Double Jeopardy And The Rule Against Punitive Damages Of *Taber v. Hutson*[1]

I. Introduction

In considering the propriety of an award of punitive damages in a civil action, the vast majority of courts have held that it is immaterial that the defendant is also subject to criminal prosecution for the same act.[2] Indiana, however, is a member of the small minority of states which, at an early date, assumed a position contrary to the majority rule and held that when a defendant is sued for a tort which is also the subject of criminal prosecution, the rule that gives damages not only to recompense the plaintiff, but to punish the offender is not applicable.[3] Despite recent vehement assaults,[4] the Indiana courts have reluctantly continued to adhere to the archaic and frequently inequitable minority position. This Note will initially address the scope of the *Taber* rule and analyze both the theoretical and the practical problems encountered in its application. The discussion will then turn to an examination of the rationale offered in support of the *Taber* rule and to an alternative method of alleviating the problems to which the rule is directed. However, before engaging in any detailed analysis of the *Taber* rule, a brief description of the purpose and scope of punitive damages in general is appropriate.

II. Punitive Damages Generally

The terms "exemplary," "punitive," and "vindictive" damages have all been applied interchangeably to a class of money damages awarded in addition to those actually necessary to compensate the plaintiff for his injuries.[5] It was well established in early English law

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[1]5 Ind. 322 (1854).

[2]*E.g.*, Wilson v. Middleton, 2 Cal. 54 (1852); Garland v. Wholeham, 26 Iowa 185 (1868); Chiles v. Drake, 59 Ky. (2 Met.) 146 (1859); Elliott v. Van Buren, 33 Mich. 49 (1875); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908); Brown v. Swineford, 44 Wis. 282 (1878).

[3]*E.g.*, Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1885); Cherry v. McCall, 23 Ga. 193 (1857); Meyer v. Bohlfing, 44 Ind. 238 (1873); Humphries v. Johnson, 20 Ind. 190 (1863); Nossaman v. Rickert, 18 Ind. 350 (1862); Taber v. Hutson, 5 Ind. 322 (1854); Fay v. Parker, 53 N.H. 342 (1872).

[4]*E.g.*, McCarty v. Sparks, 388 N.E.2d 296 (Ind. Ct. App. 1979); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. Ct. App. 1978).

[5]Such damages are also referred to as "smart money" in the earlier cases. "Punitive" and "exemplary" are the terms most often used today.

that the measure of damages in civil actions was completely within the discretion of the jury.[6] The courts were accordingly reluctant to interfere with jury determinations of damages.[7] This judicial reluctance resulted primarily from the realization that the early English juries were composed of the local citizenry which generally possessed a unique understanding of the dispute and, therefore, occupied the most advantageous position from which to assess the proper measure of damages.[8] Gradually, however, standards were developed with which to measure compensatory damages, and by the end of the eighteenth century, only pecuniary losses were awarded in personal injury cases.[9] Despite the development of these standards, the courts remained reluctant to reduce an excessive damage award in a certain class of cases. In *Huckle v. Money*,[10] the court justified this judicial reluctance through the establishment of the doctrine of punitive damages.[11] In passing upon the excessiveness of the jury award, the court, through the pen of Lord Camden, stated:

> [T]he personal injury done to him [plaintiff] was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 £ damages would have been thought damages sufficient; but the small injury done to the plaintiff . . . did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial . . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.[12]

Under current Indiana law, exemplary damages are awarded only when the defendant's behavior results from malice, gross fraud,

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[6]*See, e.g.*, 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 349 (9th ed. 1912). For a general discussion of punitive damages, *see id.* §§ 347-88; C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 77-85 (1935); 2 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 390-412 (4th ed. 1916).

[7]*See* Gilbert v. Berkinshaw, 98 Eng. Rep. 911 (K.B. 1774); Russel v. Palmer, 95 Eng. Rep. 837 (K.B. 1767); Townsend v. Hughes, 86 Eng. Rep. 994 (K.B. 1726).

[8]C. MCCORMICK, *supra* note 6, § 6, at 25; 1 T. SEDGWICK, *supra* note 6, § 349, at 688.

[9]*See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-19 (1957) [hereinafter cited as Note].

[10]95 Eng. Rep. 768 (K.B. 1763) (tort action based upon the use of an invalid warrant issued by the Secretary of State).

[11]*Id.* at 768-69.

[12]*Id.*

or oppressive conduct.[13] Thus, when the conduct complained of is the result of simple negligence, an award of punitive damages is inappropriate.[14] Unlike compensatory damages, exemplary damages are generally held not to be recoverable as of right[15] but rest with the discretion of the jury.[16] The court may review an award of punitive damages[17] but in Indiana will not reverse an award unless at first blush the punitive damages appear outrageous.[18]

Two principal theories have been advanced as justification for an award of punitive damages. The majority of jurisdictions hold that exemplary damages are awarded to punish and to deter the defendant and others from committing similar offenses in the future.[19] Under this rationale, punitive damages are not compensatory but are awarded in the interest of society and relate only in-

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[13]*E.g.*, Jeffersonville Silgas, Inc. v. Wilson, 154 Ind. App. 398, 290 N.E.2d 113 (1972); Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953).

[14]*E.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Prudential Ins. Co. v. Executive Estates, Inc., 369 N.E.2d 1117 (Ind. Ct. App. 1977); LoRocco v. New Jersey Mfrs. Indem. Ins. Co., 82 N.J. Super. 323, 197 A.2d 591 (1964); Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).

[15]*See* Smith v. Hill, 12 Ill. 2d 588, 147 N.E.2d 321 (1958); City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878 (1902); Fink v. Thomas, 66 W. Va. 487, 66 S.E. 650 (1909).

[16]*E.g.*, Clark v. McClurg, 215 Cal. 279, 9 P.2d 505 (1932); Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E.2d 778 (1955); Gill v. Selling, 125 Or. 587, 267 P. 812 (1928) ("It is for the jury, in the exercise of its discretion, to assess [punitive] damages after the court, as a preliminary matter of law, has held that it is a proper matter for its consideration." *Id.* at 591, 267 P. at 814). *But see* Sample v. Gulf Ref. Co., 183 S.C. 399, 191 S.E. 209 (1937) ("[U]nder the settled rule prevailing in this state punitive damages are awarded not only as punishment for a wrong, but also as vindication of private right, and when under proper allegations a plaintiff proves a willful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages." *Id.* at 410, 191 S.E. at 214).

[17]*See, e.g.*, Stoner v. Wilson, 140 Kan. 383, 36 P.2d 999 (1934); Stene v. Hillgren, 78 S.D. 1, 98 N.W.2d 156 (1959); Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 P. 255 (1925).

[18]*E.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 317-18, 362 N.E.2d 845, 849 (1977) (citing City of Indianapolis v. Stokes, 182 Ind. 31, 105 N.E. 477 (1914)) ("Damages are not considered excessive unless at first blush they appear to be outrageous and excessive, or it is apparent that some improper element was taken into account by the jury in determining the amount." 182 Ind. at 35, 105 N.E. at 479). Some jurisdictions employ what is known as the ratio test. In these jurisdictions, an award of punitive damages must bear some relation to actual damages. This test has been criticized as "plac[ing] an arbitrary limit on the amount of punitive damages which juries may give . . . ." Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180 (1931) [hereinafter cited as Morris].

[19]*See, e.g.*, Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899); Thomson v. Catalina, 205 Cal. 402, 271 P. 198 (1928); Eshelman v. Rawalt, 298 Ill. 192, 131 N.E. 75 (1921); York Corp. v. E. Perry Iron & Metal Co., 157 Me. 68, 170 A.2d 388 (1961); West Bros. v. Barefield, 239 Miss. 530, 124 So. 2d 474 (1960); Stevenson v. Economy Bank of Ambridge, 413 Pa. 442, 197 A.2d 721 (1964); Wright v. Everett, 197 Va. 608, 90 S.E.2d 855 (1956); Cosgriff Bros. v. Miller, 10 Wyo. 190, 68 P. 206 (1902).

cidentally to plaintiff's compensation.[20] Indiana clearly subscribes to this theory of punitive damages.[21]

In a minority of jurisdictions, exemplary damages are awarded, not to punish the defendant, but to compensate the plaintiff for the injury suffered.[22] Under this rationale, the defendant's aggressive conduct is said to increase the plaintiff's actual damage.[23] Several cases have found the distinction between the two principal theories to be of little practical importance.[24] It is reasoned that a large award of exemplary damages will serve both to deter the defendant and to compensate the plaintiff receiving the award.[25]

The doctrine of exemplary damages is not favored in the law[26] and has, indeed, been opposed in a few jurisdictions.[27] The majority of jurisdictions, however, have adopted the doctrine as part of the common law.[28]

III. THE *TABER* RULE

A. Generally

The commission of many torts will subject the defendant to both criminal as well as civil liability.[29] The defendant, therefore, may suf-

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[20]*See, e.g.*, French v. Deane, 19 Colo. 504, 36 P. 609 (1894); Florida E. Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933) ("[E]xemplary damages are, as it has been said, allowed by the law, not as a matter of compensation to the injured party, but because of the quality of the wrong done by the *tort-feasor* . . . ." 111 Fla. at 283, 149 So. at 632 (emphasis added)).

[21]*E.g.*, Vaughn v. Peabody Coal Co., 375 N.E.2d 1159 (Ind. Ct. App. 1978); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. Ct. App. 1978); Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566 (Ind. Ct. App. 1977); Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92 (1972).

[22]Doroszka v. Lavine, 111 Conn. 575, 150 A. 692 (1930); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922); Fay v. Parker, 53 N.H. 342 (1873).

[23]*See* Lucas v. Michigan Cent. R.R., 98 Mich. 1, 56 N.W. 1039 (1893); Tenhopen v. Walker, 96 Mich. 236, 55 N.W. 657 (1893).

[24]*See, e.g.*, Devine v. Rand, 38 Vt. 621 (1866) (stating that it could be of little practical difference to plaintiff or defendant whether damages are allowed according to the maliciousness of the act, whether they are allowed on the ground that the willfullness of the act increased or aggravated the plaintiff's injury, or whether they are allowed as punishment to the defendant. *Id.* at 626).

[25]An award of punitive damages will always serve to offset the cost of litigation and similar expenses.

[26]*See* Harris Mfg. Co. v. Williams, 164 F. Supp. 626 (D. Ark. 1958); White v. Doney, 82 Idaho 217, 351 P.2d 380 (1960) ("However, having in mind that such damages are not favored . . . the allowance of punitive damages should be exercised with caution and within the narrowest limits . . . ." *Id.* at 224, 351 P.2d at 384).

[27]Vincent v. Morgan's La. & Tex. T.R. & S.S., 140 La. 1027, 74 So. 541 (1917); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Boyer v. Barr, 8 Neb. 68 (1878); Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

[28]*See* 1 T. SEDGWICK, *supra* note 6, § 351, at 693.

[29]*E.g.*, Shelley v. Clark, 267 Ala. 621, 103 So. 2d 743 (1958); McCarty v. Sparks, 388 N.E.2d 296 (Ind. Ct. App. 1979) (assault and battery); Miller v. Blanton, 213 Ark. 246,

fer both civil and criminal penalties for a single course of conduct in apparent contravention of the principles of double jeopardy.[30] According to the majority of jurisdictions, however, the provision against double jeopardy will not bar the imposition of a civil penalty when the defendant is also subject to criminal prosecution.[31] The majority position, which was the position taken by the common law,[32] is founded primarily on the theory that exemplary damages are not awarded in lieu of criminal punishment and, in fact, have no relation whatever to the penalty imposed for the offense perpetrated upon the public.[33] In recognizing the civil and criminal offenses as separate and distinct, it follows that no violation of double jeopardy results from the application of both civil and criminal punishment.[34]

As further justification for the imposition of both criminal and civil penalties, the majority of jurisdictions recognize a basic difference between the two types of punishments. Although several purposes which are served by criminal punishment are also served by an award of punitive damages,[35] the effects of these two sanctions are inherently different.[36] Prosecution under a criminal statute may result in a loss of life or liberty. In addition, the stigma which attaches to criminal prosecution may be "felt by the defendant long after any sentence has been served."[37] Punitive damages, on the other hand, only affect the defendant's pocketbook and are attended by stigmatization only in that such damages express societal outrage for the defendant's conduct.[38] In this regard, it has been

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210 S.W.2d 293 (1948); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. Ct. App. 1978) (injuries caused by reckless driving).

[30]In considering the application of the principles of double jeopardy in the context of the *Taber* rule, concern is had only with article I, § 14 of the Indiana Constitution since the fifth amendment of the United States Constitution and similar provisions of many state constitutions have been construed as limiting double jeopardy solely to successive criminal proceedings. Helvering v. Mitchell, 303 U.S. 391 (1938) ("Civil procedure is incompatible with the accepted rules and constitutional guaranties [*sic*] governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties [*sic*] do not apply." 303 U.S. at 402).

[31]*See* cases cited in note 2 *supra*.

[32]*See, e.g.*, Day v. Woodworth, 54 U.S. 389 (13 How. 363) (1851).

[33]*See, e.g.*, Allen v. Rossi, 128 Me. 201, 146 A. 692 (1929); State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N.W. 935 (1906).

[34]*See, e.g.*, Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917).

[35]*See* Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 410 (1967)[hereinafter cited as Note, *Criminal Safeguards*]; Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957).

[36]*See* Note, *Criminal Safeguards*, *supra* note 35, at 410.

[37]*Id.*

[38]*Id.* at 411.

aptly noted that, "[t]here is no blank on a job application for listing past punitive damages judgments."[39]

Indiana is a member of the small minority of jurisdictions which disallows a recovery of punitive damages when the defendant is also subject to criminal sanctions for the same act.[40] Indiana adopted this position in the widely noted case of *Taber v. Hutson*,[41] in which Judge Davison stated:

> [T]here is a class of offences, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that "no person shall be twice put in jeopardy for the same offence;" and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.[42]

B. Recent Plaintiffs' Criticism of the Taber *Rule*

The *Taber* rule has recently been severely criticized not only by civil plaintiffs but by the Indiana courts as well. This criticism appears to stem primarily from the rule's failure to acknowledge the practical realities of the modern criminal justice system and the inequitable results that the rule is capable of producing when applied in certain classes of litigation.

Concerning the practical realities of the criminal justice system, it has been noted that the *Taber* rule may allow a defendant to completely escape all punishment for his reprehensible conduct.[43] "The legitimacy and necessity of the prosecutor's discretion in pressing

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[39]*Id.*

[40]*See* cases cited in note 3 *supra.*

[41]5 Ind. 322 (1854).

[42]*Id.* at 325-26. One noted author, in discussing the *Taber* holding, stated that "[o]nly the gremlins are aware of the psychologic phenomena that tempted Judge Davison to turn a deaf ear to the common law and the mountain of majority authority to adopt for Indiana a view that had previously been almost solely confined to text-writer confabulation." Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123, 123-24 (1945).

[43]Brief of Appellant, McCarty v. Sparks, 388 N.E.2d 296 (Ind. Ct. App. 1979). [hereinafter cited as Brief of Appellant].

charges have long been recognized. . . . Often it becomes apparent after [an arrest] that there is insufficient evidence to support a conviction or that a necessary witness will not cooperate or is unavailable . . . ."[44] These factors, in addition to the limited resources available to the prosecutor, may completely bar the possibility that a criminal indictment will ever be brought against the defendant. Under the *Taber* rule, however, the civil plaintiff is barred from even seeking punitive damages against the defendant, despite his ability to meet the lower burden of proof required in a civil proceeding[45] and despite the fact that criminal charges may never be lodged against the defendant.[46] In these circumstances it is argued that the application of the *Taber* rule is manifestly unfair to the civil plaintiff and is irrational since the defendant does not suffer even former jeopardy, much less double jeopardy.[47]

The *Taber* rule has also been criticized as too frequently producing inequitable results when applied in certain classes of litigation. In this respect, it has been strenuously contended[48] that the rule creates disturbing distinctions between plaintiffs who are made the victims of intentional or malicious behavior. The tort of defamation is not a subject of criminal jurisdiction in Indiana.[49] Therefore, a plaintiff who is intentionally defamed may recover punitive damages from the wrongdoer.[50] However, other intentionally injured plaintiffs, whose injuries have been made the subject of criminal jurisdiction, are barred from even seeking punitive damages under the *Taber* rule. Plaintiffs who have been the victims of aggravated battery fit into this latter category.[51] In these circumstances, it seems

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[44]TASK FORCE REPORT: THE COURTS, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, Task Force on Administration of Justice, Washington, D.C., GPO 1967 (Su. Doc. Pr. 36.8: L41/c83), *quoted in* Brief of Appellant, *supra* note 43, at 33-34.

[45]F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.6, at 243 (2d ed. 1977). The standard of proof required in a civil proceeding is the preponderance of the evidence standard.

[46]Since the *Taber* decision, concern has been had only with the *possibility* that the defendant may incur criminal liability. The possibility itself is sufficient to invoke the *Taber* rule. *See* Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966).

[47]Brief of Appellant, *supra* note 43, at 31-32.

[48]*Id.* at 40.

[49]IND. CODE § 35-13-6-1 (1976) was repealed by Act of February 25, 1976, Pub. L. No. 148 § 24, 1976 Ind. Acts 718.

[50]*See, e.g.*, Weenig v. Wood, 349 N.E.2d 235 (Ind. Ct. App. 1976).

[51]*See*, IND. CODE § 35-42-2-1 (Supp. 1979) states:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:

(1)a Class A misdemeanor if it results in bodily injury to any other person, or if it is committed against a law enforcement officer or

manifestly unfair to forbid a plaintiff from even seeking an award of punitive damages merely because he has suffered the misfortune of having been severely beaten or shot rather than defamed.[52]

Finally, in Indiana, a minor is held to be incapable of committing a crime until he has attained the age of fourteen.[53] For purposes of tort law, however, minors are held responsible for their conduct and are thus subject to liability.[54] It follows that a civil plaintiff who is intentionally or maliciously injured by a minor under fourteen years of age would be allowed to seek and recover punitive damages, although, by operation of the *Taber* rule, he would be denied recovery of punitive damages if the act were committed by a defendant old enough to suffer criminal liability.[55] Similarly, a person suffering from insanity in Indiana is generally held to be incapable of forming the requisite intent or *mens rea* for the commission of a crime.[56] However, insanity will not shield the defendant from liability for punitive damages in a civil suit.[57] Accordingly, under the *Taber* rule, a plaintiff who has been intentionally injured would be free to seek and recover an award of punitive damages from an insane defendant while such recovery would be completely barred against a defendant possessing a sound mind.[58]

C. The Disfavor of the Indiana Courts

In light of the difficulties and inequities attending the *Taber* rule, it is not surprising to discover the Indiana courts expressing

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against a person summoned and directed by the officer while the officer is engaged in the execution of his official duty;
(2) a Class D felony if it results in bodily injury to such an officer or person summoned and directed, or if it results in bodily injury to a person less than thirteen (13) years of age and is committed by a person at least eighteen (18) years of age; and
(3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon.
For purposes of this section a law enforcement officer includes an alcoholic beverage enforcement officer.

[52]Brief of Appellant, *supra* note 43, at 41.

[53]*See, e.g.*, Bottorff v. South Constr. Co., 184 Ind. 221, 227, 110 N.E. 977, 978 (1916).

[54]*E.g.*, Daughterty v. Reveal, 54 Ind. App. 71, 78, 102 N.E. 381, 384 (1913).

[55]Brief of Appellant, *supra* note 43, at 40-41.

[56]*See, e.g.*, IND. CODE § 35-5-2-1 (Supp. 1979). § 35-41-3-6 (Supp. 1979) provides:
Sec. 6. (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.
(b) "Mental disease or defect" does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

[57]*See, e.g.*, Woods v. Brown, 93 Ind. 164, 166-67 (1883).

[58]*See*, Brief for Appellant, *supra* note 43 at 41.

distaste for the rule, in addition to that ventilated by civil plaintiffs. On several occasions,[59] as an expression of this distaste, the Indiana courts have instructed the jury, in cases in which the *Taber* rule applied, that it need not confine its determination of plaintiff's injuries to his actual out-of-pocket loss, but may consider, in addition, every circumstance of the act which injuriously affected the plaintiff.[60] Items which may be properly considered under this type of instruction are injury to reputation, humiliation, loss of honor and mental suffering.[61] The courts, in giving such an instruction, are not technically departing from the *Taber* rule, since the award for these items is intended to compensate the plaintiff rather than to punish the defendant. However, as one author has stated, "[T]he distinction between vindicative damages and 'compensatory' damages of such a metaphysical nature, is largely a matter of spelling as the award may be as large in the latter case as if exemplary damages themselves had been allowed."[62]

Perhaps the most bizarre expression of judicial distaste for the *Taber* rule came from the Indiana Supreme Court in *Ziegler v. Powell*.[63] Ziegler was sued for malicious prosecution following a suit in which he had falsely charged Powell with the theft of personal property. Ziegler contested the trial court's authorization of punitive damages, asserting that he was subject to criminal liability for malicious prosecution under an Indiana statute which stated, "If any person shall maliciously, without probable cause, attempt to cause an indictment to be found . . . against any person . . ., such person . . . so offending shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months."[64] To avoid the application of the *Taber* rule, the *Ziegler* court stated that the statute did not apply to the defendant since, by its terms, the act applied only to an attempt to cause an indictment and not to a consummated prosecution.[65] The total illogic of the conclusion evidenced the court's distaste for the *Taber* rule. As one commentator noted, "To say that the defendant was subject to a criminal prosecution at one stage of his action but successfully freed himself from it by continuing to pursue his prosecution to a decision seems not only contrary to legal principles but a bit absurd."[66]

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[59]*See, e.g.*, Wolf v. Trinkle, 103 Ind. 355, 3 N.E. 110 (1885); Nossaman v. Rickert, 18 Ind. 350 (1862).

[60]*See* Millisson v. Hoch, 17 Ind. 227 (1861).

[61]*See* Stewart v. Maddox, 63 Ind. 51 (1878).

[62]Aldridge, *supra* note 42, at 125.

[63]54 Ind. 173 (1876), *noted in* Aldridge, *supra* note 42, at 126.

[64]Act of Mar. 5, 1859, ch. 80, § 18, 1859 Ind. Acts 130.

[65]54 Ind. at 178.

[66]Aldridge, *supra* note 42, at 126-27.

IV. Situations Falling Outside the *Taber* Rule

The *Taber* rule operates to bar the recovery of punitive damages in a civil action when the defendant is also subject to criminal prosecution for the same act. There are, however, three instances in which the *Taber* rule has been held not to apply. Briefly stated, these are actions in which (1) the defendant is a corporation,[67] (2) the statute of limitation has expired on the criminal offense,[68] and (3) the defendant has acted in heedless disregard of the consequences.[69] Originally, a plaintiff, when litigating in any of these three factual climates, was to some extent protected from the harshness encountered under the *Taber* rule. However, the following discussion will expose the various recent developments which have rendered this protection illusory and of little practical benefit.

A. The Corporate Defendant

In Indiana, a corporation may remain liable for punitive damages notwithstanding the *Taber* rule since a corporation cannot be prosecuted for the criminal acts of its agent,[70] except when expressly provided by statute.[71] Under this rule, the corporation may be called upon to respond vicariously with punitive damages for the criminal acts of its agent, while the agent, the wrongdoer, may protect himself from punitive damages by asserting that he is also subject to criminal prosecution for the same act.[72] Although this anomaly may be justified under the theory that a corporation should use care in selecting its agents,[73] "[t]he practical result is that the innocent corporation is chastised and the culpable agent is protected."[74] However, before taking much pleasure in this result, the plaintiff's attorney, seeking an award of punitive damages, may wish to scan a recently enacted Indiana Code provision[75] which purports to impose

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[67]*See, e.g.*, Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916).

[68]*See, e.g.*, Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966).

[69]*See* Nicholson's Mobile Home Sales, Inc. v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975).

[70]Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916).

[71]State v. Sullivan County Ag. Soc'y, 14 Ind. App. 369, 42 N.E. 963 (1896) (Corporation prosecuted under statute prohibiting a corporation from keeping a tenement for gambling which amounted to a nuisance. The complaint was dismissed, however, because the gambling in question did not amount to a nuisance.).

[72]Aldridge, *supra* note 42, at 126.

[73]*E.g.*, Goddard v. Grand Trunk Ry., 57 Me. 202 (1869).

[74]Aldridge, *supra* note 42, at 126.

[75]Ind. Code § 35-41-2-3 (Supp. 1979) states:

(a) A corporation, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved

general criminal liability upon the corporation for acts committed by its agents while acting within the scope of their authority. This provision appears to bring a corporate defendant within the scope of the *Taber* rule and, consequently, to bar the civil plaintiff from recovering an award of punitive damages when the act complained of is also the subject of criminal jurisdiction.

B. The Criminal Statute of Limitation

The court of appeals in *Cohen v. Peoples*[76] recognized the second factual setting in which the *Taber* rule does not apply. *Cohen* involved a defendant who was sued civilly for an assault and battery, which was also the subject of criminal prosecution.[77] The court of appeals, discussing the *Taber* rule in dictum, stated:

> If, as the cases indicate, the rationale supporting disallowal of punitive damages in actions involving assault and battery is a fear of violating constitutional safeguards against double jeopardy, that fear is without basis in the instant case. The statute limiting to two years the time in which criminal prosecution for the misdemeanor of assault and battery may be brought appears in Burns' § 9-304.[78]

Because the statute of limitation had expired on the criminal offense prior to the commencement of the civil action, the court of appeals held that an award of punitive damages could properly be assessed.[79]

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that the offense was committed by its agent acting within the scope of his authority.

(b) Recovery of a fine, costs, or forfeiture from a corporation, partnership, or unincorporated association is limited to the property of the corporation, partnership, or unincorporated association.

[76]140 Ind. App. 353, 220 N.E.2d 665 (1966).

[77]*See* IND. CODE § 35-42-2-1 (Supp. 1979), *quoted in* note 51 *supra*.

[78]140 Ind. App. at 357, 220 N.E.2d at 668 (citing IND. CODE ANN. § 9-304 (Burns 1956), *repealed by* Act of Feb. 5, 1976, Pub. L. No. 148, § 24, 1976 Ind. Acts 815). The current codification, IND. CODE § 35-1-3-4 (1976), states:

> Sec. 4. In all other cases, prosecutions for a misdemeanor must be commenced within two (2) years, and prosecutions for a felony must be commenced within five (5) years after its commission. But prosecutions for the forgery of an instrument for the payment of money, or for the uttering of such forged instrument, may be brought within five (5) years after the maturity thereof.

[79]140 Ind. App. at 357-58, 220 N.E.2d at 668-69. A variation to this exception may be noted in Smith v. Mills, 385 N.E.2d 1205 (Ind. Ct. App. 1979). In *Smith*, the defendant had entered into a specifically enforceable agreement with the prosecuting attorney that prevented the State from refiling criminal charges under a plea bargain agreement. The court held that under these circumstances an award of punitive damages could properly be recovered. 385 N.E.2d at 1207-08.

Although the statute of limitation may provide the civil plaintiff with some relief from the inequities of the *Taber* rule, this relief may prove to be of little practical benefit in some cases. The statute of limitation for torts in Indiana is two years.[80] In contrast, the criminal statute may be as long as five years.[81] It is, therefore, obvious that, by operation of the *Taber* rule, a civil plaintiff may be forced to pursue an action for compensatory damages and to forgo any claim of punitive damages merely because the prosecutor fails to diligently pursue the defendant criminally.[82]

The interaction between the *Taber* rule and the various statutes of limitation produces similar difficulties when observed from society's perspective. If one accepts, for the moment, that punishment is the proper theory justifying an award of punitive damages, it follows that the more heinous the crime, the more the defendant deserves to suffer an award of punitive damages. However, since the more egregious crimes are generally associated with longer statutes of limitation,[83] the probability that the *Taber* rule will intervene to protect the defendant from receiving an appropriate punishment significantly increases.[84]

C. Conduct in Heedless Disregard of the Consequences

The final factual setting in which the *Taber* rule has been held to have no application was established in *Nicholson's Mobile Home Sales, Inc. v. Schramm.*[85] In addition to acknowledging the two "ex-

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[80]IND. CODE § 34-1-2-2 (1976) provides:

> The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.
>
> First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years: Provided, That actions on account of injuries to personal property which occurred prior to the effective date of this amendatory act shall be commenced within two (2) years from the effective date of this amendatory act . . . .

[81]*See* IND. CODE § 35-1-3-4 (1976), *quoted in* note 78 *supra.*

[82]Brief of Appellant, *supra* note 43, at 32. Of course, if the prosecutor pursues the defendant within the two-year civil statute of limitation but fails to secure a conviction, the plaintiff will not be barred from seeking punitive damages in a subsequent civil suit. Once acquitted, the prosecutor is barred from bringing a second criminal suit against the defendant by the principles of double jeopardy. Thus, the *Taber* rule will not apply in the subsequent civil suit.

[83]*See* IND. CODE § 35-1-3-4 (1976), *quoted in* note 78 *supra.*

[84]*See* Brief of Appellant, *supra* note 43, at 33. Conversely, although less deserving of punishment, the defendant whose acts constitute only a minor criminal infraction is afforded virtually no protection by the *Taber* rule. These crimes are generally attended by very short statutes of limitation which expire well before the limitation on the civil action.

[85]164 Ind. App. 598, 330 N.E.2d 785 (1975).

ceptions"[86] noted above, the court of appeals further indicated that a defendant, whose actions were in heedless disregard of the consequences, could properly suffer an award of punitive damages despite the possibility that a criminal prosecution might subsequently be brought upon the same course of conduct.[87] This holding was unfortunate in two respects: first, the case cited by the *Schramm* court did not justify or support the exception,[88] and secondly, the exception was clearly in conflict with the double jeopardy rationale thought to support the *Taber* rule.[89] Both of these shortcomings were later recognized in *Glissman v. Rutt*[90] which rejected the heedless disregard exception as contrary to the principles of double jeopardy by stating:

> [I]t is clear that the rule announced by our Supreme Court in *Taber* has been adhered to and is binding upon this court. Under such circumstances it would be wholly illogical and contrary to the basic concerns of punitive damages to bar their recovery against one whose conduct constituted a criminal violation which was characterized by deliberate and malevolent intent against the victim, but permit both criminal prosecution and the sanction of punitive damages where the defendant's conduct merely exhibited a "heedless disregard of the consequences" to his victim.[91]

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[86]The *Schramm* court characterized the three instances existing outside the scope of the *Taber* rule as "exceptions" to the rule. *Id.* at 606, 330 N.E.2d at 791. This terminology, at least as applied to the statute of limitation and the corporate defendant, appears to be a misconceptualization. The *Taber* rule operates to bar the recovery of punitive damages in a civil action when the defendant is also subject to criminal prosecution for the same act. An "exception" to the rule would therefore allow the recovery of punitive damages *despite* the possibility of a subsequent criminal prosecution. As was noted in the text above, when the defendant is a corporation or the criminal statute of limitation has expired, a subsequent criminal prosecution is barred at the outset. Thus, these situations merely represent factual settings existing outside the scope of the *Taber* rule.

[87]*Id.*

[88]As support for this exception, the court cited: True Temper Corp. v. Moore, 157 Ind. App. 142, 299 N.E.2d 844 (1973); Capitol Dodge, Inc. v. Haley, 154 Ind. App. 1, 288 N.E.2d 766 (1972); Moore v. Crose, 43 Ind. 30 (1873).

[89]If a heedless disregard on the part of the defendant could support an award of punitive damages, this exception would no doubt swallow the entire *Taber* rule.

[90]372 N.E.2d 1188 (Ind. Ct. App. 1978).

[91]*Id.* at 1191. In commenting upon the cases cited by *Schramm* as support for the exception, the *Glissman* court stated:

> In *True Temper Corp. v. Moore* (1973), 157 Ind. App. 142, 299 N.E.2d 844, the punitive damage award was against a corporation which was not subject to criminal prosecution. The term "heedless disregard, etc." was used in discussing the *grounds* for securing punitive damages. The same was true in *Capitol Dodge, Inc. v. Haley* (1972), 154 Ind. App. 1, 288 N.E.2d 766. *Moore v.*

The heedless disregard exception appears to have been finally laid to rest one year after *Glissman* in *McCarty v. Sparks*[92] when Judge Robertson, who first announced this exception to the *Taber* rule, adopted the *Glissman* court's conclusion.[93]

In light of the foregoing analysis, it appears that the scope of the *Taber* rule has recently been extended beyond its original bounds to further prevent the civil plaintiff from recovering punitive damages when the defendant is also subject to criminal prosecution. Of the three original situations existing outside the scope of the *Taber* rule, only one—the criminal statute of limitation—remains unaffected by recent statutory or case law developments. However, even the criminal statute of limitation may prove to be of little advantage to the plaintiff. In those egregious cases in which the plaintiff could best show the malevolent conduct required to sustain an award of punitive damages, he may be forced by the longer statute of limitation to relinquish any claim of punitive damages. Practically speaking, the *Taber* rule has, indeed, become a comprehensive impediment to a plaintiff's rightful recovery of punitive damages merely because the defendant is also subject to criminal prosecution.

V. The Rationale Supporting the *Taber* Rule

Much confusion has centered upon the rationale justifying the application of the *Taber* rule. Several commentators have indicated that in light of the Supreme Court's construction of the double jeopardy clause of the United States Constitution,[94] the *Taber* doctrine must necessarily be founded upon some concept of fairness rather than directly upon the constitutional mandate against double jeopardy.[95] This argument overlooks the power of a state legislature

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Crose (1873), 43 Ind. 30 reversed an award of punitive damages where the instruction given by the court permitted them to be assessed without any showing of "malice, insult, or deliberate oppression."

372 N.E.2d at 1190 n.3 (original emphasis).

[92]388 N.E.2d 296 (Ind. Ct. App. 1979) (*Glissman* and *McCarty* were decided across appellate district lines. *Glissman*, in rejecting the heedless disregard exception was speaking for the third district, while *Schramm* and *McCarty* were both first district cases).

[93]*Id.* at 298. "*Glissman* also disposes of McCarty's claim that Spark's conduct, as being in 'heedless disregard of the consequences,' is a viable exception to the general rule disallowing punitive damages." *Id.*

[94]Breed v. Jones, 421 U.S. 519, 528 (1975), and Helvering v. Mitchell, 303 U.S. 391, 399 (1938), construed the double jeopardy clause of the United States Constitution as applying only in the criminal context. Benton v. Maryland, 395 U.S. 784, 794 (1968), held that the double jeopardy prohibition of the fifth amendment of the United States Constitution applied to the states through the fourteenth amendment.

[95]*See* Note, *supra* note 9, at 524 n.57.

to extend the protection provided under the state constitution beyond that offered by the Federal Constitution. Despite the Supreme Court's holding that the principles of double jeopardy embodied in the United States Constitution will not protect the criminal defendant from an award of punitive damages, this holding does not preclude the Indiana Supreme Court from construing article I, section 14[96] of the Indiana Constitution as extending double jeopardy protection to this class of defendants. Accordingly, it is just as feasible that the *Taber* rule stands directly upon the double jeopardy clause of the Indiana Constitution as solely upon considerations of fairness to the defendant. As will be discussed below, it was the failure of the early Indiana courts to recognize this dichotomy between the policy of fairness underlying the double jeopardy clause and the direct application of the clause which produced the numerous inconsistent and slightly illogical results found in the wake of *Taber v. Hutson*.[97]

A. Development of the Rationale

Initially, it should be noted that the *Taber* court did not adopt the constitutional mandate against double jeopardy as the foundation of its decision. The court merely indicated that such a result would not comport with "the spirit of our institutions."[98] Indeed, the court indicated that the rule had no constitutional footing through its recognition that the double jeopardy provision of the constitution did not relate to remedies secured by civil proceedings.[99] Thus, the supreme court's allusion to the double jeopardy clause was apparently made solely for the purpose of illustrating the basic concept of fairness "inculcated by every well-regulated system of government"[100] which, from the court's perspective, would have been violated if the defendant had suffered an award of punitive damages.

The subtle distinction made by the *Taber* court between the direct application and the policy of the double jeopardy clause was completely overlooked in *Koerner v. Oberly*[101] which was decided

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[96]Article I, § 14 of the Indiana Constitution provides that, "No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself."

[97]5 Ind. 322 (1854).

[98]*Id.* at 325.

[99]"The constitution declares, that 'no person shall be twice put in jeopardy for the same offence;' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government . . . ." *Id.*

[100]*Id.*

[101]56 Ind. 284 (1877).

twenty-three years after *Taber*. In *Koerner*, the supreme court was confronted with a statute[102] which provided for exemplary damages in a civil action brought by a wife against anyone selling alcoholic beverage to her habitually inebriated spouse. The statute also made the sale a misdemeanor. In addressing the double jeopardy issue raised by the defendant, the *Koerner* court cited the *Taber* opinion and stated, "The provision of the statute allowing exemplary damages, as applied to cases like the present, violates the fundamental principle embodied in the Bill of Rights, that no person shall be put in jeopardy twice for the same offence; and . . . as applied to such cases, [the provision] is inoperative and void."[103] If the *Taber* court had grounded its opinion directly upon an application of the double jeopardy clause of the Indiana Constitution, the result in *Koerner* would have undoubtedly been correct; the constitutional mandate against double jeopardy is as effectual against the legislature as it is against the courts. However, as was noted above, the result in *Taber* was grounded merely upon the policy of the double jeopardy clause rather than its direct application. It is, therefore, submitted that the result in *Koerner* represents little more than a misconstruction of *Taber v. Hutson*.[104] That the *Koerner* court was confused as to the proper basis of the *Taber* decision is evidenced by the result reached by the same court in *Schafer v. Smith*.[105] *Schafer* was an action brought upon the same statute[106] as that involved in *Koerner*. The first opinion for the *Schafer* case was announced by Judge Howk during the February term of 1877.[107] In upholding the constitutionality of the statute, the court specifically indicated that the double jeopardy clause did not apply and further stated:

> We recognize the rule which ordinarily prevails, that, where a given act is, or may be, "the subject of a criminal prosecution and also of a civil action for damages in favor of the party thereby injured, exemplary damages will not be allowed in such action." This rule, however, like most of the *rules of civil practice*, is a proper subject of legislative action, and the general assembly may well provide in such a case as the case at bar, that the injured party may recover, not only actual damages, but also exemplary damages, and the courts of the state will be bound to carry out and enforce such provision.[108]

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[102]Act of Feb. 27, 1873, ch. 59, §§ 12, 14, 1873 Ind. Acts 151.

[103]56 Ind. at 287.

[104]5 Ind. 322 (1854).

[105]63 Ind. 226 (1878) (*Schafer* was the sister case of *Koerner*).

[106]*See* note 102 *supra*.

[107]4 CENT. L.J. 271 (1877), *noted in* Aldridge, *supra* note 42, at 130.

[108]4 CENT. L.J., *supra* note 107, at 272 (emphasis added). Mr. Aldridge, in his arti-

Schafer I was never reported in the Indiana Reports because four days after the decision was rendered without dissent, the court granted a rehearing on the matter.[109] It was at this point that *Koerner* was decided exactly opposite to the holding in *Schafer I*. Amazingly, the conclusion reached by the *Koerner* court failed to inspire even a dissent from Judge Howk. Upon rehearing,[110] the *Schafer* controversy was curtly disposed of with the statement, "[the] question of exemplary damages has been fully discussed and ruled upon by this court, in the case of *Koerner v. Oberly*."[111]

With the *Koerner* court's misconstruction of *Taber v. Hutson*,[112] the rationale supporting the *Taber* rule was unquestionably a direct application of the double jeopardy clause of the Indiana Constitution.

The confusion concerning the rationale of the *Taber* rule was compounded in 1885 when *State ex rel. Scobey v. Stevens*[113] came before the Indiana Supreme Court. As was the situation in *Koerner*, the *Stevens* case involved a statute which arguably made the defendant subject to both civil and criminal penalties for a single course

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cle arguing in support of the direct application theory of the *Taber* rule, criticized the holding in *Schafer I* by stating:

> In arriving at this conclusion the court completely lost sight of the origin and basis of the Indiana rule which seemingly was one of constitutionality and double jeopardy and instead, relegating it to one of procedure or "a rule of civil practice" which of course, would make it a subject of legislative action. By resolving the basis of the Indiana rule to be one of procedure in order to save the statute, the court not only abandoned the basis upon which the rule against exemplary damages was originally predicated, but forced a rationalization of all previous cases where exemplary damages were denied, that was totally foreign to common law concepts. The common law had never known a rule of procedure which barred recovery of exemplary damages when the defendant was subject to criminal prosecution. How our courts could authoritatively support such a rule without legislative sanction is hard to conceive. The constitutional argument must be maintained or logically the whole formidable array of decisions since *Taber v. Hutson* which denied exemplary damages must fall.

Aldridge, *supra* note 42, at 129. The short answer to this criticism, of course, is that firstly, in light of the express language of the *Taber* court it is doubtful that the original basis of the *Taber* rule was one of constitutionality. Secondly, that the holding in *Schafer I* forced a rationalization of the prior cases denying punitive damages is of little consequence. Indeed, this rationalization appears miniscule when balanced against the rationalization required to support the cases following *Koerner* (which placed the *Taber* rule directly on constitutional foundations) which allowed the legislature to grant punitive damage despite the *Taber* holding.

[109]Aldridge, *supra* note 42, at 129.

[110]63 Ind. 226 (1878).

[111]*Id.* at 228.

[112]5 Ind. 322 (1854).

[113]103 Ind. 55, 2 N.E. 214 (1885).

of conduct. The statute[114] in *Stevens* prohibited a public official from accepting an unauthorized fee for the performance of an official act. In addition to making the act a misdemeanor, the statute also made the wrongdoer liable in damages to the injured party for five times the illegal fee accepted.[115] Clearly, the statute constituted the imposition of a civil penalty by the legislature. The single difference between the penalty authorized by the statute in *Stevens* and the imposition of punitive damages generally is that in the former, the legislature had authorized the amount of the penalty while, with respect to punitive damages generally, the jury determines the appropriate amount of the award.[116] Thus, if, as the *Koerner* court held, the *Taber* rule was grounded upon a direct application of the double jeopardy clause, the statute should have been held unconstitutional. A direct constitutional mandate must be as effective against the legislature as it is against the courts.[117] Nonetheless, the *Stevens* court upheld the statute by characterizing the amount recovered in the civil action as compensation rather than a penalty.[118] However, as one author has commented, "[e]ven the elasticity of definition could never permit of damages to the extent of five times the actual damage suffered being deemed compensatory."[119] It is important to note that in reaching its conclusion, the *Stevens* court did, however, recognize the distinction made by the *Taber* court between the technical application of the double jeopardy clause and the policy of fairness underlying the clause.[120]

The final blow to the *Koerner* direct application theory of the *Taber* rule occured in *State ex rel. Beedle v. Schoonover.*[121] *Schoonover*, similarly, involved a statute[122] which allowed a party bribed to vote in a certain manner, a civil cause of action for $300 against the bribing party. The legislature had also made the bribery a criminal offense in a statute passed the same day as the civil act.[123] The defendant asserted in the civil action that the penalty constituted a violation of the double jeopardy clause of the Indiana Constitution.[124] In rejecting this argument, the *Schoonover* court stated:

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[114]Act of March 31, 1879, ch. 60, § 37, 1879 Ind. Acts 142 (Spec. Sess. 1878) (current version at IND. CODE § 17-2-44-7 (1978)).

[115]*Id.*

[116]*See* cases in note 16 *supra.*

[117]*See* Koerner v. Oberly, 56 Ind. 284 (1877).

[118]103 Ind. at 64-65.

[119]Aldridge, *supra* note 42, at 132.

[120]103 Ind. at 60-61.

[121]135 Ind. 526, 35 N.E. 119 (1893).

[122]Act of Mar. 9, 1889, ch. 200, § 1, 1889 Ind. Acts 360.

[123]*Id.* ch. 130, § 3, 1889 Ind. Acts 267.

[124]135 Ind. at 531, 35 N.E. at 120.

> The Legislature has ample power to create a remedy for wrongs which, at common law, were without redress. This being so, a coördinate branch of the government can not nullify its action.
>
> It is true that section 59, article 1, of the Bill of Rights, provides that "No person shall be put in jeopardy twice for the same offense," but the jeopardy mentioned is the peril of a second criminal prosecution for the same felony or misdemeanor, and the liability named in section 1396, Elliot's Supp., is a civil penalty for a tortious act . . . . [125]

With the holding that the civil act did not violate double jeopardy, it became clear that the legislature could provide for a civil penalty and criminal prosecution for a single act of the defendant. This, of course, was in direct conflict with the holding of *Koerner v. Oberly*.[126]

The confusion cast by the *Stevens* and *Schoonover* opinions upon the precise rationale underlying the *Taber* rule persists even today, as was evidenced by the court of appeals in *Glissman v. Rutt*.[127] Should the *Taber* rule be retained, it must be solidly grounded upon either (1) a direct application of the double jeopardy clause of the Indiana Constitution, in which case it must act as a bar to the legislature as well as to the courts, or (2) the considerations of fairness underlying the double jeopardy provision. It is submitted that in view of the contrary language employed by the *Taber* court and the theoretical problems encountered under the first alternative rationale, the Indiana Supreme Court should adopt the original fairness rationale to support the *Taber* rule if it is to be retained.

B. Theoretical Difficulties of Direct Application of the Double Jeopardy Clause

The propriety of the direct application theory of the *Taber* rule is questionable when viewed with respect to situations in which a

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[125] *Id.* It should be noted that in *Schoonover*, the court, at one point, seems to support the allowance of punitive damages by the legislature in terms of what could be considered a "fairness" approach to the *Taber* rule. Because the problem of political bribery had become so widespread and had permeated virtually every level of government, the court appeared to be of the opinion that it was not unfair that the defendant suffer criminal prosecution in addition to an award of punitive damages. *Id.* at 530-31, 35 N.E. at 120-21. If this was in fact the view taken by the *Schoonover* court, the case comports with the view taken in *Taber*.

[126] 56 Ind. 284 (1877).

[127] 372 N.E.2d 1188 (Ind. Ct. App. 1978). The *Glissman* court applied the rule but, in light of the *Beedle* decision, was unable to articulate the grounds for its holding.

defendant is, in fact, subjected to double punishment, as defined under the reasoning of *Taber v. Hutson* and *Koerner v. Oberly*.

In *Durke v. State*,[128] the Indiana Supreme Court met squarely the issue of whether a defendant who had been previously prosecuted[129] for burglary could, in consonance with the double jeopardy clause of the Indiana Constitution, also be prosecuted for the conspiracy to commit the same burglary. In upholding the constitutionality of the subsequent conspiracy conviction, the supreme court recognized that one set of operative facts may give rise to two separate and distinct offenses.[130] The defendant could, therefore, be prosecuted for either or both offenses without violating the constitutional mandate against double jeopardy. However, if, as *Durke* held, no violation of the principles of double jeopardy occur when the defendant is twice subjected to the more rigorous criminal sanctions, it is difficult to perceive the rationality of directly applying the principles of double jeopardy to bar a civil plaintiff from seeking punitive damages merely because the defendant is subject to criminal prosecution for the same conduct.[131]

Secondly, Indiana adheres to the rule that, "[a] man charged with crime may be prosecuted by two sovereigns, the United States and the State of Indiana, if the same act is an offense under both the federal and the state laws."[132]

Therefore, under the dual sovereign rule, a defendant stands to suffer the harrassment of two trials and two punishments within the bounds of the constitutional protection against multiple punishments.[133] Setting aside for the moment any considerations of federalism,[134] it is again difficult to grasp the rationality of allowing both the state and the federal government to exact criminal punishment

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[128]204 Ind. 370, 183 N.E. 97 (1932).

[129]The defendant in *Durke* was acquitted of the burglary. However, in Collier v. State, 362 N.E.2d 871 (Ind. Ct. App. 1977), the defendant was simultaneously convicted for a violation of the Offenses Against Property Act and for conspiracy to commit the same offense. The violation itself carried a one-to-ten year penalty while the conspiracy to commit the violation carried a two-to-fourteen year penalty. In rejecting the double jeopardy argument of the defendant, the court stated that, "Collier would have this court believe that since both of his convictions stem from the same prohibited conduct, he is being punished twice for the same offense." *Id.* at 874. The court went on to hold that, "one set of operative facts gave rise to two distinct offenses and that Collier was not subjected to multiple punishments for the same offense. Therefore, the principle of double jeopardy does not apply." *Id.*

[130]204 Ind. at 377, 183 N.E. at 99-100.

[131]*See* Brief of Appellant, *supra* note 43, at 37.

[132]Richardson v. State, 163 Ind. App. 222, 225, 323 N.E.2d 291, 293 (1975). *See also* Heier v. State, 191 Ind. 410, 133 N.E. 200 (1921).

[133]Richardson v. State, 163 Ind. App. 222, 323 N.E.2d 291 (1975).

[134]*See generally* Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961).

from a defendant, yet apply the double jeopardy clause to prevent a recovery of punitive damages because the defendant is subject to criminal prosecution.[135]

In view of the foregoing theoretical difficulties and the *Taber* court's recognition that the double jeopardy clause did not directly apply to remedies secured by civil proceedings,[136] it is submitted that the *Taber* rule, if retained at all, should be re-established upon its original grounds of fairness underlying the double jeopardy clause. In so doing, both the courts and the legislature would be freed from the constraints of logic presently encountered under the direct application theory thought to support the *Taber* rule by the majority of the Indiana Courts of Appeals. Further, in adopting this rationale, considerable latitude would be gained by the Indiana courts to consider the various alternative methods available for protecting the defendant from dual liability without being unduly harsh upon the civil plaintiff. One such alternative method of alleviating the *Taber* problem will be discussed in the following section.

VI. The Supplemental Approach — An Alternative to the *Taber* Doctrine

In pointing out the difficulties attending the minority position of barring punitive damages when the defendant is subject to criminal liability for the same conduct, this Note should not be construed as supporting the majority position. Neither rule is entirely satisfactory. The majority view, although not a violation of the letter of the provision against double jeopardy,[137] does not recognize that a defendant may be overpunished for the commission of a single act. The minority Indiana position fails to recognize the generally accepted view that one course of conduct may constitute an offense against both the private and public interests.[138] The initial recognition of these failures suggests a possible solution, in particular, to the shortcomings of the minority position on the issue.

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[135]*See* Brief of Appellant, *supra* note 43, at 38. If, in fact, Indiana is committed to the direct application of the double jeopardy clause to bar punitive damages when the defendant is also subject to criminal prosecution, one further theoretical difficulty arises: Why does Indiana not offer other criminal safeguards such as "proof beyond a resonable doubt" and "confrontation of adverse witnesses" to this defendant? Logically, it would seem that under the direct application theory of the *Taber* rule these further constitutional guarantees should be accorded the punitive damages defendant when he is also subject to criminal prosecution. *See generally* Note, *Criminal Safeguards*, *supra* note 35.

[136]*See* text accompanying notes 98-101 *supra.*

[137]Reference is made here to the fifth amendment of the United States Constitution, which, as noted, *supra* at note 30, has been read literally and made applicable to successive criminal prosecutions.

[138]*See* text accompanying notes 31-34 *supra.*

Since its inception, the *Taber* rule has been unbendingly applied to tort claimants, despite the fact that the defendant may not, and probably will not, be subjected to criminal liability.[139] In this fashion, the rule not only operates unfairly to deprive the deserving plaintiff, but also to leave unchecked, conduct which society has expressed an interest in regulating. If one accepts that punishment and deterrence are the primary objectives of both criminal and civil sanctions,[140] these devices are rendered completely ineffective in serving these purposes.

Perhaps a better approach to the double jeopardy problem would be to shift the primary emphasis away from the *number* of punishments to which the defendant may be subjected and focus instead on the *quantum* of punishment that the defendant may suffer. One noted author, speaking as an advocate of this so-called "supplemental approach,"[141] has stated that:

> If the criminal courts punish all criminals effectively, a further admonition in civil courts can not be useful in itself. The only excuse for invading a culprit's economic resources is to discourage such conduct as that in which he has indulged; and if he has been sufficiently admonished elsewhere, this reason disappears.[142]

This approach appears not only to recognize the realities of the modern criminal justice system, but also to strike the most equitable balance between the individual's interest in protection against multiple punishment and society's interest in regulating undesirable conduct which may otherwise remain unchecked.

The supplemental theory essentially entails the reciprocal adjustment of the civil and criminal penalties.[143] This requires that in the situation where the defendant was prosecuted prior to the civil proceeding, the jury should be apprised of the penalty assessed against the defendant so that they may adjust the civil punishment accordingly.[144] This suggestion may, no doubt, disturb many defense lawyers, as this information may be misused by the jury to assume the defendant's liability or to increase the award. However, a possible solution to this problem may be obtained through a bifurcated

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[139]The problem is particularly acute in cases of technical assaults and batteries, libel and trespass. These "crimes" generally remain unprosecuted, leaving punitive damages as the only punishment for these offenses.

[140]*See* cases cited in note 19 *supra.*

[141]*See* Note, *Criminal Safeguards*, *supra* note 35, at 415.

[142]Morris, *supra* note 18, at 1195.

[143]*Id.* at 1197.

[144]*Id.*

proceeding in which the determination of liability and damages are separated.[145]

Should the civil trial precede the criminal prosecution, the supplemental theory allows the civil jury to assess damages without regard to the possibility that the defendant will be punished in a subsequent criminal proceeding.[146] In this situation, if a criminal action is brought against the defendant, the adjustment would be made by the judge in the criminal trial through the imposition of minimum penalties or a suspended sentence.[147]

The greatest advantage of the supplemental approach is seen when applied to that class of cases where the crime committed by the defendant subjects him only to a fine, or the crime is rarely, if ever, prosecuted.[148] The former situation was presented in *Glissman v. Rutt*[149] where the plaintiff had suffered serious injury as a result of an automobile collision with the defendant. The defendant had been found guilty of reckless driving in a former criminal prosecution, and the court granted summary judgment for the defendant on the issue of punitive damages citing *Taber v. Hutson* as support.[150] Under the supplemental theory, the *Glissman* jury would have been permitted to weigh the criminal punishment suffered by the defendant against the evidence presented as to his culpability to produce a civil penalty which, in addition to the criminal penalty, would effectively punish and deter the defendant and others similarly situated.[151]

The major problem with the supplemental approach is that the judge or jury is left with the difficult determination of what quantum of punishment will effectively serve the ends of punishment and deterrence.[152] This problem is especially profound when the jury must decide the appropriateness of the penalties, since the jury may lack the experience necessary to determine what punishment will serve to deter a given form of conduct in the future.[153] Secondly, while the supplemental theory may serve to prevent the excessive punishment which may occur under the majority view, it does not completely eliminate the double jeopardy issue. Under the supplemental theory, the defendant must still undergo two proceedings and, therefore, be twice placed in fear of punishment.[154] However,

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[145]*See* Note, *Criminal Safeguards*, *supra* note 35, at 415-16.

[146]*See* Morris, *supra* note 18, at 1197.

[147]*Id.*

[148]*See* text accompanying notes 44-47 *supra*.

[149]372 N.E.2d 1188 (Ind. Ct. App. 1978).

[150]*Id.* at 1191.

[151]*See* Morris, *supra* note 18, at 1197.

[152]*See* Note, *Criminal Safeguards*, *supra* note 35, at 416.

[153]*See* Morris, *supra* note 18, at 1179.

[154]*See* Note, *Criminal Safeguards*, *supra* note 35, at 417.

when balanced against the less oppressive nature of punitive damages relative to criminal prosecution[155] and the inequities of both the majority and minority positions, having the defendant face two trials may be justified.[156] This is especially true in light of the relief against the potential harshness of punitive damages provided by the supplemental approach.[157]

VII. Conclusion

The recent pleas of the Indiana courts of appeal for a reevaluation of the rule against punitive damages when the defendant is also subject to criminal prosecution for the same course of conduct should be heeded.

Despite the inequities frequently produced by the *Taber* rule, the rule has ironically been extended by statute to include those corporate defendants which may be subject to prosecution for the criminal acts of its agents.

The confusion concerning the rationale of the rule has persisted since the *Schoonover* decision was announced in 1893. The *Taber* rule must be based upon either (1) a direct application of the double jeopardy clause, or (2) the considerations of fairness underlying the double jeopardy clause. In view of the *Taber* court's specific recognition that the double jeopardy clause does not apply to remedies secured by civil proceedings and the theoretical difficulties encountered under the direct application theory, it is submitted that the fairness theory should be adopted by the Indiana Supreme Court to support the *Taber* rule. The adoption of the fairness theory would relieve the Indiana courts and legislature from the constraints of logic presently encountered under the direct application theory currently believed by the courts of appeal to support the *Taber* rule. In addition, the adoption of the fairness rationale as support for the *Taber* rule would significantly increase the courts' latitude in testing the various alternatives to the *Taber* rule. One such alternative is the supplemental approach suggested by Professor Morris.

The supplemental theory, in addition to its comprehension of the inefficiencies of the criminal justice system, strikes a far more appropriate balance between the individual concerns of double jeopardy and society's demand of punishment for socially unacceptable conduct. It is conceded that this approach will not completely eliminate the basis for a double jeopardy argument in that the

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[155]*See* notes 35-39 *supra* and accompanying text.

[156]*See* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158, 1175-76 (1966).

[157]*See* Morris, *supra* note 18.

defendant may still face two judicial proceedings. However, given the less oppressive nature of punitive damages, relative to criminal sanctions, and the guard against excessiveness provided under the supplemental theory, having the defendant face multiple trials seems a far more justifiable response to the constitutional mandate against double jeopardy than that offered by the *Taber* rule.

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