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Aggravating Punitive Damages

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RESPONSE

AGGRAVATING PUNITIVE DAMAGES

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In response to Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009).

No aspect of civil law aggravates defendants more, it seems, than punitive damages. Straddling the civil and criminal law, punitive damages are awarded to a plaintiff in a private lawsuit, though they are widely viewed as noncompensatory and in the nature of a penal fine. Because such damages are assessed in civil lawsuits, the procedural safeguards of the criminal law—such as the "beyond a reasonable doubt" burden of proof, the privilege against self-incrimination, and the prohibitions against double jeopardy—generally do not apply. This strange mixture of criminal and civil law objectives and effects has always drawn controversy to this peculiar remedy, like a moth to flame.[1]

The clash of views is colorfully portrayed by early state supreme court decisions. One court remarked, "The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law."[2] Yet, another court characterized punitive damages law as "an outgrowth of the English love

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[1] *See In re* Paris Air Crash of Mar. 3, 1974, 427 F. Supp. 701, 705 (C.D. Cal. 1977) ("Punitive damages like class actions have been highly praised and roundly denounced depending on who is paying the piper."), *rev'd sub nom.* McDonnell Douglas Corp. v. Plaintiffs in MDL 172 (*In re* Paris Air Crash of Mar. 3, 1974), 622 F.2d 1315 (9th Cir. 1980); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005) ("Punitive damages are a tricky subject because they have this double aspect, both civil and criminal.").

[2] Fay v. Parker, 53 N.H. 342, 382 (1873).

of liberty regulated by law" that "restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law."[3] Its grounding in essential justice, its drawing from diverse ancient legal cultures,[4] and its deep roots in early English law all suggest that the punitive damages remedy is strong enough to endure the onslaught of recurring challenges to this hybrid creation of the law.

Yet, over the last two decades, the legitimacy, scope, and administration of punitive damages have been rigorously tested under the Constitution in a series of cases in the Supreme Court.[5] These cases have formed a growing body of jurisprudence that has spawned a spate of scholarship on how punitive damages should be conceived and administered. Into this maelstrom of clashing views has plunged an important new commentator, Dan Markel, who offers novel insights and proposals in a remarkable body of scholarship still in progress: to date, this includes *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*[6] and *How Should Punitive Damages Work?*[7]

This Response focuses on the latter work and critiques its premise, which was developed in the former, that public retribution should play a major role in punitive damages. I offer an alternative view—that private law should hold tight to the punitive damages remedy, a device that, through the institution of *private* retribution, offers victims of aggravated wrongdoing robust redress for the panoply of losses aggravated by the flagrancy of a wrong. In addition, I briefly examine a couple of Professor Markel's treatments of how punitive damages should work, including the standard of proof and whether insurance against punitive damages should be allowed. Though we differ mightily on whether punitive damages should be directed principally to achieve public retribution or private justice, I applaud his focus on punitive damages' inherent pluralism and his close analysis of the appropriate levels of procedural safeguards to keep this remedy from

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[3] Luther v. Shaw, 147 N.W. 18, 20 (Wis. 1914).

[4] *See* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262 n.17 (1976) (examining this remedy's deep historical foundations).

[5] This line of cases essentially began with *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

[6] 94 CORNELL L. REV. 239 (2009).

[7] 157 U. PA. L. REV. 1383 (2009). Professor Markel reports that he has a further piece in progress, *Punitive Damages and Complex Litigation*. *Id.* at 1390 n.9.

bursting its proper bounds. Finally, I conclude that Professor Markel's extensive and creative scholarship on punitive damages helpfully pushes observers of this strange remedy to reconsider their most fundamental thoughts about how it should ideally be configured.

I. RETRIBUTION AND RESTITUTION IN PRIVATE LAW

All agree that punitive damages serve a mixture of purposes.[8] While courts typically refer only to "punishment" (meaning retribution) and "deterrence" as the purposes of such damages,[9] Professor Markel and others correctly point to a third important function—added compensation, sometimes called "aggravated damages," for the purpose of victim vindication and redress.[10] Because courts almost universally proclaim that punitive damages are noncompensatory, increasing scholarly recognition that flagrant wrongdoers should fully restore the aggravated losses suffered by their victims is an important rediscovery in the development of punitive damages theory.[11]

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[8] Indeed, the Supreme Court now evaluates the constitutionality of punitive damages in light of the damages' various functions. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991) (approving punitive damages jury instructions that "reasonably accommodated . . . Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution").

[9] *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (stating that punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing"); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 40 (Tex. 1998) ("[T]he purpose of punitive damages is to punish a party . . . and to deter it and others from committing the same or similar acts in the future."); *see also* RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) ("Punitive damages are damages . . . awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.").

[10] *See* Markel, *supra* note 7, at 1394-95, 1414. Other legal systems allow "aggravated" or "moral" damages or some other form of relief to augment a victim's award in cases of serious wrongdoing. *See* Owen, *supra* note 4, at 1264 n.23 (noting that England's use of "aggravated damages" serves much the same function as punitive damages and that Switzerland, Turkey, Norway, and Mexico provide for damages that are "punitive" in nature). Thanks to Lotte Meurkens, a Ph.D. candidate at Maastricht University who is preparing a dissertation on punitive damages law, for pointing out that punitive damages have been subject to increasing debate in Germany, France, the Netherlands, and various other European nations, despite traditional skepticism of such relief outside the United States. *See generally* PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES (Helmut Koziol & Vanessa Wilcox eds., 2009) (collecting essays on the role of punitive damages in various nations).

[11] John Goldberg should be credited with revealing that punitive damages were embedded in the very idea of legal injury in eighteenth-century English law, as chronicled by Blackstone, and that the idea appears to have migrated to America. *See* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 455-62 (2006).

While punitive damages undeniably are a hybrid remedy serving a variety of functions, modern theorists often emphasize a single function,[12] and Professor Markel does the same. While he charitably offers refuge to all three functions—aptly labeled "retributive justice, cost internalization, and victim vindication"[13]—he reenvisions the role of punitive damages primarily through a public retributive-justice lens. Thus, while his scheme is "pluralistic" in recognizing multiple purposes of punitive damages, it structures punitive damages, first and foremost, to protect the perceived retributive needs of the public. In so doing, it undermines the private justice demands of victims of aggravated misconduct.

In justifying punitive damages in terms of public retribution, Professor Markel argues persuasively for minimizing both Type I (false-positive) and Type II (false-negative) errors.[14] Preliminarily, it seems difficult to disagree with Professor Markel's premises that the law should strive to minimize both types of error—first, that it should avoid punishing persons who do not deserve punishment and avoid punishing excessively those who do (hence avoiding false-positive errors), and second, that it should capture as many flagrant offenders as reasonably possible and punish them sufficiently (hence avoiding false-negative errors). I agree that these abstract ideals are basically sound, and I agree that due process properly requires the law to diligently minimize false-positive errors. But Professor Markel and I divide on the importance of avoiding false-negative errors and on the costs we are willing to incur in that pursuit. In broadening the reach of punitive damages—including placing in the hands of strangers as well as victims the ability to enforce punitive damages against actors guilty of flagrant misconduct that may (or may not) cause injury to victims—Professor Markel expands this private law remedy into a pub-

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[12] *See* Markel, *supra* note 7, at 1387 n.5, 1393 & n.31, 1394 & n.32 (listing Guido Calabresi, Bruce Chapman and Michael Trebilcock, Thomas Galligan, Keith Hylton and Thomas Miceli, Mitchell Polinsky and Steven Shavell, and Catherine Sharkey as examples of scholars in the "cost internalization" or "deterrence" school); *id.* at 1394 & n.35 (listing Mark Geistfeld, Thomas Colby, Marc Galanter and David Luban, John Goldberg, Anthony Sebock, and Benjamin Zipursky as examples of scholars in the "victim vindication" school).

[13] *Id.* at 1403.

[14] Markel, *supra* note 6, at 256-57, 265-66.

lic penalty that bears an uncomfortable resemblance to the public law of crimes, and then he hoists it up on stilts.[15]

Professor Markel's special interest in reducing false-negative errors—maximizing the number of flagrant offenders who are caught and punished and assuring that they receive sufficient punishment—may spring from his orientation as a professor of criminal law. Unlike tort, restitution, and other branches of private law, which principally seek justice between private parties in private disputes, criminal law instead focuses on the retributive-justice and deterrence needs of the public.

Private law is also interested in the public consequences of its rules and adjudications, but its central concern is that victims are provided redress for the harmful effects of breaches of the civil law.[16] In cases of flagrant wrongdoing, retributive justice and deterrence are important to private law, but what drives private law's engines are the restitutionary and retributive needs of victims, not society. Thus, the essential retributive goal of punitive damages, a remedy of the private law, is to force wrongdoers to restore in full the well-being of those harmed by their aggravated misconduct. Call this "private revenge"[17] or call it "private retributive justice," but it is, at bottom, compensatory in that it extracts money from a person guilty of flagrant wrongdoing and uses it to repair resulting damage to the victim's basket of goods.

II. PUNITIVE DAMAGES FOR "THEFT"

How private retributive justice accomplishes the restitutionary needs of victims may be illustrated by a metaphor based on theft.[18] The flagrant wrongdoer (the "thief") deserves, retributively, to pay the

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[15] While Professor Markel avoids enlisting the police and public prosecutors in his effort to catch malefactors, his enlistment of every member of society is reminiscent of the ruthless use of collaborators by police states in the past.

[16] *See, e.g.*, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 530 (2005) ("[N]otwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals such as loss-spreading or efficient precaution-taking, it is still best understood as a law of redress."); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003) (arguing that tort law is built "on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them").

[17] *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 433-34 (2008); *see also* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1031 (2007) ("[A]n account of punitive damages as state-sanctioned revenge is the best interpretation of the practice.").

[18] This metaphor draws from David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 708-13 (1989).

victim a punitive form of aggravated damages because the thief has "stolen" goods from the victim that need to be returned in order to prevent the unjust impoverishment of the victim as well as the unjust enrichment of the thief. Once thrown out of balance by the offense, the scales of justice can only be restored by corresponding restitution for the theft.[19]

Initially, punitive damage awards serve to reimburse the plaintiff for losses that the normal rules of damages do not compensate. While providing plaintiffs a form of redress, modern rules of compensatory damages fail to restore many of a plaintiff's actual losses, particularly those involving intangible harm. For example, a severely injured person who is rendered immobile for many months may lose a number of important interpersonal relationships and will surely suffer a large variety of missed (and often unknown) opportunities. There is no practical way for the law to ascertain such amorphous losses, as real as they may be. Ordinarily, therefore, in fairness to injurers, such losses are excluded from the compensation system and instead left on victims as a risk of life. When actors inflict injury intentionally or pursue their private interests in a manner that they know exposes others to substantial undue risks, however, the equities of the situation change considerably, and responsibility for ordinarily unrecoverable emotional and other intangible losses properly may be placed upon the flagrant wrongdoer.[20]

Another, more esoteric loss suffered by theft victims, a form of loss that nevertheless is very real, springs from the reprehensibility of theft transactions. When an actor flagrantly violates the rights of another person, the actor "steals" the victim's autonomy and thereby asserts that the thief is of greater worth than the victim. If such autonomy thefts are not subject to penalties in addition to requiring the thief to restore the stolen goods (i.e., compensatory damages), the rectification of the transaction is incomplete. This is because such theft trans-

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[19] *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (Discussion Draft 2000) ("A person who is unjustly enriched at the expense of another is liable in restitution to the other.").

[20] *See, e.g.*, Stuart v. W. Union Tel. Co., 18 S.W. 351, 353 (Tex. 1886) (observing that the punitive-damages doctrine probably "has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation"); *see also* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 615 (2003) (noting that early American courts recognized that punitive damages served "not only as punishment, but also as compensation for otherwise non-compensable harms"); Edw. C. Eliot, *Exemplary Damages*, 29 AM. L. REG. 570, 572 (1881) (asserting that punitive damages arose from "[t]he difficulty of estimating compensation for intangible injuries").

actions contain two distinct components: (1) the transfer of goods from the victim to the thief, and (2) the deliberately wrongful nature of the transfer in violation of the plaintiff's vested rights—the illicit transfer of freedom from the victim to the thief.

While compensatory damages explicitly redress the first component, at least to some extent, punitive ("extracompensatory" or "aggravated") damages address both components. That is, in addition to more robustly restoring the victim's stolen goods as conventionally conceived, punitive damages serve also to restore the equality of the victim in relation to the thief by diminishing the extra worth and freedom held illicitly by the thief who stole these fundamental goods of personhood from the victim.[21] By vindicating a person's right to remain free from flagrantly inflicted harm through compensation for the aggravated nature of the person's damages attributable to the aggravated nature of the wrong, the law restores and reaffirms the equal worth and freedom of the person victimized by the flagrant wrong.[22]

Finally, although the payment of attorneys' fees and other costs of litigation ordinarily is not articulated as an explicit purpose of punitive damages, it sometimes is,[23] and requiring a plaintiff to incur these substantial costs to rectify a theft or other aggravated wrong appears fundamentally unfair. Because at least one-third of a plaintiff's recovery is ordinarily expended on legal fees, a verdict that does not in-

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[21] *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (Discussion Draft 2000) ("A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference.").

[22] *See, e.g.*, Clark v. Cantrell, 529 S.E.2d 528, 533 (S.C. 2000) ("[P]unitive damages [provide] vindication . . . and . . . compensate or satisfy for the willfulness with which the private right was invaded . . . ." (internal quotation marks omitted)); Goldberg, *supra* note 11, at 442 (explaining Blackstone's conception that "money awarded should suffice to provide satisfaction for the *victimization*, including not only the harm caused to the victim, but also the objective fact of having been mistreated by another" and noting "Blackstone's observation that claims for particularly heinous or willful wrongs may subject the tortfeasor to a statutory multiplier or 'very large and exemplary damages' . . . [as] part of the redress to which the victim is entitled because of the nature of the tortfeasor's mistreatment of the victim"); Sebok, *supra* note 17, at 1020-22 (arguing that punitive damages provide redress by allowing private revenge for abusive, harmful behavior).

[23] *See, e.g.*, Triangle Sheet Metal Works, Inc. v. Silver, 222 A.2d 220, 225 (Conn. 1966) (noting that the lower court had awarded punitive damages in the form of attorneys' fees but holding that punitive damages were inappropriate); St. Luke Evangelical Lutheran Church, Inc. v. Smith, 568 A.2d 35, 36 (Md. 1990) (holding that "whenever punitive damages are appropriate, the amount of reasonable attorney's fees incurred in the pending litigation may be considered by the jury"); *see also* Markel, *supra* note 7, at 1401-02 ("The defendant should also pay plaintiff's lawyers' fees (for the marginal labor necessary to prove the defendant's reprehensibility) . . . .").

clude a sum for these and other litigation expenses almost always leaves the plaintiff substantially worse off than before the injury. Regardless of whether requiring an injured plaintiff to suffer this significant detriment makes sense in an ordinary case, it is plainly an illogical and unjust result when victims must use the law to obtain redress from thieves. In such cases, it is surely thieves—not victims—who should pay the costs of activating and driving the legal system to restore stolen goods to their rightful owners.

The theft metaphor reveals the elementally restorative purpose served by punitive damages. As a matter of desert, it seems self-evident that a defendant who has intentionally or wantonly injured another should fairly be required, as much as a money judgment is capable of doing, to remove from the plaintiff's life all traces of the aggravated wrong.[24] While the public and private hats of retributive justice overlap, Professor Markel's proposal to remove the private hat of retributive justice altogether and to scoop up all retributive damages as public fines solely for the state[25] subverts the critical retributive, restitutionary interests protected by the private law. For aggravated wrongdoing like theft, the private law should jealously guard its punitive damages remedy to assure that victims are fully compensated for their various losses.

III. MAKING PUNITIVE DAMAGES WORK

After explaining why and how punitive damages should be fragmented pluralistically into their functional components, Professor Markel adroitly examines a variety of secondary issues, such as settlement, insurance, procedural, and constitutional matters to determine how they fit together under his disaggregated scheme.[26] Apart from difficulties raised by the dominance of public retribution in his scheme, he masterfully explains why a large number of procedural safeguards should or should not be applied to the separate components of punitive damages—retributive, deterrence, and aggravated damages—in his reconstructed scheme. Explaining that compensation-grounded forms of punitive damages (including both aggravated damages and deterrence damages available after *Philip Morris USA v.*

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[24] *See, e.g.*, Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 284 (2008) ("[T]he inadequacy of compensatory damages continues to supply a defensible rationale for punitive damages—the type of explanation required by any retributive rationale for these awards.").

[25] Markel, *supra* note 6, at 302-04.

[26] Markel, *supra* note 7, at 1422-78.

Williams[27]) might well escape constitutional limitation altogether,[28] Professor Markel argues that safeguards for defendants confronted with retributive damages (of the public kind) should trod a middle path between the basic safeguards normally applied in private litigation and the significantly heightened protections afforded by the Constitution to those accused of criminal misdeeds.[29]

A good example of Professor Markel's intermediate position on many procedural-safeguard issues concerns the standard of proof. Professor Markel agrees with the popular reform, adopted by most jurisdictions in recent decades, of raising the standard of proof from a "preponderance of the evidence" (the standard used in ordinary private law litigation) to one of "clear and convincing" evidence.[30] This salutary adjustment of the standard of proof for punitive damages focuses decisionmakers on the evidentiary merits of each case and provides courts with both authority and the obligation to closely monitor the sufficiency of the evidence for such awards.[31]

Whether insurance contracts for punitive damages should be allowable as a matter of public policy is a complex matter on which courts are split.[32] In view of the starkly punitive purpose of his retributive damages scheme, one might expect that Professor Markel would agree with courts that prohibit insurance against liability for punitive damages on the ground that the retributive effects of such liability are aimed solely at aggravated wrongdoers who deserve the punishment and who thus should not be allowed to shift it to innocent third parties. Moreover, because he argues that an important purpose of retributive damages is to remove the wrongdoer's ill-gotten gains,[33] one would assume that Professor Markel would oppose insurance that would restore such gains. Instead, based on reasoning that is not altogether clear,[34] he argues that such insurance contracts should be al-

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[27] 549 U.S. 346 (2007).

[28] Markel, *supra* note 7, at 1425-27.

[29] *Id.* at 1427, 1432.

[30] *Id.* at 1436-37. Roughly half the states have legislation to this effect, and many more have adopted this reform by judicial decision. *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW § 18.6, at 1257 & nn.22-23 (2d ed. 2008).

[31] I disagree, however, with Professor Markel's view that a preponderance of the evidence standard is preferable for aggravated and deterrence damages, *see* Markel, *supra* note 7, at 1437, because I believe that these, too, are properly grounded in retributive justice, albeit retributive justice of the private kind.

[32] *See* OWEN, *supra* note 30, § 18.5, at 1236-37 & nn.40-42.

[33] Markel, *supra* note 7, at 1401.

[34] Indeed, his arguments with respect to judgment-proof defendants and loss spreading, *id.* at 1465, as well as his arguments regarding how prohibiting insurance might increase risks to workers and customers, *id.* at 1469, are quite elusive.

lowed. He explains that intentional wrongdoing is not insurable in any event, thus reducing the question to whether courts should allow insurance against reckless misconduct, a context where competing, complex considerations are difficult to resolve.[35] Although he does not voice this view, insurance might well be justifiable for recklessly inflicted harm if courts administer punitive damages poorly and allow substantial false-positive errors—i.e., if courts frequently hold innocents liable for such damages.[36] Furthermore, to the extent that punitive damages truly are compensatory (aggravated and limited deterrence damages under his scheme), allowing insurance when a defendant is facing insolvency may possibly be sound. But, if the law were to adopt Professor Markel's *public* retribution scheme, then it seems quite clear that insurance contracts against such assessments should be disallowed. While Professor Markel's views on these matters may be preliminary,[37] the remarkable thing about his expanding punitive damage model is how elaborately fine-tuned most aspects of it truly are. In time, one may hope that he will have an opportunity to clarify why and how these important insurance issues should be resolved.

IV. PUNITIVE DAMAGES PURPOSES REDUX

Much of what Professor Markel suggests in explaining how procedural safeguards should be applied to punitive damages makes good sense. Yet, the radical way in which he would restructure punitive damages leads one ineluctably to reconsider how the various purposes of punitive damages properly should be configured under the developed constitutional jurisprudence that increasingly has cabined such awards over the past two decades. Perhaps because of our separate orientations—his from the public law of crimes, mine from the private law of torts—I think his restructuring is exactly backwards. While it seems quite normal to a person who studies the law of torts to assume that the retributive-justice and deterrence goals of punitive damages spring primarily from the private law's efforts to redress victim interests, I admit to having blithely accepted *public* retribution and *public* deterrence as beneficial side effects of this hybrid remedy, even as juries, in certain high-profile cases, sometimes bloat this public side of

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[35] *Id.* at 1463-64.

[36] *See* OWEN, *supra* note 30, § 18.5, at 1237 ("When the law is poorly defined and poorly administered . . . , the risk of undeserved punitive damage awards is substantial, making insurance contracts for such events more reasonable.").

[37] *See* Markel, *supra* note 7, at 1422-23.

the remedy. As the Supreme Court has marched ever deeper into the briar patch of punitive damages, I have viewed its foray largely as an untoward intrusion on the private law, almost as a trespass. Professor Markel's probing scholarship, in provoking a renewed focus on the separate functions of punitive damages, has provided me with new insights into what may be the essence of the Supreme Court's objections to how this remedy has developed and been applied in recent decades.

Surely, the Court has long been concerned about the growing size of such awards (albeit in a very small number of cases) and worried that the absolute magnitude of some punitive assessments is somehow outside the bounds of fairness.[38] But the sheer size of these awards in some prominent cases—for example, the Exxon Valdez oil-spill case,[39] the McDonald's hot-coffee-spill case,[40] any number of recent tobacco cases,[41] and, long ago, the Ford Pinto fuel-system-fire case[42]—may simply be a symptom of the problem. Plaintiffs' counsel and juries in these cases have used punitive damages for purposes the law has long stated to be appropriate: punishment and deterrence. And, in these cases, the punishment and deterrence assessed by the juries have been largely of the public form. Yet, what juries and courts *normally* do with punitive damages—directly contrary to the usual interpretation of their express goals—is provide additional *compensation* to theft victims (to return to this metaphor), awarding them the "aggravated" damages that naturally flow from aggravated wrongs. This truly reparative use of punitive damages is revealed empirically by how modest most

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[38] *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. . . . The threat of such enormous awards has a detrimental effect on the research and development of new products.").

[39] *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2614, 2634 (2008) (reducing the $5 billion jury verdict, already remitted by the Court of Appeals to $2.5 billion, to $507.5 million).

[40] *See* Liebeck v. McDondald's [sic] Rests., P.T.S., Inc., No. 93-02419, 1994 WL 16777706 (D.N.M. Sept. 16, 1994) (proposing a remittitur from the $2.7 million verdict to $480,000), *vacated*, 1994 WL 16777704 (Nov. 28, 1994); *see also* OWEN, *supra* note 30, § 18.1, at 1180 (discussing *Liebeck*).

[41] *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 350-52 (2007) (vacating a $79.5 million verdict); *see also* OWEN, *supra* note 30, § 18.7, at 1280 (discussing *Philip Morris USA*).

[42] *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 358, 391 (Ct. App. 1981) (upholding remittitur of a $125 million award to $3.5 million); *see also* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 48-49 (1982) (discussing *Grimshaw*); Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

punitive damage awards truly are—on average, less than their compatriot compensatory awards.[43]

Hence, I believe that the law deludes itself and is wrongheaded when it says categorically that a plaintiff is not "entitled" to punitive damages and that the purpose of punitive damages is to punish and deter, not to compensate the plaintiff.[44] By such assertions, I think what the law has actually meant is that punitive damages are distinct from the developed law of limited "compensatory" relief ordinarily available and that such damages are assessed in addition thereto both to fully restore victims of aggravated wrongdoing with monetary relief for their stolen goods, equality of worth, and other freedoms and to discourage malefactors from similarly harming such victims in the future. This is what I think the law principally, properly means by the punitive damages goals of punishment and deterrence—*private* retribution and *private* deterrence. For these thefts, private law principles of retributive, restitutionary justice in fact demand that thieves "return" full payments, in money damages, for their victims' stolen freedoms as well as for their stolen goods.[45]

CONCLUSION

Private law has long embraced the twin purposes of punishment—retribution and deterrence—as supportive features of its central pillar of restitution.[46] While it usually resides quietly out of sight, retributive

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[43] *See* LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH & JURY TRIALS IN STATE COURTS, 2005, at 7 tbl.8 (2008); Sebok, *supra* note 17, at 971-73.

[44] While most states hold that punitive damages are awardable only at a jury's discretion, I am attracted to the sentiment that "[a] plaintiff is *entitled* to recover punitive damages if the act complained of is determined to be willful, wanton or reckless." Camp v. Components, Inc., 330 S.E.2d 315, 316 (S.C. Ct. App. 1985) (emphasis added). A legislature thus might beneficially provide plaintiffs with a right to punitive damages, in cases of flagrantly harmful misconduct, to advance this remedy's restitutionary goal.

[45] This locates me squarely in the "victim vindication" school, as Markel dubs it, *see supra* note 12, though "private law redress" might be a better description. Students in this school sit at the feet of Ernest Weinrib, whose pioneering work on the correlativity of wrong and harm in private law provides the modern bedrock for tort theory, including punitive damages. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

[46] *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984) ("[P]reventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer."); *id.* at 26 ("This idea of prevention shades into that of punishment of the offender for what the offender has already done, since one admitted purpose of punishment is to pre-

justice in particular lies naturally beside restitutionary justice in the private law regime. What has troubled the Supreme Court, as it has reviewed multimillion dollar punitive damage judgments in recent decades, is how inflated the public-retribution side of this remedy has become in relation to private law's principal enterprise—returning wrongfully taken goods to the victim. When the balance of the mixed functions in punitive damages tips too heavily toward the public's interest in retribution and deterrence and away from compensation, the Court understandably becomes uncomfortable with results that look suspiciously like they spring from a public law scheme for inflicting punishment that has masked itself in a regime marked "private."

Long characterized as "quasi-criminal," punitive damages have always appeared to occupy a middle ground between the civil and criminal law. Nonetheless, this hybrid remedy has been firmly grounded in private law's task of restorative redress for victims of aggravated wrongs. Drawing from his study of the criminal law, Professor Markel lends a variety of public law perspectives to the dual problems of properly conceiving the mixed goals of punitive damages and making them work under the constitutional umbrella recently erected by the Court. In this pursuit, he lops off the public-retribution function of punitive damages and elevates it to a new nether region of "intermediate sanction" that lies closer to the criminal law and farther from its home in the private law of restitution.

Professor Markel and I agree that many aspects of punitive damages need adjusting and that, more generally, its functions need careful reconsideration. Indeed, his intense analysis of retributive justice is a singularly important study of this essential topic. Yet, by redirecting retribution's focus in punitive damages law away from victims of aggravated wrongdoing to the public at large; by expanding the realm of enforcement with a kind of "reprehensibility in the air," without need of harm or victim and enforceable by the world at large; and by minimizing victim rights to restitutionary justice and relegating them to an afterthought, the Markelian scheme aggravates punitive damages in any number of untoward ways.

One has to wonder about the Kafkaesque world constructed by Professor Markel, where free-floating reprehensibility is enforceable at will by any disgruntled law student who may lie in wait outside the office or home of a law professor who—after a long and dreary day of

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vent repetition of the offense."); Clarence Morris, *Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730, 733 (1930) (explaining that the two different functions of tort law, compensation and punishment, provide "a rough and ready sort of justice").

trying mightily to enlighten students in the classroom, colleagues in committees, and others through rigorous scholarship—enjoys a favorite wine and then operates a car harmlessly (if erratically) only to be apprehended by the student for this misbehavior.[47] I prefer the world we now inhabit—a world that answers to the clarion call of "no harm, no foul," a world where enforcers wear metal badges or have been personally harmed by flagrant wrongs, and a world where punitive damages are restitutionary in nature.

Nevertheless, by aggravating punitive damages with such skill and vigor, Professor Markel forces us to ponder anew how this hybrid remedy should be conceived, how it should be defined and limited, how it should be enforced, and, broadly, what kind of role punitive damages should play in addressing aggravated wrongdoing.

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[47] Slightly altered, this is Professor Markel's own example. *See* Markel, *supra* note 7, at 1467 n.271.