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The United States Supreme Court remarked in 1851 that the doctrine of punitive damages[1] was so well-entrenched in our legal system that the question of the propriety of awarding punitive damages "will not admit of argument."[2] Despite the Court's confident assertion, punitive damages *have* admitted of argument in recent years; they have been both exalted and assailed.

On one hand, many modern courts have expanded the application of punitive damages beyond the traditional malicious tort framework

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1. Punitive damages, also referred to as "exemplary," "vindictive," "punitory," "smart money," and "presumptive" damages, "are sums awarded apart from any compensatory or nominal damages, usually as punishment or deterrent levied because of particularly aggravated misconduct on the part of the defendant." D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973) [hereinafter cited as DOBBS]. The type of aggravated misconduct about which Professor Dobbs speaks generally is deemed to have occurred where the defendant has committed a malicious, wanton, or intentional tort, or a reckless offense in disregard of the rights or safety or others. *See* Roberts v. Pierce, 398 F.2d 954 (5th Cir. 1968); Morgan v. Bates, 390 P.2d 486 (Okla. 1964); RESTATEMENT OF TORTS § 908 (1939); DOBBS, *supra*, at 206; Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957) [hereinafter cited as *Exemplary Damages*]; Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1896 (1961) [hereinafter cited as *Malicious Torts*]. One court has stated: " 'To entitle a plaintiff to recover exemplary damages in an action sounding in tort, the proof must show some element of fraud, malice, or oppression. The act which constitutes the cause of action must be actuated by, or accompanied with, some evil intent, or must be the result of such gross negligence, such disregard of another's rights, as is deemed equivalent to such intent.' " Morgan v. Bates, 390 P.2d 486, 488 (Okla. 1964) (quoting syllabus to Keener Oil & Gas Co. v. Stewart, 172 Okla. 143, 45 P.2d 121 (1935)). Moreover, they are never granted as a matter of right but fall solely within the discretion of the jury. Crea v. Wuellner, 235 Minn. 408, 51 N.W.2d 283 (1952).

2. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

to include cases involving bad faith breach of contract claims,[3] violations of civil rights,[4] fraudulent violations of state securities laws,[5] and products liability actions.[6] On the other hand, forceful arguments have been made[7] that the doctrine of punitive damages should be abolished.

Although the idea of a punitive remedy in a civil case has long

3. *See, e.g.*, Jones v. Abriani, 350 N.E.2d 635 (Ind. App. 1976); Vernon Fire & Cas. Ins. Co. v. Sharp, 161 Ind. App. 413, 316 N.E.2d 381 (1974), *modified on other grounds*, 264 Ind. 599, 349 N.E.2d 173 (1976). *See generally* Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977) [hereinafter cited as Sullivan]; *Exemplary Damages, supra* note 1, at 531-33; Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975) [hereinafter cited as *Punitive Damages in Contract Actions*]; Comment, *Exemplary Damages in Contract Cases*, 7 WILLIAMETTE L.J. 137 (1971).

4. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 233-34 (1970) (Brennan, J., concurring); Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978); Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971). *But see* LaReau v. Manson, 383 F. Supp. 214, 219 (D. Conn. 1974). *See generally* Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. C.R.-C.L. L. REV. 325 (1974).

5. *See* Comment, *Punitive Damages and the Federal Securities Act: Recovery Via Pendent Jurisdiction*, 47 MISS. L.J. 743, 759-67 (1976), where the authors state that, while punitive damages are not available under the federal securities laws, the prevailing trend allows recovery when a state claim is joined under pendent jurisdiction. *See also* Comment, *Punitive Damages for Securities Regulation*, 8 HOUS. L. REV. 137, 149-54 (1970) (criticizing the disallowance of punitive damages under the federal securities laws).

6. *See, e.g.*, Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). *Cf.* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) (evidence insufficient to impose punitive damages in drug products liability action); Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (punitive damages award against manufacturer of unreasonably dangerous product upheld). *See generally* Igoe, *Punitive Damages: An Analytical Perspective*, 14 TRIAL, November 1978, at 48; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976) [hereinafter cited as Owen], Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); Robinson & Kane, *Punitive Damages in the Products Case*, 15 TRIAL, January 1979, at 34; Tozer, *Punitive Damages and Product Liability*, 39 INS. COUNSEL J. 300 (1972); Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972); Comment, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895 (1976).

7. *See, e.g.*, Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884). In Fay v. Parker, 53 N.H. 342 (1873), the court concluded that "[t]he idea [of punitive damages] is wrong. It is a monstrous heresy . . . an unhealthy excrescence, deforming the symmetry of the body of law." *Id.* at 382. *See also* Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891); Bass v. Chicago & N.W. Ry., 42 Wis. 654 (1877); 2 S. GREENLEAF, EVIDENCE § 253 (16th ed. 1899); C. MCCORMICK, LAW OF DAMAGES § 77 (1935); Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished* in THE CASE AGAINST PUNITIVE DAMAGES 4 (Defense Research Institute Monograph 1969) [hereinafter cited as Duffy]; Ghiardi, *Should Punitive Damages be Abolished?—A Statement for the Affirmative*, 1965 ABA PROCEEDINGS, SECTION OF INS., NEGLIGENCE AND COMPENSATION LAW 282 [hereinafter cited as Ghiardi]; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 888-89 (1976) [hereinafter cited as Long]; Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419 (1909).

been a source of judicial discomfort, courts have continued to award punitive damages. At present, all but five jurisdictions[8] allow punitive damages. One state, Indiana, has taken an intermediate position and allows punitive damages only when a defendant's conduct is not punishable as a crime.[9] It would be simplistic to characterize this virtual unanimity as mere blind adherence to an outmoded principle. Rather, the doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.[10]

At the same time, there is no dispute that the doctrine provides an extremely powerful remedy. In many states, punitive damages cannot be insured against.[11] In many others, they may be levied against an employer for the malicious acts of an employee.[12] They almost always are levied in excess of actual damages,[13] without the constitutional safeguards that attend criminal prosecution.[14] For these reasons, courts generally agree that punitive damages "are not a favorite in law and are to be allowed only with caution and within narrow limits. . . . The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuni-

8. *See* Ganapolsky v. Park Gardens Dev. Corp., 439 F.2d 844 (1st Cir. 1971) (applying Puerto Rican law); Boutte v. Hargrove, 277 So. 2d 757 (La. App. 1973); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 269-70, 47 N.E.2d 265, 272 (1943); Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Maki v. Aluminum Bldg. Prods., 73 Wash. 2d 23, 436 P.2d 186 (1968). See note 28 *infra* for other states which adhere to an intermediate position in which punitive damages are limited to compensation for actual damages.

9. *See* Koerner v. Oberly, 56 Ind. 284 (1877); Taber v. Hutson, 5 Ind. 332 (1854); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. App. 1978); Nicholson v. Schramm, 164 Ind. App. 598, 330 N.E.2d 795 (1975); Moore v. Waitt, 157 Ind. App. 1, 298 N.E.2d 456 (1973). *See generally* Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945).

10. See notes 58-66 & accompanying text *infra*.

11. *See, e.g.*, Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); Brown v. Western Cas. & Sur. Co., 484 P.2d 1252 (Colo. App. 1971); Padavan v. Clemente, 43 A.D.2d 729, 350 N.Y.S.2d 694 (1973). *See generally* Haskell, *Punitive Damages: The Public Policy and the Insurance Policy*, 58 ILL. B.J. 780 (1970); Long, *Should Punitive Damages Be Insured?*, 44 J. OF RISK AND INS. 1 (1977).

12. *See, e.g.*, Bingaman v. Gordon Baking Co., 186 F. Supp. 102 (N.D. Ind. 1960); W.E. Belcher Lumber Co. v. Harrell, 252 Ala. 392, 41 So. 2d 385 (1949); Nicholson v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975). *See generally Malicious Torts, supra* note 1.

13. DOBBS, *supra* note 1, § 3.9, at 204.

14. *See* Long, *supra* note 7, at 885; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158, 1180-81 (1966) [hereinafter cited as *Punishment by Civil Courts*].

ary punishment, and the advisability of a deterrent."[15] Because of the danger of an excessive or inappropriate imposition of punitive damages, courts must supervise punitive damage awards closely to ensure that they are imposed only when justified.[16] Yet the standards for imposing and assessing punitive damages remain frustratingly vague.[17] Appellate records are replete with evidence that judges desperately want guidance on this issue.[18]

The purpose of this Article is to articulate guidelines for a principled approach to punitive damages. The Article first reviews the policy debate over punitive damages and argues that reasons advanced for abolishing the punitive damages doctrine altogether fail to account for the strong policy considerations underlying the doctrine. Next discussed are the circumstances under which imposition of punitive damages would be appropriate. The Article concludes by proposing both a reform in the procedures to be used in imposing punitive damages and guidelines for assessing the amount of damages.

Policy Debate Over Punitive Damages

Historical Development

Two major theories have been advanced to explain the development of punitive damages in the common law system.[19] The first the-

15. Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970), *quoted approvingly in* Fountila v. Carter, 571 F.2d 487, 491 (9th Cir. 1978); Simpson v. Weeks, 570 F.2d 240, 243 (8th Cir. 1978).

16. See notes 146-63 & accompanying text *infra*.

17. *See* Long, *supra* note 7, at 879-83.

18. *See* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962): "The term is too loose, vague, indefinite, and uncertain; and its meaning often varies from state to state, court to court, and jury to jury. It is a chameleon of the law—changing its hue to the color of the situation in which it may be used." *Id.* at 443 (Gewin, J., concurring). In Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977), a concurring judge concluded: "I doubt the efficacy of the standard enunciated by the majority for the review of punitive damages awards, the 'first blush' rule. This rule is vague and contains no objective standards for the evaluation of such awards in view of their purpose, the deterrence of tortious conduct, and the danger to be guarded against, awards motivated by vindictiveness and prejudice. *I believe that we should undertake to define a standard of review of punitive damages which imposes objective limitations upon such damages.*" *Id.* at 318, 362 N.E.2d at 849 (DeBruler, J., concurring) (emphasis added). *See also Exemplary Damages, supra* note 1, at 529-30; *Punitive Damages in Contract Actions, supra* note 3, at 672 (lack of ascertainable standards responsible for reluctance of courts to interfere with punitive damages awards).

19. Remarkably, the concept of multiple damages has been traced back to *The Code of Hammurabi* in 2000 B.C. *See* Igoe, *Punitive Damages: An Analytical Perspective*, 14 TRIAL, November 1978, at 48, 50. *See also* Robinson & Kane, *Punitive Damages in the Products Case*, 15 TRIAL, January 1979, at 34, 36.

ory asserts that punitive damages grew out of the refusal of appellate courts to grant new trials when excessive damages were awarded at trial.[20] Because juries at early common law performed both investigative and adjudicative functions,[21] jurors were selected for their familiarity with the litigants and with the facts in dispute.[22] Because appellate courts had no established standards for measuring compensatory damages, they deferred to the more knowledgeable jury.[23] By the end of the eighteenth century, common law courts had developed standards to measure compensatory damages in tort, contract, and property cases, yet remained reluctant to disturb an excessive jury award when the defendant's conduct had been particularly outrageous.[24] To justify this reluctance, courts developed a theory that the jury was permitted to award an amount in excess of actual damages when the defendant's conduct had been motivated by malice or ill will.[25]

A second theory asserts that punitive damages were designed to compensate the plaintiff for otherwise uncompensable injuries.[26] Because emotional harm, pain and suffering, and other intangible harms were not compensable, punitive damages are said to have arisen from courts' efforts to justify damage awards in excess of actual, pecuniary injury.[27] Not until courts began to recognize intangible harm as compensable did punishment and deterrence become the primary justifications for punitive damages.[28]

The Attack on Punitive Damages

Some critics of punitive damages argue that both theories accounting for the development of the punitive damages doctrine show that it was motivated by the desire to compensate the plaintiff fully.[29] Be-

20. *See* Duffy, *supra* note 7, at 4-5; Ghiardi, *supra* note 7, at 283.

21. *See* Duffy, *supra* note 7, at 4.

22. *See Punishment by Civil Courts, supra* note 14, at 1159.

23. *Id.* at 1160.

24. *See id.*; Duffy, *supra* note 7, at 5.

25. Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763). *See also* Duffy, *supra* note 7, at 5; *Punishment by Civil Courts, supra* note 14, at 1160.

26. *See* Duffy, *supra* note 7, at 5.

27. *See id.*

28. *See Exemplary Damages, supra* note 1, at 520; *Punishment by Civil Courts, supra* note 14, at 1161. Connecticut, Michigan, and New Hampshire apparently continue to recognize the compensatory nature of punitive damages and limit the award to compensation for actual suffering. LeBlanc v. Spector, 378 F. Supp. 301 (D. Conn. 1973); Armstrong v. Dolge, 130 Conn. 516, 36 A.2d 24 (1944) (limited to expenses of litigation); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922) (compensation for injured feelings); Bixby v. Dunlap, 56 N.H. 456 (1876); Fay v. Parker, 53 N.H. 342 (1873) (compensation for injured feelings).

29. Duffy, *supra* note 7, at 5-6; Ghiardi, *supra* note 7, at 286-87.

cause modern tort law has developed damage formulas that compensate the injured for intangible as well as tangible harms, these critics contend that "the purpose for which punitive damages were created no longer exists. The doctrine is an anachronism and should be abolished."[30]

This argument fails to account for the fact that many legal doctrines serve purposes that differ from those for which they originally were developed. The fourteenth amendment, for example, originally was intended to protect newly freed slaves,[31] but recently has been used to protect large public corporations.[32] So long as a doctrine continues to serve a necessary policy goal, the fact that it has diverged from its original function does not provide a basis for abolishing the doctrine. The pertinent question is whether punitive damages continue to serve a rational policy.

On more substantive grounds, critics of the doctrine contend that it wrongfully attempts to have the civil law, without appropriate procedural safeguards, accomplish the purpose of the criminal laws.[33] Punishment, critics assert, is the purpose of the criminal system, whereas the purpose of the civil system is to compensate the injured.[34] Punitive damages provide the plaintiff with a windfall profit at the expense of the defendant. Moreover, civil defendants may be compelled to testify against their interests, can be punished on the strength of a preponderance of the evidence, and also may be subject to criminal prosecution.[35]

One writer argues that if the defendant's actions constitute a criminal violation, then the defendant should be criminally prosecuted, but "[i]f the actions of the defendant do not constitute a crime, he then simply should not suffer punishment."[36] The substance of this argument is that punishment is civilized only when it is accompanied by the procedural safeguards built into the criminal system and when it is im-

30. Duffy, *supra* note 7, at 8. *Accord*, Ghiardi, *supra* note 7, at 286; Long, *supra* note 7, at 888. It should be noted, however, that many intangible harms remain uncompensable in the law of contracts. *See Exemplary Damages*, *supra* note 1, at 531-33 (discussing punitive damages in contract actions).

31. *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577-78 (1949) (Douglas, J., dissenting).

32. *See, e.g.*, First Nat'l Bank of Boston v. Belloti, 435 U.S. 765 (1978).

33. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891); Duffy, *supra* note 7, at 9; Ghiardi, *supra* note 7, at 287-88; Long, *supra* note 7, at 885; *Punishment by Civil Courts*, *supra* note 14, at 1161-62; *Malicious Torts*, *supra* note 1, at 1298-99.

34. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891); Duffy, *supra* note 7, at 9.

35. Ghiardi, *supra* note 7, at 287-88; *Malicious Torts*, *supra* note 1, at 1299.

36. Ghiardi, *supra* note 7, at 288.

posed by someone knowledgeable and experienced in meting out punishment.[37] Consequently, punitive damages serve no purpose not already better served by the criminal law.[38]

This argument reflects a view of the civil law which is far too narrow. All civil doctrines are shaped with a view toward setting and enforcing rules of behavior.[39] The doctrine of punitive damages is one of the legal devices used toward this end.[40] In many cases of aggravated misconduct in which the criminal system cannot or will not supply society's sanction, an award of punitive damages is the only effective deterrent.[41]

Another frequently stated objection to punitive damages is that they can subject a defendant to multiple punishment.[42] Because juries now properly can grant a plaintiff relief for intangible harms, compensatory damages arguably may contain an element of retribution.[43] Thus, a defendant may face the possibility of punishment on three fronts: as an element of the compensatory remedy; as punitive damages; and as a criminal sanction.

The premise that juries doubly punish a defendant through compensatory damages and punitive damages is questionable. Certainly, if punitive damages were not allowed, a jury likely would incorporate the element of outrage into the compensatory award. For example, one author cites a case that was tried three times before three different juries, twice with a punitive damage instruction and once without: all

37. *See id.* at 287-88. *But see* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931) [hereinafter cited as Morris], where the author concludes that "[a]s long as the liability with fault rules are retained, the law of torts will have an admonitory function even though the doctrine of punitive damages is abandoned. So punishment in tort actions is not anomalous (if anomalous only means unusual); and punitive damage practice is only one of many means of varying the size of money judgments in view of the admonitory function." *Id.* at 1177.

38. *See* Ghiardi, *supra* note 7, at 9-10; *Punishment by Civil Courts*, *supra* note 14, at 1161-63, 1173. In *Punishment by Civil Courts*, the author states that the functions of criminal law are (1) retribution, (2) general deterrence, (3) specific deterrence, (4) neutralization (if imprisoned), and (5) rehabilitation (if imprisoned), and that punitive damages serve only the first three of these purposes and, even then, in a manner inferior to criminal enforcement: "No matter how mild the criminal sanction, the possibility of confinement or the stigma of a criminal record are greater deterrents to wrongful conduct than the mere imposition of monetary sanctions." *Id.* at 1173. But see notes 101-14 & accompanying text *infra*.

39. See notes 51-57 & accompanying text *infra*.

40. *See* Morris, *supra* note 37, at 1177.

41. See notes 66-71, 100-17 & accompanying text *infra*.

42. *See* Duffy, *supra* note 7, at 10; Morris, *supra* note 37, at 1195-98; *Exemplary Damages*, *supra* note 1, at 524-25.

43. *Exemplary Damages*, *supra* note 1, at 524-25.

three verdicts were identical.[44] Under these circumstances, the wiser course is to allow juries to be straightforward and explicitly award additional damages for the outrageous nature of a defendant's conduct. At the very least this facilitates appellate review and conserves judicial resources by allowing remittitur or new trials on the punitive damages issue alone.

To the extent that a punitive civil remedy might duplicate criminal punishment, the likelihood of criminal punishment should be taken into account when a judge decides whether to instruct a jury on punitive damages.[45] As not all outrageous conduct is criminal, however, the argument that punitive damages would be duplicative in some cases is not a persuasive reason for abandoning the doctrine altogether.

Finally, those who favor abolishing the doctrine of punitive damages argue that the lack of clear standards governing the amount of punitive awards frees the jury to act irrationally, out of passion and prejudice.[46] A closely related argument is that civil juries are inexperienced and ill-equipped to mete out punishment that will be in the best interests of society.[47]

Although no quantitative standards exist for measuring the amount of punitive damages, the same can be said for measuring intangible harm as a component of compensatory damages. As one author contends: "The invocation of a pecuniary compensation standard does not transform the inexact process of judicial inquiry into high science."[48] Punitive damages, like compensatory damages, are subject to control by the trial court and to appellate review so that the discretion of the jury is never unfettered.[49] Furthermore, flexibility in the standards for punitive damages not only is necessary, but also desirable. The effectiveness of punitive damages would be reduced drastically if they were not individualized to fit the financial status of the defendant

44. *Id.* at 521 (citing Bass v. Chicago & N.W. Ry., 36 Wis. 450 (1874) ($4,500 for exemplary and compensatory damages combined); 39 Wis. 636 (1876) ($4,500 compensatory); 42 Wis. 654, 671-72 (1877) ($2,500 compensatory, $2,000 exemplary)).

45. See notes 115-18, 180-82 & accompanying text *infra*.

46. *See* Duffy, *supra* note 7, at 10; Ghiardi, *supra* note 7, at 287; Long, *supra* note 7, at 885; Morris, *supra* note 37, at 1189; Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 227 (1960); *Malicious Torts*, *supra* note 1, at 1298.

47. *See* Morris, *supra* note 37, at 1179.

48. Sullivan, *supra* note 3, at 219 (discussing the multiple purposes of compensatory damages in contract cases). *See also Exemplary Damages*, *supra* note 1, at 529-30.

49. *See, e.g.*, Butts v. Curtis Publishing Co., 225 F. Supp. 916, 919 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (1965), *aff'd*, 388 U.S. 130 (1967); Cox v. Stolworthy, 94 Idaho 683, 496 P.2d 682 (1972). *See also* DOBBS, *supra* note 1, at 220; *Punishment by Civil Courts*, *supra* note 14, at 1171-72.

and the reprehensibility of his or her conduct.[50]

Although the foregoing objections to the doctrine of punitive damages command attention and respect, they do not dictate the abolition of the doctrine. Rather, they merely present negative features that must be balanced against the doctrine's positive goals.

Justifications for Imposing Punitive Damages

Stated in broad terms, the function performed by the doctrine of punitive damages is to aid courts in enforcing established norms of conduct.[51] All law, whether civil or criminal, reflects society's norms and goals. The criminal system enforces these rules to some extent by punishing those who violate criminal statutes, thereby deterring the defendant—and others—from similar conduct.[52] The criminal system does not, however, have a monopoly on this task.

Whenever a civil court resolves the conflicting claims of two private parties, it also sets and enforces standards of behavior.[53] For this reason, in addition to achieving a result that does justice between the parties, a court also must achieve a result that protects the interest of society. That the civil law operates to prod behavior toward certain goals is demonstrated by the fact that liability for both torts[54] and contracts is premised upon failure to conform to expected standards of behavior. Professor Morris states that "while our joint interest in the economic stability of the individuals who make up society supplies a sufficient reason for giving money *to plaintiffs*, it suggests no reason for taking money *from defendants*."[55] In his apt terms, civil law has both "reparative" and "admonitory" functions.[56] The doctrine of punitive damages concerns itself with the latter function;[57] it enhances the civil law's admonition to wrongdoers in several important ways.

50. See notes 175, 178 & accompanying text *infra*.

51. *See* Lampert v. Reynolds Metals Co., 372 F.2d 245, 247 (9th Cir. 1967); Brown v. Coates, 253 F.2d 36, 40 (D.C. Cir. 1958); Acheson v. Shefter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971); Eshelman v. Rawalt, 298 Ill. 192, 197, 131 N.E. 675, 677 (1921). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 14-16 (4th ed. 1971).

52. *See Punishment by Civil Courts*, *supra* note 14, at 1161-62.

53. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 18 (4th ed. 1971).

54. *See* Sullivan, *supra* note 3, at 217; *Punishment by Civil Courts*, *supra* note 1, at 523.

55. Morris, *supra* note 37, at 1173 (emphasis in original).

56. *Id.* at 1173-76. Professor Morris uses the term "reparative" to mean providing money substitutes for losses. *Id.* at 1173. "Admonitory" refers to discouraging repetition of wrongful conduct and warning others who are inclined to engage in similar conduct. *Id.* at 1174.

57. *Id.* at 1176.

Expressing Society's Disapproval of Outrageous Conduct and Deterring Such Conduct in the Future

An award of compensatory damages may be sufficient when injury has resulted from well-intentioned, but poorly-advised behavior.[58] When the defendant's conduct can be characterized as malicious, oppressive, or otherwise outrageous, a stronger sanction is needed. The imposition of punitive damages effectively expresses to the defendant that such conduct will not be tolerated.

This expression of disapproval by extracting money from the defendant for his or her misconduct may fairly be characterized as punishment.[59] If the doctrine of punitive damages were based solely on vindictiveness, however, it surely would be unsupportable. Although vindictiveness is a common human emotion, vindictive behavior is particularly irrational in that it seeks to inflict present suffering to "remedy" past injuries that cannot be undone. Inflicting punishment for past acts, however, tends also to control future behavior, in that the defendant and others in a similar position will wish to avoid the unpleasant consequences of such acts in the future.[60] Punishment, therefore, cannot be separated from deterrence.

This deterrent effect aids a civil court in enforcing social norms,[61] and consequently is especially vital where the defendant would have little else to lose by committing the wrong. Two cases demonstrate this

58. *See, e.g.*, Prudential Ins. Co. of America v. Executive Estates, Inc., 369 N.E.2d 1117, 1130-31 (Ind. App. 1978) (an award of punitive damages for mere negligence is improper; conduct supporting such an award must be of a more reprehensible character).

59. For discussion of the punitive element, see Long, *supra* note 7, at 876-77; *Exemplary Damages*, *supra* note 1, at 523-24; *Punishment by Civil Courts*, *supra* note 14, at 1161-63.

60. *See* Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978); Lampert v. Reynolds Metals Co., 372 F.2d 245 (9th Cir. 1967); Morgan v. Bates, 390 P.2d 486 (Okla. 1964). *See also* Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 404 U.S. 1049 (1972); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 23 (4th ed. 1971); Morris, *supra* note 37, at 1181; *Malicious Torts*, *supra* note 1, at 1298.

61. *See, e.g.*, Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970); Jones v. Abriani, 350 N.E.2d 635, 650 (Ind. App. 1976); McCarthy v. J.P. Cullen & Son Corp., 199 N.W.2d 362, 368 (Iowa 1972). *See also* Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 203 (1977-78) [hereinafter cited as Riley]. *But see* Duffy, *supra* note 7, at 11; Ghiardi, *supra* note 7, at 288. Both Duffy and Ghiardi contend that the deterrent function of punitive damages is fictional, because the incidence of outrageous conduct is no higher in the states that disallow punitive damages than in the states that allow them. This conclusion is unfounded, as the figures do not show what the incidence of outrageous conduct would have been in the 46 states that allow punitive damages *but for* the doctrine. Melvin Belli states that "[a]sking whether punitive damages actually do deter misconduct is like asking whether the death penalty deters murder." Belli, *Punitive Damages: An Historical Perspective*, 13 TRIAL, December 1977, at 40, 44.

point. In *Harris v. Wagshal*,[62] the defendants perpetrated numerous frauds on their judgment creditor to hinder the creditor's attempts to satisfy a judgment. Absent the imposition of punitive damages, the defendants had little to lose by their acts; the compensatory relief available would only have forced them to relinquish the property to the rightful owners. The imposition of punitive damages, however, removed the incentive for committing fraud.[63] This rationale also applies in cases in which the defendant has determined that he or she will reap greater profits by engaging in wrongful conduct and running the risk of later paying compensation for such conduct. For example, in *Funk v. Kerbaugh*,[64] the defendant decided that it would be "cheaper to pay damages"[65] for carrying out blasting in a manner which destroyed the plaintiff's building than to alter the blasting method. When the possibility of a punitive damage award of an uncertain amount enters a defendant's decisionmaking process, the financial temptation to engage in wrongful conduct becomes more resistable.[66]

Providing Incentives for Private Civil Enforcement

All serious misdeeds cannot possibly be punished by government prosecution. For one thing, not all misconduct is punishable as a crime or a civil violation; for another, limited judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct. Society's interest in bringing a wrongdoer to justice is especially strong where the wrongdoer's conduct exceeds all bounds of decency.

The doctrine of punitive damages promotes this interest.[67] By offering the potential for recovery in excess of actual damages, the doc-

62. 343 A.2d 283 (D.C. App. 1975).

63. *Id.* at 288 n.13. Although the creditor claimed no compensatory damages resulting from the fraud, the court found the award of punitive damages nonetheless proper, stating: "Since the purpose of punitive damages is to punish and deter intolerable conduct, we do not find it inappropriate to assess damages in a case such as this in proportion to the sum hoped to be gained by the fraud." *Id.*

64. 222 Pa. 18, 70 A. 953 (1908).

65. *Id.* at 19, 70 A. at 954.

66. *See* Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) (punitive damages operate as attempt to restore balance in contractual relationships); Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 923, 582 P.2d 980, 987, 148 Cal. Rptr. 389, 396 (1978) (refusal to accept settlement offer motivated by desire to use family's unfortunate circumstances as lever to force settlement more favorable to company).

67. DOBBS, *supra* note 1, at 205.

trine encourages plaintiffs to bring such actions.[68] This is particularly important where actual damages are minimal.[69] Absent the possibility of obtaining punitive damages, it would be economically unfeasible in such cases for a plaintiff to bring a lawsuit and unlikely that the defendant would be deterred from similar action in the future. Punitive damages thus can be characterized as a reward for the plaintiff's valuable role as a "private attorney general."[70] Even where compensatory damages are substantial, an award of punitive damages helps to finance deserving claims by defraying the expenses of the action, such as attorneys' fees, that generally are not recoverable in American courts.[71] Finally, by ensuring that a plaintiff can pursue a private punitive remedy, with the potential for financial gain at the expense of the wrongdoer, the doctrine of punitive damages encourages plaintiffs to prefer legal action over violent self-help.[72] Although revenge is not a civilized basis for imposing punitive damages, the prevention of private vengeance clearly is.[73]

Although the policy debate over the doctrine of punitive damages demonstrates that the doctrine is potentially dangerous and unfair when applied without regard to its underlying principles, the doctrine is an undeniably powerful tool in controlling antisocial conduct. The question then becomes, when is such a powerful remedy appropriate?

What Conduct Should Give Rise to Punitive Damages?

One author has noted that punitive damages have been imposed as a result of "an astounding range of conduct from 'oppression, fraud, or malice' on the one extreme to 'rudeness' or 'mere caprice' on the other."[74] To some extent, providing considerable judicial discretion is unavoidable—even desirable—when one considers that a court's decision to impose punitive damages reflects a value judgment about whether a defendant's misconduct has been serious enough to warrant an extra measure of deterrence. Nevertheless, merely to state that pu-

68. *See* Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965); DOBBS, *supra* note 1, at 205; Long, *supra* note 7, at 878; Morris, *supra* note 37, at 1183-88.

69. DOBBS, *supra* note 1, at 205; Long, *supra* note 7, at 878; *Exemplary Damages*, *supra* note 1, at 525-26.

70. For discussion of the enforcement aspect of a plaintiff's role, see Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961); DOBBS, *supra* note 1, at 205; Morris, *supra* note 37, at 1183-88; *Exemplary Damages*, *supra* note 1, at 525-26.

71. *See Exemplary Damages*, *supra* note 1, at 521.

72. *Id.* at 521-22; Morris, *supra* note 37, at 1198-99.

73. *See Exemplary Damages*, *supra* note 1, at 521-22.

74. Long, *supra* note 7, at 881.

nitive damages will be imposed in cases involving malice, oppression, and the like may obscure the principles underlying the doctrine rather than enforce them. More specific guidance is necessary to promote principled imposition of punitive damages. One major factor is whether any other existing remedy performs the functions for which the doctrine was designed. This, in turn, depends on the conduct involved.

Tortious Conduct

Although tort law has been the traditional arena for punitive damage awards, not every tort gives rise to punitive damages.[75] Simple negligence, for example, is not a sufficient basis for imposing punitive damages.[76] Courts rightfully have regarded the availability of compensatory damages as a sufficient deterrent to negligence, if indeed negligence can be deterred at all.[77] More to the point, however, is the notion that negligent conduct is not culpable enough to justify the stern sanction of civil punishment.[78] The simple fact that negligent acts are committed regularly is significant; an extraordinary sanction should not be imposed on ordinary conduct. Rather, the sanction of punitive damages is, and should be, reserved for conduct that exceeds the bounds of normal fumbling. The defendant's state of mind is what transforms conduct from the understandable to the intolerable.[79] When the defendant actively has desired to bring about harm to another, or when he or she has callously threatened harm to the rights of others, that conduct is not merely unreasonable, it is abhorrent.

The closer a defendant's state of mind comes to a subjective perception of the risk of harm to another, the more likely it becomes that punitive damages will be awarded.[80] Accordingly, simple negligence is not subject to punitive damages, but conduct variously termed "gross negligence," "willful and wanton misconduct," or "reckless disregard for the safety of others" frequently is.[81] Although there has been some

75. *See* Riley, *supra* note 61, at 225 (commission of tort in malicious manner traditional basis for punitive damage assessment).

76. *See, e.g.*, Prudential Ins. Co. of America v. Executive Estates, Inc., 369 N.E.2d 1117, 1130-31 (Ind. App. 1978).

77. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 10 (4th ed. 1971); *Punishment by Civil Courts*, *supra* note 14, at 1164-65.

78. *See Punishment by Civil Courts*, *supra* note 14, at 1165.

79. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 11 (4th ed. 1971): "[I]t is not so much the particular tort committed as the defendant's motives and conduct in committing it which will be important as the basis of the award."

80. *See* DOBBS, *supra* note 1, at 205-06.

81. *See, e.g.*, Brooks v. Wootton, 355 F.2d 177, 178 (2d Cir. 1966); Alabama Elec.

disagreement over the meaning of these terms,[82] to the extent that they indicate that the defendant had or should have had a subjective perception of the risks involved, punitive damages are properly awarded.[83] An example of this type of conduct is supplied by *Claunch v. Bennett*,[84] in which the defendant engaged a friend in a drag race on a busy city street, at speeds upwards of ninety miles per hour. A collision ensued, resulting in the plaintiff's injuries. Although there was no showing that the defendant driver consciously had desired to cause harm to others, the risk he was creating was so great and so obvious that proceeding in the face of it could only be characterized as callous indifference. Accordingly, to warrant punitive damages conduct must be reckless, not merely derelict.

In many cases, a defendant's attitude of callousness toward potential harm constitutes a greater threat to society, and hence increases the need for deterrence, than the isolated occurrence of the speed contest in *Claunch*; for instance, where the defendant proceeds in the face of a known risk to a large number of people. For example, in *Toole v. Richardson-Merrell Inc.*,[85] a leading manufacturer of pharmaceuticals marketed a drug known as MER/29, which purported to aid treatment of arteriosclerosis by inhibiting the production of cholesterol in blood. Although the company's own experiments showed abnormal blood changes and eye opacities in animals, the defendant repeatedly covered up reports of these experiments, fictionalized data, and misrepresented facts to both the medical profession and the Food and Drug Administration (FDA). When MER/29 was approved by the FDA, its release was accompanied by the greatest marketing push ever conducted by the company. Despite the fact that harmful side effects in humans were soon reported, the company continued to deny that the drug was dangerous and bitterly fought the FDA's recall of the drug. The tragic result of the defendant's callousness was that over 5,000 people were injured, among them the plaintiff, who suffered cataracts in both eyes.

Coop., Inc. v. Partridge, 283 Ala. 251, 215 So. 2d 580 (1968); Soucy v. Greyhound Corp., 27 App. Div. 2d 112, 276 N.Y.S.2d 173 (1967); Sunray DX Oil Co. v. Brown, 477 P.2d 67, 70-71 (Okla. 1970); Jones v. Hernandez, 148 Ind. App. 17, 263 N.E.2d 759 (1970). *See also* RESTATEMENT (SECOND) OF TORTS § 501, Comment (b) (1965).

82. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 10 (4th ed. 1971); *Punishment by Civil Courts*, *supra* note 14, at 1164-65.

83. *See Punishment by Civil Courts*, *supra* note 14, at 1165.

84. 395 S.W.2d 719 (Tex. App. 1965).

85. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). *See generally* Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

The California Court of Appeal affirmed the $250,000[86] punitive damages award, stating that there was ample evidence in the record that the defendant had acted recklessly and in wanton disregard of possible harm to others by marketing and promoting MER/29 despite knowledge of the drug's toxic side effects.[87]

Although the punitive damages awarded in *Toole* were paltry in comparison to the $7,000,000 the company grossed from the sale of MER/29 during its first year of sales,[88] the award of any punitive damages acted as a warning to the defendant and others who might be tempted to engage in similar conduct. That warning stated that society will not tolerate calculated misconduct that risks human suffering. Imposing damages in excess of actual harm greatly increases the costs and uncertainty surrounding reckless misbehavior and makes wrongful conduct less tempting.[89]

Courts frequently cite oppression as being a ground for the imposition of punitive damages.[90] Oppression carries with it an attitudinal element, for it implies knowledge of power over a weaker party and use of that power as leverage to gain one's own ends. A recent example of this type of case is *Zarcone v. Perry*,[91] in which punitive damages were awarded against a judge. The plaintiff in *Zarcone* operated a food

86. The original jury award of $500,000 punitive damages subsequently was reduced by consent to $250,000. Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 694, 60 Cal. Rptr. 398, 403 (1967).

87. *Id.* at 713-15, 60 Cal. Rptr. at 415-16. *But see* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), another MER/29 case in which the plaintiff's injuries arose out of the same course of conduct. The court in *Roginsky* concluded that there was insufficient proof of managerial complicity to justify punitive damages and that, in view of the multiple litigation, the imposition of punitive damages could punish the defendants too severely and "strip the cupboard bare" for other plaintiffs. See notes 183-92 & accompanying text *infra*. For a discussion of the punitive damages issue in the MER/29 cases see Rheingold, *The MER/29 Story—An Instance of Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 134-37 (1968).

88. Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 701, 60 Cal. Rptr. 398, 408 (1967).

89. The jury in a California product liability case involving the Ford Pinto based its punitive damage award of $125 million on a disgorgement of profits theory. The jury allegedly felt that since Ford had saved $100 million by marketing the unsafe fuel tanks, only an amount in excess of that figure would properly penalize the defendant. *See* The Wall Street Journal, Feb. 14, 1978, at 1, col. 4. The trial judge subsequently reduced the punitive damages award to $3.5 million, holding the jury award excessive as a matter of law. Grimshaw v. Ford Motor Co., No. 197761-199397 (Cal. Super. Ct., Orange County Feb. 14, 1978), *reported in* 22 JURY VERDICTS WEEKLY, No. 14, at 26 (1978). The case presently is on appeal to the California Court of Appeal. *Id.* See note 176 & accompanying text *infra*.

90. *See, e.g.*, Scott v. Donald, 165 U.S. 58 (1897); Roberts v. Pierce, 398 F.2d 954 (5th Cir. 1968); Morgan v. Bates, 390 P.2d 486 (Okla. 1964).

91. 572 F.2d 52 (2d Cir. 1978).

vending truck in front of a courthouse. During a night court session, the defendant judge asked a deputy to bring some coffee to the courtroom. The judge tasted the coffee, found it to be "putrid," and ordered the deputy to bring the vendor before him "in cuffs."[92] The deputy then manacled the vendor and marched him to the judge's chambers in view of dozens of people. The judge conducted a pseudo-official inquisition in which he loudly berated the vendor for 20 minutes, threatening him and his livelihood. The vendor then was allowed to leave, but upon returning to the courthouse area after resuming his normal route he was again called to the judge's chambers and verbally abused. The vendor brought suit, alleging he had suffered emotional distress from this incident which required hospitalization and prevented him from working. Although the vendor was awarded $80,000 in compensatory damages, the defendant's contention on appeal that the size of the compensatory award precluded a punitive damages award was rebuffed by the Second Circuit Court of Appeals:

> [T]here is no merit to appellant's converse claim that a large compensatory award in a civil rights action precludes a substantial punitive award. The purpose of the former is to make a plaintiff whole for his injuries; the main purpose of the latter is to deter defendants and others from similar conduct in the future.[93]

The conduct of the judge in *Zarcone* is shocking for the very reason that the judge, knowing he possessed the power of the state, used that power for personal vindictiveness. The imposition of punitive damages can be invaluable in cases of oppression, whether the oppression be governmental or economic. Because of the disparity of power between the parties, the stronger party has little else to fear.[94]

Accordingly, in instances of tortious conduct punitive damages are properly imposed when the defendant's misconduct exceeds the bounds of behavior with which most people can identify. Whether the misconduct is termed malicious, reckless, fraudulent, or oppressive, the de-

92. *Id.* at 53.

93. *Id.* at 55 n.6.

94. It should be noted that the defendant in *Zarcone* was removed from the bench for his treatment of the plaintiff. *Id.* at 54. The court stated that the judge's removal did not militate against the imposition of punitive damages, since "punitive damages are meant to deter others as well as the particular defendant." *Id.* at 56. Thus, the court treated the judge's removal as special deterrence only. It seems likely, however, that the potential for removal is as effective, if not more effective, than punitive damages as a warning to future judges. For that reason, while the facts of the *Zarcone* case are squarely within the *type* of conduct for which punitive damages should be imposed, the decision arguably is unprincipled because of the presence of another effective deterrent. The only saving argument is that the punitive damages award in *Zarcone* serves as a lesson to nonjudicial oppressors, who may not be subject to removal from office.

fendant must or should have had a perception of the possibility of harm to others. This would include cases in which the defendant may deny the conscious wish to do harm, but in which the risk of harm created is so obvious that simply continuing in the face of that risk can be characterized as callousness.[95] Such conduct implies a flouting of social norms, not just an accidental violation, and calls for a sanction more severe than mere compensatory damages. Moreover, when the misconduct is not a violation of criminal statutes, the imposition of punishment by a civil court is likely to be the only effective way of admonishing the defendant.

Conduct Punishable as a Crime

The policy attack on punitive damages is most persuasive when the conduct for which punitive damages are imposed is also punishable as a crime. If a defendant has violated a criminal statute, he or she stands to lose liberty or property in addition to suffering the stigma of criminal conviction. The argument against the imposition of punitive damages in such cases is that society's interest in punishing the wrongdoer is served adequately by the criminal system, and the imposition of punitive damages would work an unjustifiable double punishment.[96] Although the argument does not support the general abandonment of punitive damages, nor even the abandonment of the doctrine in *all* cases involving criminal conduct, it does have merit in those cases in which the criminal system is adequately performing the functions of punishment and deterrence.

One state, Indiana, has adopted the rule that punitive damages will not lie in a civil case based on conduct that is punishable as a crime.[97] Although the rule apparently grew out of the erroneous view that the imposition of punitive damages would violate the constitu-

95. *See, e.g.*, Jones v. Hernandez, 148 Ind. App. 17, 263 N.E.2d 759 (1970).

96. *See Punishment by Civil Courts*, *supra* note 14, at 1177-84.

97. *See* Koerner v. Oberly, 56 Ind. 284 (1877); Taber v. Hutson, 5 Ind. 322 (1854); Glissman v. Rutt, 372 N.E.2d 1188 (Ind. App. 1978); Nicholson v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975); Moore v. Waitt, 157 Ind. App. 1, 298 N.E.2d 456 (1973). *See also* Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945); *Punitive Damages in Contract Actions*, *supra* note 3, at 673-77. Many states have explicitly approved the imposition of punitive damages where the defendant also may be punished criminally. *See, e.g.*, Guengerich v. Smith, 36 Iowa 587 (1873); Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914). Three states hold that evidence of a prior criminal conviction and penalty is appropriately received as evidence bearing on mitigation of punitive damages. *See* Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908); Jackson v. Wells, 13 Tex. Civ. App. 275, 35 S.W. 528 (1896).

tional ban on double jeopardy,[98] it is now based on the spirit of the law regarding multiple punishment for the same offense.[99] The position of the Indiana courts is attractive because it purports to use punitive damages only when no other effective deterrent exists. To the extent that such a rule would disallow punitive damages when the conduct is merely punishable as a crime,[100] however, it falls short of a principled approach. Many types of conduct are technical violations of the criminal law, but in fact rarely are prosecuted.[101] Examples of this include libel and slander, trespass, and technical batteries.[102] In such cases, punitive damages act as a substitute for the criminal system rather than a duplication.[103]

Many other crimes, notably those involving unlawful commercial behavior, depend on the threat of civil punishment for effective enforcement despite substantial government prosecution. The raft of state[104] and federal statutes[105] that provide for multiple civil damages in addition to criminal penalties bears witness to this fact. The treble

98. Koerner v. Oberly, 56 Ind. 284 (1877) (explicitly so stating). The rule, however, clearly is not mandated by the United States Constitution. Rex Trailer Co. v. United States, 350 U.S. 148 (1956); Helvering v. Mitchell, 303 U.S. 391 (1938); Herald Co. v. Harper, 293 F. Supp. 1101 (E. D. Mo. 1968), *aff'd*, 410 F.2d 125 (8th Cir. 1969); Hauser v. Griffith, 102 Iowa 215, 71 N.W. 223 (1897). *Cf.* Roginsky v. Richardson-Merrell, Inc. 378 F.2d 832 (2d Cir. 1967) (dealing with problem of imposing punitive damages when multiple suits may be brought).

99. *See* State v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893); Taber v. Hutson, 5 Ind. 322 (1854).

100. The rule in Indiana appears to apply whenever the defendant *might* be prosecuted. Koerner v. Oberly, 56 Ind. 284 (1877); Taber v. Hutson, 5 Ind. 322 (1854); Nicholson v. Schramm, 164 Ind. App. 598, 330 N.E.2d 785 (1975); Moore v. Waitt, 157 Ind. App. 1, 298 N.E.2d 456 (1973). The possibility that the rule prohibits punitive damages only where the defendant has been *convicted* of a crime was raised in Glissman v. Rutt, 372 N.E.2d 1188 (Ind. App. 1978), but not definitely answered as the court concluded that the facts of the case made it unnecessary to determine whether the mere possibility of criminal prosecution is sufficient to bar the award of punitive damages. *Id.* at 1191 n.2.

101. *See Punishment by Civil Courts*, *supra* note 14, at 1175-76.

102. *Id.* at 1175.

103. *See id.* at 1175-76.

104. *See, e.g.*, IND. CODE § 24-1-2-7 (1976) (persons injured by combinations to restrain trade or prevent competition may recover treble damages).

105. *See, e.g.*, 15 U.S.C. § 15 (1976) (treble damages for private person injured by violation of antitrust laws); 15 U.S.C. § 72 (1976) (treble damages for private person injured by unfair competition in importing trade); 18 U.S.C. § 2520 (1976) (authorizes punitive damages in an unlimited amount for person injured by wire interception); 29 U.S.C. § 216(b) (Supp. I 1977) (discretionary award of up to two times actual damages for violation of minimum wage and overtime pay provisions of Fair Labor Standards Act); 42 U.S.C. § 3612(b), (c) (1976) (authorizes up to $1,000 punitive damages for private person enforcing fair housing laws).

damage provision of the federal antitrust laws,[106] for example, can be considered a thinly-veiled type of punitive damages.[107] In view of the limited resources of the Department of Justice, treble damages are a more effective deterrent than the possibility of criminal prosecution.[108]

It would be naive to suppose—even where conduct is of a type that is frequently prosecuted—that the criminal system will always fulfill its function.[109] Practices such as plea bargaining, suspending sentences, and granting pardons, immunity, and parole, water down the deterrent effect of the criminal law. Furthermore, maximum criminal penalties, to ensure due process, must be established in advance by the legislature. Punitive damages, on the other hand, can be individualized to provide a deterrent that will be adequate for each case.[110]

Although in a criminal case a trial judge may be flexible in sentencing, in some situations the maximum applicable penalty is small in relation to the reprehensibility of the conduct and the defendant's ability to pay. This is often true where the defendant is a corporation, not subject to loss of liberty.[111] For example, Ford Motor Company recently was indicted in Indiana on three counts of reckless homicide stemming from its defective design of fuel tanks on the Pinto, which allegedly caused the death of three young girls.[112] If convicted on all three counts, Ford could lose $35,000 in fines.[113] In a recent civil suit in California brought against Ford by a young man who was injured under similar circumstances, the punitive damages award, even as re-

106. 15 U.S.C. § 15 (1976) provides that: "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

107. Acme Precision Prods., Inc. v. American Alloys Corp., 347 F. Supp. 376, 380 (W.D. Mo. 1972), *rev'd and remanded on other grounds*, 422 F.2d 1395 (8th Cir. 1970) (dictum).

108. *See generally* Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958). *But cf.* Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329 (1974) (suggesting that a public sector approach to enforcement would be a preferable alternative to private enforcement).

109. *See* Morris, *supra* note 37, at 1196: "It is a notoriously good guess that current administration of the criminal law is not particularly efficient."

110. *See id.*

111. For example, Richardson-Merrell, Inc., Wm. S. Merrell Co., and three of its scientists were indicted under the federal false writing statute (current version at 18 U.S.C. § 1001 (1976)) for their activities with regard to MER/29. All defendants pleaded *nolo contendere*. "The corporate defendants were fined a total of $80,000, the maximum penalty, and the three scientists received suspended sentences." Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 120-21 (1968).

112. Louisville Courier—Journal, Sept. 15, 1978, § b, at 3, col. 1.

113. *Id.*

duced by the judge, totalled $3.5 million.[114] Can there be any doubt as to which penalty will be the more effective deterrent?

Because the criminal system cannot always adequately fulfill its role as an enforcer of society's rules, punitive damages should not be eliminated on the ground that the defendant's conduct *may* be punished as a crime. By the same token, punitive damages should not be imposed in instances in which the criminal system is fulfilling its function. If the criminal system does provide adequate punishment and deterrence, the imposition of punitive damages would be duplicative and thus unprincipled.[115] Punitive damages should be used in civil cases involving criminal misconduct only when they are needed as a substitute for, or as a supplement to, criminal sanctions.

What is needed in such cases is not a wholesale ban on punitive damages, but rather a system of getting more information to the trial judge.[116] The judge should have access to information concerning criminal prosecutions of the defendant to make an informed decision about the propriety of a punitive damages instruction.[117] If prosecution has been instituted for an offense that carries a serious penalty, the judge properly could decline the instruction.[118] If, however, criminal prosecution has not been instituted against the defendant, or if prosecution *has* been instituted but the maximum penalty is unduly slight in relation to the seriousness of the defendant's conduct and ability to pay, punitive damages may be appropriate.

Oppressive Conduct in Contractual Relationships

Although courts frequently state that punitive damages are not recoverable in contract actions,[119] this rule always has had important ex-

114. The jury originally had awarded $125 million in punitive damages. The judge reduced this award to $3.5 million, holding the larger figure excessive as a matter of law. See note 89 *supra*.

115. *See Punishment by Civil Courts*, *supra* note 14, at 1181-84.

116. *Id.* at 1175.

117. See notes 180-82 & accompanying text *infra*.

118. *See Punishment by Civil Courts*, *supra* note 14, at 1174, 1181-82 (suggesting that where such prosecution is *likely*, punitive damages would be inappropriate). However, basing the imposition of punitive damages on the likelihood of criminal prosecution would be unworkable. There are bound to be cases where prosecution seemed likely at the time of the civil trial but never was instituted. In cases such as these that involve serious misconduct no deterrent at all would be available. In cases where a defendant is not prosecuted until *after* the civil trial, the criminal trial judge should be able to take the punitive damages award into consideration in a sentencing decision. *See* Morris, *supra* note 37, at 1197.

119. *See, e.g.*, Young v. Main, 72 F.2d 640, 643 (8th Cir. 1934); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. App. 310, 314, 340 N.E.2d 377, 379 (1976); Ford Motor Co. v. Mayes,

ceptions.[120] Punitive damages long have been imposed in contract cases that have a decidedly tortious flavor, such as those involving breach of contract to marry, breach of contract by public utility companies, and breach of fiduciary duty.[121] In addition, one of the most important exceptions to the rule is that punitive damages may be imposed if the breach of contract constitutes some independent tort.[122] Recent cases in the insurance area demonstrate that this exception threatens to swallow the rule, because of the willingness of courts to recognize bad faith breach of contract as a new tort in itself.

The famous California case of *Gruenberg v. Aetna Insurance Co.*[123] established that a duty of good faith is implied in every insurance contract and that the breach of that duty sounds in both tort and contract.[124] Under more recent California law, an insurer who erroneously denies coverage under a policy will be liable for compensatory damages, including damages for emotional distress, even where its denial was not entirely groundless.[125] More is required, however, to subject the insurer to punitive damages.[126] A recent case illustrates what that "something extra" is that merits civil punishment.

In *Neal v. Farmers Insurance Exchange*[127] an insured motorist was seriously injured in an automobile collision with an uninsured motorist. The injured party's insurance coverage provided uninsured motorist benefits and a medical payment provision. Although the defendant insurance company paid the benefits due under the medical payment provision, it asserted various defenses to the requirement that it pay uninsured motorist benefits. Arbitration proceedings were instituted and defendant was found liable for the benefits. The injured motorist

575 S.W.2d 480, 486 (Ky. App. 1978); White v. Benkowski, 37 Wis. 2d 285, 290-92, 155 N.W.2d 74, 77 (1967).

120. *See* Sullivan, *supra* note 3, at 220-40.

121. *See id.* at 220-29; *Punitive Damages in Contract Actions*, *supra* note 3, at 677-78.

122. *See, e.g.*, Country Club Corp. v. McDaniel, 310 So. 2d 436, 437 (Fla. Dist. Ct. App. 1975); Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. App. 310, 314, 340 N.E.2d 377, 380 (1976); Ford Motor Co. v. Mayes, 575 S.W.2d 480, 486 (Ky. App. 1978) (dictum).

123. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

124. *Id.* at 573, 510 P.2d at 1036-37, 108 Cal. Rptr. at 484-85. A substantial amount of California case law supported this decision. *See* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

125. *See* Johansen v. California State Auto. Ass'n Inter-Ins. Bureau, 15 Cal. 3d 9, 15, 538 P.2d 744, 748, 123 Cal. Rptr. 288, 292 (1975).

126. *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

127. 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978).

then instituted a court action[128] seeking compensatory and punitive damages for bad faith failure to pay the benefits prior to arbitration. The award of compensatory and punitive damages totaling $749,011.48[129] was affirmed by the California Supreme Court.

In addressing the issue of punitive damages, the court, although noting that breach of the duty of good faith had been shown, concluded "such a determination does not in itself establish that defendant acted with the quality of intent that is requisite to an award of punitive damages. For this we must look further—beyond the matter of reasonable response to that of motive and intent."[130] The court concluded that this extra showing was met by evidence that defendant "acted maliciously, with an intent to oppress, and in conscious disregard of the rights of its insured."[131] The court considered the defendant's conduct to be "part of a conscious course of conduct, designed to utilize the lamentable circumstances in which . . . [the insured and her family] found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have warranted."[132] This conduct was the "something extra" on which the court hinged the award of punitive damages.[133]

The California cases allowing punitive damages against insurance companies have done so by classifying the bad faith breach of contract as a tort.[134] This approach has been necessitated by a California statute that allows punitive damages only for "the breach of an obligation not arising from contract."[135] Other states, unhampered by such a statute, appear to be breaking with the traditional rule of disallowing punitive

128. Subsequent to the filing of the complaint the plaintiff motorist died of other causes and was succeeded by her administrator. *Id.* at 917, 582 P.2d at 983, 148 Cal. Rptr. at 392.

129. The jury originally had awarded $1,528,211.35, but this amount was reduced by plaintiff's remittitur in response to a conditional order granting defendant's motion for a new trial. *Id.* at 920, 582 P.2d at 985, 148 Cal. Rptr. at 394.

130. *Id.* at 922, 582 P.2d at 986, 148 Cal. Rptr. at 395.

131. *Id.* at 923, 582 P.2d at 986-87, 148 Cal. Rptr. at 396.

132. *Id.* at 923, 582 P.2d at 987, 148 Cal. Rptr. at 396.

133. *Accord*, Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 822, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) (citing Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978)) (concluding evidence supported finding that defendant " 'acted maliciously, with an intent to oppress, and in conscious disregard of the rights of its insured' " but finding punitive damages award of $5 million excessive as a matter of law).

134. *See* Sullivan, *supra* note 3, at 241; *Punitive Damages in Contract Actions*, *supra* note 3, at 680.

135. CAL. CIV. CODE § 3294 (West 1970) provides: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

damages in contract cases and have imposed punitive damages in cases involving malicious, oppressive, or like conduct, despite the existence of a contract.[136] Significantly, this trend is not limited to cases involving insurance companies.

Jones v. *Abriani*[137] exemplifies this more modern approach of other states. In *Jones*, the plaintiffs were a young married couple who had ordered a new mobile home from the defendants. When the mobile home arrived, the plaintiffs found that it differed from the home they had ordered and was defective in several important respects. They immediately attempted to reject the delivery but were threatened with forfeiture of their down payment by the sellers, who assured the plaintiffs that the defects would be cured. The sellers also failed to disclose the terms of the limited warranty on the mobile home until the warranty had expired. Most of the defects were never repaired despite the seller's continuous assurances, and additional problems with the home arose.

Approving the jury's award of $3,000 in punitive damages, the Indiana Court of Appeals noted that while the wrong committed was a serious one and tortious in nature, it did not fit conveniently into the framework of a recognized tort.[138] Rather than demanding proof of conduct that would constitute some independent tort, the court asked whether public policy would be served by the imposition of punitive damages.

> The case at bar is a particularly appropriate instance where the public interest is served by the punishment that is inflicted on the wrongdoer. The damages awarded will tend to deter similar conduct in the future against both this buyer and other members of the public who deal with the seller. . . . In fact, it is hard to imagine where the public interest to be served is more important than in consumer matters, especially where the consumer is in an inferior bargaining position and forced to either sign an adhesion contract or do without the item desired.[139]

The adoption of this public policy approach, which imposes punitive

136. *See, e.g.*, Whitfield Constr. Co. v. Commercial Dev. Corp., 392 F. Supp. 982 (D.V.I. 1975); Jones v. Abriani, 350 N.E.2d 635 (Ind. App. 1976); Lou Leventhal Auto Co. v. Munns, 164 Ind. App. 368, 328 N.E.2d 734 (1975); Rex Ins. Co. v. Baldwin, 323 N.E.2d 270 (Ind. App. 1975); Vernon Fire & Cas. Ins. Co. v. Sharp, 161 Ind. App. 413, 316 N.E.2d 381 (1974), *modified on other grounds*, 264 Ind. 599, 349 N.E.2d 173 (1976); Eakman v. Robb, 237 N.W.2d 423 (N.D. 1975). *See also* Sullivan, *supra* note 3, at 245.

137. 350 N.E.2d 635 (Ind. App. 1976).

138. *Id.* at 650 (quoting Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 608, 349 N.E.2d 173, 180 (1976)).

139. 350 N.E.2d at 650. *Cf.* Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 608, 349 N.E.2d 173, 180 (1976) ("serious wrong, tortious in nature," even if not "conveniently

damages for serious misconduct even if arising under contract, is commendable. The imposition of punitive damages should not depend on so fine a point as whether a case sounds in tort or in contract, as distinctions between tort and contract actions frequently are difficult to maintain.[140] Further, punitive damages may be even more important in a contract action than in a tort action, because of the limitations of contract damages. If wrongdoers only have to fear a measure of damages that would force them to do what was required originally, there is little disincentive for delay and breach. This is particularly true where the breaching party is in a position of relatively strong bargaining power. Thus, compensatory damages in contract cases have little effect in preventing economic oppression. By strengthening the sanction against breach of contract, the imposition of punitive damages operates to curb the abuse of superior bargaining power.[141]

Several writers have suggested that the trend toward imposing punitive damages in contract cases reflects courts' efforts to protect vulnerable parties against abuse of bargaining power by dominant parties.[142] Although the subordinate party often will be a consumer and the dominant party a large business concern, punitive damages would be appropriate in any case in which the breaching party consciously has sought to take advantage of the dependency that has resulted from a contractual relationship.[143] As in tort cases, the imposition of punitive damages should depend on whether the conduct of the breaching party warrants the extra measure of deterrence that punitive damages provide.[144]

Naturally punitive damages should not be used to discourage parties to a contract from resorting to the courts for settlement of a good faith dispute.[145] The key factor, however, is good faith. If a breaching party is unable to advance some reasonable basis in law or in fact for

fit[ting] the confines of a pre-determined tort," coupled with a public interest which is "served by the deterrent effect" of punitive damages, justifies award).

140. *See* Sullivan, *supra* note 3, at 237, 251.

141. *Id.* at 249. The author also suggests that awarding punitive damages in contracts cases is consonant with other doctrines of modern contract law, such as unconscionability, that are designed to protect against the abuse of bargaining power. *Id.*

142. *See id.* at 249-51; *Punitive Damages in Contracts Actions*, *supra* note 3, at 688.

143. *See, e.g.*, Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566, 579-81 (Ind. App. 1977) (brewer termination of distribution agreement with beer wholesaler). *See also Punitive Damages in Contract Actions*, *supra* note 3, at 687, suggesting that dependencies resulting from a contract may create a type of fiduciary relationship.

144. See notes 75-95 & accompanying text *supra*.

145. *See* Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. App. 599, 610, 349 N.E.2d 173, 181 (1976); *Punitive Damages in Contract Actions*, *supra* note 3, at 685, 687-88.

failing to perform contractual obligations, an inference of bad faith is unavoidable. When this bad faith is coupled with disparity in bargaining power, the sanction of punitive damages is appropriate.

Effectuating a Principled Approach

As this discussion demonstrates, the doctrine of punitive damages can be a valuable device for strengthening the admonitory function of the civil law. The troublesome question is how to put the theoretical goals of the doctrine into practice. How can a court ensure that a blameworthy defendant will not be punished too harshly by an inflamed jury? How, indeed, does a court determine the sum that will effectively deter the defendant's conduct without bankrupting him or her?

The easy answer is that the trial judge has the responsibility for seeing that punitive damages are applied in a principled manner; yet this job is far from easy. In a criminal trial, the trial judge at least has the advantage of being guided by minimum and maximum penalties established by the legislature.[146] Prior to sentencing criminal defendants in most states, the judge may hold a special hearing in which additional information to guide in sentencing is received.[147] In a civil trial in which punitive damages are sought, however, the judge has no such guidance. Consequently, there is a danger that the paucity of standards regarding punitive damages may cause the judge to hesitate to disturb the jury's award, feeling that his or her judgment is no better than the jury's.[148]

Two changes in present practice are necessary to strengthen courts' control over punitive damages awards. The first relates to the procedure for imposing punitive damages and the second to the assessment of the amount of such damages.

Procedural Reform

A common practice among courts is to instruct the jury that it may award punitive damages if it finds that the defendant's conduct was outrageous and evidenced "evil motives or . . . reckless indifference to the rights of others."[149] The assessment of punitive damages is then left

146. *See Punishment by Civil Courts*, *supra* note 14, at 1169-70.
147. *Id.* at 1170.
148. *See Punitive Damages in Contract Actions*, *supra* note 3, at 672.
149. RESTATEMENT (SECOND) OF TORTS § 908(2) (Tent. Draft No. 19, 1973).

to the discretion of the jury,[150] subject to remittitur or the granting of a new trial for excessive verdicts.[151] One writer has noted the inherent irony of requiring that the jury find the defendant's conduct to be outrageous, while reversing the verdict if the jury acts on this passionate emotion.[152]

To increase the likelihood that punitive damages will be applied in a principled manner, the judge, rather than the jury, should assess the sum of the damages.[153] Although the judge is in no better position to decide whether the defendant's conduct was outrageous, the question of punishment calls for expertise. Delicate issues of economics and social policy are involved in deciding the amount of punishment—issues with which the ordinary juror is likely to have little familiarity.[154] Beyond being more aware of the public policy implications of the award of punitive damages, judges have more experience in meting out punishment.[155] They are less likely to be impressed by the histrionics of counsel and so to be inflamed by passion or prejudice. Finally, the judge could receive additional evidence, otherwise inadmissible or potentially prejudicial, to aid in reaching an informed decision about the proper sum of damages.[156]

This procedure would parallel the present practice in criminal trials in most states in which the sentence is imposed by the trial judge after conviction by the jury.[157] This bifurcation of the adjudication and sentencing functions is designed to avoid the possibility that the jury's determination of guilt would be influenced by evidence of the defend-

150. *See, e.g.*, Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566, 581 (Ind. App. 1977); RESTATEMENT (SECOND) OF TORTS § 908(2) (Tent. Draft No. 19, 1973).

151. See note 49 *supra*. *See generally* Carlin, *Remittiturs and Additurs*, 49 W. VA. L. REV. 1 (1942).

152. Owen, *supra* note 6, at 1320 n.304.

153. The shifting of the assessment function to the judge has been suggested by numerous commentators. *See* DOBBS, *supra* note 1, at 220; DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344, 352-53 (1976); Owen, *supra* note 6, at 1320-25; *Exemplary Damages*, *supra* note 1, at 530; *Punishment by Civil Courts*, *supra* note 14, at 1171. It is also provided for in the Department of Commerce's Proposed Uniform Product Liability Law. *See* DEP'T OF COMMERCE, DRAFT UNIFORM PRODUCT LIABILITY LAW § 120(b), 44 Fed. Reg. 3,002 (1979) [hereinafter cited as DRAFT UNIFORM PRODUCT LIABILITY LAW].

154. *See* Morris, *supra* note 37, at 1179.

155. This experience stems largely from presiding over criminal proceedings. Owen, *supra* note 6, at 1320.

156. *Id.* See notes 157-63 & accompanying text *infra*. The constitutionality of a sentencing hearing in a criminal case, in which the judge received evidence outside the record, has been upheld by the Supreme Court. *See* Williams v. New York, 337 U.S. 241 (1949).

157. *See Punishment by Civil Courts*, *supra* note 14, at 1171.

ant's character and personality.[158] Perhaps, too, the system was structured to avoid situations in which a jury would compromise its doubts about guilt with a light sentence.

This rationale would apply equally to a civil trial in which punitive damages are sought. Much of the information that is needed to impose a proper sum of damages may be too complex for the jury to evaluate effectively. Evidence of the defendant's wealth, while admissible in most states,[159] may give rise to what one writer has dubbed the "Robin Hood" syndrome.[160] Similarly, evidence of past or present criminal prosecution,[161] or of other ongoing civil cases,[162] may influence the jury and lead it to compromise any doubts it may have on the initial question of liability. Yet all of this information is vital for principled application of punitive damages. To avert the possibilities of compromise and overly harsh penalties, the questions of liability and punishment should be separated, and the judge provided with access to information that would otherwise be excluded.

If the record reasonably supports the inference that the defendant's conduct warrants the imposition of punitive damages, the jury should be instructed to decide whether punitive damages should be awarded. Maintaining this decision as a jury function operates as a check on the judge's decision and takes advantage of the jury's knowledge of community standards. If the jury finds that punitive damages should be awarded, the judge should then hold a special, in camera hearing to assess the amount of the award.

During this hearing, the judge should hear any evidence outside the record that would aid in assessing the amount of punitive damages, unhampered by technical rules of evidence. After considering all of the evidence and the policy factors outlined below, the judge could then assess the amount of punitive damages. To facilitate appellate review, a record should be made of this hearing, including written findings of

158. *See* G. MUELLER, SENTENCING PROCESS AND PURPOSE 3 (1977).

159. *See, e.g.*, Coy v. Superior Court, 58 Cal. 2d 210, 373 P.2d 457, 23 Cal. Rptr. 393 (1962); Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566, 581 (Ind. App. 1977); Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977); Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818 (1912). *See generally* Note, *Punitive Damages: An Exception to the Right of Privacy?: Coy v. Superior Court*, 5 PEPPERDINE L. REV. 145 (1977).

160. DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Litigation: Bonanza or Disaster*, 43 INS. COUNSEL J. 344, 353 (1976). *See also* Morris, *supra* note 37, at 1191; Owen, *supra* note 6, at 1320-21; *Exemplary Damages*, *supra* note 1, at 528.

161. *See* Morris, *supra* note 37, at 1197.

162. *See* Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 136 n.53 (1968).

fact supporting the amount of the award.[163]

Guidelines for Assessing the Amount of Punitive Damages

The problem with assessing punitive damages is that no quantitative formula is possible, yet the judge must set a certain sum that will effectuate the policy goals underlying punitive damages awards.[164] Although a quantitative formula would be comforting, it would be undesirable. The deterrent effect of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance. Similarly, any uniformity in a sanction that strikes at wealth would pose the danger of being excessive for poor defendants and inadequate for rich ones.[165] Judgment calls in assessing punitive damages, therefore, are inescapable.

Many courts have sought refuge behind the rule that the amount of punitive damages must bear a reasonable relationship to actual damages.[166] This rule is artificial in that no specific ratio of punitive damages to actual damages ever has been established.[167] In one jurisdiction, for example, ratios have been upheld that ranged between 0.18 to 1 and 12.5 to 1.[168] The greater danger of the reasonable relationship rule is that it can cut against the deterrent objective of punitive damages.[169] There are many cases in which, although actual damage is slight, the conduct involved has such great potential to cause harm that strong sanctions are warranted. For example, a person may attempt murder but only succeed in frightening the victim,[170] or a seller may commit a host of petty wrongs against consumers. Because the actual damages in such cases are small, a rule that requires punitive damages to correspond to compensatory damages would cause the award to fall

163. An alternative procedure is possible for those jurisdictions that find a complete shifting of the assessment function to be too radical. Evidence of the defendant's wealth, criminal prosecutions, and ongoing multiple civil litigation could be presented to the jury in open court *after* it has found that the defendant is liable and that punitive damages are warranted. The judge could then reduce by remittitur any excessive verdicts. *But see* Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1806-08 (1979).

164. *See* Owen, *supra* note 6, at 1315.

165. *See Punishment by Civil Courts*, *supra* note 14, at 1170.

166. *See, e.g.*, Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922, 523 P.2d 662, 672, 114 Cal. Rptr. 622, 632 (1974); Addair v. Huffman, 195 S.E.2d 739, 743-44 (W. Va. 1973). For an excellent discussion of the reasonable relationship rule, see Morris, *supra* note 37, at 1180-81.

167. *See* Riley, *supra* note 61, at 216.

168. *Id.* at 216-17.

169. *See* DOBBS, *supra* note 1, at 210-11; *Exemplary Damages*, *supra* note 1, at 531; *Punishment by Civil Courts*, *supra* note 14, at 1170-71.

170. RESTATEMENT (SECOND) OF TORTS § 908, Comment (b) (Tent. Draft No. 19, 1973).

short of its desired effect. The reasonable relationship rule is meaningless and should be abandoned.[171]

The abandonment of the reasonable relationship rule would not mean that the assessment of punitive damages would be thrown to the gods. Rather, courts would be forced to balance society's interests against the defendant's interests. The following factors may aid a court in this process.

Severity of Threatened Harm. Punitive damages should bear a reasonable relationship to the harm that is *likely* to occur from the defendant's conduct,[172] as well as to the harm that *actually* has occurred. If the harm likely to occur or the harm that has occurred from such conduct is slight, the award of punitive damages should be relatively small. If the threatened or actual harm is grievous, the amount of the award should be more severe.[173] This is certainly not a complete standard, for if present intangible harms are difficult to gauge, potential harms are impossible to gauge with certainty. Nevertheless, the severity of harm, actual and threatened, is one factor that a court should consider in assessing punitive damages.[174]

Degree of Reprehensibility of Defendant's Conduct. As the defendant's misconduct becomes more flagrant, the need to deter such conduct increases. In determining the need for deterrence, the court should focus on such elements as the duration of the misconduct, the degree of the defendant's awareness of the hazard, and any concealment of the hazard.[175] In addition, both the existence and the frequency of similar past conduct would be relevant.

Profitability of the Conduct. Where the defendant has engaged in wrongful conduct for a profit, the award of punitive damages should remove the profit incentive.[176] Not only should the defendant be forced to disgorge the profits, but an additional amount should be added to the award so that the defendant realizes not a profit, but a

171. *See* Morris, *supra* note 37, at 1181-85; *see generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 14 (4th ed. 1971); Riley, *supra* note 61, at 249.

172. *See* Morris, *supra* note 37, at 1181.

173. *Id.*

174. A recently enacted Minnesota statute identifies "the seriousness of hazard to the public arising from the defendant's misconduct" as one of the factors to be considered in assessing punitive damages. MINN. STAT. ANN. § 549.20(3) (West Supp. 1978).

175. *See, e.g., id.*; DRAFT UNIFORM PRODUCT LIABILITY LAW, *supra* note 153, § 120(b)(2), (4) & (5). *See also* Owen, *supra* note 6, at 1319.

176. *See* Owen, *supra* note 6, at 1316.

loss.[177]

Financial Position of the Defendant. Because the award of punitive damages strikes at wealth, the defendant's ability to pay must be taken into account.[178] A sum that is sizable for one person may be inconsequential to another. To accomplish the goal of deterrence, the sum assessed must be large enough to punish the defendant without being vindictive.

Amount of Compensatory Damages Assessed. The judge must scrutinize the jury's compensatory award to determine whether it contains elements of retribution. If the compensatory award seems high in relation to actual injury, the jury's outrage at the defendant's conduct may have spilled over into the compensatory award. If so, this fact should mitigate the amount of punitive damages.

Costs of Litigation. Since one purpose of punitive damages is to encourage plaintiffs to bring wrongdoers to justice, the judge should consider the costs of such litigation to the plaintiff.[179] This factor is related to the foregoing one, in that the plaintiff may have been compensated indirectly for costs through a large compensatory verdict.

Potential Criminal Sanctions. Any criminal penalties to which the defendant may be subject should be taken into account in mitigation of the punitive damages award.[180] If the defendant is being prosecuted for a crime that carries a serious penalty, such as substantial loss of liberty, society's interests probably are best vindicated by the criminal system.[181] Punitive damages in such a case probably should not be levied at all. In other cases involving criminal misconduct in which punitive damages are appropriate, the judge should consider the total effect of the punishment to which the defendant will be subjected.[182]

177. See note 89 *supra*.

178. *See* DRAFT UNIFORM PRODUCT LIABILITY LAW, *supra* note 153, § 120(b)(6); MINN. STAT. ANN. § 549.20(3) (West Supp. 1978); Owen, *supra* note 6, at 1319; *Exemplary Damages*, *supra* note 1, at 528; *Punishment by Civil Courts*, *supra* note 14, at 1170. See note 159 & accompanying text *supra*.

179. *See* Owen, *supra* note 6, at 1315, 1319. *But see* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

180. See notes 115-18 & accompanying text *supra*.

181. *Cf. Punishment by Civil Courts*, *supra* note 14, at 1174-75 (criminal penalty should abolish punitive damages).

182. *See* DRAFT UNIFORM PRODUCT LIABILITY LAW, *supra* note 153, § 120(b)(7); MINN. STAT. ANN. § 549.20(3) (West Supp. 1978); Owen, *supra* note 6, at 1319.

Other Civil Actions Against the Defendant Based on the Same Conduct. Imposing punitive damages in multiple party or mass disaster litigation has been the source of much concern.[183] Several dangers are inherent in such cases. Courts are concerned not only with the possibility that the defendant will be too harshly punished,[184] but also with the danger that the first plaintiffs receiving judgments will deplete the resources available for future litigants.[185] The suggestion that an escrow fund be created for all litigants to share equally[186] does not seem practical.[187] On the other hand, if punitive damages were abolished in such cases, the result would be that "an entirely culpable defendant is relieved of civil punitive awards when he injures many people, though he would be held liable if he had injured only one."[188]

The best approach in this problematic area would be similar to that taken in cases in which the defendant is subject to criminal punishment. The judge should assess punitive damages in view of the total punishment to which the defendant is subject,[189] giving more weight to prior awards.[190] Moreover, as between multiple plaintiffs in such litigation, one author has suggested that initial plaintiffs deserve any disproportionate award they may receive, because of the greater cost and ingenuity required of them.[191] This position has merit, particularly in view of the fact that subsequent plaintiffs may benefit, either by favorable settlements or by favorable jury verdicts, from the efforts of the frontrunners.[192]

Conclusion

The doctrine of punitive damages has for too long been a bane of the common law—misunderstood, disavowed, and disfavored. The doctrine must be forthrightly recognized for what it is: a powerful tool to be used in the civil law's job of controlling conduct. The doctrine

183. *See, e.g.*, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); DOBBS, *supra* note 1, at 212-14; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 13 (4th ed. 1971); Morris, *supra* note 37, at 1194-95; Owen, *supra* note 6, at 1322-25.

184. *See* Roginsky v. Richardson-Merrell, Inc., 378 F. 2d 832, 838-51 (2d Cir. 1967).

185. *Id.* at 839-41.

186. *See* Gilden, *Punitive Damages in Implied Private Actions for Fraud Under the Securities Laws*, 55 CORNELL L. REV. 646, 657 n.77 (1970).

187. *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1232 (10th Cir. 1970).

188. DOBBS, *supra* note 1, at 213-14.

189. See note 182 & accompanying text *supra*.

190. RESTATEMENT (SECOND) OF TORTS § 908, Comment (e) (Tent. Draft No. 19, 1973); Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 (1979).

191. Owen, *supra* note 6, at 1325.

192. *Id.*

has not outlived its usefulness. In a society that becomes increasingly impersonal and increasingly dominated by large business concerns, which are in many ways beyond the law, there will always be the need for a remedy that increases the existing admonitory function of the civil law.

Nevertheless, the very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages. To exercise meaningful control, judges need meaningful standards. Although punitive damages will never be susceptible to litmus paper tests or mathematical formulas, a consideration of the composite of factors outlined herein will aid a court in ensuring that punitive damages will be imposed only when justified by the policies underlying the doctrine.