Punitive Damages in California: The Drunken Driver

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Punitive or exemplary damages are extracompensatory penalties imposed against a defendant who commits a particularly egregious act. Courts have invoked this long-standing remedy, currently available in all but five jurisdictions, to penalize defendants for conduct such as as-

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1. D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973); see DiGorgio Fruit Corp. v. AFL-CIO, 215 Cal. App. 2d 560, 580, 30 Cal. Rptr. 350, 361 (1963); RESTATEMENT (SECOND) OF TORTS § 908 (1979). Punitive or exemplary damages should be distinguished from statutory penalties, although both are extracompensatory awards levied in pursuit of deterrence and punishment. Statutory penalties are appropriate in factual contexts prescribed by statute, regardless of the actor's state of mind; punitive damages may be assessed when the actor exhibits the statutorily required state of mind, regardless of the fact situation. See 23 CAL. JUR. 3d Damages § 119, at 239 (1975); 4 B. Witkin, SUMMARY OF CALIFORNIA LAW Punitive or Exemplary Damages § 849, at 3143 (8th ed. 1974 & Supp. 1984). Compensatory damages, on the other hand, are sums awarded to recompense the plaintiff for actual damage proximately caused by the defendant. See 23 CAL. JUR. 3d Damages § 117, at 236 (1975 & Supp. 1984).  


sault, defamation, seduction, malicious prosecution, and conversion. While the doctrine underlying compensatory damages focuses on the extent of harm that the defendant caused, the doctrine of punitive damages focuses on the defendant’s state of mind.

Section 3294 of the California Civil Code allows punitive damages when the defendant has been found guilty of malice, oppression, or fraud. Section 3294 defines malice as “conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.”

Thus, the imposition of punitive damages does not require an intent to do harm; under the “conscious disregard” standard, a defendant who commits a nondeliberate tort is subject to punitive liability if he knew the probable harmful consequences of his conduct.

Considerable controversy surrounds the imposition of punitive damages for nondeliberate torts. Despite general acceptance of the doctrine of punitive damages, the imposition of such an award remains disfavored. Critics of the doctrine argue that exemplary awards create a

10. Cal. Civ. Code § 3294(a) (West Supp. 1985). This Note is concerned only with malice as a basis for punitive liability.
11. Id. § 3294(c)(1).
12. The term “nondeliberate tort” is used here to mean tortious behavior which does not involve intent to injure or knowledge that injury is substantially certain to ensue. The term is used synonymously with “unintentional tort.”
14. See Taylor, 24 Cal. 3d at 901-11, 598 P.2d at 860-66, 157 Cal. Rptr. at 700-706 (Clark, J., dissenting); Franson, Exemplary Damages in Vehicle Accident Cases, 50 Cal. St. B.J. 93, 93 (1975); Mallor & Roberts, supra note 9, at 651.
15. See supra notes 2-3 & accompanying text.
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windfall for the plaintiff,\textsuperscript{17} constitute an excessively severe sanction against the defendant,\textsuperscript{18} and are imposed without the procedural safeguards traditionally afforded a defendant subject to extracompensatory punishment such as criminal sanctions.\textsuperscript{19} Under this view, the reprehensibility of acts committed with an actual intent to harm may justify a punitive award, but acts committed without such an intent provide no equivalent justification for punitive liability.\textsuperscript{20}

Others argue, however, that a voluntary disregard of an act’s dangerous consequences in certain contexts may be as reprehensible as an intent to harm.\textsuperscript{21} Moreover, socially costly conduct should be minimized;\textsuperscript{22} when compensatory and criminal liability provide insufficient disincentive for socially undesirable behavior, punitive damages may provide the necessary deterrent.\textsuperscript{23} Essentially, the controversy over the propriety of punitive liability for nondeliberate torts distills to one issue: whether or not a particular harmful act is sufficiently egregious, deterrable, and socially costly to warrant the punitive sanction.

Driving while intoxicated is an act for which punitive liability may be appropriate. Each year, intoxicated drivers in the United States kill 20,000 to 30,000 people,\textsuperscript{24} seriously injure 120,000,\textsuperscript{25} and cause over half of all fatal automobile accidents.\textsuperscript{26} Driving while intoxicated engenders an annual estimated cost of six billion dollars,\textsuperscript{27} and despite penal and compensatory sanction, the problem continues.\textsuperscript{28}

\textsuperscript{17} Taylor, 24 Cal. 3d at 902, 598 P.2d at 860, 157 Cal. Rptr. at 700 (Clark, J., dissenting); Rosener, 110 Cal. App. 3d at 750, 168 Cal. Rptr. at 242; see D. Dobbs, supra note 1, § 3.9, at 219-20.

\textsuperscript{18} See Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79, 90 (1982); Ellis, supra note 2, at 2 & n.7.

\textsuperscript{19} See Ellis, supra note 2, at 37-43; Mallor & Roberts, supra note 9, at 644; Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1180-81 (1966).

\textsuperscript{20} See, e.g., Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911) (evil motive required for punitive liability); Ellis, supra note 2, at 5-6, 22 (purposeful harm warrants punishment).

\textsuperscript{21} See Taylor, 24 Cal. 3d at 896-97, 598 P.2d at 856, 157 Cal. Rptr. at 697; W. Prosser & W. Keeton, supra note 9, § 2, at 10.


\textsuperscript{23} See Taylor, 24 Cal. 3d at 897, 598 P.2d at 857, 157 Cal. Rptr. at 697; Mallor & Roberts, supra note 9, at 647-50; see also infra notes 62-71 & accompanying text.

\textsuperscript{24} Ferrin, Drunk Driving in California—How Bad Is It?, MOTORLAND, Nov.-Dec. 1980, at 32, 32.

\textsuperscript{25} Id.

\textsuperscript{26} Taylor, 24 Cal. 3d at 898-99, 598 P.2d at 858-59, 157 Cal. Rptr. at 698.


\textsuperscript{28} The recidivism rate for drunken drivers has been estimated at 50-75%. W. Middendorf, The Effectiveness of Punishment 20 (1968).
Many states, including California, authorize punitive damages for at least some instances of drunken driving.\textsuperscript{29} It remains unclear, however, whether exemplary liability is appropriate for drunken driving per se,\textsuperscript{30} that is, in every situation in which an intoxicated\textsuperscript{31} driver causes an accident.

This Note examines whether punitive damages are per se an appropriate penalty for intoxicated driving. First, the Note reviews the policy justifications for punitive damages. It then examines California case law to determine the elements of the conscious disregard standard, which is the legal limitation on exemplary liability. The Note explores policy and precedent in an analysis of various drunken driving scenarios. The Note concludes that punitive damages should be available to all plaintiffs who are victims of drunken driving accidents.\textsuperscript{32}

**Public Policy Foundations of Punitive Damages**

Punishment\textsuperscript{33} and deterrence\textsuperscript{34} are the traditional justifications for

\textsuperscript{29} See cases cited infra note 122.
\textsuperscript{30} “Drunk driving per se” refers to all situations in which a driver who is intoxicated as defined by CAL. VEH. CODE § 23152, see infra note 31, causes an accident, regardless of the blood alcohol level, presence of aggravating factors, such as the defendant’s prior drunk driving arrests and accidents or the recklessness of the defendant’s driving, and the extent, nature, and cause of damage sustained by the plaintiff. It thus comprises a broader situation than those adjudicated in Peterson v. Superior Court, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal Rptr. 784 (1982); Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979); and Dawes v. Superior Court, 111 Cal. App. 3d 82, 168 Cal. Rptr. 319 (1980), in which punitive damages were ruled appropriate for particular instances of drunk driving.
\textsuperscript{31} Terms such as “drunken driving” or “driving while intoxicated” are used in this Note to refer to conduct prohibited by CAL. VEH. CODE § 23152 (West Supp. 1984). Section 23152 provides:

(a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this subdivision, percent, by weight, of alcohol shall be based upon grams of alcohol per 100 milliters of blood.

See also id. § 23155(a)(3) (presumption that person with 0.10% blood alcohol level at the time of chemical analysis was under the influence of alcoholic beverage at time of the alleged offense).
\textsuperscript{32} This Note is not an empirical or quantitative attempt to determine whether punitive damages will deter drunk driving. Instead, the Note accepts the California Supreme Court’s conclusion that policy and precedent justify punitive damages for some instances of drunk driving and analyzes whether that conclusion may reasonably be expanded, in light of policy and precedent, to new situations.
\textsuperscript{33} See Brewer v. Second Baptist Church, 32 Cal. 2d 791, 800-01, 197 P.2d 713, 720 (1948); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348, 382 (1981); CAL. CIV. CODE § 3294(a) (West Supp. 1985); see also Ellis, supra note 2, at 4-8; Mallor & Roberts, supra note 9, at 648-50; Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1279-80 (1976).
punitive damages. Under punishment theory, punitive liability is appropriate when the defendant has committed a reprehensible act. De
terrence theory supports exemplary liability only if the sanction is likely
to discourage wrongful conduct.

Punishment

According to punishment theory, punitive liability is a lawful ex-
pression of societal outrage at a defendant’s reprehensible conduct. Punishment theory rests on a principle of fairness: each defendant should receive his or her “just desserts.” This principle presents substantive
and procedural limitations on the imposition of punitive damages.

Substantively, only a reprehensible act merits punishment. The act
must be “outrageous,” evince “moral culpability,” or at least be
“knowingly wasteful.” The defendant must have desired to harm or
to insult someone, or at least have known that his act threatened others with probable danger. Punishment theory thereby justifies punitive damages for defamation, assult, witholding information in the sale

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35. Two other concepts occasionally offered as justification for punitive damages, “pre-
serving the peace” and “inducing private law enforcement,” may be incorporated into a
broader definition of deterrence called “social efficiency.” Two purported rationales for exemplary damages, compensating the victims for otherwise uncompensable damages and paying plaintiffs’ attorney fees, do not justify the punitive damage doctrine, but may explain why damages imposed against a defendant are paid to the victim-plaintiff, rather than to the state. See Ellis, supra note 2, at 3-12.

36. Id. at 5-6.
37. See infra notes 61-94 & accompanying text.
38. W. PROSSER & W. KEETON, supra note 9, § 2, at 9-10; Ellis, supra note 2, at 5.
39. See Ellis, supra note 2, at 6.
40. The term “punishment” is used here only as it applies to punitive damages.
44. Ellis, supra note 2, at 6.
45. Id. at 15.
46. Id. at 6.
47. See supra note 5.
48. See supra note 4.
of a drug, or refusing to rectify a known dangerous product, but not for acts that only unexpectedly cause harm. Thus, punishment theory limits the imposition of punitive damages to wilful, reprehensible acts.

Procedural fairness mandates adequate safeguards against the unjust imposition of liability. Criminal law, the traditional domain of punishment, employs such procedural safeguards as proof beyond a reasonable doubt, the privilege against self-incrimination, and the protection against double jeopardy. Civil law, in which punitive damage awards are assessed, does not offer these safeguards, and a jury’s discretion to determine the propriety and amount of punitive damages exacerbates this deficiency. Although some commentators have demanded the abolition of exemplary damages for this reason, California courts have held that because exemplary awards are civil in nature, the procedural safeguards associated with criminal prosecutions do not apply.

51. Ellis, supra note 2, at 5-6, 22. Punitive damages may not be imposed against a defendant who did not actually know of the potential harmful consequences. See infra note 108 & accompanying text.
52. Procedural fairness is essentially the same as procedural due process mandated by the fifth amendment of the United States Constitution applied to the states by the fourteenth amendment. See Ellis, supra note 2, at 3-12, 21-23.
54. See Mallor & Roberts, supra note 9, at 645.
55. See Taylor, 24 Cal. 3d at 902, 598 P.2d at 861, 157 Cal. Rptr. at 700-01 (Clark, J., dissenting). If the punitive damage claim is not unwarranted as a matter of law, the jury decides whether to impose punitive damages and, if so, the appropriate amount. See Ellis, supra note 2, at 37-43; Mallor & Roberts, supra note 9, at 644-46.

Additionally, many authors have suggested specific ways to remedy these procedural problems. See, e.g., Mallor & Roberts, supra note 9, at 663-69 (judge rather than jury should assess amount of award, employing factors such as degree of reprehensibility, profitability of conduct, wealth of defendant, and possibility of defendant’s being subject to criminal and other civil liability); Owen, supra note 43, at 119-20 (clear and convincing evidence test, minimum and maximum award limits, decision-making power shifted to judge).
Procedural fairness in civil law, however, does require adequate notice that an act is wrong.\textsuperscript{58} If punitive liability arises only for reprehensible acts, the actor is more likely to have known that his act deserved punishment, and the notice requirement is more likely met.\textsuperscript{59}

Thus, substantive and procedural fairness concerns indicate that punitive damages should be imposed only for reprehensible or outrageous conduct. While the definition of reprehensible conduct is inherently subjective, the essence of a reprehensible act is its known likelihood to cause harm.\textsuperscript{60}

\textbf{Deterrence}

A deterrent sanction discourages the defendant from repeating his wrongful conduct and discourages others from committing that same wrong a first time.\textsuperscript{61} Under deterrence theory, punitive liability is appropriate when such damages are necessary for deterrence, likely to deter, and economically efficient.

\textbf{Necessity}

According to deterrence theory,\textsuperscript{62} an actor will refrain from certain behavior if the losses resulting from the act outweigh the gains.\textsuperscript{63} Conversely, if an actor expects to profit from his wrongful conduct despite

and that a clear and convincing evidence test should be employed. The court also rejected the argument that the punitive damage award violated defendant's due process right of fair warning, because the defendant knew that punitive damages could be awarded for nondeliberate torts. \textit{Id.} at 811, 174 Cal. Rptr. at 383 (citing Donnelly v. Southern Pac. Co., 18 Cal. 2d 863, 869-70, 118 P.2d 465, 468-69 (1941)); see also Glovatorium, Inc. v. NCR Corp., 684 F.2d 658, 663 n.5 (9th Cir. 1982) (uncertainty as to amount of potential punitive award not unconstitutional).

58. Ellis, \textit{supra} note 2, at 5-6.

59. \textit{Id.} at 22.

60. \textit{See supra} notes 38-59.

61. Peterson v. Superior Court, 31 Cal. 3d 147, 156, 642 P.2d 1305, 1309-10, 181 Cal. Rptr. 784, 788-89 (1982); Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 790, 598 P.2d 45, 55, 157 Cal. Rptr. 392, 402 (1979); Ellis, \textit{supra} note 2, at 8. A third purpose of deterrence is to preserve the peace by providing financial remuneration through the courts and thereby discouraging victims or third parties from pursuing private revenge. Ellis, \textit{supra} note 2, at 9-10. This theory is not dealt with here because it has no prominence in California case law.

62. A sanction may deter by educating the wrongdoer or the public and by instilling a fear of the consequences of wrongful conduct. These two influences may in turn engender "unconscious inhibitions that make lawful and desired behavior \textit{habitual behavior}." Cramton, \textit{supra} note 22, at 426 (emphasis in original).

63. This may be quantified, or at least conceptualized, by analogy to the formula of $B = P \times L$ introduced by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). Here, "$B$" represents the benefit the actor derives from the act, "$P$" is the probability liability will ensue, and "$L$" is the severity of the liability imposed. When the benefit of the act is less than the liability the actor will suffer multiplied by the perceived probability that liability will be imposed, the actor will not engage in the act. For example, if the benefit "$B$" of an act is $\$10$, the fine imposed is $\$30$, and there is a .5 (50\%) probability of
compensatory and criminal liability, he will commit the wrong unless he faces some further sanction. Punitive damages supply this additional threat of liability. Thus, punitive damages are necessary when compensatory and criminal liability does not provide sufficient disincentive to wrongful conduct.

Compensatory damages alone rarely will provide adequate disincentive. First, compensatory damages will not deter a wrongdoer who believes that his act will benefit him more than it will harm others. In such cases, a threat of greater liability is necessary to outweigh the perceived benefit and deter the act.

Second, compensatory liability will not deter an actor who anticipates that he may escape all liability because the wrongful conduct will not be detected. Again, increasing the potential liability is necessary to deter; the actor may risk a small chance of $500 liability, but not the same chance of $1000 liability.

When compensatory damages are insufficient disincentives, the possibility of criminal liability may obviate the need for punitive damages by increasing the actor's potential liability. Yet criminal sanctions have not proved to be adequate deterrents in all cases. The greater standard of proof in criminal cases makes penal sanction relatively unlikely, and

apprehension and imposition of liability, the actor will refrain from acting because $10 < .5 \times$ $30$, or $15$. Thus, the actor is deterred by the $30$ fine.

64. Ellis, supra note 2, at 25. Examples include an actor who seeks to avenge his lover's infidelity, see, e.g., Holdaway v. Hall, 29 Utah 2d 77, 78, 505 P.2d 295, 295 (1973), a broker who engages in wrongful activities that render profits exceeding his liability to consumers, see, e.g., Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959), and a past employee who wrongfully solicits customers of his former employer, see, e.g., Southern California Disinfecting Co. v. Lomkin, 183 Cal. App. 2d 431, 7 Cal. Rptr. 43 (1960).

65. See Ellis, supra note 2, at 25. This may indicate that compensatory damages are insufficient deterrents in all cases. There are few acts for which there is a 100% chance of detection, apprehension, and imposition of liability. See Owen, supra note 43, at 113.

66. See Andenaes, The General Preventive Effects of Punishment, 114 U. PA. L. REV. 949, 965 (1966); Ellis, supra note 2, at 25. According to the model presented supra note 63, deterrence should result if the severity of the liability imposed is increased so that when it is multiplied by the probability of liability the total exceeds the benefit the actor derives from the conduct. For example, if $B = 10$, $P = 30\%$, and $L = 30$, deterrence should not result because $10 > .3 \times 30$, or $9$. If, however, $L$ is increased to $100$, then deterrence should result because $10 < .3 \times 100$, or $30$.


68. In Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981), the court stated: "It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass-produced defective products that punitive damages must be of sufficient amount to discourage such practices." See Mallor & Roberts, supra note 9, at 657; Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1196 (1931).
the high incidence of plea-bargains, suspended sentences, and immunity minimizes the actual liability imposed.\(^6^9\) Criminal sanctions thus may only marginally increase an actor’s total liability. Furthermore, stiffer criminal sanctions motivate defendants to fight the charge. The consequent dilatory tactics and increased frequency of trials entail expenditures of administrative time, funds, and other court resources.\(^7^0\)

In sum, punitive damages increase an actor’s potential liability and are necessary for deterrence when the severity or probability of compensatory and criminal liability is small, or when the actor’s perceived benefit from committing the act is great.\(^7^1\)

**Likelihood of Deterrence**

Deterrence theory justifies an exemplary award only if the sanction is reasonably likely to prevent wrongful conduct. Although prediction of deterrent effect is extremely difficult,\(^7^2\) it is generally accepted that the great severity of a sanction and the perceived certainty of its imposition enhance a sanction’s deterrent effect.\(^7^3\)

Punitive damages can be severe penalties\(^7^4\) because they are assessed in part according to the defendant’s wealth.\(^7^5\) This feature appears to

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69. Mallor & Roberts, supra note 9, at 657. Additionally, it is established in California that possible criminal penalties do not necessarily preclude the assessment of punitive damages. See, e.g., Bundy v. Maginess, 76 Cal. 532, 18 P. 668 (1888); Wilson v. Middleton, 2 Cal. 54 (1852) (damages may be awarded even when punishment might also be imposed in the ordinary course of law).

70. Katz, supra note 27, at 285.

71. The “preserving the peace” concept, see supra note 61, and the “undercompensation” rationale, see supra note 35, give rise to a third situation in which punitive damages may be warranted from a deterrence perspective. When the compensatory damages awarded the plaintiff are less than his actual loss, additional liability may be appropriate. In this way, punitive damages would theoretically be justified as assuring full compensation and deterring third party vigilantism, plaintiff self-help, or other private vengeance. Ellis, supra note 2, at 26-29. On the other hand, there may already be sufficient deterrents against self-help. Id. at 29. Moreover, this idea probably justifies extracompensatory damages in nearly every case. Owen, supra note 43, at 113.

72. See, e.g., J. Kaplan, Criminal Justice 13-24 (2d ed. 1978); U.S. Dept. of Transportation, Causation, Culpability, and Deterrence in Highway Crashes 127-29 (1970) [hereinafter cited as Causation]; Katz, supra note 70, at 278-79. See generally Andenaes, supra note 66. For example, while punishment is credited with decreasing personal injury accidents by 50% in one experiment, the results were later criticized on methodological grounds due to the character of the subjects and type of punishment imposed. See Causation, supra, at 128 (statistical problems of spontaneous remission and regression to the mean).

73. See Cramton, supra note 22, at 425, 427. Another factor in the efficacy of deterrence is the speed with which the penalty is imposed: the shorter the time between the act and the punishment, the greater the deterrent effect. Id; see Andenaes, supra note 66, at 961 n.21. The speed factor is not considered here because the legal sanctions of compensatory, criminal, and punitive liability are imposed at roughly the same time.

74. Ellis, supra note 2, at 2 & n.7.

75. See Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928, 582 P.2d 980, 990, 148 Cal.
contribute to the effectiveness of punitive liability as a viable deterrent. In one study, researchers who asked traffic offenders what effect various penalties would have on their subsequent driving habits were told that substantial fines proportional to the offender’s financial resources would deter drivers from repeating their offenses.

The greater the actor’s belief that punitive damages will be assessed, the more likely the penalty will deter him. The perception that a sanction will be imposed may depend largely on the amount and type of publicity a sanction receives. For example, in 1962 Britain increased its penalties for driving offenses but achieved little deterrent effect. In 1967, however, Britain publicized new laws that made conviction and sanction more likely. Initially there was a substantial deterrent effect, but the effect dissipated when the public perceived that the actual level of enforcement was less than expected. Thus, although the certainty of conviction seemed to influence behavior more than the severity of the penalty, the increased certainty did not produce greater deterrent effect unless the public perceived conviction to be likely.

The interplay of the severity and certainty factors suggests that the more reprehensible the act, the greater the likelihood of deterrence. First, punitive liability is measured, in part, by the degree of reprehensibility of the defendant’s act. The greater the reprehensibility, the greater the assessment and the higher the proportion to the defendant’s wealth. Second, the more reprehensible the act, the more likely the actor will perceive the imposition of punitive damages to be certain.


Id.

Certainty is considered a more influential factor than severity. Id. at 427. On the other hand, this factor is readily manipulated. See infra notes 79-83 & accompanying text.

See, e.g., Katz, supra note 70, at 281-84.


Id. The British Road Safety Act of 1967 focused on increasing enforcement by granting police greater power to require drivers to submit to chemical testing and by making driving with a 0.08% blood alcohol level a per se offense. Id. at 25-27.

The increased enforcement measures and concurrent publicity substantially reduced the proportion of intoxicated drivers of all those drivers involved in fatal crashes. Id. at 25-32. As the public realized that enforcement was not as stringent as originally publicized, however, the deterrent effect decreased. Id. at 32-34.

Katz, supra note 70, at 281.

See supra note 75.

Fines that are substantial in light of the defendant’s financial resources may have deterrent effect. See supra notes 74-77 & accompanying text.
Thus, deterrence theory suggests that limiting punitive liability to acts that are reprehensible maximizes the likelihood that the sanction will deter the targeted wrongdoing.

The characteristics of the individuals sought to be deterred may nevertheless negate a potential deterrent effect. For example, a person highly motivated to engage in the prohibited behavior is harder to deter than one only marginally motivated. A person whose wrongdoing is rewarded by his peers or other influences may be similarly difficult to deter. An irrational person, or one without adequate capacity or opportunity to consider the risks of punitive damages before acting, may be impervious to punitive threats. If the act or the actors customarily engaged in the act are not susceptible to the threat of punitive liability, neither the increased severity nor the perceived certainty of punitive damages will have significant deterrent effect.

In sum, while prediction of deterrent effect is difficult, certain factors affect the likelihood that the punitive sanction will deter wrongdoing. Whether punitive damages are likely to deter particular conduct turns on the severity and perceived certainty of the sanction and the characteristics of the actors typically performing the act.

Efficiency

Even if punitive damages are necessary and the act is amenable to deterrence, punitive damages may not be an efficient deterrent. Efficiency may be measured in terms of net social benefit. If a sanction deters, it diminishes the frequency with which the wrong is committed and ultimately reduces the loss society incurs from that wrong. If the benefits of that reduction are greater than the cost of imposing the sanction, there is a net social benefit, and the sanction is an efficient

86. Cramton, supra note 22, at 427. These characteristics include the actor's motivation, personality, and the "conflicting norms of groups to which the individual owes loyalty and affection." Id. (citation omitted). These factors affect the benefit (B) perceived by the actor. Theoretically, an increase in B may be offset, preserving the deterrent influence, by an equivalent increase in P X L.

87. Id. Note that while punitive damages may be warranted as a deterrent when compensatory liability does not outweigh the actor's subjective benefit from the act, this same subjective benefit may provide motivations undermining the deterrent effect. In other words, there may be some acts which simply cannot be deterred.

88. Id.
89. Id.
90. In our model, B, the actor's perceived benefit, increases as his motivation or influences to engage in the conduct increase. At some point, the actor becomes undeterrable; because the probability of apprehension and liability cannot exceed 100%, any time the actor's benefit exceeds the potential liability the actor will not be deterred.
91. See Ellis, supra note 2, at 8-9.
92. Id.
Societal losses due to wrongful conduct include the aggregate costs incurred by all the victims and the administrative costs in apprehending, adjudicating, and enforcing judgments against the wrongdoers. The costs of imposing punitive damages include the extra court time needed to adjudicate and enforce the punitive damage claim and the aggregate costs to plaintiffs of pursuing, and to defendants of defending against the claim. As long as the aggregate losses are greater than the cost of imposing punitive liability, the sanction is efficient.

A sanction may be socially inefficient, however, if it causes society to lose the benefit of some rightful conduct. For example, if an actor overestimates the likelihood or amount of potential punitive liability for marketing a defective product, he may over-invest in precautions against that defect at the expense of research, development, or safety precautions regarding other potential defects.

Summary of Public Policy Background

According to punishment theory, the essential considerations in justifying punitive liability are procedural and substantive fairness. Limiting punitive liability to sufficiently reprehensible acts satisfies these concerns. From the perspective of deterrence theory, there are three major issues: whether compensatory and criminal liability provide insufficient disincentive; whether punitive damages deter; and whether deterrence is efficient.

The Legal Standard of Culpability for Punitive Damages: Conscious Disregard of Others

Although public policy concerns may justify punitive liability for certain acts, punitive damages actually may be imposed only when the plaintiff can demonstrate that certain legal requirements are met. Thus, statutes and case law pose a second basis for determining the propriety of an exemplary award.

93. Id.
94. Id. at 57. Additionally, while the potential punitive damage award may encourage plaintiffs to pursue meritorious actions that they otherwise might not have brought, see Mallor & Roberts, supra note 9, at 649-50, the attractiveness of such recovery increases the number of cases filed, creates greater court congestion, increases social litigiousness, delays recovery for those deserving recovery, delays punishment for those deserving punishment, postpones any possible deterrent effect, and increases administrative costs. Moreover, as the stakes of litigation increase, litigation costs per case increase. See Denzau, Litigation Expenditures as Private Determinants of Judicial Decisions: A Comment, 8 J. LEGAL STUD. 295, 297 (1979); Ellis, supra note 2, at 56-57. "[F]or every $67 that reaches the injured person in product liability cases, another $75 is spent in litigation costs." Schwartz, The Tort Dinosaur, LITIGATION, Fall 1983, at 16.
95. See, e.g., CAL. CIV. CODE § 3294(a) (West Supp. 1985).
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Punitive damages are appropriate when the defendant's act exhibits malice.\(^\text{96}\) While intentional torts, such as assault, frequently demonstrate this malice,\(^\text{97}\) nondeliberate torts may also evince malice. The necessary mental state may be "recklessness," "wanton and willful disregard," or even "gross negligence."\(^\text{98}\) In California, section 3294 of the Civil Code defines malice, in part, as "conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others."\(^\text{99}\)

It is not entirely clear what "conscious disregard" means. On the one hand, it describes a state of mind short of an actual intent to injure.\(^\text{100}\) On the other hand, California courts have refused to impose punitive damages for merely reckless acts because the "central spirit" of section 3294 demands that the defendant's act evince an "evil motive."\(^\text{101}\) Thus, "conscious disregard" necessarily implies a state of mind somewhere between intent to harm and recklessness.

An intent to harm exists when a person actually desires to cause harm or when he knows to a substantial certainty that harm will result

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96. Id; W. Prosser & W. Keeton, supra note 9, § 2, at 9-10.
97. W. Prosser & W. Keeton, supra note 9, § 2, at 10-11; see supra notes 4-8 & accompanying text.
98. Mallor & Roberts, supra note 9, at 651-52.
99. CAL. CIV. CODE § 3294 (West Supp. 1985). Prior to 1980, § 3294 did not define malice, merely stating that either "express or implied" malice would suffice for punitive damage liability. CAL. CIV. CODE § 3294 (West 1971). As a result, the malice standard was not clear. See G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 29, 122 Cal. Rptr. 218, 222-23 (1975); Taylor, Punitive Damages in Business Litigation, 3 ORANG CoUrTY BJ. 384, 386-87 (1976).

Some cases required the plaintiff to show the defendant's "evil motive" or "wrongful personal intention to injure." Davis v. Hearst, 160 Cal. 143, 162, 116 P. 530, 539 (1911); see Note, Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court, 31 HASTINGS L.J. 307, 313 n.43 (1979). Other cases recognized a conscious disregard of the rights of others, or of the safety of others, to be sufficient. See id. at 313 n.44, 314 n.45. Still other cases allowed punitive damages on a showing of the defendant's reckless disregard of the safety or rights of others. See id. at 314 n.47. But see Taylor v. Superior Court, 24 Cal. 3d 890, 895-96, 598 P.2d 854, 856, 157 Cal. Rptr. 693, 696 (1979); Liodas v. Sahdi, 19 Cal. 3d 278, 284-85, 562 P.2d 316, 319, 137 Cal. Rptr. 635, 638 (1977); G.D. Searle v. Superior Court, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 224-25 (1975); Ebaugh v. Rabkin, 22 Cal. App. 3d 891, 896, 99 Cal. Rptr. 706, 709 (1972). The trend in nondeliberate tort cases at the time, however, was to recognize the "conscious disregard" standard. See Taylor, 24 Cal. 3d at 895-96, 598 P.2d at 856, 157 Cal. Rptr. at 696; Dawes v. Superior Court, 111 Cal. App. 3d 82, 88, 168 Cal. Rptr. 319, 322-23 (1980). This trend was codified in the 1980 revision of § 3294, and reflected in revisions of California's approved jury instructions. See CALIFORNIA JURY INSTRUCTIONS (BAJI) No. 14.72 (rev. 6th ed. 1981).

100. See CAL. CIV. CODE § 3294(o)(1) (West Supp. 1985) (conscious disregard standard is alternative standard to actual intent).

from his acts. Thus, if a defendant tossed a bomb into an automobile intending to kill the driver and knowing a passenger was also inside, the defendant would be liable as if he intended to kill them both. Recklessness, on the other hand, occurs when a person acts or fails to act despite the dangerous consequences he knows or should know could occur. Thus, if the defendant had thrown the bomb intending to kill the driver, believing that there was no one within a mile of the driver, he would have only recklessly killed the passenger; the defendant had no actual knowledge of the probability of the passenger's death. The distinction between intent and recklessness thus lies in the actor's subjective knowledge and the relative likelihood of harmful consequences. Actual knowledge of a substantially certain harm evinces evil motive. An evil motive is not present, however, when the defendant merely should have known of a possible harm.

The conscious disregard formula consists of three elements that, taken together, evidence the "evil motive" behind an act that was not intended to cause injury. First, the defendant must be conscious of the potential consequences of his act. Second, he must disregard those consequences. Third, the consequences must endanger the rights or safety of others.

The "consciousness" element requires that the defendant actually know the potential harmful consequences of his act. For example, punitive damages may be appropriate under the conscious disregard standard if a defendant knows that its railroad crossing poses danger to

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102. W. Prosser & W. Keeton, supra note 9, § 8, at 35, § 34, at 212.
103. See id. § 8, at 31-32.
104. Id. § 34, at 212-14. Recklessness differs from negligence in the degree of danger the act poses, or in the probability or foreseeability of the threatened harm. See id.
105. See id. § 8, at 32.
106. See Taylor, 24 Cal. 3d at 895, 598 P.2d at 856, 157 Cal. Rptr. at 696; G.D. Searle, 49 Cal. App. 3d at 32, 122 Cal. Rptr. at 224-25.
bypassers,

Exemplary liability would be inappropriate, however, when the defendant is unaware of its product's danger, even if a reasonable manufacturer would have realized the potential harm. The subjective knowledge requirement is the equivalent of the "evil" associated with intent and distinguishes the conscious disregard standard from recklessness.

The "disregard" element denotes a choice to act in spite of the dangers actually known. A volitional act or a volitional refusal to act evidences this choice. Thus, the defendant exhibits a "conscious disregard" state of mind when he volitionally acts, or fails to act, notwithstanding the known harmful consequences.

The consequences of the defendant's conduct must pose a threat to the safety or rights of others. Moreover, this threat usually must entail probable harm to others. For example, in Nolin v. National Convenience Stores, the defendant knew of a leaky gas nozzle and prior slip and fall accidents at its self-service gas pump area; thus, the defendant was "conscious." The defendant failed to provide a means of opening cans or dispensing oil and failed to establish clean up procedures or to post warning signs; thus, the defendant displayed "disregard." The court held that the defendant's knowing nonfeasance constituted a conscious disregard of the safety of others because the "[d]efendant's established inattention to the danger showed a complete lack of concern regarding the harmful potential—the probability and likelihood of injury." In


112. See supra note 106 & accompanying text.

113. This further distinguishes conscious disregard from recklessness; unless the actor actually knows of the consequences, he has not chosen to disregard them.


115. The requirement of probable harmful consequences distinguishes the conscious disregard standard from recklessness (possible harm) and intent (substantially certain harm). See supra notes 102-07 & accompanying text.


117. Id. at 288, 157 Cal. Rptr. at 37 (emphasis added); see also Seimon v. Southern Pac. Transp. Co., 67 Cal. App. 3d 600, 609, 136 Cal. Rptr. 787, 792 (1977) (trial court improperly
sum, the conscious disregard standard is satisfied when the defendant voluntarily acts or fails to act knowing the probable harmful consequences of his conduct. The subjective knowledge and probable harmful consequences requirements determine whether the defendant acted with a sufficiently evil motive. Because an actual intent to injure is not required, the conscious disregard standard authorizes punitive liability for nonfeasance, as well as for malfaeasance.\textsuperscript{118}

Application of Punitive Damages Principles to Drunken Drivers

Previous sections of this Note have examined two public policy rationales for punitive damages and the conscious disregard standard. According to punishment theory, punitive damages should be imposed when the defendant’s act is reprehensible;\textsuperscript{119} according to deterrence theory, exemplary liability is appropriate when the sanction is necessary, likely to deter wrongful conduct, and efficient.\textsuperscript{120} Under the conscious disregard standard, punitive liability is imposed when the defendant acts despite the known probable harmful consequences to others.\textsuperscript{121} This section considers whether public policy and the conscious disregard standard support the imposition of punitive damages in the context of drunk driving per se.\textsuperscript{122}

The California Supreme Court first declared that drunk driving warranted punitive damages in \textit{Taylor v. Superior Court}.\textsuperscript{123} The plaintiff in \textit{Taylor} alleged that the defendant drove while intoxicated, struck the

\begin{itemize}
\item dismissed plaintiff’s punitive damage claim in case in which defendant railroad failed to remedy known dangerous railroad crossing, because “the jury could have gleaned from [the] evidence that defendant had displayed a conscious and callous indifference to, or disregard of, \textit{probable} harm to motorists” (emphasis added)).
\item See supra notes 38-60 & accompanying text.
\item See supra notes 61-94 & accompanying text.
\item See supra notes 108-18 & accompanying text.
\item See supra note 30. Courts in two other states have held that when the defendant was driving a motor vehicle under the influence of alcohol, the intoxication itself is an adequate basis for punitive damages. Colligan v. Fera, 76 Misc. 2d 22, 349 N.Y.S.2d 306 (1973); Harrell v. Ames, 265 Or. 183, 508 P.2d 211 (1973).
\item 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979).\end{itemize}
plaintiff's car head-on, and severely injured him.\footnote{124} He further alleged that the defendant knew the dangers of drunk driving, because he had a history of drunk driving arrests and previously had caused an automobile accident while driving under the influence of alcohol.\footnote{125}

The court held that the plaintiff's allegations stated a valid claim for punitive damages. The court defined a "conscious disregard" of the safety of others as an act perpetrated despite its known dangerous consequences.\footnote{126} It stated that "one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle," exhibits a conscious disregard of the safety of others.\footnote{127} Because a "conscious disregard" constitutes malice,\footnote{128} the court concluded that the plaintiff's exemplary damages claim was valid.\footnote{129}

The drunken driving at issue in \textit{Taylor} manifested all three elements of the conscious disregard standard outlined in the previous section.\footnote{130} First, the consciousness element was satisfied by the defendant's knowledge, \textit{from the outset}, that he would drive while intoxicated.\footnote{131} Second, the defendant, by choosing to drink despite his knowledge that he would later have to drive, exhibited a wilful and deliberate\footnote{132} decision to disregard the dangerous consequences of drunk driving. Finally, driving under the influence of alcohol creates a probable danger of harm to others.\footnote{133}

Two aspects of the \textit{Taylor} decision warrant emphasis. First, the court focused on the defendant's acts and state of mind when he began to drink, before he became intoxicated. In other words, the court's analysis focused on the driver's decision to drink, not the drinker's decision to drive.

Second, the court reformulated the traditional conscious disregard standard. Although the standard usually requires that the defendant's

\begin{footnotes}
\item[124] \textit{Id.} at 893, 598 P.2d at 856, 157 Cal. Rptr. at 695.
\item[125] \textit{Id.}
\item[126] \textit{Id.} at 895-96, 598 P.2d at 857-58, 157 Cal. Rptr. at 696-97.
\item[127] \textit{Id.} at 899, 598 P.2d at 860, 157 Cal. Rptr. at 699. In Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P.2d 933 (1958), the defendant allegedly knowingly became intoxicated and then operated a motor vehicle. The court found that though his action was perhaps grossly negligent, it was not malicious, and denied a punitive damage claim. \textit{Id.} at 527, 322 P.2d at 939-40. \textit{Taylor} disapproved \textit{Gombos} to the extent it was inconsistent, explaining that at the time \textit{Gombos} was decided it was unclear whether a conscious disregard of the safety of others constituted malice. 24 Cal. 3d at 896, 899-90, 598 P.2d at 858, 860, 157 Cal. Rptr. at 697, 699.
\item[128] \textit{See supra} note 99 & accompanying text.
\item[129] \textit{24 Cal.} 3d at 899-90, 598 P.2d at 859-60, 157 Cal Rptr. at 698-99.
\item[130] \textit{See supra} notes 108-18 & accompanying text.
\item[131] \textit{See supra} text accompanying notes 108-12.
\item[132] \textit{24 Cal.} 3d at 895-96, 598 P.2d at 857-58, 157 Cal Rptr. at 696-97.
\item[133] \textit{Id.}
\end{footnotes}
act pose "probable harmful consequences," the Taylor court required only that the defendant's act threaten "probable dangerous consequences." This reformulation was crucial to the court's holding. By changing the standard from "probable harmful consequences" to "probable dangerous consequences," the court was able to focus on the probability that the harm that does occur will be severe, rather than the probability that harm would occur. Drunken driving does not pose a threat of probable harm because the likelihood of an accident while driving under the influence of alcohol, even though much greater than while sober, is so small in any one trip that harmful consequences can hardly be deemed probable. While a drunken driving accident may not be likely, however, the harm it causes is likely to be serious. The combination of the probability and severity of the harm creates the unacceptable danger posed by drunk driving and establishes a rationale for punitive liability.

In essence, the Taylor court required a risk of serious harm, rather than a serious risk of harm. This revision of the conscious disregard standard allowed the court to authorize exemplary liability for conduct that might not have warranted punitive damages under a strict reading of California precedent.

The Taylor decision advances the policies underlying punitive liability. First, the court's decision is consonant with punishment theory, which requires the defendant's act to be reprehensible. A decision to drink to the point of intoxication before driving, in view of the known threat that drunken driving poses to others, is as egregious as battery or other acts for which punitive damages have traditionally been imposed. In contrast, a person who, while intoxicated, decides to drive often lacks the wilfulness required to justify the imposition of criminal

134. See supra notes 115-18 & accompanying text.
135. 24 Cal. 3d at 895-96, 598 P.2d at 857-58, 157 Cal Rptr. at 696-97 (emphasis added). The Taylor court did not state that it was implementing a new test and did not explicitly suggest that "probable dangerous consequences" modified the conscious disregard standard. This Note argues, however, that the change in terminology is fundamental to the court's holding and shifts the emphasis of the standard.
137. Id.
139. In Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 816-17, 174 Cal. Rptr. 348, 386-87 (1981), the court reiterated the need for probability, rather than possibility, of harm, noting that to express the "essential ingredient" of the conscious disregard standard most accurately, "the rule should be expressed in terms of probability of injury rather than possibility." Nonetheless, the court cited, quoted, and applied the Taylor formulation of the standard, stating that "plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct." Id. at 809, 174 Cal. Rptr. at 381 (quoting Taylor, 24 Cal. 3d at 895-96, 598 P.2d at 857-58, 157 Cal. Rptr. at 696-97 (emphasis added)).
140. See supra notes 40-51 & accompanying text.
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punishment. 141

Second, deterrence theory supports the Taylor holding. Punitive damages may be necessary 142 to deter drunk driving. The acts of drinking before driving and driving while intoxicated are not readily detected, and only a small proportion of drunk drivers are apprehended. 143 Because the opportunity for detection is so rare, significant liability is necessary to deter. 144 Moreover, despite the availability of criminal sanctions, 145 license revocation is not taken seriously, 146 and neither license revocation nor short or long periods of imprisonment appear more effective at deterring drunk driving than substantial fines. 147 Although the fear of having an accident may provide some disincentive to drinking before driving, 148 social pressure, pride, and expedience may mitigate the deterrent effect for all but the most risk-averse. 149 In short, because of the low rate of apprehension and the ineffectiveness of compensatory and criminal liability as deterrents, punitive damages may be necessary to.

141. See supra notes 44-46 & accompanying text.
142. See supra notes 62-71 & accompanying text.
143. See Beitel, Sharp, & Glauz, Probability of Arrest While Driving Under the Influence of Alcohol, 36 J. STUD. ON ALCOHOL 109, 114 (1975); Brokenstein, A Panoramic View of Alcohol, Drugs and Traffic Safety, 16 POLICE 11-6 (1972); see also Note, supra note 42, at 929.
144. See supra notes 63-66 & accompanying text.
146. Seventy-five percent of those whose driving licenses were revoked for repeated drunk driving convictions continued to drive. Ferrin, supra note 24, at 33.
148. Taylor, 24 Cal. 3d at 909, 598 P.2d at 866, 157 Cal. Rptr. at 705 (Clark, J., dissenting).
149. See Cramton, supra note 22, at 427.
150. Despite compensatory and penal sanctions, drunken driving continues. However, a recent increase in the severity and certainty of criminal convictions in California, taking effect after the Taylor decision, appears to have had at least some short-range deterrent effect. On January 1, 1982, Assembly Bill 541 went into effect. See CAL. VEH. CODE §§ 23152-23195 (West Supp. 1985). The new legislation increased sanctions for drunk driving, restricted plea-bargaining, and established a conclusive presumption that a driver who had a blood alcohol level of 0.10% or more was unlawfully under the influence of alcohol. Id.; see also supra note 31. In 1982 there was a significant decrease in the number of fatal and injury accidents in which alcohol was a factor. DEPARTMENT OF CALIFORNIA HIGHWAY PATROL, TEN YEAR SUMMARIES § 5 (1983) [hereinafter cited as TEN YEAR SUMMARIES]. Furthermore, based on California Highway Patrol estimates from nine months of provisional data, only 45% of all fatal accidents in 1983 involved alcohol, the lowest percentage in five years. CALIFORNIA OFFICE OF TRAFFIC SAFETY, CALIFORNIA'S ANNUAL EVALUATION REPORT HIGHWAY SAFETY PROGRAM IMPLEMENTATION FOR THE 1983 FEDERAL FISCAL YEAR Table 5, at 8 (1984). Thus, it appears that a combination of increased enforcement, publicity, rate of conviction, and severity of penal sanction may have a substantial deterrent effect. See R. Peck, THE TRAFFIC SAFETY IMPACT OF CALIFORNIA'S NEW DRUNK DRIVING LAW (AB 541): AN EVALUATION OF THE FIRST NINE MONTHS OF EXPERIENCE 22 (1983).

These results, however, do not clearly show deterrent effect. For example, although the number of accidents involving alcohol decreased in 1982, the proportion of 1982 accidents in which alcohol was a primary factor increased by approximately 30% over the same proportion in 1980. See TEN YEAR SUMMARIES, supra, Table 7E, at 40. Moreover, initial deterrent ef-
provide sufficient disincentive for drinking and driving.  

Third, if drunken driving can actually be deterred, then a sanction that focuses on the driver's decision to drink is in theory more likely to deter than a sanction that focuses on the drinker's decision to drive. If the decision to drive is made when the defendant is already intoxicated and thus incapable of weighing the risks, costs, and benefits of the alternatives, deterrence is unlikely. If, however, a person knows that liability may ensue from her decision to drink when she knows she later must drive, deterrence is possible because the decision to drive is made while she possesses the capacity to make a rational decision.

Finally, the imposition of punitive damages for drunken driving would result in social efficiency. Drunken driving engenders great social cost, but the adjudication of a punitive damage claim causes only a

factors may dissipate as the public becomes better informed about the true risks of apprehension and punishment. See supra notes 80-83 & accompanying text. Initial results may be inaccurate due to statistical problems and uncontrolled variables. See CAUSATION, supra note 72, at 128. Finally, the great publicity over the perils and evils of drunk driving, generated by private campaigns may account for the initial indication of deterrence. See H. Ross, supra note 80, at 32-34. In summary, although preliminary evaluation of California drunk driving laws renders hopeful results, the true effect of such sanctions is not yet known. See R. Peck, supra, at 23.

151. Even if a criminal sanction appears to be a more effective deterrent than punitive damages, the punitive damage sanction may be justified as a supplement to criminal punishment under punishment theory. See Mallor & Roberts, supra note 9, at 658.

152. The greater a sanction's severity and certainty, the more likely it will have deterrent effect. See supra notes 73-83 & accompanying text. Because of the low rate of detection and apprehension, the certainty of punitive damages may be very low. See supra note 143 & accompanying text. Nevertheless, the severity of such liability is great, see supra text accompanying note 74, and the certainty factor is readily influenced by publicity. See supra notes 80-83 & accompanying text. In addition, both the certainty and severity factors are augmented because drunk driving is a reprehensible act. See supra notes 84-85 & accompanying text. Accordingly, drunk driving should be susceptible at least theoretically to punitive damages deterrence.

For general discussions of the problems in deterring drunk drivers, see DRINKING (J. Ewing & B. Rouse eds. 1978); Ross & Blumenthal, Sanctions for the Drinking Driver: An Experimental Study, 3 J. LEGAL STUD. 53, 53, 61 (1974).

153. See supra note 86.

154. See supra notes 87-90 & accompanying text. If, however, the defendant is an alcoholic, he might not have the capacity necessary for deterrence. See Misner & Ward, Severe Penalties for Driving Offenses: A Deterrence Analysis, 1975 ARIZ. ST. L.J. 677, 703-04. Punitive damages would not be imposed against such a defendant because the "consciousness" element of the conscious disregard standard is absent. See Taylor v. Superior Court, 24 Cal. 3d 890, 899, 598 P.2d 854, 860, 157 Cal. Rptr. 693, 699 (1979); supra note 113 & accompanying text.

155. See supra notes 91-94 & accompanying text.

156. See supra notes 24-27 & accompanying text. In Anderson v. Cozens, 60 Cal. App. 3d 130, 131 Cal. Rptr. 256 (1976), the court described the threat posed by drunk driving as "the carnage and slaughter on California freeways and byways . . . which 'now reaches the astounding figures only heard of on the battlefields.' " Id. at 143-44, 131 Cal. Rptr. at 264 (quoting Breithrupt v. Abram, 352 U.S. 432, 439 (1957); People v. Fite, 267 Cal. App. 2d 685, 73 Cal. Rptr. 666 (1968) (citations omitted)); see also Taylor, 24 Cal. 3d at 897-99, 598 P.2d at 858-59, 157 Cal Rptr. at 697-98.
marginal increase in court and litigation costs. Nonetheless, it is unlikely that any productive conduct would be deterred inadvertently. For instance, if a driver overestimates his potential punitive liability, he most likely will take precautions against driving or refrain from drinking altogether.

Cases decided subsequent to Taylor have also held that drunken driving constitutes a conscious disregard of the safety of others. In Dawes v. Superior Court, for example, the plaintiff alleged that the defendant drove while intoxicated, zigzagged in and out of traffic at excessive speeds in a crowded recreation area, ran a stop sign, and struck the plaintiff on a sidewalk. Similarly, the plaintiff in Peterson v. Superior Court alleged that the defendant, after drinking alcohol, drove at speeds in excess of 100 miles per hour, knew that probable serious injury would result, lost control of the car, and crashed, severely injuring his passenger, the plaintiff. In both cases, the courts ruled that the allegations stated facts that satisfied the conscious disregard standard.

Although Taylor, Dawes, and Peterson authorize punitive liability for drunken driving, the plaintiff in each of these cases alleged more than the defendant’s driving under the influence of alcohol. In Taylor, the defendant had a history of alcohol abuse and alcohol-related mishaps. The defendants in Dawes and Peterson allegedly drove recklessly and at excessive speeds. All three defendants purportedly caused severe personal injuries to the plaintiff. It is therefore unclear whether such additional allegations are necessary to satisfy the conscious disregard standard, or whether the standard can be satisfied in the absence of such allegations without undermining the policy justifications for imposing punitive damages.

The following section examines whether drunken driving violates the conscious disregard standard per se, that is, whether the actor manifests conscious disregard when he operates a motor vehicle while intoxicated.

157. A punitive damage claim is litigated in conjunction with the claim for compensatory damages; punitive liability does not require an additional trial. The only additional litigation costs would be during discovery, regarding the defendant’s knowledge of the harmful consequences he created.

158. See supra note 94 & accompanying text.
160. 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).
163. 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).
164. 24 Cal. 3d at 893, 598 P.2d at 856, 157 Cal. Rptr. at 695.
165. 111 Cal. App. 3d at 85-86, 168 Cal. Rptr. at 321.
166. 31 Cal. 3d at 150, 642 P.2d at 1306, 181 Cal. Rptr. at 785.
167. See supra notes 30-31.
The Significance of Aggravating Circumstances

In *Dawes v. Superior Court*,168 the defendant allegedly drove at high speeds through a crowded recreation area and ran a stop sign. The court noted that although an intoxicated driver poses only a foreseeable and possible risk to others, "the risk of injury to others from [the defendant's] conduct under the circumstances alleged was probable."169 Because the defendant's recklessness made the threatened harm probable rather than merely possible, the court determined that the plaintiff's allegations had satisfied the conscious disregard standard.170 The *Dawes* decision thus implies that drunk driving in a nonreckless manner does not pose sufficient danger to satisfy the conscious disregard standard.171

In *Dawes*, however, the defendant's conduct occurred prior to the supreme court decision in *Taylor*. Because *Taylor* did not have retroactive effect,172 the appellate court in *Dawes* had to decide whether the defendant's conduct would have constituted a conscious disregard of the safety of others under the law existing prior to *Taylor*.173 The court cited the defendant's hazardous driving to distinguish a prior case174 in which the court had held that intoxicated driving alone did not warrant punitive damages.

In light of the supreme court's decisions in *Taylor* and *Peterson*, however, hazardous driving should not be considered a requisite for pu-
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nitive liability. First, neither Taylor nor Peterson required an allegation of hazardous driving. Although in Taylor the plaintiff made no allegations that the defendant had driven in a reckless manner, the court held that the defendant's act constituted a conscious disregard.175 Although the defendant in Peterson allegedly had driven at excessive speeds, the court did not cite that fact in support of its holding. Instead, the court concluded that "[t]he gravamen of the proposed complaint, as of the complaint in Taylor, is that '[d]efendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby."176

Second, hazardous driving is not necessary to satisfy any element of the conscious disregard standard for drunken driving. Under that standard, the defendant must actually know of the probable dangerous consequences of his act from the outset, before he starts drinking.177 Recklessness occurring after the defendant has become intoxicated is irrelevant to punitive damages on the assumption that the intoxicated driver is not conscious of the hazards of reckless driving.

Third, while the conscious disregard theory existed prior to Taylor, the "probable dangerous consequences" test did not.178 Thus, current cases must assess not only the probability of harm, but also the severity of harm if it occurs. Driving under the influence, whether at excessive speeds or not, causes accidents; the severity of that consequence satisfies the conscious disregard standard.179

Fourth, reckless drunken driving is not a requirement of punishment theory. Drunken driving presents an egregious hazard in itself.180 The reprehensible act is drinking with the knowledge that one must later drive.181 Thus, the driver's conduct thereafter need not be considered.

Finally, it may not be possible to deter a driver, once drunk, from driving recklessly. In his state of inebriation, a drunken driver probably lacks the capacity to weigh the risks, costs, and benefits of the way he drives. It is inappropriate to base punitive liability on acts that the defendant committed while under the influence of alcohol. Yet if we punish reckless drunk drivers, but not "cautious" drunk drivers, liability turns on the defendant's acts while intoxicated, rather than on his volitional act of becoming intoxicated.

Thus, neither the conscious disregard standard nor public policy justifies a distinction between drunken drivers who drive recklessly and

175. Taylor, 24 Cal. 3d at 896, 598 P.2d at 858, 157 Cal. Rptr. at 697.
176. Peterson, 31 Cal. 3d at 163, 642 P.2d at 1314, 181 Cal. Rptr. at 793 (quoting Taylor, 24 Cal. 3d at 896, 598 P.2d at 858, 157 Cal. Rptr. at 697).
177. Taylor, 24 Cal. 3d at 896, 598 P.2d at 858, 157 Cal. Rptr. at 697.
178. See supra notes 134-35 & accompanying text.
179. See supra notes 137-38 & accompanying text.
180. Taylor, 24 Cal. 3d at 896-99, 598 P.2d at 858-59, 157 Cal. Rptr. at 697-98.
181. See supra notes 40-51, 140 & accompanying text.
drunken drivers who drive cautiously. While the quality of the defendant's driving may influence the amount of the punitive award, the intoxicated driving itself serves as the threshold conduct that authorizes the imposition of punitive liability. An allegation of hazardous driving should be necessary to satisfy the conscious disregard standard in drunk driving cases.

A second type of aggravating circumstance is a defendant's prior drunken history. In Taylor, the court found that the defendant's prior drunken driving arrests and accidents supported plaintiff's allegations that the defendant was actually aware of the probable dangerous consequences of drunk driving. These aggravating circumstances constituted evidence from which a jury could infer that the defendant actually realized the consequences of his act; an allegation of intoxicated driving alone does not justify this inference. Nevertheless, a history of drinking and driving is not necessary for punitive liability. Indeed, Taylor explicitly stated that such aggravating factors were not essential to punitive damages. Any allegation that tends to show that the defendant knew of the probable danger should suffice. As the court stated in Taylor:

Defendant became intoxicated and thereafter drove a car while in that condition, despite his knowledge of the safety hazard he created thereby. This is the essential gravamen of the complaint, and while a history of prior arrests, convictions and mishaps may heighten the probability and foreseeability of an accident, we do not deem these aggravating factors essential prerequisites to the assessment of punitive damages in drunk driving cases.

Public policy supports this conclusion. Drunken driving is no less dangerous, and thus no less egregious, when it is committed by a first-time offender. The threat posed by a drunken driver does not turn on the number of previous accidents. When the stakes are so high, drunken drivers should not be allowed "one free bite." Thus, evidence of the defendant's history of drunken driving may suffice, but is not necessary.

182. 24 Cal. 3d at 896, 598 P.2d at 858, 157 Cal. Rptr. at 697.
183. Id.
184. "The effect may be lethal whether or not the driver had a prior history of drunk driving incidents." Taylor, 24 Cal. 3d at 897, 598 P.2d at 858, 157 Cal. Rptr. at 697.
185. See supra notes 86-90 & accompanying text. This does not necessarily mean, however, that an exemplary award would not deter the previously "innocent" driver altogether. Moreover, punishment theory justifies punitive damages even if deterrence theory does not. See supra text accompanying notes 40-57, 65-90.
to prove the defendant’s knowledge. The requisite knowledge may also be proved by evidence of the defendant’s previous experiences with alcohol, accompaniment of an intoxicated driver, or other awareness of the commonly understood effects of drinking on driver performance.\textsuperscript{186}

In sum, the aggravating circumstances present in \textit{Dawes} and \textit{Taylor} should not be required for punitive liability in drunk driving cases. Reckless driving and prior alcohol-related mishaps are neither indispensable to the conscious disregard standard nor necessary from a policy standpoint.

\textbf{Level of Intoxication}

The courts have not addressed whether the degree of intoxication should affect the viability of a punitive damages claim. The relevant California statute makes it unlawful to drive with a blood alcohol level of 0.10\% or more.\textsuperscript{187} Yet the statute also prohibits operating a motor vehicle while “under the influence of an alcoholic beverage,” without defining the necessary blood alcohol level.\textsuperscript{188} As a result of this statutory scheme, it is not clear whether a punitive damages claim for drunk driving must contain an allegation that the defendant drove with a blood alcohol level of at least 0.10\%, or whether the plaintiff must only allege that the defendant drove while “under the influence.”

In \textit{Taylor}, the court supported its holding with statistics that depicted the danger posed by drivers with blood alcohol levels of 0.10\% or higher.\textsuperscript{189} Furthermore, the higher the blood alcohol level, the greater the defendant’s culpability.\textsuperscript{190} A person with a 0.25\% blood alcohol level poses a greater danger\textsuperscript{191} and more likely knows he is drunk, than does one with a 0.10\% level.

On the other hand, \textit{Taylor} sought to deter the driver who “voluntarily commences, and thereafter continues, to consume alcoholic bever-

\textsuperscript{186} \textit{Cf.} Nolin \textit{v. National Convenience Stores}, 95 Cal. App. 3d 279, 157 Cal. Rptr. 32 (1979); Seimon \textit{v. Southern Pac. Transp. Co.}, 67 Cal. App. 3d 600, 136 Cal. Rptr. 787 (1977) (knowledge of dangerous condition may give rise to inference of knowledge of probable harmful consequences). This does not result in an imputation of knowledge. The trier of fact’s determination of the defendant’s state of mind involves the assessment of the defendant’s credibility in denying his awareness. The well-documented, well-publicized, and well-known dangers of drunk driving alone could arguably persuade the trier of fact that the defendant was disingenuous in his claim of ignorance and did indeed know the probable dangerous consequences of his conduct. Furthermore, an allegation of public knowledge of the dangers of drunk driving should be sufficient to avoid dismissal of a punitive damages claim as a matter of law. \textit{But see} Note, \textit{Malice in Wonderland: Taylor v. Superior Court}, 8 \textsc{San Fern. V.L. Rev.} 219, 232-34 (1980).

\textsuperscript{187} \textsc{Cal. Veh. Code} § 23152(b) (West Supp. 1985); see also supra note 31.

\textsuperscript{188} \textsc{Cal. Veh. Code} § 23152(a) (West Supp. 1985); see also supra note 31.

\textsuperscript{189} Taylor, 24 Cal. 3d at 898-99, 598 P.2d at 859, 157 Cal. Rptr. at 698.

\textsuperscript{190} See Note, supra note 42, at 930-31.

\textsuperscript{191} \textsc{National Safety Council, Defensive Driver’s Manual} 23 (7th ed. 1975).
ages to the point of intoxication." 192 Although seriously inebriated drivers may pose more danger than marginally intoxicated drivers, there is no magic to the 0.10% level. The reprehensible act is becoming intoxicated before driving, and no further intoxication is necessary for the act to merit punishment. Furthermore, the only distinction between a marginally intoxicated driver and a significantly intoxicated driver is the amount of alcohol the latter consumed after he initially reached the point of intoxication. Under both punishment and deterrence theory, the focus should be on the initial act of becoming inebriated before driving, not on acts committed after the actor has become intoxicated. Similarly, a high degree of intoxication is not necessary to fulfill the volitional act or actual knowledge requirements of the conscious disregard standard because both are satisfied by the time the defendant has become drunk. Thus, as long as the plaintiff alleges that the defendant was "under the influence" at the time of the accident, 193 he need not show that the defendant's blood alcohol exceeded some particular level.

Type, Extent, and Cause of Injury

Other issues not yet addressed by courts include whether the type or extent of the plaintiff's injuries should affect the applicability of punitive damages in the drunk driving context and whether the defendant's intoxication in particular must have proximately caused that injury.

In Taylor, 194 Dawes, 195 and Peterson, 196 the plaintiffs suffered severe personal injuries as the purported proximate result of the defendants' drunk driving. There is no California precedent, however, for imposing punitive liability on a drunken driver for harm to property or for slight harm to a person. Furthermore, a drunken driver's actions may be considered more egregious if he harms people rather than property. Moreover, if the intoxication itself has not caused the harm, it is arguably unfair to punish a defendant merely for being intoxicated. These views, however, improperly focus on acts committed after intoxication. The reprehensible conduct proscribed by the conscious disregard standard is the act of drinking before driving with the knowledge of the probable dangerous consequences. Any actual damage is incurred after the defendant has decided to drink and drive. Punitive liability turns on state of mind, not the fortuitous nature or severity of the actual results. 197 Thus, as long as the damage sustained is sufficient to warrant compensatory

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192. Taylor, 24 Cal. 3d at 899, 598 P.2d at 860, 157 Cal. Rptr. at 699 (emphasis added).
193. Of course, punitive liability should not be imposed if the defendant was not "under the influence," regardless of his blood alcohol level.
196. 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).
197. See W. PROSSER & W. KEETON, supra note 9, § 2, at 9-11; Mallor & Roberts, supra note 9, at 651.
liability,^{198} neither the amount^{199} nor the type^{200} of harm—personal injury or property damage—should matter.

Similarly, as long as the defendant proximately caused the harm that established compensatory liability, it is irrelevant whether the intoxication itself caused the harm. To require otherwise could place an inordinate burden of proof on the plaintiff, limit punitive recovery when the plaintiff has otherwise shown that the defendant consciously disregarded the safety of others, and frustrate the punitive and deterrent goals of exemplary liability.^{201}

In summary, issues of the type, amount, or cause of damage, the extent of intoxication, and the absence of aggravating factors such as reckless driving or alcoholic history should not by themselves vitiate punitive damage liability if the allegations otherwise satisfy the conscious disregard standard. Allegations that a defendant knew that he would drive, knew the probable dangerous consequences of driving under the influence, and nevertheless became intoxicated satisfy the conscious disregard formula. The reprehensibility and deterrability of that conduct lie in the defendant’s decision to drink before driving and his subsequent intoxication; his conduct thereafter is thus irrelevant to a determination of punitive liability.

This conclusion has an important implication. Because there is no significant distinction among the various drunk driving scenarios, a punitive damage claim should always go to the trier of fact whenever there is evidence from which a reasonable person could infer the defendant’s voli-

\[^{198}\text{An award for punitive damages requires a showing that the plaintiff suffered some actual damage from the defendant's act. Otherwise, the defendant has not committed a tort, and punitive damages could not be awarded. See Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948); Mother Cobb's Chicken Turnovers, Inc. v. Fox, 10 Cal. 2d 203, 73 P.2d 1185 (1937); Clark v. McClurg, 215 Cal. 279, 9 P.2d 505 (1932); Vice v. Automobile Club of S. Cal., 241 Cal. App. 2d 759, 50 Cal. Rptr. 837 (1966).}\]

\[^{199}\text{Punitive damages may be awarded even if there is only nominal damage. See Sterling Drug, Inc. v. Benatar, 99 Cal. App. 2d 393, 221 P.2d 965 (1950); RESTATEMENT (SECOND) OF TORTS § 908 & comment c (1979). The amount of damage, however, may indirectly indicate the reprehensiveness of the act, which the jury may consider in assessing the punitive amount. See supra note 75.}\]

\[^{200}\text{In Colligan v. Fera, 76 Misc. 2d 22, 349 N.Y.S.2d 306 (1973), the only reported case in which the defendant sustained property damage rather than personal injuries, an intoxicated driver ran into and damaged plaintiff's parked car. The court held that a punitive damage award was proper, noting that punitive damages were permissible if the wrong complained of was morally reprehensible, or was actuated by evil and reprehensible motives. The fact that damage was to property, rather than to persons, was apparently not considered.}\]

\[^{201}\text{California Civil Code § 1714(b) (West Supp. 1985) states that "the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person." Therefore, the legislature has presumed intoxication to be the proximate cause of injuries as evidence of its refusal to condone driving under the influence of alcohol. See Taylor, 24 Cal. 3d at 897-98, 598 P.2d at 858-59, 157 Cal. Rptr. at 697-98.}\]
tion and knowledge of probable dangerous consequences. Thus, the propriety of punitive liability rests not on factual aspects of a particular case, but on whether the exemplary sanction continues to be an effective and necessary deterrent. Consequently, there is continued need to scrutinize the deterrent effect of new criminal sanctions.

Conclusion

Public policy supports the imposition of punitive liability for reprehensible, deterrable acts of high cost to society. Under the conscious disregard standard, exemplary damages are appropriate when the defendant has volitionally acted, or failed to act, with actual knowledge of the probable harmful consequences.

Policy and precedent support the availability of punitive damages to any plaintiff proximately harmed by a drunk driver. The reprehensibility and deterrability of the defendant’s becoming intoxicated before driving precludes consideration of the nature or extent of the plaintiff’s injury, or of the defendant’s level of intoxication, drunk driving history, or driving performance.

This conclusion engenders a final qualification. Although public policy and the conscious disregard standard support the same result in theory, the application of that standard may yield unjustified punitive assessments because it recognizes “evidence from which a jury may infer” as one of its elements. While this may be the inevitable price of a legal standard implemented by the trier of fact, the potential disparity between theory and result warrants further consideration of reform.

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202. See CAL. CIV. PROC. CODE § 437c (West Supp. 1985) (motion for summary judgment). Of course, the trier of fact always has discretion to decline to award punitive damages. See Ellis, supra note 2, at 37-43; Mallor & Roberts, supra note 9, at 644-46.

203. See supra note 150.

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