

GINSBURG, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 99–2035

COOPER INDUSTRIES, INC., PETITIONER *v.*  
LEATHERMAN TOOL GROUP, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May 14, 2001]

JUSTICE GINSBURG, dissenting.

In *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996), we held that appellate review of a federal trial court’s refusal to set aside a jury verdict as excessive is reconcilable with the Seventh Amendment if “appellate control [is] limited to review for ‘abuse of discretion.’” *Id.*, at 419. *Gasperini* was a diversity action in which the defendant had challenged a compensatory damages award as excessive under New York law. The reasoning of that case applies as well to an action challenging a punitive damages award as excessive under the Constitution. I would hold, therefore, that the proper standard of appellate oversight is not *de novo* review, as the Court today concludes, but review for abuse of discretion.

“An essential characteristic of [the federal court] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence— if not the command— of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.” *Id.*, at 432 (citing *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U. S. 525, 537 (1958)). The Seventh Amendment provides: “In Suits at common law . . . 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.” In *Gasperini*, we observed that al-

though trial courts traditionally had broad authority at common law to set aside jury verdicts and to grant new trials, 518 U. S., at 432–433, “appellate review of a federal trial court’s denial of a motion to set aside a jury’s verdict as excessive is a relatively late, and less secure, development,” *id.*, at 434. We ultimately concluded that the Seventh Amendment does not preclude such appellate review, *id.*, at 436, but explained that “[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [an excessiveness standard],” *id.*, at 438. “Trial judges have the unique opportunity to consider the evidence in the living courtroom context,” we said, “while appellate judges see only the cold paper record.” *Ibid.* (citations and internal quotation marks omitted). “If [courts of appeals] reverse, it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. . . . [Appellate courts] must give the benefit of every doubt to the judgment of the trial judge.” *Id.*, at 438–439 (internal quotation marks omitted) (citing *Dagnello v. Long Island R. Co.*, 289 F. 2d 797, 806 (CA2 1961)).

Although *Gasperini* involved compensatory damages, I see no reason why its logic should be abandoned when punitive damages are alleged to be excessive. At common law, as our longstanding decisions reiterate, the task of determining the amount of punitive damages “has [always been] left to the discretion of the jury.” *Day v. Woodworth*, 13 How. 363, 371 (1852); see *Barry v. Edmunds*, 116 U. S. 550, 565 (1886) (“[N]othing is better settled than that . . . it is the peculiar function of the jury to determine the amount [of punitive damages] by their verdict.”). The commitment of this function to the jury, we have explained, reflects the historical understanding that “the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.” *Day*, 13 How., at 371. The relevant factors include “the conduct and mo-

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tives of the defendant” and whether, “in committing the wrong complained of, he acted recklessly, or wilfully and maliciously, with a design to oppress and injure the plaintiff.” 1 J. Sutherland, *Law of Damages* 720 (1882). Such inquiry, the Court acknowledges, “is a fact-sensitive undertaking.” *Ante*, at 13, n. 11.

The Court nevertheless today asserts that a “jury’s award of punitive damages does not constitute a finding of ‘fact’” within the meaning of the Seventh Amendment. *Ante*, at 12. An ultimate award of punitive damages, it is true, involves more than the resolution of matters of historical or predictive fact. See *ibid.* (citing *Gasperini*, 518 U. S., at 459 (SCALIA, J., dissenting)). But there can be no question that a jury’s verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings— *e.g.*, the extent of harm or potential harm caused by the defendant’s misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously. Punitive damages are thus not “[u]nlike the measure of actual damages suffered,” *ante*, at 12 (citation and internal quotation marks omitted), in cases of intangible, noneconomic injury. One million dollars’ worth of pain and suffering does not exist as a “fact” in the world any more or less than one million dollars’ worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as factfinding, see *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 661 (1915) (compensation for pain and suffering “involves only a question of fact”), it seems to me the other should be so regarded as well.

In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257 (1989), we approved application of an abuse-of-discretion standard for appellate review of a district court’s ruling on a motion to set aside a punitive

damages award as excessive. See *id.*, at 279. *Browning-Ferris* reserved the question whether even such deferential appellate review might run afoul of the Seventh Amendment. At that time (*i.e.*, pre-*Gasperini*), the Court “ha[d] never held expressly that the Seventh Amendment allows appellate review of a district court’s denial of a motion to set aside an award as excessive.” 492 U. S., at 279, n. 25. We found it unnecessary to reach the Seventh Amendment question in *Browning-Ferris* because the jury verdict there survived lower court review intact. *Id.*, at 279, n. 25, 280. *Browning-Ferris*, in short, signaled our recognition that appellate review of punitive damages, if permissible at all, would involve *at most* abuse-of-discretion review. “[P]articularly . . . because the federal courts operate under the strictures of the Seventh Amendment,” we were “reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.” *Id.*, at 280, n. 26.

The Court finds no incompatibility between this case and *Browning-Ferris*, observing that *Browning-Ferris* presented for our review an excessiveness challenge resting solely on state law, not on the Constitution. See *ante*, at 8, and n. 7. It is unclear to me why this distinction should make a difference. Of the three guideposts *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996), established for assessing constitutional excessiveness, two were derived from common-law standards that typically inform state law. See *id.*, at 575, n. 24 (“The principle that punishment should fit the crime is deeply rooted and frequently repeated in common-law jurisprudence.” (citation and internal quotation marks omitted)); *id.*, at 580 (“The principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree.”). The third guidepost—comparability of sanctions for comparable misconduct—is not similarly rooted in common law, nor is it similarly factbound. As the Court

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states, “the third *Gore* criterion . . . calls for a broad legal comparison.” *Ante*, at 16. But to the extent the inquiry is “legal” in character, there is little difference between review *de novo* and review for abuse of discretion. Cf. *Gasperini*, 518 U. S., at 448 (STEVENS, J., dissenting) (“[I]t is a familiar . . . maxim that deems an error of law an abuse of discretion.”).<sup>1</sup>

Apart from “Seventh Amendment constraints,” an abuse-of-discretion standard also makes sense for “practical reasons.” *Id.*, at 438. With respect to the first *Gore* inquiry (*i.e.*, reprehensibility of the defendant’s conduct), district courts have an undeniably superior vantage over courts of appeals. As earlier noted, *supra*, at 2, district courts view the evidence not on a “cold paper record,” but “in the living courtroom context,” *Gasperini*, 518 U. S., at 438. They can assess from the best seats the vital matter of witness credibility. And “it of course remains true that [a] Court of Appeals should defer to the District Court’s findings of fact unless they are clearly erroneous.” *Ante*, at 15, n. 14.<sup>2</sup>

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<sup>1</sup> Appellate courts, following our instruction, apply *de novo* review to trial court determinations of reasonable suspicion, probable cause, and excessiveness of fines. See *ante*, at 10–11 (citing *United States v. Bajakajian*, 524 U. S. 321, 336–337, n. 10 (1998), and *Ornelas v. United States*, 517 U. S. 690, 696–698 (1996)). But such determinations typically are made without jury involvement, see, *e.g.*, *Bajakajian*, 524 U. S., at 325–326; *Ornelas*, 517 U. S., at 694, and surely do not implicate the Seventh Amendment. Moreover, although *Bajakajian* said “the question whether a [criminal] fine is constitutionally excessive calls for . . . *de novo* review,” 524 U. S., at 336–337, n. 10, *Bajakajian* did not disturb our holding in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257 (1989), that the “Excessive Fines Clause does not apply to awards of punitive damages in [civil] cases between private parties,” *id.*, at 260.

<sup>2</sup> An appellate court might be at a loss to accord such deference to jury findings of fact absent trial court employment of either a special verdict or a general verdict accompanied by written interrogatories. See Fed. Rule Civ. Proc. 49.

The Court recognizes that district courts have the edge on the first *Gore* factor, *ante*, at 15, but goes on to say that “[t]rial courts and appellate courts seem equally capable of analyzing the second [*Gore*] factor” (*i.e.*, whether punitive damages bear a reasonable relationship to the actual harm inflicted), *ante*, at 16. Only “the third *Gore* criterion [*i.e.*, intrajurisdictional and interjurisdictional comparisons] . . . seems more suited to the expertise of appellate courts.” *Ibid.*

To the extent the second factor requires a determination of “the actual harm inflicted on the plaintiff,” *Gore*, 517 U. S., at 580, district courts may be better positioned to conduct the inquiry, especially in cases of intangible injury. I can demur to the Court’s assessment of relative institutional strengths, however, for even accepting that assessment, I would disagree with the Court’s conclusion that “[c]onsiderations of institutional competence . . . fail to tip the balance in favor of deferential appellate review,” *ante*, at 16. *Gore* itself assigned particular importance to the first inquiry, characterizing “degree of reprehensibility” as “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.” 517 U. S., at 575. District courts, as just noted, *supra*, at 5, have a superior vantage over courts of appeals in conducting that fact-intensive inquiry. Therefore, in the typical case envisioned by *Gore*, where reasonableness is primarily tied to reprehensibility, an appellate court should have infrequent occasion to reverse.

This observation, I readily acknowledge, suggests that the practical difference between the Court’s approach and my own is not large. An abuse-of-discretion standard, as I see it, hews more closely to “the strictures of the Seventh Amendment,” *Browning-Ferris*, 492 U. S., at 280, n. 26. The Court’s *de novo* standard is more complex. It requires lower courts to distinguish between ordinary common-law excessiveness and constitutional excessiveness, *ante*, at 8, and to separate out factfindings that qualify for “clearly

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erroneous” review, *ante*, at 15, n. 14. See also *ante*, at 15, n. 13 (suggesting abuse-of-discretion review might be in order “if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury’s finding of compensatory damages”). The Court’s approach will be challenging to administer. Complex as it is, I suspect that approach and mine will yield different outcomes in few cases.

The Ninth Circuit, I conclude, properly identified abuse of discretion as the appropriate standard in reviewing the District Court’s determination that the punitive damages awarded against Cooper were not grossly excessive. For the Seventh Amendment and practical reasons stated, I would affirm the judgment of the Court of Appeals.