Fall 1980

Punitive Damages and Double Jeopardy: A Critical Perspective of the Taber Rule

Doyal E. McLemore Jr.
United States Court of Appeals for the Fifth Circuit

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Courts Commons, and the Jurisprudence Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol56/iss1/3

This Comment is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
COMMENT

Punitive Damages and Double Jeopardy: A Critical Perspective of the Taber Rule

DOYAL E. MCLEMORE, JR.*

Few protections are so established in Anglo-American law as that which prohibits putting a man twice in jeopardy for the same offense.† To avoid violating safeguards against the imposition of double jeopardy,

U.S. CONST. amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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.”

*BA. 1974, Indiana University at Fort Wayne; J.D. 1977, Indiana University School of Law, Bloomington. Staff Counsel for the United States Court of Appeals for the Fifth Circuit, New Orleans. The author of this comment prepared the Brief for Appellant (filed Feb. 4, 1979) in McCarty v. Sparks, Ind. App., 388 N.E.2d 296 (1979), a recent opinion which called for a re-examination of the Taber rule by either the Indiana Supreme Court or legislature. The ideas contained in this comment are taken from that brief.

† U.S. Const. amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The reasons underlying this protection against double jeopardy were articulated in Ex Parte Bradley, 48 Ind. 548 (1874):

[O]ur constitution provides, that “no person shall be put in jeopardy twice for the same offense.” This humane and benign provision of our fundamental law was borrowed from the common law and magna charta. Every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration, and that . . . those who had been acquitted of all crime, under a former reign, might be subjected anew to prosecution, and that a despot, by frequently
Indiana prevents tort claimants from seeking punitive damages when a defendant is subject to the possibility of criminal prosecution for the tort. Although this so-called Taber rule, which was created by the Indiana Supreme Court in 1854, has been a part of Indiana jurisprudence for over one hundred and twenty-five years, only limited examination of it has been undertaken. Recent appellate opinions, however, have invited the Indiana Supreme Court and legislature to examine the established rule. The suggestion underlying such an invitation is that the time has come for the rule to be modified or even overruled. This comment will

arraigning and trying an accused political enemy, might ultimately put him down, so that he could no longer annoy the existing power. To prevent these mischiefs, the ancient common law, as well as the magna charta itself, provided that one acquittal or conviction should satisfy the law. . . . The framers of the federal and state governments regarded the doctrine so important and necessary that they incorporated the same principle in the fundamental law. Every man accused of crime, who has been acquitted by the verdict of a jury of the whole crime preferred against him, is shielded and protected by the constitution. Id. at 557 (citation omitted); accord, Green v. United States, 355 U.S. 184, 187-88 (1957). See generally Slovenko, The Law on Double Jeopardy, 30 Tul. L. Rev. 409 (1955).

The term "jeopardy" has been defined so as to be limited in applicability to criminal prosecutions. As the Indiana Supreme Court declared in Armentrout v. State, 214 Ind. 273, 275, 15 N.E.2d 363, 364 (1938):

Jeopardy is the peril and danger to life or liberty in which a person is put when he has been regularly and sufficiently charged with the commission of a crime; has been arraigned and pleaded to such charge; has been put upon his trial before a tribunal properly organized and competent to try him for the offense charged, and a jury has been empanelled from persons competent to sit on the trial and duly sworn to try the cause and charged with due deliverance.

The meaning of the term "offense" is also technically limited to criminal prosecutions. State v. Shumaker, 200 Ind. 716, 724-25, 164 N.E. 408, 410-11 (1928); Cruthers v. State, 161 Ind. 139, 147, 67 N.E. 930, 932-33 (1900); Ind. Code § 35-41-1-2 (Supp. 1980). The double jeopardy clause covers all offenses, be they misdemeanor or felony. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 169 (1874).


See generally McClellan, Exemplary Damages in Indiana, 10 Ind. L.J. 275 (1935); Note, 2 Ind. L.J. 689 (1927); Note, 2 Notre Dame Law. 208 (1946); see also Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 Ind. L.J. 123 (1945) (focus on legislative power to provide punitive damages when wrongdoers subject to criminal prosecution).
review the reasoning behind the rule before articulating some reasons why the invitation to examine it might justifiably be accepted.

**HISTORY OF THE TABER RULE**

The genesis of the rule can be traced directly to the decision of the Indiana Supreme Court in *Taber v. Hutson.* The plaintiff in that case sought compensatory and punitive damages for an assault and battery. After the trial court instructed the jury that punitive damages could be awarded on the facts and the plaintiff prevailed, the defendant raised on appeal the issue of whether punitive damages were proper. In holding that they were not, the Indiana Supreme Court reasoned that a defendant who is sued for a tort which is not a crime might properly be assessed with exemplary damages, since such damages are the only mode of imposing punishment for violating rights to personal security or private property. However, the court declared that when a defendant commits an assault and battery, or any tort which is also a crime, punitive damages should not be awarded because to do otherwise would result in the possibility of

> [the defendant being] twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that “no person shall be twice put in jeopardy for the same offence;” and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.

Later cases confirm that a double jeopardy concern is at the heart of the *Taber* prohibition. If punitive damages are awarded while the possibility of criminal punishment is outstanding, unnecessary punishment may be inflicted. To prevent such an outcome, *Taber* and its progeny bar the recovery of punitive damages altogether.

The rationale of double jeopardy articulated in *Taber* under which defendants are simply shielded from awards of exemplary damages in tort if they are subject to the possibility of criminal prosecution for the same act has remained basically intact up to the present. Several opinions of the Indiana Supreme Court after the *Taber* decision have, however, implicitly criticized the double jeopardy rationale, drawing a distinction between civil and criminal proceedings when applying prin-

---

5 5 Ind. 322 (1854).
6 *Id.* at 335-36.
7 *See* note 2 & accompanying text supra.
8 *See* text accompanying notes 2, 6 supra.
The Indiana Supreme Court drew such a distinction in State ex rel. Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893). Schoonover was a civil action in which the plaintiff requested damages as a penalty under "an act to secure the purity and freedom of the ballot." Id. at 527, 35 N.E. at 119. The defendant questioned the act's constitutionality on double jeopardy grounds, among others, and argued that it had been repealed by a similar criminal act. Both acts had been passed on March 9, 1889; the civil act, however, had been passed first.

In discussing the constitutionality of the civil act when the criminal act made the same conduct a crime, the court stated:

When the General Assembly convened, in 1889, vote buying and vote selling were punishable alike, and convictions were extremely difficult .... The sanctity of the ballot, the freedom and purity of our elections, were ... of paramount importance ...; hence the one act provided for a civil penalty, and the other for a criminal prosecution for the offense in question, so as to open every avenue to its discovery. ....

It is true that Section 59, article 1, of the Bill of Rights provides that "No person shall be put in jeopardy twice for the same offense," but the jeopardy mentioned is the peril of a second criminal prosecution for the same felony or misdemeanor, and the liability named in [the civil act] is a civil penalty for a tortious act, and not a debt. Id. at 530-31, 35 N.E. at 120. Thus, the civil act was held not to violate the double jeopardy clause by authorizing a civil penalty for what was also a crime. Yet, in reaching this result, the court drew a distinction between civil and criminal proceedings which should logically be ignored if the double jeopardy rationale of Taber is to survive. Moreover, in reaching its result, the court did not adequately explain why a "civil penalty for a tortious act" is not a jeopardy in the same sense that punitive damages or the possibility of criminal prosecution are for the Taber rule.

The court next considered whether the criminal act impliedly repealed its civil counterpart. Quoting State ex rel. Scobey v. Stevens, 103 Ind. 55, 65, 2 N.E. 214, 220 (1885), the court found that the criminal act did not repeal the civil one:

Where ... a statute makes certain conduct a misdemeanor, and annexes to it a prescribed fine to the State, and also provides that the wrongdoer [sic] shall be liable to the injured party in a fixed or limited sum, it is certain from the beginning what the consequence may be, and there is no possibility that the penalties may overlap each other so as to put him in jeopardy of being tried twice, or suffering double the punishment prescribed for the same offense.

Id. at 532-33, 35 N.E.2d at 121. But see Koerner v. Oberly, 56 Ind. 284 (1877). Lamentably, the court does not say in principle how legislatively authorized damages "in a fixed or limited sum" which exceed actual compensation and are intended as a penalty in fact differ from punitive damages. The decision's approval of the civil penalty is reached despite the Taber rule's being required by "the spirit of our institutions." Further, the court reaches its result despite the persuasive reasoning contained in Scobey, which was decided only eight years before Schoonover:

If the provision that "no one shall be twice put in jeopardy for the same offense" is, as this court has recognized it to be, a sure protection against the power of the courts ..., it must be deemed equally potential against the power of the Legislature. It cannot be maintained in reason that it shall be interpreted to mean that the courts cannot adjudge a second punishment for the same offense except when expressly authorized by the Legislature, for the reason that in so far as the Legislature attempts to authorize such second punishment the barrier of the Constitution is as effectual against it as it is against the court.

103 Ind. at 219. But see Latshaw v. State ex rel. Latshaw, 156 Ind. 194, 201, 59 N.E. 471, 473 (1901).
that the double jeopardy clause has no literal application to "the

Decided two years after Schoonover, State ex rel. Duensing v. Roby, 142 Ind. 168, 41 N.E. 145 (1895), raises further questions about the soundness of basing the Taber rule upon principles of double jeopardy. Roby held that subjecting a defendant to criminal prosecution and enjoining criminal conduct does not violate double jeopardy. The case involved an act which made unauthorized horse racing a crime. The same act also authorized a civil suit against anyone violating its provisions and the issuance of an injunction against such violation. In its opinion, the Indiana Supreme Court considered the argument that the act violated constitutional safeguards against double jeopardy:

It is insisted that the defendant may be punished by a fine on a criminal prosecution and again made subject to an injunction and deprived of the use of his property, thus punishing him twice for the same offense or act. But the civil suit authorized by the act is not a criminal prosecution, and the injunction is not a punishment within the meaning of the . . . constitution . . . But it is further contended that in case of a violation of an injunction under the civil remedy part of the act the court might fine the defendant for contempt for disobeying the order of injunction, and that would make him liable to double punishment. The statement of that proposition furnishes a sufficient answer thereto. In that case he would not be punished for crime, but for contempt of court.

Id. at 188-89, 41 N.E. at 152 (citations omitted); accord, State v. Shumaker, 200 Ind. 716, 164 N.E. 408 (1928). The importance of the opinion, which did reach a correct result, lies nevertheless in the recognition that, when applying double jeopardy principles, "a civil suit" is not a "criminal prosecution." Taken on its face, such broad reasoning undermines the Taber rule, the integrity of which depends upon overlooking recognized differences between civil and criminal proceedings.

Issues similar to those confronted by these Indiana decisions have also been addressed by the federal judiciary. In Helvering v. Mitchell, 303 U.S. 391 (1938), for example, the United States Supreme Court considered whether a tax penalty was forbidden by the double jeopardy clause when criminal prosecution for tax fraud proved unsuccessful. Justice Brandeis, for the majority, emphasized basic differences between civil and criminal proceedings in concluding that double jeopardy was not violated by the tax penalty:

That Congress provided a distinctly civil procedure for the collection of [tax penalties] indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him, or to refuse to testify; and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy.

Id. at 402-04 (footnotes omitted). He also pointed out that the penalty had a "remedial character," in part owing to the salutary purposes served by it, in that it protected the revenue and reimbursed the government for investigating tax fraud and the loss caused thereby. Such remedial objectives of the tax penalty precluded its being so punitive as to bring the double jeopardy clause properly into play.

In United States ex rel. Marcus v. Hess, 317 U.S. 537 (1942), the Court faced a related question. Defendants therein had been criminally convicted for defrauding the government. Thereafter, pursuant to federal statute, they were sued by a private party for sums to be "forfeited" to the government as well as for double damages to be split by the government and the private party. Defendants contended that the civil action was barred by the prohibition against double jeopardy. The Supreme Court flatly disagreed, noting, among other
remedies secured by civil proceedings."

Other decisions, seemingly inconsistent with Taber, sanction statutory awards of civil damages which exceed actual compensation even though the defendant is also subject to criminal prosecution. The legislature can, for example, create a criminal offense, annex a fine to it and further provide “that the wrong-doer shall be liable to the injured party in a fixed or limited sense” without violating double jeopardy. Consistent with Taber, however, it has been held that a statute which allows unlimited exemplary damages, rather than specifying a fixed or limited sum for an act punishable by the criminal law, does violate the principle that no one shall be placed in jeopardy twice for the same offense.

Recent Indiana decisions suggest that the Taber rule be reconsidered. In one such decision, the plaintiff sued for compensatory damages sustained in an automobile collision. Punitive damages were also requested because the defendant had been intoxicated and had left the scene of the accident. Nevertheless, after the defendant had been convicted of reckless driving on the same facts, he obtained summary judgment on the prayer for punitive damages by arguing that they were improper under Taber. Since the defendant was punished by the criminal law and would be subject to “double punishment” if punitive damages were awarded, the court affirmed on appeal. Although untroubled by the application of the Taber rule when an initial jeopardy had already been suffered, the court did not address the issue of the rule’s application where “there is merely the possibility of criminal prosecution.” The court expressed concern that the reasons behind the rule had not been scrutinized in over eighty years; it is this concern which provides the focus of this comment.

things, that as to the double damages: “This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered.” Id. at 550. The Court also noted that, as to the forfeiture: “No one doubts that Congress could have accomplished the same result by authorizing ‘double’ or ‘quadruple’ or ‘punitive’ damages ...” Id. at 551. The Court has similarly refused to apply principles of double jeopardy to proceedings or statutes which can be defended *as remedial and civil rather than exclusively criminal and punitive. See, e.g., One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972); Rex Trailer Co. v. United States, 350 U.S. 148 (1955); United States ex rel. Ostrager v. New Orleans Chapter, Associated Gen. Contractors, 317 U.S. 562 (1943); Various Items of Personal Property v. United States, 282 U.S. 577 (1931). The reasoning of such cases suggests that the Taber rule could be abolished, since even punitive damages serve remedial objectives and are recovered in civil proceedings.

10 5 Ind. at 325.

11 See note 9 supra.

12 State ex rel. Scobey v. Stevens, 103 Ind. 55, 65, 2 N.E. 214, 220 (1885).

13 See Koerner v. Oberly, 56 Ind. 284 (1877). But see State ex rel. Scobey v. Stevens, 103 Ind. 55, 2 N.E. 214 (1885).

14 See note 4 & accompanying text supra.


16 Id. at ___ n.2, 372 N.E.2d at 1189 n.2.
Both the Indiana and United States constitutions prohibit putting a man in jeopardy twice for the same offense. But protection against double jeopardy is ancient; it predates the constitutional protections and was firmly established in the common law. Writing in the seventeenth century, Lord Coke described the protection of the principle against double jeopardy as stemming from three common law pleas: autrefois acquit, autrefois convict and former pardon. The construction of the double jeopardy clause in the United States Constitution has paralleled these common law pleas. Double jeopardy has been held to protect against reprosecution after acquittal, against reprosecution after conviction and, generally, against the imposition of multiple punishment for the same offense. As early as the fifteenth century, English courts occasionally used the very term "jeopardy" to describe the principle against multiple trials or reprosecuting a criminal defendant for the same crime. Justice Black once argued with conviction in a dissenting opinion: "Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive..." Double jeopardy is, in other words, a protection with a lengthy and accepted, albeit evolving, heritage.

Though the constitutional principle of double jeopardy, as applied to various fact situations, often varies, the reasons for the protection, as
well as its general meaning as a matter of policy, are not open to serious question:

In its traditional application, double jeopardy is a rule of finality: a single fair trial on a criminal charge bars reprosecution. Double jeopardy shares the purposes of civil law rules of finality; it protects the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly, and saves both the public and defendant the cost of redundant litigation. . . . It was called forth more by oppression than by crowded calendars. It equalizes, in some measure, the adversary capabilities of grossly unequal litigants. It reflects not only our demand for speedy justice, but all our civilized caution about criminal law—our respect for a jury verdict and the presumption of innocence, our aversion to needless punishment, and our distinction between prosecution and persecution.23

Once a defendant is convicted and punished, fairness and finality prohibit an additional trial or increased punishment. The double jeopardy clause thus serves a purpose of prohibiting multiple trials or successive prosecutions.24 A prosecutor is thereby disabled from subjecting a defendant to harassment, unnecessary expense or the ordeal of living in a constant state of anxiety.

The protection of double jeopardy traditionally is relevant only to the imposition of punitive sanctions, making its application virtually unique to criminal proceedings.25 It has been said, in fact, that “in the civil en-

---


Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution . . . . Although the constitutional language, “jeopardy of life or limb,” suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language . . . . At the same time, however, we have held that the risk to which the Clause
forcement of a remedial sanction there can be no double jeopardy.” In criminal proceedings, a plea of double jeopardy commonly triggers an analysis of whether or not an initial punitive sanction or risk has been suffered. Statutes which prescribe cumulative punitive sanctions, commonplace in the history of both state and federal legislation, often allow several means of redressing a single offense without bringing into play the double jeopardy clause. Antitrust laws, for example, allow civil suits for the collection of treble damages in addition to prescribed criminal penalties. The general test governing whether multiple punitive

refers is not present in proceedings that are not “essentially criminal.”

This analysis, known as “attachment,” proceeds on the assumption that double jeopardy is impossible unless an initial jeopardy has been incurred. Despite the simplicity of the governing principle, courts must struggle with individual cases, especially since judges often place different emphasis upon the fundamental purposes of the clause. See The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong., 2d Sess. S146-47 (Supp. 1978):

Criminal proceedings, a plea of double jeopardy commonly triggers an analysis of whether or not an initial punitive sanction or risk has been suffered. Statutes which prescribe cumulative punitive sanctions, commonplace in the history of both state and federal legislation, often allow several means of redressing a single offense without bringing into play the double jeopardy clause. Antitrust laws, for example, allow civil suits for the collection of treble damages in addition to prescribed criminal penalties. The general test governing whether multiple punitive

The Supreme Court has decided an uncommonly large number of double jeopardy cases and engaged in a major re-evaluation of doctrine and principle. The result has not been, however, the development of clear and consistent guidelines but rather because of the differing emphases of the Justices upon the purposes of the clause the results have more often reflected highly technical distinctions and individualistic fact patterns. Three Justices believe that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had become confused with the double jeopardy clause; in their view, the clause properly has no role to play before final judgment. Three Justices believe that the clause not only protects the integrity of final judgments but more important it protects the accused against the strain and burden of multiple trials, which also enhance the ability of government to convict. The remaining three Justices fall somewhere between the other two groups and although they endorse both roles for the clause, it appears that they engage in some form of balancing of defendants' rights with society's rights to determine when reprosecution would be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability. Thus, the basic area in which the doctrinal disagreements result in uncertain case law is the trial from the attachment of jeopardy to the judgment of not guilty.


See, e.g., Sherman Act, § 1, 15 U.S.C. § 1 (1977) (as amended) (combination in restraint of trade is a felony); Clayton Act, § 15, 15 U.S.C. § 15 (1977) (injured person may sue for treble damages); IND. CODE § 24-1-2-2 (Supp. 1980) (no monopolise is Class C misdemeanor); Id. § 24-1-2-7 (1976) (injured party may bring treble damage action); cf. IND. CODE § 34-1-60-9 (1980 Supp.) (attorney guilty of deceit with intent to deceive court guilty of Class B misdemeanor and subject to treble damage action).
sanctions may be imposed for separate criminal offenses is whether each crime requires proof of a single fact which the other does not. Thus, crimes like conspiracy to commit an offense and the offense itself can be separately punished without violating double jeopardy even though both are based on the same course of conduct.

Exemplary damages have both a punitive and remedial purpose such that the interests of society and an aggrieved individual are blended together. It is often said that some public interest should be served by their award. Such damages do not rest upon any ground of abstract justice; rather, they are founded upon an established policy which promotes the public safety and deters malicious or outrageous conduct, as well as punishes through the medium of a civil proceeding. The amount of punitive damages necessary to achieve these ends rests within the sound discretion of the jury in an action at law. In Indiana, exemplary damages may also be recovered in a court of equity, although allowing a punitive sanction to be imposed by a court of mercy appears incongruous.

---

50 Blockburger v. United States, 284 U.S. 299, 304 (1932):
Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.


52 See Taber v. Hutson, 5 Ind. 322, 324 (1854).


CRITICISM OF THE RULE

Because different burdens of proof are applicable in civil and criminal proceedings, the Taber rule results in unfairness to tort claimants. A decision to initiate a criminal proceeding is invariably affected by the burden placed upon a prosecutor of proving each element of a crime beyond a reasonable doubt. A civil claimant, however, must meet a lesser burden of proof—a preponderance of the evidence—even when punitive damages are sought. If the prosecutor in fact does not pursue potential charges, leaving only the possibility of criminal punishment.

---


38 Kempf v. Himsel, 121 Ind. App. 488, 516, 98 N.E.2d 200, 212 (1951);

This appeal involves a civil case... where the burden was merely to prove the material allegations of the complaint by a “fair preponderance of the evidence,” and where there was no presumption of freedom from fault or freedom from liability...

The distinction between “beyond reasonable doubt” in a criminal case and a “fair preponderance of the evidence” in a civil case has always been recognized in Indiana jurisprudence. The two are wholly different, clearly recognize distinguishable degrees of burdens of proof and, of course, the duty of establishing a fact “beyond reasonable doubt” imposes a duty far greater than to establish the same fact by a “fair preponderance.”


In Indiana, a tort which is also a crime need not be proved beyond a reasonable doubt before damages therefor may be recovered. Barger v. Barger, 221 Ind. 530, 536, 48 N.E.2d 813, 815 (1943); Shelby Mfg. Co. v. Harris, 112 Ind. App. 627, 633, 44 N.E.2d 315, 318 (1942); Kaufman v. American Sur. Co., 89 Ind. App. 393, 397, 166 N.E. 615, 616-17 (1929). The Indiana Supreme Court explained the justification for this rule in Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 60-61, 10 N.E. 636, 637 (1887):

The rule which demands greater certainty and weight of proof in criminal than is required in civil cases, has its foundation in the tender regard in which the law holds the life and liberty of the subject.

It had its origin, and was moulded into form and consistency, when the penal code of England visited upon offences of a comparatively trivial character the most harsh and cruel punishments. To mitigate the rigor of a code sometimes administered with severity, humane judges engrafted upon the common law the rule that no one should be convicted of a crime which affected life or liberty, until his guilt was established with such a degree of certainty as to exclude every reasonable doubt. Having grown up out of the humanity of the law, the rule is very properly retained in criminal cases, even after the reasons for it have in good measure ceased to exist. Indeed, there is little of any rule whose origin, however remote, is found in the sources whence this rule came, which should either be dissipated or obscured in the administration of the law. The consequences of a mistake, when life and liberty are involved, are so overwhelming and irreparable that the integrity of the rule which requires a greater degree of certainty and caution in such a case, before coming to a conclusion, than in a case which affects property merely, should be steadily maintained and intelligently applied.
present, the tort claimant still cannot seek punitive damages although his civil burden of proof could well be met and the facts might clearly merit their award. In such situations, the Taber rule prevents a defendant from suffering an initial jeopardy, let alone double jeopardy, making the effect of the rule an exoneration from punishment rather than the prevention of unnecessary punishment.

The comparatively short statutes of limitation which govern tort actions create additional concern. In Indiana, the general statute of limitation for torts is two years. Statutes of limitation for most crimes which are also torts, however, are commonly much longer. When the tort statute is shorter, a civil claimant must promptly litigate for recoverable compensatory damages to avoid expiration of the cause of action. Anomalous applications of the Taber rule result when the state prosecutes for the crime which is also a tort but fails to secure conviction within two years. The tort claimant can then seek both punitive and compensatory damages since Taber does not come into play if no possibility of criminal prosecution exists or if the possibility of criminal prosecution has been extinguished. In other words, the civil claimant's ability to seek punitive damages may depend merely upon whether a prosecutor diligently pursues a criminal case and not upon the merit of any claim for punitive damages.

Prohibiting a prayer for punitive damages when there is a mere possibility of criminal punishment effectively disregards the realities of a criminal justice system fraught with discretion. The prosecutor has

---

41 In Indiana, the period of limitation for felonies is five years and the period of limitation for misdemeanors is two years. Id. § 35-41-4-2 (Supp. 1980).
43 Criminal law in fact has been characterized as “an island of technicality in a sea of discretion.” J. HALL & S. GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 3 (1951). Discretion is exercised by police, witnesses, prosecutors, judges, victims and juries.

The police exercise discretion whether to arrest or not, whether to investigate or not. The prosecutor has, too, the discretion whether to initiate a prosecution or not, or whether to investigate or not. The grand jury, if there is one, has virtual discretion to indict or not, the contrary applicable statutes notwithstanding. The prosecutor, again, has a discretion whether to prosecute an indictment, or to nolle pros., or to accept a lesser plea. The court has a discretion in determining which counts to submit to a jury, the kind of charge to give to the jury, the lesser plea it may accept, or the sentence that will be imposed. The petty jury, of course, has, in the criminal case, a practically uncontrolled discretion to acquit. There is obvious discretion in the probation agency, if an offender is turned over to it. There is an ever larger discretion reposed in correctional agencies. It is evident in classification, reception centers, modes of treatment, and the various rewards, including time credit for good behavior. Parole exercises the broadest discretion in releasing, conditioning release, supervising, and returning offenders for violation. There is even the capstone of absolute discretion involved in the executive pardoning power.
great discretion with regard to whether or not to press charges. In some cases, the particular fact situation may make it inappropriate to press charges, while in others practical considerations or law enforcement needs may make it inadvisable to press charges. The Taber rule


Professor Morris made important observations about the role which punitive damages can play in achieving an equitable balance of interest when an act is both criminal and tortious:

[It] is a notoriously good guess that current administration of the criminal law is not particularly efficient. Many criminals are not apprehended. Penalties fixed—at least as to maximum and minimum—in advance by a legislature which does not have the particular culprit in mind may not make for effective punishment in particular cases. So it is possible that the allowance of punitive damages for torts which are also crimes may remedy some maladjustment not adequately treated by the criminal law. And most courts allow punitive damages, even though the defendant has been, or can be, prosecuted criminally.

Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1196 (1931) (footnote omitted). While an argument can be advanced that allowing punitive damages scarcely provides a civil claimant with a right capable of successful exercise—especially, for example, against the unapprehended criminal—such a right is nonetheless limited only by the shortcomings of private initiative rather than by the shortcomings of the criminal justice system. That a defendant is subject only to the possibility of criminal prosecution sheds no light on whether the public interest in seeking punishment will be vindicated by prosecution, let alone on why private initiative should be thwarted.

In Indiana, prosecuting attorneys represent the state in all criminal cases, State ex rel. Powers v. Vigo Circuit Court, 236 Ind. 408, 412, 140 N.E.2d 497, 499 (1957), and their discretion to enforce substantive criminal law is recognized, see, e.g., Dembowski v. State, 251 Ind. 250, 253, 240 N.E.2d 815, 817 (1968); Tinder v. Music Operating Inc., 237 Ind. 33, 46, 142 N.E.2d 610, 617 (1957); Brune v. Marshall, 169 Ind. App. 637, 593-40, 350 N.E.2d 661, 662 (1976). Out of respect for the separation of powers, a prosecutor's refusal to pursue a case is not subject to judicial control at the request of private parties. Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-80 (2d Cir. 1973); State ex rel. Spencer v. Criminal Court, 214 Ind. 551, 556-57, 15 N.E.2d 1020, 1022-23 (1938). Generally, even deliberate selectivity in the exercise of prosecutorial discretion will raise no problem of equal protection. Oyler v. Boles, 368 U.S. 448, 456 (1962).

"The President's Comm'n on Law Enforcement & Administration of Justice, Task Force Report: The Courts (1967), said of such realities:

[O]community attitudes justifiably demand that the armed robber, the corrupt public official, and the hardened, persistent offender be subjected to the full weight of condemnation. But in many cases effective law enforcement does not require punishment or attachment of criminal status, and community attitudes do not demand it.

. . .

The legitimacy and necessity of the prosecutor's discretion in pressing charges have long been recognized. There are many cases in which it would be inap-

propriate to press charges. In some instances, a street fight for example, the police may make lawful arrests that are not intended to be carried forward to prosecution. . . Often it becomes apparent after arrest that there is insufficient evidence to support a conviction or that a necessary witness will not cooperate or
fails to face these realities because it permits no consideration to be given to the desirability of exemplary damages if no criminal prosecution is instituted or if a criminal conviction is, for any of the foregoing reasons, unlikely or unnecessary.

The Taber rule, moreover, disallows punitive damages in cases where the policies underlying them would be justly advanced by their award. Before a court can allow exemplary damages, some malice, fraud, oppression, gross negligence or willful misconduct must be established. An award of punitive damages for ordinary negligence is improper. Those claimants who could best make the showing necessary to recover punitive damages are those who have been intentionally or willfully injured. Intentional and willful wrongdoers are also those on whom imposing punitive damages would advance the policies of deterrence and the promotion of public safety which underlie them. Nevertheless, claimants who have been intentionally injured are virtually always prevented from seeking punitive damages since the defendant is usually subject to criminal prosecution for his intentional tort. The Taber rule has the

is unavailable; an arrest may be made when there is probable cause to believe that the person apprehended committed an offense, while conviction after formal charge requires proof of guilt beyond a reasonable doubt. Finally, subsequent investigation sometimes discloses the innocence of the accused.

When there is sufficient evidence of guilt, tactical considerations and law enforcement needs may make it inadvisable to press charges. Prosecutors may, for example, drop charges in exchange for a potential defendant's cooperation in giving information or testimony against a more serious offender. They may need to conserve their resources for more serious cases.

Id. at 5 (footnotes omitted).


lamentable effect in such instances of not only defeating entirely certain salutary and remedial policies which underlie exemplary damages, but also disregarding socially desirable results which would be achieved by allowing them.

Preventing a defendant from enduring multiple trials, a fundamental purpose of the constitutional protection against double jeopardy, cannot be achieved by applying principles of double jeopardy to civil plaintiffs seeking punitive damages. A defendant who commits a tort which is illegal will always be potentially subject to "multiple trials"—one civil and one criminal. Although the Taber rule prevents punitive damages when the defendant is subject to criminal prosecution for a tort, it does not prevent a tort claimant from seeking compensatory damages. The claimant retains an interest in obtaining reasonable compensation for his injury and, therefore, redress will always be litigated separately from the state's pursuit of a criminal conviction. For this reason, the Taber rule cannot effectively implement the double jeopardy purpose of diminishing the uncertainty which a defendant faces from the possibility of enduring multiple trials as a result of a single act or course of conduct. At best, the rule merely reduces the amount of exposure which a defendant faces in a civil trial. But a reduction of exposure in civil cases has never been an evil against which double jeopardy was meant to protect.

The rule articulated in Taber is not widely followed in other jurisdictions. In fact, one decision in this state 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." Many jurisdictions distinguish between the interests affected by civil and criminal proceedings; whereas criminal proceedings vindicate the interests of the state and

---

4 Note, Multiple Punishment Under the Double Jeopardy Rule, 31 COLUM. L. REV. 291, 292 (1931); see Stone v. United States, 167 U.S. 178, 188-89 (1897); Jones v. District of Columbia, 212 F. Supp. 438, 449 (D.D.C. 1962); Wilson v. Gehring, 152 Mont. 221, 227-28, 448 P.2d 678, 682 (1968); Royer Motor Vehicle Operator License Case, 213 Pa. Super. 17, 21, 245 A.2d 716, 718 (1968). This proposition also follows from the very meaning of protection against double jeopardy; since compensatory damages have no punitive objective and are wholly remedial, they cannot raise concern about the infliction of unwarranted punishment which principles of double jeopardy prevent. See Ex parte Lange 55 U.S. (18 Wall.) 163, 173 (1873). A new trial on the issue of compensatory damages alone has been held proper for a tort which is also a crime. See McCarty v. Sparks, ___ Ind. App. ___, 388 N.E.2d 296 (1979). Alternatives to civil recovery of compensatory damages caused by violent crime have also been considered. Svetanoff, Compensation for Victims of Violent Crimes, RES GESTAE, Jan. 1973, at 6.

44 See notes 1, 9 supra.

public, civil lawsuits seeking punitive damages are held to vindicate the interests of an individual who has been the victim of a malicious wrong. Following the rationale of the Taber rule, a criminal defendant should be able to plead that his criminal prosecution is barred if he is being sued in tort for punitive damages. Yet, the Taber rule does not prevent the state from seeking criminal punishment merely because a criminal defendant is sued for punitive damages in tort. One explanation for the failure of Taber to bar state prosecution is that, while civil and criminal sanctions may both be punitive, they vindicate distinct interests. Ironically, Indiana decisions all appear to assume this distinction, since the Taber rule does not work in reverse.

The Taber rule sanctions unsettling differences of treatment among tort claimants who have been willfully injured, since punitive damages may be sought for intentional torts not within the jurisdiction of criminal statutes. The tort of defamation, which invades the security of one's reputation is, for example, not now criminally punishable in Indiana, and someone who is maliciously defamed may therefore seek punitive damages. But other victims of intentional torts whose injury constitutes a crime such as assault and battery are not able to seek punitive damages. The operation of the Taber rule in such cases offends funda-

---


Indiana Cent. R.R. v. Potts, 7 Ind. 681 (1856).


Formerly, the so-called dual sovereignty doctrine allowed a criminal offense under state and federal law to be prosecuted by both sovereigns, the United States and the State of Indiana. Though each sovereign obtained a conviction, no violation of double jeopardy resulted. See Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959); Heier v. State, 191 Ind. 410, 133 N.E. 200 (1921); Richardson v. State, 163 Ind. App. 222, 323 N.E.2d 291 (1975). But see Fisher, Double Jeopardy, Two Sovereignties and the Intruding Constitution, 28 U. Chi. L. Rev. 591 (1961) (although Constitution might allow double prosecution, it still violates common law double jeopardy). Given the evident double punishment which the doctrine allowed without offending double jeopardy, it is difficult to see how fear of incurring double jeopardy would in principle prevent claimants from seeking punitive damages for an illegal act. The dual sovereignty doctrine, however, may no longer be the law in Indiana. See Ind. Code § 35-41-1-2, -41-1-2 (Supp. 1980). As a matter of policy, the federal authorities will refuse to prosecute a defendant if the state has already done so. See Thompson v. United States, 444 U.S. 248 (1980); Petite v. United States, 361 U.S. 529 (1960). See also Note, The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, 31 Stan. L. Rev. 477 (1979).
mental values which require equal treatment for claimants who are similarly the victims of intentional wrongdoing.54

Whenever changes are made in the scope of criminal statutes, the Taber rule must be taken into account. Corporations, now subject to criminal prosecution in Indiana,55 provide a case in point. While it is true that a criminal conviction punishes, the application of Taber to corporations may often lead to underpunishment, particularly with large, well-established operations.56 Since a corporation cannot be deprived of lib-

54 See generally U.S. Const. amend. XIV, § 1; Ind. Const. art. I, § 23.
56 Concern with underpunishment of corporations is highlighted by the recent criminal prosecution of Ford Motor Company. State v. Ford Motor Co., No. 11431 (Pulaski County Cir. Ct. Mar. 13, 1980). Ford was tried by jury in Pulaski County on charges of reckless homicide. Prosecution followed the deaths of three teenagers who were riding in a 1973 Pinto when it was rammed, causing it to explode after an allegedly defective gas tank ruptured. See generally Ind. Code § 35-41-2-3 (Supp. 1980) (corporations subject to criminal prosecution); id. § 35-42-1-3 (reckless homicide is Class C felony). The prosecution, although unsuccessful, sought conviction on the ground that Ford was aware of the propensity of Pinto gas tanks to rupture. At a maximum, Ford could have been fined only $10,000 upon conviction—a sum insufficient to punish the company adequately. See id. § 35-50-2-6 (Supp. 1980). But see id. § 35-50-5-2 (1977) (alternative fine may be twice the pecuniary loss sustained by victim). Abolition or modification of the Taber rule could allow courts to remedy such maladjustments in the punishment provided by statute for crimes.

Additional concern is created by the Taber rule's application to corporations, since judicial ability to achieve the objectives of strict liability in tort appears compromised, albeit not thwarted entirely, when Taber is so applied. Strict liability makes sellers of products in "defective condition unreasonably dangerous to the user or consumer or to his property" liable for physical damage caused by such products. Compare Restatement (Second) of Torts § 402A (1965) with Ind. Code § 33-1-1.5-3 (Supp. 1980). An improper or dangerous design or a manufacturing flaw can make a product defective. See Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 424-26, 357 N.E.2d 738, 744 (1976). The Indiana Supreme Court later explicitly recognized strict liability as a part of the common law. See Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973). The Restatement's justification for the doctrine was stated in Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970), to be "the ... special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and properties, and the forced reliance upon that undertaking on the part of those who purchase such goods." Id. at 113, 258 N.E.2d 686 (quoting Restatement (Second) of Torts § 402A, Comment f (1965)). See also Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 374, 342 N.E.2d 908, 916 (1976). Punitive damages may well be recoverable in products liability cases given proper proof, thereby deterring defective products from finding their way into the Indiana marketplace. For similar positions in other states, see Casrell v. Altec Induss., Inc., 335 So. 2d 128 (Ala. 1976); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 396 (1967); Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 639 (1969). Although policy language and state statutes influence results, courts often conclude that punitive damages cannot be or are not covered by insurance, leaving the burden squarely on the corporation to develop safer products or pay directly. Compare American Sur. Co. v. Gold, 375 F.2d 523 (10th Cir. 1966) and Caspersen v. Webber, 258 Minn. 93, 210 N.W.2d 327 (1973) with Price v. Hartford Accident
erty upon conviction, fines are the sole realistic way to inflict punishment. But criminal fines are, by statute, limited in size and will often be insufficient to affect adversely the financial interests of corporate stockholders and to achieve the goal of deterrence. Moreover, when a corporation is prosecuted, the state’s resources may be so taxed by pursuing conviction that ability to prosecute other worthy cases is severely compromised, contrary to the public’s best interests. Alternatively, the prospect of a demanding prosecution may deter the state from seeking conviction in a meritorious case. Punitive damages do not share such drawbacks, however, since a court or jury can tailor the size of their award to the facts and they are sought through private initiative.

The double jeopardy rationale of the Taber opinion does not seem to recognize established differences between criminal punishment and punitive damages. Taber held that allowing punitive damages when a defendant is subject to criminal prosecution for the tort, although not unconstitutional, sanctions double punishment, which does “not accord with the spirit of our institutions.” However, a glance at current criminal statutes refutes the soundness of such reasoning as a justification for the rule. The “spirit of our institutions” currently allows both imprisonment and a fine for the commission of a single crime. Criminal convictions alone often adversely affect a defendant’s pocketbook and deprive him of liberty, although no violation of double jeopardy thereby results. Civil lawsuits, however, affect only a defendant’s pocketbook.


Assault and battery a Class C felony if it results in serious injury, Ind. Code § 35-42-2-1(3) (Supp. 1980), furnishes an instructive example. Id. § 35-50-2-6 prescribes a typical punishment of imprisonment and a discretionary fine for the commission of a serious assault and battery.
PUNITIVE DAMAGES

even when punitive damages are sought. A principled basis for the Taber rule becomes difficult to see following this reasoning, since criminal statutes alone appear to authorize the very kind of double punishment which Taber forbids.

The Taber rule produces other troublesome results. For example, minors and infants, normally presumed to lack the discretion necessary to be held legally accountable, remain responsible for their torts because "when civil injuries are committed by force, the intent of the perpetration is not regarded." Only after the age of fourteen is a minor presumed at common law to be capable of committing a crime.

A person who commits a Class C felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars ($10,000).

Statutes providing for imprisonment as well as a fine are common, although punishment by imprisonment and a fine may not be imposed under a statute which provides only for alternative penalties. Ex parte Lange, 85 U.S. (18 Wall.) 183, 175-76 (1873); Brown v. State, 254 Ind. 594, 597, 260 N.E.2d 876, 877-78 (1970). As is imprisonment, fines are established methods of punishment, yet serious questions may be raised about their punitive efficiency and effectiveness as deterrents. Flownting Fines, Times, Mar. 24, 1980, at 65, highlighted the drawbacks, at least at the federal level:

The Justice Department has a roster of some 18,000 federal cons who, all told, owe about $80 million in fines and bail bond forfeitures. Some of the deadbeats, among them many Prohibition moonshiners, are dead; others are in prison, untraceable, or truly too poor to pay (tight-lipped Watergate Burglar G. Gordon Liddy, for example, has paid only $5,051 of his $40,000 fine, and Justice considers his pleas of poverty to be genuine). Yet the Department says that there are some 3,500 debtors who can claim no excuses. Their fines total about $20 million.

There is little reason to suppose similar problems do not exist at the state level. If so, the case for allowing punitive damages to supplement the state's available criminal remedies is strengthened, especially in those instances where debtors have no excuse.

Awards of punitive damages against minors have also been upheld. In Kirkpatrick v. United States Nat'l Bank, 264 Or. 1, 502 P.2d 579 (1972), for example, the Oregon Supreme Court stated concerning such an award against the guardian of a 15 year old:

We have previously held that the legal justification for punitive damages is determent [sic] and that such damages will only be allowed when the violation of societal interests is sufficiently great and the conduct involved is of a kind that sanctions would tend to prevent. . . .

We hold that the vandalizing of a house by a minor who is old enough to know better, as in this case, falls within this rule.


Moreover, minors processed through the juvenile justice system are not considered to have committed crimes and are not designated as "criminals." For these reasons, someone hurt intentionally by a minor would appear to be able to seek punitive damages which would be unrecoverable from someone of majority.

Insanity or unsoundness of mind furnishes a second example. In Indiana, persons of unsound mind are also responsible for their torts, with the exception of slander, although unsoundness of mind prevents a defendant from being criminally responsible. In a proper case, someone hurt intentionally by a defendant of unsound mind could theoretically seek punitive damages since no criminal liability could be imposed on that defendant. These results, apparently fortuitous products of juxtaposed rules of law, are unrelated to the laudable purposes which the protection against double jeopardy is meant to advance.

Nor can one say that the fundamental objectives of the constitutional guarantee against double jeopardy—protection against reprosecution after acquittal, against reprosecution after conviction and against the imposition of multiple punishment for the same offense—are served by the *Taber* rule. The first two objectives, limited to criminal proceedings, have no direct application. Only the third objective, which is general enough to extend to civil proceedings, conceivably is served by the *Taber* rule. However, the interpretation given to the phrase "multiple

---

41 IND. CODE § 31-6-3-5 (Supp. 1980) 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.
(b) A child may not be 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.
42 Woods v. Brown, 93 Ind. 164, 167 (1884).
43 IND. CODE § 35-41-3-6 (Supp. 1980) 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. See also id. §§ 35-5-2-1, -3(3) (1978); id. § 35-5-3.1-1 (1978). For cases concerning this issue, see *Gaskins v. United States*, 410 F.2d 987 (D.C. Cir. 1967); *Wilson v. State*, 263 Ind. 469, 333 N.E.2d 755 (1975); *Fuller v. State*, 261 Ind. 376, 304 N.E.2d 305 (1973); *Evans v. State*, 261 Ind. 148, 300 N.E.2d 882 (1973).
44 See text accompanying note 19 supra.
punishment" by Indiana courts illustrates the difficulty. A recent opinion in which a defendant was convicted for both violating and conspiring to violate a single statute furnishes a good example. The defendant appealed, arguing that his convictions constituted a violation of his right to be protected against multiple punishments for the same offense. The court, however, completely rejected his argument:

[Defendant] would have this court believe that since both of his convictions stem from the same prohibited conduct, he is being punished twice for the same offense. This argument is without merit. . . .

. . . [W]e hold here that one set of operative facts gave rise to two distinct offenses and that [the defendant] was not subjected to multiple punishments for the same offense. Therefore, the principle of double jeopardy does not apply.

From this logic, the Taber rule cannot be said to prevent multiple punishment, since double jeopardy's protection against multiple punishment is not violated when more than one punitive sanction is imposed for the same conduct. If two distinct criminal sanctions can be imposed for the same conduct without violating double jeopardy, then a distinct civil sanction and a criminal punishment should also be permissible.

The reasoning behind the Taber rule arguably ignores principles central to the concept of double jeopardy, resulting in its having an unnecessarily broad effect. For example, double jeopardy analysis in a criminal case commonly begins with consideration of when jeopardy attaches. Applying the principle of double jeopardy to a civil action, however, causes the protection to attach immediately upon the defendant's commission of a tortious act within the jurisdiction of a criminal statute, although the prosecutor may never pursue criminal charges and no actual punishment will ever be suffered. Second, even a criminal defendant can be found under some circumstances to have forfeited or lost the right to be protected against double jeopardy. In contrast, no decision hints that the protection of Taber can be forfeited, although it

---

8 references included.
is founded upon a right subject to forfeiture. The Taber rule thereby appears to protect a criminal defendant who is merely potentially subject to suit for punitive damages to a greater degree than the constitutional protection against double jeopardy in fact protects the actual criminal defendant.

Applying principles of double jeopardy to civil proceedings also appears legally anomalous. Imprisonment for civil contempt can be imposed without observing safeguards characteristic of the criminal process, and punitive damages themselves need not be proved by the criminal law standard of beyond a reasonable doubt. Antitrust laws, moreover, permit civil penalties such as treble damages and prescribe criminal punishment without violating double jeopardy. One Indiana decision has even countenanced the civil recovery of five times actual damages in the face of criminal penalties simply because that sum was fixed and limited. But this justification does little to explain in principle why fixed damages as a penalty do not violate double jeopardy when accompanied by criminal punishment whereas unlimited exemplary damages do, especially when both limited and unlimited awards exceed actual compensation. If, in fact, "each violation of the law should be

---

74 See Duemling v. Fort Wayne Community Concerts, Inc., 243 Ind. 521, 188 N.E.2d 274 (1963). The power to punish contempts is inherent in Indiana courts. LaGrange v. State, 238 Ind. 689, 692, 153 N.E.2d 593, 595 (1958). Contempt proceedings are said to be neither civil nor criminal. See State ex rel. Trotsky v. Hutchinson, 224 Ind. 443, 445-46, 68 N.E.2d 648, 650 (1946). Punishment per se is not the proper object of civil contempt proceedings, making criminal safeguards unnecessary. In Denny v. State, 203 Ind. 682, 182 N.E. 313 (1932), for example, the Indiana Supreme Court declared that "the so-called power to punish for civil contempt is not a power to punish at all." Id. at 701, 182 N.E. at 319. Cf. IND. CODE § 33-2-1-4 (Criminal Contempts). Rather, civil contempt "is properly ... a power to ... coerce by imprisonment or to impose money penalties for the benefit of the injured party." 203 Ind. at 700, 182 N.E. at 319; see State ex rel. McMinn v. Gentry, 229 Ind. 615, 100 N.E.2d 676 (1951). Whereas punitive measures are proper in cases of criminal contempt, only coercive measures are said to be proper in cases of civil contempt. Ice v. State Bd. of Dental Examiners, ___ Ind. App. ___, ___, 397 N.E.2d 1041, 1042 (1979).

There is reason to believe, nevertheless, that punitive consequences can and do follow civil contempt. The terms "fine" and "penalty," as well as "punishment," are used by the courts in civil contempt proceedings. See, e.g., Thistlethwaite v. State, 149 Ind. 319, 49 N.E. 156 (1905). Even the Indiana Supreme Court has recognized that "some of the decisions of both this Court and the Appellate Court have apparently approved the infliction of a punitive sentence in a proceeding which was called a civil contempt action." Denny v. State, 203 Ind. at 700, 182 N.E. at 319. Moreover, intangible elements of damage such as inconvenience and frustration can be awarded in civil contempt proceedings. See Thomas v. Woollen, 255 Ind. 612, 266 N.E.2d 20 (1971). Such a rule can allow a court to inflict punishment in the name of awarding compensation, thereby making disapproval of punishing for civil contempt potentially illusory. Finally, imprisonment, characteristic of the criminal process, is an accepted sanction to impose upon proof of a civil contempt.

75 See Note, Criminal Safeguards and the Punitive Damages Defendant, 34 U. CHI. L. REV. 408, 417-18 (1967); note 38 & accompanying text supra.

76 See text accompanying note 29 supra.

77 State ex rel. Scobey v. Stevens, 103 Ind. 55, 2 N.E. 214 (1885).
followed by one appropriate punishment and no more," the justification cannot be accepted, especially when it could be used to validate a limited or fixed award of ten, fifteen or even twenty times actual damages. Nonetheless, if the award of fixed damages does not call into operation the protection against double jeopardy, then neither should a defendant's commission of an act which merits the award of punitive damages and which is also a crime.

Practical legislative alternatives to the Taber rule do exist. For example, the bar on asking for punitive damages could be transformed into an evidentiary rule. Under such a rule, if a claimant brought a civil action and requested punitive damages, the defendant could introduce into evidence at trial any criminal conviction for the tort which constituted an initial jeopardy. Counsel could then argue to the trier of fact the merits of imposing exemplary damages and the amount necessary to deter or promote the public safety, and punishment would be imposed according to the discretion of the trier of fact. This approach, although not entirely free from difficulty," would alleviate much concern with underpunishment and inadequate punishment which the Taber rule now raises. Alternatively, proof of an initial jeopardy—an actual conviction—could be established at an evidentiary hearing before trial, and, pending an appropriate finding by the court, no punitive damages could then be sought.

Courts, on the other hand, should consider abolishing the Taber rule altogether, especially as it applies when there is merely the possibility of criminal prosecution. The rule has numerous weaknesses and insures in many cases that underpunishment or no punishment at all results. Moreover, the rule often serves to defeat social policies implemented by the imposition of at least some punishment, be it civil or criminal. The rule also has a questionable legal foundation, since protection against double jeopardy is traditionally unique to criminal proceedings and a mere prayer for punitive damages is not a true jeopardy. In the event the rule were abolished, the civil tort claimant and the state would pursue their distinct interests as the merit of doing so dictated.

---

" Taber v. Hutson, 5 Ind. 322, 325-26 (1854).

" This solution could create the danger in jury trials that the evidence of a prior conviction would prejudice the jury against the defendant. Rather than persuading the jury that punitive damages are not appropriate, the evidence might actually convince the jury that the defendant deserves further punishment in the form of punitive damages. Similar fears have caused the courts to rule that evidence as to a prior conviction may not be used at trial against a defendant. See, e.g., Hambev v. Hill, 148 Ind. App. 662, 269 N.E.2d 394 (1971); Beene v. Gibraltar Indus. Life Ins. Co., 116 Ind. App. 290, 63 N.E.2d 299 (1945).
CONCLUSION

The laudable objective of the Taber rule, based on an established constitutional and common law protection, is simply to prevent unnecessary or unwarranted punishment. However, this objective is not achieved by a wholesale denial of the right of civil claimants to recover punitive damages. The effect of the Taber rule is all too often to prevent the imposition of any punishment for conduct which merits social opprobrium. When this happens, there is no deterrent to future transgressions. Both society at large and claimants victimized by demonstrably malicious acts thereby suffer. Under these circumstances the double jeopardy reasoning of the rule must be examined. The purpose of this comment has been to welcome the invitation of recent appellate opinions and make known a critical perspective of the rule. More welcome, however, would be an examination by an Indiana court whose previous decisions should not foreclose new consideration.