing court will consider the logical or undisputed context of evidence in a legal sufficiency review it is fully consistent with a traditional standard of review.<sup>209</sup> To the extent this statement may be read to imply that the Supreme Court of Texas is free to determine for itself in some type of de novo fashion the "context" of evidence in a manner contrary to the jury's verdict and thereby render judgment contrary to the jury's verdict, it is a radical departure from precedent.

With regard to competency evidence, the court states a further list of truisms. Incompetent evidence is insufficient to support a judgment, as is evidence that the Court is prohibited by other rules of law from considering.<sup>210</sup> Likewise, expert testimony which does not meet basic reliability standards is incompetent.<sup>211</sup> All these conclusions are consistent with the traditional standard of review.

The court states with regard to circumstantial equal evidence, "Thus, when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well."<sup>212</sup>

This statement appears to be directly contrary to the court's most recent comprehensive writing on the subject in *Lozano v. Lozano*.<sup>213</sup> In *Lozano*, the court discussed in exhaustive detail both the so-called "equal inference rule" and the right of a jury to draw reasonable inferences from the evidence.<sup>214</sup> In *Lozano*, the court through Chief Justice Phillips' plurality opinion noted, "The equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence

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<sup>208</sup> *Id.*

<sup>209</sup> The court's discussion relating to contextual evidence apparently does not realize that this "new" analysis has long been subsumed in the traditional legal sufficiency evaluation set out in *Cartwright v. Canode*, 106 Tex. 402, 171 S.W. 696 (1914), and thus it has been the law in Texas since at least 1918. See *supra* text accompanying note 66.

<sup>210</sup> *City of Keller*, 168 S.W.3d at 812.

<sup>211</sup> *Id.* at 812–13.

<sup>212</sup> *Id.* at 814.

<sup>213</sup> See *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001).

<sup>214</sup> See *id.* at 148–49.

‘which could give rise to any number of inferences, none more probable than another.’”<sup>215</sup>

However, in *Lozano* the court went on to hold:

Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.

Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder’s views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses’ credibility, and make reasonable inferences from the evidence it chooses to believe.

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Circumstantial evidence may be used to establish any material fact, but it must transcend mere suspicion. The material fact must be reasonably inferred from the known circumstances. “By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern.” Thus, each piece of circumstantial evidence must be viewed not in isolation, but in light of all the known circumstances.<sup>216</sup>

Thus, the conclusion in *City of Keller* that a reviewing court must consider not only favorable but all evidence is only partially correct. Insofar as it suggests or implies that the court may itself substitute one view

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<sup>215</sup> *Id.* at 148 (quoting *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex.1997)).

<sup>216</sup> *Id.* at 148–49 (quoting *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993)).

or inference from the evidence for another, it is a divergence from historical precedent and affirmatively wrong.

Regarding so-called conclusive evidence the court states, “It is impossible to define precisely when undisputed evidence becomes conclusive.”<sup>217</sup> The court also suggests a jury cannot substitute its opinion for undisputed truth.<sup>218</sup> This statement may be correct as a general matter, but begs the real question. Exactly what is the “undisputed truth” to which the Court refers, and who, if not the jury, should decide what is or is not “true”? As to this subject, the court provides no answer other than to substitute its own judgment.<sup>219</sup>

Next addressing what it refers to as consciousness evidence the Court discusses its earlier statements in *Burk Royalty v. Walls*, bad faith litigation, and consideration of other evidence in which the court has held that appellate review requires examination of all the circumstances.<sup>220</sup> This discussion appears innocuous enough but concludes as follows:

This is not to say a reviewing court may credit a losing party’s explanations or excuses if jurors could disregard them. For example, while an insurer’s reliance on an expert report may foreclose bad faith recovery, it will not do so if the insurer had some reason to doubt the report. But a reviewing court cannot review whether jurors could reasonably disregard a losing party’s explanations or excuses without considering what they were.<sup>221</sup>

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<sup>217</sup> *City of Keller*, 168 S.W.3d at 815.

<sup>218</sup> *Id.* at 814.

<sup>219</sup> Based on the manner in which the supreme court treated what it characterized as undisputed evidence in *City of Keller*, it appears that when the court refers to evidence that is undisputed it apparently means that if the *existence* of the evidence is undisputed, the court is free to draw from that evidence whatever inference the court wishes whether or not another inference is also reasonable or is also supported by evidence. This is contrary to the traditional standard of review which requires the reviewing court to view the evidence and all reasonable inferences from the evidence in a light most favorable to the prevailing party. The result in *City of Keller* was not accidental. Justice O’Neill pointed out this deficiency in her concurring opinion in *Garza*. See *Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 630 (Tex. 2004).

<sup>220</sup> *City of Keller*, 168 S.W.3d 817.

<sup>221</sup> *Id.* at 818.

The two cases cited by the court for this proposition simply do not even remotely support its conclusion, as the concurring opinion of Justice O'Neill in the *City of Keller* points out.<sup>222</sup>

The court concludes its discussion by stating, “[T]he jury’s decisions regarding credibility must be reasonable. Jurors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted.”<sup>223</sup>

Much of this language is troublesome. The Court’s statement that a jury’s decision regarding credibility must be “reasonable” has absolutely no basis in Texas jurisprudence except for the Court’s opinion in *Bentley* which, even disregarding the dubious validity of that decision on the merits, is strictly and solely limited to First Amendment issues.<sup>224</sup> Such a rationale does not apply outside that limited legal context. To the extent the Supreme Court of Texas purports to hold that it may substitute its own determination as to whether a jury’s decision regarding credibility is “reasonable,” it directly violates almost two centuries of Texas jurisprudence to the contrary.

Under the topic of conflicting evidence, the Court states it is the province of the jury to resolve conflicts in the evidence. Accordingly, courts reviewing all the evidence in a light favorable to the verdict must assume that jurors resolve all conflicts in accordance with that verdict. The court goes on to state that, in every circumstance in which reasonable jurors could resolve conflicting evidence either way, reviewing courts must presume they did so in favor of the prevailing party and disregard the conflicting evidence in their legal sufficiency review. The statement is only troublesome to the extent that the court weighs the evidence as it does in this case to substitute its own judgment of reasonableness in place of the jury’s determination.

Under the section conflicting inferences, the court states, “Even if evidence is undisputed, it is the province of the jury to draw from it whatever inferences they wish, so long as more than one is possible and the jury must not simply guess.”<sup>225</sup>

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<sup>222</sup> *Id.* at 832; see discussion *infra* note 242.

<sup>223</sup> *Id.* at 820.

<sup>224</sup> *Id.* at 819.

<sup>225</sup> *Id.* at 821.

Concluding all this discussion, the court states, “Accordingly, courts reviewing all the evidence in a light favorable to the verdict must assume jurors made all inferences in favor of their verdict if reasonable minds could, and disregard all other inferences in their legal sufficiency review.”<sup>226</sup>

To the extent this concluding statement conflicts with the majority decision in *Lozano* regarding the jury’s ability to choose between competing inferences, it also is an affirmatively incorrect statement of prior Texas law.

Next, *City of Keller* claims to adopt for Texas courts the so-called federal scope of review of a verdict, purporting to rely heavily on the United States Supreme Court decision in *Reeves v. Sanderson Plumbing Products, Inc.* to support its rationale.<sup>227</sup> The Texas Supreme Court, however, ignores entirely the central standard of review holding of the United States Supreme Court in *Reeves*. It is certainly true that in *Reeves*, the Supreme Court of the United States did adopt the so-called “inclusive” standard of review for all federal cases.<sup>228</sup> However, *Reeves* also reinforced a rule that federal courts at either the trial or appellate level are absolutely forbidden to weigh evidence, determine the reasonableness of inferences, or do anything other than view the evidence in a light most favorable to the verdict under the inclusive scope or standard of review.<sup>229</sup> In fact, the United States Supreme Court in *Reeves* reversed the Fifth Circuit Court of Appeals for impermissibly substituting its view of the evidence and the credibility of the witnesses for that of the jury.<sup>230</sup> The same error found to be present in *Reeves* infects the entire opinion of the court in *City of Keller*.<sup>231</sup>

The Court concludes its jurisprudential discussion with a quotation from the late Justice Felix Frankfurter concurring in *Wilkerson v. McCarthy*:

Only an incompetent or a willful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree,

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 825.

<sup>228</sup> *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000).

<sup>229</sup> *Id.* at 150–51.

<sup>230</sup> *Id.* at 153–54.

<sup>231</sup> Although this aspect of the *Reeves* opinion is omitted entirely in *City of Keller*, it is discussed in detail in this Article. See *infra* Part VIII.E.

often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree whether proof in a case is sufficient to demand submission to the jury. The fact that [one] thinks there was enough to leave the case to the jury does not indicate that the other [is] unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.<sup>232</sup>

The selected quotation from Justice Frankfurter can only mean that the Supreme Court of Texas is encouraging trial judges and appellate judges to take cases from the jury "when the evidence would not (in the judge's opinion) warrant a verdict." Otherwise, Texas judges will be viewed by the Supreme Court of Texas as "timid" or "lawless."

Consistent with the Frankfurter rationale, the court ultimately concludes the entire review of facts in the case with less than two pages of actual fact dispositive discussion. The court rejects all of the plaintiff's evidence<sup>233</sup> in a single stroke of its pen simply by comparing it to the defendant's evidence as follows:

Here, it was uncontroverted that three sets of engineers certified that the revised plans met the City's codes and regulations—and thus would not increase downstream flooding.<sup>234</sup> The same firm that drew up the original Master Plan certified the revised one; unless the City had some reason to know the first certification was true and the second one was false (of which there was no evidence), there was only one logical inference jurors could draw.

None of the evidence cited by the court of appeals showed the City knew more than it was told by the engineers. The Wilsons' expert testified that flooding was

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<sup>232</sup> *Id.* at 828 (quoting *Wilkerson v. McCarthy*, 336 U.S. 53, 65, 69 (1949)).

<sup>233</sup> *See supra* Part IV.B.3 (summarizing the plaintiff's evidence in the *City of Keller*).

<sup>234</sup> The conclusion "this would not increase downstream flooding" is the *court's* inference or conclusion from the certification(s), not from the contents of documents themselves. To be clear, such an inference is directly contrary to the jury's verdict.

(in his opinion) inevitable, but not that the City knew that it was inevitable.

Second, ending a ditch at a neighbor's property line may be evidence that a defendant was substantially certain of the result in some cases, but not in the context of this one.

The omission of the ditch across the Wilsons' property obviously raised concerns that the City investigated, but was no evidence that the City knew the advice it received in response was wrong.<sup>235</sup>

The opinion in *City of Keller* is extremely significant to Texas practitioners. First, apparently *City of Keller* simultaneously holds that the traditional no evidence standard of review and the traditional factual sufficiency standard of review remain viable except in parental termination, defamation, and punitive damage cases. (In these latter cases, as previously discussed, the court will employ a "heightened standard of review" without use of any objective standard, leaving the court free to substitute its own determination of what constitutes a "firm belief or conviction" in place of that of the jury.) However, in doing so, it confabulates and confuses the traditional distinction between a standard of review and the scope of review by omitting the central standard of review holding in *Reeves* upon which it supposedly is based.

Second, the court's decision in *City of Keller* appears to depart from years of Texas jurisprudence regarding the question of intent. Historically, reviewing courts have recognized that the question of intent (or "consciousness" as the court refers to it) is uniquely a question of fact for jury resolution. Before *City of Keller*, the jury in determining a question of intent was free to draw any inference from the evidence it found reasonable. In *City of Keller*, the plaintiff produced unquestioned expert testimony that flooding of his land was a certainty, that the City knew the revised development plan would substantially increase run off and channel that run off onto the Wilsons' property, that the City had approved a plan which did not include a ditch across the Wilsons' property which it had been necessary to accommodate that run off, and that demand had been made on the City to provide indemnity for the adjacent landowner in the event of

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<sup>235</sup> *City of Keller*, 168 S.W.3d at 829.

flooding of the Wilsons' property.<sup>236</sup> Indeed, most of this evidence was undisputed.<sup>237</sup> Nevertheless the court held that when faced with this evidence a jury could not reasonably infer that the City knew flooding of the Wilsons' property was virtually certain.<sup>238</sup>

At the same time, the court concludes that the fact that three sets of engineers had approved plans with a general certificate stating the plans complied with the City's code was sufficient to establish as a matter of law that the City did not know that flooding was substantially certain to occur.<sup>239</sup> *City of Keller* essentially holds that the mere existence of engineers' certifications is sufficient to conclusively establish the absence of intent on the part of the City.<sup>240</sup> This holding is all the more remarkable because if the three engineers had themselves testified in person at trial or by deposition that flooding was not substantially certain, under traditional Texas case law, the jury would have been free to believe the plaintiff's expert and disbelieve and reject the opinion of the defendant's experts. Ironically, *City of Keller* itself acknowledged this very rule earlier in the opinion, but proceeded to ignore the rule it had previously recognized as authoritative.<sup>241</sup> Predictably, as the dissent notes in *City of Keller*, the various cases the court cited for this proposition are directly contrary to its holding:

[T]he Court's conclusion that juries cannot disregard a party's reliance on expert opinions is not consistent with our jurisprudence. The Court cites two cases for this proposition, but neither supports the Court's analysis; instead, both cases support the conclusion that the jury, as the finder of fact, should appropriately resolve factual disputes regarding a party's reliance on hired experts.<sup>242</sup>

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<sup>236</sup> *Id.* at 828, 832 (the City knew of substantial certainty of increasing flooding); *id.* at 831 (O'Neill, J., concurring) (run off would increase from a rate of fifty-five cubic feet per section to ninety-three cubic feet per second); *id.* at 832 (letter to City).

<sup>237</sup> *See generally id.*

<sup>238</sup> *Id.* at 830.

<sup>239</sup> *Id.*

<sup>240</sup> *See id.*

<sup>241</sup> *Id.* at 832.

<sup>242</sup> *Id.* (citing *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 194-95 (Tex.1998); *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448-50 (Tex.1997)).

Obviously, the jury was entitled to believe the plaintiff's expert when he testified that flooding was inevitable and could quite logically have rejected the certifications of the City's engineer(s) as being erroneous, incompetent, or even contrived.

Finally, it should be noted that, according to the Supreme Court of Texas, the so-called "heightened standard of review" did not apply in *City of Keller*. Therefore, the *City of Keller's* majority simply supplants, while claiming to follow, the traditional standard of review for legal sufficiency.<sup>243</sup>

Since *City of Keller* was decided, much has been written by excellent authors on the subject. Former Chief Justice Tom Phillips contends that neither *Garza* nor *City of Keller* should be considered particularly significant: "The uproar over the *Garza* and the *City of Keller* decisions have been disproportional to the incremental nature of these opinions, which is far more about clarifying existing law than inventing new law."<sup>244</sup>

Other appellate experts reject the former Chief Justice Phillips' apologia, root and branch.<sup>245</sup>

More recently, Mr. W. Wendell Hall delivered a thorough explanation of the authority on this issue in *City of Keller*. Mr. Hall said:

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<sup>243</sup> See *id.* at 822–23.

<sup>244</sup> Thomas R. Phillips & Martha G. Newton, *Evolving Notions of "No Evidence"*, in State Bar of Texas Practice Before the Texas Supreme Court, ch. 12.3, at 6 (2007).

<sup>245</sup> See Tim Patton, *Standard and Scope of Review Spotlight: "No-Evidence" Summary Judgments*, in 17th Annual Conference on State and Federal Appeals, ch. 5, at 1 (2007) (stating *City of Keller* not only seems to modify the standards of review but also the scope of review in no evidence motion for summary judgments); James A. Baker, *Trends in No-Evidence Review*, in State Bar of Tex. 19th Annual Advanced Civil Appellate Practice Course, ch. 19, at 1 (2005) (stating *City of Keller* "completely changes the no evidence standard of review"); William V. Dorsaneo, III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233 (2005) (stating *City of Keller* radically changed traditional legal sufficiency review standards). Professor Dorsaneo's comments were acknowledged by Chief Justice Phillips and Ms. Elizabeth Dennis in the foreword of the South Texas Judge and Juror Symposium Issue, 47 S. TEX. L. REV. 157, 161–62 (2005), as follows:

In [the article], [Professor Dorsaneo] explains how the traditional scope of "no-evidence review" in Texas Civil Appeals (which had been the standard since Robert W. Calvert's landmark law review article in 1960) has been replaced by the new standard set forth in the Texas Supreme Court's 2005 opinion in *City of Keller v. Wilson*. Although the Court defends the new standard as essential to its reviewing obligations, Professor Dorsaneo decries it as a constitutional invasion of the jury's province.

There are legitimate constitutional questions raised by *City of Keller* in light of the Texas Constitution and prior Supreme Court jurisprudence. First, is *City of Keller* a new paradigm for reviewing sufficiency of the evidence, or is it déjà vu all over again? . . . Second, is there any difference between reviewing the factual and legal sufficiency of the evidence to support the jury's verdict under the Supreme Court holding in *City of Keller*? That is a difficult question to answer, but it may be argued that the two standards of review have collapsed into one standard of review—the “reasonable and fair minded juror” standard articulated in *City of Keller* and *Boeing v. Shipman*. Third, can *City of Keller* be reconciled with the Texas bill of rights, which guarantees the constitutional right to trial by jury “shall remain inviolate”? Fourth, can *City of Keller* be reconciled with the Texas Constitutional provisions that the “decisions of the courts of appeals shall be conclusive on all questions of fact brought before them on appeal or error.” If reviews of legal and factual sufficiency have become indistinguishable, what does this constitutional provision mean? It does not appear that these constitutional provisions, which were not addressed in *City of Keller*, can easily be reconciled with the holding of that case.

. . . .

Given the Supreme Court's decisions over the past few decades, appellate practitioners should be wary of assuming the Supreme Court will not review the court of appeals' disposition of a factual sufficiency challenge in some manner.<sup>246</sup>

#### 4. A New De Facto Standard for Experts: *Volkswagen v. Ramirez*.

In *Volkswagen of America, Inc. v. Ramirez*, the court considered whether there was legally sufficient evidence to support a jury's finding that

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<sup>246</sup>W. Wendell Hall, *City of Keller v. Wilson Update*, in State Bar of Tex. 21st Annual Advanced Civil Appellate Practice Course, ch. 2.2, at 22–24 (2007) (citations omitted) [hereinafter Hall II].

a defect in the defendant's product caused a fatal automobile collision.<sup>247</sup> On appeal from a second trial of the case,<sup>248</sup> Volkswagen asserted, among other complaints, that the plaintiff's expert testimony provided no evidence of causation.

The basic issue in *Volkswagen*, which is familiar to most products liability practitioners, is whether an admittedly failed component of a vehicle caused the collision or resulted from it.<sup>249</sup> The plaintiff argued that as a result of a catastrophic metallurgical failure, the left rear wheel assembly separated and ultimately detached while the plaintiff was driving at highway speed, causing her to lose control of the vehicle, cross the median and collide with oncoming traffic. The plaintiff's expert accident reconstructionist, Walker, testified that the left wheel assembly separated while the vehicle was traveling east bound which caused the vehicle to fishtail across the grassy median and collide with another vehicle.<sup>250</sup>

Volkswagen had attacked Walker's testimony as scientifically unreliable in the trial court, but those objections were overruled. In addition, plaintiff offered a metallurgical expert, Dr. Edward Cox; Volkswagen did not challenge the reliability of Cox's testimony.<sup>251</sup> Dr. Cox testified that because he had found grass in the grease inside the wheel hub, the left rear wheel assembly certainly must have separated before the Passat entered the median and therefore caused the accident.<sup>252</sup>

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<sup>247</sup> 159 S.W.3d 897, 901 (Tex. 2004).

<sup>248</sup> Following the first jury trial in which the jury returned a unanimous verdict in favor of Volkswagen, the trial judge granted a motion for new trial "in the interest of justice." In response, Volkswagen sought by mandamus to have the Texas Supreme Court require any trial judge who grants a new trial in the interest of justice to set forth his or her reasons for doing so in order that the reasons might be directly reviewed by appeal or mandamus. In that mandamus proceeding, Justice Hecht vigorously dissented arguing that lengthy, prior Texas jurisprudence which required no such explanation should be changed in order that the Supreme Court of Texas could directly review (presumably factually and legally) the propriety of the trial court's action in granting a new trial. See *In re Volkswagen of Am., Inc.*, 22 S.W.3d 462, 462 (Tex. 2000) (Hecht, J., dissenting).

<sup>249</sup> *Volkswagen*, 159 S.W.3d at 901-02.

<sup>250</sup> *Id.* at 902. At this point in the opinion, the Court departs from the actual fact question the jury was asked to resolve, that is whether the failed component caused the collision or resulted from it, to recharacterize the case from the Court's perspective. According to Justice Wainwright, the plaintiff's expert's testimony should be described or characterized as the wheel remaining "tucked" inside the left wheel well or more pejoratively as a "floating wheel" theory.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

Ostensibly, the court was performing a traditional legal sufficiency review in *Volkswagen*.<sup>253</sup> In particular, the court noted that Volkswagen “complains that Walker failed to conduct tests, cite studies, or perform calculations in support of his ‘floating wheel’ theory.”<sup>254</sup> The court acknowledged that Walker did explain how the wheel could separate from the stub axle and remain inside the wheel well throughout the accident based on generally accepted scientific principles.<sup>255</sup> Nonetheless, the court noted that Walker did not conduct or reference any tests to support his theory nor had he read any studies that corroborated his findings.<sup>256</sup> The court thus determined Walker’s opinion was no evidence of causation.<sup>257</sup>

Next the court turned its attention to Dr. Cox. Although Volkswagen did not challenge the scientific reliability of Cox’s testimony, it instead contended that Cox’s opinion of causation was conclusory on its face and therefore, constituted no evidence of causation.<sup>258</sup> Cox’s testimony in this regard was abundantly clear even from the very brief excerpts of it presented by the majority. He testified “a sudden and abrupt catastrophic event” occurred inside the left rear wheel bearing which set in motion a series of other events that lead to the wheel separating away from the stub axle.<sup>259</sup> Cox testified these events would be consistent with unusual and “erratic vehicle behavior” which would then cause the driver to make a corrective over-steer into the median.<sup>260</sup> Cox testified the bearing failure “had to happen” before the vehicle entered the median because that was the only opportunity for the pieces of grass from the median to get into the grease inside the wheel’s hub.<sup>261</sup> Yet, the court proceeded to disregard Cox’s testimony because Cox did not point to any data to prove more probably than not that the driver did in fact experience unusual behavior in

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<sup>253</sup> *Id.* at 903.

<sup>254</sup> *Id.* at 904.

<sup>255</sup> *Id.* at 905.

<sup>256</sup> *Id.* The majority in *Volkswagen* faults Walker for being unable to obtain scientific references to support the Supreme Court’s “floating” or “tucked” wheel theory, not Walker’s actual testimony. The record does not reveal that Walker ever referred to the left rear wheel as being “tucked” inside the wheel well or that he ever referred to his analysis as a “floating wheel.”

<sup>257</sup> *Id.* at 906.

<sup>258</sup> *Id.* at 911.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

the Passat.<sup>262</sup> This statement is made despite the court's earlier acknowledgement that the undisputed evidence established the deceased did suddenly veer across the median before colliding with oncoming traffic.<sup>263</sup> In holding that this expert testimony of Cox was no evidence of causation, the court weighed in with its own application of the "equal inference rule" as articulated in *City of Keller*, apparently ignoring *Lozano* entirely: "In addition, Cox's limited opinion on causation is based on finding grass in the wheel hub. His opinion is just as consistent with the wheel coming off in the median after the Passat went out of control as it is with a wheel separation prior to entering the median."<sup>264</sup>

This statement actually refutes the foundation of the opinion in *Volkswagen*. Even according to Justice Wainwright's analysis, the evidence supported a reasonable inference that the wheel hub broke before entering the median thus causing the collision. The court does not refer to any portion of the record which establishes that a contrary inference is more reasonable, or even as reasonable as was the jury's inference in support of its verdict. The *Volkswagen* rationale simply ignores the court's earlier opinion in *Lozano* which held that the jury can determine for itself which is the more reasonable inference from the evidence, as long as the evidence is legally sufficient to support the inference it draws.<sup>265</sup>

As additional support for its opinion, the Court postulates that Cox's testimony failed to answer another question "crucial" to the plaintiff's theory of causation, that is how the "floating" wheel stayed "tucked" in the wheel well throughout the collision sequence.<sup>266</sup> This "crucial" question is not a question the jury was required to answer, nor one that the plaintiff was required to prove, and there is no indication in the record of the case that Volkswagen ever asked the question. Nevertheless the court states the "[f]ailure to explain how the tucked wheel stayed in the wheel well is, by itself near fatal to the Ramirez's opinion on causation."<sup>267</sup> The supreme court accordingly holds Cox's opinion to be no evidence of causation and renders judgment for Volkswagen.<sup>268</sup>

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 901.

<sup>264</sup> *Id.*

<sup>265</sup> *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001).

<sup>266</sup> *Volkswagen*, 159 S.W.3d at 911.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 912.

In dissent, Chief Justice Jefferson, joined by Justice O'Neill, discussed Cox's testimony in great detail. Justice Jefferson reminded the court that reasonable jurors could decide this case either way, and that the court lacked the authority to weigh<sup>269</sup> conflicting evidence.<sup>270</sup> He pointed out that Dr. Cox identified three separate defects in the left wheel assembly which were confirmed by his analysis of the parts in question under an electron microscope.<sup>271</sup> At least two of the defects according to Dr. Cox had to occur before the actual collision sequence.<sup>272</sup> Chief Justice Jefferson points out that the jury was not required to accept the majority's characterization of the evidence nor was it required to believe that each of these defects were independent, coincidental and wholly unrelated to the cause of the collision.<sup>273</sup> He also pointed out that there was no requirement for the jury to accept a collision sequence in the particular order proposed by the majority.<sup>274</sup>

The majority in *Volkswagen* relied heavily on *Coastal Transport Co. v. Crown Central Petroleum Corp.* in which the court had determined that the expert's opinion was obviously merely conclusory and thus no evidence.<sup>275</sup> Chief Justice Jefferson compared the expert's opinion in *Coastal Transport* with that of Cox in *Volkswagen* and warned:

By equating Cox's testimony here with the paltry testimony at issue in *Coastal*, the Court sets a dangerous precedent that threatens to fundamentally alter the nature of no-evidence review.

Rather than indulging every reasonable inference in favor of the jury's finding, the Court adopts a contrary approach, tipping the scale in the opposite direction to dismiss as "conclusory" expert testimony that supports the

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<sup>269</sup> Chief Justice Jefferson was in the majority in *In re L.M.I.*, 119 S.W.3d 707, 712 (Tex. 2003), which prohibited weighing evidence.

<sup>270</sup> *Volkswagen*, 159 S.W.3d at 913–14 (Jefferson, J., dissenting).

<sup>271</sup> *Id.* at 914–15 (Jefferson, J., dissenting).

<sup>272</sup> *Id.* at 915 (Jefferson, J., dissenting).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 916–17 (Jefferson, J., dissenting).

<sup>275</sup> *Id.* at 903 (citing *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232–33 (Tex. 2004)).

verdict. This Court is constitutionally bound to conduct only a legal—not factual—sufficiency review.<sup>276</sup>

5. The Beat Goes On in Malicious Prosecution: *Kroger Texas, Ltd. v. Suberu*.

*Kroger Texas, Ltd. v. Suberu* is another example of what the current supreme court's legal sufficiency standard of review actually means.<sup>277</sup> Mrs. Suberu, a black woman, went to a Kroger supermarket in Garland to pick up a prescription for her husband.<sup>278</sup> However, apparently another prescription was also ready to be picked up.<sup>279</sup> Since Mrs. Suberu did not have sufficient cash with her to pay for both prescriptions, she told the pharmacy technician she would go out to her car to get the additional money and would return shortly.<sup>280</sup> As Mrs. Suberu was leaving the store, Kroger's "front-end" manager Ms. Weir stopped Mrs. Suberu and accused her of attempting to push a grocery cart full of unsacked goods out of the store.<sup>281</sup> Mrs. Suberu unambiguously testified she had not used a cart to shop for groceries and did not use one that evening.<sup>282</sup> Mrs. Suberu also testified the front-end manager accused her of being with two other people (presumably black as well) who had just left.<sup>283</sup> Weir told Mrs. Suberu she was "going to jail for a long time."<sup>284</sup> Other Kroger employees stated they also had seen Mrs. Suberu attempting to push the grocery cart out of the door.<sup>285</sup> Despite Mrs. Suberu's explanation, no Kroger employee spoke with the pharmacy technician to verify Mrs. Suberu's account of her reasons for being in or leaving the store.<sup>286</sup> Mr. Moody, the assistant manager, directed an employee to call the police who arrested Mrs. Suberu and charged her with theft.<sup>287</sup> After going through trial and being acquitted, Mrs. Suberu sued for malicious prosecution and intentional infliction of

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<sup>276</sup> *Id.* at 917 (Jefferson, J., dissenting).

<sup>277</sup> 216 S.W.3d 788, 793 (Tex. 2006).

<sup>278</sup> *Id.* at 791.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 792.

<sup>287</sup> *Id.* at 791.

emotional distress.<sup>288</sup> The jury awarded Mrs. Suberu \$500 in actual damages, \$28,000 for past and future mental anguish, and \$50,500 in exemplary damages for malicious prosecution, awarding no exemplary damages for intentional infliction of emotional distress.<sup>289</sup>

In connection with Suberu's malicious prosecution claim, the trial judge instructed the jury without objection that:

“Probable cause” means the existence of such facts and circumstances as would excite belief in a person of reasonable mind, acting on the facts or circumstances within his knowledge at the time the prosecution was commenced, that the other person was guilty of a criminal offense. The probable cause determination asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted.<sup>290</sup>

The trial court's charge was based on Texas Pattern Jury Charge Instructions.<sup>291</sup> When there has been no objection made to the jury charge, the court is to evaluate the evidence according to the charge given and the contentions of the parties at trial, as pointed out by Justice Johnson in the *Suberu* dissent.<sup>292</sup> As a result, the fact question in this case was whether or not Kroger, through its employees, both honestly and reasonably believed Suberu was pushing a loaded cart out of the store. The testimony presented a classic conflict for the jury. Suberu testified unequivocally that she was not pushing a cart out of the store, and Kroger employees testified unequivocally that she was.<sup>293</sup> Pertaining to the issue of the reasonableness of Kroger's belief, there was evidence that the Kroger employees would not listen to Suberu's explanation and made no effort to check Suberu's explanation with the pharmacy technician before initiating criminal prosecution.<sup>294</sup>

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<sup>288</sup> *Id.* at 792.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 797 (Johnson, J., concurring in part, dissenting in part).

<sup>291</sup> *Id.* (citing Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 6.4 (2000)).

<sup>292</sup> *Id.* (citing Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 618–19 (Tex. 2004)).

<sup>293</sup> *Id.* at 791.

<sup>294</sup> *Id.* at 792.

On this record, the supreme court concluded there was no evidence to support the jury's verdict.<sup>295</sup> First, the court held Kroger's failure to check Suberu's explanation with the pharmacy technician before initiating criminal prosecution was no evidence because a private citizen has no duty to investigate a suspect's alibi or explanation before reporting a crime.<sup>296</sup> Second, evidence of the pharmacy technician's testimony regarding whether or not she had seen Suberu with a cart, and its inconsistency with the testimony of the other Kroger employees, was rejected because there was no evidence any of the Kroger employees spoke to the technician before instituting the criminal proceedings, and therefore according to the court must be disregarded.<sup>297</sup> Finally, regarding Suberu's testimony that she did not have or use a grocery cart and did not commit the offense, the court opined, "In contrast to the criminal case, however, here the question is not whether Suberu had a cart, but whether Kroger reasonably believed she did."<sup>298</sup> According to the Supreme Court of Texas:

Suberu's testimony does no more than create a surmise or suspicion that Kroger did not believe she was guilty of shoplifting, because it merely invites speculation that Kroger framed her and lied to the police. This conclusion, however, is no more probable than the proposition that Kroger's employees, each independent of the others, mistakenly believed they observed the commission of a crime.<sup>299</sup>

Just as Justice Hecht did in *City of Keller* and just as Justice Wainwright did in *Volkswagen*, Chief Justice Jefferson in *Suberu* ignores the fact that the jury could draw more than one reasonable inference from the evidence, and is entitled to do so without having its verdict nullified by the supreme court's conclusion that the inference is not reasonable. If the jury believed

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<sup>295</sup> *Id.* at 795.

<sup>296</sup> *Id.* at 794.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 795. The contention that an unqualified factual denial by the accused has no more probative value than the possibility of five Kroger employees being simultaneously *independently* and yet innocently "mistaken" that a person had done what she had clearly denied doing is understandably not explained by the court. The "equally probable inference" issue is discussed, *infra* at Part IX.B.

Ms. Suberu and disbelieved Kroger's witnesses, the inferred lack of probable cause would be very reasonable indeed.

As in the other recent Texas Supreme Court cases already discussed, the court in *Suberu* ignored the true equal inference rule. As stated by the court in *Lozano*:

Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.

Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.<sup>300</sup>

The dissent in the *Suberu* case was written by the court's newest member, Justice Johnson, formerly Chief Justice of the Amarillo Court of Appeals.<sup>301</sup> Joined by Justice Medina, Justice Johnson simply pointed out the obvious:

Even assuming a lack of evidence that Kroger did not subjectively honestly believe that Suberu was leaving with a basket of groceries and that Kroger's witnesses did not subjectively honestly believe Suberu was leaving with a basket of groceries, an honest belief was not enough. Under the charge, the jury's finding that Kroger did not have probable cause could have been, and we must

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<sup>300</sup>Lozano v. Lozano, 52 S.W.3d 141, 148–49 (Tex. 2001) (citations omitted).

<sup>301</sup>*Suberu*, 216 S.W.3d at 797.

presume that it was, based on a finding that an honest belief was not reasonable because the credibility conflict was resolved in favor of Suberu: she was not leaving with a basket regardless of Kroger's witnesses' honest belief that she was.

. . . [H]er testimony that she did not have a cart and that there was no cart next to her at the time [the front-end manager] stopped her was some evidence supporting the jury's finding that Kroger's belief in a contrary set of facts was not reasonable regardless of Kroger's subjective sincerity in holding that belief.<sup>302</sup>

Once again, ignoring its own precedent guiding application of the reasonable inference rule, the court uses its power to render judgment for the defendant, contrary to the jury's verdict by simply holding that the jury could not properly draw the very inference it obviously did.

#### 6. "Constitutional" Review of Exemplary Damages: *Tony Gullo Motors v. Chapa*.

The court's treatment of both actual and punitive damages in *Bentley* would turn out to be a preview of coming attractions. In *Tony Gullo Motors I, L.P. v. Chapa*, the Texas Supreme Court moved beyond its broadened reinterpretations of legal sufficiency review to engage in what is essentially a factual sufficiency review for exemplary damages under the name of "constitutional" review.<sup>303</sup>

*Tony Gullo Motors* involved what was described by Justice O'Neill in her dissent as a "bait and switch" scheme in which the plaintiff was threatened, lied to, and the signature(s) of both she and her deceased husband were forged to cover up the defendant's conduct.<sup>304</sup> According to the dissent, the defendant's conduct in the case was at best reprehensible and bordered on criminal.<sup>305</sup> The trial court had disregarded the jury's mental anguish and exemplary damage awards on the ground that Chapa's only claim was for breach of contract.<sup>306</sup> The court of appeals reversed,

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<sup>302</sup> *Id.* at 798 (Johnson, J., dissenting).

<sup>303</sup> 212 S.W.3d 299, 307 (Tex. 2006).

<sup>304</sup> *Id.* at 316 (O'Neill, J., dissenting).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 317 (O'Neill, J., dissenting).

reinstating all the awards but reducing the exemplary damage award from \$250,000 to \$125,000.<sup>307</sup> In the Supreme Court of Texas, the majority opinion was written by Justice Brister.<sup>308</sup> The court held that Chapa was entitled under the verdict to recover exemplary damages for either fraud or violation of the DTPA.<sup>309</sup> However, the court added a new twist. Despite established precedent that the amount of exemplary damages is a matter for factual review (and therefore constitutionally limited to the factual sufficiency review by the courts of appeal), the supreme court held in *Tony Gullo* that it nonetheless has jurisdiction to make a “constitutional” review of the excessiveness of exemplary damages.<sup>310</sup> In reaching this determination, the court rejected Chapa’s contention that the court lacked jurisdiction to consider the excessiveness of the exemplary damage award, stating:

While the excessiveness of damages as a factual matter is final in the Texas courts of appeals, the constitutionality of exemplary damages is a legal question for the court. We have conducted such analyses before. Moreover, the Supreme Court of the United States has found unconstitutional a state constitutional provision limiting appellate scrutiny of exemplary damages to no-evidence review. Only by adhering to our practice of reviewing exemplary damages for constitutional (rather than factual) excessiveness can we avoid a similar constitutional conflict.<sup>311</sup>

The court then rejects Chapa’s argument that the legislature’s limitation of \$200,000 for exemplary damages renders a lesser amount constitutionally permissible.<sup>312</sup> Noting that the constitutional limitations on punitive damage awards are substantive as well as procedural, the court

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 303.

<sup>309</sup> *Id.* at 314.

<sup>310</sup> *Id.* at 307.

<sup>311</sup> *Tony Gullo Motors*, 212 S.W.3d at 307 (citations omitted). The court’s reference to U.S. Supreme Court authority regarding a state limitation to no evidence review is obviously to *Oberg*, discussed *infra*. However, as will be discussed, *Oberg* does not apply to Texas appellate review because Texas does have a procedure for reviewing the possible excessiveness of damages in the courts of appeal under a factual sufficiency review.

<sup>312</sup> *Id.*

holds that if an award is grossly excessive it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.<sup>313</sup> The court holds that while it cannot directly review whether the exemplary damages award is excessive (as the dissent contends it in fact did), it can determine whether the award is “constitutional.”<sup>314</sup> The court then serially cites various decisions of the Supreme Court of the United States to conclude that the award is unconstitutional. Finally, the court states, “Pushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public.”<sup>315</sup>

Whether as a matter of first impression or based on the plurality opinion in *Bentley*,<sup>316</sup> the supreme court holds it is appropriate to return the case to the court of appeals for suggestion of an appropriate remittitur and, if necessary, to return it to the court of appeals again if the second explanation and result is not sufficient.<sup>317</sup> It then remands the case to the court of appeals to determine “a constitutionally permissible remittitur.”<sup>318</sup>

Concurring, Justice Phil Johnson refused to adopt the court’s analysis of exemplary damages but simply referred the majority to the very cases it ostensibly relied upon to support its constitutional intervention.<sup>319</sup> Justice Johnson points out that the United States Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>320</sup> and *BMW of North America, Inc. v. Gore*<sup>321</sup> did not, as the *Tony Gullo* majority suggests, set forth any “bright line constitutional limit for exemplary damages.”<sup>322</sup> He notes correctly that “there are no rigid constitutional benchmarks that an

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<sup>313</sup> *Id.* at 308.

<sup>314</sup> *Id.* The court does not, presumably because it cannot, explain any meaningful difference between factual “excessiveness” and “constitutional” excessiveness.

<sup>315</sup> *Id.* at 310.

<sup>316</sup> The Supreme Court of Texas had no jurisdiction or authority in *Bentley* to determine factual excessiveness or to order or suggest remittitur. Nor did the court have such authority in *Tony Gullo Motors*. See discussion *supra* Part IV.B.1.

<sup>317</sup> *Tony Gullo Motors*, 212 S.W.3d at 310.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 316 (Johnson, J., concurring).

<sup>320</sup> 538 U.S. 408, 425 (2003).

<sup>321</sup> 517 U.S. 559, 583 (1996).

<sup>322</sup> *Tony Gullo Motors*, 212 S.W.3d at 315 (Johnson, J., concurring).

exemplary damages award may not surpass.”<sup>323</sup> Although Justice Johnson would have remanded to the court of appeals for a more complete explanation of the remittitur it ordered, he would not have instructed the court to determine a different amount.<sup>324</sup>

Justice O’Neill dissented in *Tony Gullo Motors*.<sup>325</sup> In addition to the concerns expressed by Justice Johnson, she points out that the court focused its damage comparison analysis solely on the award of non-economic damages rather than all the compensatory damages which would yield a ratio comparison of 4.33 to 1, well within the single digit framework expressed by the United States Supreme Court in *Campbell*.<sup>326</sup> She questions the court’s dismissal of the reprehensibility and criminality of the defendant’s conduct.<sup>327</sup> Most importantly, she points out that excessiveness of punitive damage awards has traditionally been judged in Texas by a factual insufficiency standard, noting that the court of appeals had “assiduously exercised that power in this case.”<sup>328</sup>

As Justice Johnson states in his concurrence, the United States Supreme Court simply has never imposed the bright line rules or formulas deemed by the majority in *Tony Gullo Motors* to be so crucial to constitutional acceptability.<sup>329</sup> The holding in *Tony Gullo Motors* is in fact contrary to the Supreme Court authority expressed in *Haslip*,<sup>330</sup> *TXO*,<sup>331</sup> and

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<sup>323</sup> *Id.* (quoting *Campbell*, 538 U.S. at 425).

<sup>324</sup> *Id.* at 316 (Johnson, J., concurring).

<sup>325</sup> *Id.* (O’Neill, J., dissenting).

<sup>326</sup> *Id.* at 319 (citing *Campbell*, 538 U.S. 408, 419 (2003)).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 315 (Johnson, J., concurring).

<sup>330</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). In *Haslip*, the Court stated, “We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.” *Id.* With regard to the facts of that case, the Court noted: (1) that the amount of punitive damages was more than four times the amount of compensatory damages; (2) was more than two hundred times the actual out-of-pocket expenses of the plaintiff; (3) was much in excess of any fine that could be imposed under the insurance fraud provisions of Alabama law; and (4) that imprisonment could be required of such an individual in a criminal context. *Id.* at 23. Nonetheless, the Court concluded after careful consideration that the award did not transgress the constitutional parameters of the Fourteenth Amendment. *Id.* at 24.

<sup>331</sup> *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993). *TXO* involved a common law action for slander of title. *Id.* at 446. The jury awarded \$19,000 in actual damages and \$10,000,000 in punitive damages. *Id.* In *TXO*, the United States Supreme Court specifically rejected a “test” for determining whether or not a particular punitive damage award is grossly

*Gore*.<sup>332</sup> Furthermore, the exemplary damages award of \$125,000 approved by the court of appeals fell well below the \$200,000 statutory cap provided by the Texas Legislature, and yet the Texas Supreme Court holds that even more room must be left under the cap. With this holding, the court in *Tony Gullo Motors* apparently abandons its stated practice of avoiding policy judgments of its own in the tort reform arena,<sup>333</sup> particularly when the legislature has directly and recently spoken on the subject of damage caps.

Another troubling problem with the Texas Supreme Court's majority opinion in *Tony Gullo Motors* is its minimal discussion of any issues posed by its own state constitutional limits of review. It purports to rely on United States Supreme Court authority as its basis for ignoring the historical Texas standard of factual sufficiency review which is constitutionally restricted in Texas to the courts of appeal, not the Texas Supreme Court.<sup>334</sup> Rather than acknowledging that it has usurped the Texas constitutional role of the courts of appeal by engaging in what is really a factual sufficiency review, the court has instead chosen to cloak its review of the amount of damages under a newly created "constitutional" standard without discussing any true functional difference between the two.

The Texas Supreme Court relies on the United States Supreme Court's decision in *Honda Motor Co., Ltd. v. Oberg*<sup>335</sup> as mandating this "constitutional" review by the Texas Supreme Court.<sup>336</sup> The issue in *Oberg* was the Oregon State Constitution's prohibition on any judicial review of the amount of punitive damages awarded by a jury "unless the court can

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excessive. *Id.* at 456. The Court returned to its statement in *Haslip* that there is no mathematical bright line between damage awards that are constitutionally acceptable and constitutionally unacceptable. *Id.* at 458. The Court in *TXO* stated, "In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. . . . [W]e are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." *Id.* at 462.

<sup>332</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996). With regard to the ratio of compensatory damages to the punitive damages, the Court in *Gore* noted that in *Haslip* it had suggested more than four times the amount of compensatory damages might be "close to the line" whereas in *TXO* the ratio of actual to punitive damages was approximately ten to one. *Id.* Once again the Court reiterated its holding in *Haslip* that it would not and could not draw a mathematical bright line that would fit every case. *Id.* at 582-83.

<sup>333</sup> *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690 (Tex. 2007).

<sup>334</sup> TEX. CONST. art. V, § 6.

<sup>335</sup> 512 U.S. 415 (1994).

<sup>336</sup> *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307 (Tex. 2006).

affirmatively say there is no evidence to support the verdict.”<sup>337</sup> The Court held that Oregon’s refusal to permit any judicial review of the amount of punitive damages, other than a no evidence point, violated the Fourteenth Amendment protection against arbitrary deprivations of property.<sup>338</sup> Texas appellate procedure, by comparison, allows detailed factual and legal sufficiency reviews of the underlying finding of malice and the amount of punitive damages.<sup>339</sup>

The majority in *Tony Gullo Motors* makes only passing reference to the fact that the Texas Constitution provides for exclusive appellate jurisdiction of the factual sufficiency review in the courts of appeal. The majority opinion cites to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>340</sup> as “requiring de novo appellate review of exemplary damages because ‘the level of punitive damages is not really a “fact” “tried” by the jury.’”<sup>341</sup> In *Cooper Industries*, however, the only appellate review of punitive damages by the appellate court before reaching the United States Supreme Court had been limited to an abuse of discretion standard, in which the court of appeals affirmed the punitive damage award by holding the district court did not abuse its discretion in declining to reduce the amount of punitive damages.<sup>342</sup> Moreover, the United States Supreme Court notes that although it suggests that the court of appeals should review the district court’s application of the *Gore* factors in the case de novo, the court of appeals should nonetheless defer to the district court’s findings of fact unless they are clearly erroneous.<sup>343</sup> In contrast, in *Tony Gullo Motors*, the Texas Supreme Court makes no attempt to place limits on the extent of its review of exemplary damages to give proper deference to the factual conclusivity of the courts of appeals, or to distinguish any functional difference between a factual sufficiency review of damages and a constitutional review.

Finally, it seems fair to say that based on its opinion in *Tony Gullo Motors*, the Supreme Court of Texas need give little if any deference

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<sup>337</sup> *Oberg*, 512 U.S. at 418.

<sup>338</sup> *Id.*

<sup>339</sup> See *Herbert v. Herbert*, 754 S.W.2d 141, 143 (Tex. 1988).

<sup>340</sup> 532 U.S. 424, 435 (2001).

<sup>341</sup> *Tony Gullo Motors*, 212 S.W.3d at 307 & n.30 (quoting *Cooper Indus.* 532 U.S. at 436–37).

<sup>342</sup> *Cooper Indus.*, 532 U.S. at 431.

<sup>343</sup> *Id.* at 440 n.14.

whatever to the jury's determination of the reprehensibility of the defendant's conduct.

## V. A CRITIQUE OF THE NEW TEXAS STANDARD

What exactly is wrong with the Texas heightened standard of review? At least six insurmountable defects are immediately apparent.

First, the heightened standard of review is unnecessary. The court remains unable to articulate a principled reason or justification to change the traditional standards of review for legal and factual sufficiency of evidence. Second, insofar as the heightened standard permits the Supreme Court of Texas to weigh or compare conflicting evidence such a practice is expressly prohibited by the factual conclusivity provision of the Texas Constitution. Third, the heightened standard of review effectively reverses the standard for reversible error presently contained in Texas Rule of Appellate Procedure 44.1. Instead of requiring the appellant to establish the absence of evidence to support a finding, the heightened standard of review effectively holds the existence of some or any evidence to the contrary to a finding will authorize the court to find, *de novo*, the evidence is not clear and convincing as a matter of law. This effectively requires the prevailing party in the trial court to negate the existence of any contrary probative evidence. Fourth, the heightened standard departs from or wholly ignores the federal standard of review and the federal scope of review, upon which it is supposedly based, by allowing the Supreme Court of Texas to weigh and compare evidence and to reject inferences that a jury could reasonably have made. Fifth, the heightened standard is in reality no standard at all. The Supreme Court of Texas to date has not and apparently cannot state with even a modicum of objectivity either the quantum or quality of evidence that is necessary to support a firm belief in the existence of any fact, most notably malice. Finally, the so-called heightened standard of review is inherently lacking in objectivity. It permits and even encourages subjective and result oriented decisions and thus is inherently unfair in its application. Each of these concerns will now be discussed.

### A. *The Heightened Standard is Unnecessary*

It seems strange but necessary to begin with one of the most ancient principles of judicial decision making, *stare decisis*. The principle of *stare decisis* is not merely a staid concept of judicial antiquity but rather is a part of the living law. As a jurisprudential matter, one of the ultimate goals of

the law is to produce predictability in the outcome of decisions.<sup>344</sup> Stated differently, it is only by knowledge of the substantive law and the standard and scope of review by which it will be applied in Texas courts that a competent attorney can intelligently advise a client. Ultimately, if the law is unpredictable in application, it appears to be simply arbitrary or result-oriented when applied in a particular case. Such an appearance erodes public confidence in our system of justice.

Consistent with *stare decisis*, the decision of the highest court of a state or nation should stand unless there is principled and compelling basis to change it.<sup>345</sup> Philosophically, this requires the proponent of any major change in the law to state his or her case for the change in order that it may be openly and honestly evaluated by all who will be affected by it. The central deficiency of the Texas heightened standard of appellate review is that the Supreme Court of Texas has not, because it cannot, state or justify a reason to change from the traditional standards of legal and factual sufficiency which have served this state very well, even since its early days as a Republic. Exactly as Justice Vance stated, there is no principled or logical reason why the traditional standard of review is not fully adequate to determine whether or not the record establishes proof by clear and convincing evidence. Either the record establishes a basis for a firm belief as to the fact found or it does not. The *ipse dixit* of the court in *In re C.H.* that a heightened standard of review must be adopted as a matter of “logic” begs the question and intimates a more perverse rationale which is unstated.<sup>346</sup> If some type of logic justifies or commands so major a change in so basic of a concept of the law as a standard of review, presumably the justices of the supreme court in consultation with each other should at least be able to openly state what it is. In this regard, the silence of the supreme court is meaningful by its omission. Also of concern is the supreme court’s steadfast refusal to candidly address or overrule a plethora of its own precedent, most of which is fairly recent in origin, which squarely rejects the notion that there are or could be three levels of evidentiary review in Texas. At the very least, simple respect for the intelligence of the bench and bar of Texas requires the Supreme Court of Texas to articulate the legal

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<sup>344</sup>Weiner v. Wasson, 900 S.W.2d 316, 320 (Tex. 1995).

<sup>345</sup>John G. & Maria Stella Kenedy Mem’l Found. v. Dewhurst, 90 S.W.3d 268, 281 (Tex. 2002).

<sup>346</sup>89 S.W.3d 17, 25 (Tex. 2002). Presumably, it would not be acceptable in polite legal circles to openly state that a new standard of review should be adopted in order to make it easier to reverse jury verdicts.

basis for its new standards and to explain why the policy objective it so desperately seeks to achieve by the alteration of the standards is legally supportable. As long as the Supreme Court of Texas refuses to openly discuss a principled basis for the fundamental change(s) it has made for Texas, the reputation of the court will be further tarnished, its integrity will be suspect regardless of its actual intentions, and every decision it renders will be viewed as a result looking for a rationale.

### *B. The Constitutional Prohibition*

The Texas Supreme Court's view of the Texas Constitution's factual conclusivity clause which otherwise protects the court of appeals' factual determinations from supreme court review seems to change with time depending upon whose ox is in the proverbial ditch. In unhappier times for example, Justice Hecht, dissenting in *Lofton v. Texas Brine Corporation*, stated:

The Court cannot hold that the evidence in this case is factually sufficient to support the judgment. Article V, section 6 of the Texas Constitution makes the court of appeals' determination of the factual insufficiency of the evidence in a case "conclusive."

Stymied by the constitution, the Court cannot decree the result it rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the court of appeals until it reaches a result that the Court approves. Always the ground for reversal is that the appeals court either cannot or will not follow the law. For this Court to hold that an appeals court has not conducted its factual insufficiency analysis in a lawful manner, simply to coerce that court into changing its conclusion, is to usurp the constitution prerogative of the court of appeals. That is what I believe is happening in this case.<sup>347</sup>

Justice Hecht continued:

The Court rightly holds that the court of appeals may not substitute its judgment for the finder of fact. Likewise,

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<sup>347</sup> 777 S.W.2d. 384, 388 (Tex. 1989).

the Court is constitutionally forbidden to substitute its judgment for the court of appeals. In his concurring opinion in *Pool v. Ford Motor Co.*, Justice Gonzalez expressed his fear that the Court was trying to fashion some justification for second-guessing the courts of appeals in the exercise of their constitutional prerogative to judge the factual sufficiency of the evidence in a case. Today, those fears approach reality.<sup>348</sup>

As Justice Hecht also noted in *Lofton* and in several other of his opinions, the application of this Constitutional prohibition does not depend upon the name or title of a standard of review or a scope of review. Yet, in *Bentley*, *Garza*, and *Tony Gullo Motors*, the majority accomplished exactly what Justice Hecht condemned in *Lofton*. By the simple expedient of modifying the scope of review to include all the evidence in what is nonetheless a heightened legal sufficiency complaint, the court is unashamedly weighing evidence for and against the finding exactly as the court of appeals would do in determining factual sufficiency. However, the consequences of the “new” standard of review are not only unconstitutional in the sense that they usurp the prerogative of the court of appeals to conclusively make such factual determinations. The new standard goes much further. Now, because factual sufficiency is permuted into legal sufficiency, the existence of some evidence to the contrary *ipso facto* creates, at least in the mind of some members of the supreme court, a no-evidence situation in which judgment can be rendered as opposed to remanded.

### C. Reversal of the Appellate Burden

Since the Texas Rules of Civil and Appellate Procedure were written, in order to obtain reversal, the burden has been placed upon an appellant to demonstrate that the trial court committed an error of law which probably resulted in the rendition of an improper judgment.<sup>349</sup> For the supreme court to balance or weigh evidence which is contrary to a jury’s finding essentially reverses the appellate burden by requiring the party defending the judgment to show there is no or virtually no evidence to the contrary. This is the practical effect of the *Garza/City of Keller* dichotomy.

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<sup>348</sup> *Id.* at 389 (citations omitted).

<sup>349</sup> TEX. R. APP. P. 44.1(a).

The clear direction of the so-called “heightened standard of review,” appears to be that if there is any significant evidence of significant probative force which conflicts with or is contrary to the finding, or if such evidence is undisputed, or if such should be viewed in different context, than a rational finder of fact cannot form a firm belief or conviction to the contrary. Effectively rejected by the court as presently constituted was the court’s earlier resolution of precisely the same question in *Burk Royalty Co. v. Walls*. In *Burk Royalty*, Justice Spears wrote one of the most comprehensive opinions ever published in Texas on the subject of negligence and gross negligence and the various standards or tests that the Supreme Court of Texas had used in various contexts to determine whether or not gross negligence findings could be supported on appeal.<sup>350</sup> Justice Spear’s rejection of a heightened standard of review is as true now as it was when he wrote it almost 30 years ago:

In testing a jury finding of gross negligence, the same no evidence test should apply as to any other fact issue. The plaintiff has the burden to prove that the defendant was grossly negligent. If the jury finds gross negligence, the defendant has the burden of establishing that there is *no evidence* to support the finding. The “some care” test utilized in prior workers’ compensation cases improperly reverses that burden. Under the “some care” test the defendant, instead of proving there is *no evidence* to support the verdict, would show there is *some* evidence that does not support the jury finding of gross negligence, i.e., entire want of care. The burden is thus shifted to the plaintiff to negate the existence of some care. This is almost an impossible task since anything may amount to some care. Moreover, the “some care” test does violence to the rule for testing the legal insufficiency of the evidence which requires that only the evidence viewed in its most favorable light and tending to support the jury’s finding may be considered. The jury, after all, does not have to believe evidence that “some care” was exercised. When there is *some* evidence of defendant’s entire want of care and also *some* evidence of “some care” by the defendant, the jury finding of gross negligence through entire want of

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<sup>350</sup> See generally 616 S.W.2d 911 (Tex. 1981).

care resolves the issue, and the appellate court is bound by the finding in testing for legal insufficiency.<sup>351</sup>

#### D. *The Gross Departure from Federal Precedent*

##### 1. The Federal Standard for Judgment as a Matter of Law

When the Supreme Court of Texas began the process of attempting to define or determine the quantum and quality of proof that was necessary to support a jury finding by clear and convincing evidence or to form a “firm belief,” it supposedly adopted the federal standard and scope of review for such subjects.<sup>352</sup> Yet the Supreme Court of Texas formulation of its “heightened standard of review” simply ignores the federal standards for motions for judgment as a matter of law (JMOL). As Michael Smith correctly notes, in federal court a party moving for JMOL has a difficult, if not impossible burden of persuasion because the court must view all of the evidence in a light most favorable to the non-movant and indulge all reasonable inferences in favor of the non-movant.<sup>353</sup> Further, in federal court when deciding a JMOL or reviewing a verdict on appeal, the court cannot “make credibility determinations or weigh the evidence.”<sup>354</sup> Moreover, in federal court in deciding such a motion, the reviewing court must, (1) draw reasonable inferences in favor of the non-movant; (2) give credence to evidence supporting the movant that is uncontradicted and unimpeached; and (3) refrain from making credibility determinations or weighing the evidence.<sup>355</sup>

##### 2. Federal Precedent regarding *Jackson v. Virginia*

Another thing is abundantly clear—before, during and after *Jackson v. Virginia*, the Supreme Court of the United States has steadfastly refused to

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<sup>351</sup> *Id.* at 920–21.

<sup>352</sup> *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

<sup>353</sup> MICHAEL C. SMITH, O’CONNOR’S FEDERAL RULES—CIVIL TRIALS 566 (2008) (Jones McClure Publishing, Inc. 2008); *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 43 (2nd Cir. 2002); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

<sup>354</sup> SMITH, *supra* note 353, at 567; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

<sup>355</sup> *Ellis v. Weasler Eng’g, Inc.*, 258 F.3d 326, 337 (5th Cir. 2001), *amended*, 274 F.3d 881 (5th Cir. 2001) (deleting mention of the distinction between decisions on law and facts in Louisiana cases).

permit appellate judges to weigh or balance the evidence for themselves.<sup>356</sup> Before *Jackson v. Virginia*:

The elementary but crucial difference between burden of proof and scope of review is, of course, a commonplace in the law. The difference is most graphically illustrated in a criminal case. There the prosecution is generally required to prove the elements of the offense beyond a reasonable doubt. But if the correct burden of proof was imposed at the trial, judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment. In other words, an appellate court in a criminal case ordinarily does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment is supported by substantial evidence.<sup>357</sup>

In *Jackson v. Virginia* itself, after discussing the constitutional requirement of judicial review to determine the evidence could support a finding of guilt beyond a reasonable doubt, the court stated:

But this inquiry does not require a court to “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.” Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.<sup>358</sup>

After *Jackson v. Virginia*, in *Anderson v. Liberty Lobby, Inc.*, the Court stated, “[B]ut it is clear enough from our recent cases that at the summary

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<sup>356</sup> 443 U.S. 307, 318–19 (1979).

<sup>357</sup> *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 282 (1966).

<sup>358</sup> *Jackson*, 443 U.S. at 318–19 (citations omitted).

judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."<sup>359</sup> The Court continued, "Similarly, where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity."<sup>360</sup> The Court stated:

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.<sup>361</sup>

And now most recently in *Reeves v. Sanderson Plumbing Products, Inc.*, "In entertaining a motion for judgment as a matter of law, courts should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of nonmoving party, and it may not make credibility determinations or weigh the evidence."<sup>362</sup>

If *Reeves* and *Garza* are compared in a side by side fashion, the cases are almost identical in terms of their legal construct. In both cases, the U.S. Supreme Court in *Reeves* and the Supreme Court of Texas in *Garza* attempted to review, compare and weigh inferences from evidence adversely to a jury finding relating to a state of consciousness. In both cases the lower courts either rejected inferences that could have been drawn by the jury or adopted their own inferences from the evidence directly contrary to the jury's verdict.<sup>363</sup> The result in *Garza* by virtue of the mental gymnastics of the new heightened standard of review was a reversal and rendition even though there was admittedly direct evidence in the record to support the jury's finding that SWBT had maliciously retaliated against *Garza* for filing his workers compensation claim.<sup>364</sup> In *Reeves*, the Supreme Court of the United States reversed the Fifth Circuit, chastising it

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<sup>359</sup> 477 U.S. 242, 249 (1986).

<sup>360</sup> *Id.* at 252.

<sup>361</sup> *Id.* at 255.

<sup>362</sup> 530 U.S. 133, 150 (2000).

<sup>363</sup> *Id.* at 139; *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 619 (Tex. 2004).

<sup>364</sup> *Garza*, 164 S.W.3d at 628–29.

for both misconceiving and misapplying the appropriate standard of review.<sup>365</sup>

If *Jackson v. Virginia* is considered by the Supreme Court of Texas to be the linchpin of its quasi-constitutional analysis regarding proof by clear and convincing evidence, then certainly the Supreme Court of the United States' assessment of the constitutional standard of review for proof of guilt beyond a reasonable doubt should also be persuasive if not controlling. Illustrative in this regard is *Johnson v. Louisiana*.<sup>366</sup> In *Johnson*, Louisiana law permitted conviction in certain criminal cases by 9 to 3 verdict.<sup>367</sup> Johnson first attacked the Louisiana statute which permitted conviction by less than a unanimous verdict on due process and equal protection grounds which were rejected by the Louisiana Supreme Court.<sup>368</sup> He then argued that the fact that three jurors were not convinced of his guilt beyond a reasonable doubt itself established that the evidence was insufficient to support the finding beyond a reasonable doubt under the broader federal due process and equal protection standards.<sup>369</sup> Rejecting those arguments, the Supreme Court of the United States held in part, "Entirely apart from these cases, however, it is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt."<sup>370</sup> The Court further stated:

In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard. Jury verdicts finding guilty beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt, even though the trial judge might not have reached the same conclusion as the jury,

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<sup>365</sup> *Reeves*, 530 U.S. at 152.

<sup>366</sup> 406 U.S. 356, 362 (1972).

<sup>367</sup> *Id.* at 364.

<sup>368</sup> *Id.* at 358–59.

<sup>369</sup> *Id.* at 360.

<sup>370</sup> *Id.*

and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction.<sup>371</sup>

Oddly, *In re C.H.* expressly cautioned Texas appellate courts not to apply sufficiency standards that would only uphold proof beyond a reasonable doubt.<sup>372</sup> Yet, in *Johnson*, when the far more demanding federal constitution requirements of due process and equal protection were met and a citizen was convicted of a crime by proof beyond a reasonable doubt and sentenced to hard labor by a verdict of six jurors while three jurors believe the accused to be innocent, it is difficult to understand how the result in a civil case in Texas involving the lesser burden of proof of clear and convincing evidence should be different.

The Supreme Court of Texas thus far has been unable, or more accurately unwilling, when adopting the federal scope of review, to recognize any of the simultaneous and substantively co-existing federal standards of review as limitations on the same subject. However much of the Supreme Court of Texas may wish the rule were otherwise, the question is not whether the individual justices themselves agree with the verdict, but rather whether any rational finder of fact could have reached the verdict. To fail to grasp that critical distinction is to judicially nullify the right to trial by jury.

#### *E. A Standardless Standard*

Another major deficiency in the supreme court's postulated "heightened standard of review" is the actual absence of an objective standard of review itself. The legal meaning of the phrase "clear and convincing evidence" is relatively well known.<sup>373</sup> What is not well known and thus far remains unstated by the Supreme Court of Texas is any objective standard of review for the determination of whether or not clear and convincing evidence exists. At least in part, the Supreme Court of Texas seems to have replaced an objective legal standard of traditional legal sufficiency review with a "legal" standard that is essentially, if not wholly, factual in nature, that is whether a reasonable (or rational) juror could reasonably form a reasonably firm belief that a certain fact existed. The repeated and ultimately circular

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<sup>371</sup> *Id.* at 362–63 (citations omitted).

<sup>372</sup> 89 S.W.3d 17, 26 (Tex. 2002).

<sup>373</sup> *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998).

use of the word “reasonable,” renders the court’s new “standard” at once completely unpredictable in application and totally subjective according to the individual determination of the justices of the Supreme Court of Texas as to their own notions of what is or is not “reasonable.”<sup>374</sup> In one way it would be just as logical to say that the standard of review in every case should now be whether any finding, ruling, a verdict or a judgment was “reasonable.” Mr. W. Wendell Hall also does a thorough job of tracing of the origins of what he calls the “reasonable and fair minded juror” standard.<sup>375</sup> He concludes as follows:

Finally, the supreme court rendered its decision in *City of Keller* and transitioned from the traditional statement of the standard of review that most practitioners were familiar with to an emphasis on the “reasonable and fair-minded juror” standard of review in legal sufficiency of the evidence cases. Moreover, *City of Keller* seems to Texas’s sufficiency of evidence review much closer to the federal standard of review.<sup>376</sup>

As will be noted shortly, while the supreme court may intend to make the Texas standard of review closer to that of the federal courts, exactly the opposite is the case. It is, of course, obvious that what is reasonable to one justice of the Supreme Court of Texas may not be reasonable to the other and also may not be reasonable to the jury.<sup>377</sup> One of the Chief architects of the standardless standard of review is none other than Justice Hecht

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<sup>374</sup>Very recently Mr. W. Wendell Hall has described the court’s use of the word “reasonable” in *City of Keller* as follows:

The Court uses the word “reasonable” 42 times in the *City of Keller* and the term “reasonable jurors” 15 times. Given the length of the opinion, this can be ignored as insignificant. Or, [it] can be viewed as sending a signal that jury verdicts must be reasonable, at least by five members of the supreme court.

Hall II, *supra* note 246, at 1.

<sup>375</sup>*Id.* at 14–17.

<sup>376</sup>*Id.* at 17.

<sup>377</sup>Most practitioners are familiar with former Chief Justice Calvert’s tongue in cheek evaluation of reasonableness in his famous law review article. There he noted that five members of the Supreme Court could say that twelve jurors, three court of appeals judges, and four dissenting members of the court were unreasonable in their beliefs based on the contrary opinion of the Supreme Court of Texas. See Robert W. Calvert, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361, 364–68 (1960).

himself. In 1993 in politically unhappier times, Justice Hecht decried the absence of objective standards to define what was and was not acceptable in the law. Illustrative are the following statements from several of Justice Hecht's opinions, which apply as much to subjective "reasonableness" as they did to "outrageousness."

He stated in *Twyman v. Twyman*, "Outrageousness, like obscenity, is a very subjective, value-laden concept; what is outrageous to one may be entirely acceptable to another. To award damages on an I-know-it-when-I-see-it basis is neither principled nor practical."<sup>378</sup>

Concurring in *Wornick v. Casas*, he stated:

There are, however, no legal standards by which judges and juries can distinguish conduct which is extreme and outrageous from conduct which is not. And because outrageousness is entirely in the eye of the beholder, it can neither be proved nor disproved by evidence. Liability under this tort depends upon whether a jury, trial court or appellate court, as the case may be, is offended by the particular circumstances of the case before it.<sup>379</sup>

He further stated:

The truth of the matter is that Wornick's conduct was not outrageous simply because most of the Members of this Court, Casas' court of last resort, are not sufficiently offended by it. If they were, the result would be different. . . . I have my own personal view of what is outrageous, but I do not believe that Casas should win or lose her case based upon my own personal opinions. While I am constrained to acknowledge that *Twyman* is the law, I am not obliged to decide this case or any other on the basis of my personal views. To do so, in my view, substitutes the rule of man for our rule of law.<sup>380</sup>

Also dissenting in *Massey v. Massey*, he stated:

[N]either this Court nor the court of appeals explains what exactly it is about Henry's conduct that makes it

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<sup>378</sup> 855 S.W.2d 619, 629 (Tex. 1993) (Hecht, J., concurring in part, dissenting in part).

<sup>379</sup> 856 S.W.2d 732, 736 (Tex. 1993) (Hecht, J., concurring).

<sup>380</sup> *Id.* at 737.

outrageous. That is supposed to be self-explanatory. In reality, the standard by which outrageousness is to be measured is the personal opinion of the person asked to decide. That is not a workable legal standard.

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The answer depends entirely upon the personal opinions of the person asked to decide. . . . The only guideline to which the jury could resort was its own views of propriety.<sup>381</sup>

Thus, in a very real sense, the new standard of review is no standard at all. Instead it substitutes the thought processes of the justices or their personal assessment of reasonableness for those of the jury. This appears to be a standard that of necessity requires a randomized, ad hoc, subjective evaluation of the entire record in each case by each justice in order to reach a decision. Such an approach affords no deference whatsoever to the verdict of the jury in the first instance or to the conclusiveness of the court of appeals determinations of factual sufficiency under the Texas Constitution. Last, and by no means least, this standard, such as it is, unabashedly permits, if not requires, the justices of the Supreme Court of Texas to weigh evidence for and against a finding in order to determine whether or not it is "reasonable." Completely absent from this analysis is the federal standard which rejects such an approach and asks a different question. The correct question is not whether the justices of the Supreme Court of Texas individually or collectively are satisfied that the verdict of the jury is supported by sufficient evidence but rather whether any rational trier of fact could form a firm belief of the fact found in the verdict. Unless the Supreme Court of Texas disciplines itself to avoid injection of personal and subjective opinions into what should be an objective review of evidence, the jury and its verdict will become, in the words of the Court in *Ward v. Bledsoe*, "a mere bagatelle, and a useless appendage of the court."<sup>382</sup> In the process it is not overstatement to say the right to trial by jury will soon vanish as a limitation on the power of the judicial branch of government.

If this criticism is too harsh, certainly the Supreme Court of Texas should be able to state at a minimum how it will formulate or determine whether there is an objective standard by which anyone can determine, in

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<sup>381</sup> 867 S.W.2d 766, 766–67 (Tex. 1993).

<sup>382</sup> *A.J. Ward & Co. v. Bledsoe & Clarkson*, 32 Tex. 252, 254 (1869).

advance, whether or not there is a basis for a jury's determination of a firm belief to satisfy the more onerous burden of proof by clear and convincing evidence. The quantum and quality of proof at trial does not prevent, but in fact promotes, the application of a traditional standard of legal sufficiency. If the Supreme Court of Texas would only articulate what that real standard is, the traditional standard of legal sufficiency review could quite adequately address at least some if not all of the underlying but unstated or secret concerns of the Court. Although it may not seem so to the Supreme Court of Texas, it is believed by many, including this author, that the existing standard for heightened appellate review is in reality no standard at all. In fact, the principle deficiency of the heightened standard of review is ironically the very standard that Justice Hecht and other members of the court so ardently condemned in earlier days. As Justice Hecht stated in his dissent in *Twyman*, "I-know-it-when-I-see-it [standard of review] is neither principle nor practical."<sup>383</sup> Justice Hecht also had it right when he stated in *Womack* that a party's ability to recover damages should not be dependant on the personal subjective views of the judge deciding his or her case.<sup>384</sup> Yet when the majority accepts only jury verdicts based on evidence or inferences individual justice consider to be subjectively "reasonable" with no other support or justification except its own *ipse dixit*, it sinks into the very quagmire Justice Hecht correctly decried in 1993.

A related and embarrassing problem is the evident lack of consistency that exists between the Court's decisions now when compared to a time when the present majority did not exist. As previously noted in his biting dissent in *Lofton v. Texas Brine Corp.*, Justice Hecht rightly and bitterly condemned the majority for ignoring the mandates of factual conclusivity which protected the factual determinations of the court of appeals.<sup>385</sup> He quite rightly rebuked the majority for attempting to act in excess of its jurisdiction by conducting de facto sufficiency review and for attempting to coerce the court of appeal to reach a decision with which it agreed.<sup>386</sup> Yet in *Bentley*, Justice Hecht albeit under the rubric of the First Amendment did exactly what he condemned in *Lofton*. The court ignored Texas' constitutional factual conclusivity limitations on the jurisdiction of the supreme court, and imposed a result to the majority justices' individual

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<sup>383</sup> *Twyman*, 855 S.W.2d at 629 (Hecht, J., concurring in part, dissenting in part).

<sup>384</sup> *Wornick*, 856 S.W.2d at 737 (Hecht, J., concurring).

<sup>385</sup> 777 S.W.2d 384, 388 (Tex. 1989) (Hecht, J., dissenting).

<sup>386</sup> *Id.*

liking. The court also directly instructed or coerced the court of appeals to comply with the desired result although it had no jurisdiction to do so. *Tony Gullo Motors* repeated these same constitutional insults.

## VI. OTHER LEGAL COMMENTARY

Phillip Hardberger, Former Chief Justice of the San Antonio Court of Appeals after reviewing the Texas Supreme Court's decisions for approximately ten years offered this sad summary almost ten years ago:

For almost a decade, the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts. In every area of the law, the Phillips/Hecht Court has overturned or limited potential recovery by injured individuals. In all areas of the law, concepts of duty, causation, no-evidence, and qualifications of experts have been greatly altered. Because stare decisis is so important and virtually a commandment to both an intermediary appellate and trial court, these concepts may stay as the Court has crafted them for a long time. Each decision in these various areas of the law chips away at an injured party's ability to present a case to a jury.

Although lip service is given to the importance of the jury, the decisions of the Court demonstrate that, in fact, the jury verdict does not mean much. This erosion of the jury's significance undercuts a major tenet of democracy—that the community of the parties in litigation should determine the justice of the dispute. This principle harkens back to the Greek Republic, where the citizens' voice was considered the voice of the Republic. In the final analysis, we trust the wisdom of the people, or we reject the jury in favor of a more elite voice.

Predictability in the law is greatly needed. Predictability in the law does not refer to the predictability that a Democrat will vote one partisan way, and a Republican will vote another partisan way; rather, it refers to the predictability that the law will be interpreted consistently, regardless of who the judge is or the judge's party affiliation. Predictability in the law also concerns

itself with the idea that the jury will always have the last word in deciding the facts and that a judge will not disturb those findings when he would have held otherwise.<sup>387</sup>

Essentially the same conclusion reached by former Chief Justice Hardberger was recently reached by Professor David A. Anderson of the University of Texas School of Law. Professor Anderson with his students recently conducted an exhaustive and copiously documented review of the decisions of the Supreme Court of Texas over the past decade. As of 2006, Professor Anderson concluded that his work “[d]emonstrates that the Court’s tort law decisions disproportionately favor defendants and that the disparity cannot be readily explained by factors other than a determination to limit tort liability.”<sup>388</sup> Professor Anderson found that “[t]he impression that the court is result-oriented is reinforced by its willingness to decide cases that have little precedential value.”<sup>389</sup> He further stated:

The court’s eagerness to review evidence is a reform only if one believes that allowing juries to decide facts is a defect. Rescuing defendants from their own lawyers’ mistakes is a reform only if defendants are a disadvantaged class that cannot compete with plaintiffs on a level field. Construing tort reform statutes to restrict liability even more than the language requires is a reform only if subverting legislature compromises is a legitimate judicial activity. When the court makes it difficult for plaintiffs to prevail, not by changing the law, but by ad hoc decisions that give the trial bench and the bar little guidance beyond the impression that the court will try to find a way to defeat recovery, the court does little to correct deficiencies in the law.<sup>390</sup>

He concludes:

The electorate presumably has some awareness of the ideology of the judges its chooses, even if it chooses them primarily on the basis of party affiliation; in Texas, at least, only the most obtuse voter could fail to realize that

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<sup>387</sup> Phillip Hardberger, *Juries Under Siege*, 30 ST. MARY’S L.J. 1, 141–42 (1998).

<sup>388</sup> David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 7 (2007).

<sup>389</sup> *Id.* at 44.

<sup>390</sup> *Id.* at 45.

Republican candidates are more likely than Democrats to believe tort liability needs to be curtailed. But advancing an ideology by adopting congenial legal principles is one thing; advancing an anti-tort ideology simply by refusing to allow plaintiffs to succeed is quite another.<sup>391</sup>

Professor Anderson's research and that of his students includes virtually every major Texas decision of consequence written by the Texas Supreme Court in the past ten years as well as most of the scholarly legal writing on the subjects as well.<sup>392</sup> His conclusions, however unpleasant they may be, are unassailably correct.

Professor Anderson's research was complete through most of 2006. The trends he identified continue relatively unabated with the Texas Supreme Court using a number of legal devices to achieve the result desired in a variety of cases. In addition to the cases discussed here, the following cases are illustrative (but by no means exhaustive) of this trend: *Loram Maintenance of Way, Inc. v. Ianni*,<sup>393</sup> *Jackson v. Axelrad*,<sup>394</sup> *Larson v. Downing*,<sup>395</sup> *Bed, Bath & Beyond, Inc. v. Urista*,<sup>396</sup> *Hyundai Motor Co. v.*

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<sup>391</sup> *Id.* at 46.

<sup>392</sup> *Id.* at 7.

<sup>393</sup> 210 S.W.3d 593, 598 (Tex. 2006) (holding an employer who encouraged and permitted heavy methamphetamine use by on duty employees and who gave employees time off to purchase drugs had no duty to a police officer who was shot and seriously injured by employee shortly after his shift ended because the employee was "off duty").

<sup>394</sup> 221 S.W.3d 650, 658 (Tex. 2007) (holding a physician who was the patient had a legal duty to the treating physician to more accurately disclose the severity of his pain, where it had originated, and that he had been advised to have a colonoscopy in two years, which constituted "negligence" by the patient sufficient to bar the plaintiff's recovery).

<sup>395</sup> 197 S.W.3d 303, 303 (Tex. 2006) (holding that a physician who had been practicing medicine for 27 years, was licensed in four states and one foreign country, was board certified in plastic and reconstructive surgery, had been Chief of Plastic surgery at two medical centers, had taught at Tulane Medical School until approximately one year before the subject surgery and was actively practicing plastic surgery in Arizona, was not qualified to express opinion on a particular surgery since it had been approximately fifteen years since he had personally performed that particular surgery).

<sup>396</sup> 211 S.W.3d 753, 757 (Tex. 2006) (holding that an improperly given unavoidable accident instruction was harmless error, refusing to apply its own earlier rationale in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000)).

*Vasquez*,<sup>397</sup> *Cooper Tire & Rubber Co. v. Mendez*,<sup>398</sup> and *Fifth Club, Inc. v. Ramirez*.<sup>399</sup>

Very recently using statistical expertise from the Graduate School of Business, Baylor Law School Dean Bradley J.B. Toben, Graduate School Dean Larry Lyon, former Law Professor William D. Underwood, and Law Professor James Wren conducted an exhaustive study from the best source of information regarding the supposed ideological variances of jury verdicts in Texas—Texas trial judges themselves.<sup>400</sup> Dean Toben and his group found that Texas trial judges, both Democratic and Republican, overwhelming support the accuracy and fairness of jury verdicts and have only relatively infrequently intervened to adjust jury determinations.<sup>401</sup> The Toben study debunks root and branch the myth of “run away” juries and widely exorbitant damage awards.

The ideological disposition of cases by the Supreme Court of Texas is underscored by two of its most prolific writers. Justice Hecht has postulated a variety of reasons for a declining number of jury trials.<sup>402</sup> Justice Scott Brister’s contempt for the jury system is transparent and seething.<sup>403</sup> Justice Hecht, apparently sincerely, laments the decline in jury trials and also recognizes the effect this decline will have on the development of the common law in Texas.<sup>404</sup> Justice Brister’s ideas on the subject and his comparison to a Wal-Mart economic model speak for

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<sup>397</sup> 189 S.W.3d 743, 753 (Tex. 2006) (upholding trial court’s refusal to permit voir dire questions relating to relevant evidence).

<sup>398</sup> 204 S.W.3d 797, 804 (Tex. 2006) (holding following *City of Keller v. Wilson*, while ordinarily weighing conflicting admissible evidence is a matter for the jury when conducting a no evidence review, the appellate court must consider the basis for the expert’s opinion as well as contrary evidence which shows it has no scientific basis).

<sup>399</sup> 196 S.W.3d 788, 797 (Tex. 2006) (upholding a jury’s award of a mere \$20,000 for future mental anguish damages by a bare majority (5-4)).

<sup>400</sup> Larry Lyon et al., *Straight from the Horse’s Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 420 (2007).

<sup>401</sup> *Id.* at 427.

<sup>402</sup> Nathan L. Hecht, *Arbitration and the Vanishing Jury Trial: Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B.J. 854, 855–56 (2006).

<sup>403</sup> Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 197 (2005).

<sup>404</sup> Hecht, *supra* note 402, at 856.

themselves. More balanced and informed reviews of these subjects appear in Professor Powell's article<sup>405</sup> and Dean Toben's article as well.<sup>406</sup>

Neither Justice Hecht nor Justice Brister chooses to address horrifying reality described in detail by Professors Anderson, Powell, Dorsaneo, or Dean Toben. The most obvious reason for the decline in the number of jury trials in Texas, particularly in tort cases, is because many attorneys representing individuals against institutional interests do not believe the system is fair and balanced. They do not believe that the Supreme Court of Texas decides cases on the basis of law as opposed to ideology and, accordingly, they believe that the investment of time, effort, and money necessary to prevail in a tort action in Texas is futile. If the Justices of the Supreme Court of Texas honestly do not realize this fact, such a lack of insight only illustrates how seriously removed certain justices are from the present reality of trial and appellate practice in Texas.

The ideological shift inherent in *City of Keller* and its progeny is demonstrated to be flagrantly wrong by respected members of the judiciary presently in both active and national service and from a distinguished group of Texas law professors. Most Texas practitioners are thoroughly familiar with the Supreme Court's ideological flip flop in the important case of *F.F.P. Operating Partners, L.P. v. Duenez*.<sup>407</sup> In that case on September 3, 2004, a majority consisting of Justices O'Neil, Phillip, Jefferson, Schneider, and Smith affirmed the application of legislature Dram Shop Act by refusing to permit the percentage of fault of the intoxicated driver to be submitted to the jury.<sup>408</sup> The dissent in September consisted of Justices Owens, Hecht, Brister, and Wainwright.<sup>409</sup> Shortly thereafter, on April 8, 2005, the newly reconstituted court granted rehearing and in an opinion by Justice Wainwright joined by Justices Hecht, Brister, Medina, Green, Johnson, and Willett reversed the original decision effectively nullifying the statutory intent of the Dram Shop Act.<sup>410</sup> The vigorous dissents of Justice O'Neil described the situation as follows:

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<sup>405</sup>Gerald Powell, *The Texas Civil Jury Trial and the California Condor: Endangered Species?*, in SOAKING UP SOME CLE: A SOUTH PADRE LITIGATION SEMINAR 2007 (2007).

<sup>406</sup>Lyon, et al., *supra* note 401, at 433.

<sup>407</sup>237 S.W.3d 680 (Tex. 2007).

<sup>408</sup>*Id.* at 705 (superseded opinion) (appendix).

<sup>409</sup>*Id.*

<sup>410</sup>*Id.* at 682.

Between the time the court issued its original decision in this case and the date rehearing was granted, more than seven months passed and three members of the former majority left the court. F.F.P.'s motion for rehearing raised no new issues; every point was thoroughly considered by the court in its prior decision.<sup>411</sup>

Nevertheless, the court withdrew the prior opinion, reached the opposite result, and accomplished judicially what the Legislature itself declined to do.

Commenting on this sad state of affairs, the highly respected retired Justice Deborah Hankinson stated in her paper, "It is not difficult to understand how the conflicting position was taken by the Court in *Duenes* as the result of the change in the court personnel could undermine the public's confidence in the judicial process."<sup>412</sup>

The Court's ideological preference was demonstrated again, this time even more forcefully in *Coca Cola Bottling Co. v. Harmar Bottling Co.*<sup>413</sup> A close reading of the court of appeals' opinion and the opinion of the Supreme Court itself indicates there is clearly evidence to support the jury's finding of anticompetitive conduct by Coca Cola Company as forbidden by the Texas statute. The Supreme Court's opinion in *Harmar* was so flagrantly wrong that it generated a firestorm of amicus briefs by a variety of Texas legal professors including Professor William Dorsaneo and Elizabeth Thornberg of SMU, Daniel Benson and Robert Weninger of Texas Tech, Lonnie S. Hoffman and David Krum of the University of Houston and Associate Dean Alexandra Albright of the University of Texas. Professor Gerald Powell of the Baylor Law School also filed a separate amicus brief stating many of the same concerns. The following language from the amicus brief of the Texas law professors highlights the problem succinctly:

[W]e urge the Court to consider seriously the impact of allowing its decision to stand will have in the future with respect to how courts, litigants, and the public in general regard the legitimacy of jury verdicts in this state.

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<sup>411</sup> *Id.* at 703 (O'Neill, J., dissenting).

<sup>412</sup> Deborah G. Hankinson, *Stable, Predictable, and Faithful to Precedent: The Value of Precedent in Uncertain Times*, in U. TEX. SCHOOL OF LAW 17TH ANNUAL CONF. ON STATE & FED. APPEALS (2007).

<sup>413</sup> See *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 675 (Tex. 2006).

Our central concern stated plainly and emphatically, is that it is troubling to see the Court reject a verdict in which the jurors found it to be (at least) more likely than not that petitioners had violated and antitrust laws when the Court does not declare the evidence on which this verdict is based to be legally inadmissible. In the absence of a more searching inquire, the majority's opinion seems to merely have substituted its judgment for that of the jury.<sup>414</sup>

The amici continues, "[O]ne is left with the discomfoting impression that this is an occasion in which an appellate court has merely substituted its judgment for that of the jury."<sup>415</sup> The amici concludes:

The rendition of judgment against Harmar notwithstanding the jury's verdict is troubling, then, precisely because (i) the standard for review for legal sufficiency has traditionally been—and appropriately so—far more respectful of the jury's verdict than has the majority's opinion; and (ii) even on the majority's reading of the factually evidence produced, it appears that a reasonable jury could have [found for Harmar]. . . .

We believe the majority's decision on this case has troubling consequences in terms of the legitimacy of verdicts rendered by juries of this state.<sup>416</sup>

The court overruled the concerns expressed by all these law professors without any comment.<sup>417</sup> Given these circumstances, it does not appear to be an overstatement to suggest the Supreme Court of Texas has little, if any regard, for the opinions of the most distinguished legal minds in this state and intends to advance an ideological agenda regardless of the consequences, including the public's perception of the integrity of the judicial process itself.

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<sup>414</sup>Brief for Lonny S. Hoffman et al. as Amici Curiae Supporting Respondents at 5, *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006) (No. 03-0737), available at <http://www.supreme.courts.state.tx.us/ebriefs/03/03073711.pdf>.

<sup>415</sup>Brief for Lonny S. Hoffman et al. as Amici Curiae Supporting Respondents, *supra* note 415, at 8.

<sup>416</sup>Brief for Lonny S. Hoffman et al. as Amici Curiae Supporting Respondents, *supra* note 415, at 10–11.

<sup>417</sup>*See generally Harmar*, 218 S.W.3d 671 (Tex. 2006).

## VII. THE PRESENT STATE AND FUTURE OF LEGAL AND FACTUAL SUFFICIENCY REVIEW IN TEXAS

### A. *Legal Sufficiency*

The actual meaning of the holdings of various cases collected here and the current state of Texas law as to both the standard and scope of legal and factual sufficiency review in Texas is now by no means clear. Based on the majority's opinion in *City of Keller*<sup>418</sup>, in any civil case involving parental rights, involuntarily mental health commitment, defamation, or punitive damages, it appears the Supreme Court of Texas will apply the heightened standard of review and will review any finding of fact by essentially a *de novo* process of considering the evidence for itself and balancing its assessment of the amount and quality of the evidence for and against the finding.<sup>419</sup> The court then will sustain a legal sufficiency complaint under any of the following circumstances.<sup>420</sup>

First, if the court will sustain the complaint if it determines a reasonable juror could not believe or disbelieve what they obviously did or did not believe.<sup>421</sup>

Second, the court will sustain the complaint if it determines dispositive evidence is undisputed.<sup>422</sup> In other words, if certain evidence exists, such as the certifications of the engineers in *City of Keller*, the meaning or the ultimate significance of this evidence will be supplied subjectively by the Supreme Court of Texas itself. If necessary, the significance will be supplied in a manner directly contrary to the inference(s) the jury actually drew from that evidence.<sup>423</sup>

Third, the court will determine as a matter of law the context in which certain evidence should be considered.<sup>424</sup> If a majority of the Supreme Court of Texas believes the context of the evidence is different from the context in which the trial court or jury actually considered it, the court will feel free to reverse and render the jury's determination on a no evidence basis.

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<sup>418</sup> *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).

<sup>419</sup> *See id.* at 817.

<sup>420</sup> *See id.*

<sup>421</sup> *See id.* at 814–15.

<sup>422</sup> *See id.*

<sup>423</sup> *See id.* at 810–12.

<sup>424</sup> *See id.* at 811–12.

Fourth, the court will judge, apparently on a *de novo* basis, whether the evidence meets the court's formulation or paradigm of its dispositive issue as opposed to the actual issue the jury, the trial judge, or the court of appeals decided. In this way, the court will continue to rename or reframe the dispositive issue in order to defeat the jury's verdict. The court's requirement in *City of Keller* that the plaintiff must prove that the city knew its engineers' certifications were false or "knew more than it was told" is one example.<sup>425</sup> Another is the court's rush in *Volkswagen* to characterize the plaintiff's experts' testimony as a "floating wheel theory" and then to chastise an expert for failing to find specific scientific support for the court's pejorative label.<sup>426</sup>

Fifth, the court will apply a standard of review for sufficiency of evidence in such a way as to make the proof of the required state of consciousness or intent in punitive damage cases virtually impossible to satisfy. Short of a written confession by the duly authorized officials of the City of Keller, it is difficult to image how the city's knowledge of flooding could be more clearly established than it was in the record. The same is true for the court's analysis in *Garza* and *Suberu*.<sup>427</sup> The court's approach departs wholly from the earlier objective standard of proof of conscious indifference the court articulated in *Lee Lewis Construction, Inc. v. Harrison*.<sup>428</sup> In *Lee Lewis*, the court noted correctly that the fact that Lewis' employees were required to work on a multi-story building without proper safety equipment with proof of the inherent risk of a fall was sufficient by itself to establish the required level of conscious indifference for the imposition of punitive damages.<sup>429</sup> After *City of Keller* and *Suberu*, the *Lee Lewis* formulation may no longer be viable.<sup>430</sup> In fact, any formulation of proof of intent for conscious indifference may no longer be viable in Texas.

Next, based on the court's most recent decision in *Tony Gullo Motors*<sup>431</sup>, the guidelines and factors previously suggested or discussed by

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<sup>425</sup> *Id.* at 829.

<sup>426</sup> *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904–06 (Tex. 2004).

<sup>427</sup> *See Garza v. Alviar*, 395 S.W.2d 821, 823–25 (Tex. 1965); *see also Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793–95 (Tex. 2006).

<sup>428</sup> 70 S.W.3d 778, 785 (Tex. 2001).

<sup>429</sup> *Id.* at 785–86.

<sup>430</sup> This is true despite the fact that the Texas Supreme Court continues to cite *Lee Lewis* as good law. *E.g.*, *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2006).

<sup>431</sup> *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307–08 (Tex. 2006).

the Supreme Court of the United States have now become rigid bright line rules and mathematical formulas in Texas. Implicit in the court's analysis in *Tony Gullo Motors* is the fact that the court will give little or no consideration to a jury's condemnation of despicable conduct by a defendant unless it involves physical injuries.<sup>432</sup> Even then, the court will regard the limitations on damages imposed by the legislature as insufficient to sufficiently limit the jury's discretion.<sup>433</sup> Accordingly, the court will apply what may be accurately referred to as a micromanagement review of the amount punitive damages on its own ad hoc policy basis. No standards of review exist to limit the court's unbridled discretion in doing so. Thus, the court will strike down punitive damage awards, even if they are less than the cap allows, ostensibly to make room for more serious cases in the future. This approach trivializes the deterrence and punishment policy basis for punitive damages, essentially ignoring reprehensibility of a defendant's conduct contrary to *Haslip* and *TXO* and effectively adopting the dissent in *TXO* for Texas<sup>434</sup>.

Finally, the court will avoid, gloss over, or ignore any procedural rules which would otherwise frustrate or prevent it from imposing the result it desires. In *In re J.F.C.*, the court was so anxious to extend the unsupported logic of *In re C.H.* to create a heightened standard of review for legal sufficiency that it decided a question of law—whether there was legally sufficient evidence to support the trial court's expressed or deemed finding—which the parties never raised, briefed, argued, or even mentioned at any stage of the proceeding, and which also did not present fundamental error.<sup>435</sup> The court ignored or jumped through similar procedural hoops in *Volkswagen* when the majority interpreted Tex. R. App. P. 53.2(f) to permit a party to raise a complaint that an expert's testimony was unreliable or insufficient for the first time in a reply brief in the Supreme Court of Texas.<sup>436</sup> That the court ignored settled procedural law in order to reach the result it desired in both cases cannot be seriously questioned. The dissents in both *In re J.F.C.* and *Volkswagen* clearly advised the court of what it was

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<sup>432</sup> *See id.*

<sup>433</sup> *See id.* at 307.

<sup>434</sup> *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453 (1993).

<sup>435</sup> *See discussion supra*, Part IV.A.1 to IV.A.2.

<sup>436</sup> *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex. 2004).

doing, yet a majority persisted.<sup>437</sup> This type of radical judicial conduct cannot be accidental or mistaken.

### B. *Factual Sufficiency*

Seemingly, two standards of factual sufficiency review now exist in Texas, both of which are tied to the legal sufficiency analysis. In cases involving termination of parental rights, involuntary mental commitment, defamation, or punitive damages, the Supreme Court of Texas will no longer regard factual determinations by the court of appeals as conclusive.<sup>438</sup> Instead, the court will effectively conduct de facto factual sufficiency review under its heightened standard of review.<sup>439</sup> In defamation cases, and possibly punitive damages cases, the court will review damages amounts under yet another level of review which may be referred to as super-heightened. This newfound power in defamation cases is based on the court's assumed constitutional prerogative to prevent actual damages from being a disguised disapproval of the defendant.<sup>440</sup> Again, there appear to be no limitations or standards imposed on this review, or at least none that can be meaningfully articulated. Nonetheless, the Supreme Court of Texas apparently will continue to require the courts of appeals to conduct a meaningless *Pool* type evaluation of punitive damages even though the court of appeals' factual sufficiency determination as to excessiveness will not bind the Supreme Court of Texas in its "constitutional" duty to decide whether the damages are excessive as stated in *Bentley* and *Tony Gullo Motors*.<sup>441</sup>

### C. *Scope of Review*

Based on the court's opinion in *City of Keller*, the scope of review for all cases is now apparently inclusive as opposed to exclusive or traditional. Nonetheless, while exercising this scope of review, the court will nominally continue to state that it follows the traditional standard.<sup>442</sup> As a practical

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<sup>437</sup> See *id.* at 914 n.1 (Jefferson, J., dissenting); see also *In re J.F.C.*, 96 S.W.3d 256, 285–86 (Hankinson, J., dissenting).

<sup>438</sup> See, e.g., *City of Keller v. Wilson*, 168 S.W.3d 802, 822–23 (Tex. 2005).

<sup>439</sup> See *Bentley v. Bunton*, 94 S.W.3d 561, 598 (Tex. 2002).

<sup>440</sup> See *id.* at 605.

<sup>441</sup> See *id.* at 606–07; see also *Tony Gullo Motors I v. Chapa*, 212 S.W.3d 299, 307 (Tex. 2006).

<sup>442</sup> See *City of Keller*, 168 S.W.3d at 827.

matter, the courts of appeals will be required to catalogue all of the evidence in every case in hope of complying with *City of Keller*. The Supreme Court of Texas has hopelessly confabulated the scope of review based on the nonsensical conclusion in *City of Keller* that the traditional scope of review and the inclusive scope of review are somehow in reality one in the same.<sup>443</sup>

#### *D. Proposed Solutions*

At least two solutions have been proposed to curb or limit overzealous legal sufficiency review by the Supreme Court of Texas. First, Professor Gerald Powell proposed in his amicus presentation to the Supreme Court of Texas that the court should impose a *Pool* type requirement upon itself when sustaining a legal sufficiency challenge.<sup>444</sup> While laudable in principle, the court will be unlikely to adopt this proposal for several reasons. First, if the court is only looking for a rationale to reach a predetermined result, it would not adopt a rule which would spotlight its chicanery. Second, such a rule would be beneficial only to the extent it would be prophylactic. Professor Powell rightly hopes that if the court was required to list or catalogue significant portions of the record which were contrary to its proposed decision, such a rule might cause the court to rethink a result or decision.<sup>445</sup> However, as the cases demonstrate, the Supreme Court of Texas has shown no reluctance to reconstruct or recharacterize issues, facts, or evidence to reach a desired result regardless of the evidence.

Professor Dorsaneo has also proposed a solution, suggesting a strict adherence to a traditional standard of review and to a traditional application of that standard. As previously noted, this approach requires the reviewing court, while considering the entire record, to nevertheless adopt or consider only the evidence and inferences favorable to the challenged finding while disregarding all evidence and inferences to the contrary.<sup>446</sup> If the court honestly and faithfully applied this approach, many of the abuses discussed here would be prevented. The sad fact is, as noted by Professor Dorsaneo

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<sup>443</sup> *Id.*

<sup>444</sup> See Brief for Gerald R. Powell as Amicus Curiae Supporting Respondents, *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006) (No. 03-0737), available at <http://www.supreme.courts.state.tx.us/ebriefs/03/03073708.pdf>.

<sup>445</sup> Brief for Gerald R. Powell as Amicus Curiae Supporting Respondents, *supra* note 444.

<sup>446</sup> See Dorsaneo I, *supra* note 4, at 1735.

and former Chief Justice Phillip Hardberger, Professor Anderson, and Dean Toben,<sup>447</sup> the Supreme Court of Texas is now clearly headed away from the traditional standard of review. Nonetheless, Professor Dorsaneo's suggestion has real merit if the court would conscientiously apply it.

## VIII. FEDERAL STANDARDS OF REVIEW

### A. *The Federal Standards of Review Generally*

#### 1. The Federal Rules

The Supreme Court of the United States, in its 1993 amendments to Rule 28(a) of the Federal Rules of Appellate Procedure, requires any brief in any circuit court of the United States to contain "an argument . . . [which] must also contain for each issue a concise statement of the applicable standard of review."<sup>448</sup> The Fifth Circuit Court of Appeals places its own premium on a statement of the standard of review, requiring that "the standard of review be clearly identified in a separate heading before the discussion of the issues."<sup>449</sup>

#### 2. The Value of the Standards

Mr. W. Wendell Hall correctly refers to the standard of review as a cornerstone of an appeal.<sup>450</sup> The late, highly respected Fifth Circuit Judge Henry Politz further emphasized the importance of the concept by stating "The value of the brief and oral argument depends upon and is measured against a proper understanding and application of the appropriate standards of review. The disposition of the appeal necessarily revolves around the proper standard of review."<sup>451</sup>

#### 3. The Danger of Hollow or Unfollowed Standards

In the words of the late Justice Felix Frankfurter, "There are no talismanic words that can avoid the process of judgment."<sup>452</sup> Yet, to have

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<sup>447</sup> See discussion *supra* Part VI.

<sup>448</sup> FED. R. APP. P. 28(a)(9).

<sup>449</sup> 5TH CIR. R. 28.2.6.

<sup>450</sup> Hall I, *supra* note 6, at 358.

<sup>451</sup> *Foreword* to CHILDRESS & DAVIS, *supra* note 9, at vii.

<sup>452</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

any real meaning for litigants and lawyers, the court must state in objective terms what the standards of review really mean. The court must then objectively and fairly apply the standard it has articulated. In one way, standards of review may be considered a form of a constitutional fence around the judiciary. In that context, standards impose objective boundaries within which the court must function. Of course, merely stating an esoteric standard of review is meaningless unless the standard is faithfully and honestly applied. If a court merely mouths the language of a standard of review and refuses its application, the court destroys its own credibility in the minds of the bench and bar, eroding public confidence in the integrity of the judiciary and ultimately undermining public confidence in our system of justice.

*B. The Development of Federal Standards of Review of Jury Verdicts for Factual Sufficiency*

The United States Supreme Court considered the relationship of standards of review, the right to trial by jury, and the right of the jury to draw reasonable inferences from the evidence in *Lavender v. Kurn*.<sup>453</sup> *Lavender* was a Federal Employer's Liability Act case in which the plaintiff's deceased, Haney, had been killed while employed as a switchtender in the respondent's operation in Memphis, Tennessee.<sup>454</sup> The Supreme Court of Missouri reversed the plaintiff's verdict, holding that there was "no substantial evidence of negligence to support the submission of the case to the jury."<sup>455</sup> The factual issue in *Lavender* was whether Haney had been struck in the head by a protruding mail hook or whether he had been murdered.<sup>456</sup> In reversing the Missouri court, the Supreme Court held as follows:

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook

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<sup>453</sup> 327 U.S. 645 (1946).

<sup>454</sup> *Id.* at 646.

<sup>455</sup> *Id.* at 647.

<sup>456</sup> *Id.* at 648–50.

struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.<sup>457</sup>

The Supreme Court's decision in *Lavender* followed its decision in *Pennsylvania R.R. Co. v. Chamberlain*.<sup>458</sup> In *Chamberlain*, the Court faced a situation "where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences."<sup>459</sup>

The equally probable inference rule of *Chamberlain* had become a basis for some federal appellate courts to review the jury's determination, not only from the evidence the jury had actually considered, but also by accepting or rejecting reasonable inferences the jury could have drawn from

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<sup>457</sup> *Id.* at 652–53 (citations omitted).

<sup>458</sup> 288 U.S. 333 (1933).

<sup>459</sup> *Id.* at 339.

the evidence.<sup>460</sup> Professor Dorsaneo has conducted a thorough analysis of controlling United States Supreme Court precedent in this area.<sup>461</sup> He ultimately adopts Judge Holtzoffs's opinion in *Preston v. Safeway Stores, Inc.*<sup>462</sup> Professor Dorsaneo approvingly cites *Preston*, which stated, "The [*Lavender*] case substitutes the principle that in such an event, it is for the jury to determine which inference to deduce and that the jury has a right to draw either one. The prior cases . . . [including *Chamberlain*] must be deemed to have been overruled sub silentio."<sup>463</sup>

*C. The Fifth Circuit's Articulation of Its Own Standard of Review for Sufficiency for Evidence: Boeing Co. v. Shipman*

Notwithstanding *Lavender*, the Fifth Circuit Court of Appeals in 1969 sitting en banc decided *Boeing Co. v. Shipman*.<sup>464</sup> Judge Ainsworth, writing for the en banc majority, begins the opinion as follows:

The importance of formulating a proper standard in federal court to test the sufficiency of the evidence for submission of a case to the jury, in connection with motions for a directed verdict and for judgment notwithstanding the verdict, caused us to place this Alabama diversity personal injury suit en banc.<sup>465</sup>

Ultimately, the court stated its standard as follows:

On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the

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<sup>460</sup>Dorsaneo I, *supra* note 4, at 1706–12.

<sup>461</sup>Dorsaneo I, *supra* note 4, at 1706–12.

<sup>462</sup>See 163 F. Supp. 749, 752–53 (D.D.C. 1958).

<sup>463</sup>Dorsaneo I, *supra* note 4, at 1708 n.82 (citing *Preston*, 163 F. Supp at 752–53).

<sup>464</sup>411 F.2d 365 (5th Cir. 1969).

<sup>465</sup>*Id.* at 367.

motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of the witnesses.<sup>466</sup>

Not so commonly remembered from *Boeing* was the thoughtful opinion of the late United States Circuit Judge Rives, concurring in part and dissenting in part. Judge Rives stated as follows:

There are many who do not agree with my almost reverential attitude toward jury trial, but this is no occasion for a debate on that subject, because our forefathers wrote into our Constitution the right of trial by jury in both criminal and civil cases. . . . With deference, I submit that the polished and scholarly majority opinion has one fundamental weakness. It downgrades the Seventh Amendment.<sup>467</sup>

Judge Rives proceeds with a scholarly review of virtually every major decision of the United States Supreme Court substantively relating to the right to trial by jury.<sup>468</sup> Judge Rives rejects the majority's analysis for three reasons. First, the Supreme Court of the United States had itself set forth the sufficiency test in *Lavender v. Kurn*.<sup>469</sup> Second, Judge Rives notes that "the majority simply has no authority to 'promulgate' any one standard

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<sup>466</sup> *Id.* at 374–75.

<sup>467</sup> *See id.* at 378 (Rives, J., concurring in part and dissenting in part).

<sup>468</sup> *Id.* at 379–94.

<sup>469</sup> *See id.* at 391–92. To restate, the *Lavender* test is: "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

when the Supreme Court itself has prescribed a number of them . . . .”<sup>470</sup> Third, Judge Rives rejected the majority’s use of the term substantial evidence when stating, “The word ‘substantial,’ used in its legal sense, can equally well connote either a *qualitative* or a *quantitative* meaning.”<sup>471</sup>

Judge Rives concluded as follows:

That [the granting of a new trial] continues to be the safest remedy, less subject to reversal, and encroaching least on the constitutional fact-finding province of the jury. Moreover, it keeps the decision where it belongs, in the hands of the district judge who has seen and heard the witnesses testify and observed their demeanor on the stand. A more general use of new trial instead of directed verdict would save the appellate judges many precious judicial man hours in these days of exploding dockets. Strange to say, however, we do not hear that factor mentioned by appellate court judges when they are reaching out for power to substitute their views for those of the jury.<sup>472</sup>

*D. The Search for a Workable Standard Continues in Anderson v. Liberty Lobby, Inc.*

In *Anderson v. Liberty Lobby, Inc.*, the Supreme Court of the United States in 1986 sought again to clarify standard of review issues in the context of a motion for summary judgment under Federal Rule of Civil Procedure 50.<sup>473</sup> According to the Court, the question presented was whether the district court must consider the clear and convincing evidence requirement of *New York Times v. Sullivan* when ruling on a motion for summary judgment.<sup>474</sup> In *Anderson*, the district court had granted summary judgment and the District of Columbia Circuit Court had affirmed in part and reversed in part.<sup>475</sup> The actual holding of *Anderson* was that the circuit court did not apply the correct standard of review in connection with the district court’s granting of summary judgment.<sup>476</sup> Specifically, the Court

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<sup>470</sup> *Boeing Co.*, 411 F.2d at 392.

<sup>471</sup> *Id.* at 393.

<sup>472</sup> *Id.* at 390–91.

<sup>473</sup> 477 U.S. 242 (1986).

<sup>474</sup> *Id.* at 244.

<sup>475</sup> *Id.* at 246–47.

<sup>476</sup> *Id.* at 254–56.

held that the district court should consider the burden of proof at trial in determining whether factual disputes are both genuine and material.<sup>477</sup> The Court also held, however, that the plaintiff could not merely rest upon the jury's ability to disbelieve the defendant but instead must have affirmative evidence to support both the genuineness and the materiality of the fact question.<sup>478</sup>

The Court specifically held as follows:

[T]his standard mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.<sup>479</sup>

The Court continued:

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It

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<sup>477</sup> *Id.* at 247–48.

<sup>478</sup> *Id.* at 256–57.

<sup>479</sup> *Id.* at 250–51 (citations omitted).

by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.<sup>480</sup>

Oddly, the Court in *Anderson* cites *Chamberlain* as one of three older cases for the general proposition that a scintilla of evidence was insufficient to require the submission of the case to the jury.<sup>481</sup> Notably, however, the Court did not cite *Chamberlain* for its rejection of the equally probable inferences rule.<sup>482</sup>

Dissenting in *Anderson*, Justice Brennan put his finger squarely on the crucial question when stating:

This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that the trial courts are not to weigh evidence when deciding summary judgment motions. . . .

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity,"

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<sup>480</sup> *Id.* at 254–55 (citations omitted).

<sup>481</sup> *Id.* at 251.

<sup>482</sup> See discussion *supra* Part VIII.B.

i.e., the importance and value, of the evidence in light of the “quantum,” i.e., amount “required,” could *only* be performed by weighing the evidence.

If in fact, this is what the Court would, under today’s decision, require of district courts, then I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited “summary” procedure into a full-blown paper trial on the merits.<sup>483</sup>

Justice Brennan concluded as follows:

In other words, whether evidence is “clear and convincing,” or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today’s decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.<sup>484</sup>

Justice Rehnquist with Chief Justice Burger also dissented, finding:

The Court’s decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact), will do great mischief with little corresponding benefit.<sup>485</sup>

Justice Rehnquist also pointed out the Court’s earlier decision in *Addington v. Texas*, which itself rejected the notion that the clear and convincing standard was necessarily efficacious.<sup>486</sup> In *Addington*, the Court stated:

Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that

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<sup>483</sup> *Anderson*, 477 U.S. at 265–67 (Brennan, J., dissenting).

<sup>484</sup> *Id.* at 268.

<sup>485</sup> *Id.* at 272 (Rehnquist, J., and Burger, C.J., dissenting).

<sup>486</sup> *Id.* at 272.

factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence.<sup>487</sup>

#### E. *Reeves v. Sanderson Plumbing Products, Inc.*

The Fifth Circuit Court of Appeals' struggle with *Boeing Co. v. Shipman* ultimately concluded with a legal slap in its judicial face from the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*<sup>488</sup> *Reeves*, while requiring review of the entire record, nonetheless unambiguously required the circuit court to give credence to evidence and inferences favorable to the verdict and to disregard all unfavorable evidence and inferences to the contrary.<sup>489</sup> Moreover, *Reeves* chastised the Fifth Circuit Court of Appeals for substituting its own view of the evidence, for weighing evidence, and for adopting its own inferences from the evidence.<sup>490</sup> Yet, after *Reeves*, the Fifth Circuit still appears to be ambivalent on the subject, in one case proclaiming while justifying a directed verdict that "it is not necessary that the evidence be no more than a scintilla or amount to a claim that frogs fly or stones levitate."<sup>491</sup> *Neely* has been properly criticized as condoning the weighing of evidence, which the court is constitutionally forbidden to do.<sup>492</sup>

Although the Fifth Circuit Court of Appeals' use of the word substantial evidence in *Boeing* was problematic for Judge Rives, the Supreme Court of the United States partially aided an understanding of the concept in *Pierce v. Underwood*.<sup>493</sup> In that case, the Court referred to the concept of substantial evidence in an administrative law context as evidence which "does not mean a large or considerable amount of evidence" and "just such

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<sup>487</sup> *Addington v. Texas*, 441 U.S. 418, 424–25 (1979).

<sup>488</sup> 530 U.S. 133 (2000); *see also* discussion *supra* Part IV.B.3.

<sup>489</sup> *See Reeves*, 530 U.S. at 144–49.

<sup>490</sup> *Id.* at 146–47.

<sup>491</sup> *Neely v. Delta Brick & Tile Co.*, 817 F.2d 1224, 1226 (5th Cir. 1987).

<sup>492</sup> *See* 1 *CHILDRESS & DAVIS*, *supra* note 9, § 3.03 at 3-25.

<sup>493</sup> 487 U.S. 552, 564–65 (1988).

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>494</sup>

Before *Reeves*, the Fifth Circuit confirmed the rationale of *Lavender* to protect the right to trial by jury in *Hidden Oaks Ltd. v. City of Austin*.<sup>495</sup> In acknowledging that it was not free to reweigh the evidence or determine the credibility of witnesses, the court stated that it must accept any reasonable factual inferences made by the jury, being careful not to “substitute . . . other inferences that [the court] may regard as more reasonable.”<sup>496</sup>

#### F. What Actually Happens Now in the Fifth Circuit

Notwithstanding the en banc language of *Boeing* and the Supreme Court’s decision in *Reeves*, many times at the panel level, individual judges of the Fifth Circuit Court of Appeals take remarkably different approaches to the review of jury verdicts.

The actual standard of review of jury verdicts in the Fifth Circuit was recently stated somewhat differently by the panel majority in *Brown v. Parker Drilling Offshore Corp.* when it wrote, “This Court reviews factual findings of a jury for clear error. Under a clear error standard, this Court will reverse only if on the entire evidence, we are left with a definite and firm conviction that a mistake has been made.”<sup>497</sup>

The issue in *Brown* was whether an uneducated seaman had intentionally misrepresented his physical condition concerning back trouble on his employment application.<sup>498</sup> The seaman claimed he did not believe muscle strain, pulled muscles, or even back pain were back trouble.<sup>499</sup> The jury agreed with the seaman.<sup>500</sup> The district judge wrote a well reasoned

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<sup>494</sup> *Id.*

<sup>495</sup> 138 F. 3d 1036 (5th Cir. 1998).

<sup>496</sup> *Id.* at 1049 (citations omitted). Also, compare *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000), which applies the correct analysis, with *Vadie v. Miss. State Univ.*, 218 F.3d 365, 372 (5th Cir. 2000), which purports to apply *Reeves*, but does so incorrectly. “A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as it did.” *Vadie*, 218 F.3d at 372 (citations omitted). See also Dorsaneo I, *supra* note 4, at 1717 & n.138, 1718 & n.143.

<sup>497</sup> 396 F.3d 619, 622 (5th Cir. 2005), *vacated*, 410 F.3d 166 (5th Cir. 2005) (internal citations omitted).

<sup>498</sup> *Brown*, 396 F.3d at 620.

<sup>499</sup> *Id.* at 623–24.

<sup>500</sup> *Id.* at 621.

opinion upholding the verdict.<sup>501</sup> The Fifth Circuit panel reversed, holding intentional falsification was established as a matter of law.<sup>502</sup>

United States District Judge Sam Sparks candidly observes the meaning of the panel's earlier statement in *Brown*, stating as follows:

The Fifth Circuit simply admits what it has been doing for some time. If at least two of three judges on a panel are left "with a definite and firm conviction that a mistake has been made" by the jury, then they assume the authority to disregard entirely the jury's factual findings and make their own findings—whether as to liability or damages.<sup>503</sup>

In an uncharacteristically biting dissent in *Brown*, U.S. Circuit Judge Carl E. Stewart lambasted the present majority of the Fifth Circuit for having commandeered the jury's role as fact-finder.<sup>504</sup> Judge Stewart stated:

[T]his case significantly portrays the cardinal principles of our American jury system. However reticent an appellate panel may be about the jury's verdict in a case, it should not, in the guise of correcting errors of law, usurp the constitutionally endowed jury function with a retrofitted verdict of its own. Here the majority does just that.<sup>505</sup>

Adopting Judge Stewart's dissent, U.S. Circuit Judge Jacques L. Wiener, Jr. offered an additional dissenting opinion lamenting the damage the current Fifth Circuit has inflicted on the Seventh Amendment and on the public confidence in the judiciary.<sup>506</sup> Judge Wiener charged the majority with conducting an impermissible appellate review of the facts, stating as follows:

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<sup>501</sup> See *Brown v. Parker Drilling Offshore Corp.*, No. 02-1911, 2003 U.S. Dist. LEXIS 8996, at \*1 (E.D. La. May 27, 2003).

<sup>502</sup> *Brown*, 396 F.3d at 625.

<sup>503</sup> Sam Sparks, *Disappearing Juries & Jury Verdicts*, in *State Bar of Texas, State Bar College "Summer School" Course*, ch. 12, at 7 (2006).

<sup>504</sup> *Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 181 (5<sup>th</sup> Cir. 2005) (Stewart, J., dissenting).

<sup>505</sup> *Id.* at 189.

<sup>506</sup> *Brown v. Parker Drilling Offshore Corp.*, 444 F.3d 457, 459 (5<sup>th</sup> Cir. 2006) (Weiner, J., specially concurring in the dissent). Judge Stewart was joined by Judges King, Higginbotham, Wiener, Benavides, and Dennis dissenting from denial of rehearing *en banc*. *Id.* at 457.

The core problem that results from denying en banc rehearing and thereby allowing this case to stand lies in the recognition that it matters not whether federal district judges (much less federal appellate judges) can bring themselves to credit Brown's simplistic, uneducated explanation that he did not think that back sprains and muscle pulls amounted to the kind of "back trouble" about which Parker Drilling's questionnaire was inquiring. What does matter so critically to the civil jury law of this circuit, however, is that a jury of Brown's peers (who obviously understood and identified with the common kind of blue-collar, physically strenuous, manual labor regularly encountered in the "oilpatch") recognized the truism that workers like Brown go home every night bone-weary, muscle-sore, and bodily-bruised—and think nothing of it!<sup>507</sup>

Judge Sparks even more bluntly described the existing situation for the court on this important question, declaring, "The present status then in the Fifth Circuit is Circuit Judges Stewart, Higginbotham, Wiener, Benavides, Dennis, and King honoring the Constitutional mandate while Circuit Judges Jones, Jolly, Davis, Smith, Barksdale, Garza, DeMoss, Clement, Prado, and Owen either not understanding the Constitutional authority of the jury or simply ignoring it."<sup>508</sup>

A particularly sad example of the Fifth Circuit's predisposition to disregard a jury's verdict is *Caboni v. General Motors Corp.*<sup>509</sup> In *Caboni*, the plaintiff attempted to take evasive action to avoid another vehicle and slammed into the guardrail.<sup>510</sup> Unfortunately, the driver's side air bag did not deploy and he struck his head on the steering wheel assembly, sustaining severe brain injuries.<sup>511</sup> The jury found the vehicle defective and returned a verdict for Caboni upon which a final judgment was entered by the trial court.<sup>512</sup> From the Fifth Circuit's opinion, the evidence appeared undisputed that the air bag should have deployed but did not, and that the

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<sup>507</sup> *Id.* at 461.

<sup>508</sup> Sparks, *supra* note 503, at 8.

<sup>509</sup> 398 F.3d 357 (5th Cir. 2005).

<sup>510</sup> *Id.* at 358.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 359.

deceased's head hit the steering wheel assembly which resulted in his brain injury.<sup>513</sup> Furthermore, Caboni's head would not and could not have hit the steering wheel assembly had the air bag properly deployed.<sup>514</sup> Yet the majority in *Caboni* noted, correctly, that the record contained no direct evidence of how Caboni's injuries were enhanced because of the failure of the air bag to deploy.<sup>515</sup> The truth is as Judge Sparks correctly notes in his article:

While there was no specific testimony that Caboni's head injury was worse from having hit the steering wheel than if he had not hit the steering wheel, that is an obvious and reasonable inference the jury was entitled to draw. Moreover, given the testimony in this case, it is an entirely logical conclusion Caboni's head would have not have hit the steering wheel had the air bag deployed and, therefore, he would have not suffered the brain injuries which the expert testimony established resulted from hitting the steering wheel. In this instance, the circuit panel has denied the plaintiff a recovery based upon the jury's logical inference that the specific injuries Caboni suffered would not have occurred had the air bag deployed and, instead, have substituted their own far less logical inference that there was no proof Caboni's brain injury that resulted from striking the steering wheel was enhanced by the failure of the air bag to deploy.<sup>516</sup>

### *G. The Fifth Circuit and Experts*

In the context of expert testimony, one of the most controversial decisions of the Fifth Circuit Court of Appeals in recent memory was *Brock v. Merrell Dow Pharmaceuticals, Inc.*<sup>517</sup> In *Brock*, the panel majority recited the standard of review from *Boeing* but then stated that such general and abstract formulations lose much of their usefulness when the court attempts to apply them to a concrete factual situation.<sup>518</sup> The question in

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<sup>513</sup> *Id.* at 360–62.

<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 362.

<sup>516</sup> Sparks, *supra* note 503, at 9.

<sup>517</sup> See generally 874 F.2d 307 (5th Cir. 1989), *modified*, 884 F.2d 166 (1989).

<sup>518</sup> *Id.* at 308–09.

*Brock* was whether the drug Bendectin caused birth defects.<sup>519</sup> This was a matter as to which both sides had produced extensive expert testimony.<sup>520</sup> Notwithstanding the admissibility of the expert testimony for the plaintiff, and while acknowledging that its own opinion on the matter may itself “be just a matter of [the court’s] opinion,”<sup>521</sup> the court nonetheless concluded there was no causation as a matter of law.<sup>522</sup> The court’s primary holding was that without statistically significant findings from theoretical epidemiological population studies as opposed to the actual animal experiments upon which the plaintiffs’ experts based their analysis, the plaintiff’s evidence was insufficient.<sup>523</sup> Also of concern in *Brock* was the value-laden and highly suggestive rhetoric of the majority in which it posited that the present litigation had created legal uncertainty which inhibited research and resulted in undue burdens on the drug industry; furthermore, the court posited that appellate courts should “take the lead” to reduce doubt and encourage optimal new drug development.<sup>524</sup> Recognizing the majority’s thumb on the scales in *Brock*, Judge Thomas Reavley dissented from denial of rehearing en banc, stating, “I wonder what is left in this circuit of the *Boeing* rule or, for that matter, the Seventh Amendment right to trial by jury.”<sup>525</sup> Judge Reavley was joined in dissenting from rehearing en banc by Judges Politz, King, Johnson, Williams, and Higginbotham.<sup>526</sup> Judge Higginbotham wrote separately and offered his characteristically clear insight, stating as follows:

I doubt that the drafters of the Federal Rules of Evidence foresaw the impact of their changes in the rules for expert witnesses. The changes were seen as enhancing efficiency and adopting for the courtroom standards of reliance sufficient for the community in its daily affairs. The actual changes have cut more deeply and indeed, in

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<sup>519</sup> *Id.* at 308.

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 309.

<sup>522</sup> *Id.* at 315.

<sup>523</sup> *Id.* at 314–15.

<sup>524</sup> *Id.* at 310.

<sup>525</sup> *Brock v. Merrell Dow Pharm., Inc.*, 884 F.2d 167, 168 (5th Cir. 1989) (Reavley, J., dissenting from the denial of the rehearing en banc).

<sup>526</sup> *Id.*

many ways, have materially changed the dynamics of trial.<sup>527</sup>

This case raises important questions about the role of experts in the federal courts, including whether we should accept opinions of experts not based upon a generally accepted scientific principle and the more broadly stated concern that substantive principles such as tort law are not handling science issues in a rational manner. We should confront them, and state the guiding principle, if we can.<sup>528</sup>

Justice Higginbotham further stated:

It strikes me that the issue in this case revolves around the admissibility of the expert testimony. . . . Yet, while skepticism permeates its opinion, the panel does not seem to engage the question at this juncture. Rather, the panel chooses to accept the admissibility of the testimony and to quarrel with its effect. . . . Yet, the translation of these concerns into administrable rules is absent. . . .

. . . Surely, these questions are worthy of en banc consideration. . . .

Describing the issues in the language of efficiency and impact on the courts presents only a part, and not the most important part, of larger questions of fairness and judicial roles and our commitment to the jury system. Ultimately, it is no more than that we are obligated to state the law, certainly if we truly expect people to order their affairs by its measure. We are not doing that here. When we fail to explain, we must ask if it is because we cannot. I join Judge Reavley's wise caution.<sup>529</sup>

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<sup>527</sup> *Id.* at 168 n.1 (Higginbotham, J., dissenting from the denial of rehearing en banc).

<sup>528</sup> *Id.* at 168–69 (Higginbotham, J., dissenting from the denial of rehearing en banc).

<sup>529</sup> *Id.* at 169–70 (Higginbotham, J., dissenting from the denial of rehearing en banc). Justice Higginbotham expressed this sentiment previously, well before his thoughtful discussion and rejection of much of the *Brock* majority's analysis. See *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1231 (5th Cir. 1986). In *In re Air Crash Disaster*, he lamented an expert opinion which was wildly inconsistent with the known facts. *Id.* at 1235.

*Brock* is discussed in detail and is considered to be justified by Childress & Davis in their text.<sup>530</sup> Nonetheless, many still regard *Brock* as an effort by the court to enter into a scientific arena with no real knowledge base and in the process to effectively decide expert credibility disputes, as was bitterly noted by Judge Reavley in his dissent.<sup>531</sup> Additionally, the First Circuit Court of Appeals has noted, “The adoption of such a standard [requiring too much certainty in expert testimony] impermissibly changes the trial judge’s role under *Daubert* from that of gatekeeper to that of an armed guard.”<sup>532</sup>

In 2000, the United States Supreme Court established an even more draconian result for plaintiffs whose expert testimony had been admitted, found sufficient by the jury and by the district court, but was later determined on appeal to be insufficient.<sup>533</sup> In *Weisgram*, the Court held that if expert testimony is found insufficient on appeal, judgment should be rendered as opposed to remanded.<sup>534</sup> The Court specifically rejected the plaintiff’s argument that such a result was unfair because the plaintiff had relied on the admissibility of such evidence and would have no chance to try the case again with new or additional evidence.<sup>535</sup> *Weisgram* has been widely and rightly criticized.<sup>536</sup>

Childress and Davis describe *Weisgram* as follows:

The *Weisgram* case, when combined with other recent Supreme Court decisions, signals a growing judicial check on the jury and an increased power in appellate courts to find facts. . . . This power may be at odds with the Seventh Amendment, especially if the common law allocation of

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<sup>530</sup> See 1 CHILDRESS & DAVIS, *supra* note 9, § 3.02 at 3-16 to 3-19.

<sup>531</sup> See *Brock*, 884 F.2d at 168 (Reavley, J., dissenting from the denial of rehearing en banc).

<sup>532</sup> See *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 86 (1st Cir. 1998).

<sup>533</sup> See *Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000).

<sup>534</sup> *Id.* at 456–57.

<sup>535</sup> *Id.* at 454–56 & n.11.

<sup>536</sup> See Robert A. Ragazzo, *The Power of a Federal Appellate Court To Direct Entry of Judgment as a Matter of Law: Reflections on Weisgram v. Marley Co.*, 3 J. APP. PRAC. & PROCESS 107, 109 (2001); see also Debra Lyn Bassett, “I Lost at Trial—In the Court of Appeals!”: *The Expanding Power of the Federal Appellate Courts To Reexamine the Facts*, 38 HOUS. L. REV. 1129, 1133 (2001).

law and fact is taken seriously, as the Court says it does, and then the history is examined accurately.<sup>537</sup>

A recent decision of the Supreme Court of the United States suggests that Professors Childress and Davis may well be correct in their assessment of *Weisgram*. In *Scott v. Harris*, during a high speed pursuit a police officer had intentionally struck Harris' fleeing vehicle to "take him out."<sup>538</sup> Harris' estate alleged the county and police officers had used excessive force in violation of the Fourth Amendment.<sup>539</sup> The district court denied Scott's motion for summary judgment and the Eleventh Circuit Court of Appeals affirmed.<sup>540</sup> In the majority opinion, Justice Scalia noted that it was "clear from the video tape that [Harris] posed an actual and imminent threat to the lives of any pedestrian who may have been present, to other civilian motorists, and to the officers involved in the chase."<sup>541</sup> Accordingly, the Court determined as a matter of law that there was no Fourth Amendment violation, solely based on its viewing of the video tape. Professor Erwin Chemerinsky characterized the Court's decision as follows:

[T]he Court's reliance on its viewing of the videotape is troubling as a matter of appropriate appellate methodology. Fact-finding is the trial court's job. But here, the Court gave no deference to the trial court's review of the evidence. The justices did not let a jury watch the videotape and decide what happened. Quite the opposite, in fact: They simply looked at the evidence themselves and came to their own conclusion.

It is impossible to reconcile this situation with the traditional views of appropriate appellate procedure.<sup>542</sup>

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<sup>537</sup> 1 CHILDRESS & DAVIS, *supra* note 9, § 3.01 at 45 n.7a (Supp. 2006).

<sup>538</sup> 127 S.Ct. 1769, 1773 (2007).

<sup>539</sup> *Id.*

<sup>540</sup> *Id.* at 1773–74.

<sup>541</sup> *Id.* at 1778.

<sup>542</sup> Erwin Chemerinsky, *A Troubling Take on Excessive-Force Claims*, TRIAL, July 2007, at 74–76.

*H. The Fifth Circuit following Reeves*

*Reeves* itself is by no means clear as to the standard of review for jury verdicts in general. Having adopted the inclusive or whole record scope of review the Court articulated a standard of review in the following language:

[I]t must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'<sup>543</sup>

Childress and Davis describe this language in *Reeves* as the following:

[It] is less than clear when compared to its earlier, more forceful acceptance of whole-record review. Instead, it harkens back not to the majority approach apparently adopted but rather to the "middle-ground approach" primarily recited in the Second Circuit. Even so, it seems likely that the Court meant for this language to be one application of its broader whole-record rule rather than a true limitation on it.

The bottom line appears to be a review for reasonableness of the jury's decision, one that requires the appellate court to credit the witnesses and reasonable inferences favoring the verdict but one that is not limited exclusively to reviewing only that evidence—or even only that evidence plus unimpeached contrary evidence. The actual application of this review performed on the facts in *Reeves* belies any thought that this review can only consider those pieces of the evidence which support the verdict or, if otherwise, are uncontroverted. Thus, it seems that the "middle-ground" limitation is rejected as is the one-side-only view, and a general whole-record review

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<sup>543</sup> *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (citing 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2529, at 299–300 (2d ed. 1995)).

endorsed, despite the interesting middle-ground language added.<sup>544</sup>

Some Fifth Circuit panels have referred to *Reeves* as closely resembling *Boeing* itself.<sup>545</sup> Professor Dorsaneo disagrees and argues that the traditional standard and its traditional application remain the only completely appropriate standard and method of decision.<sup>546</sup>

### I. Proper Application of the Standard

Professor Dorsaneo, after *Reeves*, suggests the standard for taking any case from the jury whether by summary judgment, motion for directed verdict, or judgment as a matter of law should be this simple:

Trial judges should review the totality of the summary judgment evidence [or trial evidence] to identify the direct evidence and reasonable inferences that relate to the challenged elements of the plaintiff's claims, but must "give credence" to the direct evidence and reasonable inferences that support the plaintiff's claims by disregarding the unfavorable evidence.<sup>547</sup>

Dorsaneo further suggests that after *Reeves* the federal standard should be applied in two steps. First, the evidence and all reasonable inferences from the evidence must be considered in a light most favorable to the non-movant or the jury verdict.<sup>548</sup> Second, the reviewing court should give credence only to the favorable evidence and give no credence to any unfavorable evidence the jury was not required to believe.<sup>549</sup> Using Dorsaneo's analysis, there is very little unfavorable evidence that a jury is required to believe.

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<sup>544</sup> 1 CHILDRESS & DAVIS, *supra* note 9, § 3.03 at 52 (Supp. 2006) (footnotes omitted).

<sup>545</sup> See *Smith v. Louisville Ladder Co.*, 237 F.3d 515, 527 n.5 (5th Cir. 2001) (Dennis, J., dissenting). It must be remembered that *Reeves* involved a pure federal question in a federal court.

<sup>546</sup> See generally Dorsaneo I, *supra* note 4; see Steven Alan Childress, *Taking Jury Verdicts Seriously*, 54 SMU L. REV. 1739, 1743–44 (2001); see also David Crump, *Jury Review After Reeves v. Sanderson Plumbing Products, Inc.: A Four-Step Algorithm*, 54 SMU L. REV. 1749, 1753 (2001).

<sup>547</sup> Dorsaneo I, *supra* note 4, at 1715.

<sup>548</sup> Dorsaneo I, *supra* note 4, at 1718.

<sup>549</sup> Dorsaneo I, *supra* note 4, at 1718.

## J. *The Fifth Circuit and Damages*

### 1. The Constitutional Standard

The Supreme Court of the United States has unequivocally held that no court can, by remittitur or otherwise, impose a specific dollar amount of damages in the manner contrary to the amount found by the jury.<sup>550</sup> In *Kennon v. Gilmer* the court confronted a case in which the Supreme Court of Montana had reduced a general damages verdict by fifty percent and affirmed the reduced amount by judgment.<sup>551</sup> The U.S. Supreme Court found that the Montana court's entry of judgment reducing the amount of the verdict "without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and so far as we are informed, unprecedented."<sup>552</sup>

In *Kennon*, the Court also held that it was a facial violation of the Seventh Amendment for an appellate court to reexamine the facts determined by the verdict and, accordingly, that a court has no authority "according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."<sup>553</sup>

The same result was obtained in *Feltner v. Columbia Pictures Television, Inc.*<sup>554</sup> In *Feltner*, the court confronted a copyright infringement case in which the copyright owner had successfully sued a television station and sought to recover statutory damages.<sup>555</sup> Both the trial court and the court of appeals held the defendant had no right to have a jury determine statutory damages.<sup>556</sup> Writing for eight members of the Court, Justice Thomas provided an exhaustive history of the Seventh Amendment

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<sup>550</sup> See *Kennon v. Gilmer*, 131 U.S. 22 (1889); see also *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935) (holding that additur, the practice of adding damages to the amount found by the jury is prohibited in federal courts. While common law and conventional federal practice permitted a trial court to condition the "allowance [or denial of a motion for] new trial on the consent of plaintiff to remit excessive damages," the Supreme Court noted that "no federal court, so far as [it could] discover," had ever increased the damages awarded by a jury to a specific dollar amount.).

<sup>551</sup> 131 U.S. at 27.

<sup>552</sup> *Id.* at 27–28.

<sup>553</sup> *Id.* at 29–30.

<sup>554</sup> See 523 U.S. 340, 342 (1998).

<sup>555</sup> *Id.* at 343.

<sup>556</sup> *Id.* at 344.

constitutional issues presented particularly as they applied to copyright issues.<sup>557</sup> Squarely holding the right to jury trial includes the right to have a jury determine the amount of damages, the Court concluded, “[T]here is overwhelming evidence that the consistent practice of common law was for juries to award damages.”<sup>558</sup>

The same year, the U.S. Supreme Court made essentially the same holding in *Hetzel v. Prince William County, Va.*<sup>559</sup> *Hetzel* was a Title Seven and civil rights action.<sup>560</sup> The district court reduced the plaintiff’s damages from \$750,000 to \$500,000 on the grounds that the evidence supporting one of the awards was legally insufficient.<sup>561</sup> On appeal, the Fourth Circuit held the entire damage award was grossly excessive because it was unsupported by the evidence, set aside the damage award and remanded the case to the district court for a *recalculation* of the award of damages for emotional distress.<sup>562</sup> Plaintiffs sought certiorari arguing that in reducing the damages, the court of appeals in effect had imposed a remittitur on her and that she was entitled to a new trial under the Seventh Amendment.<sup>563</sup> In *Hetzel*, the Court specifically held that the court of appeals could not order the imposition of judgment in a lesser amount than the amount of damages found by the jury without affording the plaintiff the opportunity of a new trial consistent with the Seventh Amendment.<sup>564</sup>

## 2. Review of Actual Damages for Excessiveness

When reviewing a jury award of damages, the Fifth Circuit was originally Seventh Amendment friendly. In 1980, the Fifth Circuit stated that review of its precedent “reveals only rare instances in which the Court felt bound to set aside a jury award for its excessiveness.”<sup>565</sup> Likewise, the Fifth Circuit appeared very deferential to a trial court’s decision to reject

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<sup>557</sup> *See id.* at 347–54.

<sup>558</sup> *Id.* at 353.

<sup>559</sup> *See generally* 523 U.S. 208 (1998) (per curiam).

<sup>560</sup> *Id.* at 208–09.

<sup>561</sup> *Id.* at 209.

<sup>562</sup> *Id.* (emphasis added).

<sup>563</sup> *Id.* at 208.

<sup>564</sup> *Id.* at 211.

<sup>565</sup> *Perricone v. Kansas City S. Ry. Co.*, 630 F.2d 317, 319 (5th Cir. 1980).

claims of excessiveness of damages: “[A]ll factors press in the direction of leaving the trial judge’s ruling undisturbed.”<sup>566</sup>

The binding en banc precedent in the Fifth Circuit for review of excessiveness of damages is still *Caldarera v. Eastern Airlines, Inc.*<sup>567</sup> There, Judge Rubin stated:

We do not reverse a jury verdict for excessiveness except on “the strongest of showings.” The jury’s award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to “shock the judicial conscience,” “so gross or inordinately large as to be contrary to right reason,” so exaggerated as to indicate “bias, passion, prejudice, corruption, or other improper motive,” or as “clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to.”<sup>568</sup>

Likewise, the Fifth Circuit stated in *Wakefield v. United States* that, although its review is necessarily subjective, it does not order remittitur every time it perceives a jury award to be overly generous; rather, remittitur is justified only when the award exceeds the bounds of reason under the facts of the case.<sup>569</sup>

The Fifth Circuit, in reviewing compensatory damages, has held the trial judge’s ruling on excessiveness should be affirmed unless “there is an absolute absence of evidence to support the [jury’s] verdict.”<sup>570</sup> Such a rule is consistent with the Supreme Court’s decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>571</sup> Indeed, in *Browning-Ferris*, the Court itself noted that because of the Seventh Amendment, it would not stray too far from traditional common-law standards so as not to interfere with the proper role of the jury.<sup>572</sup>

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<sup>566</sup> *Massey v. Gulf Oil Corp.*, 508 F.2d 92, 95 (5th Cir. 1975).

<sup>567</sup> *See generally* 705 F.2d 778 (5th Cir. 1983).

<sup>568</sup> *Id.* at 784 (citations omitted).

<sup>569</sup> 765 F.2d 55, 59 (5th Cir. 1985).

<sup>570</sup> *Litherland v. Petrolane Offshore Constr. Servs., Inc.*, 546 F.2d 129, 134 (5th Cir. 1977).

<sup>571</sup> *See* 492 U.S. 257, 280 (1989).

<sup>572</sup> *Id.* at 280 n.26.

### 3. *Gasperini v. Center for Humanities, Inc.*

In 1996, the Supreme Court of the United States decided *Gasperini v. Center for Humanities, Inc.*<sup>573</sup> The stated issue in *Gasperini* was whether application of a state rule of substantive law regarding excessiveness of compensation violated the Seventh Amendment if applied by United States District Court in a diversity case.<sup>574</sup> New York substantive law required the New York Courts to determine whether an award “materially deviates from what would be reasonable compensation.”<sup>575</sup> Oddly, the New York model, like the Fifth Circuit’s “maximum recovery rule,”<sup>576</sup> encouraged the lower courts to compare decisions in other cases to determine whether the award under review was excessive. The Court in *Gasperini* discusses in detail earlier precedent relating to the command of the Seventh Amendment and the reexamination clause.<sup>577</sup> Yet unfortunately, *Gasperini*, while adopting the essential rationale of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,<sup>578</sup> nonetheless held that *Dagnello v. Long Island R.R.*<sup>579</sup> was consistent with the Seventh Amendment, stating “We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.”<sup>580</sup>

In *Gasperini* the Court went on to hold that nothing in the Seventh Amendment precluded appellate review of a trial judge’s determination to deny a motion to set aside a jury verdict as excessive.<sup>581</sup> Yet in *Gasperini* the Court then appears to retreat from the rule it had just stated by nonetheless requiring unique deference to the trial court’s determination as to excessiveness and allowing reversal in the federal system only for abuse of discretion.<sup>582</sup>

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<sup>573</sup> 518 U.S. 415, 418 (1996).

<sup>574</sup> *Id.* at 419.

<sup>575</sup> *Id.* at 425 (quoting *Inya v. Ide Hyundai, Inc.*, 619 N.Y.S.2d 440 (N.Y. App. Div. 1994)).

<sup>576</sup> *See infra* Part VIII.J.4.

<sup>577</sup> *Gasperini*, 518 U.S. at 431–33.

<sup>578</sup> 492 U.S. 257 (1989).

<sup>579</sup> 289 F.2d 797 (2d Cir. 1961).

<sup>580</sup> *Gasperini*, 518 U.S. at 435 (quoting *Dagnello*, 289 F.2d at 806).

<sup>581</sup> *Id.* at 439.

<sup>582</sup> *Id.* at 438.

In *Gasperini*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented:

Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment’s prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment’s restriction on federal-court review of jury findings has outlived its usefulness.<sup>583</sup>

Justice Scalia would have held that the Seventh Amendment absolutely prohibits any reexamination of facts found by a jury, including the amount of damages by any legal means other than by the trial court granting a new trial.<sup>584</sup>

Further, regarding the Court’s lack of faithfulness to the Seventh Amendment, Justice Scalia stated:

The Court’s only suggestion as to what rationale might underlie approval of abuse-of-discretion review is to be found in a quotation from *Dagnello v. Long Island R. Co.* to the effect that review of denial of a new trial motion, if conducted under a sufficiently deferential standard, poses only “a question of law.” But that is not the test that the Seventh Amendment sets forth. Whether or not it is possible to characterize an appeal of a denial of new trial as raising a “legal question,” it is not possible to review such a claim without engaging in a “reexamin[ation]” of the “facts tried by the jury” in a manner “otherwise” than allowed at common law. Determining whether a particular award is excessive requires that one first determine the nature and

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<sup>583</sup> *Id.* at 448–49 (Scalia, J., dissenting).

<sup>584</sup> *Id.* at 457 (Scalia, J., dissenting).

extent of the harm—which undeniably requires reviewing the facts of the case. That the court’s review also entails application of a legal standard (whether “shocks the conscience,” “deviates materially,” or some other) makes no difference, for what is necessarily *also* required is *reexamination of facts* found by the jury.

In the last analysis, the Court frankly abandons any pretense at faithfulness to the common law, suggesting that “the meaning” of the Reexamination Clause was not “fixed” contrary to the view that all our prior discussions of the Reexamination Clause have adopted. The Court believes we can ignore the very explicit command that “no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”<sup>585</sup>

Justice Scalia then notes that *Browning-Ferris* “rejected a request to fashion a federal common-law rule limiting the size of punitive damages awards in federal courts.”<sup>586</sup>

Finally, with devastating accuracy, Justice Scalia concludes his dissent in *Gasperini*:

To say that application of [the New York substantive law] in place of the federal standard will not consistently produce disparate results is not to suggest that the decision the Court has made today is not a momentous one. The *principle* that the state standard governs is of great importance, since it bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system. Under the Court’s view, a state rule that directed courts “to determine that an award is excessive or inadequate if it deviates *in any degree* from *the proper measure of compensation*” would have to be applied in federal courts, effectively requiring federal judges to determine the amount of damages *de novo*, and effectively taking the matter away from the jury entirely.

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<sup>585</sup> *Id.* at 460–61 (Scalia, J., dissenting) (citations omitted).

<sup>586</sup> *Id.* at 463 (Scalia, J., dissenting).

. . . .

There is no small irony in the Court's declaration today that appellate review of refusals to grant new trials for error of fact is "a control necessary and proper to the fair administration of justice." It is objection to *precisely* that sort of "control" by federal appellate judges that gave birth to the Reexamination Clause of the Seventh Amendment. Alas, those who drew the Amendment, and the citizens who approved it, did not envision an age in which the Constitution means whatever this Court thinks it ought to mean—or indeed, whatever the courts of appeals have recently thought it ought to mean.

When there is added to the revision of the Seventh Amendment the Court's precedent-setting disregard of Congress's instructions in Rule 59, one must conclude that this is a bad day for the Constitution's distinctive Article III courts in general, and for the role of the jury in those courts in particular.<sup>587</sup>

Many older cases also directly refute the central holding of *Gasperini* which is that the Court can redetermine or reexamine the amount of damages by appeal or otherwise.<sup>588</sup> The Court stated the same rule again in 1894 in *City of Lincoln v. Power*<sup>589</sup> and again in *Fairmount Glass Works v.*

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<sup>587</sup> *Id.* at 467–69 (Scalia, J., dissenting) (citations omitted).

<sup>588</sup> In 1883, the Supreme Court stated:

That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of the law arising upon the record.

*Wabash Ry. Co. v. McDaniels*, 107 U.S. 454, 456 (1883).

<sup>589</sup> In affirming the lower court, the Supreme Court stated:

[I]t is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury. . . .

[W]here there is no reason to complain of the instructions, an error of the jury in allowing an unreasonable amount is to be redressed by a motion for new trial.

*Cub Fork Coal Co.*<sup>590</sup> Because *Gasperini* and, for that matter, *Dagnello* do not require the determination of excessiveness in a federal court as a matter of factual sufficiency, Professor Dorsaneo would reject *Gasperini*'s approach entirely:

Such an approach [determination of excessiveness as a matter of fact or by remittitur] would be enormously preferable to the treatment of the issue as a law question for several reasons. First, reclassification of the issue as a law question is really a verbal charade that allows or requires the nullification of the jury's role in the litigation process because it implies that no deference whatsoever is required to be given to the jury's determination. Second, the remittitur remedy is a considerably less intrusive but nonetheless effective method for handling excessive verdicts.<sup>591</sup>

#### 4. The Fifth Circuit and the "Maximum Recovery Rule."

Despite the Fifth Circuit's binding precedent which requires theoretical deference to jury verdicts on damages, one remaining artifact of an earlier time lingers on in New Orleans as a living legal dodo bird. It is referred to in the Fifth Circuit as the "maximum recovery rule."

Judge Sparks described this rule of decision as follows:

Simply stated, the rule is that if the circuit judges believe the damages determined by the jury are too large, they research the thousands of published opinions for similar facts with a lesser award of damages and then hold the "maximum recovery" cannot be greater than some percentage of the lesser award. It makes no difference that

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151 U.S. 436, 437–38 (1894), *abrogated by* *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

<sup>590</sup>The Supreme Court stated:

The rule that this Court will not review the action of a federal trial court in granting or denying a motion for new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate.

287 U.S. 474, 481 (1933) (citations omitted).

<sup>591</sup>Dorsaneo I, *supra* note 4, at 1727–28.

the verdicts were based on different evidence, determined by different juries in different places at different times with different witnesses, tried by different lawyers, and presided over by different judges making different rulings on different motions and objections in different procedural contexts.

However, exactly what the “maximum recovery rule” is has never been decided by the Fifth Circuit *en banc*. Various panels have concluded that the benchmark against which a verdict is to be measured for excessiveness is either 0%, 133%, or 150%, take your pick.

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That the “maximum recovery rule” is imprecisely stated and applied is clear, but the underlying casualties of its application are fundamentally more serious. The first of these is the principle, often espoused by the Fifth Circuit, that each case is determined by its own facts. Second to fall is the deference traditionally afforded the fact finder. Also lost is the limitation imposed by the “re-examination clause” of the Seventh Amendment itself. It is obvious that the Fifth Circuit has decided that it is better at deciding damages than are the juries who heard the evidence. Unfortunately, their actions are sometimes contrary to the letter and spirit of the Seventh Amendment.<sup>592</sup>

A fact never discussed is that the damages awarded in the cases used for comparison were not determined to be the maximum amount that the evidence would sustain, only the amount awarded by the jury in that case. It is illogical to use such an award, never tested against the maximum standard, as a basis for deciding the permissible maximum in a different case.<sup>593</sup>

Fifth Circuit Judge James L. Dennis thoroughly dissected the maximum recovery rule in *Thomas v. Texas Department of Criminal Justice*.<sup>594</sup> Another private author has also collected virtually all Fifth Circuit

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<sup>592</sup> Sparks, *supra* note 503, at 9–10.

<sup>593</sup> Sparks, *supra* note 503, at 18 n.56.

<sup>594</sup> 297 F.3d 361, 373 (5th Cir. 2002) (Dennis, J., concurring).

precedent in this area, thoroughly analyzed it and also demolished the maximum recovery rule.<sup>595</sup> Yet as of the date of this writing, the rule appears alive and well in the Fifth Circuit. Although the settled of law in the Fifth Circuit is that a subsequent panel has no power to overrule the opinion of another panel of the Fifth Circuit unless the first opinion is overruled en banc or by the Supreme Court of the United States, “maximum recovery” panels routinely ignore *Caldarera*, the Circuit’s binding precedent, on a regular basis.<sup>596</sup>

The Fifth Circuit still applies the maximum recovery rule even though many states in which the Fifth Circuit is located as a matter of state substantive law now have independent damage caps. So far, the Fifth Circuit has not been able to articulate why the maximum recovery rule is necessary (if it ever was) or why it remains appropriate given state damage limits under state law on the plaintiff’s ability to recover damages in the first instance. Likewise, the Fifth Circuit has applied the maximum recovery rule not only to jury trials but to bench trials as well.<sup>597</sup> However illogical or factually unfounded the premises supporting the so-called “maximum recovery rule” may be, it remains for the Fifth Circuit to pronounce it dead by en banc disposition. However, if Judge Sparks is correct in his analysis of the ideological preferences of the Fifth Circuit as presently constituted, the Rule’s death certificate may still be unlikely.<sup>598</sup> If not candidly rejected, the maximum recovery rule is nothing more than a subterfuge to disguise facial violations of the Seventh Amendment and the re-examination clause by allowing circuit judges to determine damages for themselves using admittedly irrelevant and ultimately fictitious factual or legal comparisons.

## 5. Federal Review of Punitive Damages

In *Gore*, the U.S. Supreme Court identified three primary factors as effecting the determination of whether an award of punitive damages was grossly excessive: (1) the degree of reprehensibility of nondisclosure;

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<sup>595</sup> Lawrence James Madigan, *Excessive Damage Review in the Fifth Circuit: A Quagmire of Inconsistency*, 34 TEX. TECH L. REV. 429, 440–41 (2003).

<sup>596</sup> See *United States v. Ocean Bulk Ships, Inc.*, 248 F.3d 331, 340 n.2 (5th Cir. 2001); see also *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (5th Cir. 2001).

<sup>597</sup> See *Douglass v. Delta Airlines, Inc.* 897 F.2d 1336, 1344 (5th Cir. 1990). The author was counsel for the plaintiff/appellee in *Douglass*.

<sup>598</sup> Sparks, *supra* note 503, at 8; see *supra* Part VIII.J.4.

(2) the disparity between the harm or potential harm suffered by the plaintiff and punitive damage award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.<sup>599</sup> However, U.S. Supreme Court's decision in *Cooper Industries v. Leatherman Tool Group* adopted a much less deferential approach to jury verdicts in order to determine "constitutional" excessiveness under *Gore*.<sup>600</sup> In effect, *Cooper* by using a *Gasperini*-like rationale simply changed a factual sufficiency issue to one of so-called "constitutional" excessiveness, so as to make a matter of fact become a matter of law: "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury."<sup>601</sup>

In *Cooper Industries*, Justice Ginsburg joined by the Chief Justice rejected the majority's reliance on *Gasperini* and also rejected the vague notion that a jury's decision to award an amount of punitive damages is any less subject to the Seventh Amendment protection based on the Court's wordsmithing or parsing of its resolution of factual matters as "historical" or "predictive."<sup>602</sup>

Professor Dorsaneo described *Cooper Industries* best:

Fundamentally, *Gasperini*'s flawed assessment that the excessiveness issue is "a question of law," evolves in *Cooper Industries* into a recharacterization of the amount of punitive damages as a legal issue or, at least, an issue that is insufficiently factual to avoid appellate reexamination. This is a dangerous development. The characterization of the issue of excessiveness as a purely legal question has the effect of removing the locus of decision-making away from juries and trial judges and toward appellate courts. It may be thought necessary to do something drastic to curb the perceived tendency of juries to award overly-large punitive damage awards and the apparent perception that trial judges cannot or will not do so. But the more troublesome and dangerous aspect of the

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<sup>599</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

<sup>600</sup> 532 U.S. 424, 431 (2001).

<sup>601</sup> *Id.* at 437 (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)) (citations omitted).

<sup>602</sup> *Id.* at 446 (Ginsburg, J., dissenting).

majority opinion involves its basic approach to the reexamination issue. . . .

. . . This “question of law” approach to reconciliation of weight of the evidence review with the reexamination clause is an unsatisfactory one because it provides no principled restraints on the judicial review of jury findings and gives the wrong guidance to the courts of appeal.

. . . [I]t is very difficult to cabin the Court’s solution to the reexamination dilemma—reclassification of a traditional fact question as a legal issue—on any logical basis. It can be anticipated that other evaluated determinations will be challenged on the basis that they do not constitute matters of historical or predictive fact. If these challenges succeed based on a logical extension of the majority opinion’s approach [in *Cooper*] to other evaluative determinations or to determinations of the types of mixed questions that are routinely submitted to juries, the right to trial by jury in federal courts will lose most of its current value.<sup>603</sup>

Dorsaneo concludes, “It would be a sad irony if the reexamination clause of the Seventh Amendment caused federal appellate courts to routinely recharacterize questions of fact as law questions to facilitate or justify appellate review.”<sup>604</sup>

The Supreme Court of the United States has very recently held in an Oregon case that a punitive damage verdict based in part on a jury’s desire to punish a defendant for harming non-parties amounts to a taking of property in violation of the Due Process Clause.<sup>605</sup> The line drawn in *Phillip Morris* by the majority opinion written by Justice Breyer is a fine one indeed. In essence, the Court holds that it is proper for the jury to consider the number of individuals that were adversely affected by the defendant’s illegal conduct that resulted in the plaintiff’s injury for the purpose of determining reprehensibility yet, at the same time, a limiting instruction should be provided to the effect that the jury may not by a punitive damage award, punish the defendant for harm to other persons who

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<sup>603</sup> Dorsaneo I, *supra* note 4, at 1733–34.

<sup>604</sup> Dorsaneo I, *supra* note 4, at 1736.

<sup>605</sup> See *Phillip Morris U.S.A. v. Williams*, 127 S.Ct. 1057, 1062 (2007).

are not parties to the case.<sup>606</sup> In *Phillip Morris*, the Court's treatment of its own precedent is interesting particularly as it relates to the Court's earlier decision in *Cooper Industries*. Otherwise, the Court's opinion in *Phillip Morris* adheres to the basic policy rationale previously stated in *Campbell*, *Cooper Industries*, *Gore*, *Oberg*, and *TXO*. Dissenting in *Phillip Morris* were Justices Stevens as well as Ginsburg, Thomas, and Scalia. Justice Ginsburg's dissent addresses a somewhat troubling preservation of error question which appears to have been written around in order to permit the majority's opinion.<sup>607</sup> While *Phillip Morris* had requested a jury instruction relating to the general subject matter of punishment for others who are not parties to the case it did not object to the Court's charge on that basis nor to any of the evidence in that regard; nor did it seek a limiting instruction regarding the purposes for which the jury could consider such evidence.<sup>608</sup> Ordinarily any one of these omissions in federal court is fatal to a complaint related to the subject matter that was "preserved" only by an objection to a requested instruction.<sup>609</sup> Nonetheless, the Supreme Court of the United States in *Phillip Morris* seems to "relax" normal procedural rules required to allow such a complaint consistent with the trend previously discussed and identified here. As will shortly be noted, outside the context of punitive damages, the Supreme Court of the United States has insisted on strict, if not rigid enforcement of all procedural rules in order to preserve a subject matter complaint on appeal. The following case illustrates that principle.

#### 6. Another Recent Discussion by the U.S. Supreme Court

Another recent decision by the Supreme Court of the United States in this area suggests that the Court continues to have significant Seventh Amendment concerns following *Reeves* and *Cooper Industries*. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the majority opinion by Justice Thomas held a party's failure to move for new trial or judgment as a matter of law after a jury returned its verdict precluded the party from seeking a new trial on appeal on the basis of alleged insufficiency of the evidence.<sup>610</sup> *Unitherm* concerned the mandatory nature of Federal Rule of

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<sup>606</sup> *Id.* at 1063.

<sup>607</sup> *Id.* at 1068 (Ginsburg, J., dissenting).

<sup>608</sup> *Id.* (Ginsburg, J., dissenting).

<sup>609</sup> See SMITH, *supra* note 353, § 5.3, at 569.

<sup>610</sup> 546 U.S. 394, 407 (2006).

Civil Procedure 50, including both subsections (a) and (b).<sup>611</sup> Nonetheless, the Court stated in part:

The dissent's approach is not only foreclosed by authority of this Court, it also may present Seventh Amendment concerns. The implication of the dissent's interpretation of § 2106 is that a court of appeals would be free to examine the sufficiency of the evidence regardless of whether the appellant had filed a Rule 50(a) motion in the district court and, in the event the appellant had filed a Rule 50(a) motion, regardless of whether the district court had ever *ruled* on that motion. The former is squarely foreclosed by *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913), and the latter is inconsistent with this Court's explanation of the requirements of the Seventh Amendment in *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 658 (1935) (explaining that "under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court's *ruling* respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury").<sup>612</sup>

#### IX. THE CONSTITUTIONAL DEMONS

All judges or justices swear an oath to support and defend the Constitution of the United States. All state judges in Texas also swear a similar oath to support and defend the Texas Constitution. Both the Constitution of the United States and the Constitution of the State of Texas unambiguously require any judge of these courts to support and defend the right to trial by jury. Why then do judges write opinions or take judicial action which minimize or nullify this cherished right? Some cynics would say that elected judges who act in derogation of the right to trial by jury are simply pandering to their core constituency, the institutional interests who would otherwise be "equalized" under the law by the action of juries. A

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<sup>611</sup> *Id.* at 396.

<sup>612</sup> *Id.* at 402 n.4 (citations omitted).

less cynical approach is that judges who take such action do so in the sincere but ultimately misguided belief that writing around the right to trial by jury is good policy for the state or for the nation. Either practice is wrong and is extremely dangerous to the survival of our democracy.

The most commonly used tools in the arsenals of the demons who would destroy the right to trial by jury are one or more of the following: (1) renaming or recharacterizing traditional fact issues or traditional sufficiency of evidence issues as questions of law; (2) interfering with or abridging the jury's right to draw reasonable inferences from the evidence; (3) transposing or fictionalizing constitutional requirements; or (4) "shoe horning" legal principles into cases to which they do not apply.

#### A. *Recharacterizing Questions of Fact as Questions of Law*

Childress and Davis state:

Despite this legacy [of the right to trial by jury], jury facts in fact are reexamined. Federal appellate courts perform their oversight function not by saying they do review facts or the verdict directly, but by calling evidentiary conflicts in limited circumstances a question of law. A jury verdict cannot stand without an evidentiary basis, and thus a judgment on a verdict entered in the absence of sufficient evidence, the courts' reasoning goes, poses an error of law reversible under common law without a constitutional dilemma.<sup>613</sup>

Childress and Davis state the question and the result as follows:

This common meaning of review "as a matter of law" boils down to the question of factual sufficiency that is the core of this chapter, and the law label is more an artifice to justify constitutionally this fact-finding review than it is a meaningful separation of law from fact.<sup>614</sup>

Regrettably, even the concept of what is or is not a fact or factual finding may itself be wordsmithed to support a particular legal point of review or desired result even by the Supreme Court of the United States. In *Bose Corp. v. Consumers Union of the U.S.*, the Court stated, "[a] finding of

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<sup>613</sup> 1 CHILDRESS & DAVIS, *supra* note 9, § 3.01 at 3-2 (footnotes omitted).

<sup>614</sup> 1 CHILDRESS & DAVIS, *supra* note 9, § 3.09 at 3-71.

fact in some cases is inseparable from the principle through which it was deduced. . . . Where the line is drawn varies according to the nature of the substantive law at issue.”<sup>615</sup> Even more recently, the U.S. Supreme Court itself appears to have confabulated a “fact finding” which it is forbidden to review by the reexamination clause by again redefining terms. In *Cooper Industries*, the Court alluded to a position that a jury’s findings of punitive damages were a finding of “predictive” fact as opposed to “historical” fact and therefore less subject to deference under the Seventh Amendment.<sup>616</sup> At least one author has openly suggested that standards of review should be variable depending upon the substantive law, the posture of the record, the burden of proof, and perhaps even the identity of the judge.<sup>617</sup>

As the late Professor Charles Alan Wright and his distinguished co-authors stated that recharacterizing questions of fact as law questions is really an obvious subterfuge.<sup>618</sup> Professor Wright also stated, “This argument is so purely verbal, and its implications for the Seventh Amendment so plainly devastating, that it has been rejected even by those who support appellate review of those orders.”<sup>619</sup> Any intellectually honest lawyer should look for constitutional trouble when the Supreme Court of the United States or the Supreme Court of Texas attempts to rename a subject of traditional factual sufficiency as legal sufficiency. In reality when the Court does so, it is transparently, disingenuously, and unconstitutionally attempting to avoid the constraints of the Seventh Amendment and the re-examination clause at the federal level, or the command that the right to trial by jury shall remain inviolate in Texas. When leading legal authors, law professors, and respected judges refer to this renaming process as “purely verbal,” an “artifice,” a “charade” or as being “deceitful,” the Justices Supreme Court of the United States and the Supreme Court of Texas should heed their warning, and stop such practices.

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<sup>615</sup> 466 U.S. 485, 501 n.17 (1984).

<sup>616</sup> *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

<sup>617</sup> See Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Recourses of Appellate Review*, 63 NOTRE DAME L. REV. 645, 654–57 (1988); see also 1 CHILDRESS & DAVIS, *supra* note 9, § 1.03 at 1-24 n.32.

<sup>618</sup> 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 2819, at 202–03 (2d ed. 1995) (citations omitted).

<sup>619</sup> *Id.* at 202; see also Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 761 (1957) (“Very few people are deceived into thinking the issue has been transmuted into an issue of law because an appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict.”); see also Dorsaneo II, *supra* note 4, at 1537.

*B. Interfering with a Jury's Ability to Draw Inference from the Evidence*

The Supreme Court of the United States created a dilemma when it decided *Chamberlain* and developed the so-called “equally probable inferences” rule.<sup>620</sup> In *Lavender*, the Court at least partially resolved that problem.<sup>621</sup> In reality, it is impossible for a reviewing court to determine either objectively or with any degree of accuracy whether one inference from the evidence is more reasonable to a jury than another. As Professor Dorsaneo has eloquently noted in his articles, the essence of jury decision-making is the ability to draw competent but different reasonable inferences from the evidence. Indeed, it is only by the process of drawing inference that juries can possibly reach a reasoned decision. The defendant's fingerprints on a hand gun found at the scene of a murder may be highly incriminating if the jury draws such an inference or completely exculpatory if the jury believes the defendant's contrary explanation to be credible. If there is any evidence of probative weight to support the jury's inference in favor of a verdict, to suggest that any court can substitute its own view of the reasonableness of an inference drawn by the jury is to ultimately reject the right to trial by jury at its most fundamental level. If any judge does so, however loudly an appellate court may trumpet theoretical fidelity to the right to trial by jury, inside his or her legal robes lurks a wolf in sheep's clothing.

As Professor Dorsaneo notes, “Under this standard, the jury, not the trial judge, and certainly not any appellate court, performs the important function of drawing and rejecting (or weighing) inferences from the evidence.”<sup>622</sup>

Rejecting the Supreme Court of Texas suggestions in *City of Keller* regarding the so-called “equal inferences rule,” Professor Dorsaneo states:

What is worse is the “equal inferences rule” is not merely unnecessary, it is actually quite harmful. In the hands of a reviewing judge who wants to violate the jury's province so as to impose his or her own idiosyncratic preferences on the case, the “equal inferences rule” provides an ideal tool. The abuse-of-power demons on the

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<sup>620</sup>Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333, 340 (1933).

<sup>621</sup>Lavender v. Kurn, 327 U.S. 645, 652–53 (1946).

<sup>622</sup>Dorsaneo I, *supra* note 4, at 1708.

judge's shoulder, need only whisper, "Just declare that the inferences are 'equal,' even if to do so requires an application of experience that our system entrusts to the jury." . . . Given its tendency to mislead, or rather to justify judicial imposition, the usefulness of the "equal inferences rule" is far outweighed by the mischief that it promotes.<sup>623</sup>

The Eleventh Circuit also rejected the so-called "equally probable inference" rule in *Daniels v. Twin Oaks Nursing Home*.<sup>624</sup> Referring to the Fifth Circuit's opinion in *Boeing*, the Eleventh Circuit stated, "This does not allow a rule where a verdict is directed simply because a contrary inference is equally likely. The contrary inference must be 'so strong and overwhelming' that the inference in favor of plaintiff is unreasonable."<sup>625</sup>

A jury's right to draw reasonable inferences from the evidence is at the heart of the jury system. If an appellate judge can restrict the jury's right to draw inferences from the evidence, it is a short step from that holding to the next holding that the inferences are "equally probable" to the final holding that there is no evidence to support the jury's verdict at all. In a very real sense, *City of Keller* is a clear effort by the Supreme Court of Texas to resurrect the long deceased "equally probable inference" rule of *Chamberlain* which itself has long since been rejected by the United States Supreme Court in *Lavender* and the cases that follow it.<sup>626</sup> In the process, the *City of Keller* opinion must of necessity ignore Chief Justice Phillips' plurality opinion in *Lozano* which squarely holds that if the jury may draw more than one reasonable inference from the evidence, it is for the jury—not the court—to determine which inference is more reasonable.<sup>627</sup> As a practical matter, the approach of *City of Keller*, like the original approach of the Supreme Court of the United States in *Chamberlain*, is ultimately doomed to failure because as a practical matter it is impossible for a court to determine which inference is more or less reasonable to a jury. Just as Justice Scalia stated in *Gasperini*, it is impossible for any judge at any level to make such determinations without engaging in a direct review or reexamination of the facts found by the jury.<sup>628</sup> This is a violation of the

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<sup>623</sup>Dorsaneo I, *supra* note 4, at 1710–11.

<sup>624</sup>692 F.2d 1321, 1325 n.5 (11th Cir. 1983).

<sup>625</sup>*Id.*

<sup>626</sup>*See Lavender*, 327 U.S. at 652–53.

<sup>627</sup>*Lozano v. Lozano*, 52 S.W.3d 141, 144 (Tex. 2001).

<sup>628</sup>*Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 449 (1996) (Scalia, J., dissenting).

Seventh Amendment to the U.S. Constitution and of the Texas Constitution as well. Moreover, it is impossible for a court to constitutionally determine which of two inferences from the evidence is more “reasonable” without directly weighing the evidence the jury used to decide the case. What may on a cold record appear to be an equally probable inference to an appellate judge may not have seemed so at all to the jury because of its view of the credibility of certain witnesses, its view of the reliability of some or all of the testimony or a variety of issues or fact determinations that a reviewing court cannot possibly know. Stated yet another way, the equally probable inference rule implies a mathematical quality to determining probability after the fact which in the real world simply does not exist. As *Lozano* correctly points out, as a matter of Texas law, inferences from evidence thrive upon, and are largely based upon, circumstantial evidence which requires a fact finder to choose among competing inferences.<sup>629</sup> As long as the circumstantial evidence or inferences from the evidence rise above naked suspicion, circumstantial evidence under federal and Texas law is as sufficient as any other evidence to prove any material fact.

### C. *Transposing Constitutional Standards*

Another intellectually dishonest way to avoid a direct assault on the constitutional right to trial by jury is to transpose constitutional concepts in such a manner that they superficially appear to support a holding or position that they actually do not support at all. In Texas for example, consider the plurality opinion in *Bentley* which holds as a matter of Texas common law, based on federal constitutional law, that the Supreme Court of Texas can effectively conduct a de novo review of the evidence in defamation cases.<sup>630</sup> In *Tony Gullo Motors*, the Court further transposed the *Bentley* rule to justify a de novo review of punitive damages in a purely commercial dispute.<sup>631</sup> Since *Bentley* is limited to purely first amendment constitutional issues, its transposition into punitive damages is extra legal at best. The “logic” of *In re C.H.*,<sup>632</sup> the “analogy” in *In re J.F.C. to Jackson v. Virginia*,<sup>633</sup> and the further analogy in *Garza to New York Times v.*

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<sup>629</sup> *Lozano*, 52 S.W.3d at 144.

<sup>630</sup> *Bentley v. Bunton*, 94 S.W.3d 561, 597 (Tex. 2002).

<sup>631</sup> *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307 (Tex. 2006).

<sup>632</sup> See *supra* notes 115–29 and accompanying text.

<sup>633</sup> See *supra* note 130–40 and accompanying text.

*Sullivan*<sup>634</sup> are other examples of transposing strictly limited constitutional concepts, that is those relating to parental termination cases and first amendment issues into rules of general application far removed from the context in which they originally arose. Once this transposition has been completed, it is easy for the Court to then refer and ostensibly rely on the newly transposed case instead of the original rule of law as supportive of a standard of review which far exceeds both state and federal constitutional limitations. The Supreme Court of Texas has also used the device of transplanting federal constitutional concepts into matters of Texas common law in derogation of the Texas Constitution, particularly as to the factual conclusivity clause and the limitation on the Supreme Court of Texas jurisdiction to suggest remittitur or to review excessiveness complaints in both *Bentley* and *Tony Gullo Motors*. The Court's inane suggestion in *Tony Gullo Motors* that the U.S. Supreme Court's decision in *Oberg* supported its decision is sophistic and another example of such transposition.<sup>635</sup> If this trend continues, the Supreme Court of Texas will soon be able to effectively relieve itself from the constraints of any portions of the Texas Constitution it desires by the simple expedient of adopting another rule of common law ostensibly from the U.S. Constitution to effectively exempt or overrule the Texas Constitution itself. If this trend continues, the Texas Constitution itself will rapidly lose any actual meaning and therefore will pose no effective restraint against the Supreme Court of Texas deciding cases essentially as it chooses.

*D. "Shoehorning" Legal Principles into Facts that Do Not Fit*

A classic and candid criticism of this tool of legal sophistry was stated by the Supreme Court of Appeals of West Virginia in *Garnes v. Fleming Landfill, Inc.*:

[W]e understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. Even judges who are remarkably dim bulbs know how to mouth the correct legal

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<sup>634</sup> See *supra* notes 189–91 and accompanying text.

<sup>635</sup> *Tony Gullo Motors*, 212 S.W.3d at 307.

rules with ironic solemnity while avoiding those rules' logical consequences.<sup>636</sup>

A classic example of “shoehorning” is the majority’s assertion that Ms. Suberu’s testimony created no more than a “scintilla” of evidence which was thus insufficient to overcome the presumption of good faith in *Kroger Texas, Ltd. v. Suberu*.<sup>637</sup> Another example of shoehorning is presented when the majority in *Volkswagen* resurrects the “equally probable inference” rule to defeat what was an obviously reasonable inference from the plaintiff’s evidence.<sup>638</sup> Shoehorning, assuming a modicum of legal competence by the judge writing the opinion, is perhaps the most sinister of all these devices because of the premeditated nature of the intent which is required to complete it.

## X. CONCLUSION

### A. *The Liberty Spirit*

Justice Learned Hand once stated, “The spirit of liberty is that spirit which is not too sure that it is right.”<sup>639</sup> In his book *Radicals in Robes*, Professor Cass Sustein of the University of Chicago Law School observed, “Hand’s comment has strong implications for both elected representatives and citizens. It suggests that when we disagree with one another, even on the most fundamental issues, each of us ought to have a little voice in our heads, cautioning: I might be wrong.”<sup>640</sup>

Although speaking in the context of members of the federal judiciary, Professor Sustein’s insightful observation applies equally to elected judges:

Unelected judges, even more than most, should respect liberty’s spirit. They lack a strong democratic pedigree; they do not stand for reelection. In addition, they have no particular expertise in ethics or political theory. They’re sometimes unable to foresee the consequences of their own decisions. For these reasons, they should be reluctant to

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<sup>636</sup> 413 S.E.2d 897, 907 (W. Va. 1991) (citations omitted).

<sup>637</sup> 216 S.W.3d 788, 797; see *supra* notes 277–302 and accompanying text.

<sup>638</sup> *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 912 (Tex. 2004).

<sup>639</sup> LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (Irving Dillard ed., 1953).

<sup>640</sup> CASS R. SUSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 35 (Basic Books 2005).

endorse controversial views about politics or morality, and to use those views in ambitious rulings against their fellow citizens. Their judgments may be erroneous; judges lack special access to moral and political truth. Even when they are right, their decisions may be fatal or counterproductive.

... In my view, federal courts do best, in the most controversial areas, when they rule narrowly and proceed incrementally.<sup>641</sup>

### *B. The Disease*

For the people of Texas, the situation with regard to appellate standards of review for sufficiency of evidence of jury verdicts is serious and is rapidly getting worse. A highly respected sitting United States District Judge in Texas has found it necessary, at great potential personal and professional risk to himself, to publicly state what is now painfully obvious:

Perhaps, after thorough consideration and open discussion and debate, our citizens will choose to amend our constitutions and give up their right of trial by a jury of their peers. However, until that happens it is unconstitutional for courts to disregard jury decisions that are supported by sufficient and competent evidence. We, as lawyers, are sworn to uphold the Constitution of our country and our states. As lawyers, we should identify those instances where proper jury verdicts are discarded. We must tell the guilty judges that it must stop because it upsets the balance between the rights of the people and the power of the judiciary.<sup>642</sup>

The American Board of Trial Advocates (ABOTA) is a non-profit, non-political group of attorneys whose members represent both plaintiffs and defendants.<sup>643</sup> ABOTA membership is by invitation only and is limited to those who have proven track records of ethical integrity and high

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<sup>641</sup> *Id.* at 35–36.

<sup>642</sup> Sparks, *supra* note 503, at 16; *see also* Sam Sparks & George Butts, *Where Have All the Jury Verdicts Gone?*, VOIR DIRE, Spring 2006, Vol. 13, Issue 1, at 1.

<sup>643</sup> *See* American Board of Trial Advocates Home Page, <http://www.abota.org>.

professional ability.<sup>644</sup> ABOTA's stated mission is to "preserve the constitutional vision of equal justice for all Americans and preserve [the] civil justice system for future generations."<sup>645</sup> The Texas branch of ABOTA has now found it necessary to form a Seventh Amendment Committee, the purpose of which is to "monitor the Texas Supreme Court and the Fifth Circuit calling attention to cases where appellate judges substitute their preferred resolution of disputed fact issues for those made by juries." The committee is co-chaired by one prominent plaintiff's attorney and one prominent defense attorney and has academic support from prestigious law schools within the State of Texas.<sup>646</sup>

Professor Dorsaneo also passionately pleads the case for all Texans who defend the constitutional right to trial by jury:

If we have lost faith in the ability of the common man to make a reasonable decision in civil cases, we should have the fortitude to say so. Perhaps the reluctance stems from the implications such an admission would have on the other decisions we entrust to ordinary citizens, such as electing our government. The founding fathers' reason for preserving the right to trial by jury is still the best reason for guarding that right today—it protects us from the tyranny, or potential tyranny, of the judiciary, most of whom are legally or practically insulated from public accountability.<sup>647</sup>

### C. *The Pathogenesis*

To be clear, exactly as U.S. Circuit Judge Rives stated almost forty years ago in *Boeing*, the question of whether the citizens of the United States or citizens of Texas are entitled to the right to trial by jury in civil

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<sup>644</sup> American Board of Trial Advocates Membership Requirements, <http://www.abota.org/about/default.asp?about=6&title=MembershipRequirements> (last visited Mar. 22, 2008).

<sup>645</sup> American Board of Trial Advocates Foundation, <http://www.abota.org/foundation>.

<sup>646</sup> Personal communication to author. The basis may be reviewed at TEX-ABOTA at <http://www.abota.org/chapters/default.asp?statechapter=3&chaptername=TEX-ABOTA> (last visited March 22, 2008).

<sup>647</sup> Dorsaneo I, *supra* note 4, at 1737.

cases is not open to competent legal dispute or even discussion.<sup>648</sup> In a democracy, if a person or group of persons desires to change the Constitution, such a result is to be accomplished by a legal process known as amendment, not by surreptitious judicial sleight of hand. In a very real sense, when a judge who has accepted the constitutionally required oath of his or her office then writes around the commands of the Seventh Amendment or the Texas Constitution, he or she is conducting a guerilla war against and cowardly coup d'etat toward the commands of the Constitution itself. Such an approach is not only illegal in the constitutional sense, it is also devastating to the integrity of the entire judicial process. If a widespread belief develops that courts cannot be trusted to follow the Constitution because they do not agree with the result the Constitution requires, the entire judicial system, good and bad, will soon lose the confidence of the legal community and the people.

One explanation for the origin of the constitutional demons described here is the sociological and psychological concept of ethnocentrism. Ethnocentrism is a set of core beliefs or emotional attitudes that one's own ethnic group, nation, culture, or intellectual construct is superior to all others. Whether appointed or elected, all judges must of necessity bring with them to the bench all their core values, both conscious and subconscious. What is worse is the undeniable fact that holding judicial office inherently, and of necessity, tends to isolate judges from the real world. If one truly believes that his or her world view or intellectual prowess is superior to those of others, the ethnocentric judge easily integrates that construct into judicial decision making. Sadly, many such judges are extremely bright or even intellectually brilliant. The Achilles heel for the brilliant but ethnocentric judge is an intellectual egotism, elitism, and arrogance toward others. The intelligence of the judge may beguile him or her into a process of decision making that is so divorced from constitutional reality as to separate it from the views mainstream legal community and even society itself. For such judges it is easy to interpret legal principles, such as review of sufficiency of the evidence, to achieve the result that the individual judge personally believes to be correct. If a jury of a party's peers has decided the case differently than the judge would do, the ethnocentric judge has no difficulty in supplanting the jury's decision with one to his or her own liking. Yet the founders of this Nation

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<sup>648</sup>Boeing Co. v. Shipman, 411 F.2d 365, 378 (5th Cir. 1969) (Rives, J., concurring in part, dissenting in part), *overruled by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

and of this State steadfastly rejected the proposition that an elite corps of judges should be able to impose their own personal biases or factual determinations on the people. Instead, the framers insisted upon a Constitution which protected each citizen's absolute right to have a group of ordinary citizens without fine academic pedigrees or lofty political connections to decide the dispositive facts in any civil case. Thus, in the end, it does not matter to the Constitution whether the ethnocentric judge acts because of partisan allegiance, ideological perversion, arrogance, or sheer stupidity. The Constitution is damaged and may ultimately be destroyed by such lawless behavior, regardless its motivation.

#### *D. The Cure*

Professor Sustain and the great judge Learned Hand were correct when they cautioned "Radicals in Robes" to adopt a liberty spirit which requires a judge to discipline one's self and to accept the reality that regardless of how strongly one may feel about a situation or a particular case, "I could be wrong."<sup>649</sup> The liberty spirit compels a conscientious judge to follow the commands of the Constitution and to honor jury decisions if supported by any evidence of probative force however much the judge may personally disagree with the result the law and the Constitution require. To do otherwise simply substitutes the rule of men for the rule of law. If we tolerate "Radicals in Robes," as a nation and a state we will soon descend into the tyranny of the rule of men which we sought to avoid by adopting the Constitution of the United States and the Constitution of the State of Texas.

In 1860, the command of the "liberty spirit" was described by the late Justice Roberts of the newly created Supreme Court of Texas in the following beautiful and ringing language. It can only be hoped and perhaps even prayed that judges of all courts at all levels will open their minds, and hearts to heed and live by these glorious words:

The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the

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<sup>649</sup> See *supra* note 638 and accompanying text.

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sense of abstract justice, as determined by any one man, or set of men, whose duty it may have been to adjudge them.

Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.

A sense of justice, however, must and should have an important influence upon every well organized mind and the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequences they may lead, is a duty.<sup>650</sup>

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<sup>650</sup>Duncan v. Magette, 25 Tex. 245, 253 (1860).