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## ARTICLES

# THE CRIMINALIZATION OF PRODUCTS LIABILITY: AN INVITATION TO POLITICAL ABUSE, PREEMPTION, AND NON-ENFORCEMENT

*Frank J. Vandall\**

### I. INTRODUCTION

Senator Arlen Specter called a hearing in March 2006, on a proposal that urges the criminalization of products liability for the manufacture of intentionally lethal goods. The hearing before the Senate Judiciary Committee provided an opportunity to comment on the numerous issues raised in the far-reaching proposal.<sup>1</sup> Responding to these issues requires revisiting the foundational question of whether the manufacture and sale of a defective product should be addressed by civil litigation or criminal prosecution. Even if the proposal is not further considered by the Senate in the near future, understanding the issues will assist state legislatures and federal agencies in considering such a proposal. Professor Richard Nagareda analyzed similar concerns ten years ago, when he proposed that tobacco litigation and other mass torts should be removed from the courts and handled exclusively by the legislative or executive branches of government.<sup>2</sup> To plumb the issues raised by Senator Specter and Professor Nagareda, history, economics, and the system of product design and manufacture must be examined. Because Senator Specter argues for a federal act and federal enforcement, his proposal demands consideration of the concepts of preemption, political abuse, and nonenforcement. Fundamental concepts of cause-in-fact and proximate cause must also be considered. After examining these concepts, it should

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1. Professor Vandall was a witness at the hearing on March 10, 2006. *Defective Products: Will Criminal Penalties Ensure Corporate Accountability?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11 (2006) [hereinafter *Defective Products Hearing*]; see also S. 3014, 106th Cong. (2000) (providing that employees of manufacturers, distributors, or retailers who sell defective products that knowingly cause serious bodily injury or death will be subject to fines, or incarceration up to fifteen years).

2. Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1190, 1197 (1998).

be clear that the criminalization of products liability is neither necessary, nor desirable.

## II. TORT OR CRIME?

Senator Specter's proposal to criminalize products liability raises the foundational issue of whether an injurious act should be a tort or a crime. Historically, it appears there was no debate: it was a tort.<sup>3</sup> The reason was because government was not yet fully developed and there were few governmental prosecutors.<sup>4</sup> Later, there appears to have been an overlap; the decision to make a complaint and go forward with a case essentially rested with the victim, and she could choose to bring a tort or prosecute a criminal action.<sup>5</sup> The role of government was not to prosecute the action, but merely to provide a courtroom to hear the case.<sup>6</sup>

This brings us to the fundamental issue of whether the sale of defective products that cause death or serious bodily injury should be classified as a tort or a crime. Because the civilized world has had a few thousand years to consider the core question of whether an injury should be classified as a tort or a crime, one would think the answer would be both readily available and clear. It is neither. Indeed, Professor Richard Epstein wrote on the issue twice and changed his mind in the later article.<sup>7</sup>

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3. See JOHN G. FLEMING, *THE LAW OF TORTS* 2 (4th ed. 1971). In describing the interplay between tort and crime in the early English common law, Fleming notes that no social value attaches to the mere shifting of loss so long as its effect is merely to impoverish one individual for the benefit of another. In order to warrant such a result, the law had to find a cogent reason for subordinating the defendant's interests to the plaintiff's, and inevitably focused attention on the moral quality of the conduct of the individual participants in the accident.

*Id.*; see also Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 12 (1996).

4. See Epstein, *supra* note 3, at 11-12. Furthermore, Professor James Lindgren points out that "[b]ecause most ancient law systems had such a broad civil system available (both in concept and in remedies), they did not need as extensive a criminal system." James Lindgren, *Why the Ancients May Not Have Needed A System of Criminal Law*, 76 B.U. L. REV. 29, 56 (1996).

5. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59-60 (1996) ("Victims could initiate actions of both kinds. According to the lawyers, victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort."); see also PERCY H. WINFIELD, *THE PROVINCE OF THE LAW OF TORT* 190-91 (1931).

6. See WINFIELD, *supra* note 5, at 90-91.

7. Compare Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, in *ASSESSING THE CRIMINAL* 231 (Randy E. Barnett & John Hagel III eds., 1977) (suggesting that criminal sanctions should be confined to intentional wrongs, and tort law

The line between tort and crime is complicated, murky, and ill-defined. Leading scholars go in different directions and argue that the definitions of tort and crime are the same, different, distinct, and overlapping.<sup>8</sup> The keys to the distinction between a tort and a crime are said to be punishment, morals, economics, functionality, and dependent on the reason for the discussion.<sup>9</sup> It is argued that critical to the distinction between tort and crime is whether the defendant has sufficient funds to pay the tort damages, whether all of society is harmed (i.e., there is no specific victim), and whether the victim or the prosecutor brings the action.<sup>10</sup>

Because there is ample scholarship on the question, there is little need to reconsider every facet of the debate here.<sup>11</sup> Instead I will discuss those elements of the argument that seem especially relevant to the questions raised by Senator Specter's and Professor Nagareda's proposals. I argue

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should be used to deal with all other deprivations of a victim's rights), with Epstein, *supra* note 3, at 21 (focusing on how the legal system's balance between tort and crime should be changed in order to create proper incentives, and concluding that there is a need to "shrink both domains simultaneously").

8. See, e.g., CLERK & LINDSELL ON TORTS 6 (Anthony M. Dugdale & Michael A. Jones eds., 19th ed. 2006) ("Little practical difficulty arises in distinguishing tort from criminal law."); KENNY'S OUTLINES OF CRIMINAL LAW 1 (J.W. Cecil Turner ed., 19th ed. 1966) ("There is indeed no fundamental or inherent difference between a crime and a tort."); GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW § 1.9, at 20 (2d ed. 1983) ("To some extent the civil law shares with the criminal law the aim of controlling conduct."); Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 753 (1943) ("A formal view of the rules strongly supports the premise that the two fields are more or less arbitrary divisions of what is actually a single discipline."); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1804 (1992) ("The criminal and civil paradigms attempt to abstract a set of traits from the complex and multifaceted nature of sanctions, in which substantial areas of overlap exist between civil and criminal law. Almost every attribute associated with one paradigm appears in the other.").

9. See SALMOND ON THE LAW OF TORTS § 3, at 8 (R.F.V. Heuston ed., 17th ed. 1977) ("The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law."); Jerome Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 967, 969 (1943) (arguing that moral culpability is a major component of criminal liability); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1194 (1985) (noting the differences between economic analyses of tort law and criminal law).

10. See CLERK & LINDSELL ON TORTS, *supra* note 8, at 6 ("A tort action is instituted by an individual seeking redress for the wrong done to him. A criminal prosecution is normally instituted by the Crown . . ."); see also Epstein, *supra* note 3, at 16 ("The insolvent defendant is beyond the scope of the tort law . . ."); Hall, *supra* note 8, at 757 ("Crimes affect 'the whole community, considered as a community' . . . [C]ivil injuries are 'immaterial to the public.'" (citations omitted)).

11. See, e.g., Angela Ellis-Jones, *Criminal and Civil—Towards a "Unified Field"?*, 16 CAMBRIAN L. REV. 42, 42, 49 (1985) (proposing a unification of criminal law and tort law proceedings); Hall, *supra* note 9, at 967, 969 (arguing that moral culpability is a major component of criminal liability); see also *supra* sources cited notes 7-10.

that the key element in the debate is the question of who is to bring the action: the government, or a private attorney?

A federal criminal action is brought by the United States Attorney General or his delegate (a U.S. attorney).<sup>12</sup> Filing an action is discretionary; the U.S. attorney does not have to bring every claim.<sup>13</sup> The U.S. attorney considers a large 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.<sup>14</sup> For example, assume that hundreds of cases involving terrorists need to be prosecuted; perhaps the U.S. attorney would file those first and permit federal criminal suits against automobile manufacturers for lethal sport utility vehicles (SUVs) to languish on his desk. Or, if a large number of immigration suits cry for prosecution and the U.S. automobile manufacturers were foundering, perhaps the U.S. attorney would engage in long, drawn-out negotiations with the manufacturers rather than prosecute a high-ranking automobile executive for a possible prison sentence.<sup>15</sup> The same could be supposed of the Justice Department's decision to prosecute a pharmaceutical company executive who manufactured and sold a drug knowing it had a substantial risk of serious bodily injury.<sup>16</sup>

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12. 28 U.S.C. § 516 (2000) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

13. See U.S. Attorney's Manual tit. 9-27.220 cmt. (2002) ("Merely because the attorney for the government believes that a person's conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution . . .").

14. For example, in its published strategic plan for fiscal years 2003-2008, the Department of Justice stated that "prosecution of persons suspected of terrorist acts is the top priority of U.S. Attorneys . . ." U.S. DEP'T OF JUSTICE, FISCAL YEARS 2003-2008 STRATEGIC PLAN 2.9, available at <http://www.usdoj.gov/jmd/mps/strategic2003-2008/pdf.html>. Other top priorities of the Department of Justice include the prevention of violence, especially against children, and the prevention of trafficking in drugs and in human beings. See *id.* at 1.3-6, 2.23. While these priorities probably do parallel the concerns of the average American with regard to legal proceedings initiated by the federal government, this does not alleviate the fact that federal prosecutors are a limited resource. See Letter from Representatives Henry A. Waxman and John Conyers, Jr. to Alberto Gonzales, U.S. Attorney Gen. (July 24, 2006), available at <http://oversight.house.gov/documents/20060724095809-74936.pdf>.

15. See U.S. DEP'T OF JUSTICE, *supra* note 14, at 2.70.

16. An example of such a drug would be Oralflex. See Philip Shenon, *Report Says Eli Lilly Failed to Tell of 28 Deaths*, N.Y. TIMES, Aug. 27, 1985, at A16 (noting the Justice Department's decision that "felony prosecution was not warranted"). Oralflex was removed from the market shortly after it was first sold. Morton Mintz, *Drug Firm Was Aware of Deaths, Probe Says*, WASH. POST, Dec. 4, 1982, at A2.

Another critical question is what path a citizen's complaint should follow in order to arrive on the U.S. attorney's desk. Quite simply, how does a citizen initiate a federal criminal prosecution? There is no clear, direct or fail-safe procedure for this step in the criminal process.<sup>17</sup> In the Firestone Tire Senate hearings, for example, the head of the National Highway Traffic Safety Administration (NHTSA), Dr. Sue Bailey, admitted that she learned of the problem of SUV rollovers from television accounts.<sup>18</sup> Later in Dr. Bailey's testimony, it became clear that Ford had no duty to inform the NHTSA that their vehicles were flipping and killing people at a high rate.<sup>19</sup> Thus, the initial suit was brought by a private attorney, not the federal government.

The precise role that politics play in a U.S. attorney's decision to prosecute or handle a case is unclear and presently a subject of intense debate. During the spring of 2007 nine U.S. attorneys were fired. The essence of the debate over this controversy appears to be whether they were fired for prosecuting Republican legislators too vigorously or for failing to prosecute Democratic legislators.<sup>20</sup>

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17. Furthermore, even if a claimant is fortunate enough to bring her claim to the attention of the DOJ, there is no guarantee the U.S. Attorney will choose to prosecute. See *supra* note 13.

18. *Firestone Tire Recall: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 106th Cong. 20 (2000) (prepared statement of Dr. Sue Bailey, administrator, NHTSA) [hereinafter *Firestone Hearings*] ("Upon learning of the KHOU story [regarding the death of two persons in a Ford Explorer rollover], we contacted the station to obtain more details . . .").

19. Dr. Bailey stated:

A number of claims, and several law suits, had been filed against Ford and Firestone before [NHTSA] became aware of any trend that would indicate a potential defect. We received no information about those events from the companies . . . Our current regulations do not require the manufacturers to give us information about claims or litigation.

*Id.* at 21. In 2000, in response to the Ford Explorer cases and other litigation, Congress passed the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, which requires automobile manufacturers to report warning signs of product defects to the NHTSA. Pub. L. No. 106-414, § 3, 114 Stat. 1800, 1808-03 (2000) (codified at 49 U.S.C. § 30166 (2000)). With this early information about defects, NHTSA will be able to act quickly.

20. See Larry Margasak, *Ethics Probes Possible for GOP Over Firings*, ATL. J.-CONST., Mar. 8, 2007, at A10. Alberto Gonzales resigned his post as Attorney General on August 27, 2007. As *The New York Times* reported:

[His] performance as attorney general, especially after the dismissals of seven United States attorneys last year, came under scathing criticism. Many say he leaves a Justice Department that has been tainted by political influence, depleted by the departures of top officials and weakened by sapped morale.

Eric Lichtblau & Scott Shane, *Attorney General Held Firm on War Policies*, N.Y. TIMES, Aug. 28, 2007, at A1.

There are two views on the controversy over whether the decision to prosecute is political. One view is that politics play no role in the decision by a U.S. attorney to prosecute a case—that politics are left at the door to the Justice Department.<sup>21</sup> This is the view of former Attorney General Griffin Bell and fired U.S. attorney David Iglesias.<sup>22</sup> The other view is that the distinction between “political” and “performance” is “largely artificial.”<sup>23</sup> Quite simply, a U.S. attorney can be fired for poor performance or for misreading the direction the political wind is blowing. This is apparently the view taken by a former high-ranking member of Attorney General Alberto Gonzales’ staff, D. Kyle Sampson, in his recent testimony before the Senate Judiciary Committee.<sup>24</sup> All agree, however, that the U.S. attorneys are employed at the discretion of the President and can be terminated at any moment.<sup>25</sup>

The truth probably lies somewhere between these two views. A U.S. attorney likely “keeps her ear to the ground” and reads the newspaper. She no doubt considers the political views of the President and the Attorney General to some extent. The recent debate over the firing of nine U.S. attorneys supports my argument that prosecuting corporate executives for manufacturing and selling defective, deadly products would likely be far down the list of priorities for a U.S. attorney because

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21. See Amy Goldstein & Dan Eggen, *Prosecutor Posts Go to Bush Insiders*, WASH. POST, Apr. 1, 2007, at A1 (quoting Professor James Eisenstein as having said that “historically, federal prosecutors have regarded operating ‘in a politically neutral, nonpartisan manner’ as a cornerstone of their roles”). As former U.S. attorney Kent Alexander stated, “[o]nce you g[e]t into office . . . you shed partisanship.” Jeffrey Scott, *Dismissals of U.S. Attorneys “Very Serious,”* ATL. J.-CONST., Mar. 11, 2007, at A5.

22. See Matthew Dolan, *Politics Skirted to Pick Nominee*, BALT. SUN, June 5, 2005, at 1C; Scott, *supra* note 21. In a television interview, Iglesias said, “we have complete discretion. It’s up to the United States attorney to decide which cases to prosecute, which cases not to prosecute and when to time the indictment. It’s not a prerogative of Congress or a special interest group or political party.” *CNN Newsroom* (CNN television broadcast, Mar. 29, 2007); see also Abbe David Lowell, *The Right Way to Manage U.S. Attorneys*, WASH. POST, Mar. 10, 2007, at A19.

23. See Dan Eggen & Paul Kane, *Ex-Aide Contradicts Gonzales on Firings*, WASH. POST, Mar. 30, 2007, at A1 (quoting D. Kyle Sampson, former chief of staff to Mr. Gonzales). *The Wall Street Journal* endorses the second view:

Thus did the entirely legitimate dismissal of nine U.S. Attorneys blossom into a “scandal” without a crime. Those Attorneys serve at the pleasure of the President, and the Administration should have defended the firings as a proper exercise of Presidential political authority from the moment they were questioned. Instead, Mr. Gonzales allowed assorted Justice officials to claim such other reasons as competence for the dismissals, giving Democrats the opening they needed to charge a “coverup” and question his “credibility.”

Opinion, *After AG Piñata*, WALL ST. J., Aug. 28, 2007, at A12.

24. See Eggen & Kane, *supra* note 23.

25. See *After AG Piñata*, *supra* note 23.

of her sensitivity to the President's agenda. I assume, in arguing this, that the President supports economic growth and corporate expansion.<sup>26</sup>

Under Senator Specter's proposal, if you have suffered serious bodily injury from a defective product, whom do you call? With a federal criminal prosecution, it is unclear whom to contact, perhaps a Representative, a Senator, the Attorney General, or a U.S. attorney. What is your motivation? What are the incentives? If the government brings suit, you might wonder how it will help you, the victim. At the end of a long criminal prosecution, does either the defendant or the government pay your medical bills, buy you a replacement automobile, or cover your lost wages? The answer is no. Then why should a citizen take the time and effort to initiate a prosecution and perhaps end up in the adverse glare of the media spotlight?

Criminal suits against product manufacturers for defective products must be contrasted with civil suits. With civil suits the process is clear, having been refined over many years. A person who has suffered serious bodily injury merely calls an attorney.<sup>27</sup> If that attorney is not experienced in bringing products suits, she will refer the case to someone who has such experience. If either attorney drops the ball, he can be sued for malpractice.<sup>28</sup> Indeed, the attorney who takes the case has an obligation to zealously represent his client.<sup>29</sup> The attorney who agrees to evaluate the case will gather the facts and research the law in deciding whether there is a case worth filing. Because law is a business, the civil attorney must decide whether the amount to be recovered exceeds the costs he will expend in bringing the specific case, including the potential costs of appeals. These costs can be enormous. In the famous cigarette case, *Cipollone v. Liggett Group, Inc.*,<sup>30</sup> Rose Cipollone argued that she was defrauded by tobacco advertisements.<sup>31</sup> The case involved numerous trips to the federal courts of appeals and two forays to the U.S. Supreme Court. As years passed, Rose died, her husband subsequently died, and

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26. See, e.g., Philip Shenon, *Senate Approves Farm Subsidy Bill President Backed*, N.Y. TIMES, Aug. 4, 2001, at A1 (reporting that Sen. Daschle criticized President Bush as willing to expand governmental programs only for corporate benefit); Elizabeth Shogren, *Warming Up to Reducing Greenhouse Gases*, L.A. TIMES, July 30, 2003, at A15 (reporting President Bush's opposition to an emission reduction bill because it would stifle corporate expansion).

27. Frank J. Vandall, *Our Product Liability System: An Efficient Solution to a Complex Problem*, 64 DENV. U. L. REV. 703, 710 (1988).

28. See 4 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 30:17 (2007).

29. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. (2002).

30. 505 U.S. 504 (1992).

31. Henry J. Reske, *Cigarette Suit Dropped*, A.B.A. J., Feb. 1993, at 30.



their son finally lost interest in the case.<sup>32</sup> In an earlier article, I estimated that the recoverable damages in a products case must exceed a large threshold amount (perhaps \$100,000) before the plaintiff's attorney will agree to take the case.<sup>33</sup>

Most products cases are taken on a contingent fee basis. This means that if the case is lost, the attorney receives nothing. About seventy percent of products cases that go to trial are lost.<sup>34</sup> In the *Cipollone* case, the plaintiff's attorney spent and failed to recover an estimated six million dollars.<sup>35</sup> In contrast to Professor Nagareda's argument that attorneys engage in witch-hunts and are not politically accountable,<sup>36</sup> they perform an efficient and socially valuable service in sifting out bad cases. Private attorneys are indirectly politically accountable because their cases are reviewed by judges who are elected or appointed. Products attorneys earn their fees by researching the facts and the law, and then trying and appealing their cases.<sup>37</sup> These functions save on costs that would otherwise be borne by the government in state and federal prosecutions.

### III. AN INVITATION TO POLITICAL ABUSE

The main distinction between the criminal case and the civil case is that with a criminal case, the facts must fit within the political criteria expressly or impliedly set out by the Attorney General for prosecution.<sup>38</sup> The Attorney General is appointed and selected because he will

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32. *Id.*

33. See Frank J. Vandall, *Constricting Products Liability: Reforms in Theory and Procedure*, 48 VILL. L. REV. 843, 843 (2003).

34. The Bureau of Justice Statistics reported that in 1996-1997, plaintiffs prevailed in federal products liability trials twenty-nine percent of the time. MARIKA F.X. LITRAS & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, FEDERAL TORT TRIALS AND VERDICTS, 1996-97, at 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/abstract/fttv97.htm>. In 2002-2003, plaintiffs won thirty-four percent of their products cases. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, FEDERAL TORT TRIALS AND VERDICTS, 2002-03, at 1 (2005), available at <http://www.ojp.usdoj.gov/bjs/abstract/fttv03.htm>.

35. See Reske, *supra* note 31.

36. See Nagareda, *supra* note 2, at 1185-86.

37. See generally Vandall, *supra* note 27.

38. The ultimate decision to bring a federal action rests with the attorney general. See *supra* notes 13-14. Much discussion around the time of the confirmation of Attorney General Alberto Gonzales focused on the United States' treatment of detainees at Abu Ghraib prison in Iraq and at Guantanamo Bay in Cuba. See Editorial, *The Wrong Attorney General*, N.Y. TIMES, Jan. 26, 2005, at A16. With these concerns in mind at the time of his confirmation, there is little doubt that civil actions against Big Tobacco were far from being at the top of Mr. Gonzales' list of priorities.

implement the agenda of the President.<sup>39</sup> The clearest example of this was when President Kennedy selected his brother Robert Kennedy to be his Attorney General.<sup>40</sup> Obviously, the unexpressed criteria for selecting and prosecuting a federal case shift as Presidents and Attorneys General come and go. For the victim, this means that whether his case is selected for prosecution may depend on who happens to be the president and the attorney general at the particular time. For instance, several years ago, federal prosecutions tended to focus on drug enforcement; now the prosecutions tend to focus on white-collar crimes.<sup>41</sup> Under Senator Specter's proposal, the political selection process may leave the injured and deserving products victim with no federal champion, merely because she is on the wrong side of the political scales.

In contrast, under the civil system, if a victim has an economically viable products case, an attorney will take the case. Perhaps this stark reality—you can usually find an attorney to take a profitable case—is the fundamental reason for tort reform: products cases are brought by private attorneys regardless of politics or the political importance of the product or the seller.<sup>42</sup> If there is money to be made, a products suit will likely be brought, although politics may still rear its head after the suit is filed. Congress smothered a large portion of the gun litigation when it began to appear that a victorious suit might be at hand, for example.<sup>43</sup> In

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39. So strong were Mr. Gonzales' ties to President Bush, that New York Senator Charles Schumer was inclined to suggest that Mr. Gonzales was "too much of a 'blind loyalist'" to the President to impartially hold the office of Attorney General. Eric Lichtblau, *Senate Panel Approves Gonzales on a Party-Line Vote*, N.Y. TIMES, Jan. 27, 2005, at A21.

40. However, the current Administration has come under fire for nepotism in political appointments as well. See Helen Thomas, *Bush Keeps It All in the Family*, SEATTLE POST-INTELLIGENCER, Aug. 17, 2001, at B6 ("It's true that President Kennedy appointed his brother Robert Kennedy as attorney general in his administration. But the New Frontier didn't come close to the Bush administration's family feeling.").

41. Expenditures related to the investigation and prosecution of white-collar crimes increased fivefold from 1995 to 2001, while expenditures to aid investigations of drug crimes has remained relatively constant. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 16 tbl. 1.13. Regardless of this increase, the federal government still spends a large portion of its criminal investigation budget on drug enforcement. See *id.*

42. See Nagareda, *supra* note 2, at 1185 n.258 ("[T]he legislative process generally tends to favor the interests of narrow, concentrated groups . . . . [W]hen one considers the present mass tort litigation system . . . deliberation in the public realm holds comparatively greater prospects for political accountability."); see also *id.* at 1190 ("[T]he judiciary is not politically accountable . . .").

43. In 2005, Congress enacted a new statute designed to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products . . . when the product functioned as designed and intended." Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2, 119 Stat.

addition, Congress dragged its feet for almost fifty years, while four hundred thousand cigarette smokers died each year.<sup>44</sup> The multi-billion dollar tobacco settlement in 1998 resulted from the Mississippi Attorney General's decision to initiate suit, not from Congress making "intentional death by tobacco" a crime (it still is not a crime to manufacture and sell tobacco, which carries a substantial risk of death from cancer).<sup>45</sup> Indeed, Congress acted swiftly following the tobacco settlement to encourage and financially support tobacco farmers.<sup>46</sup> Professor Nagareda ignored these realities and praised tobacco for calming frayed nerves.<sup>47</sup> He failed to footnote the fact that smokers had frayed nerves because they were defrauded by the tobacco manufacturers and quickly became addicted to nicotine.

Professor Nagareda's theme is that the tobacco question and other class action products cases should have been handled by Congress rather than through lawsuits—settlement negotiations—brought by entrepreneurial attorneys.<sup>48</sup> He argues that: "Consideration by political bodies is vastly superior to lawyer- or court-centered mechanisms such as reorganizations in bankruptcy, both to facilitate public debate for its own sake and as a vehicle for appropriate treatment of present-day plaintiffs and prospective defendants."<sup>49</sup> Thus, in Professor Nagareda's view:

[A]ny solution to mass tort disputes that entails *both* measures that concern liability for past misdeeds and commitments with regard to future regulation must necessarily entail political action in some form. It is only the political process at the federal level—not entrepreneurial litigators, state attorneys

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2095, 2095 (2005) (codified 15 U.S.C.A. § 7901(b)(1)(West Supp. 2007)). The statute bars most civil proceedings against gun manufacturers and sellers for damages suffered from misuse of their products. 15 U.S.C.A. §§ 7901-7903.

44. See Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 405 n.1 (1991).

45. See Frank J. Vandall, *The Legal Theory and the Visionaries That Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473, 478-79 (1998); see also Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, STAN. L. & POL'Y REV., Winter 1997, at 63, 63-64.

46. In 2000, just two years after the proposal of the Master Settlement Agreement (MSA) between the States and Big Tobacco, Congress passed a bill allocating \$340 million to a fund designed to bail out tobacco farmers whose product had experienced a decline in demand due to the MSA's terms. See Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, § 204(b), 114 Stat. 358, 401-04.

47. Nagareda, *supra* note 2, at 1151 (discussing the therapeutic qualities of cigarettes and highlighting Big Tobacco's efforts to reduce the harmful effects of smoking).

48. See *id.* at 1127, 1153, 1167.

49. *Id.* at 1127.

general, or public health advocates—that ultimately can make commitments about the content of regulatory statutes.<sup>50</sup>

These views ignore the reality that Congress preferred to support the tobacco industry, as well as ignore the millions of tobacco fatalities from approximately 1952 (when tobacco litigation began) to 1998 (when the Phillip Morris tobacco settlement was reached).<sup>51</sup> Congress' first concern during the tobacco settlement of 1998 was to "rehabilitate" the tobacco industry, not punish or deter it.<sup>52</sup> Professor Nagareda's solution is to bury injured consumers in the "red tape" and ambiguity of an agency. In addition, confining an issue such as guns or highway safety to an agency often leads to silence and inaction. In contrast, lawsuits produce thousands of pages of information, heated debates, and justice. The work of the courts is generally fully transparent.

#### IV. PREEMPTION

The concept of preemption has its foundation in the Constitution, which provides that whenever there is a substantial conflict, federal law is superior to state law.<sup>53</sup> As the Supreme Court stated:

Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Thus, since our decision in *McCulloch v. Maryland*, it has been settled that state law that conflicts with federal law is "without effect." Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." Accordingly, "[t]he purpose of Congress is the ultimate touchstone" of pre-emption analysis.

Congress' intent may be "explicitly stated in a statute's language or implicitly contained in its structure and purpose."

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50. *Id.* at 1190.

51. The Centers for Disease Control and Prevention estimates that tobacco causes approximately 438,000 deaths per year in the United States. Centers for Disease Control and Prevention, Fact Sheet: Tobacco Related Mortality, [http://www.cdc.gov/tobacco/factsheets/Tobacco\\_Related\\_Mortality\\_factsheet.htm](http://www.cdc.gov/tobacco/factsheets/Tobacco_Related_Mortality_factsheet.htm) (last visited Jan. 2, 2007); see also Vandall, *supra* note 45, at 473 (noting that tobacco litigation began in the 1950s; Philip Morris USA, Legislation and Regulation: Tobacco Settlement Agreements, [http://www.philipmorrisusa.com/en/legislation\\_regulation/tsa.asp](http://www.philipmorrisusa.com/en/legislation_regulation/tsa.asp) (last visited Jan. 24, 2008) (confirming that the tobacco settlement was reached in 1998).

52. Nagareda, *supra* note 2, at 1189 ("The measures now being debated, in practical effect, would seek to rehabilitate the tobacco industry, but would leave adult consumers free to choose its deadly wares.").

53. U.S. CONST. art VI, cl. 2.

In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>54</sup>

Expansion of the preemption concept has been driven by policy concerns and it has rapidly evolved over the last several years. Today it can be argued that the federal courts use preemption to control and limit state authority.<sup>55</sup> Preemption is important to our inquiry because if Senator Specter’s proposal is enacted, a federal court could hold that the new statute preempts all state products liability law.

The three most important cases on preemption in the context of products liability are *Cipollone v. Liggett Group, Inc.*,<sup>56</sup> a tobacco case, *Geier v. American Honda Motor Co.*,<sup>57</sup> an automobile air bag case, and *Medtronic, Inc. v. Lohr*,<sup>58</sup> a pacemaker case. In *Cipollone*, the Supreme Court found express preemption of several state causes of action.<sup>59</sup> However, a close reading of the case and the relevant statutes suggest that the preemption was implied rather than express.<sup>60</sup> If the Supreme Court can imply what is not there, then a federal court could easily find that a criminal statute under Senator Specter’s proposal occupies the field and preempts the parallel state products liability law.

In *Geier*, the federal statute at issue contained a savings clause, which provided that “‘compliance with’ a federal safety standard ‘does not exempt any person from any liability under common law.’”<sup>61</sup> With such an obvious “no preemption” clause, the intent of Congress was clear. Nevertheless, the Supreme Court ignored the savings clause and found that the allegedly conflicting state common law was preempted.<sup>62</sup>

Justice Stevens presented the *Medtronics* facts as follows:

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54. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (citations omitted) (alterations in original).

55. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313-24 (2004) (discussing the Supreme Court’s use of preemption to limit state power).

56. 505 U.S. 504.

57. 529 U.S. 861 (2000).

58. 518 U.S. 470 (1996).

59. *Cipollone*, 505 U.S. at 517, 530-31.

60. The statute does not contain a specific list of preempted areas of law. Rather, the Court drew from the statutory language to formulate a test for preemption, and then applied the test to each claim at issue. See *id.* at 523-30.

61. *Geier*, 529 U.S. at 868 (quoting 15 U.S.C. § 1397(k) (1988)) (alteration in original).

62. *Id.* at 886. Four Justices dissented. *Id.* (Stevens, J. dissenting).

Congress enacted the Medical Device Amendments of 1976, in the words of the statute's preamble, "to provide for the safety and effectiveness of medical devices intended for human use." The question presented is whether that statute pre-empts a state common-law negligence action against the manufacturer of an allegedly defective medical device. Specifically, we must consider whether Lora Lohr, who was injured when her pacemaker failed, may rely on Florida common law to recover damages from Medtronic, Inc., the manufacturer of the device.<sup>63</sup>

The court of appeals first held that Lohr's negligent manufacture and failure to warn claims were preempted, but found no preemption of Lohr's negligent design claim.<sup>64</sup> The Supreme Court granted certiorari because the courts of appeals were divided on the question.<sup>65</sup> The Supreme Court held that none of Lohr's claims were preempted, although the statute did not contain a non-preemption provision.<sup>66</sup>

There is no "black letter" rule of preemption. It is used by the federal courts to decide whether a state case of action should be permitted. The suggested guideline for preemption is to inquire whether a common law action actually conflicts with a federal statute or regulation.<sup>67</sup> Therefore, with Senator Specter's criminal products statute directly overlapping a state defective products case, it would be entirely possible for a federal court to hold that the federal act preempts the state common law products liability suit as in *Cipollone* and *Geier*.

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63. *Medtronic*, 518 U.S. at 474 (citation omitted). The Court continued:

Cross-petitioner Lora Lohr is dependant on pacemaker technology for the proper functioning of her heart. In 1987 she was implanted with a Medtronic pacemaker equipped with one of the company's Model 4011 pacemaker leads. On December 30, 1990, the pacemaker failed, allegedly resulting in a "complete heart block" that required emergency surgery. According to her physician, a defect in the lead was the likely cause of the failure.

In 1993 Lohr and her husband filed this action in a Florida state court. Their complaint contained both a negligence count and a strict-liability count. The negligence count alleged a breach of Medtronic's "duty to use reasonable care in the design, manufacture, assembly, and sale of the subject pacemaker" in several respects, including the use of defective materials in the lead and a failure to warn or properly instruct the plaintiff or her physicians of the tendency of the pacemaker to fail, despite knowledge of other earlier failures. The strict-liability count alleged that the device was in a defective condition and unreasonably dangerous to foreseeable users at the time of its sale.

*Id.* at 480-81 (citation omitted).

64. *Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1338-39 (11th Cir. 1995), *aff'd in part and rev'd in part*, 518 U.S. 470.

65. *Medtronic*, 518 U.S. at 484.

66. *Id.* at 503.

67. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

The worst result would be for the bill to be enacted but not enforced. A federal court could, nevertheless, hold that the unenforced act preempts any state products liability cause of action.<sup>68</sup> The Trojan horse analogy comes to mind because safety advocates will likely embrace the theory of Senator Specter's proposal, only to later realize that preemption has taken all of what they hold dear: state statutes and common law products liability causes of action, including punitive damages. In addition, the corporate defendant would argue that fines and incarceration, under Senator Specter's proposal, would preempt punitive damages.

#### V. THE POINT OF OVERLAP BETWEEN TORT AND CRIME: PUNITIVE DAMAGES

The careful work of scholars in drawing the line between criminal and civil actions unwinds when they broach the subject of punitive damages as compared with criminal fines.<sup>69</sup> Nowhere is the overlap between the concepts of tort and crime more clear. Punitive damages are not intended to compensate the victim; rather their primary purpose is to punish the defendant.<sup>70</sup> Punishment, of course, is the primary goal of the criminal law as well.<sup>71</sup> Thus the overlap.

Federal statutes provide for fines as an additional form of punishment.<sup>72</sup> These fines are paid to the government, not to the individual victim.<sup>73</sup> Punitive damages, by contrast, generally go to the victim.<sup>74</sup> Georgia is a notable exception: seventy-five percent of a punitive damages award in products liability cases goes to the state and

68. See discussion *infra* Part VI (considering the non-enforcement issue).

69. See Epstein, *supra* note 3, at 16; see also Mann, *supra* note 8, at 1861-62 (suggesting that punitive monetary sanctions should be used to establish a "middleground between civil and criminal law").

70. PROSSER AND KEETON ON THE LAW OF TORTS 9 (W. Page Keeton et al. eds., 5th ed. 1984) ("[Punitive] damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant . . .").

71. *Id.* at 7.

72. See, e.g., 18 U.S.C. § 3551(b)(2) (2000) (authorizing federal courts to impose fines as punishment for violating the criminal code).

73. See *id.* § 3611 (providing procedures for payment to the United States of fines based on criminal violations).

74. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 70, at 9; see also Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957). Beginning in the late 1980's however, several states began to adopt so-called "split recovery" statutes, which provide that a portion of damages awarded in a civil action be given to the state. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375-77 (2003).

the remainder goes to the victim.<sup>75</sup> This is additional evidence of the foundational overlap between tort and criminal law.

Professor Epstein argues:

The injection of punitive damages into civil actions once again undermines the strict separation contemplated by classical views of the subject. Many punitive damage cases involve affront and dignitary interests, to which the criminal law pays relatively little regard. In other instances punitive damages work well . . . against institutional defendants where the solvency risk is small, so that public resources can be directed to those cases where private prosecution is not possible. The insolvent defendant is beyond the scope of the tort law in a way that the institutional . . . defendant is not.<sup>76</sup>

Professor Nagareda accepts that punitive damages are the core of the overlap between the civil and the criminal systems:

As conventionally conceived, criminal sanctions differ in form from tort remedies. As John Coffee aptly phrases the distinction, criminal law “prohibits,” whereas tort law “prices.” Indeed, the stigma associated with imprisonment, as distinguished from the payment of damages, is a significant justification for the greater procedural protections available to criminal defendants. A criminal sentence discharges the defendant’s figurative “debt to society” rather than a debt to a particular individual in the form of a civil judgment. The victims of crime get the psychological satisfaction of knowing that the law will punish the person who harmed them, or who attempted to do so, whereas the victims of torts get cash. Even the feature of the current tort system that most clearly embodies goals of retribution akin to those of criminal law—the availability of punitive damages—comes in the form of a transfer payment from defendants to plaintiffs. Conversely, the feature of the criminal system that most resembles the damage remedy of tort—the imposition of criminal fines—involves the taking of money from the defendant. In the criminal system, fines generally do not go into the coffers of crime victims.<sup>77</sup>

Professor Nagareda reveals his pro-corporate bias by embracing the word “coffers.”<sup>78</sup> Victims are injured or dead. They lack “coffers.” Damages go to support a family or pay medical bills and other expenses such as college tuition for surviving children. Professor Nagareda’s

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75. GA. CODE ANN. § 51-12-5.1(e)(2) (2000).

76. Epstein, *supra* note 3, at 16 (footnote omitted).

77. Nagareda, *supra* note 2, at 1175-76 (footnotes omitted).

78. *See id.* at 1176.



theme is that civil suits with punitive damages are ill-suited for handling large social policy issues such as those involved in tobacco litigation.<sup>79</sup> For him, the political arena is the only solution.<sup>80</sup> Again, he ignores the fact that Congress has avoided taking meaningful steps to decrease tobacco-caused death and illness. Congress has had more than fifty years to develop a meaningful approach for dealing with the four hundred thousand tobacco deaths per year.<sup>81</sup> They have done little to punish the tobacco industry for knowingly manufacturing and selling a product that causes hundreds of thousands of deaths each year.<sup>82</sup> Indeed, immediately following the tobacco settlement, Congress perversely passed a bill that supported the tobacco farmers.<sup>83</sup> Perhaps Professor Nagareda's underlying theme is that nothing should be done in regard to critical social problems, such as tobacco and handguns. Congress said as much in its ban on handgun litigation.<sup>84</sup>

Fines and punitive damages stand in stark contrast to the moral basis of the criminal law. Professor Robinson argues that criminal law exists primarily to provide moral condemnation of the actor's conduct.<sup>85</sup> He concludes:

It does not logically follow . . . that even if the [criminal-civil] distinction was created for the reasons suggested—to capture the community's felt need to do more than just compensate for a loss, its need to condemn and to punish—that such a ground for the distinction should be maintained. Indeed, the trend of the last few decades toward muddling the traditional criminal-civil distinction suggests that the legislatures and courts that have contributed to that muddling think that the original form

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79. *See id.* at 1196-97.

80. *See id.* at 1197.

81. *See* Vandall, *supra* note 45, at 473 (noting that tobacco litigation began in the 1950s); *see also supra* note 51.

82. *See* Vandall, *supra* note 45, at 483-84 (observing that cigarette manufacturers have received favorable treatment in Congress because the industry is adept at lobbying). The warnings required on tobacco products are an exception; Congress enacted the Federal Cigarette Labeling and Advertising Act in 1965 following a report released by the Surgeon General stating that cigarette smoke is a health hazard. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-41 (2000)); James C. Thornton, Comment, *The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers*, 76 KY. L.J. 569, 574-75 (1988).

83. *See* Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, § 204(b), 114 Stat. 358, 401-04.

84. *See supra* note 43.

85. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 205-07 (1996).

of the distinction is not useful or, in any case, that there is little justification for maintaining the distinction.<sup>86</sup>

Senator Specter's proposal follows the trend noted by Professor Robinson, of further muddying the distinction between the criminal and the civil systems, by proposing criminal sanctions for products liability violations.<sup>87</sup> Punitive damages have been in existence in the United States for more than a century.<sup>88</sup> Attorneys and courts have developed a tradition for dealing with them. Although juries may award large amounts (for example, \$100 million in the famous Ford Pinto case), huge punitive damage awards are usually later dramatically reduced (\$3.5 million in the Ford Pinto case).<sup>89</sup> Large punitive awards attract the headlines and the attention of the corporations in products cases, but they are not of much importance to the corporate bottom line.<sup>90</sup> Punitive awards are rare and generally small.<sup>91</sup>

In contrast to punitive damages, the concept of criminal fines for individuals who sell defective and lethal products is new and untested.

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86. *Id.* at 210.

87. See S. 3014, 106th Cong. § (2)(b) (2000).

88. See *Scott v. Donald*, 165 U.S. 58, 86 (1896) (discussing exemplary damages), cited in PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 70, at 9 n.21.

89. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1017 (1991); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426-29 (2003) (holding that a \$145 million punitive award on a \$1 million compensatory judgment was a violation of due process); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (noting that "grossly excessive" punitive awards are subject to judicial review). The *State Farm* Court noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *State Farm*, 538 U.S. at 425; see also *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-69 (3d Cir. 1999) (reducing a \$50 million punitive award to \$1 million); *Johnson v. Ford Motor Co.*, 37 Cal. Rptr. 3d 283, 294 (Cal. Ct. App. 2005) (reducing a \$10 million punitive award to \$175,000); Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 64 n.17 (1999) (citing *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (reducing a \$200,000 punitive award on \$1 nominal damages to \$75,000)).

90. See David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1294-95 (1976). Professor Owen notes that, in some instances, manufacturers will choose to forego adopting a safety measure and simply absorb the costs associated with litigating any injury claims. *Id.*

91. The Bureau of Justice Statistics reports that in 1996, punitive damages were awarded in about three percent of tort trials with a plaintiff winner in the nation's seventy-five largest counties, and that the median punitive award was \$38,000. MARIKA F.X. LITRAS ET AL., U.S. DEP'T OF JUSTICE, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996, at 7 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf>. In 144 products liability trials in 2001, only three victorious plaintiffs were awarded punitive damages. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 3 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf>.

Large fines would attract media attention, but fines are often small.<sup>92</sup> Small fines would not likely overcome the economic incentives to make profits on potentially harmful products such as drugs, SUVs, cars, and implantable defibrillators. Of great importance is recognizing that fines and imprisonment do nothing to assist the injured victim. Therefore, punitive damages and criminal fines are not interchangeable. Arguably, compensable damages, pointedly criticized by Professor Nagareda, are never sufficient.<sup>93</sup> This is because the attorneys' fees are deducted from the tort recovery.<sup>94</sup> Because of this deficiency, punitive awards are needed to fully compensate the victim and to deter the corporate actor.

#### VI. ISSUES RAISED BY THE POTENTIAL NONENFORCEMENT OF THE PROPOSED STATUTE

A possible result would be for Senator Specter's proposal to be passed and not enforced. There are numerous reasons why the act may not be fully enforced. For instance, because prosecutor's offices are underfunded and short on personnel, they must be selective in their decisions to pursue enforcement.<sup>95</sup> Prosecuting corporate executives is complex, expensive, and time consuming; therefore, there would be a strong likelihood that these criminal suits, especially low-profile ones, would not be brought.<sup>96</sup> Or, low-level employees would be prosecuted, but not high-ranking CEOs, and the corporation would view such a

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92. In evaluating whether a \$2 million punitive award was excessive in *Gore*, the Court observed that the maximum civil fine for the misconduct was only \$2,000 in the jurisdiction, and not more than \$10,000 in other jurisdictions. *Gore*, 517 U.S. at 583-84.

93. See Nagareda, *supra* note 2, at 1126, 1174 (“[I]t is eminently sensible to place a priority upon prospective measures to reduce smoking over payment to present-day plaintiffs.”); see also Epstein, *supra* note 3, at 16 (“[W]hy not enjoin actions that result in death or serious injury, especially because no amount of damages can offer full compensation?”); Owen, *supra* note 90, at 1323 (“[C]ompensatory damages alone in cases of flagrant misbehavior inadequately satisfy the retributive needs of the injured consumer and society.”).

94. It is quite common for a plaintiff's attorney to earn a contingent fee equal to one-third of the compensation paid to the plaintiff. See JAMES S. KAKALIK & NICHOLAS M. PACE, *RAND CORP., COSTS AND COMPENSATION PAID IN TORT LITIGATION* 37-38 (1986). Thus, a plaintiff will often receive only sixty-six percent of total compensatory damages. In an award of purely compensatory damages, the victim will therefore receive at most two-thirds of the amount that was judicially determined would make her whole.

95. In July of 2006, Representatives Waxman and Conyers sent a letter to Attorney General Alberto Gonzales detailing the shortage of attorneys in various U.S. attorneys' offices throughout the country. The Congressmen suggested that this shortage has resulted in some cases worthy of prosecution being overlooked due to lack of resources. See Letter from Representatives Henry A. Waxman and John Conyers, Jr., *supra* note 14.

96. See *id.* (noting that “lessor felonies . . . are much less likely to be prosecuted than they were previously” and that “prosecutors are tempted to compromise on plea bargains in cases that would be expensive and time-consuming to take to trial”).

minor expense as merely a cost of doing business.<sup>97</sup> The value in prosecuting rank-and-file employees is that they will agree to testify against their superiors as part of the plea-negotiation process. This may bolster executive-level prosecutions in some cases.

Approximately twenty years ago, it could be said that the Attorney General was relatively adverse to prosecuting corporate executives.<sup>98</sup> Beginning with the Clinton administration, however, white-collar prosecutions have been aggressively pursued.<sup>99</sup> Thus, more is being done at the prosecutorial level.

Even if Senator Specter's proposal is not enforced, the courts might hold that the intent of Congress, in passing such an act, was to preempt all state products liability laws. Safety advocates will likely embrace the theory of the bill without realizing that it may preempt state statutes and common law products liability actions. To avoid this unintended result, the bill must clearly state that it is not intended to preempt state products liability statutes, regulations, common law actions, or punitive damages rules. Yet even such a clear disclaimer may not be sufficient to prevent preemption.<sup>100</sup>

The record of enforcement of federal laws against lethal products is bleak. The Consumer Products Safety Commission (CPSC) has been

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97. On the relevant factors in deciding whether to prosecute management or rank-and-file employees, see Memorandum from Deputy Attorney Gen. to All Component Heads and U.S. Attorneys, *Bringing Criminal Charges Against Corporations 2-3* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>. The memorandum explains that "[a]lthough acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged." *Id.* at 5.

98. See *supra* note 41 and accompanying text. In addition, the trend during the administrations of Presidents Ronald Reagan and George H.W. Bush saw a definitive focus on the investigation and prosecution of drug-related offenses, many times with the result of compromising measures taken to combat other varieties of crime. See John A. Martin, *Drugs, Crime, and Urban Trial Court Management: The Unintended Consequences of the War on Drugs*, 8 YALE L. & POL. REV. 117, 134-35 (1990) ("One result of changing political priorities and public perceptions is that routine, run-of-the-mill crimes handled by the justice system in the past are being replaced by more 'serious' drug cases. . . . [P]ossible negative impacts [of the war on drugs] on the justice system include . . . the movement of resources to drug cases and away from other court priorities such as the processing of more serious felony, civil, and domestic cases . . ."); see also Frank J. Vandall, *Criminal Prosecution of Corporations for Defective Products*, 12 INT'L LEGAL PRAC. 66, 67 (1987) (discussing why individual corporate executives in the Pinto cases were not prosecuted).

99. See *supra* note 41.

100. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (holding that a federal automobile safety statute that made installing air bags discretionary for manufacturers preempted a state law tort claim alleging defective design for failure to install air bags, even though the federal statute included both a savings clause and an express preemption provision).

guttled by Congress, which refused to allow the CPSC to deal with tobacco or guns, perhaps the most lethal products available to consumers.<sup>101</sup> Congress has forbidden the Centers for Disease Control from conducting meaningful research on preventing firearm related injuries.<sup>102</sup> NHTSA learned about the Ford Explorer rollovers and resulting deaths from the filing of civil products liability suits, not from a mandatory reporting provision.<sup>103</sup> Indeed, the Administrator of NHTSA said that Ford and Firestone did not have a duty to inform NHTSA of SUV safety issues and crashes.<sup>104</sup> If there are going to be criminal prosecutions under Senator Specter's proposal, a new agency is needed and it must have authority over all products, including vehicles, airplanes, pharmaceuticals, guns, and tobacco. To be effective, this new agency would have to impose a duty on manufacturers and sellers to keep track of and to report serious problems with their products. This must include highly dangerous products, such as tobacco and guns. Victims and their attorneys must be authorized and encouraged to file complaints with the new agency. At present there is little incentive for injured consumers to complain to a federal agency.<sup>105</sup>

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101. Federal law defines "consumer product" as not including "tobacco and tobacco products," nor "any article which . . . would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986." 15 U.S.C. § 2052(a)(1)(B), (E) (2000). Section 4181 of the Internal Revenue Code imposes taxes on pistols, revolvers, firearms, and ammunition. 26 U.S.C. § 4181 (2000).

102. See Jeffrey L. Katz, *GOP Dulls Its Cutting Edge, But Democrats Unsatisfied*, 54 CONG. Q. 1675, 1676 (1996). In 1996, the House Appropriations Committee cut \$2.6 million for a CDC research program on injury prevention related to firearm use. Jeffrey L. Katz, *After Noisy Debate, Panel Keeps Family Planning Services Law*, 54 CONG. Q. 1874, 1876 (1996). The committee report "explicitly prohibit[ed] the CDC from promoting gun control." *Id.*

103. See *supra* notes 18-19; see also Manuel A. Gomez, *Like Migratory Birds: Latin American Claimants in U.S. Courts and the Ford-Firestone Rollover Litigation*, 11 SW. J.L. & TRADE AM. 281, 285-89 (2005) (discussing the origins of the Ford rollover litigation); Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 7 (2003-2004) ("NHTSA . . . only collected and analyzed statistics about deaths and not about bodily injuries or damages to property, even though a more inclusive definition of 'cases' generally would have facilitated earlier detection of risks and hazards. In this case, it was a report by a local television station that triggered NHTSA's investigation . . ." (footnote omitted)).

104. See *Firestone Hearings*, *supra* note 18, at 21 (prepared statement of Dr. Sue Bailey, Administrator, NHTSA) ("Our current regulations do not require the manufacturers to give us information about claims or litigation.").

105. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 182-83 (6th ed. 2003). Judge Posner examines the way in which a defective product raises costs for the company which are then passed onto the consumer in the form of higher prices. Companies are thereby encouraged by the competitive market to reduce injury-causing defects in their products so that they can lower their prices and thus be more successful competitors in the market. See *id.* Judge Posner further explains that criminal sanctions raise company costs, which are also passed onto consumers, but from which consumers do not substantially

The Enron fraud disaster is an example of effective federal white-collar prosecution.<sup>106</sup> But Enron is unique front-page material. Such aggressive federal prosecution is missing from everyday products cases such as that of the painkillers Oraflex<sup>107</sup> and Vioxx,<sup>108</sup> the Ford Pinto<sup>109</sup> and Chevrolet Malibu vehicle designs,<sup>110</sup> and the Swissair<sup>111</sup> and McDonnell Douglas DC-10 airplane crashes.<sup>112</sup> For example, the DC-10 crash was the worst plane crash for its time; 345 persons were killed in the crash near Paris on March 3, 1974. The baggage door was defective and blew open. This caused the plane to depressurize so that the floor

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benefit. *Id.* at 386. Therefore, there is no incentive for consumers to report defects to a federal agency. *See id.* (describing the weaknesses of the Federal Trade Commission's enforcement mechanisms).

106. *See* Alexei Barrionuevo, *2 Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1.

107. *See* Teresa Moran Schwartz, *Regulatory Standards and Products Liability: Striking the Right Balance Between the Two*, 30 U. MICH. J.L. REFORM 431, 449 n.92 (1997) (noting that the manufacturer of Oraflex “pleaded guilty to 25 misdemeanor counts of failing to notify the FDA of numerous deaths and injuries . . . overseas” and only paid a \$25,000 fine (quoting RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLATION 337 (1988))); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1138 n.68 (1988) [hereinafter Schwartz, *Federal Safety Regulations*] (contrasting the \$25,000 that Eli Lilly & Co. was fined for failing to report overseas deaths associated with Oraflex to the \$6 million verdict against the company in a tort action brought for a death caused by Oraflex); Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 271 nn.74-75 (1997) (discussing the estimated number of deaths from the drug and the information known by Eli Lilly when the drug was released in the U.S.).

108. As of February 21, 2007, some Vioxx suits have been won and some have been lost on cause-in-fact issues. *See* Thomas Ginsberg, *Merck Defeat in Vioxx Verdict*, PHILA. INQUIRER, Apr. 12, 2006, at A1; *Verdict Bolsters Merck's Vioxx*, L.A. TIMES, July 14, 2006, at C3.

109. *See* State v. Ford Motor Co., 47 U.S.L.W. 2178 (Ind. Super. Ct. 1978). Ford was indicted for reckless homicide for manufacturing and allowing a 1973 Pinto model which it knew would explode on rear-end impact due to design defects to remain on the road. *See id.* Ford was eventually acquitted of all criminal charges. *See* LEE PATRICK STROBEL, RECKLESS HOMICIDE? FORD'S PINTO TRIAL 265 (1980).

110. *G.M. Damages Cut by over \$3 Billion in Gas Tank Case*, N.Y. TIMES, Aug. 27, 1999, at A18 (\$1.1 billion punitive damages award after remittitur in suit alleging defectively designed Chevrolet Malibu).

111. *See* Clifford Krauss, *Panel Links Faulty Wiring To '98 Crash of Swiss Jet*, N.Y. TIMES, Mar. 28, 2003, at A10 (“Canadian investigators have concluded that the 1998 crash of Swissair Flight 111, in which all 229 people on board were killed, was caused by sparks from faulty wiring that ignited flammable insulation above the cockpit, crippling the aircraft's electrical system.”).

112. *See* Nan Robertson, *345 Killed as Jumbo Jet Dives into French Forest in History's Worst Crash*, N.Y. TIMES, Mar. 4, 1974, at A1.

caved-in, hydraulic lines were cut, and all steering was lost.<sup>113</sup> The FAA required in-service repair to numerous planes, but the flawed repairs took more than a year. The defective baggage door was known to the manufacturer and the FAA prior to the crash, but nevertheless 345 persons died.<sup>114</sup> Because of concerns for quickly and cheaply repairing planes, selling new planes, and keeping existing DC-10s flying, the agency failed to protect the passengers' lives and as a result, hundreds died.

Merely because a lethal product kills or causes serious bodily injury does not mean that federal prosecution will be readily available. For example, there was no federal prosecution of tobacco manufacturers in regard to the more than four hundred thousand people per year who die from tobacco-induced cancer,<sup>115</sup> the more than thirty-five thousand who die from gun violence each year,<sup>116</sup> or the large number who have died in Ford Pintos,<sup>117</sup> Ford Explorers,<sup>118</sup> and Chevrolet pick-up trucks.<sup>119</sup>

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113. Richard Witkin, *Inquiry Set on Plane's Cargo Door Locks*, N.Y. TIMES, Apr. 25, 1989, at A16.

114. Richard Witkin, *U.S. Safeguards Faulted as Plane Accidents Rise*, N.Y. TIMES, June 19, 1980, at A1.

115. See Vandall, *supra* note 33, at 860 (discussing the failure of the Supreme Court to hold manufacturers liable in *Cipollone* for the estimated 400,000 tobacco-caused deaths each year); see also Raymond Gangarosa, Frank J. Vandall, & Brian M. Willis, *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 FORDHAM URB. L.J. 81, 116-17 (1994) (discussing design defects, failure to warn, fraud, and other possible causes of action in tobacco suits).

116. See Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 548 (1999).

117. See *State v. Ford Motor Co.*, 47 U.S.L.W. 2178 (Ind. Super. Ct. 1978); STROBEL, *supra* note 109, at 20 (In September of 1977, the NHTSA "launched a 'formal defect investigation' of the Pinto . . . The inquiry uncovered 38 cases in which rear-end Pinto crashes resulted in fuel system damage, gasoline leakage, and fire. A total of 27 Pinto occupants died in those incidents . . . and another 24 suffered varying burn injuries."); PATRICIA H. WERHANE, *MORAL IMAGINATION AND MANAGEMENT DECISION-MAKING* 74 (1999) (citing estimates of deaths caused by being inside a Ford Pinto during a rear-end collision ranging from twenty-seven to as high as nine hundred).

118. See R.A. Whitfield & A.K. Whitfield, *Improving Surveillance for Injuries Associated with Potential Motor Vehicle Safety Defects*, 30 INJ. PREVENTION, 88, 88 (2004), available at <http://www.injuryprevention.bmj.com> (stating that by fall of 2000, the NHTSA had determined "that failures of certain Firestone tires supplied primarily on Ford Explorers had killed 271 persons and injured at least 800").

119. See Martin Tolchin, *Recall Is Sought Over Fire Risk In G.M. Trucks*, N.Y. TIMES, Apr. 10, 1993, at A1 (reporting the opinion of Clarence Ditlow, director of the Center for Auto Safety, that General Motors' "side-mounted fuel tanks, mounted outside the frame rails, were responsible for 300 deaths in fire-related crashes. He said the company had failed to tell auto-safety officials that it had used steel cages to protect tanks on utility vehicles, but not on pickups made at the same time. G.M. moved the tanks within the frame rails after 1987.").

Apparently, the attorney general decided that prosecution was not appropriate in these cases.

Many product injuries attract media coverage, but public outrage and media attention should not be the test for whether prosecution goes forward. Every person who suffers serious bodily injury from a defective product should have some means of recovering her damages. At present there is no remedy for persons who suffer damages worth less than approximately \$100,000 in products liability cases.<sup>120</sup> Federal criminal fines and jail time would not help the victims in these cases with their immediate and continuing financial problems. Also, there is little incentive for the product seller to reduce the chance of injury where federal prosecution is unlikely under Senator Specter's proposal.

In contrast to the high cost of federal criminal enforcement, civil "enforcement" is relatively inexpensive and effective.<sup>121</sup> Assume that a victim is killed by a defective product. Her survivors contact an attorney. The attorney charges a contingent fee of twenty to thirty-three percent of the recovery.<sup>122</sup> This means that he gets compensated if he wins the case, but not if he loses. The key factor in a civil products case is whether the expenses of the suit will exceed the recoverable amount. If there is a profit to be made, the civil suit will most likely be brought. This process occurs regardless of what the President communicates to the Attorney General or the status of the defendant corporation (perhaps a campaign contributor). Professor Nagareda apparently disagrees with the theory of open and effective access to the courts.<sup>123</sup>

Most products liability cases begin in state courts based on a violation of state common law.<sup>124</sup> Often, however, they are transferred to federal courts at later stages.<sup>125</sup> Whether litigated as a state or a federal case,

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120. See Vandall, *supra* note 33, at 843 & n.2 (discussing why the "victim's attorney must reject all but the largest and most profitable cases").

121. POSNER, *supra* note 105, at 223 (discussing the effectiveness of civil enforcement—fines—and the costly nature of criminal sanctions).

122. See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998) (finding that a contingent fee of one-third applied to "92% of [the cases he studied]. Five percent of the cases called for fees of 25% or less, 2% specified fees around 30%, and 1% specified fees exceeding 33%.").

123. See Nagareda, *supra* note 2, at 1174-75.

124. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1266, 1269-71 (1991); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 505-18 (1985).

125. The federal courts generally apply state law under the *Erie* doctrine, however. See *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (reiterating the *Erie* holding that "federal courts sitting in diversity cases, when deciding questions of 'substantive' law, are bound by



there are substantial costs to a civil products suit. The defendant company pays the judgment and then may raise the price of the product.<sup>126</sup> The consumer hunts for the lowest priced product in the market. She rejects the higher priced (defective) product. Through the market, economics pressures the seller of defective products (higher priced) to produce safe (less expensive) products. For example, since the tobacco settlement in 1998, the price of cigarettes has increased at least five times.<sup>127</sup> The Ford Pinto was recalled, repaired,<sup>128</sup> and eventually dropped from the Ford product line. On the other side, the DPT vaccine became so expensive that county health departments stopped buying it and drug manufacturers stopped producing it.<sup>129</sup> Tort reforms, by reducing costs to the manufacturer of defective products, prevent the market from functioning, to be sure.<sup>130</sup>

The longstanding theory was that everyone charted their conduct based on the criminal law.<sup>131</sup> Presumably, this is the basis of Senator Specter's proposal. If an act were prohibited, people would not do it. It has been argued, however, that enforcement, not substantive law, is the key to changing behavior.<sup>132</sup> Speeding on an interstate highway is a good example. If there is no patrol car in sight, traffic will flow at about 80 mph on an interstate highway with a speed limit of 70 mph. As soon as a patrol car is observed, however, the speed of traffic will drop to the

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state court decisions as well as state statutes" (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

126. The defendant may be insured or absorb the loss. See Vandall, *supra* note 27, at 710-11 ("[T]he private sector must bear the [costs resulting from the strict products liability system]. In many cases, the burden will be on the manufacturer or seller to either obtain insurance or raise the price of the product, thus spreading the loss . . ."); see also Vandall, *supra* note 116, at 552-57 (discussing the potential effects of shifting the costs of gun violence from cities to gun manufacturers); *id.* at 553 n.34 (citing Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 606 (1987)) (noting that increased environmental regulations forced the steel industry to demand higher tariffs on foreign imports to maintain competitiveness).

127. See Sylvia Nasar, *The Ifs and Buts of the Tobacco Settlement*, N.Y. TIMES, Nov. 29, 1998, § 4 (Week in Review), at 1 (stating that one day after the tobacco settlement two major manufacturers raised cigarette prices by \$0.45 per pack); *Philip Morris Is Raising Cigarette Prices by 3%*, N.Y. TIMES, July 29, 2000, at C3 (citing price increases in 2000 as well as a price increase in August 1999); *Philip Morris Raises Prices of Cigarettes 14¢ a Pack*, N.Y. TIMES, Apr. 26, 2001, at C4 (reporting that Philip Morris raised cigarette prices four times from January 2000 to May 2001).

128. Schwartz, *supra* note 89, at 1018-19.

129. See Peggy J. Naile, Note, *Tort Liability for DPT Vaccine Injury and the Preemption Doctrine*, 22 IND. L. REV. 655, 655-57 (1989).

130. See Vandall, *supra* note 27, at 707-11.

131. See Melitta Schmideberg, *The Offender's Attitude Toward Punishment*, 51 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 328, 331 (1960).

132. See *id.* ("For the threat of punishment to be effective, the offender must fully believe that he will be punished . . .").

posted speed limit. This suggests that for Senator Specter's proposal to have any meaningful impact on corporate conduct, new funds must be allocated to allow for and to encourage expanded and expensive enforcement. Professor Nagareda fails to address the funding problem that is inherent in effective agency action.<sup>133</sup>

## VII. CAUSATION

In the design and sale of a product, such as a car or a drug, it is very unlikely that the manufacturer intends to kill or injure someone. However, there is often knowledge and a risk that people will be killed or injured because of a particular design. The famous Ford Pinto case serves as such an example.<sup>134</sup> Ford knew that the vehicle design possessed a much higher risk of a gas tank explosion leading to death and serious injury than other designs.<sup>135</sup> The Pasteur treatment, the drug for curing someone who has been bitten by a rabid animal, is another example of a product with a known risk of serious injury.<sup>136</sup> Because many products, such as drugs, create a risk of death or injury in varying degrees, causation must be examined. There are two branches of causation: cause-in-fact and proximate cause. These concepts are often confused by students, attorneys, judges, and juries alike.<sup>137</sup>

### A. Cause-in-fact

The concept of cause-in-fact holds that for liability to attach, the actor must have done something in scientific fact that brings about the death or

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133. See generally Nagareda, *supra* note 2. Indeed, with the ongoing war, it seems unlikely that new funds would be allocated for prosecuting corporate executives.

134. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); Schwartz, *supra* note 89, at 1013-14.

135. See STROBEL, *supra* note 109, at 286.

136. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) ("There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably dangerous*."). Even baby oil can cause serious bodily injury, if aspirated. *Ayers v. Johnson and Johnson Baby Products Co.*, 818 P.2d 1337, 1339 (Wash. 1991).

137. See Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-72 (1950); Frank J. Vandall, *Duty: The Continuing Vitality of Dean Green's Theory*, 15 QUINNIPIAC L. REV. 343, 343-45 (1995).

injury of the victim.<sup>138</sup> There are two tests for cause-in-fact: the “but for” test<sup>139</sup> and the “substantial factor” test.<sup>140</sup> When the actor points a gun at the victim and squeezes the trigger in order to kill him, there is usually little debate that his shooting the pistol was a cause-in-fact of the victim’s death. His death would not have occurred “but for” the shooting, as a matter of science. Suppose, however, the victim is traveling 40 mph over the speed limit when he leaves the road and hits a tree, breaking his leg. The design of the “toe pan” (the floor of the car) may well have contributed to the injury, but will the jury find that the design was a “substantial factor” in causing it, as compared to the driver’s speed?<sup>141</sup> What if A takes an anti-depressant drug, such as Xanax, and shortly thereafter commits suicide; would A have committed suicide, “but for” consuming the Xanax?<sup>142</sup> Was Xanax a cause-in-fact of A’s suicide? Senator Specter’s proposal does not address this foundational issue.

### B. Proximate Cause

Proximate cause is a question of policy. There are as many as six classic tests for proximate cause: remote, foreseeable, direct, foreseeable small risk, foreseeable plaintiff (zone of danger), and pure politics.<sup>143</sup> The tests essentially ask the question of whether the result was foreseeable to the actor, or whether the injury was the direct result of his conduct.<sup>144</sup> Proximate cause was developed by the courts as a device to control the jury.<sup>145</sup> A line must be drawn somewhere that severs cause-in-fact, and

138. See Green, *supra* note 137, at 476 (“The issue of causal relation require[s] a scientific inquiry of fact.”); see also Vandall, *supra* note 137, at 344 (“Cause-in-fact exists when the defendant’s conduct had something to do with the plaintiff’s injury, as a matter of science.”).

139. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 70, at 265-67 (“The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct . . .”); see also *Gilman v. Noyes*, 57 N.H. 627, 631 (1876) (using the “but for” test to determine cause-in-fact).

140. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 70, at 267-68 (“The defendant’s conduct is a cause of the even if it was a material element and a substantial factor in bringing it about.”); see also *Schultz v. Brogan*, 29 N.W.2d 719, 721 (Wis. 1947) (discussing use of substantial factor test for determining cause-in-fact).

141. Cf. *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 301, 303 (Cal. 1994).

142. See *Shanks v. Upjohn Co.*, 835 P.2d 1189, 1192-93 (Alaska 1992). The decedent in *Shanks* shot himself in the head following an argument with his wife. He had been taking the prescription drug Xanax, a central nervous system depressant. Plaintiff argued that the drug caused suicidal ideation. *Id.*

143. See Vandall, *supra* note 116, at 561-62 (examining the several proximate cause tests); see also FRANK J. VANDALL & ELLEN WERTHEIMER, TORTS CASES AND PROBLEMS 289-339 (1997) (discussing in detail the classic tests for proximate cause).

144. Vandall, *supra* note 137, at 344-45; Vandall, *supra* note 116, at 563.

145. FRANK J. VANDALL, STRICT LIABILITY 45 (1989); see also Green, *supra* note 137, at 472-73; Vandall, *supra* note 137, at 346-47, 349.

proximate cause is the concept used to draw it.<sup>146</sup> It is a question of policy, not of fact.<sup>147</sup> The actor will be held liable if the court finds that the injury was foreseeable or direct, but not if it was too remote.

An examination of several products cases will manifest the complex nature of the proximate cause problems. In the famous Ford Pinto case, cause-in-fact is straightforward: the passenger would not have been burned over ninety percent of his body by the flames from the car's defective gas tank "but for" the placement of the tank and the protruding differential bolts.<sup>148</sup> Testimony at the Ford Pinto trial showed that high-ranking executives at Ford knew that many would die in incendiary rear-end Pinto crashes, and many more would be seriously burned.<sup>149</sup> Thus, an argument could be made that these deaths and injuries met the test of being "foreseeable."

A court weighing all the issues in a federal criminal prosecution of the Ford executive in the Pinto case, Lee Iacocca, might have found the gas tank explosions were "remote," and therefore might decline to prosecute Iacocca. Yet the state civil Pinto suit brought an award of \$2.5 million in compensatory damages and \$125 million in punitive damages (which later was reduced to a total award of \$6 million).<sup>150</sup> Thus, the Pinto was surgically excised from the market by means of the civil suit, with little long-term damage to Ford and none to Lee Iacocca. He went on to become the president of the Chrysler Corporation and to pull it from the ashes of bankruptcy.<sup>151</sup>

In another example, Guidant Corporation executives discovered that the wires of its heart defibrillators were defective and could lead to the deaths of many of their patients.<sup>152</sup> Knowing this, they nevertheless refused to issue warnings to their customers until the death of a 21-year-old patient drew negative attention.<sup>153</sup> If the Guidant CEOs, who

146. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 70, at 264 ("Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy."); *see also* Vandall, *supra* note 116, at 561.

147. Vandall, *supra* note 137, at 343-44; Vandall, *supra* note 116, at 561; *see also* Green, *supra* note 137, at 757-58 (discussing the policies underlying the application of proximate cause by the courts).

148. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 359 (Cal. Ct. App. 1981).

149. *Id.* at 361.

150. *See* Schwartz, *supra* note 89, at 1017; *see also* STROBEL, *supra* note 109, at 22.

151. *See* Schwartz, *supra* note 89, at 1045 n.127.

152. *See* Barry Meier, *Maker of Heart Device Kept Flaw From Doctors*, N.Y. TIMES, May 24, 2005, at A1 ("A medical device maker, the Guidant Corporation, did not tell doctors or patients for three years that a unit implanted in an estimated 24,000 people that is designed to shock a faltering heart contains a flaw that has caused a small number of those units to short-circuit and malfunction.").

153. *Id.* ("The matter has come to light after the death of a 21-year-old college student from Minnesota, Joshua Oukrop, with a genetic heart disease. Guidant acknowledges that

knowingly withheld lifesaving information, had been criminally prosecuted, a court would likely hold that the victim's death was "foreseeable."<sup>154</sup>

In contrast, had there been a criminal prosecution of Abbott Laboratories executives for producing the synthetic hormone DES, the judge might have found that the executives were innocent on the ground that proximate cause was lacking. Daughters of the female consumers of DES developed vaginal cancer ten years after the hormone was consumed by their mothers during pregnancy. Foreseeability, a test for proximate cause, was lacking because apparently no one knew that such a risk existed when the drug was first marketed in 1948-1950.<sup>155</sup>

Drawing the line of proximate cause in the Pinto, Guidant, and the DES cases is illustrative of the proximate cause problem under Senator Specter's proposal. The most challenging issue is deciding whether the manufacturer knew enough of the serious risks from the product to be criminally prosecuted, or whether such certain and specific knowledge was absent. As casebook author, former law school professor, and dean, Victor Schwartz testified before the Senate Judiciary Committee, products liability, a key topic in the study of torts, is devoted to the puzzle of whether a product is defective.<sup>156</sup> Professor Schwartz concluded that it is inappropriate to jail a corporate CEO because he got such a complex equation wrong.<sup>157</sup>

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his device, known as a defibrillator, short-circuited. The young man was in Moab, Utah, on a spring break bicycling trip in March with his girlfriend when he complained of fatigue. He then fell to the ground and died of cardiac arrest. Guidant subsequently told his doctors that it was aware of 25 other cases in which the defibrillator, a Ventak Prizm 2 Model 1861, had been affected by the same flaw. Guidant said it had changed its manufacturing processes three years ago to fix the problem. The physicians say that had they known earlier, they would have replaced the unit in their patient because he was at high risk of sudden death.").

154. See *id.*; see also Barry Meier, *Heart Device Sold Despite Flaw, Data Shows*, N.Y. TIMES, June 2, 2005, at C1 (reporting that Guidant continued to sell older, defective units for several months after new, corrected units were available); *Health Digest*, SUN-SENTINEL (Ft. Lauderdale, Fla.), May 25, 2005, at 19A ("Dr. Douglas Zipes, a heart expert at the Indiana University School of Medicine, said Tuesday even though the risk associated with the malfunction was small, the potential consequences were severe.").

155. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 925, 931-33 (Cal. 1980); Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 993 (1978).

156. *Defective Products Hearing*, *supra* note 1, at 180 (prepared statement of Victor E. Schwartz, Partner, Shook, Hardy & Bacon LLP).

157. See *id.*

### VIII. EFFICIENCY CONSIDERATIONS IN CRIMINALIZING PRODUCTS LIABILITY

The core problem with both Senator Specter's bill and Professor Nagareda's thesis is that from an economic perspective, both proposals are inefficient.<sup>158</sup> Economics rests on the concept that the best solution to almost all problems is the free market.<sup>159</sup> From an economic perspective, the law, as a command of government, exists to deter behavior that functions to remove parties from the market.<sup>160</sup> The goal of economics is an efficient allocation of resources that drives both consumers and suppliers to the market.<sup>161</sup> This mantra is most clearly expressed in Judge Learned Hand's formula, as Judge Richard Posner restated it: "the defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident's occurring, exceeds the burden of the precautions that the defendant might have taken to avert it."<sup>162</sup> Judge Posner further explains that "[i]f a larger cost could have been avoided by incurring a smaller cost, efficiency requires that the smaller cost be incurred."<sup>163</sup> In this regard, economics and law are similar.

The basic thought in both negligence and efficiency theory is that careless acts are wasteful.<sup>164</sup> These negligent acts lead to tort liability, and the actor will be held liable for damages. This liability through increased prices will, in turn, deter the actor from such conduct in the

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158. See THE OXFORD ENGLISH DICTIONARY 903 (2d ed. 1989) (defining inefficiency as "[w]ant of efficiency; inability or failure to accomplish something; ineffectiveness, inefficient character"); see also POSNER, *supra* note 105, at 205 (explaining inefficiency in the context of certain torts and crimes).

159. See POSNER, *supra* note 105, at 3 ("[E]conomics is the science of rational choice in a world . . . in which resources are limited in relation to human wants.").

160. See *id.* at 205 (examining the economic implications of theft and the reasons that the law has allowed for seemingly inefficient allocations of costs in tort, and explaining that in the cases where the law allocates costs in a seemingly inefficient manner it does so "because the cost of market transactions is higher than the cost of legal transactions, and when market transaction costs are low, people should be required to use the market.").

161. See *id.* at 265 ("The common law attaches costs to the violation of those moral principles that enhance the efficiency of a market economy.").

162. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 122 (2d ed. 1977); see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (originally setting out the Hand formula); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (elaborating on the economic interpretation of the Hand formula).

163. See POSNER, *supra* note 162, at 122.

164. See William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 535 (1985) (examining the relationship between efficiency and care on the part of the manufacturer and consumer in products liability cases).

future. Thus the wasteful acts will not likely be repeated, and the market will function smoothly and efficiently.

In presenting an economic model for the common law, Judge Posner's view has been critiqued on the basis that the efficiency model has little to do with the philosophical underpinning of the common law, morality.<sup>165</sup> He rejects this argument and responds that there is a substantial overlap between morality and efficiency:

The theory that the common law is best understood as a system for promoting economic efficiency will strike many readers as incomplete . . . in its apparent disregard of the moral dimension of law. . . . [T]he true purpose of law . . . is to correct injustices and thereby vindicate the moral sense.

But are morality and efficiency really inconsistent? The economic value of such moral principles as honesty, truthfulness, . . . [and] trustworthiness . . . will be apparent . . . . Honesty, trustworthiness, and love reduce the costs of transactions. Foreswearing coercion promotes the voluntary exchange of goods. Neighborliness and other forms of selflessness reduce external costs . . . . [C]are reduces social waste.

. . . .

. . . The common law attaches costs to the violation of those moral principles that enhance the efficiency of a market economy.<sup>166</sup>

The criminal, legislative, and regulative system is rejected by Judge Posner because of its huge administrative costs.<sup>167</sup> These costs add no value and are a "dead weight" to society.<sup>168</sup> Professor Nagareda has no apparent reply to this argument.

The criminal system, part of Senator Specter's proposal, creates waste with its huge administrative bureaucracy.<sup>169</sup> This is to be contrasted with

165. See John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1771 (1998). Judge Noonan sees Judge Posner as having admitted that there is an "inescapable" overlap between law and morals, but has also deemed them "parallel methods of social control." *Id.* (citing Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1694 (1998)). In Judge Noonan's view, law and morals "are not parallel; they interact and mutually influence each other." *Id.*

166. POSNER, *supra* note 105, at 264-65.

167. See *id.* at 171. Posner states, as a generality, "criminal sanctions are more costly than civil." Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 425 (2d ed. 1977).

168. *Cf. id.* at 279-80 (discussing deadweight loss in the regulatory context).

169. *Cf. id.* at 556-57 (noting that the imposition of criminal penalties is more costly than the imposition of civil penalties, and that the criminal system incurs further costs because it must regulate not only the behavior of criminals, but also the behavior of the legal system's own actors, such as law enforcement officers and judges).

the efficient, market-based common law model. The conclusion is that the common law (and the civil products suit as a subset) is efficient and the criminal system is inefficient. The criminal system is only to be preferred when the crime is hidden, the defendant lacks resources (and therefore cannot pay damages), or the entire community is harmed by the act.<sup>170</sup> The criminal law has been analyzed by Professor Shavell, an economist, in terms of five factors, as summarized by Professor James Lindgren:

Shavell presents five factors determining the optimal domain of nonmonetary [i.e., criminal] sanctions: the wrongdoer's assets, the probability of escaping detection, the benefit received, the probability of harm, and the magnitude of harm. Shavell contrasts these five factors for crimes with the operation of the same factors for unintentional torts, concluding that, "in the area of unintentional torts, the use of monetary sanctions should produce a much better level of deterrence than in the core area of crime."<sup>171</sup>

Murder is the classic example of a crime. A defective product that causes death or serious injury is to be contrasted with murder. First, understanding product defects is enormously challenging.<sup>172</sup> It should not be the foundation for prosecuting a corporate CEO. Second, defective products such as motor vehicles, pharmaceuticals, and medical devices are not hidden from the view of the community.<sup>173</sup> Just the opposite, they are often common products and attract media attention when they cause injury. Lawsuits involving such products often lead to large damage verdicts.<sup>174</sup> These verdicts have a deterrent effect and lead the manufacturer back to the market.<sup>175</sup> Third, in these high-visibility defective products suits, almost by definition, the defendants are large corporations who are able to fund the verdicts.<sup>176</sup> Fourth, a defective product, such as an SUV or a defibrillator, generally threatens a discrete

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170. *See id.* at 218-19.

171. Lindgren, *supra* note 4, at 31 (citing Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236-38, 1240 (1985)).

172. *See* Vandall, *supra* note 107, at 267-68 (discussing the difficulty of determining what constitutes a design defect, as opposed to a manufacturing defect).

173. *See* Shavell, *supra* note 171, at 1239 (stating that parties who have caused intentional tortious harm generally cannot conceal their identities).

174. *E.g.*, Schwartz, *Federal Safety Regulations*, *supra* note 107, at 1138 n.68; Alex Berenson, *Merck Loses Vioxx Suit in Texas*, N.Y. TIMES, Apr. 22, 2006, at C1 (reporting a \$32 million verdict against Merck in a Vioxx suit).

175. *See* POSNER, *supra* at note 105, at 172, 182-83.

176. *See* John C. Moorhouse, Andrew P. Morriss & Robert Whaples, *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 679 (1998) (stating that plaintiffs usually pursue defendants with deep pockets).



portion of the community: the purchasers.<sup>177</sup> This stands in stark contrast to classic crimes, such as theft and murder, which threaten the entire community. Finally, the problem of defective products that knowingly cause death has been solved. The solution is a products liability suit.<sup>178</sup> Corporations live off their reputations and profits. Products liability suits garner corporate attention and reduce their bottom line. This is apparently exactly what Professor Nagareda wants to avoid.

## IX. CONCLUSION

The key question in deciding whether the intentional act of producing a product that knowingly causes death or serious bodily injury should be treated as a crime or tort is: who is best able to bring the action, the government or a private attorney? Judge Posner forcefully argues that criminal prosecutions are inherently inefficient as compared to civil suits.<sup>179</sup> This flies in the face of Professor Nagareda's thesis that complex suits, such as those involving defective drugs and tobacco, should be handled by agencies. In truth, Professor Nagareda's thesis has been adopted in part. Congress recently banned suits against handgun manufacturers and has excluded fast food from the definition of "consumer product."<sup>180</sup> With the gun suit ban, there was none of the debate that Professor Nagareda touted. Instead, Congress merely terminated the possibility of such suits.<sup>181</sup> Products liability suits would have provided insight into the functioning of the handgun industry and asked the manufacturers to develop solutions to numerous gun-related problems.

If Senator Specter's proposal is adopted by Congress, it will likely not be enforced by the Attorney General. Even if enforced, the decision to prosecute likely will be politically driven. Worse, even if the act is not enforced, the courts might nevertheless find that state products liability

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177. A defective defibrillator can only threaten that portion of the community that uses it, and therefore it would only threaten that portion of the community which is in need of one. Likewise, a defective SUV will threaten a larger section of the community, but its impact will still be limited to a specific set of demographics.

178. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474, 481 (1996); Schwartz, *Federal Safety Regulations*, *supra* note 107, at 1138 n.68 (Oraflex); *Ford Told to Pay \$25 Million for Rollover*, N.Y. TIMES, June 23, 1995, at A18 (Ford Bronco II).

179. See POSNER, *supra* at note 105, at 171, 215, 219-22.

180. See 15 U.S.C. § 2052(a) (2000) (excluding guns and food from the definition of "consumer product"); Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1 (stating that the Personal Responsibility in Food Consumption Act passed the House); Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. TIMES, July 7, 2005, at C1 ("Bills that would prohibit lawsuits by people claiming a food company made them obese have become law in 20 states and are pending in another 11.").

181. See *supra* note 43.

suits are preempted by the new act. The unfortunate result would be that state products liability civil suits for deadly products likely would be preempted, and the Attorney General would pursue few criminal prosecutions of the manufacturers and sellers of such products.

Punitive damages blur the demarcation between tort and crime. If the manufacturer knows the product to be deadly, the jury can award punitive damages. Such cases have successfully attracted the attention of manufacturers and, when allowed to function, have diminished the need for the criminalization of products liability.<sup>182</sup> Judge Posner embraces the concept of punitive damages by suggesting that compensatory damages are insufficient.<sup>183</sup> The law permits the award of punitive damages when the manufacturer's or seller's conduct was willful.<sup>184</sup> These damages have been allowed in a broad range of products cases and should be supported and encouraged because they bring the issue of defective products before the courts and society even when Congress and agencies are busy with other matters.<sup>185</sup>

The Supreme Court understands that the purpose of punitive damages is to attract the attention of the defendant manufacturer and to punish tortious conduct. However, the Court has stated that it prefers a one-digit multiplier (times compensatory damages) for punitive damages.<sup>186</sup> The punishment function has nothing to do with a one-digit multiplier, as set out by the Supreme Court in *BMW v. Gore*.<sup>187</sup> Four, five, or nine times compensatory damages may not be sufficient to punish the corporation or garner its attention in some cases. A larger punitive award may be necessary.

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182. Recent tort reforms have drastically reduced the availability of products liability suits. Reform measures in Texas have effectively killed the medical malpractice bar and have nearly done the same for products litigation. See Terry Carter, *Tort Reform Texas Style*, A.B.A. J., Oct. 2006, at 30, 33-35.

183. See POSNER, *supra* note 105, at 207. Damage awards are insufficient, in part, because the attorney takes a quarter to a third for her fee. See *supra* notes 93-94 and accompanying text.

184. See *id.* at 206-07.

185. See Schwartz, *Federal Safety Regulations*, *supra* note 107, at 1138 n.68; Berenson, *supra* note 174; Rick Bragg, *Florida Judge Upholds Jury's \$145 Billion Punitive Award in Tobacco Trial*, N.Y. TIMES, Nov. 7, 2000, at A18; *Ford Told to Pay \$25 Million for Rollover*, *supra* note 178.

186. See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (holding that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process"). On remand, the Utah Supreme Court held that a 9-to-1 ratio satisfied due process. *Campbell v. State Farm Mut. Auto Ins. Co.*, 98 P.3d 409, 418 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004).

187. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996); see Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019, 1032, 1045 (2006) (arguing that a single-digit ratio test is an irrational approach to civil rights cases).

In *Gore*, the Court made clear that, in requiring a one-digit multiplier, the Court was addressing a case of economic harm, not one involving personal injury.<sup>188</sup> This should have been the touchstone for the Court when it determined punitive damages in *Phillip Morris v. Williams*.<sup>189</sup> The Justices ignored the distinction between personal injury and economic harm, however. *Williams* involved death by tobacco-caused cancer, and thus should have been immune from the *Gore* restrictions on punitives.

Economic analysis makes clear that the criminalization of products liability would be a waste of government resources. Quite simply, the common law is efficient and the criminal law is inefficient. Requiring federal prosecution would force many important suits into the briarpatch of politics. This is a serious critique of both Senator Specter's proposal and Professor Nagareda's thesis.

Senator Specter's proposal is not needed, carries a huge administrative cost, would encourage political abuse, would not be enforced, and presents a substantial risk of preempting state law. We have a mature products liability civil litigation system that functions efficiently and effectively to deter the manufacture of deadly products. More state civil suits will be brought than federal criminal ones because civil suits are not driven by politics. The success of the civil system is apparently the fundamental reason for Professor Nagareda's opposition to it. Product liability reduces corporate profits and therefore must be addressed in the boardroom and at shareholders' meetings. Arguably, it may throw some manufacturers into bankruptcy.<sup>190</sup>

Many products are known to kill or cause serious injury. For example, some prescription drugs can cause loss of function and death. In a vehicle collision, when hit from behind at over 40 mph, some cars will crush more seriously than others, some SUVs rollover more readily than

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188. See *Gore*, 517 U.S. at 582-83 (stating that higher ratios may be appropriate where the monetary value of non-economic harm cannot be determined).

189. 127 S. Ct. 1057 (2007). In *Philip Morris*, \$79.5 million in punitives was awarded in a tobacco fraud case against Philip Morris. Mr. Williams, a cigarette smoker, died from lung cancer. *Id.* at 1060. Because the case concerned personal injury, the Supreme Court should have upheld the award in order to deter tobacco manufacturers from committing fraud, as permitted under *BMW v. Gore*. It is estimated that by the year 2020, tobacco-caused deaths will exceed those caused by AIDS by fifty percent. See Scott Sullivan, *Tobacco Talk: Why FDA Tobacco Advertising Restrictions Violate the First Amendment*, 23 WM. MITCHELL L. REV. 743, 744 n.3 (1997). But in *Philip Morris*, the Supreme Court held that the jury cannot directly consider injury to third parties. *Philip Morris*, 127 S. Ct. at 1063. In addition a strong punitive damages rule for personal injury cases will reduce the need for bills such as that proposed by Senator Specter.

190. See Nagareda, *supra* note 2, at 1142, 1145-50 (discussing products-liability-induced Chapter 11 bankruptcies); *but see* Vandall, *supra* note 116, at 553 (noting that gun manufacturer bankruptcy is not inevitable if products liability suits are successful).

others, and many people will die while riding motorcycles. We don't want to over-deter manufacturers, by means of criminal prosecution, to the point that they only produce completely risk-free and expensive products. In order to have a full range of effective and affordable products, we must realize that some products will be manufactured that are known to kill or cause serious bodily injury. Products liability civil suits function efficiently to weed out invalid suits from those involving defective products. They need to be bolstered rather than cramped and limited by means of far-reaching tort reform.<sup>191</sup> With a strong civil litigation system in place, there is no present need for Senator Specter's proposal.

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191. *But see* Vandall, *supra* note 33, at 843, 854-58, 871-73 (discussing numerous "tort reforms" that have weakened products liability litigation).

