THE EXECUTIVE-INTERNALIZATION APPROACH TO HIGH-RISK CORPORATE BEHAVIOR: ESTABLISHING INDIVIDUAL CRIMINAL LIABILITY FOR THE INTENTIONAL OR RECKLESS INTRODUCTION OF EXCESSIVELY DANGEROUS PRODUCTS OR SERVICES INTO THE STREAM OF COMMERCE

*Robert Steinbuch**

I. INTRODUCTION

On March 10, 2006, I testified before the United States Senate Committee on the Judiciary urging the enactment of legislation to impose criminal liability on corporate executives who knowingly, or with reckless disregard for life, introduce dangerously defective products or services into the stream of commerce.[1] In this article, as in my testimony, I present and discuss the reasons why the existing system of assigning liability for the intentional or reckless introduction into the marketplace of excessively risky products and services solely to the corporate entities is inefficient, and I propose a new solution.

While some products and services will inevitably injure or kill, these injuries or deaths are not necessarily the product of wrongdo-

* Associate Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law. Former attorney for the U.S. Department of Justice. The author thanks U.S. Senator Arlen Specter, U.S. Senator Patrick Leahy, Brett Tolman, Bruce Artim, Alex Dahl, Lisa Owings, Todd Braunstein, Matt McPhillips, Damion Nielson, Stephanie Cook, and Jonathan Rosen. The author also thanks Professors Pearl Steinbuch, Kenneth Gallant, Frances Fendler, and Zachary Kramer for their meaningful contributions to this article, and Jamie Evans for her outstanding insight and exceptional assistance in making this article a reality.

1. This article is a significant expansion of my testimony before the United States Senate Committee on the Judiciary. *Defective Products: Will Criminal Penalties Ensure Corporate Accountability? Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 12–13, 76–80, 202–12 (2006) (statement of Robert Steinbuch), *available at* http://judiciary.senate.gov/testimony.cfm?id=1792&wit_id=5130.

ing.[2] Others, however, are the product of improper behavior. Legally, the challenge has been to define acceptable risk and then to differentiate it from intentional wrongdoing. So far, products liability law has taken on this task. Products liability law has traditionally been used to hold manufacturers and service providers civilly responsible for those products and services that are unacceptably dangerous. However, civil liability alone has been inadequate for discouraging the introduction of excessively dangerous goods and services into the marketplace.

The current tort system provides insufficient incentives to prevent disreputable corporate executives from knowingly selling goods and services that unreasonably risk injury or death. While private causes of action offer the possibility of compensation to the improperly injured or the estates of the wrongfully killed, they perform a poor job of motivating corporate executives to take proper precautionary measures in the first place. The tort system in this context thus becomes a cost-shifting scheme by which businesses unilaterally impose injuries upon unwitting consumers for the economic benefit of the business and, ultimately, corporate executives. This system allows executives to profit from the subsidized and delayed compensation of the injured or killed members of the consuming public. While the business entities may be held financially responsible in the future for harm to the public (often after the responsible individual executives have left the business entities), this cost is inevitably borne by unwitting shareholders who have turned over control of their companies to risk-imposing management. Thus, these industry executives capture significant portions of the economic rents derived from the short-term profits resulting from selling such goods or services without full internalization of the costs of production.

In Part II of this Article, I give concrete examples of intentional or reckless industry wrongdoing causing injury and death that remains undeterred under our current system of civil liability. In Part III I analyze the underlying reasons for the insufficiency of the current legal system to properly incentivize industry executives to avoid unnecessary risks to the public. I then offer a solution to resolve this critical

2. The law may impose strict liability for manufacturing defects "even if the plaintiff is unable to show that the manufacturer's quality control fails to meet risk-utility norms." RESTATEMENT (THIRD) OF TORTS: PROD. LIAB § 2 cmt. a (1998). Such no-fault strict liability is generally thought to advance several objectives. For one, "[s]ome courts and commentators [] have said that strict liability discourages the consumption of defective products by causing the purchase price of products to reflect, more than would a rule of negligence, the costs of defects. And by eliminating the issue of manufacturer fault from plaintiff's case, strict liability reduces the transaction costs involved in litigating that issue." *Id.*

problem: by forcing individually responsible industry executives to directly internalize the cost of harm resulting from the intentional or reckless introduction of dangerously defective products or services into the stream of commerce through the imposition of criminal penalties (the Executive-Internalization Approach). I support this proposition in Part IV by comparing the Executive-Internalization Approach to similar domestic and international schemes, which addresses the misplaced concern that criminalizing industry executive behavior is a significant departure from the current legal landscape.

II.
Examples of Industry Executives Who Knowingly Sell Dangerous Products and Services

A. Medical Products and Services

Virtually all medical products and services pose some inherent risk of injury or death for patients, though most of those risks are infinitesimally small. In regulating these goods and services through the legal system, society strives to ensure that the risks to patients are low, but, understandably, not non-existent.[3] Too often, however, manufacturers and service providers knowingly provide goods and services that fall outside accepted norms of safety.[4]

1. Untreated HIV-Infected Blood Products

In 1982, a Food and Drug Administration (FDA) memorandum to manufacturers of blood products warned that "[a]lthough the cause of the outbreak is unknown, the information suggest[s] that a transmis-

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3. For instance, most prescription drugs have potentially harmful side effects but courts rarely, if ever, impose liability for defective design of such drugs as long as the net benefit outweighs any possible harm since all medications entail some risk. *See id.* at § 6(c) & cmt. a.

4. For example, individuals in the midst of heart attacks are deceptively and intentionally lured into out-dated, sub-standard medical facilities by business executives in order to maximize their income at the expense of these patients' lives. *See* Robert Steinbuch, *Preventing Under-Equipped Medical Facilities from Killing Heart-Attack Patients: Correcting Inefficiencies in the Current Regulatory Paradigm for Providing Critical Health-Care Services to Patients with Acute Coronary Syndrome*, 17 Case W. Res. Health Matrix: J. of L. and Med. (forthcoming 2007). "Community hospitals" without angioplasty facilities to treat heart attacks, nonetheless, self-advertise as having "Chest-Pain Emergency Rooms" or "Chest Pain Centers" when there are often fully-equipped hospitals and heart centers nearby. These community hospitals undertake this often deceptive advertising because they want the lucrative business of the patients that walk into hospitals with potential heart attacks, notwithstanding that they are unable to provide the best treatment.

sible agent might be involved and concern about transmission through blood and blood products has been raised."[5] Nonetheless, few blood banks conducted "surrogate" HIV testing, a method for detecting a hepatitis antigen or other abnormalities that are found in most HIV-positive donors.[6] The Center for Disease Control (CDC) warned blood bankers that blood products "appear responsible for AIDS among hemophilia patients" and that AIDS posed a real threat to recipients of blood and blood products.[7] The CDC outlined simple measures that should have been taken to prevent further spread.[8] But the leaders of the blood banking industry ignored these warnings and did not implement prevention measures. Instead, they told the American public that the blood was safe and sold the HIV-infected blood.

For example, in January 1983, the Manager of Plasma Procurement at Cutter Biological Laboratories (a blood products manufacturer) acknowledged in a letter that "[t]here is strong evidence to suggest that AIDS is passed on to other people through . . . plasma products."[9] Even earlier, Cutter recognized the potential for danger in its products. Its in-house counsel warned in 1982 that although there was little proof of a relationship between its products and AIDS, "litigation is inevitable, and we must demonstrate diligence in passing along whatever we do know to the physicians who prescribe the product."[10] Nonetheless, Cutter did not include a warning with its product for another year.[11] Similarly, Thomas Drees, president of Alpha Therapeutic, said that he believed then that the company's blood products

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5. Deborah Tedford, *Hemophiliacs Clash with Drug Companies; Suit: Firms Lax With AIDS Tests in '80s*, HOUSTON CHRON., Dec. 5, 1994, at 1; *see also*, Richard J. Newman, *How Tainted Blood is Killing Hemophiliacs*, U.S. NEWS & WORLD REPORT, June 27, 1994, at 76 ("The available evidence strongly suggests that AIDS is transmissible via AHF [antihemophilic factor]," according to a 1983 internal Red Cross MEMO.).

6. Newman, *supra* note 5, at 76.

7. Walt Bogdanich & Eric Koli, *2 Paths of Bayer Drug in 80's: Riskier One Steered Overseas*, N.Y. TIMES, May 22, 2003, at A1.

8. INST. OF MED., HIV AND THE BLOOD SUPPLY: AN ANALYSIS OF CRISIS DECISIONMAKING 101–06 (Lauren B. Leveton, Harold C. Sox, Jr., & Michael A. Stoto eds., Nat'l Acad. Press) (1995), http://books.nap.edu/openbook.php?record_id=4989&page=R1 (describing how, in 1983, the CDC recommended questioning blood donors about their sexual history to help identify higher-risk donors with multiple partners and suggested performing "surrogate testing" for AIDS, an analysis that detects a certain group of agents, such as antibodies to the hepatitis B core antigen, that are often associated with the AIDS virus.).

9. Bogdanich & Koli, *supra* note 7, at A1.

10. Elizabeth Kastor, *Blood Feud: Hemophiliacs & AIDS*, WASH. POST, May 10, 1993, at B1.

11. *Id.*

were dangerous.[12] However, "though [Alpha] should have immediately recalled the possibly infected factor concentrate, the only actions Alpha took initially to deal with the matter were to increase its insurance coverage and institute a donor self-exclusion program."[13] Alpha and other companies continued to export leftover HIV-infected blood products from inventory for over a year after making safer versions of the blood products available domestically.[14] As a result of the blood bankers' inaction, during the 1980s, more than ten thousand hemophiliacs and over twelve thousand other blood transfusion recipients were infected with the deadly HIV virus.[15]

In 1998, a class of nearly six thousand hemophiliacs and their beneficiaries received a settlement of $600 million for their injuries.[16] Chief Judge Richard Posner affirmed a consent decree requiring that each of the four accused pharmaceutical companies pay a percentage of the settlement amount approximating its market share of blood products.[17] To this day, the companies admit

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12. *AIDS-Blood Allegation*, NEWSDAY (New York), Nov. 20, 1992, at 16.

13. Cross v. Alpha Therapeutic Corp., No. 94-382, 2000 U.S. Dist. LEXIS 11804 at *22–23 (E.D. La. Aug. 11, 2000).

14. *See* Bogdanich & Koli, *supra* note 7, at A1. Records indicate even a year after receiving approval to sell safer, heated blood products, Cutter Biological, a division of Bayer, exported more than 100,000 vials of unheated blood products, valued in excess of $4 million. *Id.* An internal memo stated that "[w]e want to give the impression that we are continuously improving our product without telling them we expect soon to also have a heat-treated" version. *Id.* Executives from the three other American-based companies—Armour Pharmaceutical, Baxter International, and Alpha Therapeutic—likewise continued to sell the unsafe concentrate. *Id.*

15. *See* Michael McLeod, *Bad Blood: Every Day, a Hemophiliac Dies of AIDS*, ORLANDO SENTINEL, Dec. 19, 1993, at 10 (noting that in early 1980s, more than ten thousand hemophiliacs in the United States were infected with HIV due to a blood-based clotting agent that pharmaceutical companies and the National Hemophilia Foundation encouraged continued use of, even after federal agencies had issued warnings of its danger); JUSTICE HORACE KREVER, COMMISSION OF INQUIRY ON THE BLOOD SYSTEM IN CANADA 738 (1997), *available at* http://epe.lac-bac.gc.ca/100/200/301/hcan-scan/commission_blood_final_rep-e/vol3-e.pdf (noting that more than twelve thousand blood transfusion patients were infected with HIV during the 1980s).

16. *See In re* Factor VIII or IX Concentrate Blood Prod. Litig., 159 F.3d 1016, 1017–18 (7th Cir. 1998).

17. *See id.* The four defendant companies were Alpha Therapeutic Corporation, which paid 15% of the settlement, Armour Pharmaceutical Company and Baxter Healthcare Corporation, which both contributed 20%, and Bayer Corporation, which paid 45%. *See Blood Product Firms to Pay Government $12 Million to Settle Health Care Claims*, 6 HEALTH L. REP. (BNA) No. 19 at 712 (May 8, 1997); DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 306–07 (2000) (citing Factor Concentrate Litigation Settlement Agreement (Aug. 13, 1996) at 7), *available at* http://www.rand.org/pubs/monograph_reports/MR969/MR969.ch11.pdf).

no wrongdoing, as the settlement agreement released them from liability.[18]

2. *Guidant Defibrillators*

Guidant is one of the nation's leading heart defibrillator manufacturers.[19] An implantable defibrillator is a device used to monitor the heartbeat and administer an electric shock to the heart when needed to reestablish a normal beat rhythm.[20] Guidant produced a defibrillator with a serious defect—when the patient with the implanted defibrillator needed the "shock" produced by the unit, the device occasionally short circuited, in which case the patient typically died.[21] Recently, the company acknowledged that it waited three years before notifying the public that some of its defibrillators had this deadly electrical system defect.[22] Certain company executives were aware of the risks to patients as early as 2002.[23] Indeed, although Guidant manufactured

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18. *See* Liz Doup, *Infected at 14, Forgotten at 31; Hemophiliacs Worldwide Inherited AIDS Via a Tainted Blood Product*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 28, 2003, at A1 (responding to allegations, Bayer issued a statement that said the company "has always behaved responsibly, ethically and humanely to provide lifesaving products for the global hemophilia community.").

19. *See* Barry Meier, *Heart Device Sold Despite Flaw, Data Shows*, N.Y. TIMES, June 2, 2005, at C1; *see also* News Release, Boston Scientific, *Boston Scientific Completes Combination with Guidant* (Apr. 21, 2006), http://bostonscientific.mediaroom.com/index.php?s=press_releases&item=513; News Release, Boston Scientific, *Boston Scientific Comments on Guidant's Announcement* (Dec. 7, 2005), http://bostonscientific.mediaroom.com/index.php?s=press_releases&item=470; David Phelps, *Directors Under the Gun in Guidant Duel; Pressure from Shareholders Probably Has Many of the Players Reaching for Antacids*, STAR TRIB. (Minneapolis, Minn.), Jan. 19, 2006, at D1; Val Brickates Kennedy, *Boston Scientific Goes After Guidant*, MARKETWATCH, Dec. 5, 2005, http://www.marketwatch.com/news/story/guidant-gets-25b-offer-boston/story.aspx?guid=%7B7F1C893A%2D5DA6%2D467F%2DAC1D%2D84657FBF7956%7D.

20. *See* AM. HEART ASS'N, WHAT IS AN IMPLANTABLE DEFIBRILLATOR? (2004), http://www.americanheart.org/downloadable/heart/110081064047842%20WhatIsanImplantableDefib.pdf.

21. *See* Barry Meier, *Internal Turmoil at Device Maker as Inquiry Grew*, N.Y. TIMES, Feb. 28, 2006, at A1 (stating that "at least seven patients have died in connection with short circuits in three models of Guidant defibrillators"); Thomas M. Burton & Anna Wilde Mathews, *Guidant Sold Heart Device After Discovering Flaw*, WALL ST. J., June 2, 2005, at D3 (noting that Guidant contended the short circuit malfunction was extremely rare).

22. *See* Barry Meier, *Guidant Case May Involve Crime Inquiry*, N.Y. TIMES, Sept. 29, 2005 at C1; *FDA: Implanted Defibrillator Defects On the Rise*, MSNBC.COM, Sept. 16, 2005, http://www.msnbc.msn.com/id/9367708/ (Guidant has acknowledged that it waited three years before warning doctors and roughly 24,000 patients about an electrical system defect in its heart defibrillators).

23. *See* Barry Meier, *Files Show Guidant Foresaw Some Risks*, N.Y. TIMES, Dec. 24, 2005, at C1; *Defective Products: Will Criminal Penalties Ensure Corporate Accountability? Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 134–35

and distributed an improved version, it never informed the FDA of the defect,[24] it continued selling the defective products out of inventory, and it never warned thousands of patients and doctors about the risks of malfunction.[25] Guidant says it did not report the defibrillator design changes because it decided that FDA regulations did not require the reporting of "manufacturing enhancements."[26]

There have been at least sixty-seven clinical failures of Guidant's Prizm 2 DR and Renewal defibrillators reported, resulting in seven deaths worldwide.[27] The first case of about forty-five products liability class actions and fifty individual lawsuits filed in state and federal courts against the company regarding Guidant's defective heart defibrillators began in February of 2006.[28]

3. *Intrauterine Contraceptives*

A.H. Robins Company (Robins) manufactured an intrauterine contraceptive called the Dalkon Shield.[29] Intrauterine devices (IUDs) are contraceptives that are inserted into the uterus by a clinician.[30] A string attached to the bottom of the IUD extends "out of the uterus,

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(statement of Barry Maron, Director, Hypertrophic Cardiomyopathy Center, Minneapolis Heart Institute Foundation), *available at* http://judiciary.senate.gov/testimony.cfm?id=1792&wit_id=5122.

24. *See* Meier, *supra* note 22, at C1 (noting that in response to an earlier inquiry, Guidant said it had decided not to report the defect to the FDA). *But cf.* Burton & Mathews, *supra* note 21, at D3 (claiming Guidant notified FDA about the defect in 2002).

25. Barry Meier, *Guidant Agrees to Pay for Defibrillator Replacements*, N.Y. TIMES, June 17, 2005, at C2 (stating that Guidant first realized electrical problems with their defibrillators in early 2002 and manufactured an improved version correcting the problem but continued to sell older, defective defibrillators out of inventory and did not tell doctors or hospitals that an improved version was available).

26. Meier, *supra* note 19, at C1. For the applicable FDA regulations, see 21 C.F.R. § 806.1(b)(1) (2006) (exempting actions taken by manufacturers to improve "performance or quality" of a device from required reporting of "certain actions concerning device corrections and removals" when these actions "do not reduce a risk to health posed by the device") and § 806.10(a)(1) (requiring manufacturers to submit a written report to the FDA of any correction initiated "to reduce a risk to health posed by [a] device").

27. Nora L. Tooher, *Litigation Mounts Over Guidant Corp.'s Flawed Heart Devices*, ST. LOUIS DAILY REC./ST. LOUIS COUNTIAN, Feb. 2, 2006, at 1 (stating that Renewal had thirty-five failures and five deaths, and Prizm had thirty-two failures and two deaths).

28. *See id.*

29. *See* Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1215 (Kan. 1987) (describing factual background suit against Robins for personal injuries allegedly arising from the use of the "Dalkon Shield").

30. *See* STEDMAN'S MEDICAL DICTIONARY 487 (27th ed. 2000); Russell Mokhiber, *Criminals by Any Other Name; Corporate Executives*, WASH. MONTHLY, Jan. 1986, at 40, 43.

through the cervix, into the vagina where bacteria are present."[31] The Dalkon Shield became problematic because in its case, "bacteria in the vagina would not only rest on the string but would move into it, and then move (or 'wick') inside the string, up into the germ-free uterus, causing pelvic infection."[32]

Internal memoranda show that Robins knew about the danger posed by the tail string.[33] A 1975 internal Robins memorandum cites 248 cases of Dalkon Shield users having infection-induced miscarriages compared to the fifty-five cases for all other IUD users.[34] Robert Nickless, a former product management coordinator for Robins, advised in a company memorandum written two weeks after Robins had acquired the right to manufacture the IUD, "the string or tail situation needs careful review since the present tail is reported (by a co-inventor) to have a wicking tendency" to draw bacteria into the sterile uterus.[35]

Nevertheless, Robins went on to sell the product. Even after taking the product off the market, the company advised patients that they did not need to remove the device.[36] Not until six years later did the company reverse this position and advise the public that the continued use of the product was dangerous.[37]

In all, the Dalkon Shield killed at least seventeen women and caused injuries in over two hundred thousand more.[38] One woman

31. *See id.*

32. *Id.*

33. *See* Allen v. A.H. Robins Co., 752 F.2d 1365, 1367–68 (9th Cir. 1985).

34. Subrata N. Chakravarty, *Tunnel Vision*, FORBES, May 21, 1984, at 214.

35. Barry Siegel, *The Right Question; One Man's Effort to Tell Dalkon Story*, L.A. TIMES, Aug. 22, 1985, at 1.

36. *See Allen*, 752 F.2d at 1368 (noting that Robins removed the Dalkon Shield from the market in June 1974 while at the same time stressing in a June 28 press release that there is "no reason to believe at this time that physicians should remove the Dalkon Shields from patients now wearing [them]"; one year later in an August 1975 press release, the company again reassured consumers, saying, "A.H. Robins remains firm in its belief that the Dalkon Shield, when properly used, is a safe and effective IUD."); Jury Gives Woman $9.2 Million in Birth Control Device Suit*,* CHI. TRIB., May 4, 1985, at 3 (reporting that Robins removed the Dalkon Shield from market in 1974 but did not advise women to have it removed until 1980); Tetuan, 738 P.2d at 1221 (stating that after halting domestic sales of the Shield in 1974, Robins continued distributing it overseas).

37. Morton Mintz, *Isolated Cases Set Off the Alarms About IUD*, WASH. POST, Apr. 9, 1985, at A1 (reporting that on September 25, 1980, Robins sent out a "Dear Doctor" letter urging all women who were still wearing the Shield to have it removed; the reason given for this advice, however, was that any IUD left inside the body for this length of time posed serious health risks to the woman and not that the Dalkon Shield presented any unique hazards).

38. Gina Kolata, *The Sad Legacy of the Dalkon Shield*, N.Y. TIMES, Dec. 6, 1987, at A120 (two hundred thousand women sued the A. H. Robins Company for injuries

using the Dalkon Shield IUD was forced to undergo a total abdominal hysterectomy at the age of twenty-eight for the removal of damaged tissue caused by her implanted Dalkon Shield IUD.[39] Because Robins withheld from the public relevant information regarding the Shield's dangerous side effects, the woman's doctor initially prescribed antibiotics for the infection and not the Shield's removal.[40] The Kansas Supreme Court found "substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield . . . until those dangers worked their tragic results on [the plaintiff]. We find that the [$7.5 million] punitive damages award is not excessive nor does it shock the collective conscience of this court."[41]

In another case, two special masters in the U.S. District Court in Minnesota held that Robins had "engaged in an ongoing fraud by knowingly misrepresenting the nature, quality, safety and efficacy" of the Dalkon Shield.[42] The Minnesota District Court overseeing twenty consolidated cases concerning settlement agreements between Robins and Shield users reprimanded three Robins executives: President and CEO E. Claiborne Robins, Jr., General Counsel William A. Forrest, and Senior Vice President of Research and Development Dr. Carl D. Lunsford.[43] Judge Miles Lord reprimanded these men for knowingly

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allegedly caused by the Dalkon Shield); Associated Press, *Court OKs $2.5-Billion Fund to Cover Robins' Dalkon Shield Claims*, L.A. TIMES, at A3 (a court-approved bankruptcy reorganization plan for the A. H. Robins Co. created a $2.5-billion trust fund to compensate the roughly two hundred thousand women with injury claims against the company).

39. *See Tetuan*, 738 P.2d at 1216.

40. *Id.* at 1227.

41. *Id.* at 1240.

42. Martha Middleton, *Dalkon Makers Cited for "Ongoing Fraud,"* NAT'L L.J., Mar. 11, 1985, at 8 (quoting Special Masters Thomas Bartsh and Peter Thompson in a Feb. 21, 1985 pretrial discovery hearing for three consolidated Dalkon Shield cases brought before U.S. District Judge Robert G. Renner).

43. Judge Miles Lord delivered this reprimand in *Gardiner v. A.H. Robins Co.*, Civil Nos. 84-5061-MN; 84-5062-MN:

> Gentlemen, the result of these activities and attitudes on your part have been catastrophic. Today as you sit here attempting once more to extricate yourselves from the legal consequences of your acts, none of you have . . . faced up to the fact that more than 9,000 women have made claims that they gave a part of their womanhood so that your company might prosper. It is alleged that others gave their lives so you might prosper. And there stand behind legions more who have been injured but who have not sought relief in the courts of this land . . . .If one poor young man were by some act of his, without authority or consent, to inflict such damage upon one woman, he would be jailed for a good portion for the rest of his life. And yet your company, without warning to women, invaded their bodies by the millions and caused them injuries by the thousands. And when the time came for these women to make their

continuing to allow the victims to use a deadly product: "The only conceivable reasons you have not recalled this product are that it would hurt your balance sheet and alert women, who already have been harmed, that you may be liable for their injuries."[44]

Furthermore, the executives tried to deny any knowledge of the danger.[45] But Roger Tuttle, a former staff lawyer for the company, testified that he saved from destruction what may have been hundreds of documents that were "'legally damaging'" to the company's inaccurate assertions that corporate executives had no knowledge of the Dalkon Shield defects.[46]

> claims against your company, you attacked their characters, you inquired into their sexual practices and into the identity of their sex partners. You exposed these women and ruined families and reputations and careers in order to intimidate those who would raise their voices against you. You introduced issues that had no relationship whatsoever to the fact that you planted in the bodies of these women instruments of death, mutilation, and of disease. . . . . *The company has not suffered, nor have you men personally. You are collectively being enriched by millions of dollars each year*. There is as yet no evidence that your company has suffered any penalty whatsoever for these litigations. In fact the evidence is to the contrary. The case law indicates that the purpose of punitive damages is to make an award which will punish a defendant for his wrongdoing. Punishment traditionally involves the principles of revenge, rehabilitation and deterrence. There is no evidence I have been able to find, in my review of these cases, to indicate that any one of these factors has been accomplished. . . . . I see little in the history of this case that would deter others from partaking of like acts. The policy of delay and obfuscation practiced by your lawyers in courts throughout this country has made it possible for your insurance company and you . . . to delay the payment of these claims for such a long period that the interest you earn in the interim covers the costs of these cases. You in essence . . . pay nothing out of your pocket to settle these cases. What other corporate officials anywhere could possibly learn a lesson from this? The only lesson could be that it pays to delay compensating victims, and to intimidate, harass and shame your victims, the injured parties.

Miles W. Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 HAMLINE L. REV. 7, 7–11 (1986) (emphasis added) (citations omitted). On appeal, the Eighth Circuit later ruled this reprimand to be a violation of A.H. Robins' due process and had it stricken from the record. Gardiner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984).

44. Lord, *supra* note 43, at 10.

45. *See* Austin C. Wehrwein, *Were Dalkon Documents Destroyed?*, NAT'L L.J., Aug. 13, 1984, at 3.

46. *Id.*

4. Automobiles—the "Dangerous Type"[47]

Automobiles carry inherent dangers, and so-called luxury cars often carry safety features that economy cars do not.[48] However, there are minimum safety features established by industry practice that reflect readily-available contemporary technologies.[49] Intentional downward departures from these standards highlight a disregard for the public's well-being and are subject to sanction.[50]

The 1975 Ford Mustang was saddled with a fuel system integrity problem known to Ford when it put the car on the market.[51] According to former National Highway Transportation Safety Administration (NHTSA) official Joan Claybrook, "Ford knew and never told the Department of Transportation during the course of [a 1976 NHTSA] investigation that when the car was hit in the rear and the fuel tank came forward, fuel could spew out into the passenger compartment," increasing the risk of passenger injury or death from fire.[52]

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47. THE CARS, *Dangerous Type*, *on* CANDY-O (Elektra Records 1990) (1979).

48. *See*, *e.g.*, Volvo XC90: Celebrate Yourself, http://www.volvocars.us/models/xc90/default.htm (follow "Safety" hyperlink) (last visited Aug. 1, 2006) (explaining in Volvo advertisement advanced safety features). For example, *compare* Insurance Institute for Highway Safety, Highway Loss Data Institute, http://www.iihs.org/ratings/summary.aspx?class=10 (last visited Feb. 14, 2007) (reporting crashworthiness for 2007 models of large luxury cars and the standard nature of side airbags), *with* Insurance Institute for Highway Safety, Highway Loss Data Institute, http://www.iihs.org/ratings/summary.aspx?class=20 (last visited Feb. 14, 2007) (reporting crashworthiness for 2007 models of large family cars and the optional nature of side airbags).

49. *See,* 49 C.F.R. § 571 (2007) (showing Federal Motor Vehicle Safety Standards (FMVSSs), to which manufacturers of motor vehicles must conform and certify compliance).

50. *See* 49 C.F.R. § 578.6 (2007) (stating that a person who violates specified provisions or regulation prescribed under Title 49 of the United States Code "is liable to the United States Government for a civil penalty of not more than $6,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty . . . for a related series of violations is $16,375,000.").

51. *See* Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 476, 481 (Ga. Ct. App. 1984) (noting knowledge within Ford Motor Company as early as 1968 that design and location of fuel tank installed in 1975 Mustang would cause tank to jam into rear axle if struck from behind and upholding $8 million punitive damage award); *CBS 60 Minutes II Hosted by Dan Rather*, *A Classic Cover-Up?; Classic Ford Mustangs Present Safety Hazard Due to Location of Fuel Tank, But Ford Denies Any Problem* (CBS television broadcast Aug. 17, 1999) [hereinafter *A Classic Cover-Up?*] (reporting that Ford was warned in 1968 by one of its engineers as well as its own Ford Test 301 that rear-end collision to Ford Mustang would cause gasoline to come into car).

52. *A Classic Cover-Up? supra* note 53; *see also* Linda Fantin, *Sitting Target*, SALT LAKE TRIB. (Utah), July 28, 2003, at A1 ("'The fundamental principle of crash fire safety is that if you survive the trauma of a crash, you should not die by fire,' [Center for Auto Safety] executive director Clarence M. Ditlow wrote in a letter to Ford.").

Ford conducted a crash test[53] for other purposes in 1966 that it "withheld from the Department of Transportation," which included a video camera looking down into the Mustang's trunk that revealed gasoline spewing into the passenger compartment whenever the fuel tank was crushed upon rear impact.[54] Later that year, Ford conducted a crash test on a modified version of the Mustang in order to determine if the car met federal rear-end crash standards.[55] The frame of this modified version was strengthened in a way making the gas tank less likely to rupture during a rear-end collision.[56] Ford reported passing results of this test to the federal government even though Mustangs with the modified frame were never manufactured.[57]

When the NHTSA investigated Ford's "drop-in" fuel tank, Ford did not disclose the results of the original crash test or the fact that the Mustang's frame had been altered when performing this second crash test.[58] Unaware of these test results, however, the NHTSA, which has to approve cars for the market,[59] mistakenly concluded that classic Mustang fuel tanks "present[ed] no fire hazard which does not also exist in other fuel tank systems."[60]

Certain Ford executives had actual knowledge of an increased chance that the design of the car could cause an explosion on rear impact.[61] A report from a member of Ford's Safety Engineering staff stated that "the drop-in gas tank [was] undesirable because a fuel tank

53. During a motor vehicle crash test, the vehicle is subjected to extreme conditions in order to determine under which of those conditions the vehicle will fail. *See generally* Bengt Halvorson, *A Crash Course in Crash-Test Ratings*, FORBES AUTOS, June 23, 2006, *available at* http://www.forbesautos.com/advice/safety/crash_test/01-understanding.html (describing crash agencies and tests).

54. *See A Classic Cover-Up?*, *supra* note 51.

55. Baier v. Ford Motor Co., No. C04-2039, 2005 WL 928615, at *1 (N.D. Iowa Apr. 21, 2005).

56. *Id.*

57. *Id.* at *1–2.

58. *See id.*; *A Classic Cover-Up?*, *supra* note 51.

59. *See generally* Motor Vehicle Safety Act, 49 U.S.C. §§ 30101–30170 (2000). The National Highway Transportation Safety Authority, or NHTSA, regulates the safe condition and operation of motor vehicles sold to the public. *See* About NHTSA, http://www.nhtsa.gov (last visited Feb. 23, 2007). In doing so, it is required under the Motor Vehicle Safety Act to issue Federal Motor Vehicle Safety Standards (FMVSS) and Regulations to which motor vehicle manufacturers must certify compliance and affix a label to each vehicle stating that the vehicle conforms to the applicable FMVSSs. *See* 49 U.S.C. §§ 30111, 30112, 30115.

60. *See A Classic Cover-Up?*, *supra* note 51.

61. *See Baier*, 2005 WL 928615, at *5. In fact, the death rate in rear-end 1964–1970 model Classic Mustangs collisions where fire occurred was more than three times higher than the same death rate for all other cars of the same period. *See A Classic Cover-Up?*, *supra* note 51.

rupture could lead to gasoline getting into the car and, therefore, that the tank should be relocated or a barrier installed."[62] In addition, according to evidence produced in one case, "minutes [from] a September 12, 1967, meeting indicate that Ford knew the drop-in gas tank was more likely to burst than were the Chevrolet fuel tanks."[63]

Internal Ford memoranda recommended deferral of safety equipment in order to decrease manufacturing costs. One memorandum estimated that "'the total financial effect of the Fuel System Integrity program [would] reduce Company profits over the 1973–1976 cycle by $109 million,' and recommended that Ford 'defer adoption of the [fuel-system safety measures] on all affected cars until 1976 to realize a design cost savings of $20.9 million compared to 1974.'"[64] An estimated two hundred people burned to death as a result of the Mustang's exploding fuel tank.[65]

In *Ford Motor Co. v. Stubblefield*, the parents of fifteen-year old Terri Stubblefield brought a wrongful death suit against Ford Motor Company for negligent design of the 1975 Ford Mustang II.[66] Their daughter, who was riding in the back seat of a Mustang II, was fatally burned when the car was struck from behind by another car while stopped in traffic.[67] A Georgia Appeals Court held that:

> Ford was shown to have actual knowledge before [selling the car] of a defect in its product from which it could have reasonably foreseen injury of the specific type sustained here . . . . Ford's own documents disclosed its knowledge that if certain automobiles were struck from the rear they would burn, with a strong probability of resulting in injury to the occupants; nevertheless, Ford management decided not to correct this defect or warn the owners of the danger created thereby. The evidence further authorized [the jury's] find-

62. *Baier*, 2005 WL 928615, at *5.

63. *Id.*

64. Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 481 (Ga. Ct. App. 1984). Another company directive concerning implementation of safety measures revealed that "actual hardware will not be added until required by law." *Id.* at 476. Additionally, CBS 60 Minutes II reported that Lee Iacocca, former president of Ford Motor Company, was recorded on President Nixon's secret taping system talking about Ford's safety standards, saying: "Shoulder harnesses and head rests are complete wastes of money. Safety has really killed off our business." *A Classic Cover-Up?*, *supra* note 51; *see also* Michael L. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793, 826 (1997).

65. *See* Safety Forum: Product Safety News and Resources, *Mustang: Ford's Firebomb*, Sept. 30, 2002, http://www.safetyforum.com/fordmustang/. More than seventy families of those who have burned to death in a Classic Mustang rear-end collision between 1964 and 1974 have sued Ford. *Id.*

66. 319 S.E.2d 470, 474 (Ga. Ct. App. 1984).

67. *Id.* at 474.

> ing that Ford weighed the costs of corrective action against the benefits of profits and deliberately decided to market the 1975 Mustang II with clear knowledge of the danger . . . . [E]vidence . . . that Ford had actual knowledge before the sale of the automobile of a condition presenting a danger to users . . . authorized the jury to find that Ford acted in bad faith in placing such a vehicle in the channels of commerce.[68]

As a result, Judge Sognier held that "[t]he evidence here was sufficient to authorize the jury to find that the sum of $8 million was . . . necessary to deter Ford from repeating its conduct; that is, its conscious decisions to defer implementation of safety devices in order to protect its profits."[69]

General Motors (GM) also faced problems with dangerously located fuel tanks. Between 1973 and 1987, GM manufactured nearly ten million pickup trucks with "side-saddle" fuel tanks that were mounted outside the main frame rail.[70] This design made the truck more likely to explode upon impact, and was reported to have resulted in at least 800 fire-related deaths.[71]

Internal documents demonstrate that GM executives contemplated the risk of products liability suits, but still chose not to change the design.[72] GM's own comparative accident study showed "the 1973 trucks had more fuel leaks from the fuel tank than did the pre-1973 pick-ups."[73] In fact, former Secretary of Transportation Federico Pena noted that "GM was aware, possibly as early as the mid-1970s, but certainly by the early 1980s[,] that [the "side saddle" tank]

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68. *Id.* at 482.

69. *Id.* at 481.

70. *See* Jeffrey Brodeur, *Appeals Court Rejects GM Pickup Settlement*, CHI. SUN-TIMES, Apr. 18, 1995, at 3; Jacqueline Gaulin, *U.S., GM Strike Deal on Trucks; Pena Drops Effort to Recall Pickups*, WASH. TIMES, Dec. 3, 1994, at A1.

71. *See* Myron Levin, *A History of Fiery Deaths on the Road; Facing Lawsuits, GM Moved Gas Tanks of its C/K Pickups Inside the Frame. But it Denies the Design Was Unsafe, and Federal Regulators Retreated From a Costly Recall*, L.A. TIMES, Apr. 29, 2001, at A1. The "dual side-saddle" fuel tank design has resulted in more than eight hundred deaths and, according to head of the Center for Auto Safety, Clarence Ditlow, doubles the risk for impact disaster. *Id. See also Testimony on Need to Recall GM's Rolling Firebombs Before the S. Labor & Human Res. Comm.*, 103rd Cong. (1994), 1994 WL 684086 (F.D.C.H.) (statement of Clarence M. Ditlow, Executive Director, Center for Auto Safety) [hereinafter "Ditlow statement"].

72. *See* Andrew Pollack, *Paper Trail Haunts G.M. After it Loses Injury Suit*, N.Y. TIMES, July 12, 1999, at A12. Internal memos revealed that as early as 1973, GM began balancing the costs of making its fuel system safer with the costs of lawsuits involving fuel-fed fires. *Id.* GM continued the "side-saddle" tanks until after 1988, after which they abandoned the design mostly in response to mounting lawsuits. *See* Levin, *supra* note 71, at A1.

73. *See* Ditlow statement, *supra* note 71.

design made [their] trucks more vulnerable, and that fatalities from side-impact fires were occurring. However, GM chose not to alter the design for 15 years."[74]

In *General Motors Corp. v. Moseley*, the parents of Shannon Moseley sued GM for their son's wrongful death.[75] Moseley was fatally burned in his 1985 GMC pickup truck when it burst into flames after being struck on the driver's side by another pickup truck.[76] The Georgia Court of Appeals held that there was evidence that GM knew of the dangers involved with the placement of the fuel tanks, but did not modify the design "because of economic considerations."[77] The court relied on GM's willingness to endanger its consumers for economic benefit to support an award of punitive damages for over $100 million.[78]

The 1979 Chevrolet Malibu also had a fuel tank integrity problem; this car was constructed with a rear fuel tank located only eleven inches from the bumper.[79] Despite thousands of vehicle fires, and hundreds of injuries and deaths that resulted from this design,[80] GM did not address the problem with the Malibu until it faced a lawsuit in 1994. The litigation revealed internal memoranda establishing that GM knew of the danger of fuel tank fires upon rear impact, but chose not to modify its design before putting the vehicle on the market because it did not deem the costs of doing so to be worth the corresponding consumer safety benefit.[81] In particular, a memorandum written in

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74. Pat Etheridge, *U.S. DOT Says GM Must Recall Thousands of Pick-Ups* (CNN television broadcast Oct. 17, 1994). The testimony of Clarence Ditlow indicates that GM's priority was installing a larger gas tank to use as a selling point. *See* Ditlow statement, *supra* note 71.

75. 447 S.E.2d 302 (Ga. Ct. App. 1994).

76. *Id.* at 305.

77. *Id.* at 311.

78. *Id.* at 311–12. The court's decision was later abrogated on different grounds. *See* Webster v. Boyett, 496 S.E.2d 459 (Ga. 1998).

79. *See* Milo Geyelin, *Lasting Impact: How an Internal Memo Written 26 Years Ago is Costing GM Dearly*, WALL ST. J., Sept. 29, 1999, at A1. Placing the fuel tank 11 inches away from the rear bumper was cheaper than placing the tank 20 inches from the bumper, the customary distance for previous models. *See id.*

80. *Automotive Editors and Legal Writers*, *Greene, Broillet, Taylor, Wheeler & Panish Say GM Continues to Misplace Blame for Exploding Fuel Tanks,* BUS. WIRE, Aug. 9, 1999, at Business (quoting Brian Panish, Lead Counsel for the Plaintiffs in *Anderson v. General Motors*, who claimed that GM, by its reluctance to redesign the Malibu's fuel tank placement, "wrote off between 300 and 500 lives a year and allowed thousands more to suffer ghastly burn injuries.").

81. *See* Anderson v. General Motors Corp., No. BC-116926 (Sup. Ct. L.A. County Aug. 26, 1999), *cited in* Lori Woodward O'Connell, *The Case for Continuing to Award Punitive Damages*, 36 TORT & INS. L.J. 873, 874–5 (2001). The lawsuit resulted in a $1.09 billion verdict against GM, reduced from the original $4.9 billion

1973 by an engineer at GM, Edward Ivey, estimated that "fatalities related to accidents with fuel fed fires are costing General Motors $2.40 per automobile in current operation,"[82] which is "less than the $8.59 it would cost to use the safer over axle design."[83] GM estimated that five hundred fatalities would occur every year as a result of post-collision fuel tank fires.[84] In *Anderson v. General Motors Corp.*, the court found "clear and convincing evidence . . . that defendants' fuel tank was placed behind the axle on automobiles of the make and model involved here, in order to maximize profits, to the disregard of public safety."[85]

5. *Zylon Vests*

In 2003, the Second Chance Body Armor Company publicly acknowledged that its Zylon bulletproof vests deteriorated rapidly, decreasing their effectiveness over time.[86] The company, however, knew as early as 1998 that the Zylon material had failed company

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verdict. Margaret Fisk, *The Biggest Jury Verdict of 1999*, NAT'L L. J., Feb. 28, 2000, at A1. The jurors in *Anderson* concluded from an internal GM memo that GM made a decision to pay projected damage awards of $2.40 per vehicle rather than pay $8.59 per vehicle to move the Malibu fuel tank over the rear axle. *See* Jeffrey Ball & Milo Geyelin, GM Ordered by Jury to Pay $4.9 Billion, WALL ST. J., July 12, 1999, at A3.

82. *The "Ivey Memo,"* CNN.COM, Sept. 10, 1999, http://www.cnn.com/US/9909/10/ivey.memo/.

83. *Defective Products: Will Criminal Penalties Ensure Corporate Accountability?: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 154 (2006) (statement of Brian Panish, Partner, Panish, Shea & Boyle, LLP); *see also* David Zeman and Janet L. Fix, *When Secrecy Explodes (Part 1) GM and Fuel-Tank Fires*, DETROIT FREE PRESS, Jan. 7, 2000, at 1A.

84. *The "Ivey Memo," supra* note 82. *See also Greene, Broillet, Taylor, Wheeler & Panish Say GM Continues to Misplace Blame for Exploding Fuel Tanks*, BUS. WIRE, Aug. 9, 1999, at 1 (attorney statement alleging that GM's rear-mounted fuel tank design has caused hundreds of Americans to burn to death); Robert Sherefkin, *Lee Iacocca's Pinto: A Fiery Failure*, 77 AUTOMOTIVE NEWS 208 (2003) (an estimated 500 deaths and hundreds of injuries have been linked to rear-mounted fuel tank design in the Ford Pinto).

85. Fisk, *supra* note 81, at A1.

86. *See* Sara Hoffman Jurand, *Zylon Body Armor Fails to Protect & Serve Police, Lawsuits Claim*, 41 TRIAL 14, 18 (2005) (quoting a 2003 press release that admitted "more severe Zylon degradation problems over time and use than previously disclosed"). L. Anne Newell, *Arizona Law Enforcement Wearing Potentially Unsafe Bulletproof Vests,* ARIZ. DAILY STAR, Sept. 30, 2003, at 1, *available at* http://www.accessmylibrary.com/coms2/summary_0286-7544464_ITM (subscription required) (reporting that "Second Chance Body Armor . . . sent warning letters to tens of thousands of customers across the country . . . . The letters said a synthetic fiber used in the vests might be deteriorating as it ages and, although tests are inconclusive so far, the vests have been discontinued. 'We tested more than 200 vests in the last two years, and the most recent set of tests yielded results that caused us to be concerned,' said company spokesman Gregg Smith.").

quality tests. That year, Second Chance was informed in writing by Japanese Zylon manufacturer Toyobo of its own tests indicating the fabric lost twenty percent of its durability over a two hundred-hour period of light exposure.[87] One complaint alleged that in 2000, internal testing conducted by Toyobo revealed that the Zylon material "suffered from severe and accelerated degradation when exposed to light, heat and humidity."[88] By 2001, Second Chance research director Aaron Westrick advised Zylon executives in a company memorandum to "immediately notify our customers of the degradation problems we are experiencing [with Zylon vests] . . . Second Chance should make the right, [sic] difficult decisions regarding this issue. Lives and our credibility are at stake."[89] Ed Bachner, Board Member and Vice President of Technology, also warned in that same year that if Toyobo's Zylon tests were accurate, it was "unlikely the present Zylon designs will maintain adequate performance throughout their warranty period."[90]

Not only did certain company executives realize the danger of the product, they were also aware of the risk of not disclosing the product's flaws. Company executives of Second Chance wrote in a 2002 letter to the board that the company could "continue to operate as though nothing is wrong until one of our customers is killed or wounded or . . . Dupont or some other entity exposes the Zylon problem."[91] But the "downfall" to this solution, they wrote, would be that

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87. *See Pennsylvania Attorney General Pappert Accuses Bulletproof Vest Maker of Failing to Disclose Potentially Life Threatening Flaws in Equipment Sold to Pennsylvania Law Enforcement*, PR NEWSWIRE, July 27, 2004, at State and Regional News. Toyobo also recommended that Second Chance keep the fabric stored in a box at the factory and not left out in the light for extended periods. *Id*. In a subsequent letter dated August 2001, Toyobo informed Second Chance of the fabric's loss of strength during exposure to heat and humidity, conditions customers wearing the vest were likely to experience. *Id*. Specifically in that letter, Toyobo warned Second Chance to "please share this information with your customers." *Id*. Yet according to Attorney General Jerry Pappertto, "[t]he climate test results were not shared with police nor were law enforcement officials warned that exposure to light or excessive heat and humidity could also weaken the vests." *Id*.

88. Erik Arvidson, *Reilly Suing Two Companies Over Bulletproof Vests*, LOWELL SUN (Lowell, Mass.), Nov. 18, 2003, at Local (quoting Attorney General Thomas Reilly's complaint against Second Chance and Toyobo).

89. *See* Scott Marshall, *Officer's Widow Waits For Justice––Criminal, Civil Trials Remain Months Away*, N. COUNTY TIMES (Cal.), Feb. 20, 2005, http://www.nctimes.com/articles/2005/02/21/news/top_stories/22005194524.txt.

90. David Zeman & Joe Swickard, *Flaws and Secrets Lead to a Fall*, DETROIT FREE PRESS, Nov. 22, 2005, at 1B.

91. *Maker of Bulletproof Vest May Face Charges*, CBS NEWS, Sept. 26, 2005, http://www.cbsnews.com/stories/2005/09/26/ap/business/mainD8CRUNB01.shtml?CMP=OTC-RSSFeed&source=RSS&attr=Business-APDigital_D8CRUNB01.

"a law enforcement officer will be killed wearing one of our vests and we will be forced to make excuses as to why we didn't recognize and correct the problem. In the eyes of law enforcement we will either be stupid for not knowing, or greedy and uncaring for knowing and not doing anything about it."[92]

Still, not a single police department was warned of the vest's flaws, and no recall was issued for another year, a decision Westrick suggests may have been influenced by executive plans to make shares of the corporate stock available for public trading.[93] A year later, in June 2003, Officer Tony Zeppetella was shot to death while wearing an eight-month-old Zylon vest.[94]

In *Zeppetella v. Second Chance Body Armor, Inc.*, Tony Zeppetella's wife brought a lawsuit against Second Chance Body Armor and Toyobo Co. Ltd., the Japanese manufacturer of the Zylon fiber used to make the vests, for the wrongful death of her husband.[95] She alleged that "the companies knew for years that the strength of Zylon fibers, used to make the vests, quickly and significantly degraded—sometimes in only a few months—yet continued to sell the vests and did not let law enforcement officials know of the potential dangers and risks."[96] The companies did not warn the public of these risks until four months after Zeppetella's death.[97] After nearly a week of deliberations, the jury found the two companies fully liable for economic damages and thirty percent liable for non-economic damages and de-

92. Joe Swickard & David Zeman, *In the Line of Fire*, DETROIT FREE PRESS, Nov. 28, 2005, at 1. Davis insists that his concerns regarding the vest, when raised at board meetings, were met with resistance from and stymied by other board executives, who voted instead to continue providing funds for vest testing. Zeman & Swickard, *supra* note 90, at 1B. Paul Banducci, however, a board member who later became President and CEO of Second Chance, testified in a deposition that Davis, as President of the company, had the final word on the issue, saying "I think Richard Davis held veto as president." *Id.*

93. *See* Zeman & Swickard, *supra* note 90, at 1B.

94. *See* Dana Littlefield, *Lawsuits Mount for Maker of Protective Police Vests*, SAN DIEGO UNION-TRIB., Jan. 25, 2004, at A1; Zeman & Swickard, *supra* note 90, at 1B. Weeks after Zeppetella's shooting and the permanent disabling of another officer who had been wearing a Second Chance Body Armor vest, Davis resigned as President and CEO of the company and then later left the board in 2004. *Id.*

95. Allison Torres Burtka, *Settlement Follows Jury Verdict in Body Armor Case,* TRIAL, Jan. 1, 2007, at 74(2) (citing Zeppetella v. Second Chance Body Armor, Inc., No. GIN 034151 (Cal., San Diego Co. Super.) (settled Nov. 7, 2006)).

96. Natalie White, *Calif. Superior Court Rules Bulletproof Vest Manufacturer Liable for Death of Officer*, POLICE.COM, Oct. 23, 2006, http://www.policeone.com/police-products/tactical/body-armor/articles/1187179/.

97. Jose Luis Jiménez, *Trial Against Makers of Protective Vest Begins,* SAN DIEGO UNION-TRIB., Aug. 11, 2006, at NC1.

manded they pay Zeppetella's wife and toddler son $2.5 million in damages.[98]

III.
Correcting the Asymmetry of Costs to Benefits of Risk-Creating Behavior by Corporate Executives

In all of the examples discussed in Part II, the corporate entity was held civilly liable to its victims or was at least potentially liable. But because no Executive-Internalization federal laws exist and only extremely limited versions exist in some states, no criminal charges were brought against any of the culpable executives.

Currently, business entities are civilly liable for fraudulent claims and for selling excessively dangerous products, mostly under products liability laws.[99] This liability system, however, has not sufficiently dissuaded many corporate executives from passing on the risks to consumers because corporate executives, who are rationally interested in maximizing personal remuneration, shift the costs (including punitive damage awards) of risky behavior to the business entities or the consuming public. Payments to victims are reflected against the corporation's profits, which, all else being equal, will lower the value of the stock to the shareholders. While corporate executives usually have sizeable shareholdings and stock options, and are thus arguably affected, this offset often does not directly result in negative incentives to the executives responsible for the wrongdoing because the ultimate compensation to the victims (and thus the corporation's payment) typically takes place years, or even decades, after the initial tort, well after the executives have either realized the gains on their holdings and options or even left their corporations.

98. Scott Marshall, *Jury: Vest Makers Failed to Warn Slain OPD Officer of Problems,* N. County Times (Cal.), Sept. 8, 2006, at Bus. & Fin. News (reporting that jurors awarded Jamie Zeppetella and her toddler son, Jakob, $2.1 million in economic damages and $1.5 million for the loss of love and companionship they would suffer as a result of Tony Zeppetella's death; the Zeppetellas expected to collect only about $2.5 million of the $3.6 million in damages the jury awarded because the jury decided that the man on death row for shooting Zeppetella was responsible for seventy percent of the non-economic damages and the Zeppetellas had previously dropped the man from the suit because the criminal justice system was already holding him accountable.).

99. *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. (1998) § 1 ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

Since corporate executives personally realize the gains of salary and executed stock options, but do not bear the potential liability costs under this regime, they have no incentive to limit the latter if doing so will negatively impact the former. This incentive/disincentive asymmetry rationally leads corporate executives to pursue riskier than optimal activities.[100] Indeed, for various reasons, some not implicating strategic departure, corporate CEO tenure has been on the decline.[101] Regardless of the cause, the cyclical nature of executive tenure fosters this environment of pursuing short-term individual returns at the expense of long-term corporate costs. While we would expect that shareholder governance mechanisms would work to counteract this incentive for executives to exploit the business entity, these industry executives are the very ones with the information that would allow the outside investors to act as a check on this executive abuse.[102] Due to these informational asymmetries, the potential safeguard shareholders may use to control management abuse is too often ineffective.

A. The Absence of Executive-Directed Disincentives in Current American Corporate Law

The solution to industry executives' exploitation of informational asymmetries and cost-shifting opportunities is the imposition of criminal liability directly on corporate executives responsible for the knowing or reckless introduction of dangerous products and services into the marketplace, i.e., the Executive-Internalization Approach. This

100. During the hearing before the United States Senate Judiciary Committee, Victor Schwartz, opponent of the Executive-Internalization Approach, admitted that he has not evaluated the asymmetry of costs to benefits of risk-creating behavior by industry executives because he draws no distinction between the industry executives and the business entity itself. *Defective Products: Will Criminal Penalties Ensure Corporate Accountability?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 17–18 (2006) (statement of Victor Schwartz). Moreover, Schwartz stated that he "do[es]n't see the need for any additional criminal deterrence to get the right decision[s by industry executives.] That is just based upon [his] experience." *Id.* at 18.

101. *See Be a CEO? No Way!*, CNNMoney.com, Oct. 6, 2004, http://money.cnn.com/2004/10/06/news/newsmakers/ceo_survey/index.htm (discussing a Burson-Marsteller survey which reports that CEO tenure has increasingly declined from ten years in 1990, to four to six years in 2004); Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. Chi. L. Rev. 871, 883 & n.58 (2002) (reporting that median CEO tenure decreased from seven years in 1980 to five years in 2000); CEOGO.com, Quick Stats, http://www.ceogo.com/pages/ceofacts/quickstats.jsp (last visited Feb. 14, 2006) (noting average CEO tenure of 10 years in 2002 down to 6.6 years in 2003); Chuck Lucier, Eric Spiegel & Rob Schuyt, Booz Allen Hamilton, Why CEOs Fall: The Causes and Consequences of Turnover at the Top 7 (2002), *available at* http://www.boozallen.com/media/file/110173.pdf.

102. *See* Richard Posner, Economic Analysis of Law 440–41 (2007).

will improve upon the existing scheme by incentivizing corporate executives to minimize the manufacturing and provision of excessively dangerous products and services.

The Executive-Internalization Approach may appear to be a radical change to corporate law, which traditionally has sought to protect corporate executives from personal liability via the "corporate veil."[103] The legal landscape, however, has resisted a dogmatic application of such immunity in an attempt, albeit highly inconsistent, to balance equities. As such, corporate law already recognizes two long-standing exceptions to the limitation on personal liability—piercing the corporate veil and executive civil liability.[104] These two devices must be examined to determine whether they can be used to re-orient corporate executives' incentives before we consider adopting the Executive-Internalization Approach to address the present problem.

The doctrine of piercing the corporate veil allows injured parties to seek compensation directly from corporate executives with ownership interests in the company in certain circumstances.[105] Application of the doctrine remains fact-specific and difficult to define generally, but frequently begins with issues of control and fraud.[106] The application of the doctrine to large publicly-held corporations, however, is

103. *See generally* FRANKLIN A. GEVURTZ, CORPORATION LAW 69–70 (2000) (explaining that piercing the corporate veil means suing shareholders of a corporation, i.e. attaching liability directly to owners rather than the business entity); *see also* Vermont v. Staco Inc., 684 F. Supp. 822, 831–32, 835 (D. Vt. 1988) (holding CEOs liable because of their capacity and authority to control disposal activities); Int'l Clinical Lab. Inc. v. Stevens, No. CV 87-3472, 1990 U.S. Dist. LEXIS 3685 at *9–10 (E.D.N.Y. Jan. 12, 1990) (holding the president liable as an operator because he had the overall responsibility for the management of the corporate operator); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (holding a parent company liable as an operator because the parent company participated in the management of the subsidiary and exercised control over the subsidiary's facility).

104. For a general exposition of these corporate law topics, see GEVURTZ, *supra* note 103, at 69–70, 273–448 (discussing piercing the corporate veil and executive liability for breaches of fiduciary duties).

105. *See id.* at 69–70; STEPHEN M. BAINBRIDGE, CORPORATION LAW & ECONOMICS 150 n.48, 151 (2002).

106. *See id.* at 151–53 (discussing the instrumentality rule for piercing the corporate veil which requires a plaintiff to show "(1) control of the corporation by defendant that is so complete as to amount to total domination of finances, policy, and business practices such that the controlled corporation has no separate mind, will or existence; (2) such control is used to commit a *fraud*, wrong or other violation of plaintiff's rights; and (3) the control and breach of duty owed to the plaintiff was a proximate cause of the injury.") (emphasis added); *see, e.g.*, Walkovsky v. Carlton, 223 N.E.2d 6, 8 (N.Y. Ct. App. 1966); United States v. Milwaukee Refrigerator Transit Co. 142 F. 247, 255 (E.D. Wis. 1905) ("[When] the notion of legal entity is used to defeat public convenience, justify wrong, *protect fraud*, or defend crime, the law will regard the corporation as an association of persons.") (emphasis added).

highly limited and, when viewed with the goal of holding corporate actors personally liable—rather than parent corporations—has been so haphazard as to make it all but a theoretical curiosity.[107] Accordingly, this doctrine cannot be used to attach personal liability to corporate executives in publicly-held corporations for their knowing introduction of dangerous products and services into the marketplace.

The second method by which corporate executives may typically be exposed to personal liability is through direct or derivative actions brought against them individually rather than against their corporations for their actions in breaching their fiduciary obligations.[108] However, these suits typically can be initiated only by the shareholders, not third-party victims.[109] Furthermore, executives can take precautionary measures to limit their exposure. One such option is directors and officers liability insurance (D&O insurance).[110] Another is to insert indemnification and advancement-of-expenses clauses in their employment contracts.[111] And after *Smith v. Van Gorkom*,[112] statutes such as Delaware General Corporation Law § 102(b)(7) have virtually eliminated any significant likelihood of personal liability for corporate executives by allowing them to shift these costs back to the

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107. There are almost no reported cases of veil piercing for publicly held corporations. *See* Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 9 (1997). After analyzing hundreds of cases, Professor Thompson concluded that "[p]iercing occurs only in close corporations or corporate groups; it does not occur in publicly held corporations." *Id*. In an earlier study, Thompson found that "among the 1600 reported cases of piercing the veil, there was no case in which shareholders of a publicly held corporation were held liable," and he further concluded that "[p]iercing occurs only within corporate groups or in close corporations with fewer than ten shareholders. None of the close corporations in which piercing occurred had more than nine shareholders." *See also* Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 983–85 (1971) (noting that shareholder liability is an "exceptional remedy"); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1047 (1991) (reporting from the author's empirical data that "[i]n the entire data set, piercing did not occur in a publicly held corporation" and that "[t]his universal respect for the separateness of the corporate entity in publicly held corporations reflects the different role that limited liability plays in larger corporations").

108. *See generally* GEVURTZ, *supra* note 103, at 273–448.

109. *See id.* at 304–13 (explaining that directors generally do not have a legally enforceable duty to constituencies other than the corporation, its shareholders and, under certain limited circumstances, its creditors).

110. *Id.* at 447–48.

111. *See id.* at 437–47 (explaining that corporations may contractually agree to reimburse corporate officers for expenses associated with certain lawsuits against them and may advance executives the money necessary to pay legal expenses).

112. 488 A.2d 858, 893 (Del. 1985) (finding directors have a duty to shareholders "to inform themselves of all information reasonably available to them and relevant to their decision").

corporation.[113] Given the diffuse nature of shareholders,[114] their resistance to corporations' assumption of director and officer liability or the costs of D&O insurance is insignificant—all but guaranteeing that officers and directors of publicly-held corporations will virtually never face personal liability for direct or derivative suits.

While these rules imposing civil liability on individual executives have largely proven ineffective, they do demonstrate that the direct imposition of liability on corporate executives is an accepted legal theory. As such, the Executive-Internalization Approach offers a viable supplement to current law.

No discussion of options for corporate and executive liability would be complete without analyzing all of the permutations of liability. I have discussed civil liability for corporations (products liability law) and the limitations that it poses. I have also discussed civil liability for executives. Criminal corporate liability remains. While a relatively new development, statutes that hold corporations criminally liable are now generally accepted.[115] As a Texas court observed,

> At early common law, a corporation being an artificial person and an inanimate legal entity, was deemed incapable of committing a crime, it could not entertain a culpable mental state and it could not be physically punished. This incapacity no longer exists. A corporation is now capable of committing a crime and is capable of being

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113. Del. Code Ann. tit. 8, § 102(b)(7) (2001) ("the certificate of incorporation may [ ] contain . . . [a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director: . . . [except] (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . or (iv) for any transaction from which the director derived an improper personal benefit").

114. *See e.g.*, John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable are U.S. Public Corporations?*, 24 J. Corp. L. 837, 849 (1999) (explaining that shareholders exercise little control over public corporations for mainly two reasons: the problem of free-riding presents the risk of bearing all the costs, while receiving only a portion of the benefit and the costs of communication, coordination, and negotiation, rise in proportion to the number of shareholders); K.A.D. Camara, *Shareholder Voting & The Bundling Problem in Corporate Law*, 2004 Wis. L. Rev. 1425, 1472–74 (2004) (noting that individual shareholders lack incentive to thoroughly investigate consequences of corporate actions because benefits of conducting costly research accrue to entire corporations rather than to individual contributors alone); John L. Orcutt, *Improving the Efficiency of the Angel Finance Market: A Proposal to Expand the Intermediary Role of Finders in the Private Capital Raising Setting*, 37 Ariz. St. L. J. 861, 884–85 (2005) (arguing that shareholders will not monitor corporation since cost to individual outweigh benefits).

115. *See, e.g.*, Vaughan & Sons, Inc. v. State, 737 S.W.2d 805, 806 (Tex. Crim. App. 1987) ("Today, however, the general rule is that a corporation may be held liable for criminal acts performed by its agents acting on its behalf.").

> punished therefor. [sic] The circumstances under which it is liable are commonly described by statute.[116]

This liability, however, does nothing to address the concerns that I have discussed, that is, that the costs of the penalties will not be internalized by the corporate executives, particularly if those executives have left the corporations by the time the liability attaches to the corporations. Since corporations cannot be imprisoned, only financial and, perhaps, stigmatic sanctions remain. The former are identical to the economic sanctions discussed regarding products liability, and the latter are unlikely to transfer significantly to corporate executives—should they even be with the corporation when the liability attaches.

These three doctrines still leave a gap through which executives can largely escape full internalization for their actions. For this, I have proposed executive criminal liability—the Executive-Internalization Approach—in response.

B. The Executive-Internalization Approach: The Unique Incentive Effects of Criminal Law

The most effective method to shift the costs of pursuing excessively risky corporate behavior back to the corporate executives is through the imposition of criminal sanctions on these individuals. In contrast to civil liability discussed above, the criminal penalties of the Executive-Internalization Approach are unique in three ways that prevent corporate executives from shifting the costs of personal liability back to the corporation.

First, individual (in contrast to corporate) criminal penalties are non-transferable. Imprisonment is individual specific and non-fungible. Similarly, criminal fines are typically not reimbursed by business entities and insurance policies.[117]

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116. *Id*. at 806 n.3 (internal citations omitted). *See also id.* at 812 ("However it has been said that a definition of certain forms of manslaughter may be formulated which would be applicable to a corporation and make it liable for various acts of misfeasance and nonfeasance when resulting in homicide. Thus, a corporation has been held subject to prosecution for involuntary manslaughter where there was nothing in the definition of the crime or the punishment provided which would make it impossible to hold a corporation liable.") (internal citations omitted).

117. Corporate Laws Committee, *Corporate Director's Guidebook*, 56 BUS. LAW. 1571, 1619–21 (2001) (noting that D&O insurance typically excludes criminal penalties and fines, and Model Act forbids, even with shareholder approval, inclusion of a provision in articles of incorporation eliminating or limiting directors' personal liability for money damages resulting from his or her intentional violation of criminal law; corporate indemnification is permitted only when individual director has acted in good faith and without reasonable cause to believe that his or her conduct was unlawful).

Second, criminal penalties, regardless of their form or nature, carry a social stigma of moral condemnation. As such, even if the penalty is *de minimus* and does not infringe personal freedom, the sanction has a significant cost to corporate executives.[118] Given their personal risk adversity, corporate executives are particularly sensitive to this sanction.[119] As a consequence, in the corporate executive context, society will have to spend less to exact corrective behavior than it will to enforce laws designed to protect society from risk-preferring criminals, i.e., more "traditional criminals."[120]

Third, these non-pecuniary costs typically translate to direct financial costs by limiting corporate executives' future access to the executive-labor market.[121] As a result, even criminally convicted corporate executives who are able to avoid incarceration and significant fines will have the economic benefits of risk-taking derived from the afore-described cost-shifting and informational asymmetries offset, if not eliminated, by the subsequent inability to obtain similar employment.

Some question the Executive-Internalization Approach based on an asserted difficulty in defining a "defective" product.[122] This critique, however, is unwarranted. Defining dangerousness has been thoroughly litigated and analyzed in products liability law when evaluating defectiveness. The standard rule is that "[b]adly conceived products that carry needless danger are designed defectively."[123]

The Restatement of Products Liability speaks extensively to this issue and adopts the well-litigated risk-utility test to define design de-

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118. *See, e.g.*, Maura M. Okamoto, *Recent Development: RCRA's Criminal Sanctions: A Deterrent Strong Enough to Compel Compliance?*, 19 U. HAW. L. REV. 425, 428 & n.27 (1997).

119. An example of this phenomenon can be seen with Martha Stewart's continued pursuit of her appeal of her conviction, notwithstanding the completion of her term of imprisonment. *See* Krysten Crawford, *The Fight to Clear Martha's Name*, CNNMONEY.COM, Mar. 17, 2005, http://money.cnn.com/2005/03/16/news/newsmakers/martha_appeal/index.htm.

120. *See* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 184 (1968) (discussing the cost of deterrence and noting that some criminals are "risk preferrers," who then require greater punishment in order to deter).

121. *See* Amy Borrus & Mike McNamee, *Go Ahead, Make the SEC's Day*, BUS. WK., June 2, 2003, at 27 (noting that during first two-thirds of 2003, SEC barred 105 fraudulent executives from ever holding another executive position in a public company).

122. *See Defective Products: Will Criminal Penalties Ensure Corporate Accountability? Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 181–82, 185 (2006) (statement of Victor Schwartz, Partner, Shook, Hardy & Bacon LLP).

123. 2 DAN DOBBS, THE LAW OF TORTS 980 (2001).

fects.[124] The risk-utility test is itself a derivation from Judge Learned Hand's test set forth in the iconic decision, *United States v. Carroll Towing Co*.[125] Under the oft-quoted Learned Hand formula, the defendant is liable if the cost of preventing harm is less than the product of the probability and the magnitude of harm.[126] This test protects only those that undertake "all appropriate investigation," and unknown risks are, appropriately, not held against manufacturers either.[127] Moreover, product harm and, therefore, the determination as to whether the product is defective, is reduced by disclosing known

124. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b), cmt. a (1998) (explaining that for design defects "[s]ome sort of independent assessment of advantages and disadvantages, to which some attach the label 'risk-utility balancing,' is necessary" to determine dangerousness); *see also id.* Reporter's Note, cmt. d.III.A at 77 ("Scholarly commentary written prior to this Restatement project agrees overwhelmingly with the majority view reflected in the above-cited decisions and § 2(b) and the risk-utility/reasonable alternative design approach adopted herein.") (citing 1 MADDEN, PRODUCTS LIABILITY 299 (2d ed. 1988)); DOBBS, *supra* note 123, at 985 (stating that the Restatement adopted a risk utility test). Some states have adopted this test statutorily, as well. *See id.* at 985 & n.5 (citing to statutory provisions of North Carolina and Ohio).

125. 159 F.2d 169, 173 (2d Cir. 1947).

126. *Id*. ("if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: *i.e*., whether B<PL."). *See also* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. (f) at 91–92 (1998) ("The monetary cost of the alternative design may exceed the safety benefits to be derived from it. Furthermore, an alternative design may impose significant nonmonetary costs on product users and consumers . . . . Courts that apply a 'risk-utility' balancing test recognize that these considerations are central to the finding that a substitute design is a reasonable alternative . . . . This also accounts for the oft-repeated statement that a manufacturer has no obligation to provide the safest design available or provide for the ultimate in safety . . . . In sum, an alternative design is reasonable if its marginal benefits exceed its marginal costs."); George Priest, *Economic of Civil Justice Reform Proposals*, 9 KAN. J. L. & PUB. POL'Y 401, 401 (2000), *available at* http://www.law.ku.edu/journal/articles/v9n3/v9n3p401.html ("Let's imagine we have costs [of preventing accidents] on the vertical axis . . . . [T]he cost curve for almost any type of investment will increase over time as it becomes marginally more costly to prevent further accidents. We would imagine, as parties are encouraged to make investments to prevent accidents, that accident losses would decline. As there are greater investments to prevent accidents on this upwards sloping curve, the number of accidents, and the magnitude of accidents that occur, is going to decline. So the horizontal axis is both the level of preventive investments and the number of accidents, the magnitude of accidents, weighted by the costs of the accidents. If we are trying to think about this as a general social policy question, the optimum is at the point where the marginal cost of accidents equals the marginal cost of preventing accidents. We are never actually going to find a point like this, but it is useful in thinking about such a point for conceptual purposes. It is at this point that we have optimal accident prevention, in the sense that the costs of preventing further accidents, that is, the costs beyond this optimum, are greater than the costs of the accidents themselves.").

127. DOBBS, *supra* note 123, at 990–91.

risks.[128] This creates a positive incentive to disclose risks, allowing consumers to make more informed and rational decisions.[129]

The Restatement of Torts distinguishes between two types of product defects: design defects and manufacturing defects.[130] The former is inherent in the product, and is subject to the fault analysis described above[131] while the latter is typically unintended and subject to strict liability.[132] It is in this latter category that those opposed to the Executive-Internalization Approach seek refuge. They suggest that this standard is inconsistent with the precepts of criminal law that typically require knowledge.[133] This distinction is, however, misplaced, as the proposal contained herein requires knowledge even in the manufacturing defect context. Indeed, the cases discussed above demonstrate this application.

For example, the defective Guidant defibrillator calamity demonstrates how the Restatement's products liability standard, combined with a universal knowledge requirement, produces equitable and enforceable rules. Guidant produced a defibrillator with a serious defect. When the patient with the implanted defibrillator needed the "shock" produced by the unit, the device occasionally short circuited, in which case the patient typically died.[134] The first question in this situation is whether this is a design or a manufacturing defect. If Guidant defibrillator occasionally short circuited regardless of an error during the manufacturing process, then the product is easily determined to be a design defect, because "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the

128. *See id*. at 996; *see also* Ross Labs v. Thies, 725 P.2d 1076, 1079 (Alaska 1986) ("The cost of giving an adequate warning is usually so minimal . . . that the balance must always be struck in favor of the obligation to warn where there is a substantial danger which will not be recognized by the ordinary user."); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 Reporter's Note cmt. i at 95 (1998) (discussing the informed-choice concept in products liability suits).

129. The Restatement further limits defective claims in medical products only to those cases in which the foreseeable risks are so great in comparison to the benefits that a reasonable medical provider would not provide the product to any class of patient. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. at § 6(c).

130. *Id.* at § 2.

131. *Id.*, cmt. a. at 16–17.

132. *Id.*; *see also id*., Reporters' Note cmt. a at 40.

133. *See, e.g.*, *Defective Products: Will Criminal Penalties Ensure Corporate Accountability? Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 185 (2006) (statement of Victor Schwartz, Partner, Shook, Hardy & Bacon LLP).

134. *See supra* note 21 and accompanying text.

alternative design renders the product not reasonably safe."[135] In this case, the "reasonable alternative design" would be the design that other defibrillator manufacturers were using—one without faulty wiring. Under products liability law, the manufacturer is liable under both sections 2 and 6 of the Restatement (Third) of Torts: Products Liability.[136] Of course, it seems unreasonable to assume that Guidant intentionally designed its defibrillator with faulty wiring.

The better analysis of the Guidant affair would be through the prism of a manufacturing defect.[137] Under such a view, we would assume that Guidant did not intend to produce a deadly short-circuiting defibrillator, when safer designs were readily available. In other words, we assume that in producing the properly designed product, a defect developed. In such a circumstance, Guidant could be held liable *civilly* even without knowledge of the defect.[138] This should *not* be the standard for criminal culpability, and nobody who seriously discusses these issues suggests otherwise. Criminal liability should require knowledge of the manufacturing defect, which is exactly what occurred in the Guidant affair. Guidant became aware of the previously latent manufacturing defect, yet continued to sell the deadly device and failed to inform future as well as past purchasers.[139] At this point, under the Executive-Internalization Approach, the corporate executives would become criminally liable.

Indeed, in *all* of the cases discussed above, the alleged facts involve corporate executives who knew or should have reasonably known of the dangers that they imposed on consumers. These are *not* cases of strict liability, which does exist in civil products liability law. The Executive-Internalization Approach, which redefines civil products liability law for the criminal context, would hold industry executives personally responsible for their knowing or reckless actions. Such legislation would require reasonable investigation of risks by industry executives, to prevent intentional ignorance, and it would offer protection to the industry executives upon compliance. The Execu-

135. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) (1998). *See also id.* § 6(b)(2), (c).

136. Section 2 provides the general requirements for products liability and Section 6 further refines the standard for medical products. In the latter instance, the Restatement is more generous to the manufacturer because of the difficulty in eliminating risks of danger in medical devices, which typically balance the risk of side effects against the reward of positive health effects. *See id.* § 6 cmt. b at 146–47.

137. Indeed, it seems indisputable that Guidant would agree that the defect was not part of the intended design.

138. *See supra* note 136, Reporters' Note cmt. a at 40–41.

139. *See* discussion *supra* Part II.A.2.

tive-Internalization Approach has significant historical parallels both nationally and internationally, which are analyzed below.

C. The Proposed Statute

A draft of the operative language for the Executive-Internalization Approach follows:

A. It shall be unlawful for individuals to knowingly or recklessly introduce a defective product or service into the stream of interstate commerce. If a defective product or service is introduced into the stream of interstate commerce through a business entity, the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions of business entities that introduce products or services into the stream of interstate commerce, shall constitute the individuals referenced above in this section, and criminal liability shall not attach to subordinates within the organization under this section unless they knowingly prevent the principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions from receiving information establishing the defectiveness of the product or service. Each violation of this section that causes injury shall be subject to a penalty of up to ten years imprisonment and a maximum fine of $1 million. Each violation of this section that causes death shall be subject to a penalty of up to twenty years imprisonment and a maximum fine of $2 million.

B. The principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions of business entities that introduce products or services into the stream of interstate commerce shall design, maintain, and update such internal controls to ensure that reasonable efforts are made to determine whether any product or service being introduced into the stream of interstate commerce is defective prior to the introduction of the product or service into the stream of interstate commerce. Each violation of this section shall be subject to a penalty of up to twenty years imprisonment and a maximum fine of $2 million.

C. No business entity or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee

(i) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of the above sections; or

(ii) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowl-

edge of the employer) relating to an alleged violation of the above sections.
(1) Enforcement Action
(i) A person who alleges discharge or other discrimination by any person in violation of this section may seek relief under subsection (2) by bringing an action at law or equity in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.
(2) Remedies
(i) An employee prevailing in any action under subsection (C)(1) shall be entitled to all relief necessary to make the employee whole.
(ii) Relief for any action under paragraph (i) shall include, but is not limited to:
(a) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
(b) the amount of back pay, with interest; and
(c) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
(3) Savings Clause
(i) Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

IV.
Comparative Analysis of Criminalizing Wrongful Industry-Executive Behavior

A. The Domestic Model

Recent congressional action demonstrates that the federal criminalization of wrongdoing, previously thought the exclusive province of civil enforcement, has been effective. The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) requires the chief executive and chief financial officers of covered corporations to *personally* certify that Securities Exchange Commission reports comply with regulatory standards.[140] The failure to do so personally exposes these senior executives to criminal sanctions,[141] ensuring that corporate executives do not shift responsibility to unwitting or powerless subordinates. As such, this statute, like the Executive-Internalization Approach, applies criminal penalties directly to corporate executives and prevents them

140. 18 U.S.C. § 1350(a), (b) (Supp. V [Jan. 2, 2006]).
141. *Id.* at § 1350(c).

from protecting themselves through intentional ignorance and failure to investigate, a strategy attempted by Kenneth Lay and others.[142]

Following this model, the law should require businesses to elicit and maintain organized data on serious injuries and deaths sustained as a result of their products and services, and to share this information with other senior executives and the public. Sarbanes-Oxley grants legislative protection to whistle blowers by imposing separate criminal liability on corporate executives who knowingly and intentionally retaliate against them.[143]

Similarly, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) created amnesty from criminal prosecution in exchange for disclosures of criminal antitrust-law violations.[144] Under the ACPERA, if a corporate conspirator self-reports its illegal antitrust activity to the Department of Justice and meets certain conditions, this corporate conspirator may both obtain amnesty from criminal liability and avoid the exposure to treble civil damages in private actions.[145] These approaches would encourage the distribution of safety information, and address at least one of the causes of the excessive risks to which consumers are exposed. Sarbanes-Oxley's penalties are not insignificant; they permit a combination of a $1 million fine and a ten year prison term for the knowing certification of a financial statement that does not fairly present the firm's condition, or a maximum penalty of $5 million and twenty years in prison for the same conduct if done willfully.[146] As President Bush declared, "If you're a CEO and you think you can fudge the books in order to make yourself look better, we're going to find you, we're going to arrest you and we're going to hold you to account."[147] If personal responsibility for corporate executives can be, and indeed has been, adopted for financial wrongdoing, then the same approach certainly is available and advisable for wrongs that directly result in physical injury or death.

Although the criminalization of corporate executive behavior under Sarbanes-Oxley was novel at the federal level, criminal sanc-

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142. *See* Anthony Bianco, *Commentary: Ken Lay's Audacious Ignorance*, BUSINESSWEEK ONLINE, Feb. 6, 2006, http://www.businessweek.com/magazine/content/06_06/b3970082.htm.

143. 18 U.S.C. § 1513(e) (Supp. V [Jan. 2, 2006]).

144. Pub. L. No. 108-237, § 213, 118 Stat. 661, 666 (2004) (codified at 15 U.S.C. §§ 1, 2, 3 and 16).

145. *Id.* The required conditions include determining: it is the first conspirator to confess, it is not the ringleader of the conspiracy, and it agrees to cooperate fully with the investigation. *Id.* at § 213(b).

146. 18 U.S.C. § 1350(c).

147. Mike Allen, *Bush Pledges More Corporate Fraud Arrests; President Highlights Issue as Poll Shows Ratings Down*, WASH. POST, July 30, 2002, at A10.

tions to industry executives already exist in a very limited fashion under state law. Many current state criminal laws expose individuals to criminal liability for false advertising; others impose individual criminal liability on corporate actors for corporate criminal activity, including deceptive acts.[148] Both of these serve as a philosophical parallel to the Executive-Internalization Approach proposed here.

These state laws, however, fail dramatically to achieve the goals of the Executive-Internalization Approach for a variety of reasons. First, these statutes are typically of limited applicability; as the footnote and more detailed appendix at the end of this article demonstrate, these statutes tend to focus on particular acts of misrepresentation and are punishable as misdemeanors or low level felonies. As such, even if enforced, the incentive effect is limited by both the breadth of the statutes and the degree of potential punishment. Second, an examination of these statues demonstrates the wide variation among them. This variation is problematic for products sold nationally, as the punishment will vary depending on the state in which the injury occurs, the state in which the injured party lives, or the state in which the corporation is headquartered. Third, and most importantly, state prosecutors often are not motivated to prosecute such complex, resource-intensive cases of national dimension.[149] Specifically, states have far more limited budgets than the federal government; as such, federal agencies are better able to conduct investigations and pursue prosecutions than state prosecutors.[150] This discrepancy is a real problem that merits considering federal legislation on the issue.[151]

The sizeable criminal penalties of Sarbanes-Oxley caused many to predict an exodus of corporate executives as a result of the statute's enactment.[152] These prognostications of doom turned out to be

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148. *See infra* Appendix.

149. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1052 (2006) (noting that states have more limited budgets than the federal government, particularly in the criminal-justice context); David L. Cook et al., *Criminal Caseload in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1579, 1595 (1995) (asserting that increasing federal budgets allow federal agencies to conduct more investigations and pursue a greater number of prosecutions).

150. *See supra* note 149.

151. Senate staff attorneys have often remarked on the availability of state resources, both statutory and financial, and considered whether a problem has a national scope in determining if an issue should be subject to federal legislation.

152. *See* Michael Schroeder, *Business Reform Measure Debated*, ALBANY TIMES-UNION, July 27, 2003 at D1 (noting that many predicted a shortage of board member candidates due to Sarbanes-Oxley, but data has not supported prediction).

false.[153] Comparable predictions offered about the current proposal ultimately will be relegated to a similar position of obscurity.

This does not mean that legislating the Executive-Internalization Approach will have no negative consequences. The Executive-Internalization Approach will likely increase the cost of hiring and maintaining executives at corporations because the executives will rationally want to be compensated for the assumption of this additional risk. This increased cost will likely result in lower profits for public shareholders, although the size of this effect is not likely great.

As with any criminal sanction, the Executive-Internalization Approach might result in wrongful convictions that would inflict damages upon the wrongfully convicted and could remove capable individuals from the executive market.[154] The Executive-Internalization Approach may indeed deter some qualified individuals from entering the executive marketplace, although, as discussed above, the magnitude of this effect also is likely to be small. The Approach will also likely increase the costs of potentially dangerous products and services since executives will undoubtedly try to reduce their criminal exposure by increasing the safety of their good(s) and services, and passing the cost on to consumers. Finally, the Executive-Internalization Approach will certainly have administrative costs at both the corporate and governmental level. But, as with any policy decision, the costs must be balanced against the benefits. I believe that the balance inures in favor of the Executive-Internalization Approach. Of course, the goal of this approach is an increase in safety, and the associated increase in cost is a predictable and an appropriate offset.

B. The International Model

The concept of imposing criminal liability directly on corporate executives also has some precedence internationally. For example, France, Japan, and Canada faced problems of HIV-contaminated

153. *See id.*; Booz Allen Hamilton, *Performance-Related Departures of CEOs Reached Record Levels in 2004*, May 18, 2005, http://www.boozallen.com/publications/article/658375 (noting that Sarbanes-Oxley has not heightened CEO turnover rates in the U.S.; overall rates of turnover, dismissals, and tenure remain consistent with pre-enactment trends); Burson-Marsteller, *Who Wants to Be a CEO? (*2005), http://www.ceogo.com/documents/2005CEOCapitalBrochure.pdf (clarifying that regulations are not overriding factors in decisions to turn down CEO positions).

154. This situation is different from executives dropping out of the employment market due to the potential risk of criminal sanctions. The criminal sanction effect, as discussed above, seems minimal. Removal from the executive market is akin to the specific-deterrence concept in criminal law: the individual is physically prevented from being part of the executive-employment market because of incarceration or some other legal prohibition.

blood supplies during the 1980s which were similar to those occurring in the United States.[155] And again, while methods of purifying blood plasma were available at the time many of these incidents occurred, financial concerns often trumped patient safety.[156] However, in contrast to the United States, responsible individuals in the other countries faced criminal charges.

1. France

In a 1992 case known as "l'affaire du sang contaminé," i.e., the tainted blood episode,[157] six French public officials were convicted for continuing to sell blood products from inventories that were known to be contaminated with HIV instead of selling safer heat-treated factor concentrates to the market.[158]

Three of the convicted were executives at France's Center for National Blood Transfusions (known by its French acronym CNTS).[159] CNTS operates similarly to the Red Cross, although in France CNTS is a government entity. Dr. Michel Garretta, former Director of CNTS, ordered a regular shipment of non-heated blood products in 1985, at a time when other countries had widely begun purifying their blood by heating it.[160] The French trial court found Garretta was "personally aware" that the blood products distributed by the blood transfusion service were "seriously infectious" and that he as well as other executives were on a path to "deceive" hemophiliacs until the un-heated blood in inventory had been completely used.[161] Garretta was sentenced by the trial court to four years in prison for "merchandising fraud" under the Act of August 1, 1905 and section L675 of the Public Health Code and was fined five hundred thousand

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155. *See generally* Eric Feldman, *Blood Justice: Courts, Conflict, and Compensation in Japan, France, & The United States*, 34 LAW & SOC'Y REV. 651 (2000). *See also*, *supra* Part II.A.1 for a discussion of the U.S. crisis.

156. *See* discussion, *supra* Part II.A.1.

157. Feldman, *supra* note 155, at 651; KREVER, *supra* note 15, at 810. *See also* Rod Usher, *The Stain That Won't Go Away*, TIME, Mar. 8, 1999, at 25, *available at* http://www.time.com/time/magazine/article/0,9171,21165,00.html ("[I]n the mid-1980's some 4,400 [French] citizens were given HIV-infected blood, among them babies, patients after surgery, and almost 1,350 hemophiliacs. About 40% of them, including 625 hemophiliacs, have died.").

158. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, October 23, 1992, D. 1993, 222 (Fr.). *See* Feldman, *supra* note 155, at 651–52; KREVER, *supra* note 15, at 810–11, 833–36.

159. *See* Feldman, *supra* note 155, at 652.

160. *See* Editorial, *Murder by Bureaucracy*, WALL ST. J., Aug. 5, 1992, at A1. *See also* KREVER, *supra* note 15, at 820–21 (discussing Garretta's strategy to use up all non-heat treated products before introducing heat treated factor concentrate).

161. *See* KREVER, *supra* note 15, at 833.

French francs.[162] Former Scientific Director of CNTS Dr. Jean-Pierre Allain was charged with merchandising fraud and served two years for knowingly allowing infected blood products to be administered to patients,[163] and former Director General of Health Professor Jacques Roux was convicted under article 63 of the French Penal Code for "failure to assist a person in danger" and served a suspended sentence of three years.[164]

The other three to be charged were political figures. Article 68-1 of the French Constitution allows criminal liability to be imposed on government officials for acts committed in the exercise of their duties,[165] and former Prime Minister Laurent Fabius, former Minister of Social Affairs Georgina Dufoix, and former Minister of Health Edmond Hervé were charged with involuntary manslaughter and involuntary bodily injury for being "accessories to poisoning" by failing to remove batches of contaminated blood in circulation even though safe products had become available.[166] Fabius and Dufoix were acquitted, and Hervé was convicted on a minor charge and not sentenced.[167]

2. *Japan*

Japan's own HIV blood crisis during the 1970s and 1980s resulted in 1,432 hemophiliacs and other patients contracting the virus

162. *See* Feldman, *supra* note 155, at 689–90; Anne-Marie Savard & Caroline Simard, *Analyse comparative de deux systèmes d'enquêtes publiques: l'affaire du sang contaminé* [*Comparative Analysis of Two Systems of Public Investigations: The Tainted Blood Episode*], 28 REVUE DE DROIT UNIVERSITE DE SHERBROOKE [R.D.U.S.] 151, 190 (1997) (Can.-Fr.); KREVER, *supra* note 15, at 810.

163. *See* Feldman, *supra* note 155, at 689; KREVER, *supra* note 15, at 810, 835; *Scandal of Aids Transfusions Puts Ex-Ministers in the Dock*, INDEPENDENT (London), Feb. 9, 1999, at 11.

164. *See* Feldman, *supra* note 155, at 689; KREVER, *supra* note 15, at 810, 834–35. Dr. Netter, director of the National Laboratory of Health, was similarly charged but was acquitted because of his efforts to alert his superiors. *Id*. at 835.

165. CONST. OF 4 OCT. 1958 art. 68-1 (Fr.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: FRANCE 20 (Gisbert H. Flanz, ed., 2003).

166. *See Fabius On Aids Blood Charge*, INDEPENDENT (London), Oct. 1, 1994; KREVER, *supra* note 15, at 837. *See also* Michael E. Tigar, *French Officials Now Face New Crime Charges*, NAT'L L.J., Aug. 31, 1998, at A20 (discussing charges against Fabius, Dufoix & Hervé and explaining that involuntary homicide—causing death by "imprudence, inattention, negligence, or failure to observe a safety or cautionary requirement imposed by law or regulation"—warrants a maximum sentence of five years when there is evidence of deliberate failure to observe a regulation; otherwise, the maximum sentence is three years; involuntarily causing incapacity warrants a one-year maximum sentence).

167. *See* Peter D. Weinberg, et al., *Legal, Financial, and Public Health Consequences of HIV Contamination of Blood and Blood Products in the 1980s and 1990s*, 136 ANNALS OF INT'L MED. 312, 312 (2002), *available at* http://www.annals.org/cgi/reprint/136/4/312.pdf.

from untreated blood products.[168] Four months after the U.S. Food and Drug Administration certified heat treatment for making blood products safe from HIV, Japanese officials advised clinics and hospitals to stop using unheated blood.[169] One week later, however, the ministry reversed this decision, despite knowing that unheated products carried the risk of HIV contamination.[170]

Dr. Takeshi Abe, a former top blood-policy advisor in Japan, was criminally charged with professional negligence[171] for allegedly ignoring scientific evidence of blood contamination when creating Teikyo University Hospital's blood policy.[172] Criminal charges were also filed against Akihito Matsumura, a former senior health ministry official, who was sentenced to a suspended prison term for both knowingly administering untreated blood products after the ministry had authorized safer, heat-treated blood and failing to warn the pharmaceutical industry and doctors of the risks of using unheated blood products.[173] Finally, Green Cross[174] executives Renzo Matsushita, Tadakazu Suyama, and Takehiko Kawano were charged with professional negligence for selling unheated blood products even though they were informed of the risk of HIV contamination.[175] The three

168. *Ex-Health Official Appeals Ruling Over AIDS Death*, JAPAN ECON. NEWSWIRE, Oct. 9, 2001, at Int'l News. *See also* Edith Hill Updike, *Anatomy of a Tragedy*, BUS. WK., Mar. 11, 1996, at 44 (reporting that according to internal memos from records of Atsuaki Gungi, former head of Japanese ministry's Biological and Antibiotics Division, the ministry's recommendation to allow emergency imports of heat-treated blood was overturned due to concern imports would "deal a blow" to domestic companies).

169. Todd Crowell & Murakami Mutsuko, *A Case of Delayed Justice: The Health Minister Admits to a Government Cover-Up Over HIV-Tainted Blood*, ASIAWEEK, Mar. 4, 1996, at The Nations: Japan.

170. *Id.*

171. Article 211 of the Japanese Penal Code defines professional negligence: "A person who fails to take necessary precautions in the conduct of business and thereby causes death or injury to another shall be punished with penal servitude or imprisonment for not more than five years or a fine of not more than five hundred thousand yen." KEIHŌ, art. 211, para 1, *translated in* 2 EHS LAW BULL. SER. No. 2402 (2005).

172. *See* KREVER, *supra* note 15, at 891; Feldman, *supra* note 155, at 683. *See also Hemophilia Expert Abe Dies at 88 After Acquittal in AIDS Death*, JAPAN ECON. NEWSWIRE, Apr. 27, 2005, at Int'l News (reporting that Abe was acquitted at trial and prosecutors appealed to the Tokyo High Court but the appeal was dismissed after Abe's death in 2005).

173. *See Ex-Health Official Appeals Ruling Over AIDS Death*, *supra* note 168.

174. In 1980, Green Cross was Japan's largest importer and distributor of blood products. Feldman, *supra* note 155, at 677–78.

175. *See* KREVER, *supra* note 15, at 891; *Japan-AIDS: Japanese Drug Company Chiefs Jailed For HIV-Contaminated Blood Scandal*, AGENCE FRANCE-PRESSE, Feb. 24, 2000, http://www.aegis.com/news/afp/2000/AF000225.html. Judge Mikio Miyoshi, who presided over their case, said, "The accused were well aware of the risk of the blood products in January 1986 when (safer) heated products were put on the

executives continued to sell unheated blood products even after they had approved the sale of heated blood products in January 1986.[176] The courts required them to issue public apologies,[177] and sentenced them in February 2000 to between sixteen and twenty-four months in prison.[178]

3. Canada

In the 1980s and early 1990s, after receiving injections of contaminated blood products, more than one thousand Canadians became infected with HIV and twenty thousand more contracted hepatitis C.[179] Despite the United States Center for Disease Control's recommendation that plasma should be heated to sixty-eight degrees Celsius for seventy-two hours in order to effectively kill HIV, and after U.S. and British health officials' growing concern that the products were responsible for spreading HIV among its users forced the company to withdraw these products from both the U.S. and the U.K. markets,[180] the U.S.-based Armour Pharmaceutical Company (Armour) exported blood products to Canada that had been heated to only sixty degrees Celsius for only thirty hours.[181] Canadian officials briefly suspended

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market . . . . However, they neglected their responsibility to immediately halt sales of the unheated products and recall the lots that had already been sold by them." *Id.*

176. *See* Kozo Mizoguchi, *Japan: Convictions in Blood Scandal*, CBS NEWS, Feb. 24, 2000, http://www.cbsnews.com/stories/2000/02/24/world/main164402.shtml.

177. *See* Feldman, *supra* note 155, at 683. Government officials also offered public apologies. *See* KREVER, *supra* note 15, at 890. In 1995 the former Minister of Health issued an apology to the victims of the contaminated blood products saying, "We would like to sincerely apologize to the families of those who have died and those still fighting the disease. We cannot deny that delayed government measures led to the tragic increase of victims." *Id*. Then in 1996, the new Minister of Health, Naoto Kan, also issued an apology to those who had been infected, saying "On behalf of the Ministry of Health and Welfare . . . I apologize from the bottom of my heart for the heavy damage inflicted on many innocent people." *Id*. Kan announced that he would take a 20 percent reduced salary for two months as a gesture of remorse for the actions of Ministry officials. *Id*.

178. Feldman, *supra* note 155, at 683; *see also* Joe Lamar, *Drug Company Bosses Jailed for Selling HIV Infected Products*, BMJ, Mar. 4, 2000, http://www.bmj.com/cgi/content/extract/320/7235/601 (reporting that Matsushita received a 2 year sentence, Suyama received an 18 month sentence and Kawano received 16 months).

179. Tracy Huffman & Harold Levy, *They Knew Blood Was Tainted: Crown; All Charges Will Be Pursued Against Company*, HAMILTON SPECTATOR (Ontario), Feb. 22, 2006, at A9.

180. *See* Ian McDougall, *'Knew It Was Not Safe'; Crown Outlines Case Against Doctors as Criminal Trial in Tainted Blood Scandal Begins*, TORONTO SUN, Feb. 22, 2006, at 8 (noting that Armour withdrew the product in Britain and Canadian officials wondered if they should do the same); *Canada at a Glance: Emotion-Laden Trial Begins*, RES. NEWS INT'L, April 21, 2006.

181. *See* KREVER, *supra* note 15, at xxvii (stating that Armour withdrew its factor VIII concentrates that were heated to only sixty degrees Celsius (dry-heated) from the

the distribution of Armour blood products within Canada but ultimately allowed the products to be sold.[182]

Dr. Robert Perrault, a former Canadian Red Cross director, Dr. Donald Wark Boucher, former Chief of the Blood Products Division at the Bureau of Biologics (a regulatory body), Dr. John Furesz, former Director of the Bureau of Biologics Michael Rodell, former Armour vice president, and Armour itself are all currently being charged with "criminal negligence causing bodily harm" under § 221 of the Criminal Code of Canada.[183] They were specifically charged with "permit[ting] or caus[ing] to be distributed Armour H.T. Factorate infected with [HIV]" and one count of "common nuisance by endangering the public" under § 180 of the Criminal Code of Canada for "distributing or failing to take sufficient measures to prevent the distribution or infusion of Armour H.T. Factorate, and . . . thereby endanger[ing], through exposure to the risk of [HIV] infection, the lives, safety or health of the public."[184]

We can conclude from these international examples that it is far from beyond the realm of legal possibility to impose liability directly on corporate executives who knowingly introduce dangerous products and services in the marketplace. Although these individuals were government officials, their posts involved organizations similar in function and operation to private companies. It appears that the United States lags behind other countries in its commitment to employ criminal law to assure corporate responsibility for the health and safety of its citizens. When the well-being of our citizens is at stake, we should be willing to look to the international community for possible guidance.

V.
Conclusion

Manufacturers and service providers affect the health, safety, and lives of Americans every day—almost always in positive ways. But at times, some business entities produce goods and services that are excessively dangerous. Unfortunately, our current system of tort law does not adequately incentivize industry executives to avoid this sub-

U.K. in October, 1986); McDougall, *supra* note 180, (reporting that shipments into Canada continued into 1987).

182. *See id.*

183. *See* Tanya Talaga, *Four Doctors Charged in Tainted-Blood Scandal*, Toronto Star, Nov. 21, 2002, at A1; R. v. Armour Pharm. Co., No. P51/04, 205 C.C.C. (3d) 97, 101 (O.S.C.J. Jan. 17, 2006), *available at* 2006 C.C.C. LEXIS 17, *10–11.

184. *See id.* at 101–02, 2006 C.C.C. LEXIS at *10–11; *HIV Tainted Blood Victims Testifying*, Brockville Recorder & Times (Ontario), Apr. 21, 2006, at A5.

optimal outcome. While private tort causes of action offer the possibility of compensation to the improperly injured or to the estates of the wrongfully killed, they are ineffective in motivating corporate executives to take proper precautionary measures because such executives can simply shift the costs of risky behavior to the business entities or consuming public. Since corporate executives personally realize the gains of their compensation packages brought by sales of these excessively dangerous products, but do not bear the potential liability for this risky behavior, they have no incentive to limit the latter if doing so will negatively impact the former.

The Executive-Internalization Approach is the most effective method to shift the costs of pursuing excessively risky corporate behavior back to the corporate executives for their knowing creation of excessive dangers that cause injuries or deaths. The incentive effects of the Executive-Internalization Approach are unique in three ways that prevent corporate executives from shifting the costs of personal liability back to the corporation. Individual (in contrast to corporate) criminal penalties are non-transferable. Criminal penalties, regardless of their form or nature, carry a social stigma of moral condemnation. And these non-pecuniary costs typically translate to direct financial costs by limiting corporate executives' future access to the executive-labor market.

The Executive-Internalization Approach will undoubtedly have costs. But the costs serve a fundamental purpose: closing the loophole that allows corporate executives to retain the gains of their risk-taking while forcing the consumer to bear the brunt of these dangers. I believe that the balance favors adopting the Executive-Internalization Approach. The Executive-Internalization Approach can both increase safety and impose liability on culpable parties. As a result, lives will be saved, and individual executives will be held responsible for their wrongful behavior.

APPENDIX

Examples of State Corporate Criminal Liability Statutes:

ARK. CODE ANN. § 5-37-101(3)(A) (2006) ("'Deception' means: (i) [c]reating or reinforcing a false impression, including a false impression of fact, law, value, or intention or other state of mind that the executive does not believe to be true; (ii) [p]reventing another person from acquiring information that would affect his or her judgment of a transaction; (iii) [f]ailing to correct a false impression that the executive knows to be false and that the executive created or reinforced or that the executive knows to be influencing another person to whom the executive stands in a fiduciary or confidential relationship.");

ARK. CODE ANN. § 5-37-515 (b), (d)(1), (2) (2006) ("No person, firm, corporation, group, or association, with intent to sell or in anywise dispose of . . . merchandise . . . service, or anything offered by that person, firm, corporation, or with intent to increase the consumption thereof or to induce the public in any manner to enter into any obligation relating thereto or to acquire title thereto or an interest therein, shall make, publish, disseminate, circulate, or place before the public or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state . . . in any . . . way, . . . which advertisement contains any assertion, representation, or statement of fact that is untrue, deceptive, or misleading. . . . Any person . . . violating any provision of this section is guilty of an unclassified misdemeanor and upon conviction shall be punished by a fine . . . or be imprisoned. Each sale, advertisement, or representation in contravention of a provision of this section is deemed a distinct offense.");

CONN. GEN. STAT. *§ 53a-11 (2006) ("A person shall be criminally liable for conduct constituting an offense which such person performs or causes to be performed in the name of or in behalf of a corporation . . . to the same extent as if such conduct were performed in such person's own name or behalf.");*

FLA. STAT. § 817.40(5) (2006) ("The phrase 'misleading advertising' includes any statements made, or disseminated, in oral, written, or printed form or otherwise, to or before the public, or any portion thereof, which are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue or misleading, and which are or were so made or disseminated with the intent or purpose, either directly or indirectly, of selling or disposing of real or personal property, services of any nature whatever, professional or otherwise, or to induce the public to enter into any obligation relating to such property or services.");

FLA. STAT. § 817.41(1) (2006) ("It shall be [a misdemeanor], for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.");

GA. CODE ANN. § 16-9-50(a)(2) (b) (2006) ("A person commits the offense of using a deceptive business practice when in the regular course of business he knowingly . . . [s]ells, offers, or exposes for sale or delivers less than the represented quality . . . of any commodity . . . . Any person who commits the offense . . . shall be guilty of a misdemeanor.");

HAW. REV. STAT. ANN. § 702-228 (LexisNexis 2006) ("A person is legally accountable for any conduct the person performs or causes to be performed in the name of a corporation . . . or in its behalf to the same extent as if it were performed in the person's own name or behalf. Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or the unincorporated association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon the agent. When a person is convicted of an offense by reason of the person's legal accountability for the conduct of a corporation, . . . the person is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and class involved.");

IDAHO CODE ANN. § 18-1909 (2006) ("Every director of a corporation . . . who is present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.");

§ 815 ILL. COMP. STAT. ANN. 602/5-110 (2006) ("It is unlawful for any person, in connection with the offer or sale of any business opportunity in this State, to publish, circulate or use any advertising which contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.");

§ 815 Ill. Comp. Stat. Ann. 602/5-115 (2006) ("Any person who willfully violates [ ] . . . § 815 Ill. Comp. Stat. Ann. 602/5-110 . . . knowing that the statement was false or misleading in any material respect is guilty of a Class 3 felony for each offense. Each of the acts specified shall constitute a separate offense.");

Iowa Code § 714.16(2)(a) (2005) ("It is deceptive advertising within the meaning of this section for a person to represent in connection with the lease, sale, or advertisement of any merchandise that the advertised merchandise has certain performance characteristics, accessories, uses, or benefits . . . if, at the time of the representation, no reasonable basis for the claim existed.");

Me. Rev. Stat. Ann. tit. 17-A, § 61 (2005) ("An individual who performs criminal acts, or causes such acts to be performed, in the name of or on behalf of a corporation is legally responsible to the same extent as if such acts were in his own name or on his own behalf. If a criminal statute imposes a duty to act on an organization, any agent of the organization having primary responsibility for the discharge of the duty is criminally liable if he recklessly omits to perform the required act, and he shall be sentenced as if the duty were imposed by law directly on him.");

Md. Code Ann., Com. Law § 13-301 (2006) ("Unfair or deceptive trade practices include any (1) [f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers; (2) [r]epresentation that (i) consumer goods . . . or services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have; (ii) a merchant has a sponsorship, approval, status, affiliation, or connection which he does not have; . . . (iv) consumer goods . . . or services are of a particular standard, quality, [or] grade . . . which they are not; (3) [f]ailure to state a material fact if the failure deceives or tends to deceive; . . . (9) [d]eception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with (i) [t]he promotion or sale of any consumer good, consumer . . . or service.");

Md. Code Ann., Com. Law § 14-2902(a), (f) (LexisNexis 2006) ("For the purpose of . . . selling, or disposing of property or a service, a person may not advertise a statement containing a representation of fact that the person knows, or by the exercise or reasonable care should know, to be untrue, deceptive, or misleading. . . . A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment . . . or a fine . . . or both.");

MO. REV. STAT. § 407.020 (2006) ("The act, use or employment by any person of any deception, fraud, false pretense, false promise, or misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is declared to be an unlawful practice. Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful in this section with the intent to defraud shall be guilty of a class D felony.");

MONT. CODE ANN. § 45-6-317(1)(b), (2) (2005) ("A person commits the offense of deceptive practices when the person purposely or knowingly . . . makes or directs another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or services. If . . . the value of any property, labor, or services obtained exceeds $1,000, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.");

N.H. REV. STAT. ANN. § 330-C:13(I)(j)(VII) (2006) ("Any person convicted of [engaging in false or misleading advertising] shall be guilty of a class A misdemeanor.");

N.H. REV. STAT. ANN. § 638:6(I)(d)–(e) (2006) ("A person is guilty of a class B misdemeanor if, in the course of business, he . . . (d) [s]ells, offers or exposes for sale adulterated or mislabeled commodities. "Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage. "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage; or (e) [m]akes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services.");

N.M. STAT. ANN. § 25-3-15(A)(2) (2006) ("It is a fourth degree felony for any person to . . . (2) engage in unfair trade practices, inaccurate or deceptive advertising, bait and switch selling, product misrepresentation . . . of meat, livestock products or poultry products.");

N.M. STAT. ANN. § 47-5-6 (2006) ("Any officer, agent or employee of any firm or corporation, or any other person who knowingly authorizes or assists in the publication, advertising, distribution or circulation of any false statement or representation concerning any subdivided land offered for sale or lease, and any person, firm or corporation who, with knowledge that any written statement relating to the subdivided land is false or fraudulent, issues, circulates, publishes or distributes it in this state, is guilty of a felony and shall be [punished] by imprisonment for not more than five years, or by a fine of not more than one hundred thousand dollars ($100,000), or both.");

N.Y. PENAL LAW § 190.20 (False advertising) (2006) ("A person is guilty of false advertising when, with intent to promote the sale or to increase the consumption of property or services, he makes or causes to be made a false or misleading statement in any advertisement." Under the predecessor statute, in fact, knowledge of the advertisement's falsity was not required; thus, the statute imposed strict criminal liability without even an intent requirement.

William Donnino, Practice Commentary to N.Y. PENAL LAW § 190.20 (1999);

People v. Richter's Jewelers, Inc., 51 N.E.2d 690, 691 (1943);

People v. Glubo, 158 N.E.2d 699, 704, 706 (1959);

N.Y. GEN. BUS. § 392-b (Consol. 2006) ("A person, who with intent to defraud . . . (2) [s]ells or offers for sale an article, which to his knowledge is falsely described or indicated upon any such package . . . or label . . . is guilty of a misdemeanor.");

N.Y. GEN. BUS. § 399 (2006) ("On each package of cigarettes sold . . . there shall be printed thereon . . . a warning of the consequences of excessive smoking. . . . Any person, firm, corporation or association or its officers or agents who or which violate any of the provisions of this section shall be guilty of a misdemeanor.");

TEX. PENAL CODE ANN. § 7.23(c) (2006) ("If an individual is convicted of conduct constituting an offense performed in the name of or on behalf of a corporation or association, he is subject to the sentence authorized by law for an individual convicted of the offense.").

But see, e.g., LA. REV. STAT. ANN. § 12:83(A)(1) (2006) ("A corporation may indemnify any person who was or is a party . . . to any [criminal] action, suit or proceeding . . . by reason of the fact that he is or was a director, officer, employee, or agent of the corporation . . . if he acted in good faith and . . . with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful.");

MONT. CODE ANN. § 35-1-452 (2005) ("[A]n individual made a party to a proceeding because he is or was a director may be indemnified against liability incurred in the proceeding if (a) he conducted himself in good faith; . . . [or] (c) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.”).