Notes

Punitive Damages for Crime Victims: New Possibilities for Recovery in Indiana

I. Introduction

In its 1978 decision in *Glissman v. Kutt*,[1] the Indiana Court of Appeals held that plaintiffs injured in an automobile accident could not recover punitive damages against a defendant convicted of reckless driving for the same accident. The court found that it would be "contrary to the basic concerns of punitive damages . . . [to] 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."[2] The *Glissman* decision reaffirmed the rule first announced by the Indiana Supreme Court in 1854 in *Taber v. Hutson*:[3]

> [T]here is a class of offenses, 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[4] Taber may be twice punished for the same assualt 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 offense,' 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.[5]

Since *Taber*, Indiana has been among the minority of states disallowing punitive damages in a civil action where the defendant is also subject to criminal prosecution arising from the same act.[6] In light of

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[1]175 Ind. App. 493, 372 N.E.2d 1188 (1978).

[2]*Id.* at 497, 372 N.E.2d at 1191.

[3]5 Ind. 322 (1854).

[4]At the plaintiff's request, the lower court had instructed that "it is the true policy of the law . . . not only to give compensation for the actual loss, but to give such additional damages as will tend to prevent such conduct, and give peace and security to private rights and the community in general." *Id.* at 324.

[5]5 Ind. at 325-26.

[6]A sampling of other cases espousing the double jeopardy safeguard includes Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884) (legislatively overruled); Angelloz v. Humble Oil & Ref. Co., 196 La. 604, 199 So. 656 (1941); Winkler v. Koeder, 23 Neb. 706, 37 N.W. 607 (1888); Fay v. Parker, 53 N.H. 342 (1872). *Cf.* Louisville, New Albany & Chicago

the unjust results often fostered by the application of *Taber* in various types of litigation[7] and in an effort to placate increasing judicial dissatisfaction with the rule,[8] the Indiana State Legislature in 1984 reversed long standing precedent by eliminating criminal prosecution as a defense to a civil claim for punitive damages.[9] The new statute reads in relevant part:

> It is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action.[10]

In enacting the statute, Indiana has adopted the majority rule.[11] The legislature's conformity to the majority position will inevitably increase a plaintiff's opportunities for recovery of punitive damages.

This Note will initially trace the downfall of the *Taber* rule in Indiana and uncover several areas of litigation where the rule's previous application has produced unsatisfactory results. The discussion will then turn to defining the criminal activity most likely to be affected by the new statute as evidenced by other states, and an analysis will be made of the legislative and anticipated judicial efforts to control its possible misuse. The Note will conclude by assessing the crime victim's realistic chances for recovery under the new statute and the statute's impact on Indiana's victim compensation program. Before defining the limits of the new statute, a brief examination of the purposes and historical development of punitive damages is necessary.

Ry. Co. v. Wolfe, 128 Ind. 347, 27 N.E. 606 (1890) (punitive damages award justified because conduct complained of was not punishable criminally). *Contra* Smith v. Bagwell, 19 Fla. 117 (1882); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911).

[7]*See infra* notes 53-55 and accompanying text.

[8]*See* Smith v. Mills, 179 Ind. App. 459, 385 N.E.2d 1205 (1979) (stating that the rule was ripe for reconsideration).

[9]Act of Feb. 29, 1984, Pub. L. No. 172, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1985)).

[10]*Id.* Other jurisdictions have enacted similar laws. *See, e.g.*, COLO. REV. STAT. § 13-21-102 (1973) (allowing assessment of punitive damages for wrongs committed against an individual, or to personal or real property); Ga. Code § 51-12-5 (1982) (punitive damages allowed in tort actions in which aggravating circumstances are present); MONT. CODE Ann. § 27-1-221 (1983) (civil punitive award permitted where the defendant has been guilty of oppression, fraud, or malice); N.C. GEN. STAT. § 99A-1 (1979) (recovery of punitive damages allowed for interference with property rights). A punitive damages provision has also been incorporated within the Texas constitution. TEX. CONST. art. XVI, § 26 gives a surviving spouse or heir a claim for punitive damages against a person or corporation guilty of homicide.

[11]"In determining the propriety of a punitive damages award, the vast majority of courts have considered it immaterial that the defendant is also subject to criminal prosecution for the same act. One decision in this state has even recognized, "Indiana is in the distinct minority of states which disallows exemplary damages in a civil action if the party against whom they are levied is subject to criminal prosecution arising out of the same act." Cohen v. Peoples, 140 Ind. App. 353, 356, 220 N.E.2d 665, 668 (1966).

II. An Overview of Punitive Damages

A. The Origins and Purposes of Punitive Damages

The doctrine of punitive or exemplary damages[12] originated in the 18th century English courts as a justification for jury money awards greatly in excess of the tangible harm suffered by the plaintiff.[13] Juries were endowed with a judicial grant of unlimited discretion in gauging the severity of a punitive award.[14] Their verdicts were rarely reviewed by the courts, especially where the conduct in question had caused personal suffering.[15] This grant of unlimited discretion was bestowed upon juries very early in several American jurisdictions.[16] The awards rendered by juries in these jurisdictions involved elements of intangible harm.[17]

By the nineteenth and twentieth centuries, however, punitive damages were used almost exclusively to deter and punish the defendant where compensatory damages failed to achieve similar results.[18] In short, they

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[12]"Punitive" and "exemplary" are terms most commonly applied to this class of money damages. Throughout this Note, these damages will be referred to as punitive damages.

Punitive damages are distinguished from compensatory damages in that an award of the latter is merely intended to make the plaintiff whole, replacing the loss caused by the wrong or injury and nothing more. Punitive damages transcend actual damages and are inflicted not because of any special merit in the injured party's case, but to punish the defendant and to make an example for similar wrongdoers. Because of this punitive purpose, punitive damages are usually not covered by liability insurance. *See* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962). For a general discussion of punitive damages in a tort action see W. Prosser, Law of Torts § 2 (4th ed. 1971).

[13]The case generally cited as establishing the rule of punitive damages is *Huckle v. Money*, 2 Wils. 205 (K.8. 1763). In *Huckle*, Lord Camhen sanctioned the jury's condemnation of the defendant's abuse of state authority by upholding a large money award even though the plaintiff's actual damages were negligible. For a general discussion of the law of punitive damages, see K. Redden, Punitive Damages §§ 2.1-2.9 (1980); 1 T. Sedgwick, A Treatise on the Measure of Damages § 348 (9th ed. 1912).

[14]*See* K. Redden, *supra* note 13, § 2.2(A)(2), at 26; *see also* W. Hale, Law of Damages, 201-10 (1896). (It is within the province of the court to determine whether the evidence supports an award; however, it is within the exclusive province of the jury to determine whether or not it should be awarded.).

[15]T. Sedgwick, *supra* note 13, § 349, at 688.

[16]*See, e.g.*, Tillotson v, Cheetham, 3 Johns 46 (N.Y. Sup. Ct. 1808).

[17]W. Hale, *supra* note 14, at 202. Some examples include mental anguish, humiliation, and injury to reputation.

[18]*See* Tillotson v. Cheetham, 3 Johns 56 (N.Y. Sup. Ct. 1808). In a New York action for libel, Judge Spencer emphasized the objectives of the punitive damages rule: "In vindicative actions such as for libel, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury that they are to inflict damages for example's sake, and by way of punishing the defendant." *Id.* at 64.

The dual objectives of deterrence and punishment are also a part of the Indiana law on punitive damages. *See, e.g.*, Riverside Ins. Co. v. Pedigo, 430 N.E.2d 796, 809 (Ind. Ct. App. 1982); Monte Carlo, Inc. v. Wilcox, 180 Ind. App. 669, 672, 390 N.E.2d 673, 675 (1979); Vaughn v. Peabody Coal Co., 176 Ind. App. 474, 481, 375 N.E.2d 1159,

protected society "against a violation of personal rights and social order."[19]

B. *The Culpability Requirements of Criminal and Civil Punishment: A Comparison*

In a criminal proceeding, the prosecutor must prove that the defendant had the intent, or mens rea, to commit the offense. This criminal intent is found in the actor's desire to cause the consequences of his act, or in his belief that the consequences are substantially certain to result from it.[20] This element must also be established to recover punitive damages in a civil action.[21]

To support an award for punitive damages in a civil action, however, the plaintiff has the additional burden of proving some aggravating circumstance such as malice, fraud, ill will, or a conscious disregard for the rights or interests of others.[22] It is this element of wantonness for which the law inflicts punishment. This added requirement is generally satisfied by offering either direct or circumstantial evidence of the defendant's state of mind or underlying motive.[23]

Punitive damages are generally not awarded for simple acts of negligence.[24] Rather, conduct resulting in a punitive damages award often involves "some element of outrage similar to that usually found in a

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1163 (1978).

In addition to the punitive aspect, punitive damages may also serve as a revenue mechanism. *See, e.g.*, Gostkowski v. Roman Catholic Church of the Sacred Heart, 262 N.Y. 320, 324-25, 186 N.E. 798, 800 (1933) (jury permitted to award damages which express indignation at the defendant's conduct rather than establish a value for plaintiff's loss).

[19]W. HALE, *supra* note 14, at 201.

[20]*See* Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. Rev. 1158, 1163 (1966).

[21]*Id.*

[22]"Punitive damages may be awarded when there is a finding of fraud, malice, gross negligence, or malicious or oppressive conduct on the part of the defendant." Vaughn v. Peabody Coal Co., 176 Ind. App. 474, 480, 375 N.E.2d 1159, 1163 (1978). *Accord* Klam v. Koppel, 63 Idaho 171, 118 P.2d 729 (1941); Brademas v. Real Estate Dev. Co., 175 Ind. App. 239, 370 N.E.2d 997 (1977); Jones v. Ross, 141 Tex. 415, 173 S.W.2d 1022 (1943); Baker v. Marcus, 201 Va. 905, 114 S.E.2d 617 (1960). While "intentional" or "willful" denotes a mental state accompanying the defendant's act, "malice" describes an act *known* to be harmful to another. *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 35 (1982).

[23]Wantonness may be inferred from the surrounding facts and circumstances. *See, e.g.*, Watkins v. Layton, 182 Kan. 702, 324 P.2d 130 (1958); Hannahs v. Noah, 83 S.D. 296, 158 N.W.2d 678 (1968).

[24]*E.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Louisville, New Albany & Chicago Ry. Co. v. Shanks, 94 Ind. 598 (1883); Prudential Ins. Co. of Am. v. Executive Estates, Inc., 174 Ind. App. 674, 369 N.E.2d 1117 (1977); Sinclair Ref. Co. v. McCullom, 107 Ind. App. 356, 24 N.E.2d 784 (1940); McNamara v. St. Louis Transit Co., 182 Mo. 676, 81 S.W. 880 (1904).

crime."[25] Punitive damages are subject to the discretion of the jury,[26] and, unlike compensatory damages, are not recoverable as of right.[27] Furthermore, a punitive award is predicated upon the finding of actual damages[28] and must generally bear some relation to the amount of the compensatory damages award.[29]

Punitive damages have not been favored in the law[30] and throughout their long history have been widely criticized.[31] Nonetheless, the majority of jurisdictions, including Indiana, have continued to follow the doctrine "more because of precedent than anything else."[32]

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[25]RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

[26]*See, e.g.*, Hall-Hottel Co. v. Oxford Square Co-op., Inc., 446 N.E.2d 25 (Ind. Ct. App. 1983); American Family Ins. Group v. Blake, 439 N.E.2d 1170 (Ind. Ct. App. 1982). In fact, it is error to instruct the jury to award punitive damages. *See* McClellan, *Exemplary Damages in Indiana*, 10 IND. L.J. 275, 283 (1935).

[27]*E.g.*, Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916).

[28]*See* Hubbard v. Superior Ct. of Maricopa County, 111 Ariz. 585, 535 P.2d 1302 (1975); Martin v. United Sec. Serv., Inc., 314 So.2d 765 (Fla. 1975); Baker v. American States Ins. Co., 428 N.E.2d 1342 (Ind. Ct. App. 1981); Newton v. Yates, 170 Ind. App. 486, 353 N.E.2d 485 (1976); Stratton v. Jensen, 64 Mich. App. 602, 236 N.W.2d 527 (1975).

[29]*See* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. Rev. 1173, 1180 (1931); *see also* Murphy Auto Sales v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953). Under current Indiana law, there is no rule that the amount of punitive damages must be within a certain ratio to compensatory damages. *See* Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980). *But see* Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E.2d 778 (1955), *trans. denied*, 237 Ind. 5, 143 N.E.2d 285 (1957).

[30]*See* Aladdin Mfg. v. Mantle Lamp Co. of Am., 116 F.2d 708, 717 (7th Cir. 1941); *see also* Walther & Plein, *Punitive Damages: A Critical Analysis*, 49 MARQ. L. REV. 369, 380 (1966). Although arguments have been advanced both for and against the doctrine in every state, nearly every state has accepted the concept of punitive damages to some degree. *Id.*

[31]The doctrine of punitive damages has been attacked from many corners. It has been argued frequently that punishment is not a proper object of the civil law and that the state alone has the power to inflict penalties. *See* Morris, *supra* note 29, at 1176. Moreover, if the wrongdoer has been sufficiently punished in a criminal court, a further intrusion into his economic resources as a deterrent to future wrongful acts is not necessary. *Id.* at 1195.

Another criticism of the doctrine of punitive damages relates to the unregulated power of the jury to determine the amount of the award. For a critique of jury awards against corporate defendants, see DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344 (1976). To eliminate the "Robin Hood" philosophy — the practice of taking from a wealthy corporation and giving to a needy plaintiff — DuBois suggests that the jury should be restricted to *determining* if the defendant should be punished, while the court would be solely responsible for fixing the amount of damages awarded. *Id.* at 353.

Despite these criticisms of the rule, punitive damages have been defended "as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit." W. PROSSER, *supra* note 12, § 2, at 11 (footnote omitted).

[32]*See* McClellan, *supra* note 27, at 286. Indiana courts have sometimes disagreed

C. *Criminal and Civil Penalties: Similarity of Purpose, Differences in Effect*

Because the purposes of criminal penalties and punitive damages are identical — deterrence, retribution and punishment — an award of such damages with the goal of civil punishment has been described as a legal anomaly.[33] Despite similarity of purpose, the effects of civil and criminal punishment are unequal. Whereas a punitive damages award only invades the defendant's pocketbook, criminal penalties often include a loss of freedom,[34] warranting the protection of special procedural safeguards.[35] A criminal conviction also carries with it a social stigma not found with a determination of civil liability.[36]

Notwithstanding the disparate impact of civil and criminal sanctions, both constitute a form of punishment. Where conduct results in both civil and criminal accountability, the defendant is not only confronted with a potential loss of liberty, but with an intrusion into his financial resources as well. It is for this reason that the Indiana Supreme Court adopted a seemingly broad interpretation of the constitutional protection against double jeopardy in the *Taber* decision.[37]

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with the entire doctrine. *See, e.g.*, Western Union Tel. Co. v. Bierhaus, 8 Ind. App. 563, 36 N.E. 161 (1893). In an attempt to limit punitive damage awards to the most deserving plaintiffs, the Indiana Legislature has raised the standard of proof for punitive damages to "clear and convincing" evidence. *See infra* note 156 and accompanying text.

[33]*See* Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 409-11 (1976) [hereinafter cited as Note, *Criminal Safeguards*].

[34]The threat of imprisonment also accompanies a criminal fine. *See, e.g.*, IND. CODE § 35-50-2-6 (1982) (Class C felonies in Indiana are punishable by both a fixed term of imprisonment and a criminal fine.).

[35]Examples include the higher standard of proof of "beyond a reasonable doubt" and the protection against self-incrimination. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 4, at 16, 22, and 161 (1972).

[36]"There is no blank on a job application for listing past punitive damages judgments." *See* Note, *Criminal Safeguards, supra* note 33, at 411.

[37]U.S. CONST. amend. V provides in relevant part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause applies to the states through the due process clause of the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). IND. CONST. art. I, § 14 reads, "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." The *Taber* rule outlawing punitive damages in a civil action where the tortious act is also criminally punishable was founded on the spirit, not the letter, of the fifth amendment's prohibition against double jeopardy. Note, *Criminal Safeguards, supra* note 33, at 413. The fifth amendment's prohibition is applicable solely to successive criminal punishments for the same offense and does not relate to the remedies secured by civil proceedings. *See* Breed v. Jones, 421 U.S. 519 (1975) (the risk to which the double joepardy clause refers is not present in proceedings that are not essentially criminal); Rex Trailer Co. v. United States, 350 U.S. 148 (1956) (a liquidated damages clause was found to be remedial in nature, therefore not constituting a second criminal penalty); Helvering v. Mitchell, 303 U.S. 391 (1938) (double jeopardy clause merely prohibits punishing the defendant twice for the same act or omission, or attempting for a second time to punish him criminally).

Prior to the legislative enactment of Indiana Code section 34-4-30-2, the *Taber* rule had been criticized for disregarding the practical inner workings of the modern criminal justice system. The rule had also been discredited for its incongruous effects when applied to certain classes of lawsuits.[38]

III. The Inadequacies of the *Taber* Rule

A. The Taber *Rule Ignored the Practicalities of the Modern Criminal Justice System and Failed to Distinguish Criminal and Civil Redress*

With respect to the practical realities of the criminal justice system, the most troublesome flaw of the doctrine announced in *Taber* was its failure to acknowledge the distinction between private and public redress.[39] The majority of jurisdictions have long recognized that an act punishable as a tort and as a crime is both an offense against society at large, for which the state, as the public's representative, will prosecute to vindicate the interests of society as a whole, and a personal wrong committed against an individual, for which he may seek private vindication in a civil court.[40] Thus, punitive damages are not granted in lieu of criminal punishment, nor do they have any necessary relation to the penalty incurred for the injury done to the public.[41] Rather, punitive damages supplement criminal penalties by addressing the interests of the individual victim.

Under the *Taber* rule, those plaintiffs who had been willfully and intentionally injured and who were in the best position to advance the punishment and deterrence objectives of punitive damages were completely precluded from seeking punitive relief.[42] As a consequence of a variety of factors, such as the prosecutor's unlimited discretion in trying cases, problems of proof, or the difficulty in meeting the procedural requirements of a criminal proceeding, the same reprehensible conduct for which the culpable party escaped civil liability for punitive damages

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[38]Note, *Double Jeopardy and the Rule Against Punitive Damages of* Taber v. Hutson, 13 Ind. L. Rev. 999, 1004 (1980) [hereinafter cited as Note, *Double Jeopardy*].

[39]McClellan, *supra* note 26, at 279.

[40]W. Prosser, *supra* note 12, at 7.

[41]*See* Soucy v. Greyhound Corp., 27 A.D.2d 112, 276 N.Y.S.2d 173 (1967), where the court held, "While an award of such damages is concededly punitive, it is in our opinion, in fact, a private remedial remedy rather than a public criminal sanction." *Id.* at 113, 276 N.Y.S.2d at 175.

[42]Thus, the victim of an aggravated assault and battery was barred from seeking punitive damages against the culprit, despite his ability to satisfy the lower standard of proof required in a civil action because of the culprit's possible exposure to criminal prosecution. *See, e.g.*, Borkenstein v. Schrack, 31 Ind. App. 220, 67 N.E. 547 (1903).

as a result of *Taber* frequently went unpunished at the criminal level.[43] The possibility existed for what was in all practical effects total exoneration of the defendant in the majority of these cases.[44] In this manner, the rule not only afforded blanket protection against double jeopardy, but succeeded in warding off initial jeopardy as well.

Although originally rooted in the constitutional protection against double jeopardy, the *Taber* rule ironically failed to serve the fundamental objectives of the constitutional guarantee upon which it was based. One of the underlying objectives of the constitutional protection against double jeopardy is eliminating the fear of having to endure multiple trials.[45] But where the state decided to prosecute conduct which was the subject of a civil suit — this situation was more typical of an aggressive act, such as a violent assault — the defendant was still made to suffer two trials despite the doctrine's restraints.[46] Although plaintiffs were prohibited from seeking punitive damages against individuals subject to criminal prosecution, they were still permitted to bring claims for compensatory damages.[47] Moreover, while a criminal trial did not prohibit a tort claimant from seeking reasonable compensation for his loss, the fact that a defendant was being sued in tort barred the state from seeking criminal punishment.[48] Although the *Taber* rule might have lessened the defendant's exposure in a civil trial, it failed to fully and "effectively implement the double jeopardy purpose of diminishing the uncertainty

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[43]*See* Note, *Double Jeopardy, supra* note 38, at 1004-05; *see also* McLemore, *Punitive Damages and Double Jeopardy: A Critical Perspective of the* Taber *Rule*, 56 IND. L.J. 71, 82-83 (1980). *See generally* Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 *N.Y.U. L. Rev.* 925 (1960); Tieger, *Police Discretion and Discriminatory Enforcement,* 1971 *Duke L.J.* 717 (1971).

[44]*See* McLemore, *supra* note 43, at 82. The victim could still bring an action for compensatory damages, however.

[45]*See* McLemore, *supra* note 43, at 85.

[46]*See* Stone v. United States, 167 U.S. 178, 188-89 (1897) *noted in* McLemore, *supra* note 43, at 85.

Interestingly, double jeopardy principles do not prevent the double conviction and punishment of a defendant for a crime and conspiracy to commit that crime, even though both offenses stem from the same prohibited conduct. *See* Iannelli v. United States, 420 U.S. 770 (1975); Blockhurer v. United States, 284 U.S. 299 (1932); *see also* Elmore v. State, 269 Ind. 532, 382 N.E.2d 893 (1978) (where the court focused on the identity of the offenses, not on the identity of their source); Durke v. State, 204 Ind. 370, 183 N.E. 97 (1932); Collier v. State, 173 Ind. App. 120, 362 N.E.2d 871 (1977). It is well established in Indiana that the legislature may prescribe both criminal and civil penalties for the same act without transgressing the spirit of the double jeopardy provision. *See* State *ex rel.* Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893). *See generally* Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

[47]Individuals may always seek civil redress for actual losses suffered because the allowance for compensatory claims is premised on the wholly remedial nature of such damages. Stone v. United States, 167 U.S. 178, 188-89 (1897).

[48]"[T]his court does not view the rule . . . as being one based on the probability of criminal prosecution but rather on the possibility of such prosecution." Moore v. Waitt, 157 Ind. App. 1, 8, 298 N.E.2d 456, 460 (1973).

which a defendant faces from the possibility of enduring multiple trials as a result of a single act or course of conduct."[49]

B. Types of Litigation Where the Taber *Rule Has Produced Inconsistent Results*

The doctrine also created anomalous results when applied to certain types of litigation. For example, when an individual had suffered harm to his character or reputation because of the culpable acts of another,[50] he was permitted to recover punitive damages. Because the tort of defamation was not punishable as a crime in Indiana, such recovery was not precluded.[51] Yet, when a plaintiff was physically injured, his claim against the wrongdoer was restricted to compensatory relief. Plaintiffs who were victims of aggravated assault — punishable as a crime in Indiana — provide an illustrative example.[52] With regard to these acts, *Taber* created the unusual situation of increasing the opportunities for relief for one whose name had been slandered while limiting the monetary recovery for one whose body had been beaten.[53]

The *Taber* rule fostered other disturbing results. For instance, while minors were generally held civilly accountable for their tortious acts,[54] only after the age of fourteen were they presumed capable of committing crimes.[55] Thus, a victim of an intentional wrongdoing committed by a

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[49]*See* McLemore, *supra* note 43, at 85.

[50]*See* IND. CODE § 34-4-13-1 (1982) (general statute governing the standard of proof in a civil action for libel and slander).

[51]*See* Note, *Double Jeopardy, supra* note 38, at 1005.

[52]*Compare* IND. CODE § 34-4-13-1 (1982) (libel and slander) *with* IND. CODE ANN. § 35-42-2-1 (Burns Supp. 1984) (battery).

[53]*See* Note, *Double Jeopardy, supra* note 38, at 1005-06.

[54]Daugherty v. Reveal, 54 Ind. App. 71, 78, 102 N.E. 381, 384 (1913); *accord*, Patterson v. Kasper, 182 Mich. 281, 148 N.W. 690 (1914); Rozell v. Rozelle, 281 N.Y. 106, 22 N.E.2d 254 (1939); Lowery v. Cate, 108 Tenn. 54, 64 S.W. 1068 (1901); Wisconsin Loan & Fin. Corp. v. Goodnough, 201 Wis. 101, 228 N.W. 484 (1930).

[55]*See* Note, *Double Jeopardy, supra* note 38, at 106; *see also* Bottorff v. South Constr. Co., 184 Ind. 221, 227, 110 N.E. 977, 978 (1916) *noted in* McLemore, *supra* note 43, at 89; *accord*, State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970), *cert. denied*. 401 U.S. 942 (1971).

Many jurisdictions have codified this common law rule. *See, e.g.*, State v. Taylor, 109 Ariz. 481, 512 P.2d 590 (1973); Stanley v. State, 248 Ark. 787, 454 S.W.2d 72 (1970). The presumption that children under the age of fourteen are incapable of committing crimes is, however, rebuttable. *See* Senn v. State, 53 Ala. App. 297, 299 So.2d 343 (1974); *In re* Davis, 17 Md. App. 98, 299 A.2d 856 (1973).

Even minors who have been processed through the juvenile court system are not characterized as "criminals." IND. CODE § 31-6-3-5 (1982) provides:

> (a) A child may not be charged with or convicted of a crime . . . unless he has been waived to a court having criminal jurisdiction.
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> (b) A child may not he considered a criminal by reason of an adjudication in a juvenile court nor may such an adjudication be considered a conviction of a crime. Such an adjudication does not impose any civil disability imposed by conviction of a crime.
>
> (c) A child's contact with the juvenile justice system does not disqualify him from any governmental application, examination, or appointment.

child under the age of fourteen would not have been prohibited from seeking punitive damages. Such victims however, *would* have been precluded from requesting punitive relief from an adult under the same circumstances. Similarly, an individual deliberately injured by a defendant of unsound mind could have conceivably recovered a punitive damages award because such defendant under Indiana law was liable for his torts, but immune from criminal prosecution.[56] A similar award, however, would have been denied to a victim of a wrongdoing committed by one adjudged competent. These situations illustrate incongruities that the *Taber* court did not foresee.

C. Indiana Courts Have Nonetheless Disfavored the Limitations of Taber

Following the *Taber* decision, Indiana courts produced distorted constructions of the rule in an endeavor to escape its application. For example, although the judiciary had consistently denied punitive damages where the defendant was subject to a criminal prosecution for the same act, compensatory damages were expanded liberally in these early cases to include all injuries, both mental and physical, directly stemming from the defendant's wrongdoing.[57] Included within this seemingly limitless category were such elements as loss of reputation, bodily pain, humiliation, and loss of peace of mind and individual happiness.[58] More recent opinions carved out various exceptions to the rule in attempts to counteract its often inequitable results.[59] Several such holdings openly called

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[56]IND. CODE § 35-41-3-6 provides:

> (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.

For cases on point, see Buzynski v. Oliver, 538 F.2d 6 (1st Cir.), *cert. denied,* 429 U.S. 984 (1976); Law v. State, 406 N.E.2d 1185 (Ind. 1980); Hill v. State, 252 Ind. 601, 251 N.E.2d 29 (1969); Woods v. Brown, 93 Ind. 164 (1883).

[57]Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381, 388 (1882) (jury not restricted to the pecuniary loss of the sufferer).

[58]*See* Wolf v. Trinkle, 103 Ind. 355, 3 N.E. 110 (1885); Stewart v. Maddox, 63 Ind. 51 (1878).

[59]*See, e.g.*, Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966) (punitive damages allowed for an assault where statute of limitations had run on the criminal prosecution of the offense; double jeopardy principles would not be violated where threat of criminal prosecution ceased to exist). *Compare* Nicholson's Mobile Home Sales, Inc. v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975) (defendant whose actions were in complete disregard of the consequences was assessed punitive damages despite probable criminal prosecution for the same conduct) *and* True Temper Corp. v. Moore, 157 Ind. App. 142, 299 N.E.2d 844 (1973) (punitive damages assessed despite criminal prosecution where defendant exhibited a heedless disregard of the consequences) *with* Glissman v. Kutt, 175 Ind. App. 493, 372 N.E.2d 1188 (1978)(rejecting the heedless disregard exception as contrary to the principles of double jeopardy).

for total abrogation of the *Taber* rule by either legislative action or judicial pronouncement.[60]

In response to this mounting judicial pressure to correct the inequitable situations created by the *Taber* rule, the legislature enacted the new punitive damages statute in 1984. One of the legislature's considerations in enacting the new statute may have been a desire to substitute private for public law enforcement as a means to effect a more efficient level of compliance.[61] Despite its motives, by exposing the defendant to both criminal and civil liability upon the commission of certain crimes in Indiana, the legislature has given crime victims an opportunity to seek greater relief.

IV. The Scope of the New Statute in Light of Practices Adopted by Other States

A. Possible Retroactivity of the New Statute

The new punitive damages statute became effective on September 1, 1984.[62] One issue yet to be decided is the statute's retroactive application to crimes committed before its effective date.

In determining whether a statute is to operate retroactively, Indiana courts are likely to look first for specific language in the act which would indicate that the legislature intended to give it retroactive application.[63] In Indiana, statutes are to be construed and applied prospectively, unless a contrary intent is manifested in clear and unambiguous terms.[64] Therefore, without unmistakable language sanctioning retroactivity, courts will presume that the new statute is to be given prospective effect only.[65] This presumption may be rebutted, however, where re-

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[60]*See, e.g.*, McCarty v. Sparks, 180 Ind. App. 251, 388 N.E.2d 296 (1979); Smith v. Mills, 179 Ind. App. 459, 385 N.E.2d 1205 (1979) (rule ripe for reconsideration).

[61]*See generally* Ellis, *supra* note 22, at 1-9. The value of punitive damages as an effective deterrent against a culpable corporate defendant in a products liability action was acknowledged in Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) where the court stated:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices.

Id. at 820, 174 Cal. Rptr. at 389.

[62]Act of Feb. 29, 1984, Pub. L. No. 172, 1984 Ind. Acts 1462 (codified at Ind. Code § 34-4-30-2).

[63]*See* State *ex rel.* Uzelac v. Lake Criminal Ct., 247 Ind. 87, 91, 212 N.E.2d 21, 22 (1965) (application of a new criminal statute requiring that criminal proceedings be brought against the accused within six months from the initial charges was expressly limited to arrests made on or after the effective date).

[64]*Id.* at 24.

[65]*See, e.g.*, Shelton v. State, 181 Ind. App. 50, 390 N.E.2d 1048 (1979) (criminal sentencing provision not retroactive).

troactivity would further a legislative purpose, or where the statute would not impose a new duty or create a new obligation, or attach a new disability with respect to transactions already past.[66]

Indiana's new statute contains no language, explicit or otherwise, that the act shall apply retroactively. Additionally, the statute increases the potential liability to be borne by the defendant and hence, attaches a new disability to past acts. Thus, from a strict construction of the statute and without further analysis it would appear that acts punishable as crimes committed before September 1, 1984, will not subject wrongdoers to civil actions for punitive damages. Strong public policy reasons exist, however, which would favor retroactive application of the new statute.

These public policy reasons were outlined by the California Supreme Court in *Taylor v. Superior Court*.[67] In *Taylor*, the California Supreme Court held that an accident victim who had suffered personal injury as a result of another's drunk driving could sue that person for punitive damages.[68] The court reasoned that because drunk drivers were the cause of many serious accidents, the threat of a punitive damages award might operate to deter such similar conduct in the future.[69]

The California Supreme Court had the opportunity to determine the retroactivity of the rule announced in *Taylor* in *Peterson v. Superior Court*.[70] The plaintiff in *Peterson* was injured by the reckless driving of an intoxicated driver before *Taylor* was decided. The plaintiff subsequently filed suit against the driver and attempted to amend his complaint to include an additional claim for punitive damages. The lower court refused his motion for leave to amend, and he appealed that decision to the California Supreme Court.[71] In entertaining the plaintiff's appeal, the court relied on the decision of the United States Supreme Court in *Stovall v. Denno*[72] for guidance in its retroactivity analysis.

In *Stovall*, the Court was asked to determine whether a constitutional rule of criminal procedure issued that same day could be applied ret-

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[66]*See* Standard Accident Ins. Co. v. Miller, 170 F.2d 495 (7th Cir. 1948); Stewart v. Marson Constr. Corp., 244 Ind. 134, 191 N.E.2d 320 (1963); *see also* Malone v. Conner, 135 Ind. App. 167, 189 N.E.2d 590 (1963). In *Malone*, the court held that an intervening rule giving an administrator of an estate a cause of action for reasonable medical expenses incurred by the decedent from the date of his injuries caused by the defendant until the date of his death should not be retroactively applied. A retroactive statute must not take away an existing right *or give a new right*, but can only provide a new remedy to enforce an existing right.
Id. at 170, 189 N.E.2d at 591.

[67]24 Cal.3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).

[68]*Id.*

[69]*Id.* at 900, 598 P.2d at 858-59, 157 Cal. Rptr. at 698.

[70]31 Cal.3d 147, 642 P.2d 1035, 181 Cal. Rptr. 784 (1982).

[71]*Id.* at 147, 642 P.2d at 1306, 181 Cal. Rptr. at 784.

[72]388 U.S. 293 (1967).

roactively.[73] In deciding that issue, the Court examined "(a) the purpose to be served by the new standards (in this case, a rule of criminal procedure), (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[74] After considering these factors, the Court held that because retroactivity would have a devastating impact upon the administration of criminal law, the new rule should only be applicable to events occurring after that date.[75]

The *Peterson* court applied the same criteria and held that the punitive damages rule announced in *Taylor* could be retroactively applied.[76] Although *Stovall* involved a criminal rule, the court in *Peterson* noted that civil rules of retroactivity were not inconsistent with those present in criminal decisions, both being dependent upon principles of public policy and fairness. "Public policy considerations include the purpose to be served by the new rule, and the effect on the administration of justice of retroactive application. Considerations of fairness would measure the reliance on the old standards by the parties or others similarly affected . . . ."[77]

In *Peterson*, the defendant argued against retroactivity, claiming that the rule would not have a deterrent effect and would instead inflict hardship upon litigants who had relied upon prior law.[78] The court found both arguments unpersuasive. Instead, the court held that the change in the law had not been unforeseeable and that retroactivity would "create a greater, more immediate deterrent impact on the consciousness of the driving public . . . ."[79]

In resolving the issue of retroactivity, the *Peterson* court balanced the potential harm caused by a retroactive application of the rule against a determination of whether any discernible public purpose justified its effects.[80] In making its determination, the court accorded great weight to the foreseeability of the change in the law.[81] Indiana's new punitive

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[73]*Id.* at 296. In *Stovall*, the petitioner, without benefit of counsel, was identified in a lineup by a woman from her hospital bed the day after she underwent life-saving surgery. The petitioner was convicted of murder and attempted murder and sentenced to death. In seeking habeas corpus, the petitioner argued for retroactive application of a rule decided that same day in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), requiring the presence of counsel at lineups.

[74]388 U.S. at 297.

[75]*Id.* at 300.

[76]31 Cal.3d at 164, 642 P.2d at 1315, 181 Cal. Rptr. at 794 (1982). *See generally* Note, *Retroactivity of Punitive Damages Rule in Drunk Driving Cases:* Peterson v. Superior Court, 10 PEPPERDINE L. REV. 232 (1982)

[77]31 Cal.3d at 153, 642 P.2d at 1307, 181 Cal. Rptr. at 786-87.

[78]*Id.* at 156, 642 P.2d at 1308, 181 Cal. Rptr. at 788.

[79]*Id.* at 164, 642 P.2d at 1315, 181 Cal. Rptr. at 794.

[80]The balancing approach used by the *Peterson* court was advocated in DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U.L. REV. 253, 272-75 (1983).

[81]31 Cal.3d at 153, 642 P.2d at 1307-08, 181 Cal. Rptr. at 786-87 (citing Neel v. Magana, Olney, Cuthcurt & Gelfand, 6 Cal.3d 176, 193, 491 P.2d 421, 432, 98 Cal. Rptr. 837, 848 (1971)).

damages statute was similarly not unexpected. For many years, Indiana's minority position has been criticized and condemned by both commentators and the Indiana judiciary.[82] Arguably, conformity to the majority position was only a matter of time.

Greater civil accountability might be construed to be in the public interest. Not only would retroactive application deter the wrongdoer and others from repeating such antisocial conduct, but it would also reimburse the crime victim for any uncompensated financial loss. Thus, in balancing considerations of fairness and public policy against any harm which might befall a defendant by way of increasing his potential liability, the scales weigh in favor of retroactivity. Even though retroactive application of the new statute might add to civil court dockets, it is likely that many victims of pre-act crimes have already sought compensatory relief, in which case an additional claim for punitive damages would not necessitate an extra court date. Whether or not the courts rule in favor of retroactivity, the new statute will doubtless have a far-reaching effect on the types of criminal activity within its purview.[83]

B. Criminal Activity Likely to Be Affected by the New Statute

The following discussion surveys the classes of criminal activities for which punitive damages may now be awarded under the new statute. This survey is not intended to be exhaustive of all conceivable areas where punitive damages might be justified. Instead, the more common situations where the defense of criminal exposure has previously been invoked to bar a claim for punitive damages have been selected. Because the defendant's state of mind, rather than the particular tort or crime committed, is determinative of a punitive damages award,[84] the litigant who decides to pursue punitive relief should probably be guided more by the degree of culpability common to all punitive damages cases than by analysis of prior punitive damages awards under any particular factual situation.

1. *Offenses Against the Person.*—From a very early date, many jurisdictions acknowledged the propriety of awarding punitive damages in cases involving violent crimes against the person, such as assault and

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[82]*See supra* notes 59-60 and accompanying text.

[83]To date, no court has ruled on the possible retroactive application of the new punitive damages statute. After the passage of the new statute but before its effective date, the case of *Gomez v. Adams*, 462 N.E.2d 212 (Ind. App. 1984) was decided. In *Gomez*, the Indiana Court of Appeals denied a punitive damages award on the ground that the defendant bore potential criminal liability for the same conduct complained of in the civil suit. The court did note in its decision the passage of the new statute removing possible criminal sanctions as a defense in an action for punitive damages, but declined to speculate as to its possible retroactive application. *Id.* at 227 n.12.

[84]*See supra* notes 20-25 and accompanying text.

battery,[85] sexual assault,[86] and homicide.[87] As the Oregon Supreme Court emphasized:

> We are unable to understand why the additional determent of punitive damages is considered unreasonable. Not only the criminal justice system but every law-abiding citizen is concerned with the increasing crime rate. If we are concerned with the types of acts which may subject a defendant to a criminal charge and civil liability such as violent crimes against the person, as in this case, we see nothing wrong with the additional determent of the allowance of punitive damages.[88]

In contrast, the Indiana Supreme Court refused to award punitive damages to the victim of an assault in *Taber v. Hutson*,[89] as did the Indiana Court of Appeals in *Borkenstein v. Schrack*.[90] Each court based its decision on the fact that the offense was punishable criminally.[91] In courts which distinguish the separate functions of public and private redress,[92] punitive damages are awarded despite the presence or absence of a previous criminal conviction and accompanying prison sentence imposed for the offense committed.[93] Some jurisdictions have even refused to weigh the punitive effect of a criminal fine in determining civil

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[85]*See* McNamara v. St. Louis Transit Co., 182 Mo. 676, 81 S.W. 880 (1904); Roberts v. Mason, 10 Ohio St. 278 (1957); Brown v. Swineford, 44 Wis. 282 (1878) (punitive damages awarded an assault victim, albeit not without criticism of the doctrine); *see also* Shelley v. Clark, 267 Ala. 621, 103 So.2d 743 (1958).

[86]*See* Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917). Indiana's present rape statute is codified at IND. CODE § 35-42-4-1 (1982).

[87]*See* Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (1945).

[88]Roshak v. Leathers, 277 Or. 207, 212, 560 P.2d 275, 278 (1977) (defendant criminally charged with attempted murder and convicted of the crime of assault in the third degree).

[89]5 Ind. at 322, 327.

[90]31 Ind. App. 220, 67 N.E. 547 (1903).

[91]Indiana's current assault and battery statute punishes the offense as either a misdemeanor or a felony, depending upon the attendant circumstances. IND. CODE § 35-42-2-1 (Supp. 1985) reads:

> 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 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; . . . 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.

[92]*See supra* notes 39-41 and accompanying text.

[93]*See, e.g.*, Roberts v. Mason, 10 Ohio St. 278 (1857); Stark v. Epler, 59 Or. 262, 117 P. 276 (1911).

damages.[94] Thus, because federal courts[95] and most state courts recognize the importance of punitive damages as both de facto compensatory relief for the plaintiff,[96] and a retaliatory tool of society it is highly probable that Indiana will also ignore whether or not criminal punishment has been imposed in gauging a punitive award, at least with respect to claims involving injury to the person.

The following cases illustrate the many factual circumstances which have resulted in punitive damages awards. In each of these cases, the act complained of was one that was also criminally punishable.

In *Jones v. Fisher*,[97] the Wisconsin Supreme Court allowed punitive damages for an assault and battery where defendants had forcibly extracted a dental plate from the plaintiff's mouth. Although the defendants were entitled to the property as security for repayment of a loan, the court seemed to object to the unreasonable methods employed by the defendants to recover the plate.[98]

An award of punitive damages was upheld for assault with intent to murder by the Oregon Supreme Court in *Koshak v. Leathers*.[99] The plaintiff, a law enforcement officer, instituted civil proceedings against the defendants for injuries he received after the defendants violently protested traffic violation charges.[100] In permitting punitive damages, the court was unmoved by the fact that the defendants had already been convicted for assault in the third degree.[101]

The plaintiff received punitive relief in the Pennsylvania Supreme Court case of *May v. Baron*.[102] In *May*, the defendant demanded payment from the plaintiff for a debt owing. When the plaintiff refused to tender payment, the defendant kicked him repeatedly, eventually rendering him unconscious.[103]

As a precondition to considering punitive relief, all three courts either required the plaintiff to offer direct proof of malice or inferred malice from the nature of the act committed.[104] Furthermore, all instances of offenses against the person were intentional torts. Thus it appears

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[94]*E.g.*, Bundy v. Maginess, 76 Cal. 532, 18 P. 668 (1888); Hartman v. Logan, 203 S.W. 61 (Tex. Civ. App. 1918).

[95]Punitive awards have often been upheld by federal courts in assault cases. *See, e.g.*, Shimman v. Frank, 625 F.2d 80 (6th Cir.), *reh'g denied* (1980); King v. Nixon, 207 F.2d 41 (D.C. Cir. 1953) (per curiam).

[96]In addition to the deterrence and punishment aspects of punitive damages, the award compensates the plaintiff for litigation costs and counsel fees. *See* W. PROSSER, *supra* note 12, at 11.

[97]42 Wis.2d 209, 166 N.W.2d 175 (1969).

[98]*Id.* at 217, 177 N.W.2d at 180.

[99]277 Or. 207, 560 P.2d 275 (1977).

[100]*Id.* at 209, 560 P.2d at 276.

[101]*Id.*

[102]329 Pa. 65, 196 A. 866 (1938).

[103]*Id.* at 65, 196 A. at 866.

[104]277 Or. at 209, 560 P.2d at 276; 329 Pa. at 65, 196 A. at 866; 42 Wis. 2d at 218, 166 N.W.2d at 180.

that courts are influenced by aggravated or humiliating circumstances when attempting to distinguish those offenses which justify a punitive award from their less egregious counterparts.

2. *Offenses Against Property Rights.*—Classes of criminal activity affecting property rights now subject to punitive awards under the new statute include arson,[105] criminal mischief,[106] burglary,[107] trespass,[108] theft,[109] conversion[110] and forgery.[111] Other jurisdictions have granted punitive relief on several of these grounds.

For example, a punitive damages award was upheld by the South Carolina Supreme Court in *St. Charles Mercantile Co. v. Armour & Co.*[112] In *St. Charles Mercantile*, the defendant's agent had altered the plaintiff's postdated check and presented it to the bank for immediate payment. He was subsequently convicted for forgery and his employer was held vicariously liable for punitive damages.[113] Because the agent's willful and malicious act had resulted in harm to the plaintiff's credit and commercial reputation, the civil award was upheld, notwithstanding the prior criminal conviction. "The violation of a criminal law, which results in any actual damage to a person, is entirely sufficient as the foundation for punitive damages."[114]

Punitive damages were levied against the defendant for conversion in the Kentucky case of *Hensley v. Paul Miller Ford, Inc.*[115] The court held that such damages were recoverable for gross neglect and disregard for the plaintiff's rights where the defendant car dealer sold the plaintiff's car, along with certain private property within the car, in violation of a prior mutual understanding and without the plaintiff's permission.[116]

Prior to the enactment of the new punitive damages statute in Indiana, a person suffering a pecuniary loss as a consequence of the defendant's interference with his property rights could bring a claim for an amount equal to three times his actual damages.[117] The new act now

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[105]IND. CODE § 35-43-1-1 (1982).

[106]IND. CODE § 35-43-1-2 (1982).

[107]IND. CODE § 35-43-2-1 (1982).

[108]IND. CODE § 35-43-2-2 (1982). *See* Skufakiss v. Duray, 85 Ind. App. 426, 154 N.E. 289 (1926) (prejudicial error to instruct jury to assess punitive damages if the trespass committed was found to be wanton and willful). *But see* Cosgriff v. Miller, 10 Wyo. 190, 68 P. 206 (1902).

[109]IND. CODE § 35-43-4-2 (1982).

[110]IND. CODE § 35-43-4-3 (1982).

[111]IND. CODE § 35-43-5-2 (1982).

[112]156 S.C. 397, 153 S.E. 473 (1930).

[113]*Id.* at 399, 153 S.E. at 474.

[114]*Id.* at 406, 153 S.E. at 478.

[115]508 S.W.2d 759 (Ky. Ct. App. 1974).

[116]*Id.* at 762.

[117]An amount "equal to" has been amended to read an amount "not to exceed" three times his actual damages. *See* Act of Feb. 29, 1984, Pub. L. No. 172 § 1, 1984 Ind. Acts 1462, (amending IND. CODE § 34-4-30-1) (1982)).

permits a choice between punitive or treble damages, but recovery of both is expressly precluded.[118]

Neither the legislature nor the judiciary has yet indicated at what stage of the litigation the plaintiff must choose between the two statutory remedies. There is nothing to prohibit, however, a request for treble damages or alternatively, punitive damages, recovery being limited to the greater of the two. Such a complaint would not be violative of the Indiana trial rule governing the general rules of pleading.[119]

Furthermore, the doctrine of election of remedies would not appear to compel a litigant to choose at the pleadings stage between treble and punitive damages for injury to property rights. The doctrine of election of remedies applies only when there are two or more coexisting, but inconsistent, remedies available to the litigant, and the choice and uninterrupted prosecution of one would preclude pursuit of all others.[120] Indiana courts have generally applied this definition to claims involving conflicting theories of action. For example, a plaintiff who has entered into a compromise agreement of a tort claim and who, upon breach of the compromise agreement, chooses to prosecute the original tort action to final judgment is barred under the doctrine from also maintaining an action for breach of the compromise agreement.[121] The plaintiff may treat the compromise agreement as rescinded and sue on the original tort or he may sue on the contract; however, he may not prosecute one of the remedies to judgment and subsequently sue on the other.[122]

In contrast, what is presented in the statute is not a choice between differing courses of action, but between two statutory awards for a single property claim. The choice between distinct statutory awards has been found to be within the province of the jury. In *Curtis Publishing Co. v. Butts*,[123] the Fifth Circuit held that under Georgia law,[124] the jury was responsible for determining whether punitive damages were to be awarded as a deterrent to the wrongdoer or for compensation for the

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[118]*See* Act of Feb. 29, 1984, Pub. L. No. 172 § 2, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1985)).

[119]IND. R. TR. P. 8(A) provides:

(A) *Claims for relief.* To state a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, a pleading must contain:

(1) A short and plain statement of the claim showing that the pleader is entitled to relief; and

(2) A demand for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

[120]*See* New York Cent. R.R. Co. v. Churchill, 140 Ind. App. 426, 218 N.E.2d 372 (1966). The doctrine only applies "where a party has chosen one remedy and later pursues another remedy which is repugnant to or inconsistent with the remedy selected." *Id.* at 429, 218 N.E.2d at 374.

[121]Burrus v. American Casualty Co., 518 F.2d 1267, 1269 (7th Cir. 1975).

[122]*Id.* at 1269.

[123]351 F.2d 702 (5th Cir. 1965).

[124]*See* GA. CODE § 51-12-5 (1982).

plaintiff's wounded feelings.[125] Punitive damages satisfying either objective were allowed by statute, although recovery for both was expressly forbidden.[126] Conceivably, the methods used to calculate punitive damage awards under either purpose may differ, resulting in unequal figures. But because the duty of determining the final amount to be awarded as well as the theory under which such relief is given is within the jury's discretion, the litigant is not faced with having to choose between the two remedies in his complaint.

The new Indiana punitive damages statute fails to distinguish the purposes for which punitive relief is granted. It does, however, provide for two different remedies from which the jury, and not the plaintiff, could competently choose as an appropriate foundation for recovery.

If the litigant chooses one form of relief over the other prior to final adjudication, certain factors should be weighed in the selection process. In many cases, a punitive award may be more advantageous than recovery of treble damages. For instance, in a suit for conversion where the article unlawfully taken is of little value, relief in the form of treble damages may be much lower than a punitive damages award designed to reprimand the defendant for his acts and deter him from repeating the same conduct in the future.[127]

3. *Corporate Offenses and Securities Violations.*—In Indiana, a corporation, partnership, or unincorporated association can be criminally prosecuted for acts committed by an agent acting within the scope of his authority.[128] A corporate entity, however, unlike an individual, cannot be deprived of liberty upon conviction. Thus, punishment is effected through the imposition of a criminal fine, the size of which is limited by statute.[129] However, fines which are negligible when compared to the gross earnings and profit-generating capacity of a large-scale operation often fail to achieve the objective of deterrence[130] or to impair seriously

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[125]351 F.2d at 717-18.

[126]*Id.*

[127]*E.g.*, Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. Ct. App. 1975) (assessing $25,000 in punitive damages with $600 in actual damages for the wrongful possession of a debtor's automobile; treble damages award would have been a fraction of the punitive relief actually given).

[128]IND. CODE § 35-41-2-3 (1982).

[129]IND. CODE §§ 35-50-2-4 to -7.

[130]*See* McLemore, *supra* note 43, at 88. Recent concern with underpunishment of corporations surfaced in the prosecution of the Ford Motor Company in *State v. Ford Motor Co.*, No. 11431 (Pulaski County Cir. Ct. Mar. 13, 1980) (*noted in* McLemore, *supra* note 43, at 88), on charges of reckless homicide, a Class C felony. IND. CODE § 35-42-1-5 (1982). Criminal charges followed after three teenagers were killed when the gas tank of their Pinto exploded after being hit from behind. Conviction was sought on the ground that Ford management was aware of the gas tank's design defects, but marketed the product despite this knowledge. Had Ford not won an acquittal, the maximum fine levied would have been limited to $10,000. IND. CODE § 35-50-2-6.

With Indiana's new punitive damages statute, adequate punishment of corporations for criminal offenses may be less difficult to achieve. In reference to the *Ford* case, the requisite finding of malice might easily have been inferred from management's knowledge of the vulnerability of the tank to rear-end collisions and the subsequent conscious decision to incorporate the tank into the car's design. Such a finding was made in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 757, 174 Cal. Rptr. 348 (1981) (strict products liability).

the financial interest of stockholders.[131] Furthermore, as one commentator has noted, pursuance of corporate criminal convictions not only encumbers the state treasury, contrary to the public's best interests, but also commands much effort and attention, impeding the state's ability to prosecute other meritorious cases.[132] Under the new statute, a punitive damages claim sought through private initiative will further the goals of punishment and deterrence while averting the drawbacks of a state prosecution.

The new punitive damages statute may also affect securities violators, as illustrated by the Colorado case of *E.F. Hutton & Co. v. Anderson*.[133] A securities brokerage instituted civil proceedings against several options buyers whose checks had been returned for insufficient funds. Although the defendants had already received criminal convictions on separate counts of theft and deceptive securities practices, the court granted plaintiff's request for punitive damages. The court reasoned that the added civil penalty did not violate double jeopardy principles, but was necessary to punish the defendants and compensate the plaintiff for the purchasing losses sustained.[134]

Under Indiana law, the unlawful sale or procurement of securities is punishable both criminally and civilly, with civil liability limited to recovery of consideration paid or accepted, together with interest and attorney's fees.[135] Unless Indiana's securities statute is construed to exclude all other forms of civil relief, the introduction of punitive damages as an added form of punishment may further assist both state and national efforts to curb fraudulent securities practices.

4. *Driving While Intoxicated.*—Attention to the frequent underpunishment of drunk drivers is highlighted by the legislature's recent attempts to stiffen penalties against first-time and habitual offenders.[136] With the passage of the new punitive damages statute, the arsenal of judicial weapons against the drunk driver will be even greater. Unlike the new repeat offender provision for drunk driving convictions,[137] however, the application of the new punitive damages statute to personal

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[131]Impairing the financial interests of innocent shareholders is arguably not a goal in assessing criminal fines against corporate assets. Nevertheless, because corporations can only act through their agents and servants, the alternative would leave many instances of criminal conduct unpunished. *See* H. BALLANTINE, BALLANTINE ON CORPORATIONS §§ 113-14 (rev. ed. 1946).

[132]*See* McLemore, *supra* note 43, at 88.

[133]42 Colo. App. 497, 596 P.2d 413 (1979).

[134]*Id.* at 501, 596 P.2d at 415.

[135]*See* IND. CODE § 32-2-1-18.1 (1982) (securities violations punishable as a Class C felony); *see also* IND. CODE § 23-2-1-19 (1982) (deceptive practices generally and civil remedies therefor).

[136]*See* IND. CODE §§ 9-11-2-1, -4, -5 (Supp. 1985) (driving while intoxicated is punishable as a misdemeanor upon the showing of a blood-alcohol level of .10% or more, but elevated to Class C and D felony status if the crime results in serious bodily injury or death); *see also* IND. CODE § 9-11-2-3 (repeat offender provision).

[137]IND. CODE § 9-11-2-3 (Supp. 1985).

injury claims against drunk drivers will likely escape constitutional attack. To date, the application of similar punitive damages statutes in other states to personal injury claims has not been challenged on constitutional grounds.[138]

Notwithstanding the disqualification of criminal prosecution as a defense to a punitive damages claim, Indiana courts must still decide whether evidence of intoxication is sufficient to impute malice.[139] Many jurisdictions, focusing upon the defendant's conduct rather than upon his actual state of mind, have inferred malice and a general disregard for the safety of persons and property solely from the voluntary acts of drinking and driving.[140] In furthering an already strong public policy decision against drunk driving, the Second Circuit Court of Appeals upheld a punitive damages award without first deciding whether evidence of driving while intoxicated was sufficient in itself to prove willful and wanton conduct.[141]

It remains to be seen whether Indiana courts will impute malice for drunken driving in itself; however, it would unquestionably be in the public's best interest, and in the interest of effective law enforcement, to increase civil penalties imposed upon the guilty defendant, especially

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[138]*See supra* note 10 (listing similar statutes in other jurisdictions).

[139]Mere negligence is an insufficient basis for a punitive damages award. The plaintiff must establish malice to recover punitive damages. *See supra* note 22 and accompanying text.

[140]*See* Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); Peterson v. Superior Ct., 31 Cal.3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982); Ingram v. Pettit, 340 So.2d 922 (Fla. 1976) (intentional infliction of harm or recklessness which is the result of an intentional act authorized punishment which may deter future harm); Baker v. Marcus, 201 Va. 905, 114 S.W.2d 617 (1960). *But see* Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977) (intoxication plus negligent driving does not, per se, equal reckless disregard for the safety and rights of others); Detling v. Chockley, 70 Ohio St. 2d 134, 436 N.E.2d 208 (1982) (although punitive damages are allowed for criminal activity, evidence of driving while intoxicated alone is insufficient to impute malice); Ayala v. Farmers Mut. Auto. Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956). *Cf.* Thompson v. Pickle, 136 Ind. App. 139, 191 N.E.2d 53 (1963) (punitive damages denied, but willful and wanton misconduct present where evidence showed that the defendant was intoxicated and drove seventy m.p.h. in a thirty m.p.h. zone). The merits of assessing punitive damages as an added deterrent against convicted drunk drivers were discussed in *Harrell v. Ames*, 265 Or. 183, 508 P.2d 211 (1973):

> However, in the absence of a showing of substantial evidence to the contrary, we are not prepared to hold that law enforcement officials and courts, who have a heavy responsibility in this area, are wrong in their present apparent assumption that both criminal penalties and awards of punitive damages may have at least some deterrent effect in dealing with this serious problem.

Id. at 190, 508 P.2d at 215. For a general discussion of the propriety of awarding punitive damages in drunk driving cases, see Note, Detling v. Chockley: *Punitive Damages and the Drunk Driver - An Untimely Decision*, 12 CAP. U.L. REV. 271 (1982); Note, *Punitive Damages and the Drunk Driver*, 8 *Pepperdine L. Rev.* 117 (1980).

[141]Brooks v. Wootton, 355 F.2d 177 (2d Cir. 1966).

in light of the substantial number of traffic fatalities attributable each year to drunk drivers.[142]

5. *Other Offenses.*—Certain types of offenses generally escape criminal prosecution, either as a result of the state directing its prosecutorial efforts to more egregious crimes or simply because of the comparatively benign nature of the criminally punishable activity itself. One example is bigamy.[143] In *Morris v. MacNab*,[144] a New Jersey court awarded the plaintiff punitive damages in an action for fraudulent inducement to enter a bigamous marriage, even though the defendant had previously been convicted on a bigamy charge.[145] The court stated, "[I]t has been pointed out that the inclusion of punitive damages in the plaintiff's tort judgment, which is allowable for the private wrong to the individual rather than the accompanying wrong to the public, may effectively supplement the criminal law in punishing the defendant."[146]

More noteworthy offenses which are criminally punishable, and therefore subject to the purview of the new punitive damages statute, include civil rights violations[147] and criminal confinement.[148] With respect to civil rights violations, the propriety of a punitive damages award was addressed by the United States District Court for the Northern District of Iowa in *Amos v. Prom, Inc.*[149] In *Amos*, a black plaintiff sued a corporate defendant for its alleged willful and malicious refusal, in violation of the Iowa Civil Rights statute, to admit him into a ballroom operated by the corporation. The court, in overruling the defendant's motion to dismiss for lack of jurisdiction, stated in dicta that punitive damages would be allowable for such reprehensible conduct despite coexistent criminal liability.[150]

Indiana's Civil Rights statute states:

> A person who knowingly or intentionally denies to another person, because of color, creed, handicap, national origin, race, religion, or sex, the full and equal use of the services, facilities, or goods in:
>
> (1) an establishment that caters or offers its services, facilities or goods to the general public; or
>
> (2) a housing project owned or subsidized by a governmental entity;
>
> commits a civil rights violation, a Class B misdemeanor.[151]

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[142]PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983) (between 1973 and 1983, over 250,000 were killed in alcohol-related crashes; over 50% of all highway deaths involve the use of alcohol).

[143]*See* IND. CODE § 35-46-1-2 (1982).

[144]25 N.J. 271, 135 A.2d 657 (1957).

[145]*Id.* at 279, 135 A.2d at 662-63.

[146]*Id.* at 280, 135 A.2d at 663.

[147]*See* IND. CODE § 35-46-2-1 (1982) (Class B misdemeanor).

[148]IND. CODE § 35-42-3-3.

[149]115 F. Supp. 127 (N.D. Iowa 1953).

[150]*Id.* at 134.

[151]*See* IND. CODE § 35-46-2-1 (1982).

Before the passage of the new punitive damages statute, an individual or establishment could selectively discriminate in furnishing goods and services in Indiana, without the fear of being civilly liable for anything more than any actual damages sustained. Such liability in many instances would be an ineffective deterrent in light of the fact that a plaintiff's pecuniary loss resulting from the unjust discrimination is generally inconsequential.[152] Thus, because the principal justification for punitive damages is deterrence,[153] imposition of punitive awards will likely encourage strict compliance with state and federal anti-discrimination laws.[154]

V. Potential Obstacles to Recovering Punitive Damages for Criminal Acts

A. Actions by the Legislature

Judicial decisions invoking the *Taber* safeguard against double jeopardy have done so in reliance upon the rule's underlying principles of fairness in prescribing punishment for the defendant.[155] Notwithstanding abrogation of the rule, the legislature has attempted to preserve this objective by increasing the plaintiff's burden of proof in a punitive damages action from a mere preponderance of the evidence to clear and convincing proof.[156] Although different in form from criminal penalties, the consequences of civil liability are unmistakably penal in nature.[157] Despite this similarity in effect, and the potential magnitude of a punitive award, the defendant in a civil action for punitive damages is not afforded the same safeguards which accompany the criminal trial and protect the criminal defendant.[158] In criminal courts, the state is required to establish

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[152]*See* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961).

[153]*See* Note, *Criminal Safeguards, supra* note 33.

[154]*See, e.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1976).

[155]*See, e.g.*, Glissman v. Rutt, 175 Ind. App. 493, 497, 372 N.E.2d 1188, 1191 (1978).

[156]*See* Act of Feb. 29, 1984, Pub. L. No. 172, 1984 Ind. Acts 1462-63 (codified at Ind. Code §§ 34-4-34-1, -2 (Supp. 1985)) which reads:

> (1) This chapter applies to all cases in which a party requests the recovery of punitive damages in a civil action.
>
> (2) Before a person may recover punitive damages in any civil action, that person must establish, by clear and convincing evidence, all of the facts that are relied upon by that person to support his recovery of punitive damages.

This higher standard of proof for punitive damages claims was first enunciated in *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982), where the court stated: "The stricter standard is utilized when fundamental rights are involved and the legal and social ramifications of the civil proceeding are serious." *Id.* at 32.

[157]*See* Note, *Criminal Safeguards, supra* note 33.

[158]*See id.*, at 430.

the defendant's guilt beyond a reasonable doubt,[159] while in civil proceedings the plaintiff must generally prove his case by a preponderance of the evidence.[160] By changing the civil evidentiary rule to require proof by clear and convincing evidence, the legislature has increased the plaintiff's burden of proof in accordance with the increase of possible consequences to the defendant.

B. Judicial Decisions

In addition to the increased burden of proof now borne by the plaintiff in a punitive damages action, Indiana case law furnishes an inherent safeguard against potential misuse of the statute. In actions for which punitive damages are sought, the defendant's financial condition is admissible in evidence as bearing upon the amount of punitive damages recoverable.[161] Such information is material in calculating the amount necessary to meet the punishment and deterrence functions of punitive damages. As one New York court stated, "[The] defendant's wealth . . . is only relevant with respect to what should be awarded to plaintiff as punishment to defendant and to deter defendant and others of similar mind from engaging in malicious acts."[162]

Although the introduction of the defendant's pecuniary resources has primarily been used as a plaintiff's weapon,[163] most courts also permit a punitive damages defendant to show evidence of his wealth in diminution of an award.[164] Tailoring punitive awards to the defendant's financial resources both preserves the laudable objectives of the *Taber* rule and protects against the possibilities for overpunishment long characteristic of the majority position. The defendant is sufficiently deterred,

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[159]C. McCormick, Evidence § 341, at 962 (3d ed. 1984).

[160]F. James and G. Hazard, Civil Procedure § 7.6, at 243 (2d ed. 1977).

[161]*See* Nate v. Galloway, 408 N.E.2d 1317 (Ind. Ct. App. 1980). In addition to the defendant's financial condition, the court in *Nate* considered the nature of the tort and the extent of the actual damages sustained in reviewing a punitive damages award. In light of the fact that the defendant owned three apartment buildings, a $3,500 punitive damages award was held not to be excessive. *Id.* at 1323. *See also* Chapin v. Tampoorlos, 325 Ill. App. 219, 59 N.E.2d 334 (1945); Joseph Schlitz Brewing Co. v. Central Beverage Co., Inc., 172 Ind. App. 81, 359 N.E.2d 566 (1977); Gierman v. Toman, 77 N.J. Super. 18, 185 A.2d 241 (1962).

[162]Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975).

[163]This is especially true against large corporate defendants where assets and holdings information frequently contribute to large punitive damages awards. For an examination of jury verdicts in a corporate setting, see Belli, *Punitive Damages*, 13 Trial 40 (1977), where the author noted, "Courts and insurance companies hate punitives; juries and plaintiffs savor them. Judges are doing everything in their power to restrict them; plaintiffs are clamoring for them as the silver bullet that can hurt even the invulnerable corporate defendant."

Id. See also Silliman, *Punitive Damages Related to Multiple Litigation Against a Corporation*, 16 Fed'n Ins. Coun. Q. 91 (1966).

[164]*See* Grimshaw v. Ford Motor Co., 119 Ca.3d 757, 174 Cal. Rptr. 348 (1981) (trial court reduced a jury punitive damages award of $125 million to $3.5 million after considering evidence of the company's profit-generating capacity.)

yet is not confronted with a liability grossly disproportionate to the crime committed.

C. The "Supplemental Approach" to Punitive Damages

The objective of the *Taber* rule was merely to prevent the imposition of excessive or unwarranted punishment.[165] Despite misgivings relating to the rule's continued vitality in judicial decision making, Indiana courts have remained loyal to this doctrine for one hundred thirty years.[166] Although the recovery of punitive damages is no longer precluded by the possibility of criminal prosecution, it is unlikely that courts will now ignore the well-established concern for the rights of the defendant. Under the new statute, a defendant who is sufficiently punished at the criminal level may later be subject to punitive damages in a civil trial. This would overpunish the defendant and violate the spirit of the prohibition against double jeopardy.[167] A more consistent approach in confronting the double jeopardy concern would be to focus upon the effectiveness of the punishment actually given, rather than the number of sanctions to which the defendant may be subjected.[168]

The principle of this "supplemental approach," a term developed by Harvard University Professor Morris, has been adopted in several jurisdictions[169] and entails the reciprocal adjustment of both civil and criminal penalties.[170] Under this theory, double punishment is permitted

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[165]5 Ind. at 325-36.

[166]*See generally* Aldridge, *supra* note 46.

[167]"However, the subsidiary functions of exemplary damages — compensation and revenge — seem to justify making the award to the plaintiff even though it may be largely a windfall." Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 525 (1957).

[168]This suggestion was propounded in Note, *Double Jeopardy and the Rule Against Punitive Damages of* Taber v. Hutson, 13 IND. L. REV. 999, 1020 (1980).

[169]The "supplemental approach" provides that the factfinder should be allowed to consider criminal liability as one factor in determining whether a punitive damages award would serve a meaningful deterrent function. *See* Badostain v. Grazide, 115 Cal. 425, 47 P. 118 (1896) (assault and battery conviction); Hanover Ins. Co. v. Hayward, 464 A.2d 156 Me. (1983); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908) (prison sentence imposed following attempted murder conviction). The vast weight of authority, however, holds otherwise. *See, e.g.*, Irby v. Wilde, 155 Ala. 388, 46 So. 454 (1897); Edwards v. Wessinger, 65 S.C. 161, 43 S.E. 518 (1903) (evidence of a prior acquittal for the same act is inadmissible in the mitigation of damages) (overruled on other grounds); DuBois v. Roby, 84 Vt. 465, 80 A. 150 (1911). In *Hoadley v. Watson*, the court maintained,

> The fact that in a civil action founded on a criminal act, the guilty party had been compelled to pay exemplary damages to the party injured on account of the act, would be no bar to a prosecution in a criminal proceeding for the same act, nor to any part of the fine imposed by law upon such offenses. Neither should the liability to, nor the actual imposition of, a fine in a criminal proceeding, bar any portion of the liability in a civil action for the same act.

45 Vt. 289 (1873). *See also* Bannister v. Mitchell, 127 Va. 578, 104 S.E. 800 (1920) (award of punitive damages wholly uninfluenced by criminal sanctions imposed).

[170]Professor Morris contributed a thorough analysis respecting both the merits and the shortcomings of the supplemental approach in Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1195-97 (1931).

only when the first penalty fails to achieve the goals of adequate punishment and deterrence. Where the civil case precedes a criminal hearing, the jury remains free to assess damages without considering the possibility of criminal punishment.[171] If a criminal action is subsequently brought, any inadequacy in the money judgment may he remedied by the criminal court judge by imposing a longer jail term than he would have given the defendant had there not been a civil suit.[172] If an adjustment is not deemed necessary, the court may suspend sentences or impose minimum penalties if mandated by the evidence.[173]

If the defendant has been prosecuted prior to the civil proceeding, the jury should be apprised of all criminal sanctions levied against such defendant in order to adjust the civil punishment accordingly.[174] Because the legislature predetermines many criminal penalties without taking into account the specific circumstances of the unlawful act,[175] the jury would be able to tailor further punishment to redress the conduct of the particular culprit. To avoid the danger that the jury might misuse the information to assume guilt and inflict greater punitive damages,[176] the defendant's liability and punishment should be separately determined.[177] In such a bifurcated trial, the defendant's financial condition and prior criminal conviction would be withheld until after the defendant's liability has been established.

The major flaw with the supplemental approach relates to the burden of predicting what amount of punishment will best further the goals of punishment and deterrence.[178] This problem is particularly acute when an often inexperienced jury must decide the appropriateness of the penalties. Moreover, because no set standards exist by which a judge or a jury may accurately gauge the value of the plaintiff's emotional duress or loss of reputation, it would likewise be difficult "for them to determine the amount of punitive damages that would produce an efficient level of deterrence . . . ."[179]

The judiciary's enduring adherence to the *Taber* rule might indicate its willingness to implement the supplemental approach. Theoretically,

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[171]*See* Note, *Criminal Safeguards, supra* note 33, at 415.

[172]Better protection against double punishment lies with the criminal rather than the civil courts because the former have ample power of preventing any great injury from excessive punishment. For instance, if the complainant refuses to release his private injury, the court may, following conviction, either impose a merely nominal fine or stay proceedings until termination of the civil suit, and then govern itself accordingly in the final determination of punishment. *See* Cook v. Ellis, 6 Hill 466 (1884).

[173]*Id.*

[174]*See* Morris, *supra* note 170, at 1197.

[175]*See, e.g.*, IND. CODE §§ 35-50-2-4 to -7 (1982).

[176]*See* Morris, *supra* note 170, at 1197. Again, the likelihood of this occurring would probably be greater in proceedings against well established corporations.

[177]The bifucated trial was recommended in Note, *Double Jeopardy, supra* note 38, at 1020-21 to overcome the pitfalls endemic to punitive damages determinations.

[178]*See* Morris, *supra* note 170, at 1178-79.

[179]Ellis, *supra* note 22, at 31.

such acceptance would temper the new statute's potential misuse by striking an equitable balance among the defendant's interest in protection against excessive punishment, the victim's interest in seeking private retribution, and the public's desire to check undesirable behavior. The shortcomings, however, may outweigh any benefits generated by the doctrine. For example, the task of balancing criminal and civil penalties to effect an "adequate" punishment is a highly subjective process. One court's determination of an equitable balancing may in fact be detrimental to the public good. The crime involved may be of such an egregious nature that public interests would best be served by a mandatory jail sentence, despite any previously imposed punitive awards. Furthermore, although separate determinations of liability and damages are designed to produce a fair punishment, they may actually encumber the administration of justice by causing unnecessary delays.

Other practical obstacles exist. As previously mentioned, judges and juries are simply not equipped with the appropriate standards by which to weigh and adjust different forms of punishment to each defendant. Also, the propriety of a jury second-guessing the decision of a criminal court judge might be questionable where the civil trial follows the criminal proceeding. Moreover, the extent of penalties inflicted should not rest on the unpredictable timing of the two trials.

Review of a penalty, either criminal or civil, might also pose problems. Although a balancing of different forms of punishment may originally have been struck at the trial court level to the satisfaction of some parties, an appeal and subsequent reversal of one or both judgments would render such initial efforts at balancing mere exercises in futility. Additionally, a court or jury might hesitate to adjust a second penalty where the first had been appealed.

Ironically, the supplemental approach also fails to satisfy fully the double jeopardy principle *Taber* championed for so long. The defendant remains subject to multiple trials and hence is twice placed in fear of punishment.[180] But because supplementation supposedly individualizes punishment, thereby making it more effective and less uncompromising, the legal community may choose to tolerate having the defendant undergo two proceedings.

Ostensibly, the greatest advantage of the mitigation approach is evident when the illegal act complained of completely evades prosecution.[181] Applied to the facts of *Glissman v. Rutt*,[182] set out in the introduction of this Note, the defendant's prior conviction of reckless driving would not operate as a bar to plaintiff's request for punitive damages for personal injuries sustained, but instead would be considered

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[180]The concern is not so much whether the defendant will suffer two trials, whereby he might be doubly punished, but whether the total punishment inflicted transcends the objectives of retribution and deterrence.

[181]*See* Note, *Double Jeopardy, supra* note 38, at 1021.

[182]175 Ind. App. 493, 372 N.E.2d 1188 (1978).

by the jury in determining civil relief designed to deter and punish the wrongdoer sufficiently.

D. The Defendant's Insolvency

A higher standard of proof and possible employment of the supplemental approach both serve to limit the plaintiff's recovery of punitive damages. The defendant's lack of resources, however, will probably represent the greatest deterrent to recovering a punitive claim.

Although the plaintiff may now recover punitive damages for conduct that is both tortious and criminal, statistical studies uniformly show that perpetrators of property offenses and crimes against the person are apt to be penniless.[183] The results from a sample study of ninety-three non-southern cities with populations of over fifty thousand clearly indicate a high correlation between lower income and the offenses of robbery, burglary, and crimes against the person.[184] Thus, of all defendants named in civil proceedings, the criminal is generally least able to satisfy a punitive damages judgment.

Nor will the unpaid civil claimant find adequate relief from state-run victim compensation programs. Indiana's own program, like its counterparts, does nothing more than its name implies — compensate victims of crime.[185] In 1979, the total budget for Indiana's victim compensation program was only $120,000 with the maximum award established at ten thousand dollars for a minimum loss of one hundred dollars.[186] Such a meager budget is hardly sufficient to compensate adequately the actual losses, including mental anguish, humiliation, and harm to reputation, suffered by thousands of claimants each year.[187] Excessive reliance upon state programs seems to indicate the high percentage of convicted criminals unable to pay compensatory damages,

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[183]Winning the civil suit is the easy step; the difficulty lies in enforcing the judgment. Kiesel, *Crime and Punishment*, 70 A.B.A. J. 25-28 (1984).

[184]The data was drawn from the 1970 U.S. Census of the Population and the 1971 Uniform Crime Reports. *See* Carroll & Jackson, *Inequality, Opportunity, and Crime Rates in Central Cities*, 21 CRIMINOLOGY 178 (1983). Similar statistical studies were conducted with reference to the homicide rate in two hundred four standard metropolitan areas. *See* Messner, *Poverty, Inequality, and the Urban Homicide Rate*, 20 CRIMINOLOGY 103, 112 (1982) ("Homicidal offenders are recruited disproportionately from the ranks of the poor, yet a large poverty population appears to be associated with a low homicide rate.").

[185]Indiana's victim compensation fund was established in 1978. The provisions governing its operation are codified at IND. CODE §§ 16-7-3.6-1 to -19 (1984).

[186]A comparison of other state budgets is provided in Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485, 486 (1980).

[187]*See* Ashby, *New Crimes Laws Push Restitution, Increase Penalties*, L.A. DAILY J., Dec. 30, 1983, at 1, col. 6; Cox, *Underpayments Add to Woes of Fund to Aid Crime Victims*, L.A. DAILY J., Apr. 17, 1984, at 2, col. 4; L.A. DAILY J., Nov. 1, 1982, at 4, col. 1.

not to mention punitive awards. Therefore, the new punitive damages statute will probably not alleviate the financial misfortunes currently plaguing program operations.

Unhampered exercise of the newly-created opportunity to recover punitive damages is further compromised by the fact that many criminals escape apprehension. But "such a right is nonetheless limited only by the shortcomings of private initiative rather than by the shortcomings of the criminal justice system."[188]

VII. Conclusion

Until the legislature acted, the courts had unbendingly prohibited punitive damages where the defendant was subject to a criminal prosecution for the same act, primarily because of the constitutional prohibition against double jeopardy. In consideration of the often unprosecuted or underpunished criminal defendant and the inequities frequently generated by the application of *Taber* to various classes of litigation, the Indiana General Assembly has finally heeded the pleas of Indiana courts for a reevaluation of the rule against punitive damages.

The new statute exposes all offenders, whose acts are punishable as felonies or misdemeanors, to increased civil liability. In doing so, the deterrence and punishment purposes of punitive damages are more readily effected. While the legislature did not expressly limit the statute's scope of applicability, it did, however, pass a simultaneous measure upgrading the plaintiff's burden of proof from a preponderance of the evidence to clear and convincing proof, reserving the award for the most clear-cut cases of malicious or reckless conduct.

The *Taber* doctrine was founded on the principles of fairness underlying the constitutional prohibition against double jeopardy. A continuation and revitalization of this fairness rationale by Indiana courts in the form of mitigation of punishment might, at least in theory, guard against the pitfalls peculiar to the majority position, which ignores the possibility of punishment at both the criminal and civil levels. The supplemental approach would attempt to strike an equitable balance between the defendant's concern for overpunishment and the public's desire to check undesirable behavior. The adjustment of a punitive damages award to reflect a prior fine or prison sentence and the corresponding consideration of civil relief as a mitigating factor in determining punishment at the criminal level would apparently achieve both objectives.[189] The practical obstacles of the supplemental approach, how-

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[188]*See* McLemore, *supra* 43, at 83.

[189]The greatest advantage of the new punitive damages statute is, other than increasing monetary relief for civil claimants, the opportunity to make the punishment proportional to the crime:

> My object all sublime-
> I shall achieve in time-
> To let the punishment fit the crime.

W. Gilbert, The Mikado and Other Plays 42 (1917).

ever, particularly the possibility that judges and juries will not be truly capable of determining fair cumulative punishment, may persuade Indiana courts to reject its adoption. Furthermore, the requirement of clear and convincing proof, coupled with the permissible introduction of the defendant's financial status into evidence, should guard against overpunishment. For these reasons, it would appear that the Indiana judiciary will choose to avoid the pitfalls of the supplemental approach. Despite the potential for awards of punitive damages because of the new statute, the biggest obstacle to the effectiveness of the statute may be the insolvency or limited financial resources of the majority of the defendants who commit criminal acts.

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