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A New Look at Criminal Liability for Selling Dangerous Vehicles: Lessons from General Motors and Toyota

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Automobile safety is one of the most serious public health issues facing our country. In addition to the costs in terms of personal injury and death, automobile accidents cost society billions of dollars in lost productivity and medical costs.[1] In 1966, there were over 50,000 deaths from automobile accidents. By 2015, this number had fallen to approximately 35,000 deaths and 2.4 million injuries resulting from automobile accidents.[2] By some measures, this is a remarkable reduction that might lead us to conclude that automobile safety is no longer an important public policy concern. The reduction in automobile deaths has been due to several factors, including increased focus on drunk driving, the use of seat belts and the lowering of speed limits.[3] The reduction does not necessarily mean that cars themselves are safer. In fact, in 2014, over sixty-four million vehicles were recalled because of safety concerns.[4] This number represents a staggering

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1. U.S. Department of Transportation National Highway Traffic Safety Administration 2020 Report, (1997), http://www.nhtsa.gov/nhtsa/whatis/planning/2020Report/2020report.html [https://perma.cc/9YQ3-CYTL]. In 1966, the National Academy of Sciences published a white paper entitled "Accidental Death and Disability – The Neglected Disease of Modern Society." The report likened automobile safety issues to an epidemic and argued that this "neglected epidemic of modern society [was] the nation's most important environmental health problem." National Academy of Sciences, ACCIDENTAL DEATH AND DISABILITY – THE NEGLECTED DISEASE OF MODERN SOCIETY, 5 (1966) (cited in Aaron Ezroj, *Product Liability After Unintended Acceleration: How Automotive Litigation Has Evolved*, 26 LOY. CONSUMER L. REV. 470, 473 (2014)).

2. *NHTSA Stats*, May 2017, https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812348. In 1996, there were over 6.8 million crashes resulting in over 41,000 deaths and 3.5 million injuries. NHTSA Report, *supra* note 1.

3. These three factors are cited by the CDC as actions that can be taken to further reduce accidents and deaths. Center for Disease Control *Motor Vehicle Crash Deaths*, July 18, 2016, https://www.cdc.gov/vitalsigns/motor-vehicle-safety/index.html.

4. Rena Steinzor, *(Still) "Unsafe at Any Speed": Why Not Jail for Auto Executives?*, 9 HARV. L.

forty-five percent of all passenger cars registered in 2012![5] A number of high-profile cases have drawn attention to the problem and serve as examples for the issue to be discussed in this article.

On September 18, 2015, the Department of Justice (DOJ) announced that it had entered into a Deferred Prosecution Agreement (DPA) with General Motors (GM) stemming from an ignition-switch defect which allegedly killed at least 169 people.[6] In this agreement, GM promised to pay a $900-million fine and accepted independent monitoring.[7] This followed Toyota Motor Corporation (Toyota) entering into a DPA with the DOJ in which it agreed to pay $1.2 billion for wire fraud for failure to disclose safety issues related to unintended acceleration in a number of its models.[8]

The announcement of the DPA with GM was met with severe criticism.[9] Critics noted that the $900-million fine was insignificant when compared to the $156 billion GM reported in revenue.[10] Moreover, critics called for individual and corporate criminal responsibility. Clarence Ditlow of the Center for Auto Safety said, "Yet no one from GM went to jail or was even charged with criminal homicide. This shows a weakness in the law not a weakness in the facts. GM killed innocent consumers. GM has paid millions of dollars to its lobbyists to keep criminal penalties out of the Vehicle Safety Act since 1966. Today thanks to its lobbyists, GM officials walk off scot free while its customers are six feet under."[11] Public

& POL'Y REV. 443 (2015).

5. *Id.*

6. Drew Harwell, *GM to Pay a $900 Million Fine for Fatal Ignition Switch,* WASH. POST (Sept. 18, 2015), https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist/?utm_term=.e2eac7d4d64f [https://perma.cc/HW2P-EEHK].

7. This followed an agreement reached with the National Highway Traffic Safety Administration (NHTSA) on May 16, 2014, in which it agreed to pay a $35 million civil penalty and to be subjected to NHTSA oversight. *U.S. Department of Transportation Announces Record Fines, Unprecedented Oversight Requirements in GM Investigation,* DEPARTMENT OF TRANSPORTATION PRESS RELEASE, May 16, 2014, http://www.nhtsa.gov/About+NHTSA/Press+Releases/2014/DOT-Announces-Record-Fines,-Unprecedented-Oversight-Requirements-in-GM-Investigation [hereinafter DOT Press Release].

8. *Justice Department Announces Criminal Charge Against Toyota Motor Corporation and Deferred Prosecution Agreement with $1.2 Billion Financial Penalty*, DEPARTMENT OF JUSTICE PRESS RELEASE, (Mar. 19, 2014), http://www.justice.gov/opa/pr/justice-department-announces-criminal-charge-against-toyota-motor-corporation-and-deferred [hereinafter DOJ Press Release].

9. David Ingram, *Corporate "Siloing" an Obstacle to Charging GM Employees – Prosecutor*, REUTERS (Sept. 17, 2015), http://www.reuters.com/article/2015/09/17/gm-settlement-individuals-idUSL1N11N17E20150917.

10. Harwell, *supra* note 6.

11. *Critics Rip GM Deferred Prosecution Agreement in Engine Switch Case*, CORPORATE CRIME REPORTER (Sept. 17, 2015), http://www.corporatecrimereporter.com/news/200/critics-rip-gm-deferred-prosecution-in-switch-case/ [https://perma.cc/49CU-83DQ]. Professor Brandon Garrett has been quoted as saying, "It is deeply disturbing if GM settles this case in a deferred prosecution, out of court, with no individuals charged . . . . A case this serious should result in a criminal conviction for the

Citizen's Rob Weissman noted that "This deal will not deter future corporate wrongdoers, it will not hold GM accountable and it sets back the demand for justice by the family members of the victims of GM's horrible actions."[12] In defending the DPA, Preet Bharara, the U.S. Attorney for the Southern District of New York at the time, said that "the law doesn't always let us do what we wish we could."[13] Acknowledging the difficulty in getting a criminal conviction, Bharara admitted that it is not unlawful for an automobile manufacturer to put potentially deadly cars on the market.[14] Ditlow asserted "the law is just inadequate to the crime."[15] A limited number of scholars have also voiced criticism calling for criminal liability for top GM executives.[16]

If the issue of automobile safety is perceived as one of high priority, why are the laws inadequate to address it? The traditional approach to products liability, including liability stemming from defective automobiles, has been one of civil tort liability. Injured consumers of defective products can sue manufacturers and sellers of those products for negligence. When cars became prevalent and the resulting injuries from automobile accidents became common, the law responded. By eliminating the privity requirement and making it easier for injured consumers and bystanders to sue sellers and manufacturers of defective products, civil liability remained the primary regulatory mechanism. Punitive damages could be imposed to punish egregious wrongdoing; compensatory damages were awarded to make injured consumers whole. In this way, plaintiffs were compensated, defendants were supposedly deterred from selling dangerous products and those whose behavior was particularly egregious were punished with punitive damages.

In 1966, this scheme of private tort liability was supplemented by creation of the NHTSA.[17] The NHTSA was created to address a perceived public health concern—the number of highway injuries and deaths. Under the National Traffic and Motor Vehicle Safety Act of 1966 ("Vehicle

company, and many criminal convictions for the individuals involved." *Id.*

12. *Id.* Professor Garrett continued, "It is unconscionable that a giant corporation can conceal information about deadly safety defects for a decade, be responsible for the deaths of more than 100 people as a result and escape any criminal liability based only a corporate fine and a promise not to do wrong again in the future. It is equally unconscionable that none of the executives inside General Motors responsible are going to be held criminally accountable …"

13. *Why the law doesn't actually cover GM's deadly defects*, PBS NEWSHOUR (Sept. 17, 2015), accessed at http://www.pbs.org/newshour/bb/law-doesnt-actually-cover-gms-deadly-defects [https://perma.cc/YV4T-CNK7].

14. Ingram, *supra* note 9.

15. Harwell, *supra* note 6.

16. Steinzor, *supra* note 4, at 446 ("[I]ndividual executives with the power to establish early warning systems and repair defects quickly must perceive a personal threat if they do not act").

17. NHTSA 2020 Report, *supra* note 1.

Safety Act") and the Highway Safety Act of 1966, the NHTSA was charged with "reducing deaths, injuries and economic losses resulting from motor vehicle crashes. This was accomplished by setting and enforcing safety performance standards for motor vehicles and motor vehicle equipment, and through grants to state and local governments to enable them to conduct effective local highway safety programs."[18] The primary way in which the NHTSA assures automobile safety is through product recalls.

In this article, we will argue that automobile safety is still a major public health concern in light of the large number of recalls and the high-profile cases of the last few years. We will further argue and that the current approach (of civil liability supplemented by the NHSTA) is inadequate to deter automobile manufacturers from designing and selling dangerous cars. We will consider possible public policy approaches to better protect consumers.

To accomplish this objective, we will, in Part I, outline the two cases used as examples: GM and Toyota. In Part II, we will outline the existing regulatory scheme starting with the traditional approach of civil liability and the regulatory scheme adopted by the Vehicle Safety Act implemented by the NHSTA. We will then discuss the alternative of imposing criminal liability for what has traditionally been civil tort liability in Part II. In this section, we will consider the practical limitations in imposing criminal liability upon corporations: the size of the fines and the use of DPAs.[19] Moreover, in this part, we will consider the inadequacy of laws at both the federal and state levels criminalizing the design and sale of dangerous products. We will note that despite the widespread belief to the contrary, prosecution of white-collar criminals is actually quite common but said prosecution is more prevalent for certain types of crimes and almost entirely prosecuted in federal court. Therefore, we will argue that there is a need to add new criminal statutes that federal prosecutors can use in cases like GM and Toyota. In Part III, we will offer a two-pronged approach. The first prong is a statutory approach. We propose enactment of a new federal statute. This statute would, first, impose criminal liability on

18. National Highway Traffic Safety Administration Website, *Who we are and what we do*, http://www.nhtsa.gov/About+NHTSA/Who+We+Are+and+What+We+Do.

19. We will largely ignore the larger more philosophical question of whether criminal liability can and should be imposed on the corporate form. *See generally, see e.g.*, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997) (arguing that civil liability should be imposed on the corporate entity with criminal liability imposed on the individual corporate wrongdoers); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); John Hasnas, *Where is Felix Cohen when we Need Him?: Transcendental Nonsense and the Moral Responsibilities of Corporations*, 19 J.L. & POL'Y 55, 76 (2010) (arguing that "it is impossible to punish a corporation").

individual corporate executives. This approach is not novel. Others have advocated for this and we do not argue with this as a partial solution.[20] It is, however, insufficient. This approach ignores the difficulty in finding identifiable wrongdoers in the corporate environment. Moreover, and more importantly, it ignores the culpability of the corporate entity and the effect of corporate culture on the individual decision-maker.[21] In our proposed statute we also argue for corporate criminal liability. Several federal statutes were proposed in the aftermath of the GM/Toyota cases, but these statutes basically required early warning and increased the penalties for failure to warn. We see these statutes as a laudable first step but insufficient. Because the size of the fines, while appearing to be large, are typically seen as a cost of doing business by corporate criminal defendants, we call for a more severe sanction. If a corporation has been found guilty of manufacturing and marketing an automobile that it knows is defective and the defect causes death or serious injury, we believe that company should lose its license to do business for a specified period and should suffer debarment for a specified period.[22] This is a type of *corporate incapacitation*.

In a case involving a corporation that knowingly sells a product that causes a *substantial number* of deaths and injuries, we advocate a more severe level of corporate incapacitation: permanent loss of a business license or permanent revocation of the corporate charter. The latter step would effectively be a *corporate death penalty*. Moreover, because most white-collar criminals are prosecuted in federal court rather than state court, we propose a federal law that would impose both individual and criminal liability and would specify the punishments we advocate. The

20. Others have argued for prosecution under existing state laws (e.g., negligent homicide). As we will discuss *infra*, however, prosecution in state courts is unusual for a variety of reasons including doing so would take enormous resources and there are political reasons at the local level to ignore these cases. *See infra* notes 151-153 and accompanying text.

21. For example, Toyota's culture in the time leading up to the sudden acceleration cases has been described as a "corporate culture of secrecy." *See* Joel Finch, *Toyota Sudden Acceleration: A Case Study of the National Highway Traffic Safety Administration Recalls for Change*, 22 LOY. CONS. L. REV. 472, 474 (2010).

22. It is already illegal for an automobile manufacturer to sell cars that are not compliant with current federal safety standards. 49 C.F.R. § 573.11 (2010); 49 U.S.C. § 30112 (2010). We are proposing extending this prohibition to all vehicles manufactured by manufacturers who sell vehicles that they know are defective and likely to cause death or personal injury. At least one other scholar has proposed something similar. Finch advocated for what the termed a "tiered probationary system." *See* Finch, *supra* note 21, at 494 ("Congress should work with the NHSTA to develop a probationary system for automobile manufacturers. Such a system would rate each automaker's track record with safety standards compliance and defects. A tiered system would serve as a reward to companies who comply in good faith and a deterrent for those who fail to meet safety standards and take appropriate precautionary measures for defects"). Moreover, Finch advocated for the probationary period to be assessed by the NHSTA. By contrast, we are proposing that the period be imposed as a sanction against manufacturers who have been found criminally liable.

second prong of our approach involves implementation. Because there is reason to believe that even with additional statutory tools federal prosecutors may not vigorously pursue criminal cases against corporate defendants, we will urge policy changes in the DOJ regarding such cases.[23]

I. FAILURE OF THE CURRENT SYSTEM: TWO CASE STUDIES

A. TOYOTA AND SUDDEN ACCELERATION

As early as 2000, the National Highway Traffic Safety Administration (NHTSA) began receiving complaints of sudden acceleration in certain Toyota models.[24] Toyota first blamed their customers, arguing that confused drivers had inadvertently stepped on the accelerator rather than the brake pedals. In August 2009, a famous 911 call alerted the public to a problem with Toyota vehicles.[25] Toyota then blamed the problem on improperly installed floor mats.[26] In late 2009, Toyota finally acknowledged that the problem was larger than defectively installed floor mats. Later that year, the company recalled eight of its U.S. models for "floor mat entrapment susceptibility" and assured the public that the "root cause" of the unintended acceleration problem had been addressed.[27] Unfortunately, this was not true. Toyota had conducted internal tests that revealed that not all affected cars had been recalled and that there was a second cause of unintended acceleration—the sticky accelerator pedal problem.[28] By 2007, Toyota had received a series of reports alleging unintended acceleration and opened an internal defect investigation. Throughout 2007, Toyota denied the need for a recall even though their internal testing revealed that some of their models had design features that

23. This refers to the reluctance of federal prosecutors to go after white-collar and corporate defendants because of their fear that it may hurt their win-loss record, etc. and the need for a policy change regarding annual review for raises and promotion. *See e.g.*, JESSE EISINGER, THE CHICKEN SHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017).

24. Suzanne M. Kirchhoff & David Randall Peterman, Cong. Research Serv., RLR41205, UNINTENDED ACCELERATION IN PASSENGER VEHICLES 1 (2010). In that same year, Toyota issued a limited recall of 10,000 Lexus models sold in England. Finch, *supra* note 21, at 475.

25. Statement of Facts (2014). Deferred Prosecution Agreement, accessed at http://www.justice.gov/opa/documents/toyota-stmt-facts.pdf [https://perma.cc/Y7JH-MMXA] [hereinafter Statement of Facts Toyota], at ¶ 9.

26. Finch, *supra* note 21, at 476-77. Toyota insisted that there was "no evidence to support any other conclusion." Finch, *id*. (citing Bill Vlassic et al., *Toyota's Slow Awakening to a Deadly Problem*, N.Y. TIMES, Feb. 1, 2009). Toyota went so far as to issue a press release claiming that the NHTSA had determined "that a defect exists in vehicles in which the driver's floor mat is compatible with the vehicle and properly secured." Finch, *id*., at 477.

27. In 2009, Toyota argued that the problem with the acceleration pedal, not the floor mat. Finch, *supra* note 21, at 477.

28. Statement of Facts Toyota, *supra* note 25, at ¶ 10.

made floor mat entrapment likely.[29] In September 2007, Toyota negotiated a limited recall and touted this as a major victory via internal emails: "had the agency. . . pushed for recall of the throttle pedal assembly (for instance), we would be looking at upwards of $100 million+ in unnecessary costs."[30] Shortly after the limited recall, Toyota engineers revised Toyota's internal guidelines in a manner that would make floor mat entrapment less likely. It was decided, however, to only apply the new guidelines when the model received a full model redesign which occurred every three to five years. It was not until 2010 that Toyota acknowledged the full extent of the problem. On January 21, 2010, Toyota issued another recall asserting that the sudden acceleration problem was caused by "abnormal friction" in defective accelerator pedals ("sticky pedals").[31]

Sudden acceleration resulted in at least eighty-nine deaths since the 2002 model year[32] (more than all other manufacturers combined)[33] and Toyota faced over 400 wrongful death and injury lawsuits. In addition to the $1.2 billion the firm agreed to pay as part of the DPA, Toyota also faced civil penalties of more than $66 million.[34]

B. GENERAL MOTORS AND THE IGNITION SWITCH

GM began developing a new ignition switch in the late 1990s.[35] GM provided specifications to its supplier with respect to the torque needed to turn the key in the ignition.[36] The switch "failed miserably" in early testing and was redesigned.[37] Although the new switch failed to meet GM's specifications, it was approved by GM engineer Raymond DeGiorgio.[38] In

29. *Id*. at ¶18.

30. *Id*. at ¶ 19.

31. Finch, *supra* note 21, at 478.

32. Steinzor, *supra* note 4, at 445 (citing NHTSA statistics); Finch, *supra* note 21.

33. The death toll is reported to be more than double the amount of all other manufacturers combined. Finch, *supra* note 21, at 476.

34. DOJ Press Release, *supra* note 8.

35. Valukas Report 25, 34 (May 29, 2014). Report to the Board of Directors of General Motors Corporation regarding ignition switch recalls, http://www.nytimes.com/interactive/2014/06/05/business/06gm-report-doc.html?_r=0 [https://perma.cc/T68D-C35N].

36. If the key turned too easily, the ignition could easily be moved from the "run" to the "accessory" position. This would result in the car's power being shut off and the disablement of the car's airbags. Valukas Report, *id*., at 3540.

37. *Id*. at 42.

38. *Id*. at 39, 40. DeGiorgio was given a choice by the supplier. He could "do nothing or elect to change the Ignition Switch to solve the problem of low torque, which might, however, cause electrical problems and would cause delay in getting the Ignition Switch into production." *Id*. at 47. He chose to do nothing. Arguably, DeGiorgio is the chief villain in this story. It seems likely that he could be found liable as an individual. *See infra* note 147 and accompanying text where the possibility of individual criminal liability is discussed. This would not, however, preclude corporate criminal liability. *See infra* notes 156-163 and accompanying text where this option is discussed.

2002, GM began manufacturing cars with the defective ignition switch[39]. The defect was such that drivers could inadvertently turn the ignition switch from the "run" to the "accessory" position.[40] This resulted in vehicle stalls while moving, loss of vehicle power and prevented deployment of airbags in the event of a crash.[41] This caused the driver to lose control of the power steering and power brakes.[42] By some estimates, the defective ignition switch resulted in more than 100 deaths.[43] The problems with the switch were known by the engineers at GM as early as 2002, but nothing was done to address the problems.[44] In fact, certain engineers knew of the problem before the affected cars went into production in 2002 but nevertheless approved production.[45]

In 2004, GM customers began reporting problems with sudden stalls and engine shut-offs. GM determined that the problem did not pose a safety concern and decided against any changes.[46] They rejected an improvement to the head of the key that would have significantly reduced the likelihood of an unexpected shut-off at the cost of less than one dollar per car.[47] Instead, they issued a statement acknowledging the problem but adding that GM did not believe that this posed a safety issue.[48] In February 2005, GM notified their dealers of the issue. They urged dealers to notify their customers of the potential for a moving stall and to advise consumers to "remove unessential items from their key chain[s].[49] At the same time, the Current Production Improvement Team concluded that there was "no

39. Valukas Report, *supra* note 35, at 54.

40. Bernard W. Bell, *Recalling the Lawyers: The NHTSA, GM, and the Chevrolet Cobalt*, 84 FORDHAM L. REV. 1899, 1904 (2016).

41. Valukas Report, *supra* note 35.

42. Statement of Facts (2014). Deferred Prosecution Agreement, accessed at http://www.justice.gov/usao-sdny/file/772301/download [hereinafter Statement of Facts GM], at ¶ 4.

43. Maggie McGrath, *General Motors recalls another 7 million vehicles, some dating back to 1997*. FORBES, (June 30, 2014), http://www.forbes.com/sites/maggiemcgrath/2014/06/30/general-motorsrecalls-another-7-million-vehicles-some-dating-back-to-1997 [https://perma.cc/475R-332R]. GM acknowledged 15 deaths as a result of the ignition switch defect. Statement of Facts GM, *supra* note 41, at ¶ 4.

44. Valukas Report, *supra* note 35, at 1.

45. Statement of Facts GM, *supra* note 41, at ¶ 5.

46. At that time, Current Production Improvement Team classified the problem as a Level 3 (or "moderate") problem that could be addressed at the next dealership visit. Valukas Report, *supra* note 35, at 63-64. Because the problem was defined as a "customer convenience issue" rather than a safety issue, cost considerations were considered when evaluating possible solutions. Valukas Report, *id*. at 2. *See also id*. at 54 ("Complaints of ignition shut-offs and moving stalls were classified as non-safety issues; that classification was not revisited even as new complaints surfaced; and resolution of the issues remained mired in cost and 'business case' justifications – factors that would have played no role in resolving a safety issue").

47. Valukas Report, *supra* note 35, at 67.

48. Statement of Facts GM, *supra* note 41, at ¶ 6.

49. Valukas Report, *supra* note 35, at 92.

acceptable business case"[50] for fixing the ignition switch problem. In 2006, DeGiorgio approved a change to the ignition switch designed to increase the torque needed to turn the key. He failed, however, to create a unique part number for the modified switch and did not advise others of the change.[51]

Because of the number of complaints, in 2011, GM in-house lawyers met with GM engineers and asked that an investigation be undertaken by the GM Product Investigation unit. The investigation was slow moving; the lead investigator continually disregarded reports. By Spring 2012, however, it was clear to GM personnel that the ignition switch problem did pose a safety issue because it could prevent the airbag from deploying in the case of an accident. It was not until April 2013 that GM investigators discovered that the design of the ignition switch had been changed in 2006. Despite this knowledge,[52] it was not until February 2014 that GM notified the NHTSA and the public of the incidents and began an initial recall of 700,000 vehicles.[53] GM admitted that the defective switch problem was not handled in the normal way; instead steps were taken to delay the recall until they could package and explain the issue. During this time frame, GM assured the NHTSA that they were acting promptly and in accordance with their formal recall process.[54] Moreover, during this time frame, GM touted the reliability and safety of its cars to the public. Although it sold no new cars during this time frame, it sold pre-owned cars accompanied by certificates assuring customers that all components met safety standards. In total, GM recalled 40 million cars,[55] set up a compensation fund promising more than $1 million per victim and set aside $2.5 billion for this fund.

The Toyota and GM cases offer two examples of automobile safety failures. We have a regulatory system that is designed to protect the public from such failures and to assure automobile safety. In Part II, we will outline the basic provisions of this regulatory scheme.

50. To present an acceptable business case, a solution had to solve the issue, meet the cost considerations and have sufficient lead time to implement. *Id*. at 69.

51. *Id*. at 98, 100-102. This is a highly unusual practice. It made it difficult for investigators, including GM engineers and plaintiff lawyers, to identify the cause of the problem.

52. Valukas refers to this as a "bombshell." *Id*. at 11.

53. Statement of Facts GM, *supra* note 41, at ¶ 8.

54. *Id*., at ¶ 9.

55. AP (2014). *New recalls and questions about auto parts safety*, accessed at http://www.washingtonpost.com/business/new-recalls-and-questions-about-auto-parts-safety/2014/07/01/117deb24-00ee-11e4-b203-f4b4c664cccf_story.htm.

II. THE CURRENT REGULATORY SCHEME

A. CIVIL LIABILITY

Consumers rely on car manufacturers to design, market and sell safe cars. There are sound public policy reasons why we expect manufacturers to ensure that the products they sell are reasonably safe. It is necessary to a smooth functioning of the economy and necessary to protect consumers. To accomplish these goals, products liability law is typically designed to serve the goals of compensation, deterrence and in some cases retribution. When manufacturers instead offer for sale defective products, the law typically responds by allowing the injured consumer recourse—he/she can sue the company for civil liability and recover damages for his/her injury.[56]

As early as the 1916 case of *MacPherson v. Buick Motor Company*[57] courts recognized a duty on the part of manufacturers of products to protect the users of such products from injury. In the now famous language, Judge Cardozo held:

> We hold, then, that the principle of [inherent danger] is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.[58]

In so holding, the court made clear that negligent manufacturers were liable to people who are affected by their product without the defense of privity. In the landmark case of *Henningsen v. Bloomfield Motors*,[59] the court made clear that lack of privity was no longer a defense. In 1963, in the case of *Greenman v. Yuba Power Products*,[60] the California Supreme Court first articulated the theory of strict liability, imposing liability on a manufacturer of a defective product without a showing of negligence. Judge Traynor held that:

56. *See, e.g.*, Mark P. Robinson, Jr. & Kevin F. Calcagnie, *A Catalyst for Safety: Americans Can Thank Products Liability Litigation for Helping to Make Their Cars, Drugs, and Other Products Safer than Ever. But there is still work to be done*., 45-NOV. TRIAL 32 (2009).

57. MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916).

58. *Id.* at 389.

59. 32 N.J. 358, 161 A.2d 69 (N.Y. 1960).

60. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

> To establish the manufacture's liability, it was sufficient that the plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in the design and manufacture of which the plaintiff was not aware that made the [product] unsafe for its intended use.[61]

Thus, civil liability emerged as the traditional method of assuring automobile safety and of compensating plaintiffs when they are injured by unsafe vehicles.

Civil liability, however, is inadequate for several reasons. First, it should be noted that the evolution of products liability law from *Winterbottom v. Wright,*[62] where the court upheld a strict privity standard, to the *Greenman* case discussed above, was one of expanding options for plaintiffs. In other words, the law was making it easier for plaintiffs to sue manufacturers of defective products. The result was that the number of product liability lawsuits increased significantly especially during the 1960s and 1970s.[63] To some extent, this changed in the 1980s. During this period, the success rate of such lawsuits decreased.[64] In response to cries for tort reform, states imposed caps on pain and suffering, limited punitive damages and the federal Class Action Fairness Act made it more difficult for plaintiffs to bring class actions.[65]

Second, to some extent criminal and civil liabilities serve different public policy goals. Both criminal law and civil law aim "to shape people's conduct along lines that are beneficial to society."[66] They do this, however, in different ways. Civil liability is largely compensatory. Civil damages are awarded to, as much as possible, put the injured plaintiff back in the position he/she was in prior to the injury. Civil damages also serve a deterrent function. It is believed that people will act carefully to avoid paying civil damages.[67] By contrast, criminal law acts as a vehicle to

61. 59 Cal. 2d, at 64.

62. Winterbottom v. Wright, 20 Meeson & Welsby 109 (Exchequer of Pleas [England] 1842).

63. Ezroj, *supra* note 1.

64. Ezroj, *supra* note 1, at 470.

65. *See e.g.*, Conor Dwyer Reynolds, *The Role of Private Litigation in the Automobile Recall Process*, 29 LOY. CONSUMER L. REV. 121, 158160 (2016) (describing the effect that caps on noneconomic damages have on the likelihood of a products liability filing).

66. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 12 (2d ed. 2003). *See also* R. A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1128 (1998) ("Both tort and criminal law take as a significant objective the prevention of socially undesirable conduct.").

67. *See e.g. Restatement (Third) of Torts: Products Liability* § 2 cmt. A (1998) ("On the premise that tort law serves the instrumental function of creating safety incentives, imposing strict liability on manufacturers … encourages greater investment in product safety than does a regime of fault-based liability … The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products.").

punish wrongdoers.[68] Thus, civil damages compensate the plaintiff but are inadequate to punish the defendant; they perform limited deterrent functions and are not designed to rehabilitate the defendants. In other words, civil law fails to punish automobile manufacturers for designing and marketing dangerous vehicles.

This ignores the role that punitive damages play in civil liability.[69] Punitive damages are awarded to punish a defendant when his conduct is particularly egregious.[70] The question becomes whether punitive damages adequately serve the retribution function.[71] Awarding punitive damages has become increasingly difficult. Punitive damage awards are rare and typically small.[72] In addition, in many jurisdictions there are caps on awarding punitive damages enacted as part of tort reform, including Alabama's code.[73] Moreover, the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[74] supported limiting the amount of punitive damages by placing a cap on the ratio of punitive damages to compensatory damages.[75] In this landscape, arguably, punitive damages are inadequate punishment.

68. As will be discussed below, criminal law also serves deterrent and rehabilitative functions. *See infra* notes 116-120 and accompanying text.

69. *See generally* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009).

70. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 559 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"). *See also* Benjamin J. McMichael, *Constitutional Limitations on Punitive Damages: Ambiguous Effects and Inconsistent Justifications*, 66 VAND. L. REV. 961, 962 (2013) (describing punitive damages as intended to "punish reprehensible conduct and to deter future bad acts"). Punitive damages also serve a deterrent function. Paul B. Taylor, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis when Punitive Damages are Sought*, 16 HARV. J.L. & PUB. POL'Y 769, 771 (1993) ("punitive damages are generally justified on the grounds that they provide an added penalty that deters defendants from causing future harm").

71. *See* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 225–28 (2006).

72. Frank J. Vandall, *Should Manufacturers and Sellers of Lethal Products be Subject to Criminal Prosecution?*, 17 WIDENER L.J. 877, 890 (2008) ("They occur in three percent of cases and usually range from $30,000 to $40,000").

73. *See* American Tort Reform Association, http://www.atra.org/issues/punitive-damages-reform [https://perma.cc/QYZ7-BKTW] (providing an overview of state statutes on punitive damages).

74. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

75. Rather than set an absolute cap, the court made clear that the most relevant factor in determining the appropriate ratio was the degree of reprehensibility. *Id*. at 418–19. However, it is clear punitive damage awards that are greater than single digits will likely not pass constitutional muster. *Id*. at 425.

B. THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

The failure of civil law as an adequate remedy lead to the creation of NHTSA.[76] The National Traffic and Motor Vehicle Safety Act of 1966 ("Vehicle Safety Act")[77] created the NHTSA and charged it with the task of reducing deaths and injuries stemming from automobile crashes. To accomplish this objective, the NHTSA was given the power to set motor vehicle safety standards and conduct safety research.[78] The agency can promulgate federal motor vehicle safety standards (FMVSS) to set minimum performance standards for vehicle components that affect the safe operation of the vehicle (e.g., brakes, tires) and those that protect drivers and passengers in the event of an accident (e.g., seat belts, airbags).[79] These standards need only be "practicable," stated in "objective terms" and "meet the need for motor vehicle safety."[80] Moreover, the agency has the power to recall defective vehicles.[81]

Each year, the NHTSA receives over 30,000 complaints from consumers who believe that their car is defective or fails to meet a FMVSS.[82] Car manufacturers are required to notify the NHTSA of any "defect. . . related to motor vehicle safety"[83] and to remedy any such defects without charge to the consumer.[84] Such notification must be submitted within a reasonable period of time after a defect in a vehicle has

76. Government safety regulation has been credited with serving in parallel with tort liability. *See e.g.*, James T. O'Reilly, *Dialogue with the Designers: Comparative Influences on Products Design Norms Imposed by Regulators and by the Third Restatement of Products Liability*, 26 N. KY. L. REV. 655, 655 (1999) ("The common law tort system and the government safety regulation system serve as parallel and protective deterrents, encouraging safer design of products.").

77. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101–30169 (2012)). *See* Reynolds, *supra* note 64, at 124 where he terms the Vehicle Safety Act as the "bedrock of the auto safety regulatory regime").

78. Finch, *supra* note 21, at 484; Haroon H. Hamid, *The NHTSA's Evaluation of Automobile Safety Systems: Active or Passive*?, 19 LOY. CONSUMER L. REV. 227, 230 (2007).

79. Ezroj, *supra* note 1, at 474-75. Kevin M. McDonald, *Don't tread on me: Faster than a tire blowout, Congress passes wide-sweeping legislation that treads on thirty-five year old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1165 (2001). The NHTSA primarily fulfills its mandate through the use of recalls rather than by promulgating safety standards. For example, the FMVSS do not address any of the specific systems that failed in the case of GM's ignition switch. They do not impose requirements with respect to ignition switches, stalls, airbag deployment, or power steering systems. Valukas Report, *supra* note 35, at 30.

80. Jerry L. Marshaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REG. 167, 176 (2015).

81. 49 U.S.C. §§ 30,118-20 (A)(2012).

82. Finch, *supra* note 21, at 484. Despite the large number of complaints, it is estimated that vehicle failure accounts for approximately 2.4% of accidents. Mashaw & Harfst, *supra* note 79, at 178 (citing a study conducted by the NHTSA). However, recall the number of injuries and deaths from automobile accidents each year. In 2015 alone, there were 6,296,000 accidents accounting for 2,443,000 injuries and 25,000 deaths. NHTSA Statistics, *supra* note 2.

83. 49 U.S.C. §§ 30118 (c)(1) (2012).

84. McDonald, *supra* note 78, at 1166.

been determined to be safety related. A defect is defined as a "defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment."[85] Moreover, such defect is deemed to be safety-related if it presents "an unreasonable risk of accidents."[86] If a "significant" number of vehicles in a class of vehicles has failed in the normal operation of the vehicle, there is said to be a defect in that class of vehicle.[87] Once the Secretary of the Department of Transportation (DOT) determines that certain vehicles contain either a product related defect or fail to meet a FMVSS, the Secretary may order remedial measures.[88] The DOT is given broad powers to investigate and manufacturers are required to maintain information and produce it when requested,[89] and can be compelled to answer questions under oath.[90] If the Secretary determines that there is a violation, he may refer the matter to the Attorney General who may bring an enforcement action to recover civil penalties and/or injunctive relief.[91]

In 2000, the Vehicle Safety Act was amended by the Transportation Recall Enhancement, Accountability, and Documentation Act (TREAD). In large part, TREAD was a response to perceived deficiencies in the way the NHTSA handled the Ford/Firestone events of the late 1990s.[92] TREAD was intended to "improve and strengthen the Secretary's ability to detect and investigate defects."[93] In addition to increased reporting requirements, TREAD increased the civil penalties from $1000 to $5000 for each violation and increased the penalties for a series of violations from $800,000 to $15 million.[94] Moreover, TREAD provided for criminal penalties where a person violated the reporting requirements with the intention of misleading the NHTSA with regards to safety-related defects that have caused death or serious bodily harm.[95] Note that the increased penalties are for failure to comply with the notice and reporting requirements imposed by TREAD; neither civil nor criminal penalties are imposed by TREAD for marketing a dangerous car.

Unfortunately, NHTSA is also inadequate for several reasons. While

85. 49 U.S.C. § 30102 (a)(2)(1994).
86. *See id*. § 30102(a)(8).
87. McDonald, *supra* note 79, at 1168.
88. 49 U.S.C. § 30118 (b)(2) (1994).
89. *Id*. § 30166(c).
90. *Id*. § 30166(f).
91. *Id*. § 30163.
92. *See generally* McDonald, *supra* note 79, for a discussion of the Ford/Firestone event and subsequent adoption of the TREAD Act.
93. S. Rep. No. 106-423, at 1 (2000).
94. Pub. L. No. 106-414, § 5 (a), 114 Stat. 1800, 1803-04 (2000) (codified at 49 U.S. C. §§ 30165(a) (2012)(civil penalties).
95. *Id.* at § 30170.

the NHTSA sets standards with respect to automobile safety, it does not review car designs or products to assure that the cars are safe. In the early years of NHTSA history, the agency attempted to impose performance standards upon the industry. This was met with political and judicial opposition. After this early attempt at dictating safety standards, the agency, instead embraced the recall as the primary way in which it acts to achieve its mission.[96] If a car is found to pose an unreasonable threat to vehicle safety, the NHTSA orders a product recall.[97] In the years 1966 through 1999, there were 7200 recalls involving over 259 million vehicles; the majority which were voluntarily initiated by manufacturers.[98] In 2014, automobile manufacturers recalled 64 million vehicles.[99] GM itself had to recall over 40 million cars.[100] This approach to product safety does little to assure that the vehicles sold are safe. In fact, the sheer number of recalls provides some evidence that they are not.[101] Moreover, the sheer volume of deaths and injuries from automobile accidents should give us pause.

The NHTSA fails to adequately protect consumers and ensure automobile safety for several reasons.[102] First, they lack sufficient legal

96. Mashaw and Harfst describe three phases of NHTSA regulatory emphasis. Initially, the NHTSA engaged in rule-making in which they issued performance standards. The agency then switched its focus to recalls. As Mashaw and Harfst describe it the agency has now engaged in rule-making once more. But, the focus of rule-making is not on dictating performance standards. Instead, it seeks to encourage the "diffusion of safety technologies the industry [is] already incorporating, or planning to incorporate, … in nearly all of new vehicles." Marshaw & Harfst, *supra* note 80, at 172. Moreover, the regulations set forth by the NHTSA can best be characterized as "minimal in nature." Robinson & Calcagnie, *supra* note 56, at 33.

97. *See* Ezroj, *supra* note 1, at 476-79 (outlining the recall process). *See also* Reynolds, *supra* note 64, at 124 where he concludes that most recalls "were preceded by defect-related litigation."

98. McDonald, *supra* note 78, at 1170. *See* McDonald at 1169-70 (detailing the rise in the number of recalls.) He opines that while there is no single cause to explain the increase in recalls, it might be in part due to the pressure to increase production to meet demand and the proliferation of new models. Automobile manufacturer action and NHTSA response to accidents and deaths caused by distracted driving provides an illustration of this approach. Rather than mandate a technological solution (plug-in devices that disable cell phone use while the car is moving), the NHTSA has mounted a public relations campaign to discourage distracted driving. *See* Mashaw & Harfst, *infra* note 100, at 264-66 discussing NHTSA initiatives.

99. This figure is about 45 percent of all passenger cars registered in 2012! Steinzor, *supra* note 4, at 443. *See also* Mashaw & Harfst, *supra* note 82, at 173 ("[I]n recent years, NHTSA has recalled more vehicles than are sold new in the United States").

100. AP, *supra* note 55.

101. Mashaw and Harfst conclude that the "NHTSA is now predominately a provider of consumer safety information …, an enforcer of implied warranties (product recalls), a codifier of industry practice, a broker of voluntary agreements, and a promotor of best practices and guidelines." Mashaw & Harfst, *supra* note 80, at 172. They conclude, "we are doubtful that a strategy based increasingly ion information provision and voluntary commitments from industry will meet the need for automobile safety envisioned by the 1966 Motor Vehicle Safety Act." *Id*. at 261.

102. *See* Steinzor, *supra* note 4, at 445446 ("Although the regulatory system was intended to prevent such deadly outcomes, it has failed, and will continue to be dysfunctional until Congress gives NHTSA significantly stronger legal authority and much more money"). *See also id*. at 446 ("The agency's bewildered, even feckless responses to Toyota's sudden acceleration problems, GM's

authority. As noted above, their primary recourse is the recall which is typically voluntary. They lack authority to require that automobile manufactures use safe designs. Professors Marshaw and Harfst, in their seminal work *The Struggle for Auto Safety*,[103] describe how early in the history of the NHTSA, the agency ceded the option of writing preventative rules and instead adopted the recall as the primary enforcement mechanism.[104] Most of the recalls are voluntary, the result of extensive negotiations between the auto manufacturer and the NHTSA.[105] In addition, civil penalties are capped at $105 million for late reporting of defects.[106]

Second, they lack sufficient resources. Their entire budget was $830 million for fiscal year 2015.[107] Most of their budget is spent on public relations campaigns against drunk driving (and now distracted driving); little, if any, of this money is spent on assuring safe designs.[108] The Office of Defects Investigation, had a staff of only fifty-one people in 2014.[109] Moreover, arguably, they lack expertise.[110] NHTSA response to the Toyota sudden acceleration case provides a useful example. Instead of working internally to determine the cause of the sudden acceleration (whether it was the floor mats, the sticky acceleration pedal or a more serious problem with the car's computer system), the NHTSA referred the question to NASA.[111] Perhaps this was because there was not a single electrical or software engineer on the NHTSA staff.[112]

Third, some argue that they are subject to industry capture and fail to

defective ignition switches, and Takata's air bag fiasco have brought the agency back to the forefront of public attention in what can only be described as a disgrace.").

103. JERRY L. MARSHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

104. *See also* Steinzor, *supra* note 4, at 447 where she concludes that the NHTSA "shifted instead to recalls to ameliorate the effects of safety defects rather than trying to forestall them through preventative rules." Marshaw and Harfst argue that the shift from a rules-based approach to a recall strategy "signaled the abandonment of [NHTSA's] safety mission" (at 167) and a shift from auto safety regulation to "crime and punishment" (at 111). They conclude that NHTSA changed from a "proactive technology forcing regulatory agency" to a "complaints bureau and prosecutor's office." *Id*. at 111. They revisited this work in 2017 and concluded that recalls have "no demonstrable system effect on motor vehicle safety." Mashaw & Harfst, *supra* note 80, at 167.

105. This has led Steinzor to term the NHTSA the "cajoler-in-chief." Steinzor, *supra* note 4, at 449.

106. *See* 49 U.S.C § 30165 (2012).

107. National Highway Safety Traffic Safety Administration, Fiscal Year 2016 Budget Overview 8 (2015).

108. Steinzor, *supra* note 4, at 450.

109. *Id.*

110. Steinzor, *supra* note 4, at 451 ("[NHTSA] cannot afford to hire adequate technical staff ….").
See also Reynolds, *supra* note 65, at 156 ("NHTSA also fails to be an effective investigator because it does not have the capacity to understand the data it does collect").

111. Steinzor concludes that this "confirm[s] the worst suspicions that the agency was incompetent with respect to this central aspect of automobile design and construction." Steinzor, *supra* note 4, at 448.

112. Finch, *supra* note 21, at 489.

adequately police the industry.[113] Professor Steinzor outlines the "steady migration of NHTSA officials to the far better compensated ranks of the car companies' technical and public relations staff" and argues this trend "cannot help but blunt NHTSA's regulatory instincts."[114] Clarence Ditlow, an American automotive safety consumer advocate, describes the relationship between the NHTSA and the auto industry as "entirely too cozy. They view their constituency as the auto industry and not the consumer."[115] Again, the Toyota case offers us a useful example. Rather than using their subpoena power to obtain Toyota records, officials from the NHTSA traveled to Japan to meet with Toyota executives. This resulted in the Toyota lobbying team's bragging about saving Toyota $100 million by stalling NHTSA's efforts to obtain a voluntary recall.[116]

C. CRIMINAL LIABILITY FOR THE MANUFACTURE OR SALE OF DANGEROUS PRODUCTS

Unfortunately, the scheme outlined above has all too often failed to bring about an adequate level of automobile safety. The Toyota and GM cases highlight the need to consider criminal liability for selling dangerous products, especially when they cause death or serious injury. In fact, there has been a recent increase in calls for criminal liability, both corporate and individual, in product liability cases.

1. Public Policy Objectives of Criminal Law

The public policy objectives of civil and criminal liability overlap to some extent, but there are important differences. One policy objective of the criminal law that overlaps with civil law is deterring harmful conduct. Deterrence may be *general* or *specific*. Specific deterrence is aimed at the specific defendant who committed a crime. A defendant may be punished for a criminal act to deter *him* from engaging in that same behavior. General deterrence is aimed at the whole society. A defendant may be punished for a criminal act because it deters *others* from engaging in that same behavior in the future.[117] As we have seen, tort law is intended, in

113. Steinzor, *supr*a note 4, at 451.

114. Steinzor, *supra* note 4, at 451.

115. Eric Lichtblau & Bill Vlasic, Safety Agency Scrutinized as Toyota Recall Grows, N.Y. TIMES, (Feb. 9, 2010) http://www.nytimes.com/2010/02/10/business/10safety.html?_r=0 [https://perma.cc/YXM9-EJ78].

116. Peter Valdes-Dapena, *Toyota: Saved $100 million dodging recall*, CNN MONEY (Feb. 22, 2010, 11:46 AM), https://money.cnn.com/2010/02/21/autos/toyota_document/index.htm [https://perma.cc/F2EX-C7MZ].

117. Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41, 54 (2012); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1319, 1325 (2007).

part, to deter injurious behavior,[118] which in the context of this article, is making and selling dangerous vehicles. The regulatory system of recalls administered by NHTSA likewise is intended, in part, to deter the same behavior.[119] In light of the GM and Toyota cases, it is apparent that the deterrent effect of both types of law is inadequate. This makes it appropriate to look to criminal law to provide a significant, additional deterrent, both specific and general. Arguably, criminal law, with its broad array of punishments—ranging from minor to severe—should be able to deter more effectively than either tort law or regulatory law. In a case of corporate wrongdoing, imposing criminal liability upon the corporation is designed to deter corporate employees from engaging in misconduct and, at the same time, provide an incentive for those in positions of power to properly monitor their subordinates.[120]

The unique features of the criminal sanction come into view when we move beyond deterrence. A second public policy goal of criminal law is *rehabilitation.* Rehabilitation seeks to change the convicted defendant in such a way that he will not be inclined to engage in wrongful behavior. In the corporate context, rehabilitation is based on the belief that imposing criminal sanctions can encourage a corporation to change its corporate culture, among other things.[121] Here, the focus is on what steps the corporation can take to insure similar wrongdoing is unlikely to occur in the future. Most corporations already have compliance programs in place. Rehabilitation asks the corporation to explore why such programs failed. In the case of continued or systemic violations despite the presence of a compliance program, criminal prosecution can mandate or encourage the type of change needed in corporate culture and, thus, fulfill the rehabilitative goal of criminal law.

Another public policy goal that sets criminal law apart from civil law is the ability of the criminal sanction to *incapacitate* the defendant and deny him the opportunity to engage in criminal behavior in the future.[122] In the case of an individual, incapacitation is typically accomplished by

118. *See supra* notes 65-66 and accompanying text.

119. The substantial costs of a vehicle recall give manufacturers an incentive to design and manufacture safe cars in the first place.

120. Deterring agent misconduct has been termed the "enduring policy behind criminally punishing corporations." G. R. Skupski, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. RES. L. REV. 253, 268 (2011).

121. Ashley S. Kircher, *Corporate Criminal Liability versus Corporate Securities Fraud Liability: Analyzing the Divergence in Standards of Culpability*, 46 AM. CRIM. L. REV. 157 (2009).

122. GEORGE COLE, CHRISTOPHER SMITH, & CHRISTINA DEJONG, 46668 THE AMERICAN SYSTEM OF CRIMINAL JUSTICE (14th ed. 2015). *See also, e.g.*, Owens, E., *More Time, Less Crime? Estimating the Incapacitative Effects of Sentence Enhancements*, 52 J.L. & ECON. 551 (2009).

incarceration.[123] Simply put, however inclined a person might be to commit criminal acts against the public in the future, they cannot do so while they are locked inside a prison or jail cell. In the case of a corporate defendant, the conventional view holds that a corporation cannot be incarcerated. A corporation is an abstract entity and, as such, cannot be put behind bars. However, imprisonment does not exhaust the possible ways in which incapacitation can be accomplished with respect to a corporate offender. There are several other sanctions that are rarely discussed, let alone imposed, with respect to a corporation. These include suspension of a business license in a specific state, suspension of the corporate charter, temporary or permanent debarment of a corporation with respect to government contracts, and the most serious sanction: revocation of the corporation charter. Including these sanctions in the array of corporate punishments will greatly enhance the effectiveness of the criminal law in dealing with corporations that manufacture and sell dangerous products.

Finally, perhaps the central public policy goal of the criminal law is *retribution*.[124] Retributive theories justify punishment based on the idea of *just deserts*. The defendant *deserves* to be punished because they committed a wrongful act, one that was harmful to society. Here, criminal law provides something that is absent entirely from both tort law and the regulatory recalls, namely, society's moral condemnation of the defendant.[125] Some scholars have argued that what sets criminal liability apart from imposition of civil liability is the "moral scorn and condemnation that only criminal punishment entails."[126] Criminal penalties are imposed to express a moral judgment or condemnation about the actors' conduct.[127] This moral condemnation, which sets criminal law apart from both civil law and regulatory regimes such as the one under the Vehicle Safety Act, makes it an essential part of the solution to the problem of

123. Some forms of community corrections would also have the effect of incapacitating an offender.

124. Michael Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1311, 131617 (2000) (viewing the goals of deterrence, incapacitation and rehabilitation as social or utilitarian goals and, thus, different from the goal of retribution). *See also generally* KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS (1990).

125. Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 4449 (1997).

126. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

127. William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1292 (2000) ("[O]nly criminal punishment involves expressing moral censure and moral condemnation."); Andrew Weissmann, *supra* note 116, at 1324 ("Criminal law, after all, is reserved for conduct that we find so repugnant as to warrant the severest sanction."). Imposition of punishment upon a corporation can be problematic. To what extent can one judge the intent, action and voluntariness of a *corporate* entity? In other words, is the corporate entity deserving of punishment for the actions of an individual employee?

dangerous vehicles and the deaths and injuries they cause. Criminal penalties should be appropriate when the conduct at issue is so reprehensible that it deserves public retribution.[128]

In the case of individual wrongdoing, retribution is achieved through a variety of punishments, including a monetary fine, community corrections, incarceration, and, for serious crimes, death. In the case of corporate crime, retribution typically is achieved through assessment of a fine on the corporation,[129] but as suggested above regarding corporate incapacitation, there are other possible and arguably more effective punishments that can express society's moral condemnation.

It is noteworthy that the public policy goals of criminal law, at least from a traditional perspective, do not include compensation for the victim of the crime. Criminal penalties may be necessary to promote vehicle safety, to deter the wrongful conduct, and to punish when that conduct is so reprehensible that it deserves public retribution. However, when traditional criminal penalties, including monetary fines, are imposed on a guilty defendant, the injured victims are not compensated.[130] In other words, Toyota might agree to pay $1.2 billion as a penalty, but none of that money is earmarked to compensate the victims. Not one penny of that money goes to pay medical expenses or to compensate for lost wages. We believe that this shortcoming can be remedied by taking a more contemporary approach to criminal sanctions.

2. Individual Criminal Liability

a. Individual Criminal Liability Under State Law[131]

Most criminal law is state law.[132] Most state criminal statutes address street crime or common crime, but some are aimed at malfeasance in a business context. While many of these statutes deal with financial crimes,

128. *See* Patrick Hamilton, *Corporate Criminal Liability for Injuries and Death*, 40 U. KAN. L. REV. 1091, 1095 (1992) (Imposing criminal liability upon corporations "for acts that threaten or adversely affect the lives of workers and consumers indicates a growing awareness that injuries and deaths resulting from marketing knowingly defective products and from willful violations of health, safety, and environmental laws are no different than injuries and deaths produced by violent street crimes.").

129. Friedman, *supra* note 19*;* Kircher, *supra* note 121.

130. The traditional justification for this is that criminal law protects the public and a criminal offense is against the public even though there may be an identifiable victim. Of course, a criminal prosecution and imposing of a criminal sanction did not preclude the victim from seeking compensation in a civil action against the person who caused the injuries.

131. Because of the limited scope of corporate criminal liability, some have argued for individual criminal liability in the case of automobile safety. *See e.g.*, Steinzor, *supra* note 4, at 446 ("[I]ndividuals with the power to establish early warning systems and repair defects quickly must perceive a personal threat if they do not act").

132. *See* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012).

there are a few state criminal statutes that can be used to impose liability on individuals employed by corporations and who share responsibility for the company's manufacture and sale of dangerous products. Foremost is a reckless homicide statute. These laws generally make it a crime to "consciously disregard a substantial and unjustifiable risk" that causes a death.[133] In a prosecution under this statute the issues typically include the nature of the risk, the defendant's awareness of the risk, and the nature of the defendant's actions considering that risk. Although there has not been any judicial determination of the facts of either the GM case or the Toyota case, based on the Valukas report[134] it is reasonable to believe that a prosecutor could make a case for reckless homicide against employees at various levels in both GM and Toyota.

In addition to reckless homicide, obstruction of justice statutes, which "protect the integrity of the criminal justice system by imposing criminal penalties for lying to the government, destroying evidence, or interfering with witnesses or juries,"[135] may be relevant in the GM case, particularly with respect to the actions of GM's lawyers. If they had knowledge of the dangerousness of the ignition switch and "continued to countenance both their clients' failure to notify NHTSA and their misleading assurances to the agency that GM was dealing appropriately with faulty ignition switches,"[136] a prosecutor could make a case for obstruction of justice.

b. Individual Criminal Liability Under Federal Law

Although the scope of federal criminal law is more narrow than state criminal law, there are some relevant statutes. The federal obstruction of justice statutes[137] are essentially the same as their state counterparts and would apply under basically the same circumstances. In addition to possible obstruction of justice, federal mail fraud[138] and wire fraud[139] statutes are potentially relevant in cases such as GM and Toyota. In fact, in both the Toyota and GM cases, the DOJ based their case on wire fraud and the manufacturer's assertions that the cars were safe when they knew they were not. These statutes do not impose criminal liability on the manufacture for sale of dangerous products. Instead, they prohibit the

133. Steinzor, *supra* note 4, at 46465.
134. Valukas Report, *supra* note 35.
135. Steinzor, *supra* note 4, at 464.
136. *Id.*
137. 18 U.S.C. §§ 1501-1521 (2012).
138. 18 U.S.C. § 1341 (2012).
139. 18 U.S.C. § 1343 (2012).

"misrepresentation or concealment of a material fact."[140] Arguably, these statutes can be used to prosecute an individual who uses mail or electronic means to communicate that a vehicle is safe when it is not.

The federal statute that is most directly related to the manufacture or sale of dangerous automobiles is the TREAD Act.[141] Recall that this Act imposes an affirmative duty on automobile manufacturers to report any defect to the NHTSA and imposes criminal liability for failure to do so. Arguably, enactment of the TREAD Act reflects Congress's judgment that existing tort law and administrative remedies were inadequate to ensure automobile safety and needed to be supplemented with an alternative sanctioning mechanism. Under TREAD, the only basis for individual or corporate criminal liability is failure to notify. Significantly, it does not make the manufacture or sale of a dangerous vehicle a federal crime. Nevertheless, it is plausible that a federal prosecutor could make a case against some individuals in these two companies for a TREAD Act violation.

c. Problems with Individual Criminal Liability Under State and Federal Law

There are several problems with the current state of individual liability under both state and federal law that significantly undermine their efficacy in reducing deaths and injuries from dangerous vehicles. First and foremost, a very significant problem with individual criminal liability is the absence of any statute that specifically makes the manufacture or sale of a dangerous product a criminal offense. It is not a crime to design, manufacture or sell a dangerous vehicle—even with knowledge of the defect and danger to public safety.[142] The only basis for individual criminal liability under the TREAD Act is failure to notify, but this reporting violation is very different from the underlying wrongful act of manufacturing and selling a dangerous vehicle. Theoretically, an automobile executive could report to NHTSA that a particular model is dangerous and then go ahead with marketing that model without being subject to criminal liability under federal law.

It is noteworthy that the federal criminal code does include statutes that prohibit placing *other types* of dangerous products into interstate commerce or the U.S. mail. Examples include placing adulterated

140. Neder v. United States, 527 U.S. 1, 3 (1999).

141. *See supra* notes 92-95 and accompanying text where this statute is briefly discussed.

142. It might be possible to bring a case based on state negligent homicide laws where one knowingly markets a dangerous car that leads to death. While Steinzor asserts that there is a "long tradition of punishing reckless homicide," few, if any cases can be found where this claim was successful against an automobile manufacturer. Steinzor, *supra* note 4, at 446.

pharmaceuticals into interstate commerce.[143] It is also a federal crime to place child pornography into interstate commerce.[144] It is difficult to find a logical explanation for why Congress would prohibit these items from interstate commerce but not dangerous vehicles, especially when the risk of serious harm is known.

An individual could be prosecuted under a state reckless homicide statute for selling a dangerous vehicle, but such prosecutions are exceedingly rare. No individuals have been prosecuted under these statutes in the Toyota or GM cases. An individual could be prosecuted under federal mail and wire fraud statutes, but no individuals have been prosecuted under these statutes in the Toyota and GM cases. Similarly, an individual could be prosecuted under state or federal obstruction of justice statutes, but no such prosecutions have taken place in the Toyota or GM cases.

A second problem with using criminal law to attach liability to individual wrongdoers involves identifying those individual wrongdoers in the corporate setting. Traditionally, the criminal sanction has been limited to wrongful conduct that is egregious, that is, conduct most deserving of moral condemnation by society. Defendants are punished for intentionally engaging in wrongful behavior, knowing or being deliberately indifferent to the consequences or risks of their actions. This mental state, known as *mens rea* or the guilty mind, is an essential element of most crimes.[145] Under the concept of *mens rea*, a defendant who committed a criminal act in a careless or negligent manner does not deserve to be criminally punished.[146] In a criminal case, the prosecutor must prove that the defendant had the requisite state of mind *at the time* he committed the criminal act. In many cases of white-collar crime this is not problematic. White-collar crime is successfully prosecuted on a regular basis, especially in federal court.[147] In some organizational settings, however, with extensive specialization of labor,[148] it is not uncommon for decision making to be widely dispersed and be separated from the task or tasks of carrying out the decision. Often, those who carry out a decision are not the same

143. 21 U.S.C §§ 331, 351 (2012).

144. 18 U.S.C. § 2252 (2012).

145. During the course of the 20th century we can observe the rise of so-called strict liability crimes. These crimes typically are found in administrative law. *See* WAYNE R. LAFAVE, *Criminal Law* § 5.5 (6th ed. 2017). With respect to the requirement that the criminal act and the mental state must occur at the same time *see id*. at § 6.3.

146. The major exception to this is the crime of negligent or reckless homicide.

147. *See generally* DAVID WEISBURD, STANTON WHEELER, ELIN WARING, & NANCY BODE, CRIMES OF THE MIDDLE CLASS: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS (1991).

148. Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629 (2002).

individuals who make the decision. From a legal perspective, this can have the effect of separating the criminal act from the state of mind—the *mens rea*. In an organizational setting, it is not unusual to have the individual who engaged in the criminal action lack the intent (or knowledge) needed to hold them criminally liable. Similarly, the individual with the intent (or knowledge) of the wrongfulness of the action may not be the person who carried out the act. Moreover, in an organizational setting the decision making may be widely dispersed so that it is difficult to find *an individual* who made the decision.[149] In the GM case, the Valukas Report acknowledged that it was almost impossible to identify actual decision makers involved in the ignition switch design.[150] The result in such a case is that it may be exceedingly difficult for the prosecutor to hold any individual in the organization criminally responsible.

Third, the extent to which imposing criminal liability upon individual corporate executives creates a sufficient deterrence to some extent depends upon several factors. Deterrence of individual wrongdoing is not problematic in theory. Large fines should deter, except for the very wealthy. In that case, incarceration, even for a short period of time, should provide adequate deterrence. Social science literature supports this.[151] Other, more creative punishments such as community corrections, attending classes on the environment or other appropriate topic, combined with fines and a short period of incarceration could also work. For the less wealthy, large fines should deter, but other punishments, such as short periods of incarceration or community service, could effectively

149. General Motors identified 15 individuals who were at least partially at fault for the defect and terminated their employment. Bill Vlasic, *G.M. Inquiry Cites Years of Neglect over Fatal Defect*, N.Y. TIMES, June 5, 2014. The Valukas Report faults Ray DeGiorgio, the engineer responsible for the development and manufacture of switches used by GM in their compact models. Valukas Report, *supra* note 35. *See also* Steinzor, *supra* note 4, at 455-57 (outlining DeGiorgio's involvement in a section entitled "DeGiorgio Goes Under the Bus"). Arguably, these individuals' actions and mental state might be enough to satisfy the *mens rea* requirement. Steinzor argues that certain individuals might have the requisite knowledge to meet the mens rea requirement. Steinzor, *supra* note 4, at 459 ("[T]he three champions should, at the very least, be considered key targets in any such investigation. How much they knew about why other executives thought the problem demanded the appointment of a champion and the reasons why they failed to respond to the urgent request that they serve as one could indicate the kind of willful blindness that can demonstrate *mens rea* in a criminal case").

150. Valukas Report, *supra* note 35, at 255

> The Cobalt Ignition Switch issue passed through an astonishing number of committees. We repeatedly heard from witnesses that they flagged the issue, proposed a solution, and the solution died in a committee or with some other ad hoc group exploring the issue. But determining the identity of any actual decision-maker was impenetrable. No single person owned any decision. Indeed, it was often difficult to determine who sat on the committees or what they considered …

151. *See, e.g.*, Natalie Schell-Busey, Sally S. Simpson, & Melissa Rorie, *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387 (2016).

supplement such fines.[152] If there is a problem, it is that sentences are too lenient. If that is the case, is it due to the attitudes of judges or to sentencing guidelines, or to insufficient degree and type of punishments specified in the relevant statutes? If it is the attitudes of the judges, the sentencing guidelines can be modified or mandatory punishments added to the statutes. If punishments specified in the statute are too lenient, that can be remedied by legislation, which will at the same time reduce the judges' discretion.

A related matter regarding individual liability of corporate executives is the problem of indemnification. If managers are indemnified for any amounts of money they must pay as a criminal fine, there is insufficient deterrent. It is not clear whether indemnification could be legally prohibited. It is possible, but this problem points to a better solution: incarceration coupled with community corrections, or other punishments in which the burden cannot be shifted to others. As much as they might wish otherwise, a wealthy corporate executive would not be able to send a low-level employee to prison in his place.

Fourth, a review of existing laws shows that to some extent a gap in the law is a contributing factor in the problem of injuries and death caused by dangerous vehicles. The gap in federal law, which fails to criminalize the knowing placement of a dangerous vehicle into interstate commerce, is especially glaring. Repairing this gap by enacting a new federal statute prohibiting placing dangerous vehicles into interstate commerce will be discussed below. However, enacting new criminal statutes will not be adequate to remedy the problem of vehicle safety. The statutes that *are on the books* are not being enforced by prosecutors in cases of dangerous vehicles. Even when there are adequate laws in effect, prosecutions are very rare. The reasons for this are found in an array of obstacles to attaching criminal liability.

Given that prosecutors operate in an environment of resource constraints,[153] it is easy to see why a prosecutor may decline to prosecute an individual in an organizational setting. Not all cases can be prosecuted, so the limited resources that are available are used to prosecute the cases in which a conviction is easier to obtain. This is not to suggest that white-collar crimes are not prosecuted. In fact, the opposite is the case.[154] There are many successful prosecutions of individuals in an organizational setting. However, it may partially explain why some corporate executives

152. *Id.*

153. *See, e.g.* Don Stemen & Bruce Frederick, *Rules, Resources, & Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1 (2013).

154. WEISBURD, *supra* note 147; SCHLEGEL, *supra* note 124.

are not prosecuted and why automobile executives have not been prosecuted. Federal prosecutors typically have more resources at their disposal than local prosecutors have. Still, they are operating under an environment of resource constraints. This may push them to focus on cases that are easier to prosecute and away from corporate executives who are more difficult to prosecute.

Beyond resource constraints, there may be political and sociological reasons why prosecutors are reluctant to prosecute corporate executives.[155] Local prosecutors throughout the country, with rare exceptions, are elected officials.[156] As such they will inevitably be connected to local politics. The executives of corporations that have local presence would typically be politically connected as well. These executives and the prosecutor may belong to the same political party, belong to the same service organizations such as Rotary or Kiwanis, and belong to the same social circles and even be personal friends. Any of these connections may influence a prosecutor's decision on whether to prosecute an executive, even though doing so might entail a conflict of interest.

Even if the local prosecutor has no connection with a corporate executive, the corporation itself may have a substantial local presence. It may employ large numbers of local people, have supply chain links with local vendors, and have a long history of local philanthropy with financial support of local museums, youth sports teams, as well as local arts and cultural events. The political fallout of bringing a criminal case against the executives of such a corporation could make a local prosecutor decide to devote their limited resources to prosecuting other cases. While federal prosecutors are appointed and, therefore, may not have the same local political connections that a county prosecutor has, they may nevertheless be socially connected with corporate executives, and such connections may have the same degree of influence on the decision to prosecute that they do

155. Stemen & Frederick, *supra* note 153. Unfortunately, there is no empirical research on the question of why federal prosecutors decide to prosecute or not prosecute. RINA STEINZOR, WHY NOT JAIL? 169 (2015). Two empirical studies on state prosecutors point to lack of resources as a major factor in the decision to not prosecute. Kenneth A. Ayers Jr. & James Frank, *Deciding to Prosecute White-Collar Crime: A National Survey of State Attorneys General*, 4 JUST. Q. 425 (1987); Michael L. Benson et al, *District Attorneys and Corporate Crime: Surveying the Prosecutorial Gatekeepers*, 26 CRIMINOLOGY 505 (1988). Jesse Eisinger examines the motivations of United States Department of Justice attorneys regarding the decision to bring criminal cases against corporate executives. EISINGER, *supra* note 23.

156. Prosecution of state criminal cases can be at the local or state level. In three states, the state attorney general directs all local prosecutions (Alaska, Delaware, and Rhode Island). In the rest, prosecutions are handled by local prosecutors almost all of whom are elected officials. GEORGE COLE, CHRISTOPHER E. SMITH, & CHRISTINA DEJONG, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 38788 (14th ed. 2015).

with local prosecutors.[157]

So, we see that local prosecutors may be reluctant to bring a criminal case because of personal reasons, political reasons, resource constraints, or legal reasons such as anticipated difficulty with proving *mens rea* in certain individuals within an organization. A prosecutor who decides to bring a criminal case against a corporate executive may fail to obtain a conviction because of resource constraints or the *mens rea* problem. These obstacles must be overcome for individual criminal liability to play a meaningful role in promoting vehicle safety. Unless this problem is remedied, providing new statutory tools to prosecutors will have a negligible effect on the problem.

But even if a prosecutor succeeds in convicting one or more individuals who committed a crime within an organizational setting, individual criminal liability is problematic because it lets the corporation "off the hook." Organizations are instrumental in shaping the attitudes, beliefs, perceptions, and behavior of individuals who work in them. In some situations, they also provide the opportunity and means to commit a criminal act. As a result, whether an individual is prosecuted for a crime within an organizational setting and whether or not an individual is convicted of such a crime, it is essential that the criminal liability of the organization itself be considered. This will be discussed in the next two sections.

3. Corporate Criminal Liability Under State and Federal Law

a. Background

Corporate criminal liability has been an accepted part of American law for over a century. In the leading case of *New York Central and Hudson River Railroad Company v. United States*,[158] the U.S. Supreme Court held that corporations can be responsible for criminal acts committed

157. In his classic study, Jack Peltason discussed the difficult time federal judges in the south experienced during the school desegregation cases. Arguably, the experience of federal prosecutors would not be significantly different. JACK W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971).

158. N.Y. Cen. & Hudson River Railroad Co. v. U.S. 212 U.S. 481, 495-96 (1909).

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents whom it has entrusted authority to act.
>
> Insulating corporations from criminal liability would "virtually take away the only means of effectually controlling" corporations and would allow the law to "shut its eyes to the fact that the great majority of business transactions in modern times are conducted through" corporations. *Id.*

by their employees. The Court noted that an important justification for this rule is the need to control corporations, which by that time had acquired enormous power and the potential for inflicting substantial harm to people, the economy, and the environment. That potential is much greater today.[159]

A review of the specific statutes applicable to a corporation shows that for the most part the same statutes that potentially apply to an individual in a dangerous product case arguably also apply to a corporation. Under state law, reckless homicide appears to be especially relevant. As mentioned above with respect to individual liability, it is reasonable to believe that a prosecutor could make a case for reckless homicide against both GM and Toyota. In addition, as in the case of individual liability, a prosecutor may be able to make a case for obstruction of justice against GM and Toyota for concealing evidence and misleading state government officials.

With respect to federal criminal statutes, the federal obstruction of justice statute[160] is much more relevant than its state counterparts if GM or Toyota officials or their lawyers lied to or mislead federal regulators regarding the safety issues relating to the vehicles. In addition to possible federal obstruction of justice charges, the federal mail fraud[161] and wire fraud[162] statutes are potentially relevant regarding corporate liability. As is the case with individual liability, these statutes do not impose criminal liability on a corporation for the manufacture or sale of dangerous products. Arguably, these statutes can be used prosecute a corporation when its employee uses mail or electronic means to communicate that a vehicle is safe when it is not. In fact, federal mail and wire fraud statutes were the basis of the federal government's threatened prosecution of Toyota that resulted in a DPA in 2014.

The federal statute that is most directly related to corporate liability for the manufacture or sale of dangerous vehicles is the TREAD Act.[163] As in the case of individual liability, the only basis for corporate criminal liability is failure to notify. It is plausible that a federal prosecutor could make a case against both GM and Toyota for a TREAD Act violation.[164]

For nearly as long as the corporate criminal liability doctrine been in effect it has been the subject of criticism and this criticism continues today.[165] While corporate criminal liability has become widely accepted

159. SCHLEGEL, *supra* note 124, at 3; WEISBURD, *supra* note 147, at 172.

160. 18 U.S.C. §§ 1501-1521 (2012).

161. 18 U.S.C. § 1341 (2012).

162. 18 U.S.C. § 1343 (2012).

163. *See* notes 82-87 and accompanying text where we discuss the duty to notify.

164. For example, GM failed to notify the NHTSA within the required time period. Statement of Facts GM, *supra* note 42.

165. Nan S. Ellis & Steven B. Dow, *Attaching Criminal Liability to Credit Reporting Agencies: Use of the Corporate Ethos Theory of Criminal Liability*, 17 U. PA. J. BUS. L. 167, 176 n.34 (2014).

among the courts, there has been a contrary view espoused by some commentators who are arguing essentially for corporate criminal immunity. For them, this immunity typically rests on the claim that holding a corporation criminally liable for the acts of its employees is impossible, or unfair, or both. This claim is supported by a set of arguments that are flawed at best or simply vacuous.

b. *Problems with Corporate Criminal Liability Under State and Federal Law*

1. Gaps in the Law.

Because, for the most part, the same criminal laws that apply to an individual also apply to a corporation, the same gaps in the statutes that we saw in the case of an individual defendant are present in the case of a corporate defendant. In particular, the glaring gap in federal law in the case of an individual defendant (i.e., federal law does not prohibit selling a car that is known to be dangerous) persists in the case of a corporate defendant. There is no federal reckless homicide statute. As in the case of an individual defendant, the TREAD Act does little to fill the gap because it punishes only reporting violations. A company whose employees knowingly put a dangerous vehicle into interstate commerce can escape liability under the TREAD Act by simply complying with its reporting requirements. Clearly, there is a need for a new federal statute that will give federal prosecutors the necessary tools to respond to cases like GM and Toyota.

2. The Mens Rea Problem.

A significant impediment to successfully prosecuting any corporate defendant is proving *mens rea*.[166] The basic problem is that a corporation is an abstract legal entity. As such, it is not able to have a state of mind in the conventional sense. Traditionally, courts have resolved this problem by looking at the actions and mental state of corporate employees applying the principle of *respondeat superior* to find corporate criminal liability.[167] Use of *respondeat superior* to impose criminal liability upon the corporation

166. *See, e.g.*, Patricia Abril & Ann Morales Olazabal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81 (2006).

167. Miriam H. Baer, *Organizational Liability and Tension Between Corporate and Criminal Law*, 19 J. OF LAW & POL'Y 1, 4 (2010); Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285 (1985).

has, however, been the target of intense criticism by commentators.[168] First, it is argued that the *respondeat superior* model fails to provide adequate deterrence. Arguably, under *respondeat superior*, the corporation is incentivized to monitor and police its employees to avoid criminal charges.[169] The typical way that corporations act to deter wrongdoing is by adopting corporate codes of conduct and compliance programs. However, the existence of these codes and programs will not insulate the corporation from liability for the actions of an agent in violation of those rules. Therefore, it is argued that attaching liability under *respondeat superior* provides inadequate incentives for corporations to develop, implement, and enforce effective corporate compliance programs.[170]

Second, it is argued that the model of *respondeat superior* fails to serve any real retributive function. Recall the goal of retribution as a part of criminal law stems from the belief that it is proper to punish wrongdoers when their conduct is morally repugnant. The problem in the case of *respondeat superior* is obvious; liability is imposed upon the corporation without finding the corporation morally culpable.[171]

Third, utilizing the *respondeat superior* model promotes inconsistent enforcement by being both under and over-inclusive. Some commentators have argued that the theory is over-inclusive, giving prosecutors too much discretion and forcing even innocent corporations to accept responsibility to avoid prosecution.[172] Moreover, the doctrine is over-inclusive because under *respondeat superior*, a corporation faces liability for the actions of a rogue employee even when it has taken all possible steps to prevent misconduct.[173] At the same time, the doctrine is under-inclusive because oftentimes prosecutors shy away from criminal prosecution to avoid punishing innocent shareholders and for all the reasons discussed above.

168. *See e.g.*, Ellis & Dow, *supra* note 165.

169. Skupski, *supra* note 120, at 268 (describing the "enduring policy behind criminally punishing corporations" as one of "deterring agent misconduct by allocating risk of criminal liability to the corporation to incentivize greater control of its agents").

170. Pamela H. Bucy, *Corporate Criminal Liability: When Does it Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1441 (2009) ("[T]his standard provides no incentives for companies to expend resources to institute effective compliance programs."); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 450 (2007) (criminal corporate liability should *only* be imposed upon corporations who fail to have reasonable policies and procedures in place to prevent employee wrongdoing).

171. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1104 (1991); Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ's Internal Moral – Culpability Standard for Corporate Criminal Liability*, 41 STETSON L. REV. 7, 10 (2011) ("[T]he current standard allows conviction of corporations when the entity has engaged in no morally culpable behavior.").

172. *See, e.g.*, Abril & Olazahal, *supra* note 166, at 113.

173. Kircher, *supra* note 121, at 159 (acknowledging that the *respondeat superior* doctrine fails to distinguish between crimes that are committed with encouragement of upper management and those perpetrated by a rogue employee).

By giving little guidance to prosecutors to determine which corporations to prosecute, we are left with arbitrary and inconsistent enforcement.

Most importantly, the doctrine of *respondeat superior* focuses on the individual actor and, as such, often fails to recognize the role that corporate culture can play in fostering illegal conduct by its employees.[174] In doing so, it fails to focus on the actual misconduct by the corporation.[175]

3. The Mens Rea Problem Solved

Theories that impose corporate criminal liability by focusing only on the individual wrongdoer's conduct ignore the effect that the organizational culture can have on whether individuals within that organization are likely to engage in wrongdoing. Theories that focus on the actions of one individual fail to recognize that often organizational wrongdoing cannot be easily traced to action by one individual. GM provides an example of this difficulty. Although DeGiorgio is one clearly identifiable culpable individual, other engineers, managers, and lawyers also played a role and it is impossible to identify exactly who.[176] This is true because often corporate behavior is made up of many small actions by disconnected individuals which when aggregated become unethical or illegal conduct.[177] The corporate ethos theory addresses those shortfalls by emphasizing the role corporate culture plays.[178]

Under the corporate ethos theory attention is paid to factors that comprise corporate culture, imposing liability on a corporation when the corporate culture created "an environment or a demonstrable personality that encouraged the violation."[179] The first aspect of corporate culture that is relevant to identifying the corporate ethos is its hierarchy.[180] This aspect

174. James A. Fanto, *Recognizing the "Bad Barrel" in Public Business Firms: Social and Organizational Factors in Misconduct by Senior Decision-Makers*, 57 BUFF. L. REV. 1, 58 (2009).

175. Skupski, s*upra* note 120, at 277 ("[T]he strict liability effect of the respondeat superior standard causes a failure to inquire into the genuine culpability of the corporation").

176. *See generally* Valukas Report, s*upra* note 35, at 255.

> The Cobalt Ignition switch issue passed through an astonishing number of committees. We repeatedly heard from witnesses that they flagged the issue, proposed a solution, and the solution died in a committee or with some other ad hoc group exploring the issue. But determining the identify of any actual decision-maker was impenetrable. No single person owned any decision. Indeed, it was often difficult to determine who sat on the committees or what they considered . . .

177. Fanto, *supra* note 172, at 26 ("[O]rganizational misconduct may also not be easily traceable to one bad act; rather, it is made up of small decisions or actions that may be at first ethically or legally equivocal and that are the bases for later decisions or actions that eventually and cumulatively are clearly unethical and illegal.").

178. Bucy, *supra* note 170, at 1099. *See also* Ellis & Dow, *supra* note 165 (comparing the respondeat superior model to the corporate ethos model).

179. Abril & Obazabal, *supra* note 166, at 123.

180. Bucy, *supra* note 171.

recognizes the role that leaders play in shaping corporate culture and focuses on how the actions of leaders might encourage misconduct. In a strong organizational culture, the leader should pay attention to the culture of the corporation. This means, among other things, that the leader should discuss unethical behavior by employees, punish such behavior and outline a plan to minimize the likelihood of such behavior occurring again.[181] Second, corporate ethos is shaped by corporate goals.[182] People are basically obedient and when told to meet certain goals, the means of achieving those goals are unimportant; people are likely to achieve those goals by any means possible. [183] Third, corporate policies, including training and education programs, are an important factor in shaping the corporate ethos.[184] It is important to note what efforts the corporation has taken in educating its employees about legal requirements and ethical expectations. This includes adoption of mission statements, corporate codes of conduct, and specific training initiatives. However, it is necessary to consider whether these policies are inculcated into the fiber of the corporation or are mere posturing. Fourth, the corporate ethos is defined in part by the monitoring mechanisms including all preventative measures that the corporation may have in place.[185] Related to this, it is, fifth, important to consider how the corporation responded to allegations of wrongdoing in the past. How seriously did corporate officials investigate these allegations? Indifference or denial can be a sign that they have "recklessly tolerated" the misconduct. It is also important to consider how corporate leaders responded to allegations of misconduct. Sixth, the compensation scheme partly defines the corporate ethos. This includes an analysis of what is rewarded and what is punished. People act in ways that are rewarded and they act to avoid punishment.[186] Just as importantly, people watch what is rewarded and what is punished in the behavior of others.

181. Bucy, *supra* note 170, at 1448.

182. Bucy, *supra* note 171, at 1133 ("whether the goals set by the corporation promote lawful behavior or are so unrealistic that they encourage illegal behavior").

183. *See generally* Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Crime: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1 2003 (arguing rewards based on achievement of goals that ignore the way of bringing about that achievement induce people to work to achieve goals without attention to the ethics or the legality of the methods used).

184. Bucy, *supra* note 171, at 1134-35.

185. Kircher, *supra* note 121, at 172.

186. Linda K. Trevino & K. A. Nelson, *Managing Business Ethics: Straight Talk about How to Do It Right* (2014). (Similarly, people will act to avoid punishment. In the corporate setting, perhaps the most threatening punishment is to be fired. People respond to rewards and incentives and watch how others are rewarded and punished. It follows that if people are rewarded for "making the numbers" at all costs, people will act in ways to meet that goal.).

We can use GM to illustrate. For 77 years, GM sold more cars than any other car manufacturer worldwide. That ended in 2007 when Toyota overtook them in worldwide sales.[187] In the early 2000's GM was faced with sagging sales and unstable profits.[188] In 2005, GM lost $10.6 billion.[189] In the early 2000's, GM sought to develop a successful small car line to compensate for sagging sales in trucks and SUVs.[190] The Cobalt, with the newly designed ignition switch, was GM's reentry into the small car game.[191] The success of the small car line was important to GM's overall financial performance and to its ability to meet federal emission standards. In fact, GM's North American Strategy Board had determined that the success of the Cobalt was essential if GM were to survive.[192] It was produced on slim margins to help meet these objectives.[193] Another way in which GM responded to its fiscal woes was in their attempts to reduce costs including cutting costs for individual parts and consolidation of the U.S. Engineering group from 11 centers to one unit.[194] The corporate culture, thus, appeared to be one driven by the goal of increasing car sales and reducing costs. The launch of the Cobalt was in response to these goals and it appears that there was pressure to get the car launched in a timely fashion. Steinzor opines that internal pressures not to delay the 2004 launch date of the Cobalt influenced DeGiorgio's decision to approve the ignition switch even though it failed to meet GM's specifications.[195]

In its examination of the GM corporate culture, the Valukas Report discussed what it termed the "tone at the top." The message from GM leaders was inconsistent. On the one hand, the message was "when safety is at issue, cost is irrelevant." At the same time, a message was conveyed that "cost is everything."[196] Training materials highlighted safety concerns and made no mention of cost as a relevant factor.[197] However, the 2000's were a time of cost-cutting at GM. One engineer was quoted as saying that the emphasis on cost-cutting "permeates the fabric of the whole culture."[198]

187. Valukas Report, *supra* note 35, at 15.
188. *Id.* at 22.
189. *Id.* at 23.
190. *Id.* at 17.
191. *Id.* at 19.
192. *Id.* at 21.
193. *Id.* at 22.
194. *Id*. at 234.
195. Steinzor, *supra* note 4, at 454 ("But he said nothing as the new car went into production probably because of internal pressure not to interfere with the 2004 launch date.").
196. Valukas Report, *supra* note 35, at 249.
197. *Id*. at 249 (quoting a training presentation "[W]e are competing in a new world, one that demands a culture where there is not tolerance for defects at any point during in[side] the vehicle development and manufacturing process. Because the marketplace has zero tolerance for defects, this organization has no tolerance for defects.").
198. *Id*. at 250.

This cost-cutting mentality impacted all aspects of the business, from bringing projects in on time, sourcing to the lowest bidder and to cuts in engineering staff. While the ignition switch issue was presented to GM senior engineering management, they failed to take immediate action. Instead, an investigation was opened that lasted two and half years.[199] Moreover, the issue of the ignition switch was never raised with upper management .[200] To the extent that management was aware of the issue, it failed to take a leadership role in in elevating the investigations to a more urgent level.[201]

In fact, committee after committee reviewed the problem but no action was taken.[202] The Valukas Report recounts the story of a junior safety investigation engineer who presented the issue to the committee charged with reviewing such matters. The committee quickly closed the safety investigation without taking any action.[203] The Valukas Report describes a culture in which "everyone had responsibility to fix the problem, [but] nobody took responsibility."[204] The Valukas Report concludes that there was a "troubling disavowal of responsibility made possible by a proliferation of committees."[205] It references what was called the "GM Salute"—where one crossed his arms and pointed outward to others to indicate that the decision and responsibility belonged to someone else. The committee had responsibility, but "no single person bore responsibility or was individually responsible."[206]

Corporate culture shapes individual action within the corporation. Individuals conform to the behavior around them.[207] At GM, this manifested itself in what had been termed the "GM nod" where everyone nods in agreement to a proposed plan of action but leaves the room and does nothing."[208] This tendency to conform manifested itself in a more significant manner when Steven Oakley, a Brand Quality Manager, classified the inadvertent shut-off as a convenience issue rather than a safety issue. Oakley recounts how he believed the shut off to be a safety issue, but the Program Engineering Manager for the team and other

199. *Id*. at 211.
200. *Id.*
201. *Id.*
202. The greater the numbers of people who participate in an action the less likely people are to feel a sense of individual responsibility. John M. Darley, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. OF PERSONALITY & SOC. PSYCHOL. 377 (1968).
203. Valukas Report, *supra* note 35, at 78.
204. *Id*. at 2.
205. *Id*. at 68.
206. *Id*. at 69, 255 ("No single person owned any decision").
207. Soloman E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, PSYCHOL. MONOGRAPHS 70 (1956).
208. Valukas Report, *supra* note 35, at 256.

engineers told him that it was merely a convenience issue and he "deferred to them."[209]

In addition, people exhibit confirmation bias.[210] A fatal example of this at GM was their unwillingness to reevaluate their conclusion that the ignition switch defects were a convenience issue rather than a safety issue.[211] GM personnel repeatedly failed to search for information that might explain the accidents and complaints from consumers. Although faced with mounting evidence to the contrary, GM engineers and committee members refused to consider the impacts of moving stalls or to question the effects upon airbag deployment. [212] It is common for people to act this way due to escalation of commitment.[213] The ignition switch was problematic from the start. In fact, the engineer who approved the design called it the "switch from hell."[214] The prototype performed so poorly that it had to be totally redesigned. Upon completion, the redesigned switch still failed to meet mechanical specifications for torque. Nevertheless, it was approved and went into production.

Last, fragmented knowledge within a corporate culture can impact decision-making. In the case of GM, this aspect of corporate culture was fatal. When GM engineers began receiving complaints that the low torque on the ignition switch could lead to moving stalls, they did not recognize this as a safety issue. This was in part because those engineers did not know that other engineers had designed the car so that turning the key to the accessory position would disable the airbags. The Valukas Report describes the "information silos" where engineers in one department of GM did not know what engineers in other departments were doing. This which lead to the delayed response.[215]

The formal culture at GM is comprised at least in part by policies that encourage safe design. For example, the expectation is that GM lawyers who discover a safety issue elevate that issue to their superiors.[216]

209. *Id*. at 76.

210. The confirmation trap operates in a way that encourages individuals to look for evidence to confirm preexisting conclusions and to disregard information that does not support that conclusion. David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision-Making*, SLOAN MGMT. REV., Winter 1996, at 9, 19.

211. Valukas Report, *supra* note 35, at 211.

212. *Id*. at 256.

213. Moreover, escalation of commitment makes it likely that once started down a path, even a dangerous path, people are unlikely to change course. Barry M. Staw & Jerry Ross, *Understanding Behavior in Escalation Situations*, 246 SCIENCE 216, 216 (1989).

214. Valukas Report, *supra* note 35, at 5.

215. *Id.* at 33 ("Had GM personnel connected the dots and understood how their own cars were built, they might have addressed the safety defect before injuries and fatalities occurred.").

216. *Id.* at 109–10 ("If you believe … that the conclusion is wrong, you should continue to seek an appropriate resolution. It is your duty to bring the situation to the attention of superiors or their supervisors if necessary.").

However, the engineer in charge of the project, Ray DeGiorgio, approved production of the ignition switch knowing that it failed to comply with GM's specifications. Nothing in GM policy prevented him from doing so and, in fact, it seems likely that no one at GM, other than DeGiorgio, even knew that the part failed to meet the specification.[217] Unfortunately, GM failed to have sufficient monitoring systems in place to detect or prevent such action.[218] One of GM's main safety lawyers explained his defense of the switch saying, that he did not want to be criticized for failing to "defend a brand new launch."[219] According to the Valukas Report there was a reluctance to raising issues at GM. When explaining this reluctance some pointed to their reluctance to do anything that would delay the launch, and some spoke to a fear of retaliation.[220]

4. The Spillover Effect.

An argument often raised by those promoting corporate immunity is the *spillover effect*, which is sometimes referred to as the *innocent shareholder*. Those who raise this argument suggest that it goes to the issue of fairness. That is, they argue that the spillover effects of a criminal prosecution make such a prosecution unfair. The argument can be summarized in the following way. When a corporation is prosecuted criminally, an array of "innocent" parties is impacted. If the prosecution causes the value of the company's shares to fall or the company goes out of business, this will harm the shareholders who, the argument goes, were not responsible for the criminal actions and did not have the means to prevent it. This argument typically implies or specifies that the shareholders are a retired couple whose income depends in significant part on their investments. Not only will the shareholders be harmed, the company's employees, the employees' families, and suppliers will also suffer. Hence, it is argued that prosecuting any corporation is unfair.

To be sure, there are collateral consequences to any criminal prosecution.[221] However, as a justification for corporate immunity, the spillover effect argument completely fails. It fails because when logically applied in the broader context of individual criminal defendants, we see

217. *Id.* at 52.

218. *Id.* at 34 ("'[W]hile the decision to change the Ignition Switch, without changing the part number, violated GM's policies, GM also failed to have in place an oversight system sufficient to ensure such decisions were reviewed and the correct decisions made.").

219. *Id.* at 7.

220. *Id.* at 252.

221. *See, e.g.*, Steven B. Dow, *Navigating Through the Problem of Mootness in Corrections Litigation*, 43 CAP. U. L. REV. 651, 662–65 (2015); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017).

that it is completely vacuous. Virtually all criminal prosecutions will have some spillover effects. The people hurt by such a prosecution are often *far more innocent* than corporate shareholders. When an individual is convicted of a crime and sent to prison there is a profound negative impact on his/her family. Financial and other kinds of support that the defendant was providing to the family disappears. This may entail a complete loss of income. This loss of support can have an especially tremendous impact on the defendant's children. These children are truly innocent. The shareholders made the choice of purchasing those corporate shares; the children did not choose their parents. Purchasing shares of a corporation always entails some degree of risk. Loss of share value is one of the many risks that share ownership entails. There is no justification for distinguishing loss of share value that results from corporate crime from other types of share value loss. Moreover, in many cases the shareholders will have other sources of income to rely on in the event the shares lose all or a substantial amount of their value. Institutional shareholders (and many individual shareholders) will manage the risk of this through diversification. On the other hand, in many cases the incarceration of a parent will deprive the defendant's children of all financial support, which may result in destitution without reliance on government assistance.

The spillover effect argument includes the claim that the shareholders were not responsible for the criminal act and could not have prevented it. They may have no legal responsibility for the crime, but it is does not necessarily follow that they could not have to some degree prevented it. Children are truly not able to prevent their parent from committing a crime. The same cannot be said with respect to shareholders and corporate crime. While the "retired couple" is often used as the example of an innocent shareholder, the reality is that a substantial portion of corporate shares are held by institutional investors. It is widely known that they are sophisticated and have substantial economic clout. They *do* have the ability to influence corporate management, and the risk of partial or total loss of share value gives these investors the incentive to do so.

There are truly innocent parties significantly impacted by criminal convictions, but they are not the shareholders. It is the family members, especially children. There is little concern expressed about them in debates over sentencing policy. The corporate apologists never express any concern about these truly innocent parties. They typically are left out of the broader narrative on the collateral effects of conviction and punishment. If there were genuine concern about these innocents, should we not expect to find it integrated into criminal sentencing guidelines?

The same point should be made about others impacted by the spillover effect. The corporate criminal immunity argument refers to innocent

employees who may lose their jobs if their company is prosecuted and convicted. It also cites innocent suppliers that also will incur financial loss. Such losses will obviously occur in some cases of corporate criminal prosecution, but *exactly the same thing* happens in many cases of individual criminal prosecutions. If a physician is incarcerated for Medicaid fraud, his or her employees may lose their jobs. Suppliers of the medical practice may incur a financial loss. Has this resulted in lenient treatment of these individual defendants?

The basic problem with the spillover effect argument is that the concern for the innocents is highly selective and unjustifiably so. The fact of the matter is that the "innocents" who the corporate apologists focus on cannot be used to support corporate criminal immunity because that argument logically applied in the broader context of individual criminal liability would fundamentally undermine the use of the criminal sanction across the board. If a negative impact on innocent family members—individuals who are far more innocent than shareholders—is a justification for immunity from prosecution in the case of individuals, then there would have to be a massive reduction in such prosecutions. Such a reduction would have no support as a matter of public policy. It is highly doubtful that even the corporate apologists would support this sort of change.

5. Corporate Fines.

An issue in the corporate crime debate that is attracting more attention in recent years is the inadequacy of criminal fines imposed on corporations. Obviously, how well such fines work depends upon the size, frequency and likelihood of the fine being imposed.[222] While it is true that in some cases the fines imposed on a corporation by government regulators, criminal court judges, or through a DPA are perceived by many to be a staggering amount of money, the reality is that these fines most likely have little, if any, deterrent effect on corporate wrongdoing because they are far too small. For example, in the GM case the fine imposed under the DPA was $900 million. While this sounds like an enormous amount of money, critics have compared this to the $156 billion in GM revenue, suggesting that it is woefully inadequate.[223]

The most commonly voiced explanation for this is that the company executives see such fines merely as one of the many costs of doing business. Even if the fine is perceived to be a very large amount of money, paying the fine has no financial impact on them personally and may have

222. Vandall, *supra* note 72.
223. *See generally* Schlegel, *supra* note 124, at 23.

little, if any, financial impact on the company. The problem of inadequacy of fines is an important part of the proposals outlined in Part III.

6. Reluctance of Prosecutors to Bring Cases Against Corporations.

In the discussion on problems with individual criminal liability we touched on the matter of prosecutors being reluctant to bring criminal cases against individual defendants.[224] This is a significant problem with local prosecutors in state court. There are relatively few prosecutions of white-collar defendants in that venue. It was suggested that this is due to a combination of political, sociological, and financial (i.e. lack of adequate resources) factors rather than any lack of statutes in the criminal code.[225] This also explains why white-collar prosecutions are more common in federal court, where these factors have much less influence on the decision to prosecute as well as on the outcome of each case.

The hurdles that make prosecution of white-collar defendants problematic in state court are far more daunting when the defendant is a corporation. As in a case of individual defendants, prosecutors may be politically and socially connected with the executives of the corporation that may become the subject of a criminal prosecution. The corporation may be a significant local employer such that the decision to prosecute may entail electoral consequences for the prosecutor, nearly all of whom are elected officials. Prosecuting street criminals may be perceived as generating political benefits and at a much lower cost.[226] The problem of adequate resources would be much more significant when the defendant is a corporation. A corporate defendant may possess enormous resources that can be used to overwhelm a local prosecutor, who, along with pursuing a case against that corporation, is responsible for prosecuting the typical array of street crime, domestic violence, etc.[227] A local prosecutor contemplating bringing a case against a large, powerful corporation may conclude that there are not adequate resources available to prosecute that case and, at the same time, carry out the other, routine responsibilities of the office. This theory is difficult to test because there are so few cases in which a local prosecutor brings a criminal case against a large corporate defendant. It is especially difficult to test with respect to dangerous products because the only known case is one in which a local prosecutor in Indiana brought a reckless homicide case against Ford Motor Company for

224. *See* Stemen & Frederick, *supra* note 153 and accompanying text.
225. *See* Stemen & Frederick, *supra* notes 153, at 153 and accompanying text.
226. Steinzor, *supra* note 155, at 463.
227. *Id.* at 6.

three deaths caused by a safety defect in Ford Pintos.[228] Three local residents were burned to death after the vehicle in which they were riding was stuck from behind, resulting in a ruptured fuel tank and fire. In the book *Reckless Homicide?: Ford's Pinto Trial*,[229] Lee Strobel discusses the case brought against Ford Motor Company based on their manufacture of the Pinto. In what has been termed the "only case in American history in which a corporation was criminally prosecuted for knowingly marketing a dangerously defective product,"[230] Ford was charged with three counts of reckless homicide. The primary account of this case suggests that the prosecutor was overwhelmed by the defense mounted by Ford's lawyers, with the case (perhaps not surprisingly) ending in a not guilty verdict for Ford.[231]

Federal prosecutors are in a situation that differs from local prosecutors in some important ways. Foremost among them is access to greater resources, which in a case of prosecuting a corporation can make a significant difference in the decision to prosecute and the outcome of that prosecution. Federal prosecutors are appointed rather than elected and, therefore, less politically connected to local corporate executives and, more importantly, much less susceptible to electoral consequences arising out of their decision to prosecute than are local prosecutors.[232] *In theory*, this should make them more willing and effective in prosecuting corporate crime, so the glaring gap in federal criminal law handicaps the very prosecutors that are in the best position to bring and win these cases. This makes adding a new federal statute to fill this gap critical, but the gap in the law is not the only problem and may not be the most serious problem.[233] This is because despite the differences just mentioned, federal prosecutors are in a situation that is similar in some respects to local prosecutors. They may be socially connected to local corporate executives in the same ways that local prosecutors are socially connected to them. If that is the case, it may undermine their objectivity with respect to the decision on whether to prosecute.

The decision of a federal prosecutor to bring a case against corporate

228. *See generally* LEE STROBEL, RECKLESS HOMICIDE? FORD'S PINTO TRIAL (1980).

229. *Id.*

230. Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Desserts*, 31 U. MICH. J.L. REFORM 289, 313 (1998).

231. STROBEL, *supra* note 228.

232. Steinzor, *supra* note 155, at 6.

233. *See* Frank J. Vandall, *The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-enforcement*, 57 CATH. U. L. REV. 341, 344 (2008).

> The U.S. Attorney considers a number of criteria in deciding whether to bring a specific case. Those criteria include: the social importance of the case, the number of other cases on her desk, the time needed to prosecute the case, the expense of the litigation, the likelihood of victory, and the President's agenda.

executives also can be significantly influenced by that prosecutor's career aspirations and DOJ personnel policies. DOJ policies on promotions and salaries may result in focusing on a prosecutor's won-lost record.[234] Prosecuting a corporate defendant, which typically can be expected to invest an enormous amount of resources in defending itself, may be passed over in favor of prosecuting easier—more "winnable"—cases, such as individual street criminals and perhaps individual white-collar defendants as well. These factors provide a plausible explanation for why federal prosecutors who, in theory, have access to far greater resources than local prosecutors, fail to prosecute large corporations for wrongful activities, including selling dangerous products. Those same factors, along with the gap in the criminal code, also provide a plausible explanation for the frequent use by federal prosecutors of DPAs. This problem will be addressed next.

7. Excessive Use of DPAs.

While a DPA entered into between a corporation and the prosecutor on behalf of the government may encompass some positive changes in the corporate structure and compliance regime, they clearly are not the same as a guilty plea.[235] It is common for a DPA to specify that the company denies any wrongdoing, so it lacks the moral condemnation that a guilty plea or guilty verdict entails. Even if the DPA includes a large fine, a DPA does not entail a conviction and the stigma that would go with it, which will undermine its deterrent effect. The deterrent effect is further undermined if the negotiated fine may be considered "just the cost of doing business."

Finally, the matter of fairness of DPAs should be considered. The regular use of DPAs with corporations and their very infrequent use with individual defendants raises a question about the fairness of this practice. For individual defendants, especially those accused of street crimes, the choices given to them by the prosecutor are quite limited and unattractive. The choices are pleading guilty or going to trial with the risk of being convicted. With the latter choice, if the defendant is convicted, the punishment imposed likely will be much harsher than it would be if the defendant agreed to plead guilty.[236] It would be very rare for a case against an individual defendant to be resolved with a DPA in which the defendant

234. EISINGER, *supra* note 23.

235. *See generally* David M. Uhlman, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013).

236. Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, Bureau of Justice Assistance: U.S. Dept. of Justice (2011), https://www.bja.gov/Publications/PleaBargainingResearch Summary.pdf [https://perma.cc/49ZS-LDR2].

admits no wrongdoing and agrees to pay a fine. Even if the fine is a hefty one, the DPA entails no moral stigma and, more importantly, entails no finding or admission of guilt. This is significant because if there is a finding or admission of guilt, the defendant will be treated much more harshly if he enters the criminal justice system in the future.[237] There is no doubt that an individual defendant would prefer to resolve a case against him with a DPA, but that choice would rarely be offered. Giving a corporate defendant the opportunity to enter into a DPA is grossly unfair and is evidence of corporate coddling. While some commentators have argued that the use of DPAs leads to over-inclusive enforcement, giving prosecutors too much discretion and forcing even innocent corporations to accept responsibility to avoid prosecution,[238] we believe that, overall, DPAs give corporations an unfair advantage over individual defendants and undermine the essential policy goals of the criminal law.

This section has shown that there is an array of problems with the current regime of state and federal criminal law as applied to individuals and corporations that sell dangerous products. In addition to gaps in the law and inadequate fines, there are sociological and organizational problems that undermine its effectiveness in addressing the problem. The next part of the article will discuss ways to remedy these problems and our proposal for needed reforms.

III. A TWO-PRONGED SOLUTION TO THE PROBLEM OF DANGEROUS VEHICLES

The forgoing discussion has shown that there is an array of problems that has contributed to the inability of the current regime of state and federal criminal law to adequately address the matter of injuries and death caused by dangerous vehicles. While not every one of these problems has a solution, we will argue that a few specifically targeted reforms put in place simultaneously would bring about a significant improvement in this area of the law. Using terminology associated with the American Legal Realist Movement,[239] the necessary reforms can be separated into the law "in books" and the law "in action." Both will be discussed in this part of the article.

237. *See, e.g.*, Ellen M. Bryant, *Section 3 E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269 (1995).

238. *See e.g.*, Weissmann, *supra* note 117, at 1322 (arguing that under current policy "no *systemic* checks effectively restrict the government's power to go after corporations").

239. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

A. THE LAW IN BOOKS

1. New Federal Criminal Statute Needed

To give federal prosecutors the statutory tools they need to effectively prosecute cases involving dangerous vehicles, the glaring gap in the federal criminal code must be repaired. Congress has already made the judgment that the specific conduct targeted in the TREAD Act should be prohibited and, in some cases, imposed criminal liability for violation of TREAD provisions. Arguably, the enactment of the TREAD Act reflected Congress's judgment that tort law was inadequate to assure automobile safety and needed to be supplemented with an alternative sanctioning mechanism. However, it is clear that at least in the Toyota and GM cases the existing scheme was still inadequate. The fear of possible civil penalties, even compensatory awards supplemented by punitive damages, did not provide a sufficient deterrent effect. Nor did the fear of criminal prosecution under the TREAD Act motivate the manufacturers to report the defect in a timely manner.

Following the Toyota recalls, there were calls for legislative reforms. In the wake of the GM recalls, Ralph Nader, among others, called for statutory reforms.[240] Legislative proposals focused on increasing civil penalties[241] and mandating greater disclosure of defects.[242] The latest of these proposals, the Grow America Act of 2015[243] proposed increased civil

240. Press Release (April 8, 2014). Center for Corporate Policy, http://www.corporatepolicy.org/2014/04/08/after-gm-disaster-nader-groups-call-for-criminal-liability-for-hiding-product-dangers/ [https://perma.cc/5592-GEWY].

241. J. Plungis, *GM hearings revive debate on tougher corporate penalties*. ST. LOUIS POST-DISPATCH (2014), http://www.stltoday.com/business/local/gm-hearings-revive-debate-on-tougher-corporate-penalties/article_f3216ad4-33d3-5efd-9091-a0ce499b3245.html [https://perma.cc/L3ZM-CVW9]. For example, Senate Bill 1743 proposed increased civil penalties and criminal sanctions where a business or corporate officer received "actual knowledge" of a serious danger associated with a covered product, and failed to verbally inform the appropriate federal agency "as soon as practicable and no later than 24 hours after acquiring such knowledge." S. 1743, 114th Cong. § 2082 (a)(1) (2015).

242. For example, Senate Bill 1743 proposed imposing additional early warning reporting requirements on automobile manufacturers. H.R. 1743, 114th Cong. § 102 (2015). Any information disclosed to the NHTSA would be disclosed to the public through an early warning reporting database. H.R. 1743, 114th Cong. § 102 (c)(i)(II) (2015). Under House Bill 1181 an automobile manufacturer would have had a duty to send to the DOT "a true or representative copy of each communication to the manufacturer's dealers or to the owners or purchasers of a motor vehicle" concerning any safety defect or failure to comply with motor vehicle safety standard. H.R. 1181, 114th Cong. § 101 (1)(a),(b) (2015). If a motor vehicle was determined to have a defect, dealers would be forbidden from selling or leasing a used vehicle until the defect was remedied. H.R. 1181, 114th Cong. § 205(k) (2015).

243. H.R. 2410, 114th Cong. (2015).

penalties for failure to report safety defects.[244] To date, only one legislative response has been enacted into law—the Motor Vehicle Safety Whistleblower Act.[245] This Act offers a "bounty" to auto insiders who reported serious safety violations.

While we are not opposed to increasing sanctions for failure to report safety defects, we believe that this fails to get to the root of the problem. Currently, there is no law that prohibits an automobile manufacturer from selling cars that it knows will kill or injure people. Increasing the penalties for failure to notify people of these defects is a laudable first step but is inadequate to deal with the problems discussed in Part II.

To repair the glaring gap in the federal criminal code we propose the enactment of a new criminal statute that would make it a federal crime for any person or corporation to intentionally or recklessly place into interstate commerce a vehicle or components of a vehicle knowing or having reason to know it has a defect that is likely to cause death or serious bodily injury.

2. Features of the Statute

Note that our proposal would apply to individuals *and* to corporations. It would also apply to suppliers of automotive components and vehicle manufacturers. Deterring suppliers from selling components to manufacturers that they know or have reason to know are defective would significantly reduce the likelihood that a vehicle with such a component would ever be sold to a consumer. Liability would be based on an *intentional act*, defining intent in the conventional way in the case of an individual[246] and using the corporate ethos theory in the case of a corporation, or upon *recklessness*, defining reckless in the conventional way.[247] Allowing liability based on recklessness is based on the concern that in an organizational setting, decision making often is so fragmented that it is difficult to find an individual who made a specific decision with specific knowledge. Attaching liability for recklessness would allow liability to be based on *disregard* of the risk associated with a defective vehicle or component.

The proposed statute would base liability on a defective vehicle or component that is *likely to cause* death or serious bodily injury. The purpose of this is to impose liability without having to wait for someone to

244. H.R. 2410 § 4110.
245. 49 U.S.C § 30172 (2015).
246. LaFave, *supra* note 145, at § 5.2.
247. LaFave, *supra* note 145, at § 5.4.

be killed or seriously injured. Of course, a provision could be added to the statute that would enhance the punishment(s) if the defect *actually causes* a death or serious injury.

B. PUNISHMENT OF INDIVIDUAL DEFENDANTS

1. Monetary Fine

In the case of an individual convicted under the statute based on intent, punishment should include a monetary fine. If a fine is intended to deter (specifically, or generally, or both), then it will fail to accomplish that goal unless it is large enough to "hurt." Because the wealth of individuals who might be prosecuted under this statute would range from modest (i.e. middle management, automotive engineers) to high (i.e., corporate executives), the amount of the fine should correspondingly range from modest to large. In this context, we urge the adoption of the *day fine* as an equitable method to address the problem of large wealth disparities among defendants in this and other criminal cases. The amount of the fine would be based on one day of the defendant's income multiplied by a specified number that is calibrated to reflect the seriousness of the offense. Because the executive's income for a day is far larger than is the case for someone in middle management, the total amount of the fine imposed on the executive will be correspondingly larger.[248] In addition, there should also be a provision in both sections of the statute prohibiting reimbursement to the individual defendant by the corporation and another provision specifying that the amount of the fine is not a deductible business expense for purposes of federal income tax.

It is reasonable to ask whether a monetary fine, of any size, will provide meaningful deterrence. In theory, there is an amount of money that, if imposed as a criminal fine, will deter corporate executives from engaging in the kind of wrongful behavior that the statute targets. It is reasonable to believe that in the white-collar arena, the corporate actor might actually calculate the costs and benefits of his action.[249] Manufacturing and marketing a dangerous vehicle presumably fits into the same category. However, because the likelihood of detection and

248. For a discussion of the day fine and examples from Sweden and Germany *see* PHILIP L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH, 234–35 (6th ed. 2013).

249. Lynch, *supra* note 125, at 45 (White-collar crime is "by definition carried out in the economic arena, where the pursuit of financial profit and the calculation of the costs and risks of choices is characteristic. Mail fraud, unlike murder, is not commonly a crime of blinding passion.").

prosecution is perceived to be small, the threat of criminal penalties might offer scant deterrent effect.[250] It is for this reason that the punishments under the proposed statute must include incarceration and community corrections.

2. Incarceration

More important than a monetary fine is the potential for incarceration. Including incarceration in the array of punishments in the statute will go far in deterring the targeted conduct, as well as signaling society's condemnation of it. Relatively brief periods of incarceration can be expected to adequately deter, except in situations of multiple convictions of an individual defendant—in which case longer periods of incarceration would be justified. An option that should be considered in the statute is making incarceration mandatory in cases in which the defective vehicle or component causes a death. Such a measure would prevent judges from imposing monetary fines in lieu of incarceration in cases where effective deterrence or society's moral condemnation call for incarceration.

3. Community corrections

Sanctions such as community service and probation would be appropriate to include in the array of punishments under the statute. These might be imposed in conjunction with a monetary fine or incarceration. As such they should be expected to contribute to effective deterrence as well as to signal society's condemnation of the conduct targeted in the statute.

C. PUNISHMENT OF CORPORATE DEFENDANTS

As we suggested in Part II, while it is important to hold individuals accountable when they are responsible for the sale of a dangerous vehicle, this should not be the limit of criminal liability. Holding the corporation accountable is important. In some cases, we may not be able to find an individual who is responsible, and typically the corporate culture is a significant factor in shaping the attitudes and behavior of its employees.

250. The amount of the monetary fine—at any level—must be discounted by the probability of detection, prosecution, and conviction. If corporate executives see this probability as exceedingly small, there may not be a monetary fine of any size that will provide meaningful deterrence. DAVID J. PYLE, THE ECONOMICS OF CRIME AND LAW ENFORCEMENT (1983); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 7.1-7.2 (2011).

1. Monetary Fines

Monetary fines should be included among the array of punishments specified in the statute. However, for reasons we set out in Part II, we believe that monetary fines should not be at the heart of corporate criminal punishment. Too often, monetary fines—even very large monetary fines—do not provide adequate deterrence because they are seen as merely the cost of doing business. And, for the same reason, they do not adequately signal society's condemnation of the defendant's conduct. This is especially the case when the fine is part of a DPA.

2.. New Punishment Strategies

Because monetary fines are inadequate and incarceration is obviously not a punishment option in the case of a corporate defendant, we believe that new, more creative punishments (i.e. corporate incapacitation) should be implemented in such cases. Starting with the least severe, we propose that in an appropriate case, a convicted corporation be debarred from government (state, or federal, or both) contracts for a meaningful period. Governments are customers of automobile manufacturers with the purchase of vehicle fleets on a regular basis. Debarring a convicted manufacturer from supplying vehicles under a government contract for a meaningful period will have an impact on corporate profits and, therefore, have some deterrent effect. It would also signal society's condemnation of the defendant. However, because governments are not a significant portion of automobile manufacturers' customer base, debarment alone would clearly not be an adequate punishment.

Suspension of or restrictions of a business license on a state or local basis for a meaningful period would have a greater deterrent effect than debarment. For example, a corporation convicted in a state criminal prosecution might be prohibited from selling vehicles in that state for a period of time. On the federal level, suspension of or restrictions on a corporate charter for a meaningful period would have an even greater deterrent effect because it could be national in scope. This sanction would be effective only at the federal level because only on that level would it prevent a convicted corporation from shifting business operations from a state in which it is restricted or suspended to different states to minimize the financial impact of the sanction. Clearly, the suspension or restriction of a corporate charter would be an unambiguous signal of society's condemnation of the defendant.

Finally, in egregious cases, including situations in which the corporate defendant has multiple convictions over a period of time, revocation of the

corporate charter should be available as a sentencing option, especially in cases where the defective vehicle was placed intentionally in interstate commerce and caused loss of life. Justifications for this corporate "death" penalty are not difficult to find. One need only look at the justifications for the proliferation over the last few years of death penalty provisions in federal and state criminal statutes.[251] This last point is not intended as an endorsement of the death penalty for individuals on either the state or the federal level. Instead, we are suggesting that if the death penalty is available to impose on individual defendants, there is no reason that the corporate "death penalty" should not also be imposed in cases where a corporation knowingly places a dangerous vehicle in interstate commerce and causes loss of life. Even if the evidence on the deterrent effect may turn out to be ambiguous, there is no penalty that would send a clearer signal to a convicted corporate defendant that society is condemning their conduct. The corporate form is a privilege. A corporation that has caused the loss of life through an intentional act does not deserve to continue to enjoy those benefits, especially when there are prior convictions for the same offense. As is the case with suspension or restrictions on a corporate charter, revocation of a corporate charter would be most effective at the federal level because only on that level would it prevent a convicted corporation from evading the penalty by simply incorporating in another state and continuing with business as usual.[252] The statute also should authorize the sentencing judge to use his or her equitable powers to bar individual corporate officers from re-incorporating under a new name and from engaging in the same type of business in the future under any organizational form.

3. Restitution

In a departure from traditional criminal punishments, but in keeping with the recent trends in punishment, we urge that restitution be part of the array of sanctions that can be imposed on a corporate defendant convicted

251. *See, e.g.*, Jay D. Aronson & Simon A. Cole, Science and the Death Penalty: DNA, *Innocence, and the Debate Over Capital Punishment in the United States*, 43 LAW & SOC. INQUIRY 603 (2009).

252. In nineteen states the professional licenses of people who fall behind on their student loan payments can be revoked. These states are obviously unconcerned by the fact that without the license the debtor will be unable to earn money with which to pay their student load debt. These states also are obviously unconcerned by any "spillover effect" that might result with respect to the debtor's children, spouse, partners, employees, etc. If individuals are having their professional licenses revoked for falling behind on their student loan payments, surely it is fair to revoke the business license or charter of a corporation that kills people by knowingly selling dangerous vehicles. *See* Jessica Silver-Greenberg, Stacy Cowley & Natalie Kitroeff, *When Unpaid Student Loan Bills Mean You Can No Longer Work*, N.Y. TIMES, (Nov. 18, 2017) https://www.nytimes.com/2017/11/18/business/student-loans-licenses.html [https://perma.cc/9AA3-A29V]l.

under the statute. As we suggested in Part II, a significant shortcoming of both administrative fines and traditional monetary fines in criminal cases is that the victims' need for compensation is completely overlooked. Both administrative fines and criminal fines are paid to the government. While this may be effective in some cases in deterring future criminal behavior and signaling society's condemnation of the defendant's conduct, it does nothing to remedy the significant hardships associated with the death or serious injury caused by the defendant's conduct. The statute should require the sentencing judge to order that restitution be provided by convicted defendants to injured victims and the families of those killed by dangerous vehicles.[253]

4. Constitutionality

It goes without saying that all federal statutes must be solidly based on more or more enumerated powers granted to Congress in the Constitution.[254] The federal statute proposed here is clearly within the scope of the interstate commerce power. While it is true that starting with *United States v. Lopez* in 1995,[255] the U.S. Supreme Court has narrowed to some extent the scope of the interstate commerce power. That trend, if it is a trend, has been limited to those activities affecting interstate commerce and has not impacted Congress's power to regulate the channels or instrumentalities of interstate commerce.[256] The criminal statute we propose here is on constitutional ground as solid as the federal felon in possession statute[257] and the federal carjacking statute,[258] to name just two.

253. There is an empirical question on whether and to what extent various punishments deter corporations and corporate executives. The literature does not provide a clear answer, but the consensus is that the threat of punishment does deter. Schlegel, *supra* note 124, at 15-24; Schell-Busey, Simpson, & Rorie, *supra* note 151, at 387. Even if the matter remains the subject of some debate, however, we do not believe that this undermines the soundness of our proposals. Even if there were not convincing evidence that the punishments we propose deter, it is critical to keep in mind that there are justifications for punishment other than deterrence. Punishment can be (and in the case of dangerous vehicles, ought to be) justified as a matter of just desert. Even if some specific punishment may not deter, it is nevertheless appropriate because it expresses society's condemnation of the corporation and its managers. In the case of a corporate defendant it is punishment for maintaining a corporate ethos that led to the deaths and injuries.

254. *See, e.g.*, Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575 (2013).

255. 514 U.S. 549 (1995).

256. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 4.8(b), 4.9(d) (8th ed. 2010). *See also, e.g.*, Victoria Davis, *A Landmark Lost: The Anemic Impact of* United States v. Lopez, 115 S. Ct. 1624, *On the Federalization of Criminal Law*, 75 NEB. L. REV. 115 (1996).

257. 18 U.S.C. § 922(g) (2012). *See, e.g.*, Barbara H. Taylor, *Close Enough for Government Work: Proving Minimal Nexus in a Federal Firearms Conviction: United States v. Corey*, 56 ME. L. REV. 187 (2004).

258. 18 U.S.C. § 2119 (2012). *See generally* Klein & Grobey, *supra* note 132.

The federal statute we propose here is an essential element in remedying the inadequacies of the current legal regime dealing with injuries and death caused by dangerous vehicles. However, we have already suggested that while new laws will give federal prosecutors the needed statutory tools to prosecute automobile manufacturers and their employees, these laws clearly would not be sufficient to bring about the necessary changes in how the law works in such cases. We have already suggested in Part II that a study of the law "in action," that is, how the law works in the real world, points to the significant need for organizational reform in the DOJ. The next section will address this important matter.

C. THE LAW IN ACTION

In Part IIC we highlighted the reasons why there is a lack of criminal prosecutions for injuries and deaths caused by dangerous vehicles. These problems exist on the state and local level with respect to both prosecutions of individuals and of corporations. They also exist, but to a far lesser extent, on the federal level.

We outlined the array of economic, political, and sociological problems on the state and local level that render prosecutors unable and unwilling to bring criminal cases against corporate executives and other corporate employees. These problems become even more daunting when the subject of a potential prosecution is a corporation, which can be expected to mount a far more rigorous and costly defense than would be the case with an individual defendant, even a wealthy defendant. In light of this reality, we believe that the multitude of problems with prosecuting both corporations and corporate executives on the state and local level are insurmountable. The lack of adequate resources is chronic. The inherent responsibility of local prosecutors for prosecuting *other crime* demands an overwhelming majority of their resources and attention.[259] The potential political fallout from prosecuting either a corporation or a corporate executive is paralyzing, so long as the office of local prosecutor is an elected office. We believe that these insurmountable problems require that we pin our hopes on federal prosecutors to effectively deal with deaths and injuries caused by dangerous vehicles. Even though federal prosecutors are free from some of the handicaps under which local prosecutors operate, their situation is in some ways similar to that of a local prosecutor. For this reason, we propose that the following reforms be implemented in addition to the statutory proposal outlined in Part III A.

259. Steinzor, *supra* note 155, at 63.

1. Outside Review of Decisions to Not Prosecute and of DPAs

Federal prosecutors enjoy far more political independence than local prosecutors could ever enjoy; however, they may still be socially connected with corporate executives, especially if they are in a district in which the corporation has a substantial presence. These personal connections may result in more lenient treatment of a corporation or its executives than justified. For this reason, we propose that the DOJ adopt a policy requiring an evaluation by outside prosecutors of a decision to not prosecute a corporation or corporate executives when there has been a death or serious injury caused by a defective vehicle. Prosecutors brought in from another district can insure a reasonable measure of independent decision making on this critical matter. We propose that the same sort of outside review take place anytime there are negotiations underway to enter into a DPA.[260] While a DPA may be appropriate in some cases, there is a substantial risk that they will resolve a case in a manner that is far too lenient with respect to the policy goals of the criminal law.

2. Adequate Resources

Federal prosecutors enjoy an abundance of resources compared with the amount of resources usually available to local prosecutors; however, the prosecution of a corporate executive may require resources beyond the amount federal prosecutors need for a typical case. The prosecution of a corporation would most likely require an even greater amount of resources. We propose instituting a policy requiring all United States Attorneys to monitor criminal prosecutions of corporations and their executives and to ensure that the prosecutors who are handling such cases have sufficient resources to respond to whatever level of defense is put up by the defendant.

3. DOJ Personnel Policies

We suggested in Part II that a significant reason for federal prosecutors' reluctance to bringing criminal cases against corporations and corporate executives can be found in DOJ policies relating to salaries and promotions, especially the emphasis on an individual prosecutor's "won-lost " record. The career aspirations of a typical federal prosecutor may

260. Steinzor states that "prosecutors are rarely asked why they fail to pursue white-collar criminal enforcement . . . . and their motivations have never been studied empirically at the federal level." *Id*. at 42. An outside review of decisions to *not* prosecute would inject a measure of fairness into the process.

incline him or her to avoid bringing cases against corporations and other defendants who could be expected to put up a significant defense and, instead, bring cases against street criminals and other individual defendants who, without the help of a public defender, are barely able to put up any defense. This may be a significant part of the problem addressed in this article. We urge the DOJ to review its own personnel policies and those of each U.S. Attorney's office. Policies that focus heavily on won-lost records for purposes of salary and promotion should be abandoned in favor of policies that reward tackling difficult cases, especially cases against corporations that have engaged in intentional or reckless behavior that results in loss of life or serious personal injury. Other things being equal, a "loss" in such as case should be given more credit than a "win" in a case against an individual defendant.

4. Curtail the Use of DPAs

The final reform we propose is for the DOJ to adopt a policy that curtails the use of DPAs generally, especially in cases involving large corporations. Although there are some legitimate uses of PDAs, we suggested in Part II that a PDA in which the defendant denies any wrongdoing, completely lacks the moral condemnation which is an essential part of a criminal conviction, and even when it includes a large monetary fine, fails to provide an adequate deterrent. We propose a policy that normally gives corporate defendants the same limited and unattractive options that are given to individual defendants: plead guilty (perhaps to reduced charges) and accept the punishment offered or plead not guilty and bear the risk of conviction and a much harsher punishment. If a case has unusual circumstances suggesting that a DPA is the best way to resolve a criminal charge, an outside review of the case should be required before the agreement is given final approval.

CONCLUSION

We are aware that those who are concerned with the over-criminalization of American business specifically or American society generally will hesitate to support our proposal, which openly pushes for an additional criminal statute and increased enforcement of all criminal statutes relating to the manufacture and sale of dangerous vehicles. Those who advocate blanket corporate criminal immunity most likely will experience apoplexy well before reaching this portion of the article. In light of the varying degrees of resistance that our proposals will meet, it

should be emphasized that when a manufacturer negligently designs and sells a defective car (or any other consumer product), civil liability under tort law or regulatory action is appropriate. We do not see a moral compulsion in this situation to punish the manufacturer and do not see these actions as particularly blameworthy. The civil tort law and regulatory regimes, while not perfect, are the appropriate way to deal with such cases.

On the other hand, in a situation like the Toyota or GM cases, where a manufacturer discovers a defect in its vehicle that is likely to lead to death or serious bodily injury, and it does lead to death and serious bodily injury, and the manufacturer learns of this and still does nothing—fails to notify the public, fails to recall the car, and lies to the regulatory agency responsible for promoting safety in the industry—its action is worthy of moral condemnation, and criminal liability is appropriate. The problems in the existing criminal law regime render it inadequate for this task. While not every one of these problems has a realistic solution, the reforms we propose, which are aimed at both fixing the glaring gap in federal law and significantly improving its enforcement, will greatly strengthen the law and enable it to respond adequately to the problem of deaths and injuries caused by dangerous vehicles.

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