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## RESPONSE

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### “RETRIBUTIVE DAMAGES” AND THE DEATH OF PRIVATE ORDERING

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

Mayola Williams sued Philip Morris, the manufacturer of Marlboros, for the wrongful death (from lung cancer) of her husband Jesse, who had been a lifelong Marlboro smoker.<sup>1</sup> Despite warnings from the federal government, family, and many others, Jesse Williams had smoked because he allegedly believed Philip Morris’s claims that smoking had not been proven to be dangerous.<sup>2</sup> An Oregon jury awarded Ms. Williams \$821,000 in compensatory damages (reduced to \$521,000 because of a cap on pain and suffering) and \$79.5 million in punitive damages (of which sixty percent was diverted to the Oregon government<sup>3</sup>).<sup>4</sup> The punitive award was upheld by Oregon’s appellate courts and was reaffirmed on remand after the United States Supreme Court ordered it to be reconsidered in light of the Court’s ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>5</sup> The Oregon

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<sup>1</sup> *Williams v. Philip Morris Inc.*, 48 P.3d 824, 828 (Or. Ct. App. 2002), *vacated sub nom.* *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003).

<sup>2</sup> *Id.* at 829.

<sup>3</sup> See OR. REV. STAT. § 31.735 (2007) (directing sixty percent of all punitive damage awards into the “Criminal Injuries Compensation Account”).

<sup>4</sup> *Williams*, 48 P.3d at 828.

<sup>5</sup> *Williams*, 540 U.S. at 801 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

Supreme Court upheld the award under *Campbell* because Philip Morris's behavior was "extraordinarily reprehensible."<sup>6</sup>

A sharply divided United States Supreme Court reversed, finding that the punitive damages award against Philip Morris violated the company's constitutional right to due process.<sup>7</sup> Justice Breyer's majority opinion ruled for the first time that a factfinder must be instructed that it may not increase punitive damages because of harm caused to nonparties to a lawsuit.<sup>8</sup> Such harm is, Breyer conceded, relevant to the *availability* of punitive damages but may play no role in determining the *amount* of a punitive award.<sup>9</sup> The majority declined to consider a separate question—whether the one-hundred-to-one ratio of punitive to compensatory awards in *Williams* flouted the constitutional standards of *BMW of North America v. Gore*—presumably because it expected the *quantum* to be reduced on remand.<sup>10</sup>

In dissent, Justice Ginsburg, joined by Justices Scalia and Thomas, noted that Philip Morris's proposed jury instruction—the rejection of which was the basis for its appeal—itsself approved consideration of harm suffered by nonparties, and that, therefore, the majority's ruling did not respect the case's procedural posture.<sup>11</sup> Justice Thomas, agghast at yet another use of substantive due process, concluded that the Court's jurisprudence on punitive damages "is 'insusceptible of principled application.'"<sup>12</sup> Justice Stevens, writing separately, agreed with Justice Ginsburg that the defendant's appeal precluded the majority's ruling and added that he saw "no reason why an interest in punishing a wrongdoer 'for harming persons who are not before the court' should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct."<sup>13</sup>

I have long believed that the most coherent federal-constitutional justification for judicial control of state punitive damages awards is the Eighth Amendment's "excessive fines" clause.<sup>14</sup> Unfortunately, this

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<sup>6</sup> *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1177, 1181-82 (Or. 2006), *vacated sub nom. Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

<sup>7</sup> *Williams*, 549 U.S. at 353-55.

<sup>8</sup> *Id.* at 355.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 352 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)).

<sup>11</sup> *Id.* at 362-64 (Ginsburg, J., dissenting).

<sup>12</sup> *Id.* at 361 (Thomas, J., dissenting) (quoting *BMW*, 517 U.S. at 599 (Scalia, J., dissenting)).

<sup>13</sup> *Id.* at 358 (Stevens, J., dissenting) (quoting *Id.* at 349 (majority opinion)).

<sup>14</sup> See Michael I. Krauss, *Punitive Damages and the Supreme Court: A Tragedy in Five Acts*, ENGAGE, Oct. 2003, at 118, 119-20.

view was rejected by a majority of the Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*<sup>15</sup> In an interesting footnote to his *Williams* dissent, however, Justice Stevens returned to the Eighth Amendment.<sup>16</sup>

In any case, after *Williams*, judges must tell jurors to think about harm to nonparties in deciding whether the defendant's conduct merits a punitive award. But then jurors cannot think about that harm when determining the amount of punitive damages; to calculate punitive damages they must somehow consider only the harm to the plaintiff. How jurors are to clear their minds between these two steps is unclear—what *is* clear is that this issue will be back before the Court.

My own view is that awards of punitive damages almost always violate a key characteristic of tort law by breaching the private ordering/public ordering divide. If I am correct, the role Professor Dan Markel reserves for punitive damages is incompatible with tort law's nature. I wish to first summarize that view and then comment on "micro" aspects of Markel's interesting paper.

#### I. PUBLIC ORDERING VS. PRIVATE ORDERING

Political legal philosophers conventionally distinguish between aspects of law that regulate private ordering and aspects of law that regulate public ordering.<sup>17</sup> *Private ordering* is between citizens. Property law, contract law, tort law, and family law exist to regulate this ordering. *Public ordering* is between citizens and the State. Criminal law, administrative law, tax law, and welfare law are components of public ordering.

Public ordering is the *only* kind of legal order in totalitarian societies. In such a society there is no such thing as property as Americans experience it. Nor is there freedom of contract between consenting adults—private contracts would allow self-determination without state supervision and would thus be impermissible. Importantly, to the extent it is totalitarian, a state can have no tort law: there's no such thing as a private wrong because every wrong is a wrong against the state.

On the other hand, tort law is an essential component of private ordering. It is contract law's necessary counterpart—regulating non-

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<sup>15</sup> 492 U.S. 257 (1989).

<sup>16</sup> See *Williams*, 549 U.S. at 360 n.1 (Stevens, J., dissenting) ("I continue to agree with . . . those scholars who have concluded that the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout."). Indeed, the fact that most of the punitive award in this case accrued to the state makes the analogy to a fine even stronger than in *Browning-Ferris*.

<sup>17</sup> See generally Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623 (1991).

contractual interaction among humans. This rectification of private imbalances takes place without the intervention of prisons and police, quintessential components of public ordering. As part of private ordering, tort law has the several implications.

First, without a wrong, there is no imbalance requiring private redress. An efficient businessman who through acceptable techniques outcompetes his competitor owes the latter nothing. The causing of a loss incurs no tort liability; rather, it is the *wrongful* causing of a loss that creates the requirement of compensation.<sup>18</sup>

Similarly, wrongful behavior without damages creates no corrective justice duty. Driving home while drunk is negligent (wrongful) and may garner public outrage, but if a drunk makes it home without hitting anyone, she has no tort liability. Her crime is a matter for public ordering, which carries with it all of the protections to which an individual is entitled when the might of the state is directed against her. It is the conjunction of wrongfulness and the harm caused thereby that creates the tort obligation.<sup>19</sup>

Finally, when a tort occurs, compensation must be full.<sup>20</sup> Compensation is a function of damages wrongfully incurred rather than that of the extent of wrongdoing. A tortfeasor who negligently burns down a \$50,000 house is liable in tort to pay \$50,000 to make the homeowner whole. If that house was worth \$1 million, she would likewise be required to pay \$1 million to its owner. This is not because tort law favors the rich, but because tort equally respects the poor and the rich. Each tort victim has the right to be returned to her former state by the tortfeasor who wrongfully harmed her—that far but no farther. Similarly, rich tortfeasors owe full compensation, as do poor

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<sup>18</sup> This is of course Aristotle's conception of corrective justice as first sketched in ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5, ch. 4, at 120-23 (Martin Ostwald trans., 1962). For a modern description, see ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56-83 (1995). Corrective justice theory is so orthodox that jurists who depart from it are noteworthy. See, e.g., John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2037 (1997) (contrasting Judge Weinstein's jurisprudence to "the traditional measure of relief—full compensation—as the norm of justice in mass tort cases").

<sup>19</sup> See generally Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987).

<sup>20</sup> See Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 46 U. LOUISVILLE L. REV. (forthcoming 2010) (manuscript at 32-39), available at <http://ssrn.com/abstract=1272678> (applying this principle to misguided tort reform efforts to reduce recovery through the abolition of the collateral source rule).

tortfeasors.<sup>21</sup> *Public* law may distinguish in many ways between the rich and the poor (e.g., with regard to “progressive” income tax rates or criminal sentencing guidelines), but private law is properly blind to wealth.

Punitive damages as currently understood do not fit into this scheme of tort law because, by definition, punitive damages are overcompensatory. Nevertheless, a different conception of punitive damages was present at the conception of tort law. Under that conception punitive damages continue to have a legitimate but extremely limited role in tort.

## II. PUNITIVE DAMAGES’ HISTORICALLY LIMITED ROLE

England’s common law courts first awarded punitive damages in the eighteenth century at a time when the institutional structure of criminal law enforcement was quite primitive.<sup>22</sup> Plaintiffs invariably served as private attorneys general and collected “penalties.” In fact, quite a few such “punitive” damage awards were in reality compensatory. As Judge Richard Posner explains in *Mathias v. Accor Economy Lodging, Inc.*,

An example is deliberately spitting in a person’s face, a criminal assault but because minor readily deterrable by the levying of what amounts to a civil fine through a suit for damages for the tort of battery. Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence—and an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury—and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that his act would incite a breach of the peace by his victim.<sup>23</sup>

The premise for Judge Posner’s observation may be the fact that tort law provided no subjective damages (damages for the outrage to one’s dignity) to victims of dignitary harms who suffered no neurolog-

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<sup>21</sup> Of course, if the tortfeasor is so poor that he has insufficient assets to compensate the victim (and insufficient insurance to make him solvent), then he cannot be adequately reached in tort.

<sup>22</sup> See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12-20 (1982) (tracing the origins of punitive damages in Anglo-American law).

<sup>23</sup> *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676-77 (7th Cir. 2003).

ical pain.<sup>24</sup> “Punitive” damages in these dignitary cases were not punitive at all. They remedied a loophole in tort law in cases where damages were grossly undercompensatory.<sup>25</sup>

An excellent contemporary illustration of this function for punitive damages is the aforementioned Seventh Circuit decision, *Mathias v. Accor Economy Lodging, Inc.*<sup>26</sup> In *Mathias*, a motel knowingly rented rooms infested with bed bugs while fumigation took place, instead of closing down for a few days and losing rental income.<sup>27</sup> The plaintiffs, who were bitten, claimed that the defendant was guilty of “willful and wanton conduct,” making it liable for punitive damages under Illinois law.<sup>28</sup> The jury agreed and, although it granted only \$5000 in compensatory damages, awarded \$186,000 in punitive damages.<sup>29</sup> The plaintiffs’ emotional distress was arguably substantial, but that distress could not be the object of compensatory damages.<sup>30</sup> In reality, the punitive award was compensatory. Indeed, American common law’s lack of a “loser pays” rule ensures undercompensation of the wrongfully injured. As Judge Posner noted in *Mathias*, the “American rule” enables strategic behavior by wealthy and culpable defendants:

[A wealthy defendant can] mount an extremely aggressive defense against suits such as this and by doing so . . . make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee.<sup>31</sup>

Today, we have paid attorneys general and local prosecutors, and fines are collected in public ordering settings. Indeed, today we have criminal offenses where in the past public ordering would never have

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<sup>24</sup> See, e.g., Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 393 (2009) (“[N]ineteenth-century tort law . . . refus[ed] to recognize claims mainly pursued by women, such as those for emotional distress.”).

<sup>25</sup> Cf. Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 40-58 (1990) (identifying situations when punitive damages could be used to reach efficient results).

<sup>26</sup> 347 F.3d 672.

<sup>27</sup> *Id.* at 674.

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

<sup>29</sup> *Id.*

<sup>30</sup> Will the plaintiffs ever again enjoy sleeping in hotel rooms or ever sleep soundly in such rooms again?

<sup>31</sup> *Id.* at 677.

been involved.<sup>32</sup> In addition to tort damages, the hotel in *Mathias* was subject to both criminal prosecution and a regulatory “death penalty”—the removal of its permit to operate a hotel.<sup>33</sup>

The prosecution of criminal offenses, however, is subject to constitutional protections, including Fifth Amendment protection against self-incrimination and double jeopardy,<sup>34</sup> Eighth Amendment protection against excessive fines,<sup>35</sup> and the Article I prohibition of ex post facto laws subjecting individuals to federal prosecution for crimes not previously clearly defined.<sup>36</sup> A tort trial today offers none of those protections: compulsory discovery compels self-incrimination, one tort may lead to many successful lawsuits, and the grounds for liability may be utterly unknown before judgment.<sup>37</sup> Extension of punitive damages beyond the rectification of “tort loopholes” would, therefore, be an abuse of the current public/private divide.

Such abuse occurs when punitive damages are sought in noncompensatory settings, but it also occurs in other areas of the law. “Civil penalties” sought by the state for having one’s car photographed by a speed camera allow for prosecution without due process (the state need not prove that the speeder is the defendant) and are a mockery of the criminal burden of proof (the defendant cannot recall the context of the speeding to justify it, since he is notified of the photo only weeks later; and he must identify anyone else driving his car in order to avoid liability).<sup>38</sup> Similarly, efforts by states to exact criminal punishment without jury trial through civil contempt proceedings have been properly repressed by the Supreme Court as intruding on public ordering.<sup>39</sup> Implementation of public policy through punitive damages awards similarly awaits satisfactory Supreme Court remedy.

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<sup>32</sup> See, e.g., HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (describing overlegislation and overenforcement of public offenses at the federal level).

<sup>33</sup> *Mathias*, 347 F.3d at 678.

<sup>34</sup> U.S. CONST. amend. V.

<sup>35</sup> U.S. CONST. amend. VIII.

<sup>36</sup> U.S. CONST. art. I, § 9.

<sup>37</sup> See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 466 (1993) (upholding tort liability for slander of title, previously unknown as a tort in West Virginia).

<sup>38</sup> See, e.g., Kevin P. Shannon, *Speeding Towards Disaster: How Cleveland’s Traffic Cameras Violate the Ohio Constitution*, 55 CLEV. ST. L. REV. 607, 620-21 (2007) (describing Cleveland’s speed camera enforcement ordinances).

<sup>39</sup> See *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 837-38 (1994) (relying on several considerations to determine that the parties held in contempt “were entitled to a criminal jury trial”).

Even when punitive damages are in fact compensatory, as in *Mathias*, they may no longer be needed for complete deterrence. Judge Posner virtually recognized this in *Mathias* when he validated the punitive damages award for exposing guests to bedbugs. Though he upheld the award for corrective justice reasons, he wondered out loud whether deterrence required it:

[I]t would have been helpful had the parties presented evidence concerning the regulatory or criminal penalties to which the defendant exposed itself by deliberately exposing its customers to a substantial risk of being bitten by bedbugs. That is an inquiry recommended by the Supreme Court. But we do not think its omission invalidates the award. We can take judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case.

### III. MODERN PUNITIVE DAMAGES AND PRIVATE ORDERING

The modern growth of substantial punitive awards is a product of confusion between private and public ordering. It is arguably one reason why four states' supreme courts have declared that their common law of tort does not permit punitive damages.<sup>41</sup> A fifth state has abolished punitive damages by statute.<sup>42</sup> Quite a few other states have statutory caps on punitive damages.<sup>43</sup> Of course, many states have no limitation on punitive damages. Yet, in all states punitive damages were "covertly compensatory" as in *Mathias* until the great torts explosion of the 1980s. Until 1976, the highest punitive damages award was

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<sup>40</sup> *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (citations omitted).

<sup>41</sup> See *Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988) ("Under Louisiana law, punitive or other 'penalty' damages are not allowable unless expressly authorized by statute."); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989) ("[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5 . . ."); *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (noting the "court's long-standing rule prohibiting punitive damages without express legislative authorization"); *Fleshner v. Technical Commc'ns Corp.*, 575 N.E.2d 1107, 1112 (Mass. 1991) ("Punitive damages are not allowed in this Commonwealth unless expressly authorized by statute.")

<sup>42</sup> See N.H. REV. STAT. ANN. § 507:16 (2009) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.")

<sup>43</sup> In my home state of Virginia, the cap is \$350,000. VA. CODE ANN. § 8.01-38.1 (2007). This is quite typical nationwide.

\$250,000,<sup>44</sup> a sobering observation in light of recent multibillion-dollar judgments.

Today, massive punitive damage awards in products liability and intentional tort cases have blurred the public/private divide. Thomas Colby has described, in a nutshell, the intellectual fog created by the Supreme Court's refusal to address this problem:

The obvious objection to punitive damages is that it seems clearly unconstitutional to punish a defendant with a sanction that the Supreme Court concedes is conceptually and functionally indistinguishable from a criminal punishment without affording the procedural safeguards that the Constitution guarantees to criminal defendants. That objection has plagued punitive damages for well over a century. Yet the Supreme Court has never confronted it. Instead, the Court has consistently sidestepped the issue with the assurance that punitive damages must be constitutional because they predate the Constitution and the Framers manifested no intention to displace them.<sup>45</sup>

Yet, as we have seen, pre-Constitution punitive damages were qualitatively different from today's punitive damages. Today's punitive damages awards are usually frank exercises in public policymaking, while pre-Constitution damages were either a product of an underdeveloped public ordering system or disguised compensation for damages that, for historical reasons, tort law had denied.

#### IV. MARKEL'S MISSTEPS

Dan Markel, in two recent articles, has attempted to provide a "principled application" of punitive damages (which he calls "retributive damages"), the lack of which was condemned by Justices Thomas and Stevens in *Williams*.<sup>46</sup> In *Retributive Damages*, Markel argues that punitive damages are uniquely qualified—and should be restructured—"to advance the public's interest in retributive justice."<sup>47</sup> In *How Should Punitive Damages Work?*, Markel focuses on the nuts and

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<sup>44</sup> David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 2-3 (1982).

<sup>45</sup> Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 395 (2008) (footnotes omitted); see also Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 131 (2005) (noting the Supreme Court's "disinclination to engage the civil-criminal gestalt").

<sup>46</sup> Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009) [hereinafter Markel, *How Should Punitive Damages Work?*]; Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009) [hereinafter Markel, *Retributive Damages*].

<sup>47</sup> Markel, *Retributive Damages*, *supra* note 46, at 239.

bolts of the retributive system he favors, including its procedural safeguards,<sup>48</sup> effects on insurance markets,<sup>49</sup> and regulation of settlements.<sup>50</sup> Both of Markel's articles outline a "pragmatic form of redress against anti-social misconduct" by "wealthy and powerful individuals."<sup>51</sup>

Markel uses yet another complicated multifactor test<sup>52</sup> to determine when and within what limits punitive damages should be available. He recommends using a percentage of the defendant's wealth.<sup>53</sup> He adds suggested jury instructions as an appendix to his first article.<sup>54</sup> In the second article, he crafts a set of procedural protections for the "intermediate sanction" that is punitive damages<sup>55</sup> and appends slightly modified jury instructions.<sup>56</sup>

It should be obvious that I do not find Markel's theoretical defense and explication of punitive damages tenable. I reject his premise that punitive damages are authorized in any but quasi-compensation cases, whether to pay for moral offenses or for attorneys' fees.<sup>57</sup> Retributive use of punitive damages represents, to me, a pollution of tort law by public ordering principles.<sup>58</sup>

Though I reject Markel's overall strategy, for those who find it palatable, I note several specific problems with several of his tactics.

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<sup>48</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 46, at 1423-25.

<sup>49</sup> *Id.* at 1463-69.

<sup>50</sup> *Id.* at 1471-78.

<sup>51</sup> Markel, *Retributive Damages*, *supra* note 46, at 335. The desire to limit punitive damages to suits against the rich is refreshingly honest, if empirically unneeded—the poor are unlikely to be sued in tort and even less likely to have the wherewithal to pay punitive damages.

<sup>52</sup> For a chronicle of the rise of balancing tests in constitutional adjudication and a critical discussion of its merits, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

<sup>53</sup> Markel, *Retributive Damages*, *supra* note 46, at 248.

<sup>54</sup> *Id.* at 336-40.

<sup>55</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 46, at 1435-62.

<sup>56</sup> *Id.* at 1479-84.

<sup>57</sup> It should be noted that the portion of the *Williams* punitive award left to the plaintiff, after deduction of the state's "take," is meant in part to compensate for legal fees payable under the "American Rule." See OR. REV. STAT. § 31.735(1)(a) (2007) ("Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph . . ."). Clearly, the Oregon statute recognizes that punitive awards are in part compensatory and implies that the part of the punitive award that is not compensatory does not justly belong to the victim.

<sup>58</sup> I share the view of Martin Redish and Andrew Mathews that "the concept of a distinct category of 'private' punishment for 'private' wrongs is, at its foundation, incoherent . . ." Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 19, n.90 (2004).

First, Markel's notion that punitive damages should represent a percentage (between 0.5% and 10%) of a defendant's net worth—i.e., that wealthier defendants should pay higher punitive awards *ceteris paribus*—is in my opinion subject to severe Due Process problems.<sup>59</sup> Crucial both to tort law and to our understanding of equality as a component of the rule of law, Aristotelian corrective justice holds that, unlike liability, “sanctions [(e.g., punitive damages)] should be based on the wrong done rather than on the status of the defendant.”<sup>60</sup> If a person is to be punished, it should be for what she has done, not for who she is, even if she is a large corporation. Of course, if tort law is meant to deter, not to correct private injustice, then some have argued that the rich need greater deterrents than do the poor.<sup>61</sup> Does Markel wish to be identified with those who see tort law as quintessentially deterrent (and who therefore must make the case that criminal law, tax law, securities law, and the other components of public law are somehow insufficiently deterrent in their combined penalties on culpable corporations)?

In any case, the use of a defendant's net worth to help determine punitive damages is theoretically troubling and insufficiently thought through by Markel. As Judge Posner indicated in *Mathias*, net worth is not a particularly powerful measure of a corporation's resources. It is essentially an accounting artifact that reflects the allocation of ownership between equity and debt claimants. A firm financed largely by equity investors has a large net worth, while an otherwise-identical firm “financed largely by debt may have only a small net worth because accountants treat debt as a liability.”<sup>62</sup> Markel's proposal, if implemented, would lead corporations to favor debt over equity at the margin and to dole out more in dividends than otherwise would be the case, so as to lower their expected outlays of punitive damages. To my knowledge, no sound philosophical or economic reason exists to create such an incentive. Markel hopes to avoid this problem by using an undefined term, “net value,” to determine—along with the degree

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<sup>59</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring) (arguing that apportioning punitive damages to wealth “provides an open-ended basis for inflating awards when the defendant is wealthy”); *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 509 (7th Cir. 1992) (“Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this, and the court in this case had none.”)

<sup>60</sup> *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

<sup>61</sup> See, e.g., Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 422-23 (1992) (arguing that “wealthy defendants should be required to take more care than less wealthy defendants” to realize society's “optimal level of care”).

<sup>62</sup> *Mathias*, 347 F.3d at 677-78.

of culpability—the quantum of punitive damages for corporations.<sup>63</sup> But “net value,” however it is defined,<sup>64</sup> is no more attractive than “net worth,” in my opinion: why should a corporation that wastes social resources while committing evil deeds pay less in punitive damages than a corporation whose tremendous contributions to consumer surplus have positively affected its takeover price?

Second, Markel’s rules for dealing with criminal prosecution and civil litigation for the same tortious behavior pose serious problems. Markel advocates that the “intermediate sanction” of punitive damages would be credited against any fines assessed against the company, and if a company has already been criminally convicted for relevant conduct, such conviction would preclude any claim for punitive damages based on the underlying conduct.<sup>65</sup> Obviously, Markel offers this solution as one way to resolve the constitutional conundrum of double jeopardy—how to prevent the defendant from “paying twice” for the same crime? But the political machinations involved in the decision to, for example, delay a criminal prosecution—so that the “prize” for misbehavior can accrue to a politically favored private party and not to the state—are too numerous and severe to contemplate seriously. Indeed, occult influence can run in both directions: one can anticipate cases where innocent corporations anxious to avoid confiscatory punitive damages decide to plead guilty to a crime they did not commit. How all of this is compatible with justice is anyone’s guess.

Finally, courts are utterly ill-equipped to deal effectively with the settlement process, which they would have to supervise very closely to prevent settlements from producing “sweetheart deals” that expand compensatory damages and exclude punitive damages in order to defraud insurers (whose policies often exclude coverage of punitive damages) or the state (who, like Oregon, sometimes gets a “take” of punitive damages), as Markel concedes.<sup>66</sup>

Markel counters that punitive damages should be insurable.<sup>67</sup> But would he mandate such insurance by statute? If not, there are sound reasons related to “adverse selection” why insurers might want to exclude Markel’s punitive damages from their contractual coverage—

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<sup>63</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 46, at 1400-01; Markel, *Retributive Damages*, *supra* note 46, at 288-89.

<sup>64</sup> *See id.* at 289 (“With a corporation, we could look at the worth of the enterprise as measured by valuation models used on Wall Street.”).

<sup>65</sup> Markel, *How Should Punitive Damages Work?*, *supra* note 46, at 1458.

<sup>66</sup> *Id.* at 1471-76.

<sup>67</sup> *Id.* at 1477.

higher premiums would have to be charged to corporations with large amounts of equity, thereby exacerbating the incentive to overleverage.

#### CONCLUSION

Some cars require high-octane gasoline, while others need only regular. Mid-grade gasoline, a “balanced” and “intermediate” solution, may in fact be optimal for virtually no vehicles. Such is, alas, often the fate of compromises. But mid-grade gasoline is at least nothing but a mixture of low- and high-octane fuel. The “compromise” of “intermediate” “retributive damages” is, to the contrary, more like mixing oil and water. It is a balance of two incommensurables—private and public ordering. When this balancing occurs, private ordering is always the loser.

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