

A Distinction Without a Difference: Revisiting the Constitutionality of Additur in Federal Courts

KAITLYN ABERNATHY HANSEN*

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* Senior Notes Editor, Volume 48 *The University of Memphis Law Review*; Juris Doctor Candidate, May 2018, The University of Memphis Cecil C. Humphreys School of Law. To my wife, Charise, for indirectly becoming an expert in all things English Common Law and the Seventh Amendment, while listening to me talk about this Note for the better part of two years. Thank you to Professor Andrew J. McClurg, who piqued my interest in this area during a Torts class on damages. Thank you to Professor Steven J. Mulroy and Suzanne Lamb for their invaluable contributions to the development of this Note.

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I. INTRODUCTION

Kimberly Connelly, a plaintiff in a personal injury action, was just nineteen years old when an intoxicated driver struck the car in which she was riding.¹ Todd Willey, who had consumed five beers

1. *Connelly v. Willey*, No. 86C-OC-132, 1989 WL 16972, at *1 (Del. Super. Ct. Feb. 28, 1989) (stating that defendant was the sole cause of the accident and of Connelly’s injuries, and thus trial was solely on the damages, not liability).

and was driving under the influence of alcohol, disregarded a stop sign, pulled onto a highway on a dark and rainy night, and hit the car in which plaintiff was a passenger.² The accident destroyed five of Connelly's teeth, and she underwent approximately fifty treatments at her dentist's office after the accident.³ Specifically, Connelly had a four-hour surgery in which an oral surgeon hammered a metal plate into her mouth to anchor her artificial teeth.⁴ The surgeon ground down her remaining teeth to fit the appliance and wired her jaw shut for 3 months.⁵ Connelly proved all of this at trial and offered testimony of the incredible pain, inconvenience, discomfort, and loss of enjoyment of life due to her extensive facial injuries.⁶

Through expert testimony, Connelly showed at trial that her future dental bills would total approximately \$19,000, considering her future life expectancy of 56.5 years.⁷ Connelly also presented evidence that all of her dental bills had been paid, save for \$7,000 that remained for payment toward future expenses.⁸ The jury ultimately awarded Connelly \$12,000 in compensatory damages, in response to which she motioned for a new trial based on the inadequacy of damages.⁹ The jury accepted the \$19,000 figure for future dental expenses and subtracted \$7,000 remaining under the no-fault insurance plan of Connelly to reach the \$12,000 total in damages.¹⁰ On appeal,

2. *Id.*

3. *Id.* at *2.

4. *Id.*

5. *Id.*

6. *Id.* The metal implant will remain in Connelly's mouth for the rest of her life. *Id.* She experienced pain and aches in her mouth and jaw, because the implant causes sensitivity to cold weather, food, and drinks. *Id.* This extreme pain will likely endure throughout her life. *Id.* Connelly must also avoid certain foods and drinks, while being overly cautious with others. *Id.* The maintenance and care of this appliance is incredibly time-consuming and troublesome. *Id.*

7. *Id.* at *2.

8. *Id.* at *3.

9. *Id.* at *1.

10. *Id.* at *3. Delaware courts have held that reference at a trial to a plaintiff's liability insurance is not prejudicial per se. *See generally* Chavin v. Cope, 243 A.2d 694, 696 (Del. 1968) (holding that the decision to allow or preclude mention of liability insurance in an automobile insurance case is within the discretion of the trial judge); Lord v. Poore, 108 A.2d 366, 370 (Del. 1954) ("In Delaware . . . ordinarily an appropriate instruction from the court to disregard [liability insurance] evidence is

the Delaware Appellate Court found that the \$12,000 award “strongly suggest[ed] the jury totally ignored the unrefuted evidence of pain, suffering and inconvenience that plaintiff has already experienced and will continue to experience for the rest of her life.”¹¹

In viewing all of the evidence in a light most favorable to the defendant, the appellate court concluded as a matter of law that Connelly proved her substantial pain and suffering.¹² Because the jury ignored the unrefuted evidence of pain and suffering and awarded no damages in that category, the court found that the jury’s award of damages was grossly inadequate, and it granted Connelly’s motion for a new trial.¹³

Although the appellate court ultimately ruled in her favor, Connelly had to file an appeal and retry an issue that a jury of her peers had already decided. She spent even more of her own money and time (as well as more of the judicial system’s time) for a second jury to come to a decision that had, essentially, already been made. Most importantly, the trial court could have corrected the jury’s verdict through additur, a type of jury-award modification.¹⁴ The trial court’s inability to use additur ultimately delayed Connelly’s ability to enjoy the purpose behind damages in tort: to put the claimant, so far as money can, back into the position she would have been in had the accident not occurred.¹⁵

sufficient to protect the defendant.”); *Blatz v. Wilson*, 170 A. 808, 810 (Del. 1933) (“[I]t is sufficient for the Court to instruct the jury that evidence or statements in reference to the defendant being insured, brought out or made during the course of the trial of a negligence case, should be disregarded by it and not considered in agreeing upon its verdict.”); *Justice v. Neutz*, No. 86C-06-88, 1993 WL 189525, at *2 (Del. Super. Ct. May 13, 1993) (reasoning that the mention of automobile insurance is not prejudicial per se because all automobiles registered in Delaware must be insured, and the jury knew or should have known that fact).

11. *Connelly*, 1989 WL 16972, at *3. “While the jury ha[d] a wide latitude in accepting or rejecting evidence in whole or in part, ‘it cannot totally ignore facts that are uncontroverted and against which no inference lies.’” *Id.* (quoting *Haas v. Pendleton*, 272 A.2d 109, 110 (Del. Super. Ct. 1970)).

12. *Id.* at *3.

13. *Id.*

14. *See infra* text accompanying note 16.

15. Courts have acknowledged that money cannot actually return someone to an uninjured state. *See, e.g., Ratych v. Bloomer*, 1 S.C.R. 940, 962–63 (1990). It is still the essential purpose and most basic principle of tort law, however, that the

Connelly could have avoided the issues in her suit if the judge had used additur. Additur is the practice of a trial judge adding damages to the original amount that the jury awarded when the judge finds that the damages are inadequate in light of the evidence presented.¹⁶ Remittitur, conversely, is a ruling by a judge, usually upon motion of the defendant, to reduce a jury verdict because it is excessive in light of the presented evidence.¹⁷ While the Supreme Court of the United States (“Supreme Court” or “the Court”) has upheld the practice of remittitur in federal courts as constitutional, the Court determined that additur was an unconstitutional exercise of a federal court’s power in the 1935 case of *Dimick v. Schiedt*.¹⁸

Although additur and remittitur are essentially mirror-images of the court’s inherent power, federal courts continue to treat them differently. This differential treatment gives an advantage to defendants, who can use their litigation position to force plaintiffs to accept a lower damage award in lieu of retrying the case. And plaintiffs who are unhappy with the award amount must either accept the insufficient award or spend even more money relitigating in the hopes of obtaining a more favorable jury verdict by moving for a new trial.¹⁹ This dynamic creates an unjustified paradigm in the federal courts: favoring defendants while leaving plaintiffs behind, which can be particularly devastating in cases of severe personal injury, when a

plaintiff “be placed in the position he or she would have been in absent the defendant’s negligence.” *Athey v. Leonati*, 3 S.C.R. 458, 466 (1996); *see also* *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009) (“Compensatory damages are intended to compensate an injured plaintiff for personal injury . . . and thereby make the plaintiff whole again.”). While Connelly could not be put into her “original position”—the damage to her jaw could not be reversed; the pain and suffering not forgotten—the delay in justice caused by forcing a new trial just delayed her ability to try to rebuild back to having some semblance of a life that Connelly enjoyed before the accident.

16. *Additur*, BLACK’S LAW DICTIONARY (10th ed. 2014).

17. *Remittitur*, BLACK’S LAW DICTIONARY (10th ed. 2014).

18. 293 U.S. 474, 486–88 (1935).

19. “The Seventh Amendment requires . . . that the plaintiff be given the option of a new trial in lieu of remitting a portion of the jury’s award.” *Johansen v. Combustion Eng’g, Inc.* 170 F.3d 1320, 1329 (11th Cir. 1999) (citing *Hetzel v. Prince William Cty.*, 523 U.S. 208 (1998)); *Dimick*, 293 U.S. at 482 (noting that, if the plaintiff does not consent to the remittitur, the court has no alternative but to order a new trial).

defendant acts egregiously, or when a plaintiff is completely without the funds to continue litigation. Further, the federal courts have already employed much more drastic steps—such as judgment as a matter of law and judgment notwithstanding of verdict—to remedy an improper jury verdict.²⁰

It is illogical for courts to dismiss an upward adjustment of a jury award that is legally insufficient when it is permissible to destroy a jury's verdict altogether. Additur saves the court's time and provides relief to plaintiffs from arbitrary decisions by saving them from having to relitigate claims. It also helps ensure that plaintiffs receive just compensation for their injuries, thereby preserving *both* parties' right to trial by jury. The Supreme Court should therefore reverse its decision in *Dimick v. Schiedt* and allow additur in the federal courts.

Part II traces the history of damage award adjustments in the English common law prior to the adoption of the Seventh Amendment in 1791. Part III discusses the history of the Seventh Amendment right to trial by jury in civil causes. Part IV analyzes the federal standards for additur and remittitur in the context of *Dimick v. Schiedt*—including discussion of its factual and procedural background, holding, reasoning under the common law and the Seventh Amendment, and Justice Stone's dissent. Part V makes the case that the Supreme Court should reverse its decision in *Dimick v. Schiedt* and employ additur in federal courts. Thereafter, Part VI discusses the application of additur in state courts. Various sections of Part VI discuss the maximum and minimum recovery rules, California's outright allowance and justifications for remittitur (and additur by analogy), and Tennessee's comparative-reasonableness approach. Part VII delineates a proposed standard for the federal courts to apply additur. Finally, Part VIII concludes the analysis.

II. ADJUSTING JURY DETERMINED DAMAGE AWARDS: A COMMON-LAW TRADITION

Judges' ability to correct jury decisions began as early as the 14th century, when English courts started exercising the power to grant

20. See *infra* Section V.A.

new trials where jury misconduct was involved.²¹ In 1655 came the first reported case in which a court set aside a verdict solely on the basis of an error in the jury award amount.²² In the 1700s, judges regularly granted new trials and, by the middle of the 18th century, the extension of the court's purview to include control over the jury's power to assess damages was evident.²³ In 1757, Lord Mansfield noted that:

Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials. If unjust verdicts were to be conclusive for ever [sic], the determination of civil property in this method of trial would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should . . . be opportunities of reconsidering the cause²⁴

This attitude toward the extension of court power ushered in a new era of civil jury trials—one in which English common-law judges did not

21. Jeffery Cole, *Additur—Procedural Boon or Constitutional Calamity*, 17 DEPAUL L. REV. 175, 178 (1967) (citing ROSCOE POUND & THEODORE F. T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 167 (3d ed. 1927); JOSEPH HENRY BEALE, CASES ON DAMAGES 1–9 (3d ed. 1928)). This Note does not analyze the intricacies of either remittitur or additur under the English common law, other than to discuss their existence in the framework of its constitutionality, as the Supreme Court determined it in *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935). Remittitur, as currently practiced in the federal courts, did not exist under the English common law. See Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 763–82 (arguing the Supreme Court did not accurately describe remittitur under the English common law). Additur also did not exist. See *id.* at 733.

22. Cole, *supra* note 21, at 178 (citing *Wood v. Gunston* (1655) 82 Eng. Rep. 867 (K.B.)). The court here set aside the jury verdict on the ground that the amount of damages awarded by the jury was excessive. *Id.* In his opinion, Chief Justice Glyn claimed: “It is in the discretion of the court in some cases to grant a new [trial], but this must be a judicial and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new [trials] upon them, and it is for the peoples benefit that it should be so.” *Id.* at 178 n.14.

23. See Albert C. Bender, *Additur—The Power of the Trial Court to Deny a New Trial on the Condition That Damages Be Increased*, 3 CAL. W. L. REV. 1, 4 (1967).

24. Cole, *supra* note 21, at 179 (citing *Bright v. Enyon* (1757) 97 Eng. Rep. 365, 367 (K.B.)).

hesitate to exercise their power to grant a new trial on the sole ground that the verdict violated some rule of the law of damages.²⁵ By the time the United States was founded, this power was firmly established and seen as a power to examine an entire case on the law and the evidence with the purpose of doing what justice requires.²⁶ As Jeffrey Cole noted:

The considerations involved in determining whether a verdict is inadequate are manifestly the same as those involved in determining whether a verdict is excessive. Thus, one would expect the courts to have granted new trials for inadequacy of damages just as they had come to do for excessiveness of award. The courts, however, uniformly refused to grant new trials where the verdict was inadequate.²⁷

Thus, although it seemed that additur and remittitur were, in fact, mirror images of one another, common law continued to preclude judges from fixing damage awards when a judge determined that a damage award was grossly inadequate.²⁸ The only remedy for a plaintiff, then, was to spend even more of his or her own money retrying the case, hoping for a more favorable verdict. If a plaintiff could not afford to do so, he or she had to accept the money that the jury already awarded, even if a judge had determined that the evidence reasonably only pointed in the plaintiff's direction. Meanwhile, defendants could ask a judge to lower jury verdicts when judges found them to be grossly excessive, without defendants spending another dime in extra litigation costs.

25. Cole, *supra* note 21, at 178–79 (citing, inter alia, JOSEPH HENRY BEALE, *CASES ON DAMAGES* 1–9 (3d ed. 1928); ROSCOE POUND & THEODORE F. T. PLUCKNETT, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW* 167 (3d ed. 1927)).

26. Cole, *supra* note 21, at 179 (citing *Lincoln v. Power*, 151 U.S. 436, 438 (1894); *Wilson v. Everett*, 139 U.S. 616, 621 (1891)). See also JOHN D. MAYNE, *DAMAGES* 457–62 (2d ed. 1872); Fleming James Jr., *Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur*, 1 *DUQUENSE L. REV.* 143 (1963)).

27. Cole, *supra* note 21, at 179–80.

28. *Id.*

III. THE SEVENTH AMENDMENT: SUBSTANCE VS. PROCEDURE

One major concern about any adjustment of jury-awarded damages after the verdict is the notion that a judge may be overstepping his or her bounds and impinging on the Seventh Amendment right to a jury trial. The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.²⁹

The Supreme Court has noted that the “substance” of a civil jury trial right must be preserved as fundamental to the Seventh Amendment, but that the “incidents” of the right need not remain static.³⁰ Although the right to trial by jury is one of the foundational principles within the Bill of Rights, and the Supreme Court has repeatedly asserted the necessity of preserving it, the Court has continually adapted the Seventh Amendment since its inception, rather than keeping true to the procedures that existed at the time of the ratification.³¹

Throughout the 19th century, the Supreme Court sought to define what constitutes the substance of the Seventh Amendment right to trial by jury. The Supreme Court in *Walker v. New Mexico Southern Pacific Railroad Co.* claimed that the Seventh Amendment

does not attempt to regulate matters of pleading or practice Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not

29. U.S. CONST. amend. VII.

30. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (citing the above proposition from *Galloway* with approval); *Galloway v. United States*, 319 U.S. 372, 390 (1943) (“The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing.”).

31. *Galloway*, 319 U.S. at 390.

assume, directly or indirectly, to take from the jury or to itself such prerogative.³²

Similarly, in *Galloway v. United States*, the petitioner asked the Supreme Court to determine whether a directed verdict,³³ a tool that courts developed outside of English common law, infringes on the Seventh Amendment right to trial by jury.³⁴ In holding that it does not, the Court emphasized that practices prevalent when the Seventh Amendment was written in 1791 are not controlling, so long as the fundamental elements of the jury trial right are preserved.³⁵ Thus, so long as its function still preserves the right to jury trial, additur should survive challenges in federal courts, notwithstanding that it lacks basis in the common law.

Additionally, in *Tull v. United States*, the Supreme Court found that there is a jury trial right to determine liability in actions where the government seeks damages and injunctions under the Clean Water Act because the nature and remedies of these cases were more analogous to the Seventh Amendment's "[s]uits at common law" than to traditional cases tried by courts in equity.³⁶ The Court held that the judge, rather than the jury, should determine the amount of civil penalties, stating that "[t]he Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability."³⁷ Therefore, the Court reasoned that whether the remedy must go to the jury depends on "whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.'"³⁸

The Supreme Court in *Tull* cited Professor Austin Wakeman Scott's article, *Trial by Jury and the Reform of Civil Procedure*,³⁹ for

32. 165 U.S. 593, 596 (1897).

33. A directed verdict is a ruling by a trial judge that takes the case from the jury's purview because the evidence presented by the parties will only permit one reasonable verdict. *Directed Verdict*, BLACK'S LAW DICTIONARY (10th ed. 2014).

34. 319 U.S. at 388.

35. *See id.* at 395–96.

36. 481 U.S. 412, 417–25 (1987).

37. *Id.* at 425–26.

38. *Id.* at 426 (citing *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)).

39. Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669 (1918).

the proposition that “[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.”⁴⁰ Although the *Tull* Court never explicitly laid out in its opinion what is considered “fundamental” to the system of trial by jury, Professor Scott’s article listed four fundamental aspects: (1) having a jury composed of twelve persons;⁴¹ (2) having a unanimous verdict; (3) having a jury that is impartial and competent; and (4) having the jury determine questions of fact.⁴² The Supreme Court thus implicitly insisted that there were very few rights that were considered to be “fundamental,” a competent and impartial jury comprised of twelve people being one of them. Even these few essentials of the civil jury trial right have been amended throughout the years—a unanimous, twelve-person jury has since been removed from this so-called “fundamental” list.⁴³

40. *Tull*, 481 U.S. at 426; Scott, *supra* note 39, at 671.

41. Note that, by the time of *Tull*, the Supreme Court had already dispensed with the requirement of a twelve-person jury as “fundamental” to the Seventh Amendment. See *Colgrove v. Battin*, 413 U.S. 149, 159–60 (1973). States are thus free to experiment with the number of jury members they use in criminal cases because the right to trial by jury fails to prescribe the precise number that constitutes a jury. See *Brown v. Louisiana*, 447 U.S. 323, 330–31 (1980) (citing *Williams v. Florida*, 399 U.S. 78, 87 (1970)). There are size limits that a court may not transgress, however, if it is to maintain the essence of the jury trial right. See *generally* *Ballew v. Georgia*, 435 U.S. 223 (2009) (holding that a reduction in the size of a jury to below six persons in non-petty criminal cases raises such substantial doubts as to the fairness of the proceeding and the jury’s ability to represent the true sense of the community that it deprives the accused of his right to trial by jury).

42. Scott, *supra* note 39, at 672–75. Note that states are free to experiment with the conviction proportion in jury trials because unanimity is not enumerated in the Sixth Amendment. See U.S. CONST. amend. VI; *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (holding that the Sixth Amendment does not require that the jury’s vote be unanimous because the requirement of unanimity “does not materially contribute to the exercise of . . . commonsense judgment.”). The *Apodaca* Court could find no difference between juries required to act unanimously and those permitted to convict or acquit by votes of ten to two or eleven to one. *Id.*; see also *State v. Bertrand*, 6 So. 3d 738, 741–42 (holding that non-unanimous twelve-person jury verdicts do not violate the Sixth and Fourteenth Amendments).

43. See *supra* note 41. In a 5-4 decision, the Supreme Court held that six-person juries were permissible in civil trials under the Seventh Amendment. *Colgrove*, 413 U.S. at 158 (1973). The Court reasoned that “the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil

Simply put, the fundamental/incidental dichotomy boils down to one real issue: whether the practice furthered by the court impinges on the jury's role as a finder of fact. The substance of the right to trial by jury that the Seventh Amendment preserves is the jury's role as finder of fact. Matters of pleading and practice, on the other hand, are mere incidents to the right because they do not affect the jury's substantive role of determining the facts of a case.⁴⁴ Although proof of damages is typically considered a "finding of fact for the jury," this has not affected a judge's right to step in and correct jury missteps when there is jury misconduct,⁴⁵ a lack of evidence to support the jury's finding,⁴⁶ or even a finding that the jury awarded excessive damages.⁴⁷ Additur is exactly the mirror-image of the latter example

cases where it existed at common law, rather than the various incidents of trial by jury." *Id.* at 155–56.

44. Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897).

45. Take, for example, a mistrial. *Black's Law Dictionary* defines "mistrial" as, "An erroneous, invalid, or nugatory trial; a trial of an action which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite." *Mistrial*, BLACK'S LAW DICTIONARY (10th ed. 2014). It defines "misconduct" as "any unlawful conduct on the part of a person concerned in the administration of justice which is prejudicial to the rights of parties or the right determination of the cause." *Misconduct*, BLACK'S LAW DICTIONARY (10th ed. 2014). It also describes "misconduct" as a "dereliction of duties." *Id.* Mistrials and misconduct require action on the part of the judge to correct a wrong in the administration of justice, effectively giving a judge the power to take the decision out of the hands of the jury.

46. Judgment as a matter of law gives the judge the power to end the trial before a jury is able to render a decision by ruling that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50. Judgment as a matter of law not only allows the judge to take the decision before a jury is able to render a decision, but it allows a judge to effectively reverse a jury's decision as legally insufficient. *Id.* Thus, allowing the judge to determine that the jury's finding of fact—a supposedly "protected" substantive Seventh Amendment right—was incorrect. See *infra* notes 88–101 and accompanying text.

47. Remittitur is the example of a judge making a determination most like a "finder of fact" which most mirrors additur, yet the law does not consider it an infringement on a party's right to a jury trial under the Seventh Amendment. Remittitur has been sanctioned by its long usage by which the court may condition a denial of the motion for a new trial by lowering a plaintiff's damage award. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815 (3d ed. 2017). Yet although additur is essentially the same—allowing a judge to deny a motion for a new trial upon the addition of damages to an insufficient verdict—the

of a judge's check on the jury's determination of fact, and for reasons this Note espouses, the law should consider it a constitutional exercise of that power.

While most of the criteria in Professor Scott's list of "fundamental" jury trial aspects remain intact, courts have considered all other portions of a jury trial incidental rather than fundamental and, thus, they are within the court's purview to determine whether to change.⁴⁸ Additur is uniquely incidental—that is, it is a motion that asks a judge to review a jury's decision to assess whether a jury has acted properly. It functions as an appeal that is only available when the judge determines that no reasonable jury should have or would have come to a particular decision. Because additur is a procedural matter for the court, it does not impinge upon the right to trial by jury. Particularly persuasive is California's modification theory, which claims that, because a nonconsenting party has *already* had a jury determine damages, there is no violation of the general principal that a jury must determine controverted facts.⁴⁹ Thus, a judge's upward modification of the jury's award of damages does not destroy the jury's determination because he simply adds to the award jurors already made to meet the reasonably proven amount.

Additur is the mirror-image of remittitur, and the law should likewise treat additur as a constitutional exercise of a judge's power. There is a distinction without a difference between the two functions of a trial judge. In fact, both additur and remittitur empower judges to safeguard the litigants by preventing extra loss to a plaintiff from any jury misconduct or misunderstanding in the process of calculating damages in the civil sense.

IV. THE FEDERAL STANDARD FOR ADDITUR AND REMITTITUR:

DIMICK v. SCHIEDT

The Supreme Court first addressed the issue of judges increasing a jury's inadequate award of damages in 1935.⁵⁰ While there was a long line of remittitur cases in the federal courts and in

federal courts have unquestioningly followed the Supreme Court's analysis from *Dimick v. Schiedt*, 293 U.S. 474 (1935).

48. See Scott, *supra* note 39, at 671–72.

49. See *infra* Section VI.B.2.

50. *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935).

English common law prior to the ratification of the Seventh Amendment,⁵¹ the inverse—additur, as coined by the court in *Dimick*—was an unheard-of practice, and the Court rejected it because of its lack of historical use and purported infringement upon the Seventh Amendment right to trial by jury.

A. *Factual and Procedural Background*

The plaintiff in *Dimick* brought an action against the defendant in federal court to recover for personal injury resulting from the alleged negligent operation of a motor vehicle on a public highway in Massachusetts.⁵² At the conclusion of trial, the jury returned a verdict for the plaintiff in the amount of \$500.⁵³ The plaintiff moved for a new trial on the grounds that the damage award was inadequate inasmuch as it bore no reasonable relation to his injuries.⁵⁴

The trial judge threatened a new trial on the inadequacy of damages unless the defendant agreed to an increase in damages for a total award of \$1,500.⁵⁵ The defendant consented to the increase in damages, and the trial judge subsequently denied the plaintiff's motion for a new trial.⁵⁶ The plaintiff then appealed the trial court's finding to the Court of Appeals for the First Circuit.⁵⁷ In a two-to-one decision, the First Circuit reversed the trial court's judgment and held that the court's order for a new trial conditioned on the defendant's refusal to submit to a higher damage award violated the Seventh Amendment right to trial by jury.⁵⁸

51. *Id.* at 477–82 (citing *Beardmore v. Carrington* (1764) 95 Eng. Rep. 790 (K.B.); *Brown v. Seymour* (1742) 95 Eng. Rep. 461 (K.B.); 1 Wils. 5; *Burton v. Baynes* (1733) 94 Eng. Rep. 852 (K.B.)).

52. *Id.* at 475.

53. *Id.*

54. *Id.*

55. *Id.* at 475–76.

56. *Id.* at 476.

57. Although the plaintiff received a favorable decision from the trial judge in raising the jury award, he appealed on the ground that the later adjustment was a violation of his right to trial by jury because, while the defendant had consented to the additur, the plaintiff did not. *Schiedt v. Dimick*, 70 F.2d 558, 559 (1st Cir. 1934).

58. *Id.* at 562.

B. The Supreme Court's Holding and Reasoning

The Supreme Court granted certiorari and affirmed the decision of the First Circuit Court of Appeals, holding that enabling the court to heighten an insufficient verdict would compel a plaintiff to forego his or her constitutional right to a jury verdict and accept “an assessment partly made by a jury which has acted improperly and partly by a tribunal which has no power to assess.”⁵⁹

1. Lack of Basis in Common Law

The Supreme Court, denying relief through the process of additur, held that, to ascertain the scope and meaning of the Seventh Amendment, one must look to the appropriate rules of common law established at the time of adoption of the Seventh Amendment in 1791.⁶⁰ The Court pointed to many cases where the common-law courts either rejected the use of additur outright or recognized the power of the courts to increase damages, yet continued to refuse to do so.⁶¹ The Supreme Court also cited to *Burton v. Baynes* as an outlier case where the English court used additur, but it swiftly noted that this was by no means normal in the common-law system.⁶² The majority established that while additur had no real root in common law, remittitur, on the other hand, had a long line of cases establishing it as precedent.⁶³ Moreover, the Court noted that, in early common law, the application for an increase of damages was an absolute request by a

59. *Dimick v. Schiedt*, 293 U.S. 474, 482 (1935).

60. *Id.* at 476.

61. *Id.* at 477. *See also* *Beardmore v. Carrington* (1764) 95 Eng. Rep. 790 (K.B.) (“The court reviewed the subject and reached the conclusion that the English courts were without the power to either increase or abridge damages in any action for a personal tort.”); *Brown v. Seymour* (1742) 95 Eng. Rep. 461 (K.B.) (noting that the court conceded its power to increase damages for the maimed party but refused to exercise it, holding that the damage award was sufficient).

62. *Dimick*, 293 U.S. at 477 (explaining that the court, upon view of the injury, increased the damages from £11 to £50, but noting that the power of a trial court to increase damages was “seldom exercised”).

63. *Id.* at 477–79 (citing *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891); *McCoy v. Lemon*, 11 Rich. 165; *Beardmore v. Carrington* (1764) 95 Eng. Rep. 790 (K.B.); *Brown v. Seymour* (1742) 95 Eng. Rep. 461 (K.B.)).

plaintiff, not exercised as a condition to be followed by a defendant.⁶⁴ The *Dimick* Court used this analysis of the early English common law to support its holding that,

while there was some practice to the contrary in respect of *decreasing* damages, the established practice and the rule of common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration.⁶⁵

2. Lack of Basis Under the Seventh Amendment

Regarding the Seventh Amendment, the Supreme Court claimed that “the power to conditionally increase the verdict of a jury does not follow as a necessary corollary from the power to conditionally decrease it.”⁶⁶ The Court largely tracked the reasoning of the First Circuit Court of Appeals, claiming that, in cases of conditional remittitur, the amount is within the scope approved previously by a jury, while in cases of conditional additur, the increased amount falls outside the scope of the jury’s verdict.⁶⁷ The Court claimed that a decreased verdict through remittitur “has the effect of merely lopping off an excrescence,” while an increased verdict through additur is a “bald addition of something which in no sense can be said to be included in the verdict.”⁶⁸

C. Dissent

Justice Stone dissented in *Dimick*, arguing that the Seventh Amendment neither prescribed any particular procedure by which the benefits of the right should be obtained, nor does it forbid any procedure that does not curtail the function of the jury to decide questions of fact.⁶⁹ While the States adopted the Constitution against

64. *Dimick*, 293 U.S. at 477.

65. *Id.* at 482 (emphasis added).

66. *Id.* at 485.

67. *Id.*

68. *Id.* at 486.

69. *Id.* at 491.

a common-law backdrop, Justice Stone claimed that one of the most important principles of the Constitution was its capacity for growth, development, and adaptability to every new situation.⁷⁰ This general view of the Constitution's capacity to grow and adapt assures its continuing validity and usefulness.⁷¹ Thus, Justice Stone argued, the Court ought not be restricted solely to the existing common law—or lack thereof—regarding the adequacy of jury awards at the time the Constitution was written.

Justice Stone also argued that the Framers intended the Seventh Amendment to protect the substance of the jury trial right, not the procedural minutiae of trial practices existing in English common law in 1791.⁷² As interpreted, Justice Stone argues that the Seventh Amendment guarantees that suitors

shall have the benefits of trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact as it did before the adoption of the amendment. It does not restrict the court's control of the jury's verdict, as it had previously been exercised, and it does not confine the trial judge, in determining what issues are for the jury and what for the court, to the particular forms of trial practice in vogue in 1791.⁷³

70. *Id.* at 495–96.

71. This view of constitutional interpretation is generally referred to as the “living Constitution.” Justice William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (“Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.”).

72. *Id.* at 490.

73. *Id.* at 491.

Justice Stone continued his analysis with examples of procedural changes in the right to trial by jury since the common law.⁷⁴ While none of the procedures he mentioned existed in the English common-law courts, the Supreme Court found that the Seventh Amendment does not bar the federal courts from adopting of these methods because they leave the function of the jury to decide issues of fact unimpaired.⁷⁵

The crux of Justice Stone's argument for granting additur rests on the proposition that there is no conflict between the guarantees of the Seventh Amendment and the granting of an adjusted verdict when damages are grossly inadequate. He argued, "[a]fter the issues of fact had been submitted to the jury, and its verdict taken, the trial judge was authorized to entertain a motion to set aside the verdict and, as an incident, to determine the legal limits of a proper verdict."⁷⁶ The plaintiff in *Dimick* had not suffered an infringement of his right to trial by jury when his motion for a new trial was denied because the judge, exercising his judgment in light of the proven evidence, is safeguarding that "a proper recovery had been assured to the plaintiff by consent of the defendant [to the higher recovery amount]."⁷⁷ In that same sense, the defendant suffered no infringement of right to trial by jury because he consented to the increased jury verdict, and thus, waived his complaint.⁷⁸ Justice Stone concluded:

74. *Id.* See, e.g., *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931) (holding that a federal court may accept so much of a verdict as it declares that the plaintiff is entitled to recover, and may set aside so much as fixes the amount of damages, and order a new trial on that issue alone); *Ex parte Peterson*, 253 U.S. 300 (1920) (holding that a federal court, without consent of parties, may appoint auditors to hear testimony, examine evidence, and report upon issues of fact to aid a jury in arriving at a verdict); *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593 (1897) (holding that a federal court may require a general and a special verdict form and set aside a general verdict for a plaintiff and direct verdict for a defendant on the basis of specific facts found).

75. *Dimick*, 293 U.S. at 492. Justice Stone also argued in passing that, although the common law never adopted the practice of making a motion for a new trial directly to a judge rather than to a court sitting *en banc*, it is now "firmly imbedded in federal procedure." *Id.* at 491-92. See also *id.* at 492 n.2.

76. *Id.* at 492.

77. *Id.*

78. *Id.* at 492-93.

The fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance. For in neither does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict, but by the consent of the party resisting the motion for a new trial.⁷⁹

V. A CASE FOR ADDITUR IN FEDERAL COURTS

The Supreme Court should reevaluate and reverse its holding from *Dimick v. Schiedt* in 1935. The Court in *Dimick* relied heavily on its argument that the Seventh Amendment requires a civil jury trial right similar to that of the common law at the time of the adoption of the Seventh Amendment in 1791. It is irrelevant, however, that there was no analogue to additur before 1791. One of the most important principles of the Constitution is its capacity for growth and adaptability to ensure its viability through the years.⁸⁰ Thus, restricting the courts to exactly the procedures of the common law existing at the time of the writing of the Constitution is impossible, considering the way technology, the law, and society have developed in the some 200 years since the birth of the Constitution.

Inflexibility of the jury trial right will lead to exactly what Lord Mansfield warned of when he claimed that trial by jury in civil causes could not subsist without a power to grant new trials.⁸¹ “It is absolutely

79. *Id.* at 494.

80. See Rehnquist, *supra* note 71; DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010) (“A ‘living Constitution’ is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.”). Two explicit and oft-used examples of this change are the Thirteenth Amendment, which abolished slavery, and the Fourteenth Amendment’s “Equal Protection Clause.” U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). *But cf.* U.S. CONST. art. I, § 2, *repealed by* U.S. CONST. amend. XIII, XIV (treating slaves as three-fifths of a person for the purpose of counting population for representation).

81. Cole, *supra* note 21, at 179 (citing *Bright v. Enyon* (1757) 97 Eng. Rep. 365, 367 (K.B.)).

necessary to justice, that there should . . . be opportunities of reconsidering the cause”⁸² And an opportunity to reconsider the case is precisely what additur provides when a plaintiff believes that the weight of the evidence points to a jury award that is only reasonable at a higher amount than the jury has already awarded.

A. *The Common Law Is Not Dispositive*

The Supreme Court has continually adapted the civil jury trial right throughout the years,⁸³ making the argument that the mere non-existence of a procedure at common law is a less viable reason for invalidating additur as unconstitutional.⁸⁴ For example, the Supreme Court has separately claimed that: (1) a federal court may accept so much of a verdict as the plaintiff is entitled to recover, and may set aside the allegedly erroneous award and order a new trial on that issue alone;⁸⁵ (2) a federal court, without consent of parties, may appoint auditors to hear testimony, examine evidence, and report upon issues of fact to aid a jury in arriving at a verdict;⁸⁶ and (3) a federal court may require a general and a special verdict form and set aside a general verdict for a plaintiff and direct verdict for a defendant on the basis of specific facts found.⁸⁷

Additionally, the Supreme Court in *Galloway v. United States* found that a directed verdict⁸⁸—which itself had no basis in common law—was not unconstitutional, holding that the common-law practices prior to 1971 are not controlling, so long as the elements of a civil trial

82. *Id.*

83. *See supra* notes 39–41 and accompanying text.

84. *See Dimick*, 293 U.S. at 482 (“[T]he established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to *increase* the amount of damages awarded by a jury in actions such as that here under consideration.” (emphasis added)).

85. *Id.* at 491 (citing *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931)).

86. *Id.* (citing *Ex Parte Peterson*, 253 U.S. 300 (1920)).

87. *Id.* (citing *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593 (1897)).

88. Directed verdicts are often used as a colloquial name for one subset “judgment as a matter of law.” Judgment as a matter of law also encompasses “judgment notwithstanding of verdict,” which refers to the renewed Federal Rule of Civil Procedure 50 motion, made after the jury has made a decision. *See* FED. R. CIV. P. 50(b); *supra* note 86 and accompanying text.

by jury right are preserved.⁸⁹ As a way to avoid the costly problems of a new trial, American courts in the 19th century turned to directed verdicts, and eventually the Supreme Court held that the power to “direct a verdict” was a necessary result of the propositions that findings of the facts were for the jury and conclusions of law were for the judge.⁹⁰ The standard for a directed verdict states:

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

- (A) resolve the issue against the party; and
- (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under controlling law, can be maintained or defeated only with a favorable finding on that issue.⁹¹

The trend toward using directed verdicts as a substitute for a new trial blurred the already malleable distinction between fact and law even further, turning questions that had once been considered issues of fact for the jury into issues of law for the judge.⁹² Thus, the question of sufficiency of the evidence, traditionally posed as a question of fact for the jury to determine, suddenly became a question of law for the judge to decide upon motion for a directed verdict.⁹³

89. 319 U.S. 372, 390 (1943) (citing *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897)).

90. Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 463 (2013) (citing *People v. Cook*, 8 N.Y. 67, 67–68 (1853)).

91. See FED. R. CIV. P. 50(a)(1). A motion for directed verdict may be made at any time during the trial, but before the case is submitted to the jury, and it must specify the judgment sought and the facts entitling the movant to judgment. FED. R. CIV. P. 50(a)(2).

92. See Lerner, *supra* note 90, at 463.

93. See Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 542–46 (1996) (noting that the standard for ordering a new trial for a verdict being against the evidence evolved from being permitted only if the non-movant provided *no* evidence, to being permitted even when there was evidence on the non-movant’s behalf—so long as no reasonable jury could find for the non-movant).

Another tool that courts use often is another form of judgment as a matter of law that occurs after the jury has returned a verdict, known colloquially as judgment notwithstanding of verdict (“JNOV”). The Federal Rules of Civil Procedure enumerate the current standard for JNOV, providing that:

If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. . . . [T]he movant may file a renewed motion for [JNOV] and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.⁹⁴

JNOV was another 19th century addition to powers of the judge and was met with hardship and strain. For example, in *Slocum v. New York Life Insurance Co.*, the Court found JNOV unconstitutional because a court, in re-examining facts tried by a jury, could only grant a new trial—but it could not grant judgment to the loser of the jury judgment.⁹⁵ In 1935, however, the Supreme Court reconsidered the constitutionality of JNOV in *Baltimore & Carolina Line, Inc. v. Redman* and found the process constitutional.⁹⁶ The *Baltimore* Court noted that it had previously recognized that “a federal court may take

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

95. 228 U.S. 364, 399 (1913) (holding that re-examination of a fact tried by the jury must only be “according to the rules of the common law” of England—which only allowed new trials as a remedy for an erroneous verdict). Although the dissent argued that there was no violation of the Seventh Amendment right to trial by jury in civil cases because there were not actually facts for the jury to try in these cases, *id.* at 401 (Hughes, J., dissenting), it failed to persuade the Court.

96. 295 U.S. 654 (1935).

a verdict subject to the opinion of the court on a question of law,⁹⁷ and in one case in which a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.”⁹⁸ As a result, the Court claimed that judgment for the defendant was appropriate where the Court determines that the evidence was insufficient, rather than ordering a new trial.⁹⁹ Here, the Court departed from its analyses in both *Slocum* and *Dimick*, under which it had originally claimed that a procedure was unconstitutional if it did not exist under the common law.¹⁰⁰ Thus, the Court solidified the substance/procedure dichotomy of the Seventh Amendment: allowing the procedures of the civil jury trial right to grow and develop through the years, while maintaining the substance or the “heart” of the right.¹⁰¹ These procedures developed after 1791, which goes to show that the non-existence of *additur* in common law is not fatal to the constitutionality of *additur*.

The federal courts’ continued use of directed verdict and JNOV (together, “JMOL”), as well as many other jury trial procedures that did not exist in English common law, shows that the courts have no hesitation in adapting the Seventh Amendment civil jury trial right, even when there is no basis in common law. Further, the Supreme Court has already said that it is constitutional for a judge to step in and stop a jury from making findings of fact¹⁰² and that it is constitutional

97. *Id.* at 660 (citing *Suydam v. Williamson*, 61 U.S. 427, 434 (1857); *Chinoweth v. Haskell’s Lessee*, 28 U.S. 92, 94 (1830); *Brent v. Chapman*, 9 U.S. 358 (1809)).

98. *Id.* at 660–61 (citing *Chinoweth*, 28 U.S. at 92–98).

99. Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 698 (2004) (citing *Baltimore*, 295 U.S. 657, 661 (1935)).

100. *See generally* *Dimick v. Schiedt*, 293 U.S. 474 (1935).

101. The English common law has become even less relevant to Seventh Amendment analysis in more recent years. The Court, in *Gasperini v. Ctr. for Humanities, Inc.*, for the first time refused to determine the constitutionality of a procedure in light of its existence in English common law. 518 U.S. 415 (1996). In allowing appellate review of a denial of a motion for a new trial for excessiveness of the verdict, the Supreme Court justified its decision on the basis that “at some point a jury verdict was so excessive so as to become a question of law that was reviewable ‘as a control necessary and proper to the fair administration of justice.’” *See* Thomas, *supra* note 99, at 701 (citing *Gasperini*, 518 U.S. at 435).

102. *See supra* notes 90–93 and accompanying text.

for a judge to vacate a jury's decision after a verdict has been rendered.¹⁰³ Thus, it is illogical for the courts to dismiss an upward adjustment of a jury award that is legally insufficient when it is permissible to take a much more drastic approach and destroy a jury's verdict altogether.

*B. Additur Does Not Impinge upon the Seventh Amendment
Right to Trial by Jury*

The *Dimick* Court's other line of attack on additur came from the notion that additur destroys the right to trial by jury in civil causes.¹⁰⁴ The majority also spent time arguing that the similarities in the processes of additur and remittitur do not make them both constitutional because there is a difference between adding and subtracting to a jury verdict.¹⁰⁵ But this is a misguided claim because additur, if employed with careful restrictions so as to not usurp the jury's role as the finder of fact, is a procedural tool and does not violate the Constitution.

In determining the constitutionality of additur in light of the Seventh Amendment, the Court looks to whether the practice would infringe on a party's right to have the jury act as a finder of fact. While defendants often advance the argument that a judge's addition of damages to those already afforded by the jury takes away that right to the finding of fact,¹⁰⁶ it is, in fact, more of a procedural "incident" to the substance of the jury's findings. In essence, the jury has already found that the plaintiff is entitled to relief in the form of damages, but there has been some misstep in the calculation, leading the judge to determine that the award was legally insufficient in light of the evidence presented at trial. Although proof of damages is typically considered a "finding of fact for the jury," this has not affected a

103. See *supra* notes 95–101 and accompanying text.

104. *Dimick*, 293 U.S. at 486.

105. *Id.* at 491.

106. See *Dimick*, 293 U.S. at 486 (claiming that decreased verdicts through remittitur "ha[ve] the effect of merely lopping off an excrescence" while increased verdicts through additur are a "bald addition of something which in no sense can be said to be included in the verdict").

judge's right to interfere in other situations where it was determined that the jury made an error.¹⁰⁷

Under California's particularly persuasive modification theory, which claims that because a nonconsenting party has *already* had a jury determination of damages, there is no dissonance between additur and the general principle that a jury must determine controverted facts.¹⁰⁸ Thus, a judge's upward modification of the jury's award of damages does not destroy a jury's determination because the judge is simply adding damages to meet an already reasonably proven amount. If implemented carefully, with clear boundaries between the Seventh Amendment's substance versus procedure dichotomy, the use of additur in federal courts could both protect plaintiffs, in making sure they are awarded sufficient damage amounts, and protect defendants' right to trial by jury.¹⁰⁹

As a mirror-image of remittitur, the law should consider additur constitutional, alongside remittitur. There is a distinction without a difference between these two functions of a trial judge—one takes away the excessive part of a verdict, while one adds to an insufficient verdict—but both determinations are based upon reasonableness and evidence clearly produced at trial. In fact, both additur and remittitur provide for a judge's ability to safeguard the jury process by preventing extra loss to a plaintiff from any jury misconduct or misunderstanding in the process of calculating damages in the civil sense.

C. Additur Does Not Impinge upon the Civil Liberties of Defendants Subject to It

Opponents may raise an argument against additur by an analogy to civil liberties; namely, by comparing added jury verdicts to the imposition of additional prison time after sentencing in a criminal case. Civil liberties are personal freedoms that cannot be infringed upon by the government without due process of law.¹¹⁰ This general principle

107. See *supra* notes 48–49 and accompanying text.

108. See *infra* note 155 and accompanying text.

109. See *infra* Part VII for a suggestion for a more effective and stable implementation of additur in the federal courts.

110. *Civil Liberty*, BLACK'S LAW DICTIONARY (10th ed. 2014). Due Process is the conduct of fair legal proceedings in which all parties will be given notice of the

grew out of the Declaration of Independence, which states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,¹¹¹ that among these are Life, Liberty and the pursuit of Happiness.”¹¹²

The Supreme Court in *Apprendi v. New Jersey* found that it is unconstitutional for a legislature to remove from the jury the assessment of facts that would increase the prescribed range of penalties to which criminal defendants are exposed.¹¹³ In *Blakely v. Washington*, the Court clarified that “the statutory maximum,” for *Apprendi* purposes, is the maximum sentence a jury may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.¹¹⁴ In *United States v. Booker*, the Supreme Court claimed, “If a State makes an increase in a defendant’s authorized punishment contingent on a finding of fact, that fact . . . must be found by a jury beyond a reasonable doubt.”¹¹⁵ Together, *Apprendi*, *Blakely*, and *Booker* stand for the proposition that a judge’s finding of fact at sentencing that would increase the sentence would be a violation of a criminal defendant’s right to a trial by jury.¹¹⁶ Analogizing additur to increases in sentencing, so the argument goes: additur would

proceedings and have an opportunity to be heard. *Due Process*, BLACK’S LAW DICTIONARY (10th ed. 2014).

111. A non-exhaustive list of generally perceived inalienable rights includes: freedom of expression; freedom of speech; freedom of assembly; freedom of press; freedom of religion; freedom of conscience; *right to liberty* and security; freedom from torture; freedom from forced disappearance; right to privacy; right to equal treatment under the law; right to due process; and *right to a fair trial*. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. I; U.S. CONST. amends. IV–VI. The right to a fair trial is the most oft-used example of individual liberties when discussing the issue of additur.

112. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

113. 530 U.S. 466, 490 (2000) (“It is equally clear that such facts must be established by proof beyond a reasonable doubt.” (quoting *Jones v. United States*, 526 U.S. 227, 252–53 (1999))).

114. 542 U.S. 296, 303–04 (2004).

115. 543 U.S. 220, 231 (2005) (citing *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002)). *But see id.* at 233 (“[W]hen a trial judge exercises the judge’s discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”).

116. See *Booker*, 543 U.S. at 231; *Blakely*, 542 U.S. at 303–04; *Apprendi*, 530 U.S. at 490.

unilaterally increase the burden on the defendant—that was already placed by a jury—and infringe upon the defendant’s civil liberties without due process of law.¹¹⁷

Additur is substantively distinct from an adjustment of criminal sentencing in that an increase in the severity of criminal sentencing carries with it a heavier burden¹¹⁸ and more constitutional protections¹¹⁹ than does an increase in a jury’s damage awards. Thus, additur, though imposing a higher damage award on a defendant than

117. While there is no case on point whereby a party draws an analogy between additur and increasing criminal sentences, there has long been the idea that a damage award could be so out of line as to “raise a suspicious judicial eyebrow” or “shock the judicial conscience” and render the verdict unconstitutional and invalid. *Cf.* *BMW of N. Am. v. Gore*, 517 U.S. 559, 583–85 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 n.10 (1991) (“[A]n amount awarded would be set aside or modified only if it was ‘manifestly grossly excessive,’ (quoting *Pezzano v. Bonneau*, 133 Vt. 88, 91 (1974)), or would be considered excessive when ‘it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.’” (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985))). Thus, opponents of additur could advance the argument that additur would impinge on the civil liberties of a defendant, thereby “shocking the judicial conscience.”

Precedents regarding remitted jury verdicts also widely use the idea of a verdict “shocking the judicial conscience.” *See Cuevas v. Wentworth Grp.*, 144 A.3d 890, 893 (N.J. 2016) (noting that, to grant a motion for remittitur, the judge must find that the award is so grossly excessive that it “shocks the judicial conscience”). The court in *Cuevas* drew a distinction between a damages award that shocks the judge’s personal conscience, holding that a judge should not rely on personal knowledge of other verdicts or comparative verdict methodology, and whether the damages award shocks the judicial conscience. *Id.* at 894–95, 903–04. “The shock-the-judicial-conscience standard is objective in nature and transcends any individual judge’s personal experience.” *Id.* at 903 (citing *Baxter v. Fairmont Food Co.*, 379 A.2d 225, 229 (N.J. 1977)). The court further noted that, “[a]n award that shocks the judicial conscience is one that is ‘wide of the mark,’ ‘pervaded by a sense of wrongness,’ and ‘manifestly unjust to sustain.’” *Id.*

118. *Compare* TENN. CODE ANN. § 40-35-112 (2016) (enumerating the range of time to be served in prison for felonies in Tennessee when a defendant is convicted), *with Damages*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining damages as “[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury”).

119. *See* U.S. CONST. amend. V (“No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”). Double jeopardy applies uniquely to criminal cases. *See In re Bennett*, 301 Md. 517, 524–25 (1984) (noting that double jeopardy is a phenomenon peculiar to criminal cases).

the jury awarded, does not carry with it the same burden that would justify banning it on the grounds of an impingement on the defendant's civil liberties. Additionally, if the federal courts were to follow the suggested implementation of additur as outlined in Part VII,¹²⁰ the limitations of additur in civil cases would fall into line with the limitations of an increase in the severity of a sentence in criminal cases. That is, in either criminal or civil cases, a judge would be barred from making a *factual determination* that falls outside of the scope of the jury's original findings. This would make the application of a jury trial right under the Sixth Amendment and the Seventh Amendment uniform, regardless of the context of its use.

Further, authorities split regarding the constitutionality of increases in criminal sentencing. Some courts holding that a state trial court which had orally pronounced a valid sentence could not thereafter resentence the defendant in a manner that increased the severity of the sentence.¹²¹ Others hold that a state trial court cannot properly modify that sentence by increasing its severity once the defendant has served any part of the initial sentence.¹²² Notwithstanding the split in authority regarding the procedure of criminal sentencing increases, additur does not impede upon a defendant's civil liberties under either type of argument. In the jurisdictions that would compare additur to criminal sentencing where a trial court may not increase the severity once any part of it has been

120. See *infra* Part VII.

121. See, e.g., *People v. Hills*, 401 N.E.2d 523, 527 (Ill. 1980) (holding that the trial court was without power to increase the severity of a criminal sentence after it had been imposed, regardless of whether the imposed sentence had been executed); *State v. Nardone*, 334 A.2d 208, 210 (R.I. 1975) (assuming that a sentence imposed after conviction could not be increased due to the prohibition against double jeopardy); *Tooke v. State*, 642 S.W.2d 514, 518 (Tex. Ct. App. 1982) (holding that a trial court has no authority to resentence the defendant by increasing the severity of the sentence after formal sentencing and acceptance of such sentence).

122. See, e.g., *State v. Olson*, 539 P.2d 166, 168 (Or. Ct. App. 1975) (holding that where the initial sentence had been fully satisfied, the court was without the authority to subsequently order the defendant to pay "special costs" of the prosecution submitted one week after the imposition of the sentence); *Tinker v. State*, 579 S.W.2d 905, 907-08 (Tenn. Crim. App. 1979) (holding that the trial court's increase of a partially executed sentence violated both the federal and state prohibitions against placing a defendant twice in jeopardy), *overruled by State v. Jones*, 15 S.W.3d 880, 897 (Tenn. Crim. App. 1999).

served, additur would not infringe upon the defendant's civil liberties because a court would only apply it upon a motion before a defendant would be required to pay the judgment. Additionally, in the jurisdictions that prohibit an adjustment in sentencing after a "final" imposition, additur would not infringe upon the defendant's civil liberties because the final imposition of judgment in federal cases does not occur until the time passes for a motion for a new trial—no later than 28 days after the entry of judgment.¹²³ Thus, the final imposition of judgment does not occur until the day after the 28-day period has ended, allowing the aggrieved party—the plaintiff—to make a motion for a new trial, or in the alternative, a motion for additur within the window that occurs before the judgment is finalized.¹²⁴

D. Policy and Fairness Considerations Require the Use of Additur

Allowing for the use of additur, as well as remittitur, creates advantages for those in the litigation process. The trial judge may consider an independent judgment upon a motion to check the sufficiency of the jury's verdict, rather than forcing a new trial and wasting the court's time to relitigate issues that have already been resolved by a jury, albeit improperly. This judgment furthers the court's always-present, underlying goal of promoting judicial efficiency by allowing a trial judge to remedy a legally insufficient judgment without forcing the court to retry the case.¹²⁵

Not only would the allowance of additur be both a time- and money-saving procedure for a court, but it would allow a plaintiff to challenge an insufficient jury verdict without subjecting that plaintiff to litigation costs that would explode with a second trial. Defendants in civil litigation in federal courts already have this privilege via the

123. FED. R. CIV. P. 59(b) ("A motion for a new trial must be filed no later than 28 days after the entry of judgment.").

124. *See generally* Pinero v. Jackson Hewitt Tax Serv., No. 08-3535, 2009 U.S. Dist. LEXIS 43389, at *5 (E.D. La. May 20, 2009) (noting that the decision of the jury is rendered final after 10 days and that a party may only move to set the judgment aside under Federal Rule of Civil Procedure 60(b) after that time).

125. *See generally, e.g.,* Gathy v. United States, 754 A.2d 912, 917 (D.C. 2000) ("[J]udicial efficiency favors . . . resolution now rather than later.").

process of remittitur,¹²⁶ and they do not face the risk of wasting more of their money to relitigate a case when they would agree to a lower verdict payout. It is unfair to refuse a plaintiff the same latitude that defendants receive. This paradigm either forces the plaintiff to take an unfair and grossly inadequate jury award or spend a great deal more to relitigate when a defendant can challenge such a verdict without such extra costs accruing. The courts, using these fundamentals of fairness, should give plaintiffs opportunities that the law often affords defendants in the federal courts. Given these considerations, the Supreme Court should reevaluate and overturn its decision in *Dimick v. Schiedt*,¹²⁷ and permit the use of additur in federal courts.

VI. APPLICATION OF ADDITUR IN STATE COURTS

Although the Supreme Court of the United States reasoned in 1935 that additur violates the United States Constitution's civil jury right,¹²⁸ a number of individual states have employed additur for use under their constitutions,¹²⁹ claiming no violation under state law due to the doctrine of incorporation. The incorporation doctrine is the process whereby the Supreme Court makes amendments to the United States Constitution applicable to the states.¹³⁰ The Supreme Court has

126. *See supra* Part IV.

127. 293 U.S. 474, 487–88 (1935).

128. *Id.*

129. *See, e.g.*, CAL. CIV. PROC. CODE § 662.5 (West, Westlaw through Ch. 3 of 2018 Reg. Sess.) (grant of new trial subject to denial upon consent of additur or remittitur); FLA. STAT. § 768.74(2) (West 2011) (“If the court finds that the amount awarded is excessive or inadequate, it shall order a remittitur or additur.”); MISS. CODE ANN. § 11-1-55 (2002) (“The . . . court . . . may overrule a motion for new trial . . . upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.”); TENN. CODE ANN. § 20-10-101(a)(1) (2016) (“In cases where . . . a jury verdict is not adequate . . . the trial judge may suggest an additur in such amount or amounts as the trial judge deems proper to the compensatory or punitive damages awarded by the jury, or both such classes of damages.”).

130. *See generally* *McDonald v. City of Chicago*, 561 U.S. 742 (2010), for a discussion of the incorporation doctrine.

employed the doctrine of selective incorporation—only making some of the amendments applicable to the states.¹³¹

A. *Incorporation of the Seventh Amendment Civil Jury Trial Right to the States*

Through a series of Supreme Court decisions culminating in the *McDonald v. City of Chicago*¹³² decision, the Court affirmatively decided that all of the rights that the Constitution previously protected only from the federal government, such as the Second Amendment right to bear arms,¹³³ also received constitutional protection from the States. The Court, however, excepted three jury rights: the civil jury

131. Through selective incorporation, the U.S. Supreme Court gradually selected provisions of the Bill of Rights to enforce against the states through the Fourteenth Amendment's Due Process Clause. *See Palko v. Connecticut*, 302 U.S. 319, 324–25, 328 (1937) (holding that the entirety of the Bill of Rights should not be applied to the states through the Fourteenth Amendment and, instead, should be incorporated according to whether the amendment protects a right deemed “implicit to the concept of ordered liberty”); *see also Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (incorporating part of the Fifth Amendment regarding the right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963) (incorporating part of the Sixth Amendment by holding that state courts are required to provide counsel for indigent defendants); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226–27 (1963) (incorporating the First Amendment's Establishment Clause as a whole); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (incorporating the Fourth Amendment by holding that the protection against unlawful searches and seizures applies to the states); *Near v. Minnesota*, 283 U.S. 697, 722–23 (1931) (incorporating the First Amendment freedom of the press); *Gitlow v. New York*, 268 U.S. 652, 670–72 (1925) (holding that states may regulate speech that may incite crime to protect the interests and general welfare of its citizens). *But cf. Barron v. Baltimore*, 32 U.S. 243, 250–51 (1883) (refusing to incorporate the Fifth Amendment's assertion of just compensation by the government for taking property and holding that it applies solely to the federal government).

132. 561 U.S. 742 (2010).

133. *See Presser v. Illinois*, 116 U.S. 252, 264–66 (1886) (refusing to incorporate the right to bear arms); *see also Miller v. Texas*, 153 U.S. 535, 538–39 (1984) (same); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (same). These cases were later obviated because of the Court's decision to incorporate the Second Amendment in *McDonald*. 561 U.S. at 750 (“[W]e hold that the Second Amendment right is fully applicable to the states.”).

right,¹³⁴ the grand jury indictment requirement,¹³⁵ and the criminal jury unanimity requirement.¹³⁶ These three jury rights remain unincorporated to this day. The Supreme Court has not revisited the issue of whether jury rights apply to the states since *McDonald* in 2010, and thus, as the reasoning goes, the states are free to employ additur because they are not subject to the Seventh Amendment's right to trial by jury.

While proponents of additur often advance this argument, it is of no import whether the Seventh Amendment applies or a state constitutional provision applies, as additur is constitutional because it does not encroach upon a parties' right to trial by jury. A judge's upward or downward modification of a jury's award of damages does not destroy a jury's determination because the judge is simply adding damages to meet a reasonably proven amount or lopping off an excrescent amount. If the federal courts hold that remittitur is a constitutional exercise of a trial judge's inherent powers, additur should also be included because of the tremendous similarities between the two functions.

B. Miscellaneous State Standards Regarding Improper Jury Verdicts

Because the Seventh Amendment civil jury trial right is not incorporated to the states, they are free to adopt methods of dealing with grossly insufficient or grossly excessive jury verdicts that the federal courts have failed to recognize. For example, a handful of states refuse to recognize either additur or remittitur,¹³⁷ while others

134. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 220–23 (1916) (refusing to incorporate the Seventh Amendment right to a civil jury trial).

135. See *Hurtado v. California*, 110 U.S. 516, 537–38 (1884) (refusing to incorporate the Fifth Amendment requirement of grand jury indictment).

136. *Apodaca v. Oregon*, 406 U.S. 404, 412–14 (1972) (refusing to incorporate the Sixth Amendment criminal jury unanimity requirement); see also *McDonald*, 561 U.S. at 743–44, 867–68 (first citing *Hurtado*, 110 U.S. at 521; then citing *Minneapolis & St. Louis R.R. Co.*, 241 U.S. at 219; then citing *Apodaca*, 406 U.S. at 410); *supra* notes 39–43 and accompanying text.

137. See, e.g., *S. Ry. Co. v. Montgomery*, 46 F.2d 990, 991 (5th Cir. 1931); *Louisville & Nashville R.R. Co. v. Earl's Adm'x*, 22 S.W. 607, 608–09 (Ky. 1893).

recognize remittitur and refuse the use of additur.¹³⁸ Yet there are other states that allow unrestricted use of these jury award modifications,¹³⁹ while others have bright line rules for when they are or are not acceptable,¹⁴⁰ and some states use case law to plot out standards of reasonableness and use very fact-intensive inquiries in the determination of acceptableness of additur and remittitur.¹⁴¹

1. The “Maximum Recovery” Rule and the “Minimum Recovery” Rule

In determining the proper amount to be remitted, states in the Fifth Circuit and other jurisdictions such as New York have adopted the “maximum recovery” rule, which requires that the amount of the jury verdict remitted only reduce the verdict to the maximum amount a reasonable jury could have found in the case.¹⁴² In other words, when analyzing a motion for remittitur in light of the maximum recovery rule, a judge will look at the categories of damages and determine the maximum amount the plaintiff could recover as determined by the damages he or she proved. If the jury award is more than the maximum, a court will generally grant a motion for remittitur; if the jury award is less than the amount calculated by the trial judge, the judge will deny the remittitur motion.¹⁴³ The theory behind the maximum recovery rule is that juries give excessive awards because they want to give plaintiffs the maximum recovery the law allows.¹⁴⁴ To effectuate the jury’s intent, the rule reduces the verdict only as to make the award non-excessive, while giving the plaintiff the maximum

138. See, e.g., ARK. CODE ANN. § 16-64-124 (2005); *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 237–38 (1998) (rejecting additur).

139. See *infra* Section VI.B.2.

140. See *infra* Section VI.B.1.

141. See *infra* Section VI.B.3.

142. See, e.g., *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1047 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1971); *Schottka v. Am. Exp. Isbrandtsen Lines, Inc.*, 311 F. Supp. 77, 80–82 (S.D.N.Y. 1969); Irene Sann, *Remittitur Practice in the Federal Courts*, 76 COLUM. L. REV. 299, 307 (1976) (citing *Jenkins v. Aquatic Contractors & Eng’rs*, 446 F.2d 520 (5th Cir. 1971)).

143. See generally *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136 (E.D. La. 1974) (denying remittitur motion for less than the amount calculated by the trial judge).

144. See Sann, *supra* note 142, at 307–08.

amount allowable under the law and under reasonableness standards.¹⁴⁵ The maximum recovery rule has served as a good baseline for judges to use when the jury award amount is in question.¹⁴⁶ States applying the maximum recovery rule, however, have no analog when it comes to insufficient jury verdicts.¹⁴⁷

On the other end of the spectrum, Wisconsin embraces a unique approach called the “minimum recovery” rule, under which a plaintiff can retain only the portion of his award that is below the minimum amount that a reasonable jury would award.¹⁴⁸ In Wisconsin, when a trial judge determines that a jury award is inappropriate, he calculates and then announces the maximum and minimum amounts that he believes a reasonable jury could have found.¹⁴⁹ This allows the judge to set upper and lower limits of the jury verdict. After the judge sets the maximum and minimum recovery guidelines, the defendant has twenty days to agree to the higher amount.¹⁵⁰ If he disagrees, the plaintiff has ten days to accept the lower figure.¹⁵¹ If the plaintiff disagrees, the judge orders a new trial.¹⁵²

While theoretically a good idea, the minimum recovery rule apparently created another dichotomy that again forces a plaintiff to choose the lesser of two evils. Defendants reportedly never exercised their options to pay the larger amount; thus, “minimum recovery”

145. Note that the maximum-recovery rule only applies to compensatory damages, and the Fifth Circuit Court of Appeals has declined to extend it to cover calculation of remittitur from punitive damage awards. See *Gilbert v. St. Louis-S.F. R.R.*, 514 F.2d 1277, 1280 (5th Cir. 1975); *Curtis Publ'g Co. v. Butts*, 351 F.2d 702, 718–20 (5th Cir. 1965). The Fifth Circuit rejected an argument that the maximum recovery rule should apply to punitive damages in *Gilbert*, saying that, while compensatory and punitive damages both have speculative damages, they are “not administrable in the same fashion.” *Gilbert*, 514 F.2d at 1280. Further, the *Gilbert* court claimed that any limitation on punitive damages is not a question of fact, given great deference within the jury’s purview, but a question of law for the judge to determine. *Id.* at 1280–81.

146. See generally *supra* notes 142–143 and accompanying text.

147. See Sann, *supra* note 142, at 308–09.

148. *Meissner v. Papas*, 35 F. Supp. 676, 677 (E.D. Wis. 1940).

149. See ROSENBERG ET AL., *ELEMENTS OF CIVIL PROCEDURE* 854 n.3 (2d ed. 1970).

150. Sann, *supra* note 142, at 308 n.63.

151. See *id.* at 308 n.63.

152. *Id.*

became the prevailing standard because a plaintiff ultimately had to choose between taking the minimum amount set by the trial judge, or retry the case, making the jury essentially useless in that trial.¹⁵³

2. California's Outright Allowance of Remittitur—and Additur by Association

California's constitution guarantees the right to trial by jury as it existed at common law.¹⁵⁴ In conformity with the majority of jurisdictions, California's supreme court has held that remittitur does not violate the constitutional guaranty of trial by jury.¹⁵⁵ While the California Appellate Court claimed that additur was unconstitutional in *Dorsey v. Barba*, its decision was short-lived: the California Supreme Court quickly reversed the decision upon appeal.¹⁵⁶ California courts continue to justify additur by analogy to the constitutionality of remittitur, under two theories: the historical theory and the modification theory.¹⁵⁷

The historical theory applies primarily to remittitur, reasoning that, because remittitur existed at common law at the time of adoption of the Constitution, the Framers must have intended as an exception to the general principal that a jury must determine controverted facts.¹⁵⁸

153. *See id.*

154. CAL. CONST. art. 1, § 16 (“Trial by jury is an inviolate right and shall be secured to all In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.”).

155. Comment, *Additur and Remittitur in California*, 3 STAN. L. REV. 738, 739 (1951) (citing MCBAIN, CALIFORNIA TRIAL AND APPELLATE PRACTICE § 798 (2d ed. 1950)).

156. *Dorsey v. Barba*, 226 P.2d 677 (Cal. Dist. Ct. App. 1951), *rev'd*, 38 Cal. 2d 350 (1952).

157. *See Additur and Remittitur in California*, *supra* note 155, at 139–40. California has gone so far to reject the principles of *Dorsey v. Barba*, even after its reversal, as to codify the process of additur in its code of civil procedure. CAL. CIV. PRO. CODE § 662.5(a)(1) (West, Westlaw through Ch. 3 of 2018 Reg. Sess.) (“[T]he trial court may in its discretion: (1) If the ground for granting a new trial is inadequate damages, issue a conditional order granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable.”).

158. *Additur and Remittitur in California*, *supra* note 155, at 739–40.

Additur is justified under the historical approach by analogy—“[i]f remittitur is constitutional, then additur is said to be because there is no difference in principal between the two.”¹⁵⁹ Most courts, however, refuse to use only the historical theory to justify an exception to the right to trial by jury for remittitur and additur because, while remittitur existed at common law, it was at most questionable.¹⁶⁰

The modification theory complies with the general principal that a jury must determine the controverted facts because the nonconsenting party has already had his jury determination of damages.¹⁶¹ The argument is that the judge is simply modifying the jury determination of damages and either cutting off the excrescence or adding damages to meet the reasonably proven amount, rather than setting aside the jury verdict and invalidating it wholly.¹⁶² Those who criticize the modification theory maintain that “a party’s right to a jury determination of damages cannot be satisfied by using part of the finding of a jury which has admittedly acted unreasonably.”¹⁶³

While California’s justifications for allowing both additur and remittitur are valid and persuasive arguments, its outright allowance of the two functions are concerning because, without upper and lower limits of allowable award adjustments, there is a higher chance of abuse of discretion or power on the part of a trial judge who thinks particular verdicts are unfair.¹⁶⁴ Without clearly discernable limits, the California approach is much too difficult to implement in the federal court system.

3. Tennessee’s Comparative Reasonableness Approach

The Tennessee courts have adopted a hybrid approach to both additur and remittitur that is measured by percentage increase or decrease of an original jury verdict and additionally employs an overarching theme of “reasonableness,” whereby the credible proof of damages a plaintiff establishes during trial defines the parameters of

159. *Id.* at 740.

160. *Id.* (citations omitted).

161. *See id.*

162. *Id.* at 740–41.

163. *Id.* at 741.

164. *See generally id.* at 742.

acceptable award adjustments. The Tennessee Code Annotated provides that neither additur nor remittitur violate the right to trial by jury protected by the Tennessee Constitution Article I, Section 6,¹⁶⁵ because the aggrieved party may reject a suggested additur or remittitur and demand another jury.¹⁶⁶ Thus, consent to additur by the defendant or consent to remittitur by the plaintiff in a civil action essentially waives the right to a jury trial.¹⁶⁷ This function allows for a trial judge to remedy the issue of an excessive or insufficient verdict without forcing both parties to retry their cases, which would result in more money spent and more of the court's time being used. Additur and remittitur, however, are not *per se* constitutional in Tennessee—that is, the use of these tools is subject to a reasonableness standard that may be raised in challenging the validity of a remedied error in damages awarded.¹⁶⁸

Tennessee case law gives courts data points that have been fairly emblematic of the general trend, inside of which it is permissible

165. TENN. CONST. art I, § 6 (“That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.”).

166. TENN. CODE ANN. § 20-10-101 (2016).

167. *See id.* § 20-10-101(a)(2) (“If the additur is accepted by the defense, it shall then be ordered by the trial judge and become the verdict, and if not accepted, the trial judge shall grant the plaintiff’s motion for a new trial because of the inadequacy of the verdict upon proper motion being made by the plaintiff.”) (emphasis added); TENN. CODE ANN. § 20-10-102 (2016) (“In all jury trials had in civil actions . . . in case the party in whose favor the verdict has been rendered refuses to make the remittitur, a new trial will be awarded” (emphasis added)). While consent by plaintiffs and defendants to remittitur and additur, respectively, does happen, not much data exist on the realities of how often this consent actually occurs. It is hard to ignore the reality, however, that there is more pressure on a plaintiff to consent to a lower damages award due to outside forces: lack of funding, the desire to recover for harm already caused, and the stress of another trial.

168. *See Smith v. Shelton*, 569 S.W.2d 421, 427–28 (Tenn. 1978) (noting that if the jury’s verdict is within the range of *reasonableness*, the appellate court must restore the verdict but if it is not, the appellate court must affirm the award modification). *But see Foster v. Amcon Int’l, Inc.*, 621 S.W.2d 142, 147 (Tenn. 1981) (modifying the original reasonableness standard to allow trial judges to suggest award adjustments even when the original jury award is within the range of reasonableness, if the trial judge was of the opinion that the jury verdict was inadequate). The *Smith* court also defined the “range of reasonableness” as based upon the credible proof of damages. *Smith*, 569 S.W.2d at 427.

for a trial judge to employ additur and remittitur without infringing upon a party's right to trial by jury.¹⁶⁹ This range gives the parties fair certainty that an additur or remittitur from 1% to 40% is almost definitely acceptable, while an additur or remittitur from 54% to upwards of 100% is almost definitely unacceptable.¹⁷⁰ The Tennessee courts fail, however, to give any guidance regarding jury award adjustments of between 41% and 53%, leaving a gray area, albeit smaller than other standards. This "comparative reasonableness approach" also continues to provide for necessary retrials in the event that there is any misconduct that may compromise the fairness of the trial, so that the "victim" of misconduct is not stuck with an unfavorable decision as the result of such wrongdoing.¹⁷¹

Tennessee's approach, though still subject to uncertainties, is fairly reliable for the courts to apply. It serves as a model for the proposition that additur and remittitur should and *can* be successfully

169. Starting in 1978, a line of cases from the Tennessee Courts delineated the constitutionally permissible range of additur and remittitur that they would uphold. See *Foster*, 621 S.W.2d at 143, 148 (holding that, while the judge was justified in suggesting an additur, an award of thirty times that of the verdict bore no relation to the jury's verdict and was unjustified, improper, and erroneous); *Jenkins v. Commodore Corp. S.*, 584 S.W.2d 773, 776 (Tenn. 1979) (upholding a remittitur of 40% because the original jury verdict was "shockingly excessive," but not so much as to render the verdict invalid); *Smith*, 569 S.W.2d at 427–28 (reversing an additur of 54% and holding that if the jury's original verdict is "within the range of reasonableness . . . the appellate court must restore the verdict."); *Steele v. Fort Sanders Anesthesia Grp., P.C.*, 897 S.W.2d 270, 283–84 (Tenn. Ct. App. 1994) (holding that a remittitur of roughly 40% is within the "range of reasonableness" and affirming the trial judge's ruling); *Guess v. Maury*, 726 S.W.2d 906, 913 (Tenn. Ct. App. 1986) (finding that a remittitur of 75% destroyed the essence of the verdict and reversing the trial judge's additur).

170. See *supra* note 169 and accompanying text. For an example of the federal courts using the same type of "percentage standard," see *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). There, the Supreme Court announced a three-part test to determine whether punitive damages are "grossly excessive," measuring (1) the reprehensibility of the act, (2) the difference between the actual harm and the punitive damages, and (3) the comparable civil penalties in the jurisdiction. *Id.*

171. See *Guess*, 726 S.W.2d at 916 ("[W]e know of no method of evaluating a verdict in relation to the degree and extent to which a jury's mind has been prejudiced and confused by irrelevant evidence, comments and remarks of counsel that ultimately affect the fairness of the trial, so as to be able to cure these effects mathematically by an additur or remittitur.").

treated in the same manner. There are other flaws with the application of Tennessee's approach, however, that may lead to the "range of reasonableness" not being primed for use in the federal courts. For example, the range of reasonableness and percentage scale requires a heavily fact-intensive inquiry for the judge, leading to judicial inefficiency. Perhaps the most troubling is that Tennessee's range is fairly arbitrary; although successful for use in the cases cited in Tennessee,¹⁷² there are other times in which this number range may still fail to provide the parties with the adequate compensation or remedial payout.¹⁷³

172. See *supra* note 169 and accompanying text.

173. For example, in *Powell v. Allstate Insurance Co.*, an all-white jury awarded a black couple roughly \$29,000 in damages when the plaintiffs requested \$200,000 for injuries sustained in a car crash. 652 So. 2d 354, 355 (Fla. 1995). The court became aware that various jurors had made racially biased remarks and jokes during the trial, and the plaintiff believed that the low verdict was the result of racial bias. *Id.* The Florida Supreme Court eventually granted a new trial, remanding it back to the trial court. *Id.* at 356. Had there not been affirmative evidence of the jury's racial bias, however, a finding which demands a new trial, the plaintiff-couple would have had no other course of remedy. While Tennessee's standard is a step in the right direction toward the regulated use of additur—its arbitrary limitations would have had little remedial effect on the couple in this case. A 40% increase in the jury award damages would have allowed the couple to gain an additional \$11,000, bringing the total award up to \$40,000—still significantly lower than the requested amount; one-fifth of the award, to be precise—assuming that the \$200,000 in damages was adequately proved, and the \$29,000 award was against the weight of the evidence. See *Steele*, 897 S.W.2d at 284 (ruling that a 40% jury award adjustment is not an infringement on a party's right to a jury trial). Under Tennessee's standard, while the 40% increase would not destroy the jury's verdict, it would still allow for a jury to get away with its misconduct and leave the harmed party without recourse. This reasoning can also work with remittitur, in the instance of a jury primarily biased against big companies, whereby a jury gives an unconscionable award to a plaintiff and a 40% remittitur would still allow the plaintiff an excessive award. Although the Tennessee standard is built with the caveat that a new trial must be ordered in the event of jury misconduct, it is often difficult to prove. In a perfect world, it would be easy for a judge to spot the misconduct and be able to order a new trial. The difficulties in that process, however, could leave a plaintiff or defendant lacking the relief so sought.

VII. A PROPOSAL FOR IMPLEMENTING ADDITUR IN FEDERAL COURTS¹⁷⁴

To establish a more effective and more stable implementation of additur in the federal courts, a judge should have guidance to make her decision more formal, more reliably reviewed, and more straightforward. The issue of additur—and particularly how much of an additur is reasonable—is a very fact-intensive and subjective analysis. Below is a proposal that federal judges could employ to make use of additur feel like less of a “shot in the dark” when trying to adjust a jury award to meet the adequately proven damages.

A. *The trial judge should accept an attorney’s request¹⁷⁵ for special verdict form usage for ease of administration should an award sufficiency dispute arise.*

While the majority of civil cases tried in federal courts are resolved through a general verdict,¹⁷⁶ the ultimate decision of whether to use a general verdict form or a special verdict form rests within the trial judge’s discretion.¹⁷⁷ Special verdicts generally have three major advantages over general verdicts. First, special verdicts may “increase confidence in the fairness and effectiveness of the jury system by

174. While this proposal specifically focuses on its application to additur, it could realistically apply to remittitur in the federal courts as well, making the functions not only mirror images in concept, but in application.

175. Note that the attorney should request the special verdict form. The judge has no obligation to allow special verdict forms and, without a request, may not do so. *See* FED. R. CIV. P. 49(a)(1).

176. Donald Olander, Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 *FORDHAM L. REV.* 1089, 1089 (1985) (“Juries are normally requested to return a general verdict—a finding for or against the plaintiff that does not state the grounds for the jury’s decision.” (citations omitted)).

177. *See* FED. R. CIV. P. 49(a)(1) (“The court *may* require a jury to return only a special verdict in the form of a special written finding on each issue of fact.” (emphasis added)); *see also* *Mateyko v. Felix*, 924 F.2d 824, 827 (9th Cir. 1990) (“[T]he trial court has complete discretion whether a general or special verdict is to be returned, and this discretion extends to determining the form of the special verdict, provided the questions asked are adequate to obtain a jury determination of the factual issues essential to judgment.” (quoting *R.H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 508 (9th Cir. 1964))).

giving litigants and the public a better understanding of how the jury analyzed the case.”¹⁷⁸ Second, by placing more responsibility on the jury for applying the law, special verdicts may diminish the possibility of jury confusion or legal error.¹⁷⁹ Finally, special verdicts may help limit or avoid retrials and improve judicial efficiency by solving some errors identified on appeal.¹⁸⁰

B. If the trial judge’s additur implies a finding of fact that the jury did not make, the adjustment is improper.

This guideline draws a clear line between the jury’s role in making findings of fact and the judge’s role in making conclusions of law.¹⁸¹ If a judge’s suggested additur includes damages that could not have been within the realm of fact-finding that the jury completed, then the judge will have usurped the jury’s role and violated the parties’ Seventh Amendment right to a civil jury trial.

Take, for example, a tort action where a plaintiff requests \$15,000 in medical costs, \$10,000 in lost wages, and \$50,000 in physical and mental pain and suffering. If the jury awards \$25,000 in damages, it *may* be presumed that the jury factored the “economic” damages—i.e. medical costs and lost wages—while disregarding the “noneconomic” damages.¹⁸² If, after a motion for additur by the

178. See Olander, *supra* note 176, at 1092.

179. See *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990) (“The special verdict [form] also avoids . . . possible error . . . [in] the consideration of questions of law and the application of law to the facts. Since the jury does nothing more than report the facts under the special verdict system, the jury is completely removed from considering and applying the law.”).

180. See Olander, *supra* note 176, at 1091 (“If error affects a general verdict, the entire verdict collapses and all the issues in the case must be relitigated. If a special verdict is used, however, error may only affect a few of the jury’s findings, thus limiting a second trial to the issues covered by the tainted findings.”).

181. See *generally* *Sparf v. United States*, 156 U.S. 51, 95 (1985) (“All that I have said or have to say upon the subject of juries is agreeable to this established maxim, that ‘juries must answer to questions of fact and judges to questions of law.’ This is the fundamental maxim acknowledged by the Constitution.” (quoting EDWARD WYNNE, *EUNOMUS: OR, DIALOGUES CONCERNING THE LAW AND CONSTITUTION OF ENGLAND* 523–24 (W. M. Bythewood ed., 5th ed. 1822)).

182. Though that presumption is not always correct, a court would likely believe it to be the case when the economic damages are adequately proven, while the

plaintiff, the judge suggests an additur of \$15,000—making the total award \$40,000—an inference can be drawn that the judge made a finding of fact that the jury did not make, namely a finding that the plaintiff suffered damages for physical *and* mental pain and suffering. Because the scope of the additur is a number outside of the \$25,000 in reasonably proved economic damages, the judge would have overstepped the bounds of his duty of making findings of law to find for additional facts that the jury may not have found in their deliberation. This would make the additur an unconstitutional exercise of the judge's power.

C. If the trial judge's suggested additur relies on a finding of fact that the jury did make, then the adjustment is proper if it can reasonably be thought to include "adequately proven damages."

In contrast to the previous example, if the trial judge's suggested additur relies on a finding of fact made by the jury—whether it be by assumption or through the information contained on a special verdict form—then the judge will have acted within his powers to determine the sufficiency of the evidence regarding whether a reasonable jury could have found the verdict to be so low, in light of the evidence presented.¹⁸³ Although the jury will have had a legally sufficient basis to find for the plaintiff, the judge now has the latitude to weigh the legal sufficiency of the evidence and determine whether the jury arbitrarily or unreasonably lowered the verdict in regard to the amount awarded, despite finding liability and damages in certain categories.

Adapting the previous example to these new facts: a plaintiff seeks \$15,000 in medical costs, \$10,000 in lost wages, and \$50,000 in physical and mental pain and suffering in a tort action with a jury trial. If the jury awards \$28,000 in damages, it *may* be presumed that the jury factored the "economic" damages—i.e., medical costs and lost

economic damages are not. The issue of uncertainty could be resolved by using the special verdict forms outlined by Federal Rule of Civil Procedure 49. *See supra* Section VII.A.

183. This standard is partially borrowed from the Federal Rule regarding directed verdicts. *See* FED. R. CIV. P. 50(a)(1) ("[T]he court finds that a reasonable jury would not have legally sufficient evidentiary basis to find . . .").

wages—as well as the “noneconomic” damages—i.e., physical and mental pain and suffering. Here, the jury will have already found that the plaintiff was entitled to recovery for physical and mental pain and suffering—hence, the award for \$3,000 more than the \$25,000 requested in economic damages. If, after a motion for additur by the plaintiff, the judge suggests an additur of \$15,000—making the total award \$43,000—the judge is, in effect, weighing the sufficiency of the jury’s verdict from the perspective of whether a reasonable jury could have awarded such a small amount of damages regarding physical and mental pain and suffering, in light of the evidence presented.¹⁸⁴ This standard is a high bar for the judge to meet to allow additur, but it allows additur for the situations in which the jury has acted unfairly, prejudicially, or wrongly, even when it cannot be proven. The requirement that a judge view the evidence from a reasonable jury standpoint ideally prevents the judge from inserting his or her own viewpoints into the determination of the legal sufficiency of the evidence—but still allows the judge to evaluate whether the award is grossly inadequate, in light of the evidence presented.

D. The non-movant (the defendant) may always refuse to accept the additur suggested by a judge and demand a retrial.

Another limitation on the use of additur that would prevent constitutional arguments about its application in light of the Seventh Amendment would be the opportunity for the party to refuse consent to the additur itself, prompting the judge to grant a motion for a new trial.¹⁸⁵ This would alleviate a party’s concern about his or her right to trial by jury because, without consent of the parties, the judge could

184. Non-economic damages are inherently and unresolvedly speculative, and that judges may stray from making those determinations. In instances that may be clearer regarding economic damages, however, or instances of suspected juror misconduct that does not rise to the level of requiring a new trial regarding non-economic damages, judges have more latitude to determine the legal sufficiency of the evidence.

185. A defendant’s refusal to consent to additur should have the same legal effect: the grant of a new trial, assuming the judge finds sufficient evidence for doing so. *See* 11 FED. PRAC. & PROC. CIV. § 2815 (3d ed. 2016) (allowing the court to condition to deny a motion for a new trial upon the plaintiff’s consent to a lower verdict).

not make this unilateral order. Upon consent to an additur, the parties would be agreeing to waive the right to a new trial and to accept the jury award, as amended by the trial judge. This would also alleviate the probabilities of appeals on the merits of an additur, because a party would have been able to request a new trial if it did not agree—or at least, acquiesce—with the judge’s determination. State courts have relied on this approach to additur as a constitutional use of a state court’s power,¹⁸⁶ and it could also backstop Seventh Amendment concerns in the federal courts.

VIII. CONCLUSION

Despite the “bad rap” that additur has acquired in the federal courts since the Supreme Court has released its decision in *Dimick v. Schiedt*, there are many reasons why it would be beneficial for the federal courts to reconsider employing its use today. It is of no import that English common-law courts refused to employ additur. Despite arguments to the contrary, additur is a modification to jury verdicts, not an infringement on that verdict—especially where there are limits in place to prevent trial judges from finding facts that were outside of the scope of a jury’s verdict in the pursuit of a just result. The courts have also employed other procedures, like directed verdict and judgment notwithstanding of verdict, that did not occur in English common law and were much more drastic than a simple adjustment of damages. Further, additur does not destroy a party’s right to trial by jury because courts can implement it in such a way that trial judges cannot impose on the jury’s duty to make factual findings. Additionally, additur, though imposing a higher damage award on a defendant than the jury awarded in its deliberations, does not carry

186. See, e.g., CAL. CIV. PROC. CODE § 662.5(a) (2012) (“[T]he trial court may in its discretion: (1) If the ground for granting a new trial is inadequate damages, issue a conditional order granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable.”); TENN. CODE ANN. § 20-10-101 (2016) (“If the additur is accepted by the defense, it shall then be ordered by the trial judge and become the verdict, and if not accepted, the trial judge shall grant the plaintiff’s motion for a new trial because of the inadequacy of the verdict upon proper motion being made by the plaintiff.” (emphasis added)).

with it the same burden that would justify its ban on the grounds of an impingement on the defendant's civil liberties. Finally, the benefits of time- and money-saving for both the federal courts and for the parties to the litigation will help save resources that can be best used elsewhere. The federal court system should adopt an approach to additur that only allows the procedure if the trial judge's suggested increase relies on a finding of fact that the jury necessarily made and can reasonably be thought to include "adequately proven damages."

If Kimberly Connelly had been able to request relief from the errant jury award, she would have been able to recover her medical expenses and begin to move on with her life without spending more of her own money, reliving the horrible pain throughout a subsequent trial, or wasting the judicial system's time relitigating a decision that the original jury had had already substantially made. The use of additur could have helped Connelly move forward and begin to rebuild her life sooner by sooner enabling her enjoy the purpose of damages in tort—by putting her life in the same position she enjoyed before the fateful accident that changed her life.