

12-2000

# Judgement as a Matter of Law on Punitive Damages

Colleen P. Murphy

*Roger Williams University School of Law*

Follow this and additional works at: [http://docs.rwu.edu/law\\_fac\\_fs](http://docs.rwu.edu/law_fac_fs)

 Part of the [Civil Procedure Commons](#), [Common Law Commons](#), [Constitutional Law Commons](#), [Legal Remedies Commons](#), and the [Litigation Commons](#)

---

## Recommended Citation

75 Tul. L. Rev. 459, 480 (2000)

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact [mwu@rwu.edu](mailto:mwu@rwu.edu).

# HEINONLINE

Citation: 75 Tul. L. Rev. 459 2000-2001

Provided by:

Roger Williams University School of Law Library



Content downloaded/printed from [HeinOnline](#)

Thu Apr 6 10:44:45 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# ESSAY

## Judgment as a Matter of Law on Punitive Damages

Colleen P. Murphy\*

*Under traditional doctrine, a court that considers a jury's award of damages to be excessive generally has two choices: order a new trial or offer a remittitur to the plaintiff, who may decline it in favor of a new trial. Federal courts of appeals are divided as to whether this traditional doctrine applies to excessive punitive awards, with some courts reducing such awards outright and entering judgment as a matter of law on the reduced amounts. After identifying the limited circumstances in which judgment as a matter of law is appropriate on awards of damages, the author argues that punitive damages fall within the general rule that a court may not reduce a jury award outright.*

I. INTRODUCTION.....	459
II. NEW TRIAL, REMITTITUR, AND JUDGMENT AS A MATTER OF LAW ON DAMAGES.....	462
III. REDUCING EXCESSIVE PUNITIVE DAMAGES.....	468
IV. CONCLUSION.....	478

### I. INTRODUCTION

A federal court that considers a jury's award of damages to be excessive has limited options under the Seventh Amendment.<sup>1</sup> It may order a new trial, either of the whole case or of damages alone.<sup>2</sup> Alternatively, it may offer the plaintiff a remittitur, whereby the court compels the plaintiff to choose between accepting a reduction of the excessive award or proceeding with a new trial.<sup>3</sup> The Supreme Court has indicated that the Seventh Amendment generally does not permit a court to reduce outright a jury's award.<sup>4</sup> Nonetheless, exceptions to

---

\* Professor of Law, Roger Williams University School of Law. J.D. 1986, Yale Law School; B.A. 1983, University of Virginia. I am grateful to Michael Yelnosky for his comments on this Essay.

1. U.S. CONST. amend. VII ("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 re-examined in any Court of the United States, than according to the rules of the common law.").

2. See FED. R. CIV. P. 59(a).

3. See 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 59.13[2][g][iii][A], at 59-81 (3d ed. 1999).

4. See *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (per curiam); *Kennon v. Gilmer*, 131 U.S. 22, 27-29 (1889).

this general rule exist. Courts have reduced damages when a legal rule invalidated an identifiable amount of the jury's award.<sup>5</sup> Courts also have altered jury awards as a matter of law when the facts could support no other result—i.e., when the plaintiff sought an award that was fixed at a sum certain or that could be made certain by computation.<sup>6</sup>

With respect to punitive damages, federal appellate courts have split as to the proper procedure for reducing an excessive jury award. Several courts follow the traditional rule that the plaintiff should be granted the choice between proceeding with a new trial or accepting the amount that the reviewing court has determined to be the lawful limit.<sup>7</sup> Other courts, upon determining the limit of an appropriate punitive award, have directed entry of judgment as a matter of law on that amount.<sup>8</sup> These latter courts generally have given little or no

---

5. See, e.g., *N.Y., Lake Erie & W. R.R. v. Estill*, 147 U.S. 591, 619-22 (1893); see *infra* notes 33-36 and accompanying text.

6. See *infra* notes 37-40 and accompanying text.

7. See *Thorne v. Welk Inv., Inc.*, 197 F.3d 1205, 1212 (8th Cir. 1999) (stating that the district court erred in ordering remittitur on compensatory and punitive damages without the plaintiff's consent); *Riley v. Kurtz*, No. 98-1077, 1999 U.S. App. LEXIS 24341, at \*25 (6th Cir. Sept. 28, 1999) (involving an award deemed excessive under nonconstitutional standards); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 598 (5th Cir. 1998) (examining an award deemed excessive under nonconstitutional standards), *vacated sub nom. Williams v. Wal-Mart Stores, Inc.*, 169 F.3d 215 (5th Cir.), and *reinstated by* 182 F.3d 333 (5th Cir. 1999); *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-49 (9th Cir. 1998) (involving an award deemed excessive under nonconstitutional standards); *Cont'l Trend Res., Inc. v. Oxy USA Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (stating, after concluding that the punitive damages award was unconstitutionally excessive, that "[t]o avoid any conflict with the Seventh Amendment, the preferable [course] is to afford the party . . . the option of either accepting the remittitur of the punitive damages award or a new trial on that issue" (quoting *Morgan v. Woessner*, 997 F.2d 1244, 1258-59 (9th Cir. 1993))); *Lee v. Edwards*, 101 F.3d 805, 812-13 (2d Cir. 1996) (involving an award that the court seemingly reviewed under both constitutional and nonconstitutional standards); *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 593 (4th Cir. 1996) (involving an award deemed excessive under nonconstitutional standards); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-92 (7th Cir. 1984) (reversing the trial court's reduction of damages where no option for a new trial was offered to the plaintiff); see also *Mahoney v. Can. Dry Bottling Co.*, No. 94-CV-2924(FB), 1998 WL 231082, at \*6-\*9 (E.D.N.Y. May 7, 1998) (recognizing the plaintiff's right to choose between a remittitur amount and the defendant's motion for a new trial); *Kim v. Dial Serv. Int'l, Inc.*, No. 96 CIV.3327(DLC), 1997 WL 458783, at \*5 (S.D.N.Y. Aug. 11, 1997), *aff'd*, 159 F.3d 1347 (2d Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999); *Leab v. Cincinnati Ins. Co.*, No. CIV.A.95-5690, 1997 U.S. Dist. LEXIS 8868, at \*53 (E.D. Pa. June 23, 1997).

8. See, e.g., *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 463, 470 (3d Cir. 1999) (remanding so that the district court could "enter a judgment for punitive damages in the amount of \$1 million," down from a \$100.6 million jury award already reduced by the district court via a remittitur to \$50 million); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1330-31 (11th Cir. 1999) (finding that a court may enter judgment for a constitutionally reduced award without offering the plaintiff a new trial); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576-78 (8th Cir. 1997) (directing the district court to reduce the punitive damages award to an amount determined by an appellate court as reasonable under

attention to whether such an outright reduction is consistent with the Seventh Amendment. The Eleventh Circuit is the only court to provide a detailed rationale for its conclusion that it could reduce outright a punitive damages award, and its ruling was limited to awards that are excessive under federal due process.<sup>9</sup>

This Essay suggests that judgment as a matter of law on damages should be limited to the same sets of circumstances in which judgment as a matter of law is permissible on liability—that is, when a legal rule dictates a certain outcome or when there is only one conclusion on the facts that a reasonable jury could reach. Entering judgment as a matter of law on punitive damages does not fall within either category.<sup>10</sup> No legal rule exists to inform the court of the precise limit on punitive damages, and reasonable juries could reach different conclusions on the proper amount of relief. Admittedly, there is some intuitive appeal to the argument that plaintiffs should not get a second chance at proving damages when a reviewing court has determined the lawful limit of a punitive award. The thrust of long-established remittitur doctrine, however, is that a plaintiff should have the option to go before a new jury, in the hope that the plaintiff's proof at the new trial will justify an award larger than the maximum previously set by the reviewing court. The option of a new trial—although inefficient and often rejected by plaintiffs in favor of remittitur—is integral to preserving the constitutional ideal that juries, rather than judges, are the principal decision makers on uncertain damages.

---

state law and rejecting the argument that the plaintiff should be offered the option of a new trial on punitive damages); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) (directing the district court to reduce the punitive damages award to an amount determined to be reasonable in accordance with prior case law).

9. See *Johansen*, 170 F.3d at 1331.

10. I have argued elsewhere that the Seventh Amendment should not be interpreted to require that juries assess punitive damages as an initial matter. See Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 798-804 (1993) [hereinafter *Murphy, Constitutional Authority of Juries*]; Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 171-86 (1999) [hereinafter *Murphy, Judicial Assessment*]. Others have also suggested that the Seventh Amendment should not be a bar to judicial assessment of punitive damages. See, e.g., Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998) (offering arguments based on policy and the Constitution for why judges should determine punitive damages). In this Essay, however, I take as a starting point the prevailing assumption of federal courts that the Seventh Amendment preserves a role for juries in the assessment of punitive damages. See *infra* note 61. From that starting point, I argue that the Amendment does not permit outright reduction of such damages.

## II. NEW TRIAL, REMITTITUR, AND JUDGMENT AS A MATTER OF LAW ON DAMAGES

In eighteenth-century England, a judge could not replace a jury award of uncertain damages with the judge's own assessment of the proper amount of monetary relief.<sup>11</sup> Rather, the cure for an excessive or inadequate jury award was a new trial.<sup>12</sup> The Seventh Amendment, which guarantees in part that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law,"<sup>13</sup> constitutionalizes this common law rule. The Supreme Court, however, has upheld some modification of the common law practice. Since the nineteenth century, the Court has permitted federal judges to offer remittiturs to plaintiffs.<sup>14</sup> While a court is obliged under Federal Rule of Civil Procedure 59 to order a new trial when it deems the damages award to be excessive, it is under no obligation to offer a remittitur.<sup>15</sup>

---

11. See Murphy, *Judicial Assessment*, *supra* note 10, at 188-89 (discussing the historical treatment of excessive jury awards).

12. See *id.*

13. U.S. CONST. amend. VII.

14. See, *Gila Valley, Globe & N. Ry. Co. v. Hall*, 232 U.S. 94, 103-05 (1914) (upholding the constitutionality of remittitur); *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) (allowing a court to grant a motion for a new trial, deny the motion, or condition a denial upon the plaintiff's remitting part of the award); *Ark. Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 73-74 (1889) (stating that a remittitur does not "impair the constitutional right of trial by jury"); *Hopkins v. Orr*, 124 U.S. 510, 515 (1888) (allowing the verdict to stand if the plaintiff remitted the excess interest award); *N. Pac. R.R. Co. v. Herbert*, 116 U.S. 642, 646-47 (1886) (holding that it was within the court's discretion to offer the plaintiff a remittitur). *But see Dimick v. Schiedt*, 293 U.S. 474, 484-85 (1935) (indicating reservations about the constitutionality of remittitur, but concluding that "the doctrine would not be reconsidered or disturbed at this late day"). The most famous early instance of remittitur appeared in an 1822 circuit court decision by Justice Story. See *Blunt v. Little*, 3 F. Cas. 760, 762 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 1578). Responding to the defendant's argument that the jury's damage award was excessive and necessitated a new trial, Justice Story ordered that the action should be submitted to another jury unless the plaintiff was willing to remit a portion of the damages. *Id.* (Story, Circuit Justice). Under current Supreme Court doctrine, if a court considers a jury's award to be inadequate, it may order a new trial, but it may not increase the jury's award. See *Dimick*, 293 U.S. at 485-87 (finding that additur—increasing a jury award as a condition for denying the plaintiff's motion for a new trial—violates the Seventh Amendment).

15. See 12 MOORE, *supra* note 3, § 59.13[2][g][i], at 59-75 ("[A] motion for a new trial on the issue of damages, governed by Rule 59(a), will be granted when the amount of the verdict is so unreasonable as to be entirely disproportionate to the plaintiff's injury."). If the judge considers the jury award to be the product of passion or prejudice, the judge should not offer a remittitur. Rather, the court should order a new trial because the passion or prejudice could have affected the jury's findings on liability as well as on damages. 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2815, at 165 (2d ed. 1995).

Soon after the Supreme Court first upheld the practice of remittitur, it rejected the argument that a court could reduce outright a jury award. In *Kenyon v. Gilmer*, involving compensatory damages for personal injury, the Court ruled that the Seventh Amendment prohibits a court from “enter[ing] an absolute judgment for any other sum than that assessed by the jury.”<sup>16</sup> Instead, if a court wants to reduce a jury award, it must give the plaintiff the option of rejecting the reduced amount in favor of a new trial. In a recent per curiam opinion involving compensatory damages for unlawful discrimination, *Hetzel v. Prince William County*, the Supreme Court reaffirmed its long-held view that the Seventh Amendment does not permit the outright reduction of an excessive jury award.<sup>17</sup>

One justification for the Court’s doctrine is purely historical. Because the only cure for an excessive jury award prior to the ratification of the Seventh Amendment was a new trial before a new jury, the Amendment preserves a plaintiff’s right to reject a remittitur in favor of a new trial.<sup>18</sup> Another justification for the doctrine is that it preserves the ideal of the jury as the principal decision maker on the amount of damages.<sup>19</sup> If judges were able to reduce jury awards outright, they would become the principal assessors of damages, relegating the jury to the role of initial assessor only.

As a practical matter, a plaintiff is under significant pressure to take the reduced amount set by the judge because of the time and cost of a new trial, as well as the risk that a different jury might reach a result less favorable to the plaintiff. Moreover, even if the second jury renders a favorable verdict for the plaintiff, the court may deem that verdict to be excessive also. This is particularly likely when the judge at the second trial is the same one who offered a remittitur after the first trial.

---

16. 131 U.S. at 29. The Supreme Court held that a court’s reduction of the amount of a jury’s award, “without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest,” violated the Reexamination Clause of the Seventh Amendment. *Id.* at 27-28.

17. 523 U.S. 208, 210-12 (1998) (per curiam). *Hetzel* relied primarily on *Kenyon*. *Id.* at 211. It also cited *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996), in which the majority commented that a trial judge’s discretion encompasses “overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner’s refusal to agree to a reduction (remittitur).” 523 U.S. at 211. The Supreme Court in *Hetzel* invalidated the appellate court’s outright reduction of the lower court award; the prohibition on outright reduction thus applies to both appellate and trial courts. *See id.*

18. *See* Murphy, *Constitutional Authority of Juries*, *supra* note 10, at 767-68.

19. *See, e.g., Hetzel*, 523 U.S. at 211 (per curiam) (prohibiting a court from reexamining facts already determined by a jury, under the Seventh Amendment).

The plaintiff may insist on the constitutional right to a jury determination of damages, but only at the peril of having to endure successive new trials. The facts of *Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, a 1996 case before the Fourth Circuit, are illustrative.<sup>20</sup> The first jury rendered judgment in favor of the plaintiff, including a three million dollar punitive damages award.<sup>21</sup> The trial court indicated that it would order a new trial on punitive damages unless the plaintiff agreed to a reduced punitive damages award of one million dollars.<sup>22</sup> The plaintiff rejected the remittitur, and the court ordered a new trial.<sup>23</sup> At the second trial, the jury awarded four million dollars in punitive damages.<sup>24</sup> The court again stated that it would order a new trial unless the plaintiff accepted one million dollars and it warned: "If they want to keep going for more, they can do that. And if they don't produce any . . . different testimony, I guess this court will be required to continue to rule as it sees the facts and the law."<sup>25</sup> A rational plaintiff would thus reject a remittitur in favor of a new trial for one of two primary reasons: to gain a favorable settlement with the defendant before the new trial<sup>26</sup> or to attempt the daunting task of presenting proof at the new trial that would justify an award greater than the reduced amount the reviewing court offered after the first trial.

This raises why plaintiffs should have a second chance at proving their case on damages, with all the inefficiency that entails.<sup>27</sup> A

---

20. 99 F.3d 587 (4th Cir. 1996).

21. *Id.* at 591.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 593.

26. The Fourth Circuit, on remand from the Supreme Court's decision in *Hetzl*, noted the strategic use to which a plaintiff might put the option of a new trial:

[I]t seemed to us that permitting the plaintiff to retain her finding of liability against the defendants and retry only the issue of damages would create an affirmative incentive for the plaintiff unilaterally to force the defendant to proceed through trial after trial, *ad infinitum*, until the plaintiff received the damages award she wished (through forced settlement if not through jury verdict).

*In re Bd. of County Supervisors*, 143 F.3d 835, 841 (4th Cir. 1998).

27. Because of the costs and risks entailed in refusing a remittitur and opting for a new trial, some plaintiffs might wish that the court had the power to enter judgment as a matter of law on a reduced amount. Such a judgment would be "final," and thus immediately appealable. By contrast, if the plaintiff refuses a remittitur, any appeal on the ground that the court erred in setting aside the original verdict as excessive must await the outcome of the second trial. See 11 WRIGHT ET AL., *supra* note 15, § 2815, at 169. If a plaintiff accepts a reduced amount in lieu of a new trial, it generally may not appeal the court's determination that the original verdict was excessive. See *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977).



comparison to court review of jury determinations of liability is helpful on this question. A court may enter judgment as a matter of law on liability only when a legal rule dictates the outcome or when the court finds that there is but one conclusion a reasonable jury could reach on the facts.<sup>28</sup> The practice of setting aside an erroneous jury verdict and entering judgment on the court's view of liability can be justified by the notion that a jury does not have the authority to violate governing legal rules or standards.<sup>29</sup> The question of liability is a yes or no proposition, and it makes sense that a court could reverse a jury decision that is clearly wrong. If the court believes that a jury verdict in favor of the plaintiff is merely against the weight of the evidence, however, the cure is a new trial, with the plaintiff having a second chance to prove liability.<sup>30</sup> In cases where reasonable people might differ over the outcome, this second chance retains the jury as the principal decision maker on liability.

Just as a plaintiff has a second chance at proving liability in cases where reasonable people might disagree, so too, should the plaintiff be offered a second chance at proving damages when reasonable people might disagree as to the amount.<sup>31</sup> In most cases of noneconomic or punitive damages, reasonable people will disagree about the proper amount because such damages are not susceptible of precise measurement. Thus, a reviewing court cannot be sure of the

---

28. For example, the court has the power to dismiss the complaint for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6),(h). The court's decision to dismiss would be based on a legal rule that denies recovery to the plaintiff, even if the facts alleged by the plaintiff are true. See FED. R. CIV. P. 59(c). The Supreme Court's recent decision in *Weisgram v. Marley Co.*, 120 S. Ct. 1011, 1013 (2000), illustrates the point that judgment as a matter of law is appropriate when no reasonable jury could find for the plaintiff on the facts presented. In *Weisgram*, the federal appellate court ruled that expert testimony offered by the plaintiffs at trial was improperly admitted by the trial judge. *Id.* The plaintiffs argued that they should be afforded a new trial because at the first trial, they had relied upon the admissibility of the expert testimony. *Id.* at 1013-14. In a unanimous opinion, the Supreme Court found that the appellate court could enter judgment as a matter of law against the plaintiffs based on the lower court's finding that the remainder of the plaintiffs' evidence was insufficient to prove liability. *Id.* at 1014.

29. See Murphy, *Constitutional Authority of Juries*, *supra* note 10, at 765-66 (providing a constitutional rationale for the legitimacy of a judgment that is contrary to a jury verdict of liability).

30. See FED. R. CIV. P. 59.

31. With excessive damages, a plaintiff's option to proceed to a new trial is not as inefficient as it seems, because there are strong incentives for the plaintiff to decline a new trial in favor of accepting a lesser amount set by the court. The plaintiff still "wins" upon accepting a reduced amount. See *supra* notes 19-26 and accompanying text. A plaintiff that has presented an insufficient case on liability, by contrast, would typically choose to proceed with a new trial if given the chance, because there is no win for the plaintiff without either a new trial or a settlement induced by the threat of a new trial.

appropriate amount of noneconomic or punitive damages in the way that it can be sure of whether liability has been proven.

Nonetheless, there are situations when a court could find that judgment as a matter of law on damages is required.<sup>32</sup> Federal courts have entered judgment as a matter of law on damages when a legal rule dictated an alteration of the jury's verdict. Specifically, courts have modified jury awards because a legal rule invalidated an identifiable amount of the award. Examples include the reduction pursuant to a statutory cap of a jury award of compensatory or punitive damages,<sup>33</sup> the striking of interest included in a jury award when interest was not permitted by law,<sup>34</sup> and the disallowance of damages against an insurance company beyond the limits of an insurance policy.<sup>35</sup> Some courts have also granted nominal damages when the jury had not made an award, because a statutory or constitutional rule compelled some kind of relief.<sup>36</sup> The foregoing are examples of the *ex*

---

32. I address cases in which the court altered the *amount* of the jury's award in ordering judgment as a matter of law, not cases where the court entered judgment as a matter of law because of disagreement with the jury's liability decision or because the evidence did not support the *kind* of monetary award at issue. *See, e.g.,* *Silor v. Romero*, 868 F.2d 1419, 1422-23 (5th Cir. 1989) (finding that the evidence was not sufficient to support an award of lost profits and upholding judgment as a matter of law on that portion of the jury award).

33. *See, e.g.,* *Ins. Co. of N. Am. v. Fed. Express Corp.*, No. CV 97-9155-CAS(BQRx), 1998 U.S. Dist. LEXIS 21313, at \*18-\*20 (C.D. Cal. June 19, 1998) (stating that judgment as a matter of law is appropriate when the Warsaw Convention limits the amount of damages to which the plaintiff is entitled), *aff'd*, 189 F.3d 914 (9th Cir. 1999). I have previously raised questions about the validity of statutory caps on compensatory damages and argued that categorizing a statutory cap as a legal rule does not itself answer whether such caps are constitutional. Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 *TEX. L. REV.* 345, 379-410 (1995). Federal courts generally have assumed that statutory caps are consistent with the Seventh Amendment. *See, e.g.,* *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989); *Davis v. Omitowaju*, 883 F.2d 1155, 1165 (3d Cir. 1989); *cf. Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 429 n.9 (1996) (noting that the Supreme Court has not addressed whether caps violate the Seventh Amendment); *id.* at 439-40 (Stevens, J., dissenting) ("A state-law ceiling on allowable damages . . . fixed by a dollar limit . . . is a substantive rule of decision that federal courts must apply in diversity cases . . .").

34. *See, e.g.,* *N.Y., Lake Erie & W. R.R. Co. v. Estill*, 147 U.S. 591 (1893) (upholding the compensatory damages award rendered by the jury, but denying the award of interest from the time the suit was brought).

35. *See, e.g.,* *Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386-88 (1872) (holding that the jury committed legal error in awarding damages beyond the amount due on an insurance policy plus interest, and that the court could enter judgment disallowing those damages rather than order a new trial, which "would lead to unnecessary delay and expense"); *Westchester Fire Ins. Co. v. Hanley*, 284 F.2d 409, 418 (6th Cir. 1960) (finding that rather than ordering a new trial, the court could reduce the jury's award of damages against the insurance company by twenty-five percent, where the jury had not given effect to the insurance policy provision that the company would be liable for only seventy-five percent of the insured's loss).

36. *See, e.g.,* *Gibeau v. Nellis*, 18 F.3d 107, 111 (2d Cir. 1994) (finding that the court's award of nominal damages did not violate the jury's province under the Seventh

*post* application of a legal rule to the jury's verdict; the legal rule in each instance did not supply a means to determine the proper amount of relief *before* the jury deliberated.

Courts also have entered judgment as a matter of law on the amount of damages, both before and after a jury assessment, when the facts could support no other result—specifically, when the plaintiff sought damages that were fixed at a sum certain or that could be made certain by computation. Examples include judgment as a matter of law on damages for a discrete item of economic loss<sup>37</sup> and on back pay owed to an employee.<sup>38</sup> Courts have both decreased and increased jury awards as a matter of law when the proper amount was a sum certain.<sup>39</sup> The Second Circuit, which affirmed a lower court's addition of the amount of a hospital bill to a jury's award, explained why judgment as a matter of law was appropriate and not in violation of the Seventh Amendment: "The district court did not divine a figure . . . . It simply adjusted the jury award to account for a discrete item that manifestly should have been part of the damage calculations and as to whose amount there was no dispute."<sup>40</sup>

Thus, alteration of a jury's award of damages "as a matter of law" has meant either that the court is compelled by a legal rule to adjust the award to a specific sum, or that the facts are so one-sided that a reasonable jury could come to but one conclusion on the proper amount. In the latter situation, the court's decision to alter the jury's award is functionally similar to a decision that the plaintiff has failed to prove liability—in both contexts, the court is sure that the jury has produced the wrong answer. When it is not possible for a court to be convinced of the one "right answer" on damages, then the only procedural avenues under the Seventh Amendment for correcting an

---

Amendment); *Taylor v. Green*, 868 F.2d 162, 165 (5th Cir. 1989); *see also* 12 MOORE, *supra* note 3, § 59.13[2][g], at 59-80 to 59-81 (recognizing authority from two circuits allowing for nominal damages to be added under appropriate statutory rules).

37. For example, the Second Circuit affirmed a lower court's addition of an undisputed amount of a hospital bill to a jury's award. *Liriano v. Hobart Corp.*, 170 F.3d 264, 272-73 (2d Cir. 1999).

38. *See, e.g.*, *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1252-53 (11th Cir. 1997) (correcting a jury's calculation of the back pay owed to the plaintiff).

39. *See* 12 MOORE, *supra* note 3, § 59.13[2][g][i][C], at 59-78 to 59-81 (discussing additur).

40. *Liriano*, 170 F.3d at 272-73. The Supreme Court has held that additur, unlike remittitur, violates the Seventh Amendment, *Dimick v. Schiedt*, 293 U.S. 474, 485-87 (1935), although the Court has recently hinted that it might rethink the question. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 n.16 (1996).

excessive jury award are a remittitur accepted by the plaintiff or a new trial.

### III. REDUCING EXCESSIVE PUNITIVE DAMAGES

In reviewing punitive damages awards for excessiveness, some federal courts have broken with the traditional doctrine that a court may not reduce a jury award of uncertain damages without the plaintiff's consent.<sup>41</sup> The Third, Eighth, and Eleventh Circuits recently have directed entry of judgment as a matter of law on reduced awards of punitive damages.<sup>42</sup> The Third and Eleventh Circuits took this action after the Supreme Court's reaffirmation of the traditional doctrine with respect to compensatory damages in *Hetzl*. Only the Eleventh Circuit, in *Johansen v. Combustion Engineering, Inc.*, gave attention to whether its action was consistent with the Seventh Amendment.<sup>43</sup> The court's conclusion that the Amendment did not prohibit judgment as a matter of law was rooted in the fact that the jury award was deemed excessive under federal constitutional standards, rather than under nonconstitutional standards.<sup>44</sup> In contrast, the Tenth Circuit, when faced with an unconstitutionally excessive punitive award, concluded that "[t]o avoid any conflict with the Seventh Amendment, the preferable [course] is to afford the party . . . the option of either accepting the remittitur of the punitive damages award or a new trial on that issue."<sup>45</sup>

To evaluate whether judgment as a matter of law is appropriate when a punitive damages award is deemed excessive, it is helpful to identify the different sources of law that might control the excessiveness inquiry. The common law provides limits on punitive damages awards, under standards such as whether the award "shocks the judicial conscience" or is unreasonable in light of the punitive and deterrent purposes of the award.<sup>46</sup> Deviating from common law standards, at least one federal appellate court has stated that a district court should make an "independent judgment" on the amount of punitive damages and depart from the jury's award "to the extent that it concludes that its own comparative advantages warrant such a

---

41. However, several courts follow the traditional rule that a court may reduce a jury award only with the consent of the plaintiff. *See supra* note 7 and accompanying text.

42. *See supra* note 8 and accompanying text.

43. 170 F.3d 1320, 1333-35 (11th Cir. 1999).

44. *Id.* at 1331.

45. *Cont'l Trend Res., Inc. v. Oxy USA Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (internal quotations omitted) (quoting *Morgan v. Woessner*, 997 F.2d 1244, 1258-59 (9th Cir. 1993)).

46. *See* 12 MOORE, *supra* note 3, § 59.13[2][g], at 59-75 to 59-87.

departure.”<sup>47</sup> Statutes may also provide standards on how to judge excessiveness.<sup>48</sup> Finally, federal due process doctrine constrains the amount of punitive damages awards.<sup>49</sup>

In a series of cases culminating in *BMW of North America, Inc. v. Gore*, the Supreme Court has indicated that a “grossly excessive” punitive damages award violates due process.<sup>50</sup> This is because due process requires that “a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”<sup>51</sup> In *BMW*, the Supreme Court articulated three “guideposts” for reviewing whether a jury’s punitive damages award violates due process: the degree of reprehensibility of the defendant’s conduct, the ratio between compensatory damages and punitive damages, and the difference between punitive damages and the “civil or criminal penalties that could be imposed for comparable misconduct.”<sup>52</sup>

In theory, nonconstitutional review under common law or statutory standards differs from constitutional review under due process.<sup>53</sup> A punitive damages award might be considered excessive under nonconstitutional standards but fall short of being so excessive

---

47. *Atlas Food Sys. & Servs., Inc. v. Crane Nat’l Vendors, Inc.*, 99 F.3d 587, 595 (4th Cir. 1996).

48. *See, e.g.*, ARK. CODE ANN. § 16-64-123 (Michie 1987) (“The verdict of any jury rendered in any action for the recovery of damages where the measure thereof is indeterminate or uncertain shall not be held to be excessive or be set aside as excessive, except for some erroneous instruction or, upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice.”); MONT. CODE ANN. § 27-1-221(7)(b)-(c) (1997) (listing several factors that a judge should consider in reviewing a jury award of punitive damages). Statutes also may cap the amount of punitive damages that may be awarded in certain types of cases, but such statutes set forth limits of liability rather than standards for how to judge excessiveness in individual cases.

49. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

50. 517 U.S. at 574-75.

51. *Id.* at 562, 574-75.

52. *Id.* at 574-83.

53. At least a few members of the Supreme Court have explicitly recognized a distinction between common law review for reasonableness and review as to whether an award violates the due process clause. As a plurality of the Court noted in a decision a few years before *BMW*: “A violation of a state law ‘reasonableness’ requirement would not . . . necessarily establish that the award is so ‘grossly excessive’ as to violate the Federal Constitution.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 n.24 (1993) (plurality opinion). The Supreme Court, however, has confused matters by describing review under due process in terms of “reasonableness.” *See, e.g.*, *BMW*, 517 U.S. at 582-83 (“[A] general concern[] of reasonableness . . . properly enter[s] into the constitutional calculus.” (alterations in original) (citations omitted) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991))).

as to constitute a due process violation.<sup>54</sup> Lower federal courts, however, have exhibited differing perspectives on constitutional and nonconstitutional review. Some lower courts explicitly distinguish review under due process from review under common law or statutory standards.<sup>55</sup> Other courts expressly use the *BMW* guideposts to decide whether a punitive award should be set aside under the “shock the judicial conscience” standard and other nonconstitutional tests.<sup>56</sup> Still other courts, without citing *BMW*, use standards for nonconstitutional review that mirror the *BMW* guideposts, such as the reprehensibility of

---

54. Because of the high bar for concluding that an award is so excessive as to deny the defendant fair notice, “[p]unitive awards so high as to be unconstitutional ought to be rare.” Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 75 (1999). Professors Eisenberg and Wells have demonstrated that in the year after the Supreme Court’s decision in *BMW*, the case had little effect on the patterns of punitive damages awards in published opinions. *Id.* at 75-83. The authors comment: “It may be that insufficient time has elapsed for *BMW*’s effect to be fully felt. But it also may be that the case is of less practical importance than some believe. *BMW* is a constitutional decision and one should not expect the Constitution to play a role in routine punitive damages cases.” *Id.* at 83.

55. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, No. 98-2122, 1999 U.S. App. LEXIS 33144, at \*15-\*16 (10th Cir. Dec. 21, 1999) (finding that the award did not “shock the conscience” or violate due process); *Mason v. Okla. Tpk. Auth.*, 182 F.3d 1212, 1214 (10th Cir. 1999) (indicating that the defendant could not raise a constitutional challenge because it was not asserted below); *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999) (distinguishing a punitive damages award that violates due process and thus is not permitted as a matter of law from an award that is “unreasonable on the facts”); *Visionquest Nat’l, Ltd. v. Marimed Found.*, No. 97-15014, 1998 U.S. App. LEXIS 15340, at \*2-\*3 (9th Cir. July 6, 1998) (noting that punitive damages “would survive common law or constitutional review for excessiveness”); *FDIC v. Hamilton*, 122 F.3d 854, 860-62 (10th Cir. 1997) (ruling that the amount of the punitive award violated due process and state law); *Riley v. Kurtz*, No. 98-1077, 1999 U.S. App. LEXIS 24341, at \*20-\*25 (6th Cir. 1999) (reviewing a punitive award first under *BMW* for whether it violates the Fourteenth Amendment and then under the common law for whether the award “shocks the conscience”); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 597 (5th Cir. 1998) (distinguishing nonconstitutional from constitutional review but asserting that *BMW* is “instructive for reviewing other excessiveness claims for punitive damages”).

56. See, e.g., *Deffenbaugh-Williams*, 156 F.3d at 597 (“[A]lthough *BMW* concerns constitutional limits, it is instructive for reviewing other excessiveness claims for punitive damages.”); *Lee v. Edwards*, 101 F.3d 805, 808-09 (2d Cir. 1996) (using *BMW* guideposts to determine whether a punitive award “shock[ed] our judicial conscience” and considering awards in comparable cases to determine the appropriate amount of remittitur); *Leab v. Cincinnati Ins. Co.*, No. CIV.A.95-5690, 1997 U.S. Dist. LEXIS 8868, at \*41-\*53 (E.D. Pa. June 23, 1997) (using *BMW* guideposts to determine whether punitive award was “so large as to shock the conscience of the court”); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032, 1041-44 (S.D. Ind. 1997) (applying *BMW* guideposts to decide whether the jury awarded excessive damages under state and federal standards), *vacated by* 142 F.3d 367 (7th Cir. 1998); *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164, 176-78 (E.D. Pa. 1996) (applying *BMW* guideposts to determine whether the punitive damages award was excessive).

the defendant's conduct and the ratio between compensatory and punitive damages.<sup>57</sup>

I suggest that regardless of the type of review, the Seventh Amendment generally prohibits a court from reducing a punitive damages award without offering the plaintiff the option of a new trial. With the exception of reduction pursuant to a statutory cap,<sup>58</sup> outright reduction of punitive damages does not fall within either of the categories in which judgment as a matter of law is appropriate. No legal rule exists that dictates the amount of punitive damages, and reasonable juries likely would reach varying conclusions on the proper amount of relief. Nonetheless, because some courts have assumed the propriety of judgment as a matter of law on the amount of punitive damages, it is worth considering the arguments that have been, or might be, offered in support of the practice.

One argument in favor of judgment as a matter of law might be that an award of punitive damages is not a "fact tried by a jury" and thus does not fall within the prohibition of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined [except] according to the rules of the common law."<sup>59</sup> In other contexts, courts have characterized decisions on the amount of punitive damages to be decisions more of policy than of fact.<sup>60</sup> An argument that the

---

57. See, e.g., *Thorne v. Welk Inv., Inc.*, 197 F.3d 1205, 1211 (8th Cir. 1999) (considering the reprehensibility of the defendant and the ratio between compensatory and punitive damages); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999) (examining the reprehensibility of the defendant's conduct, the ratio between punitive and compensatory damages, and the difference between the punitive award and comparable statutory remedies to determine whether the award "shock[ed] the judicial conscience"); *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) (using the ratio between the compensatory and punitive damages and reprehensibility of the defendant's conduct to determine whether punitive award was excessive); *Adgate v. Robinson Ford Sales*, No. 98-55784, 2000 U.S. App. LEXIS 2815, at \*7-\*8 (9th Cir. 2000) (considering the ratio between punitive and compensatory damages in deciding whether the award was excessive under state law); *Riley*, 1999 U.S. App. LEXIS 24341, at \*20-\*25 (finding a review of *BMW* factors inconclusive as to whether due process was violated by large punitive award, the court performed a common law review and, without citing *BMW*, relied on the ratio between punitive and actual damages to conclude that the award "shocked the conscience"); *Lambert v. Ackerley*, 180 F.3d 997, 1011 n.15 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000) (taking into account the defendant's reprehensibility and financial assets in determining that a punitive damages award was not excessive).

58. See *supra* note 33.

59. U.S. CONST. amend. VII.

60. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting) ("Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." (citation omitted)); *Atlas Food Sys. & Serv. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) ("The jury's determination of the amount of punitive damages . . . is not a factual determination about the degree of injury but is, rather, an almost unconstrained

assessment of punitive damages should not be considered a question of fact for purposes of judicial review, however, would be at odds with the prevailing doctrine that the Seventh Amendment guarantees jury assessment of punitive damages in the first instance.<sup>61</sup> It would be inconsistent to treat the assessment of punitive damages as a question of fact for the jury initially, but not as a question of fact for purposes of judicial review.

Another argument is that courts determine “as a matter of law” whether an award of punitive damages is excessive, and thus courts should be able to reduce an excessive award outright. This argument was advanced by the Eleventh Circuit in *Johansen*, in the context of an award deemed to be excessive under due process.<sup>62</sup> To characterize the reduction of the punitive award as a question of law, *Johansen* asserted that “[n]o one would dispute that the court, not the jury, has the responsibility for determining [the] constitutional limit.”<sup>63</sup> To be sure, the decision whether a jury’s award is excessive is a question of law for a court to determine; the Supreme Court has recognized this to be true whether the legal maximum of the award is governed by

---

judgment or policy choice about the severity of the penalty to be imposed, given the jury’s underlying factual determinations about the defendant’s conduct.”); *cf.* *Cont’l Trend Res., Inc. v. Oxy USA Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996) (finding that the appellate court could review a jury’s award of punitive damages because the question of excessiveness was one of constitutional fact under due process).

61. Current doctrine assumes that the Seventh Amendment guarantees jury assessment of punitive damages as an initial matter. *See, e.g.*, *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 235-36 (3d Cir. 1997) (concluding that the Seventh Amendment guarantees jury assessment of punitive damages in a bad faith action against an insurer); *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991) (en banc) (stating that the “[S]eventh [A]mendment guarantees the right to a jury determination of the amount of punitive damages”); *see also* *Murphy, Judicial Assessment*, *supra* note 10, at 169 n.103 (citing additional cases in state courts interpreting state constitutional guarantees to jury trial). The Supreme Court’s opinion in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347 (1998), a case finding that the Seventh Amendment guarantees jury assessment of the amount of statutory damages in copyright cases, makes it unlikely that the current Court would find that the assessment of punitive damages falls outside the ambit of the Seventh Amendment. Although I have made arguments elsewhere that the Seventh Amendment should not be interpreted to require that juries assess punitive damages as an initial matter, *see supra* note 10, my discussion in this Essay on whether judgment as a matter of law is permissible on the amount of punitive damages assumes that courts will continue to interpret the Seventh Amendment as guaranteeing initial jury determination of such damages.

62. *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1330-31 (11th Cir. 1999) (“Neither common law nor the Seventh Amendment, however, prohibits reexamination of the verdict for legal error. Therefore, if legal error is detected, the federal courts have the obligation and the power to correct the error by vacating or reversing the jury’s verdict.” (citation omitted) (footnote omitted)).

63. *Id.* at 1331.



constitutional or nonconstitutional standards.<sup>64</sup> But it is quite a different matter to conclude, as *Johansen* did, that the court accordingly may enter absolute judgment reducing the jury award to the legal maximum.<sup>65</sup> The Supreme Court in *Hetzel v. Prince William County* rejected such an approach.<sup>66</sup> *Hetzel* reaffirmed that, when a jury award exceeds the upper limit permissible under nonconstitutional standards, the cure is a new trial, with the court having the option of offering a remittitur to the plaintiff.<sup>67</sup>

There seems little reason why the response to an excessive jury award should be absolute judgment on a reduced amount simply because the standard for determining excessiveness is provided by constitutional law, as opposed to statutory or common law. The defendant's due process right not to be subject to a grossly excessive award can be vindicated without abridging the plaintiff's Seventh Amendment right to have a jury determine the amount of uncertain damages. The respective constitutional rights of the defendant and the plaintiff can be served by vacating the jury's excessive award and granting a new trial. If the court also offers a remittitur to the plaintiff in an amount the court determines to be the maximum permissible under due process, then the plaintiff would proceed with a new trial only at great risk. The plaintiff could earn an award at a new trial greater than the amount previously set by the reviewing court only if the plaintiff achieved the difficult task of putting on proof that justified a higher constitutional maximum.

In attempting to cast the reduction of an unconstitutionally excessive award as a matter of law outside the ambit of the Seventh Amendment, *Johansen* relied on the power of courts to alter awards that include "an identifiable amount that is not permitted by law."<sup>68</sup> It cited as support the Supreme Court's decision in *New York, Lake Erie & Western Railroad Co. v. Estill*, which upheld a lower court's exclusion of interest improperly awarded by the jury.<sup>69</sup> But *Estill*

---

64. See *Gasperini*, 518 U.S. at 437-38.

65. See *Johansen*, 170 F.3d at 1331 ("The real issue, therefore, is whether the court may enter judgment for a constitutionally reduced award without plaintiff's consent. So put, the question answers itself. Plaintiff's consent is irrelevant if the Constitution requires the reduction.").

66. *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998).

67. *Id.*

68. *Johansen*, 170 F.3d at 1330.

69. 147 U.S. 591, 621-22 (1893). In *Estill*, the Supreme Court found that the jury improperly awarded interest. *Id.* It affirmed the jury's award for damages, but directed that the "judgment is modified as to such interest, and the case is remanded to the court below, with a direction to enter a judgment for the plaintiffs for [the damages]." *Id.* at 622 (emphasis omitted).

merely exemplifies the uncontroversial proposition that a court may enter judgment as a matter of law, on either liability or damages, when a legal rule dictates a certain result.<sup>70</sup> Determining the “constitutional maximum” for a punitive damages award is not subject to similar certainty, because the setting of that maximum is infused with factual decisions about the reprehensibility of the defendant’s conduct; no legal rule exists to inform the court of the precise constitutional limit.

The difference between an award that is excessive under a definite legal rule and an award that is excessive under constitutional standards is demonstrated by comparing how a new trial on remedy might aid the plaintiff. With a jury award that improperly includes interest, for example, there is nothing that a plaintiff could do at a new trial that would change the legal conclusion that interest is unavailable. Judgment as a matter of law, excising the “identifiable amount that is not permitted by law,” thus makes practical sense.<sup>71</sup> With an award of punitive damages, however, there is the possibility that the plaintiff might be able to put on proof at a new trial that would alter a reviewing court’s perception of the constitutional maximum.<sup>72</sup> At retrial, the plaintiff might establish that the defendant’s conduct was more reprehensible than was proven at the first trial. This possibility is significant, for the Supreme Court in *BMW* stated that the degree of reprehensibility is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.”<sup>73</sup> In addition, there is the possibility (although perhaps remote) that proof about the defendant’s conduct at a new trial would cause the reviewing court to look to a different set of civil and criminal penalties for comparison with the punitive award than were considered after the first trial. A new trial might also affect the reviewing court’s perception of whether the ratio between compensatory and punitive damages is too high, even though the new trial might be limited to the issue of punitive damages.<sup>74</sup> The award of punitive damages in a new trial might be as

---

70. *See id.* at 621-22.

71. *Johansen*, 170 F.3d at 1330.

72. This analysis contradicts the assertion in *Johansen* that “[g]iving a plaintiff the option of a new trial rather than accepting the constitutional maximum for this case would be of no value.” *Id.* at 1332 n.19. Although *Johansen* contends that “[i]f the plaintiff obtained more than the constitutional maximum [at a new trial], the award could not be sustained,” it is possible that the plaintiff could put on proof at the new trial that would justify a higher constitutional maximum. *Id.* (emphasis omitted).

73. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

74. *See* FED. R. CIV. P. 59(a) (authorizing the grant of a new trial “on all or part of the issues” already tried); *see also* *Cont’l Trend Res., Inc. v. Oxy USA Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (offering a remittitur on punitive damages found to be constitutionally

large or larger than in the first trial, but a reviewing court might nonetheless find the ratio between punitive and compensatory damages to be acceptable based on proof at the new trial concerning the defendant's conduct.<sup>75</sup> Thus, reducing outright an unconstitutionally excessive punitive award cannot be likened to excising an "identifiable amount" of a jury award that is "not permitted by law."<sup>76</sup>

Beyond the arguments that the assessment of punitive damages is not a question of fact and that determining the excessiveness of an award is a question of law, there is the argument, advanced by *Johansen*, that the reduction of a punitive award to the constitutional maximum is not a remittitur, and thus a new trial need not be offered.<sup>77</sup> The court in *Johansen* labeled a constitutional reduction as mandatory, but a remittitur as discretionary.<sup>78</sup> It also characterized a constitutional reduction as "a determination that the law does not permit the award," while it labeled a remittitur as the product of a court's determination that "the jury's award is unreasonable on the facts."<sup>79</sup>

*Johansen* drew a false dichotomy between a "mandatory" constitutional reduction and a "discretionary" remittitur. The proper comparison is between entering judgment as a matter of law and ordering a new trial (which carries with it the discretion to offer the plaintiff a remittitur). As noted earlier, a court has the mandatory obligation to order a new trial if it finds a jury award of uncertain damages to be excessive; remittitur is discretionary in the sense that the court could simply order a new trial without offering the plaintiff a remittitur. Contrary to *Johansen's* characterization, the requirement of offering the plaintiff a new trial does not proceed from the decision to offer a remittitur.<sup>80</sup> Rather, the possibility of a remittitur flows from the mandatory obligation to order a new trial when a jury award is

---

excessive but stating that if the plaintiffs declined to accept the reduced amount, the district court should grant a new trial limited to the issue of punitive damages).

75. See *BMW*, 517 U.S. at 582-83 (indicating that the egregiousness of the defendant's conduct should inform a court's decision as to whether the ratio between compensatory and punitive damages is within a constitutionally acceptable range).

76. *Johansen*, 170 F.3d at 1330.

77. See *id.* at 1331.

78. *Id.* ("Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion, a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause." (citations omitted)).

79. *Id.* (emphasis omitted). Further drawing a distinction between a constitutional reduction and a remittitur, the Eleventh Circuit commented that, while an appellate court should review a remittitur under an abuse of discretion standard, an appellate court should review a constitutional reduction de novo, because whether the award is constitutionally excessive is a legal issue. *Id.* at 1334.

80. See 11 *WRIGHT ET AL.*, *supra* note 15, § 2815, at 159-60.

excessive.<sup>81</sup> Moreover, although a court's choice to offer a remittitur is discretionary, determining the proper amount of the remittitur is not. The Seventh Amendment has been interpreted by modern courts and influential authorities alike to require that, if a court offers a remittitur, the amount of the reduction should be to the maximum the jury lawfully could have awarded.<sup>82</sup> A court that offers a remittitur must determine the maximum award permitted by common or statutory law, just as a court that has concluded that an award is unconstitutionally excessive must, if it wants to reduce the award, determine the maximum permitted by constitutional law.<sup>83</sup> Thus, for purposes of determining whether a court can enter absolute judgment on the "maximum" set by the court, a remittitur according to nonconstitutional standards is not functionally distinguishable from a reduction according to constitutional standards.

*Johansen* was also unpersuasive in suggesting that a constitutional reduction can be distinguished from a remittitur on the basis that the former embodies a legal conclusion, but the latter reflects a court's review of the facts. A conclusion that a jury award is excessive, whether under constitutional or nonconstitutional standards, generally involves an evaluation of both the law and the facts. To find that a punitive damages award violates due process requires consideration of the facts of the defendant's reprehensibility; to find that a damages award is "unreasonable on the facts" requires the application of some common law or statutory standard to judge excessiveness.

Yet another argument to validate the outright reduction of an unconstitutionally excessive award is that *BMW* casts doubt on whether the plaintiff must have the option of a new trial.<sup>84</sup> In *Johansen*, the Eleventh Circuit asserted that the "Supreme Court itself recognized" that "[n]o new trial need be offered" when a punitive damages award is deemed excessive under due process.<sup>85</sup> *Johansen* observed that the Court in *BMW* remanded the case to the state supreme court to determine "[w]hether the appropriate remedy

---

81. *See id.*

82. *Id.* § 2815, at 167-68 (discussing various theories and court approaches to how to determine the amount of a remittitur, but asserting that the maximum recovery rule "is the only theory that has any reasonable claim of being consistent with the Seventh Amendment"); 12 MOORE, *supra* note 3, § 59.13(2)(g), at 59-86 (stating that "setting the final judgment amount at anything less than the maximum legal award may violate the Seventh Amendment").

83. *See* 11 WRIGHT ET AL., *supra* note 15, § 2815, at 167-68.

84. *See* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586 (1996).

85. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1332 (11th Cir. 1999).

requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers.”<sup>86</sup> This statement by the Supreme Court, however, must be read in the procedural context of the case. The Supreme Court found only that the punitive award was excessive under due process; it did not further determine the constitutional maximum.<sup>87</sup> Thus, the Supreme Court’s remand directions can be read as simply leaving to the Alabama high court the choice of ordering a new trial or determining for itself the upper limit permitted by due process.<sup>88</sup> The Supreme Court did not suggest what the procedural consequence should be (absolute judgment or remittitur with the option of a new trial) if the state supreme court chose to determine the constitutional limit.<sup>89</sup> The Court’s failure to comment on this point is unsurprising because the Seventh Amendment does not apply to the states.<sup>90</sup> *BMW* thus provides little, if any, support for the *Johansen* conclusion that federal courts may order absolute judgment on the amount of punitive damages.

Even if one were to accept the proposition that judgment as a matter of law is appropriate on the constitutional maximum of a punitive damages award, there is the practical problem of distinguishing awards in which the constitutional maximum has been surpassed from awards that are merely excessive under nonconstitutional standards. *Johansen* commented that “if the district court exercises its discretion to reduce the verdict lower than the constitutional maximum for that case, the verdict has been ‘reexamined’ and the plaintiff must be afforded the option to elect a new trial.”<sup>91</sup> Under the *Johansen* reasoning, a court wanting to reduce an award and avoid the possibility of a new trial would seek to

---

86. *Id.* (alteration in original) (emphasis omitted) (quoting *BMW*, 517 U.S. at 586).

87. *See BMW*, 517 U.S. at 585-86.

88. *See id.*

89. *See id.* *Johansen* found it significant that the Supreme Court in *BMW* did not use the term “remittitur” to characterize a constitutionally required reduction in a verdict, but that *Hetzl* did refer to the Fourth Circuit’s reduction of the jury’s verdict as a remittitur. *See Johansen*, 170 F.3d at 1331 n.15. There was no reason for the Supreme Court to use the term “remittitur” in *BMW*, however, because the Court did not itself set an upper limit for punitive damages in the case; it simply found the amount awarded to be unconstitutionally excessive and then remanded for further proceedings.

90. *See, e.g., Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875) (stating that “[t]he States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way”). *But cf. In re Bd. of County Sup’rs*, 143 F.3d 835, 840 (4th Cir. 1998) (stating that the Supreme Court’s remand instructions in *BMW* were “for reasons unrelated to incorporation insofar as appears from the opinion”).

91. *Johansen*, 170 F.3d at 1332 n.20.

characterize the award as unconstitutionally excessive, rather than merely unreasonable.

As discussed earlier, there are, in theory, different standards for constitutional and nonconstitutional review of the amount of a punitive damages award. We have seen, however, that courts commonly conflate the two types of review, making it difficult to draw any meaningful line between unconstitutionally excessive awards and merely unreasonable ones.<sup>92</sup> Moreover, the *BMW* guideposts are so indeterminate that a reviewing court would have substantial leeway to characterize an excessive award as unconstitutional, rather than simply invalid under nonconstitutional standards. Thus, the exception that *Johansen* sought to establish for unconstitutionally excessive punitive damages has the potential to swallow the rule against outright reductions of jury awards.

The arguments for outright reduction of excessive punitive awards fail to reconcile such a procedure with the prerequisites for entering judgment as a matter of law—either that a legal rule dictates a certain outcome or that there is but one conclusion a reasonable jury could reach on the facts. Moreover, none of the arguments justify departure from the Seventh Amendment doctrine that an excessive jury award of uncertain damages may be corrected only by a new trial or by a remittitur accepted by the plaintiff.

#### IV. CONCLUSION

The Seventh Amendment embodies the principle that juries, rather than judges, are to determine the amount of uncertain damages within lawful limits. When a jury has rendered an excessive award, the plaintiff's opportunity to have a new jury determine damages preserves the constitutional principle. A court that enters judgment as a matter of law on a reduced punitive award sacrifices this principle for little practical gain. A plaintiff has powerful incentives to accept a remittitur if offered a choice between a new trial and the reduced amount that the court determines to be the lawful maximum. A court's refusal to offer the plaintiff the option of a new trial may, at best, achieve some efficiency at the margins for the litigants and the justice system. The more troubling—and unconstitutional—result is that the

---

92. See *supra* notes 53-67 and accompanying text. For example, the reprehensibility of the defendant's conduct is relevant to both nonconstitutional and constitutional review. This factor thus could not easily distinguish the unconstitutionally excessive award from the merely unreasonable award.

court, rather than a jury, has become the principal decision maker on the amount of damages.

\* \* \*